

# WHOSE LAND IS IT?

## *Rethinking Sovereignty in British Columbia*

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CENTRAL TO THE HISTORY of what is today known as “British Columbia” is the persistent quest by First Nations to regain sovereignty over their traditional territories: “The Sovereignty of our Nations comes from the Great Spirit. It is not granted nor subject to the approval of any other Nation. As First Nations we have the sovereign right to jurisdictional rule within our traditional territories.”<sup>1</sup> Whether it be the Mowachaht reclaiming Yuquot in 1795; the Tsilhqot’in defending their territory through armed force;<sup>2</sup> the seventy-three and fifty-six Stó:lō leaders who petitioned the superintendent of Indian affairs in 1873 and 1874, respectively, seeking settlement of the land question;<sup>3</sup> the Tsimshian and Nisga’a chiefs demanding a treaty in 1887; the 1906 trip by Chiefs Capilano, David, and Isipaymilt to Buckingham Palace to place before King Edward VII the Cowichan petition for land justice;<sup>4</sup> the Lil’wat chiefs’ declaration of sovereignty in 1911; the almost universal Indigenous cry for land justice during the McKenna-McBride hearings,

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<sup>1</sup> Union of British Columbia Indian Chiefs (UBCIC), *Our Land Is Our Future: Aboriginal Title and Rights Position Paper*, 1989, now referred to in Article 2 of the UBCIC Constitution as part of the guiding principles of UBCIC. See [https://d3n8a8pro7vhmx.cloudfront.net/ubcic/pages/1440/attachments/original/1484861461/12\\_aboriginalrightspositionpaper1985.pdf?1484861461](https://d3n8a8pro7vhmx.cloudfront.net/ubcic/pages/1440/attachments/original/1484861461/12_aboriginalrightspositionpaper1985.pdf?1484861461).

<sup>2</sup> See John Sutton Lutz, *Makúk: A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008), chap. 5.

<sup>3</sup> See Megan Harvey, “Story People: Stó:lō-State Relations and Indigenous Literacies in British Columbia, 1864–1874,” *Journal of the Canadian Historical Association* 24, no. 1 (2013): 51–88.

<sup>4</sup> See Keith Thor Carlson, “Rethinking Dialogue and History: The King’s Promise and the 1906 Aboriginal Delegation to London,” *Native Studies Review* 16, no. 2 (2005): 1–38; and Daniel P. Marshall, *Those Who Fell from the Sky: A History of the Cowichan Peoples*. Duncan, BC: Cowichan Tribes, 1999).

1913–16;<sup>5</sup> the formation of the Allied Tribes of BC in 1916;<sup>6</sup> the creation of the Native Brotherhood of BC and North American Indian Brotherhood in 1931 and 1943, respectively;<sup>7</sup> the postwar court challenges in the 1960s, including *R. v. White and Bob* and *Calder v. British Columbia*;<sup>8</sup> the Union of BC Indian Chiefs' 1971 declaration asserting their right to sovereignty over their traditional territories;<sup>9</sup> the Constitution Express, organized in 1980 and 1981;<sup>10</sup> the 1995 occupation at Gustafsen Lake; Idle No More, beginning in 2012; or recent struggles, including that of the Tsleil-Waututh and Wetsuwet'en to defend their lands, First Nations have continuously and actively sought to overcome the dispossession and destruction associated with settler colonialism.

In this article we attempt to understand the depth of this resistance by exploring how two First Nations – the WSÁNEĆ and Mowachaht/Muchalaht communities whose traditional territories are on and around Vancouver Island – articulate in their own language their relationships to the land and to each other as well as their concepts of sovereignty. We examine these two nations because of our association with them – Claxton as a member of the WSÁNEĆ Nation and Price as a researcher who has worked with the Mowachaht/Muchalaht for the past four years and has obtained their consent to publish his findings. We find that in both nations a deep attachment to the land – derived at least in part from organic concepts of being in which people do not own the earth but, rather, belong to it – has given these First Nations the strength to survive 170 years of settler colonialism and rapacious dispossession while continuously insisting on their sovereignty over their territories. We counterpose their ongoing assertions of sovereignty to those of settler assertions as articulated in the courts of British Columbia and Canada over the past fifty years. We find the case for Indigenous assertions of sovereignty over their territories persuasive, particularly in light of the Supreme Court of Canada determination that Crown sovereignty over British Columbia is based solely on the Treaty of Oregon, an agreement

<sup>5</sup> See the full testimonies of Indigenous leaders on the Union of BC Indian Chiefs website at [https://www.ubcic.bc.ca/mckenna\\_mcbride\\_royal\\_commission](https://www.ubcic.bc.ca/mckenna_mcbride_royal_commission).

<sup>6</sup> R.M. Galois, "The Indian Rights Association, Native Protest Activity and the 'Land Question' in British Columbia, 1903–1916," *Native Studies Review* 8, no. 2 (1992): 1–34.

<sup>7</sup> Paul Tennant, "Native Indian Political Organization in British Columbia, 1900–1969: A Response to Internal Colonialism," *BC Studies* 55 (Autumn 1982): 3–49.

<sup>8</sup> Bev Sellars, *Price Paid: The Fight for First Nations Survival* (Vancouver: Talonbooks, 2016), chap. 9.

<sup>9</sup> Arthur Manuel, Grand Chief Ronald M. Derrickson, *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2015), 58.

<sup>10</sup> *Ibid.*, chap. 6.

that we show is based solely on the now discredited Doctrine of Discovery.

## WSÁNEĆ WORLDVIEWS: ACCORDING TO ORAL HISTORY

Our language is the voice of the land. We honour the land with the words of the language that we use. We acknowledge the beautiful land with the words of our people. Language was given to us from the beginning. It tells us how we can care for the land and each other.

—John Elliott, WSÁNEĆ Nation<sup>11</sup>

The WSÁNEĆ people have lived on the lands and waters of the WSÁNEĆ territory since time immemorial. This territory extends from what is today called the Saanich peninsula, to the southern Gulf and San Juan Islands, across the Salish Sea to Point Roberts and Boundary Bay, up to the Fraser River. The WSÁNEĆ people are also known as the Saltwater People because the WSÁNEĆ made no distinction between land and water – all of it was our/their homelands. “At one time or another practically every sheltered bay and nook along the southeast coast of Vancouver Island and on the small islands adjacent to it carried a settlement of greater or less size.”<sup>12</sup>

The WSÁNEĆ people maintain an intense relationship to the land, which includes concepts of ownership and responsibility, and, more recently, resistance to settler colonial assertions of sovereignty. For the WSÁNEĆ, our identity as a nation and our language are inseparable from the land. Learning about the WSÁNEĆ people’s relationship to the land through the lens of our language, SENĆOŦEN, and a brief history illustrates how WSÁNEĆ sovereignty is contingent on the WSÁNEĆ people’s land base and territory, and this has never been ceded or sold. It has also been at the centre of the WSÁNEĆ people’s struggles to maintain our WSÁNEĆ identity and nationhood from the time of contact to the present day. The goal of this section is to contribute to a deeper understanding of WSÁNEĆ sovereignty and relationship to the territory for both the WSÁNEĆ community and the wider settler community. It is really important to start with the deep history of the WSÁNEĆ people.

<sup>11</sup> As cited in Indigenous Studies (IST) 234, Land and Language Course Outline, Camosun College Indigenous Studies Course Development Package, April 2010.

<sup>12</sup> Barnett Richling, ed., *The WSÁNEĆ and Their Neighbours: Diamond Jenness on the Coast Salish of Vancouver Island* (Oakville, ON: Rock’s Mills Press, 2016 [1935]), 1.

The W̱SÁNEĆ people together are rebuilding our nation to become self-determining within our homelands and to promote a just relationship and peaceful co-existence with other nations (including British Columbia and Canada), as was embodied in the intentions of our W̱SÁNEĆ leaders at the time of the signing of the Douglas Treaty in 1852. The W̱SÁNEĆ people have lived on our homelands for tens of thousands of years, if not longer. Archeological studies support this timeframe.<sup>13</sup> W̱SÁNEĆ oral history informs us that we have been here since the beginning, and it was the Creator X̱ÁLS, the sacred one, who put us here, provided us with all of the teachings and everything we needed to live a prosperous, meaningful life on our homelands. It was with our traditional knowledge, practices, philosophies, beliefs, laws, and worldview that the W̱SÁNEĆ people lived on/with our homelands in peace and prosperity since time immemorial.

The W̱SÁNEĆ territorial homelands, or ÁLEÑENEÇ in our language, are vast. The ÁLEÑENEÇ includes the marine environment as much as it does the terrestrial environment. It was said that our people did not distinguish land from water but, rather, that all of it was our homeland. Elders often say that our territory is well defined by place names in our language, encoding and embodying our relationship to the territory. Our ancestral language, enforced by our teachings and beliefs and reflected in the territory, illustrates the strong relationship between the W̱SÁNEĆ people and the ÁLEÑENEÇ. This was how the W̱SÁNEĆ lived since time immemorial, since the beginning. The most important part of our W̱SÁNEĆ oral history is the story of the great flood. Here is that story, as told by my late uncle, Earl Claxton Sr:

One day a long, long time ago, the waters began to rise.

The people began to worry as the waters rose up to their homes.

They collected their belongings and went to their canoes.

As the water rose, they paddled to the highest mountain.

When they reached the top, one of the men made a long anchor rope of cedar bark.

The waters rose to the top of the mountain.

The people were anchored there for a long time, but were well prepared

<sup>13</sup> R.L. Carlson and P.M. Hobler, "The Pender Canal Excavations and the Development of Coast Salish Culture," *BC Studies* 99 (1993): 25–52; and R.L. Carlson, P. Szpak, and M. Richards, "The Pender Canal Site and the Beginnings of the Northwest Coast Cultural System," *Canadian Journal of Archaeology* 41 (2017): 1–29.

and had lots of dried salmon to eat.

As they were tied up there, a raven came and landed on the bow of the canoe. It seemed to be telling them something.

So finally one of the men pointed out to the far distance and said, “NI QENNET TFE WŚÁNEĆ!” Look what is emerging!

So then they knew this is what the raven was telling them.

They knew the flood was over.

As the tide went down, they gathered in a circle and gave thanks to the mountain that saved their lives. They said from now on this place will be called LAÚWELNEW, the place of refuge, and we will be called the WŚÁNEĆ people.

We are still called the WŚÁNEĆ people today, the emerging people.

Those ancestors had visions for our people; this is one of those visions.<sup>14</sup>

This story reminds us of the deep connection between our people and the land: it is a part of our identity. It is a part of our laws and beliefs that the WŚÁNEĆ people are inseparable from the land. Key SENĆOFEN terminology helps illustrate this WŚÁNEĆ worldview.

#### WŚÁNEĆ RESPONSIBILITY AND OWNERSHIP

The WŚÁNEĆ people’s relationship to the land is governed by laws, teachings, and beliefs that come from XÁLS, the Creator. These laws were put in place so that we could live with one another and with the land in a good way. This is what is known as SKÁLS (our laws and beliefs). Over thousands of years, these laws and beliefs are upheld in the hearts and minds of the WŚÁNEĆ in the sacred stories of life known as SOXHELI. One example of this is the flood story above. Stories like these were more than just stories: they were our reality. For the WŚÁNEĆ, the laws, beliefs, the SENĆOFEN language, and the land were all a part of our ĆELÁNEN, our birthright. WŚÁNEĆ Elders maintain that our ĆELÁNEN, as a concept, cannot be ceded, sold, given away, or, most of all, forgotten.

The WŚÁNEĆ have lived on their homelands for millennia and have lived in relationships with these lands as living beings. These relationships are expressed and articulated through the SENĆOFEN language.

<sup>14</sup> As cited in Nicholas XEMFOLTW Claxton, “To Fish as Formerly: A Resurgent Journey Back to the Saanich Reef Net Fishery” (PhD diss., University of Victoria, 2015), 45.

An example of this is TENE<sub>W</sub>, the SENĆOFEN word for “land.” While this word can be translated into “land,” “soil,” or “earth,” it also has a deeper meaning. Literally it would translate into “my wish for the people,” which refers to the land as a gift to us from the Creator. A gift that was meant for us to exist as WSÁNEĆ people with our WSÁNEĆ identity and worldview. The land was a gift that was invaluable and that, within the WSÁNEĆ worldview, could not be ceded or sold. Another example of this is TETÁCES, the SENĆOFEN word for “islands.” This word is for the islands in our territory but its deeper meaning is “relatives of the deep.” This again expresses a kincentric worldview in relation to the land – specifically, the Southern Gulf Islands and San Juan Islands. When you consider the land contained within the Island territories from the WSÁNEĆ perspective, then you can understand how it would have been unthinkable to sell or trade it away. It would have been like selling your own flesh and blood. In the SENĆOFEN language, many parts of the natural world were referred to as relatives. Salmon, trees, deer, killer whales, even landforms were all considered to be relatives with human-like spirits. Within this relationship, there was a responsibility to each other and it was understood that a relationship could not be ceded or sold. We are here to protect them as much as they are there for us.

For the WSÁNEĆ the notion of responsibility to the land was paramount, but the concept of ownership was also important. There are also some examples of ownership within the WSÁNEĆ worldview. One of the most important concepts in WSÁNEĆ law is NEHIMET. NEHIMET is central to the political, economic, social, and cultural organization of the WSÁNEĆ people. This word means “rights, teachings, and history passed on through the family lineage.” NEHIMET connects family members to their harvesting, property, and cultural and ceremonial rights. NEHIMET was an integral part of the WSÁNEĆ reef net fishery, a fishing technology that was unique to the Straits Salish, designed to catch salmon out in the straits of the Salish Sea in an environmentally sustainable way.<sup>15</sup> The physical fishing location and the associated fishing village site, including the land base, were passed down through the hereditary line and were strictly respected. The family and property rights, again, were not and could not be ceded, traded, or sold.

The WSÁNEĆ at the time of contact was a strong nation with its own laws, governance structures, and a vast land base. The WSÁNEĆ

<sup>15</sup> N. Claxton, “ISTÁ SĆIÁNEW, ISTÁ SXOLE (To Fish as Formerly): The Douglas Treaties and the WSÁNEĆ Reef Net Fisheries,” in *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations*, ed. L. Simpson, (Winnipeg: Arbeiter Ring, 2008), 47–58.

resisted the effects of colonization and strove to uphold our nationhood. There are many examples of this, going back to the time of contact. The Douglas Treaties (1850–54) could be considered to be a reflection of W̱SÁNEĆ resistance. According to W̱SÁNEĆ oral history, at the time of the signing of the Douglas Treaties there was growing tension with the people of Fort Victoria. Logging was occurring within W̱SÁNEĆ Territory, and a young W̱SÁNEĆ person was shot and killed by a settler. It has been said that the W̱SÁNEĆ gathered their leaders and warriors to go and meet with James Douglas with plans to kill him. Instead, a peace agreement was reached, but this was not a land transaction. Our leaders understood at the time that our nationhood would be respected, along with W̱SÁNEĆ sovereignty within our homelands. There are several examples since the time of contact, right through to the present, where the W̱SÁNEĆ have maintained the position of sovereignty, nationhood, ownership, and responsibility of our homelands. Several court cases deal with the Douglas Treaties, including the Saanichton Bay Marina Case of 1987, where the Tsawout people were awarded a permanent injunction in the Supreme Court of British Columbia against the construction of a marina in Saanichton Bay.<sup>16</sup> In 2013, as a part of the Idle No More movement, the Tsawout community blocked the Patricia Bay Highway to raise awareness that the federal government has not lived up to its treaty responsibilities.<sup>17</sup> More recently, in 2015 and 2018, the Tsawout First Nation testified in front of the National Energy Board against the proposed expansion of the Trans Mountain Pipeline. The W̱SÁNEĆ Nation remains engaged with the Crown on several fronts, including the Gulf Islands National Park Reserve, the National Marine Conservation Area Reserve, and the Federal Reconciliation Exploratory Tables, to name a few. It has always been and continues to be the position of the W̱SÁNEĆ Nation that we have never surrendered our sovereignty or our homelands.

<sup>16</sup> *Saanichton Marina Ltd. v. Claxton*, [1989] 3 C.N.L.R. 46.

<sup>17</sup> See CBC news report from 2013 at <https://www.cbc.ca/news/canada/british-columbia/idle-no-more-protesters-block-victoria-highway-1.1356595>.

MOWACHAHT/MUCHALAHT WORLDVIEWS<sup>18</sup>

The Mowachaht/Muchalaht people have been living continuously on the west coast of what is known as Vancouver Island for thousands of years.<sup>19</sup> The resources of the area allowed the population to grow, reaching into the thousands in the 1700s. A rich, vibrant, if at times difficult life on the ocean, centred on whaling and salmon fishing, underpinned the sophisticated culture and system of governance that evolved. Central in this evolution was the notion of *ħabuuti*. This term has often been translated as “territory,” but the English-language term does not capture the many layers of *ħabuuti*. As an Ahousat chief explains: “It is not ownership in the white sense; it is a river or other place that is shared by all Nuu-cha-nulth people, with a caretaker being hereditary chief of each site or village.”<sup>20</sup> Mowachaht/Muchalaht Elders today continue to teach that *ħabuuti* is a holistic notion of life anchored in the physical elements of land, water, and air that sustain it. Access to *ħabuuti* was based on family lineages and hereditary chiefs (*ħaw’iib*) who became the centre of social organization. The family and chief’s wealth was captured in the term *ĤuupuK<sup>w</sup>anum* – meaning all that belongs, all that was sacred, and it included the family’s shared land, resources, rights, and privileges as well as hereditary objects, dances, and names.<sup>21</sup> Or, as Elder Bill Howard succinctly put it – the *ĤuupuK<sup>w</sup>anum* is a clan’s “chest of treasures.”<sup>22</sup>

These concepts of life and governance emerged over hundreds of years as the Mowachaht people developed a confederation of *ħaw’iib* (chiefs) based at Yuquot (formerly Friendly Cove, Nootka Island), with the chief of the Maquinna clan emerging as the leader of the Mowachaht by the time of contact.<sup>23</sup> It was here that the Spanish explorer Perez passed in 1774, and the British explorer James Cook arrived and stayed for one month in 1778. Yuquot and Tahsis had become the summer and winter village sites that were perennially maintained. Around the beginning of

<sup>18</sup> We extend our appreciation to Chief Mike Maquinna, Chief Jerry Jack, Margarita James, the Elders of Tsaxana, Dorothy Hunt, and Kevin Kowalchuk for their support of this research.

<sup>19</sup> See John Dewhirst and William J. Folan, *Indigenous Archaeology of Yuquot, a Nootkan Outside Village*, vols. 1–3 (Ottawa: Parks Canada, 1980).

<sup>20</sup> Chief Earl Maquinna George, *Living on the Edge: Nuu-Chab-Nulth History from an Ahousat Chief’s Perspective* (Winslaw, BC: Sono Nis, 2003), as cited in Alan Twigg, *Aboriginality: The Literary Origins of British Columbia*, vol. 2 (Vancouver: Ronsdale, 2005), 175.

<sup>21</sup> Martha Black, *ĤuupuK<sup>w</sup>anum – Tupaat, Out of the Mist: Treasures of the Nuu-chab-nulth Chiefs* (Victoria: Royal British Columbia Museum, 1999), 13.

<sup>22</sup> From a meeting with the Mowachaht/Muchalaht Elders Group, including Leonard Mark, Bruce Mark, Brenda Johnson, Rose Jack, Bill Howard, August Johnson, Sam Johnson, Anthony (Tony) Dick, Margarita James, and Michelle James, 10–11 December 2018.

<sup>23</sup> Yvonne May Marshall, “A Political History of the Nuu-chah-nulth People: A Case Study of the Mowachaht and Muchalaht Tribes” (PhD diss., Simon Fraser University, 1993), chap. 6.



the twentieth century the Muchalaht people joined the Mowachaht and built their big houses at Yuquot as part of the confederacy. Mowachaht and Muchalaht Elders believe the concepts of landholding persist despite the devastating impact of colonialism and the dispossession of their land. So, too, do other communities in the Nuuchahnulth Tribal Council (NTC).<sup>24</sup> As E. Richard Atleo expresses it: “All aspects of formal life among the Nuuchahnulth, including matters related to sovereign rights over *ḥabuuti* and its resources, together with names, prayer chants, songs, dances, *tupati*, and sacred ceremonies, are all rooted in origin stories, the truths of which have been validated by *oosumich* and subsequently translated into the various cultural expressions found in the formal ceremonies of the potlatch.”<sup>25</sup> He contends that the pristine state of the territories was directly related to sound and deliberate management through chiefly sovereign rights to *ḥabuuti*, which were recognized by all neighbouring nations.<sup>26</sup> Respect for the *ḥabuuti* required visitors to follow appropriate protocols when approaching, and beachkeepers (families with the responsibility for guarding the territory) kept an eye out to protect the *ḥabuuti*.

The sovereign authority of the Mowachaht/Muchalaht peoples was acknowledged by early visitors. As the British explorer James Cook observed: “We no sooner drew near the inlet than we found the coast to be inhabited and the people came off to the Ships in Canoes without shewing the least fear or distrust.”<sup>27</sup> After trying to obtain grass for the livestock on board and being told by the Mowachaht that the grass had to be purchased, Cook noted: “Here I must observe that I have no were [*sic*] met with Indians who had such high notions of every thing the Country produced being their exclusive property as these; the very wood and water we took on board they at first wanted us to pay for.”<sup>28</sup> The British merchant John Meares, who visited Yuquot in 1788, observed: “Maquilla ... is the sovereign of this territory; which extends to the Northward ... and to the Southward, the dominions of this chief stretch away to the

<sup>24</sup> The Nations of the NTC include the Ditidaht, Huu-ay-aht, Hupacasath, Tse-shaht, Uchucklesaht, Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht, Yuu-cluth-aht, Ehatesaht, Kyuquot/Cheklesah, Mowachaht/Muchalaht, and Nuchatlait.

<sup>25</sup> Umeek E. Richard Atleo, *Tsarwalk: A Nuuchahnulth Worldview* (Vancouver: UBC Press, 2004), 96.

<sup>26</sup> *Ibid.*, 126.

<sup>27</sup> J.C. Beaglehole ed., *The Journals of Captain James Cook on His Voyages of Discovery*, vol. 3, *The Voyage of Resolution and Discovery, 1776–1780* (Cambridge: Cambridge University Press-Hakluyt Society, 1967), 295.

<sup>28</sup> *Ibid.*, 306.

Islands of Wicananish.”<sup>29</sup> So too Galiano, the Spanish explorer, noted: “Macuina was endowed with remarkable ability and quickness of intelligence, and knew very well his rights as a sovereign.”<sup>30</sup>

Rival claims over the Pacific Northwest by the Spanish and British erupted into armed conflict in 1789 with the Spanish seizing the ships of John Meares at Yuquot. The Nootka Crisis brought the Spanish and British to the brink of war and led to the murder of one of the Mowachaht leaders, Chief Callicum, reflecting the ongoing tension in Mowachaht-European relations. Under the leadership of Maquinna, the Mowachaht temporarily withdrew from Yuquot, but, according to Bodega Y Quadra, Maquinna reportedly stated that “he himself donated the place where the Spanish have built their houses to Mr Francisco Eliza, who later gave it to me [Bodega Y Quadra], under the condition that whenever the Spanish withdrew, we would give it back to him.”<sup>31</sup> Indeed, the Mowachaht reclaimed the land when the British and Spanish agreed to mutually withdraw in 1795, underscoring their determination to maintain control of their territory.<sup>32</sup>

Trading in sea otter furs in exchange for guns and other manufactured goods continued, and Chief Maquinna attempted to cultivate positive relations with European traders to reinforce his position as local leader. However, Mowachaht consternation intensified in the face of insults and aggression on the part of the newcomers. European sailors often committed acts of sexual aggression against Nuu-chah-nulth women, who have been described as extremely modest and averse to any social intercourse with European men.<sup>33</sup> Traders began to be perceived as violators of the *hahuuli*, and, in 1803, Maquinna led a war party to capture an American trading vessel, the *Boston*. The Mowachaht killed all the crew

<sup>29</sup> John Meares, *Voyages made in the years 1788 and 1789 from China to the north west coast of America: to which are prefixed an introductory narrative of a voyage performed in 1786 from Bengal in the ship Nootka, observations on the probable existence of a north west passage, and some account of the trade between the north west coast of America and China, and the latter country and Great Britain* (London: Logographic Press, 1790), 228. Available online at [https://archive.org/details/cihm\\_36543](https://archive.org/details/cihm_36543).

<sup>30</sup> This quote is from *A Spanish Voyage to Vancouver and the North-West Coast of America being the Narrative of the Voyage Made in the Year 1792 by the Schooners Sutil and Mexicana to Explore the Strait of Fuca*, translated with an introduction by Cecil Jane (London: The Argonaut Press, 1930), 17. The authorship is contested but often attributed to Galiano.

<sup>31</sup> This statement is drawn from an affidavit of 20 September 1792, prepared by Bodega y Quadra and summarizing the land dispute related to the Nootka Crisis. It is reproduced in Freeman M. Tovell, Robin Inglis, and Iris H.W. Engstrand with a foreword by Chief Michael Maquinna, *Voyage to the Northwest Coast of America, 1792: Juan Francisco de la Bodega y Quadra and the Nootka Sound Controversy* (Norman, OK: Arthur H. Clark, 2012), 154–55.

<sup>32</sup> Kendrick contracts – assignment of land, though Americans used English to construe as assignment of fee simple. In either case, sovereignty over area is not in question.

<sup>33</sup> Marshall, “Political History of the Nuu-chah-nulth People,” 223.

and officers with the exception of John R. Jewitt, the ship's armourer, and John Thompson, the ship's sailmaker. This violent act of resistance reflected Mowachaht disillusionment with colonial intrusions into their territories and a repudiation of any land dealings. Alexander Walker, who visited Yuquot in 1786, later reflected that the attack was "the Bloody revenge of a long series of injuries which the tribe had experienced from their Civilized Visitors."<sup>34</sup> A few ships still visited Yuquot after 1803, but diseases brought by the whites began to take a toll. Still, traditional notions and practices persisted, and familial clans continued to live on within the big houses at Yuquot.

Although colonial and church officials occasionally visited Yuquot, the settler states of Vancouver Island (1849–66) and British Columbia (1858–) only slowly extended control over the land, and it was not until 1889 that the BC government sent its Indian reserve commissioner, Peter O'Reilly, to the west coast of Vancouver Island to survey the territory and impose the despised reserve system there. In recommending the creation of seventeen small reserves, O'Reilly noted that, "except as fishing stations, they are very worthless, the land being unsuitable for cultivation. They do not encroach on the claim of any white settler, nor is it likely they will retard settlement at any future time."<sup>35</sup> Ever since then the Mowachaht/Muchalaht have sought to regain their sovereignty.

In 1914, Mowachaht chiefs Napoleon, Maquinna, and Captain Jack, as well as Muchalaht chief Joseph testified before the McKenna-McBride Commission. Chief Napoleon expressed his dissatisfaction to the commissioners on 21 May 1914:

CHIEF NAPOLEON addresses the Commission as follows:

I am very glad to see you people come to our reserve today. I will explain to you about the white people and what they are doing to us now. I don't want any white man to stop us from fishing or hunting. I don't want any white men to give away (take away) any of our land or fishing places or hunting places, because God made us this way and put us in the places where we live. We catch fish in the winter time and dry it so that we will have something to eat. I don't want the white man to fish with a net right here at the village. We don't want that.

MR. COMMISSIONER MACDOWALL: Is that the seine net?

<sup>34</sup> Alexander Walker, *An Account of a Voyage to the North West Coast of America in 1785 & 1786*, ed. Robin Fisher and J.M. Bumsted (Vancouver: Douglas and McIntyre, 1982), 189.

<sup>35</sup> P. O'Reilly to Chief Commissioner of Lands and Works, 26 April 1890, RBCM, GR-2982, box 4, file 41.1.

CHIEF NAPOLEON: Yes. We don't want any white man to stop us falling the trees to make our canoes.

MR. COMMISSIONER CARMICHAEL: Do you mean on the reserves or outside the reserves?

CHIEF NAPOLEON: Outside. We don't want the white man to stop us falling the trees for wood outside of the reserve. We don't want to be stopped, because we are not like the white men. They have lots of money to buy wood. I have some land out here for fishing or hunting, and I don't want any white man to take that land away.<sup>36</sup>

The reserve system essentially stripped the chiefs and community of the *ḥabuuti*, and, for a time, the community appeared to be on the verge of collapse. By 1920, only thirty-eight Mowachaht/Muchalaht under the age of twenty survived. For the whole of the province, demographers have estimated that First Nations populations declined by 75 to 90 percent in the first 150 years after contact.<sup>37</sup> Settler colonialism's seizure of land and resources from Indigenous peoples and the residential school system were major factors leading to poor living conditions and the deaths of Indigenous children.<sup>38</sup> The surviving group, however, had larger families and provided the basis for the Mowachaht/Muchalaht First Nation (MMFN) population recovery that took place in the 1930s and later.<sup>39</sup> Their resilience, ability to fish salmon, and belief in the eventual return of their *ḥabuuti* enabled them to survive.

The subsequent decline of the fishing industry, however, led to further challenges as the community faced increasing isolation due to lack of access to services.<sup>40</sup> Although the Mowachaht/Muchalaht had asked for health facilities for Yuquot, the colonial government refused them. Increasingly, families left Yuquot to find jobs and gain access to services. Beginning in 1959, the Tahsis Corporation solicited and gained the support of W.S. Arneil, the Indian commissioner for British Columbia, to obtain access to the Muchalaht reserve (IR 12 Ahaminaquus near Gold

<sup>36</sup> McKenna-McBride Commission Reports on the resource page of the Union of BC Indian Chiefs website.

<sup>37</sup> Mary-Ellen Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia, 1900–1950* (Vancouver: UBC Press, 1998), 4.

<sup>38</sup> *Ibid.*, 7.

<sup>39</sup> Marshall, "Political History of the Nuu-chah-nulth People," 286.

<sup>40</sup> The concept of imposed isolation is developed in Paige Raibmon, "'Handicapped by Distance and Transportation': Indigenous Relocation, Modernity and Time-Space Expansion," *American Studies* 46, nos. 3/4 (Fall 2005/Spring 2006): 363–90.

River) to build a pulp mill.<sup>41</sup> Four years later a deal was finally struck by which the MMFN leased a section of IR 12 to Tahsis Corporation. The corporation's promise of jobs, housing, and services convinced the majority of the community to leave Yuquot to live at the mouth of Gold River.

The bloom soon came off the rose as the promised jobs never materialized and the community faced severe pollution from the mill. Matters came to a head in July 1975, when *haw'iib* Jerry Jack Sr. mobilized community members, establishing a roadblock on the road between Gold River and the Tahsis mill in protest of the federal government's failure to take land claims seriously. The community was also protesting mill pollution, which continued to plague its members, and sport fishers, who were depleting the salmon stocks – the lifeblood of the Mowachaht/Muchalaht peoples.<sup>42</sup> The RCMP assailed the blockade on 19 July and arrested many of the activists. However, later in the year, the charges were stayed.<sup>43</sup> The anti-pollution fight continued into the 1990s, when the government finally conceded impropriety in its dealings with the nation, resulting in the establishment of a new reserve, IR 18 Tsaxana, with new housing for the community. The cost, however, remained high – for the first time in thousands of years the Mowachaht/Muchalaht were living kilometres from the sea and the salmon that had sustained them for millennia.

The Mowachaht/Muchalaht First Nation persisted in its contention that it is a sovereign nation, as expressed clearly in its 1 November 1994 declaration prepared in anticipation of treaty talks with the government:

Since time Immemorial, we the Nuu-chah-nulth *haw'iib* are the rightful owners and carry the full authority and responsibility to manage and control all that is contained within each of our *hahuu'i*. Strict traditional laws and teachings dictate that it is our responsibility to govern our territories by managing and protecting all lands, waters and resources within our *hahuu'i* to sustain our *muschim* and our traditional ways of life.

Our authority and ownership have never been extinguished, given up, signed away by Treaty or any other means or suspended by any law.<sup>44</sup>

<sup>41</sup> W.S. Arneil, "Proposed Use and Occupancy – Tahsis Co., Ahaminaquus I.R. no. 12, 39 Acres, Nootka Band," 14 July 1959, LAC, RG 10, 978/32-9-12-1, file 1.

<sup>42</sup> "We Saw Real Unity amongst Our People," *Nesika*, July 1975, 2.

<sup>43</sup> "Indians 73 – Government 0," *Nesika*, November/December 1975, 12–14.

<sup>44</sup> "Declaration by the Ha'wiih of the Nuu-chah-nulth Nation," 15 November 1994, *Ha-Sbilth-Sa*, 3.

The treaty process, however, did not yield the results hoped for, and, in 2001, the MMFN with other nations of the Nuu-chah-nulth Tribal Council decided to go to court to assert their fishing rights.<sup>45</sup> Fishing and whaling had been the principal means of livelihood for the Mowachaht/Muchalaht peoples and, indeed, the heart of its *habuuti*. They still await the final decision in this case. Twenty years after moving to Tsaxana, the Elders still get together to study and discuss the notions of *habuuti* and *HuupuK<sup>w</sup>anum*. They are fighting to preserve and redeploy their language so that future generations will thrive and see the return of the lands that belong to them. As current MMFN *haw'it* Michael Maquinna expresses it: "As tough as things have been, we should learn that the struggle is still there, yes, but I would say that be aware that times are changing."<sup>46</sup>

#### CROWN SOVEREIGNTY AND THE TREATY OF OREGON

We believe that the WSÁNEĆ and Mowachaht/Muchalaht peoples have, in their own languages, similar notions of their close and complex relationship to the land represented by such terms as TENEW and NEHIMET (SENCOTEN) or *habuuti* and *HuupuK<sup>w</sup>anum* (Nuučaanuŋ). These concepts are part of worldviews that have strong holistic and spiritual dimensions. Included in these worldviews is the notion of territorial sovereignty – an English-language expression that has its own etymology and does not in itself fully reflect the worldviews discussed above.<sup>47</sup> However, we retain the term "sovereignty" because we believe: (1) it closely approximates the important notion of a given body politic being the supreme authority over specific territory, a notion integral to WSÁNEĆ and Mowachaht/Muchalaht stories, and (2) it cuts to the chase regarding the fundamental issues arising from recent court decisions regarding control of the territory now known as British Columbia.

In the past few decades, a limiting concept of Aboriginal title has recently found some recognition in the courts. This began with Supreme Court of Canada decisions, including *Calder* in 1973 through the *Tsilhqot'in* decision in 2014, as well as constitutionally, with the adoption

<sup>45</sup> F. Mathew Kirchner, "The Aboriginal Right to Sell Fish, Ahousaht Nation et al. v. Canada," a paper presented to the Pacific Business and Law Institute, Vancouver, British Columbia, 4 March 2010.

<sup>46</sup> ACVI interview with Chief Maquinna, 21 July 2019, Yuquot.

<sup>47</sup> See Kent McNeil, "Indigenous and Crown Sovereignty in Canada," in *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, ed. John Borrows and James Tully (Toronto: University of Toronto Press, 2018), 293-314.

of section 35 of the Constitution Act in 1982.<sup>48</sup> There is, however, an important distinction between land title (the ownership of property) and sovereignty (holding ultimate authority over the land). Today, Canadian courts at all levels persist in asserting that Aboriginal title, to whatever extent it may exist, remains subordinate to Crown sovereignty and that the Crown gained sovereignty over what would become British Columbia only in 1846 when the British signed the Treaty of Oregon with the United States. This assertion was based on earlier court rulings, particularly *Calder et al. v. Attorney-General of B.C.*, in which the Supreme Court of Canada asserted that the Royal Proclamation of 1763 did not apply to British Columbia,<sup>49</sup> and that, for the Nass Valley:

[T]he area in question in this action never did come under British sovereignty until the Treaty of Oregon in 1846. This treaty extended the boundary along 49th parallel from the point of termination, as previously laid down, to the channel separating the Continent from Vancouver Island, and thus through the Gulf Islands to Fuca's Straits. The Oregon Treaty was, in effect, a treaty of cession whereby American claims were ceded to Great Britain.<sup>50</sup>

According to Justice Judson: "The fee was in the Crown in right of the Colony [British Columbia] until July 20, 1871, when the colony entered Confederation, and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion under the Terms of Union."<sup>51</sup> In the 2007 *Tsilhqot'in* Supreme Court of British Columbia hearings, government lawyers provided the Court with a number of possible dates when the Crown supposedly asserted sovereignty over British Columbia.<sup>52</sup> Justice David Vickers examined these materials and ruled as follows:

<sup>48</sup> The key decisions include *Calder et al. v. Attorney-General of B.C.*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Sparrow* [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, and section 35 of the Constitution Act, 1982. The 2014 Supreme Court of Canada's *Tsilhqot'in* ruling was a landmark in that it recognized that the Tsilhqot'in occupied and governed large sections of territory prior to contact and awarded them "title" over some 1,750 square kilometres of land near Williams Lake. Furthermore, the Supreme Court of Canada declared that the concept of *terra nullius*, that the lands were uninhabited, was invalid.

<sup>49</sup> "The British Columbia Courts have dealt with the history of the discovery and settlement of their province. The history demonstrates that the Nass Valley, and, indeed, the whole of the province could not possibly be within the terms of the [Royal] Proclamation [of 1763]." *Calder et al. v. Attorney-General of BC*, [1973] S.C.R. 313 at 325.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, 327

<sup>52</sup> *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 199–207.

It seems to me that Canada's argument builds on the failed assertion of sovereignty in 1792. While it might be argued that the events of 1818, 1821 and 1830 were a vast improvement over Captain Vancouver's act of imperialism, in my view, these events do not meet the tests imposed by international law. New Caledonia was not sufficiently occupied by the Crown on any of these dates. More importantly, there was no actual or effective control over the area. The legislative acts of a distant Parliament do not occupy a territory. Nor do the words on a page, in any sense, provide a de facto administrative control over the area.

I have no difficulty in concluding that The Treaty of Oregon, 1846 is a watershed date that the courts have relied upon up to now. I see no reason to move from that date.<sup>53</sup>

When the *Tsilhqot'in* case reached the Supreme Court of Canada in 2014, the court adhered to these earlier court decisions and reaffirmed that, in 1846, "the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty."<sup>54</sup> This then has become the dominant interpretation and legal precedent that has been established by the courts despite efforts to argue that the Crown in British Columbia was under the legal obligation to negotiate treaties based on the Royal Proclamation of 1763 and the Treaty of Niagara in 1764.<sup>55</sup>

Few settlers in British Columbia know much about this treaty (officially known as the Treaty of Washington), other than that it fixed the boundary with the United States and/or that it led to the so-called "Pig War" of 1871.<sup>56</sup> The treaty did, in fact, draw the border along the

<sup>53</sup> *Tsilhqot'in Nation v. British Columbia*, 2007 B.C.S.C. 1700.

<sup>54</sup> *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, at para 12. This ruling did not provide a historical overview of Aboriginal title and relied on the Guerin decision in its description of Aboriginal title. It seems to accept sovereignty over British Columbia being asserted in 1846 with the Treaty of Oregon. See paragraphs 69-72 for the Supreme Court's definition of aboriginal title.

<sup>55</sup> See the legal cases previously cited for the arguments on this question, and Hamar Foster, "The Royal Proclamation of 1763 in British Columbia: An Indigenous Magna Carta's Chequered Canadian Career," in *Challenges to Authority and the Recognition of Rights: From Magna Carta to Modernity*, ed. Catherine Macmillan and Charlotte Smith, 269-95 (Cambridge: Cambridge University Press, 2018); Douglas C. Harris, "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal," *BC Studies* 162 (Summer 2009): 137-64; Hamar Foster, Heather Raven, and Jeremy Weber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007); Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, BC: Talonbooks, 1998).

<sup>56</sup> The well-known British Columbia writer Bruce Hutchison, in his classic work *The Struggle for the Border*, mentions the Oregon Treaty solely in relationship to the conflict over San Juan Island. See Bruce Hutchison, *The Struggle for the Border* (Oxford: Oxford University Press, 2012), 394-95.



49th parallel from the Rocky Mountains to Tsawwassen and from there through the middle of the Salish Sea to the Pacific, thus putting Vancouver Island and what are known as the Gulf Islands under purported British control.<sup>57</sup> If few in the settler communities know much about the Treaty of Oregon, such is not the case with First Nations. Many in the WSÁNEĆ and Nuu-chah-nulth nations know this treaty well since the new border arbitrarily divided numerous Indigenous nations. For example, the Lummi and Makah peoples were separated from their WSÁNEĆ and Nuu-chah-nulth relatives, respectively. Neither of these Indigenous groups, along with several others, were consulted by the colonial powers at any time during the negotiations.

The focus on the 1846 Oregon Treaty as a boundary marker, or as an “international treaty” as outlined by the courts, conceals what in fact was the essence of the negotiations: that is, the basis upon which the British or American governments thought they had the right to assert sovereignty over the territory. A close reading of the documents exchanged between the British and Americans regarding control of this area during negotiations that took place in 1818, 1826, and 1843–45 helps to clarify this question.<sup>58</sup> For the purposes of this article, we focus on how the British staked their claim over what would become British Columbia.

In the final set of negotiations in 1845, the British representative in Washington, Richard Pakenham, offered the following summary: “the claims of Great Britain, resting on discovery, exploration and settlement, are in point of principle equally valid with those of the United States.”<sup>59</sup> The basis for British claims of “discovery, exploration and settlement” are explained in some detail, and since the negotiations leading to the 1846 Oregon Treaty have had little attention, we quote in full the case as summarized by Pakenham in 1845:

[T]hat in 1778 Captain Cook discovered Cape Flattery, the southern entrance of the Straits of Fuca; Cook must also be considered the

<sup>57</sup> “Treaty between the United States and Great Britain Establishing the Boundary in the Territory on the Northwest Coast of America West of the Rocky Mountains June, 1846 (Treaty of Washington),” NARA, Record Group 11, Perfected Treaties (1778–1945), TS 120 EX: NAID 299808, <https://catalog.archives.gov/id/23914173>.

<sup>58</sup> Other than geographer Daniel Clayton, no one has fully explored the Treaty of Oregon. For Clayton’s brief account, see his “The Creation of Imperial Space in the Pacific Northwest,” *Journal of Historical Geography* 26, no. 3 (2000): 327–350. Or, for more detail, see his book, *Islands of Truth: The Imperial Fashioning of Vancouver Island* (Vancouver: UBC Press, 2000), chap. 12.

<sup>59</sup> “Mr. Pakenham to Mr. Buchanan,” Washington, 29 July 1845, in *British Parliamentary Papers*, vol. 2, *Canadian Boundary* (Shannon: Irish University Press, 1969), 43.

discoverer of Nootka Sound, in consequence of the want of authenticity in the alleged previous discovery of that port by Perez.

In 1787, Meares, a British subject, formed the establishment at Nootka, which gave rise to the memorable discussion with the Spanish Government, ending in the recognition by that Power of the right of Great Britain to form settlements in the unoccupied parts of the northwest portion of the American Continent, and in an engagement on the part of Spain to reinstate Meares in the possession from which he had been ejected by the Spanish commander.

In 1792, Vancouver, who had been sent from England to witness the fulfilment of the above-mentioned engagement, and to effect a survey of the north-west coast, departing from Nootka Sound, entered the Straits of Fuca, and after an accurate survey of the coast and inlets on both sides discovered a passage northwards into the Pacific, by which he returned to Nootka, having thus circumnavigated the island that which now bears his name; and here we have, as far as relates to Vancouver's Island, as complete a case of discovery, exploration, and settlement, as can well be presented, giving to Great Britain, in any arrangement that may be made with regards to the territory in dispute, the strongest possible claim to the exclusive possession of that island.

While Vancouver was prosecuting discovery and exploration by sea, Sir Alexander Mackenzie, a partner in the North-West Company, crossed the Rocky Mountains discovered the head waters of the river since called Fraser's River, and following for some time the course of that river, effected a passage to the sea, being the first civilized man who traversed the continent of America from sea to sea in these latitudes. On the return of Mackenzie to Canada the North-West Company established trading posts in the country to the westward of the Rocky Mountains.

In 1806 and 1811, respectively, the same company established posts on the TacoutcheTesse and the Columbia.

In the year 1811, Thompson, the astronomer of the North-West Company, discovered the northern head waters of the Columbia, and following its course till joined by the rivers previously discovered by Lewis and Clarke he continued his journey to the Pacific.

From that time until the year 1818, when the arrangement for the joint occupancy of the territory was concluded, the North-West Company continued to extend their operations throughout the Oregon Territory, and to occupy, it may be said, as far as occupation can be effected in regions so inaccessible and destitute of resources.<sup>60</sup>

That these claims erased Indigenous peoples from the territories while using “discovery” assertions as a basis for seizing the land is clear. But they did not convince the United States. James Polk, running on the slogan of “54/40 or fight,” won the presidency in 1844, and shortly afterwards the US Secretary of State James Buchanan informed Pakenham that they were withdrawing earlier proposals for dividing the territory. Polk was thoroughly disenchanted with Pakenham’s arguments (as described above) and briefly contemplated seizing the whole area. The Polk administration subsequently rejected British proposals to take the issue to a third party for mediation/arbitration. However, once the United States went to war with Mexico in 1846, the US president and the Senate opted to resolve the dispute, and thus the treaty was signed in June that year to “terminate the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the Territory.”<sup>61</sup>

Previous studies confirm that Pakenham’s assertions of discovery constitute the essence of the negotiations.<sup>62</sup> The absence of any discussion of Indigenous occupation of the territory during negotiations is striking, particularly when early white visitors to these lands noted how they were occupied and how the nations were sovereign, as noted earlier in this article. The settlement claims associated with the 1846 treaty appear patently preposterous when we examine population figures. According to one source, only forty Americans were living north of the Columbia River in 1846.<sup>63</sup> As for the British, employees of the Hudson’s Bay Company numbered a few hundred at the most (including Kānaka Maoli) while the Indigenous population in this territory was probably between 100,000 and 200,000.<sup>64</sup> This was known even at the time – Henry Howells, a

<sup>60</sup> Mr. Pakenham to Mr. Buchanan (Enclosure 2 in No. 28), Washington, 29 July 1845, in *British Parliamentary Papers*, vol. 2, *Canadian Boundary* (Shannon: Irish University Press, 1969), 43–44.

<sup>61</sup> “Treaty between the United States and Great Britain,” 3.

<sup>62</sup> This is clear in an assessment of the 1846 treaty on its one hundredth anniversary. See Walter N. Gage, “The Oregon Treaty of 1846,” *Canadian Historical Review* 27, no. 4 (1946): 349–67. Geographer Daniel Clayton’s accounts also point to these assertions. See his “The Creation of Imperial Space,” 327–50. Further details can be found in his book, *Islands of Truth*, chap. 12.

<sup>63</sup> Gage, “The Oregon Treaty of 1846,” 358.

<sup>64</sup> This figure is based on estimates contained in Wilson Duff, *The Indian History of British Columbia*, vol. 1, *The Impact of the White Man* (Victoria: Provincial Museum of Natural History and Anthropology, 1969), 38–39; and in Matthew McCarthy, “Native American Population

British philanthropist, wrote to the British foreign secretary in 1845, before the signing of the treaty, letting him know that there were over 100,000 Indigenous people in Oregon “to whom it rightfully belongs, and not in equity to either of the nations claiming the same.”<sup>65</sup> A map from the United States Exploring Expedition (1838–42) headed by Charles Wilkes is replete with the names of Indigenous communities in the area. And an ethnographer who accompanied the expedition gave a population estimate for only a fraction of the territories at over thirty thousand.<sup>66</sup>

In light of the above, the Canadian courts’ persistence in claiming that the Crown asserted sovereignty over British Columbia on the basis of the 1846 Treaty of Oregon is nothing less than a present-day reassertion of the outdated colonial “Doctrine of Discovery.” As defined by the Assembly of First Nations: “The Doctrine of Discovery emanates from a series of Papal Bulls (formal statements from the Pope) and extensions, originating in the 1400s. Discovery was used as legal and moral justification for colonial dispossession of sovereign Indigenous Nations, including First Nations in what is now Canada. During the European ‘Age of Discovery,’ Christian explorers ‘claimed’ lands for their monarchs who felt they could exploit the land, regardless of the original inhabitants.”<sup>67</sup> The doctrine was applied initially by the Spanish and Portuguese to divide the world, but then was further refined by later imperial powers into the formula of “discovery, exploration and settlement” found in the 1846 treaty negotiations.<sup>68</sup> The Canadian state’s continued adherence to the doctrine has led First Nations to specifically target it, as recently expressed in the Assembly of First Nations declaration *Dismantling the Doctrine of Discovery*.<sup>69</sup> Further, the Truth and Reconciliation Com-

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Decline during the Nineteenth Century,” 2014, available at <https://nativestudy.wordpress.com> (viewed 16 October 2018).

<sup>65</sup> Howells to Aberdeen, 8 May 1845, as cited in Clayton, *Islands of Truth*, 214, n40.

<sup>66</sup> Horatio Hale, *Ethnography and Philology: United States Exploring Expedition* (Philadelphia: Lea and Blanchard, 1846), 197–225. This estimate excluded much of the population of the Coast Salish and Nuu-chah-nulth populations in what is today known as Canada.

<sup>67</sup> Assembly of First Nations, *Dismantling the Doctrine of Discovery* (Ottawa, Assembly of First Nations, 2018), 2.

<sup>68</sup> For a historical overview, see Robert J. Miller et al., eds. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); and Jennifer Reid, “The Doctrine of Discovery and Canadian Law,” *Canadian Journal of Native Studies* 30, no. 2 (2010): 335–59. The most thorough analysis and understanding of the issues can be found in Kent McNeil, “The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands – The Doctrine of Discovery in the English Colonies,” by Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg – and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn,” *Osgoode Hall Law Journal* 53, no. 2 (2016): 699–728.

<sup>69</sup> Assembly of First Nations, *Dismantling the Doctrine of Discovery*.

mission of Canada called for Canadian governments to jointly develop with Indigenous peoples a new Royal Proclamation and Covenant of Reconciliation that would “i. repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*” (Article 45.1 – erasure of Indigenous peoples who occupied the lands). Moreover, the parties to the Indian Residential Schools Settlement Agreement sign a Covenant of Reconciliation (Article 46) based on principles including “ii. Repudiation of concepts to justify European sovereignty over Indigenous land and peoples, such as the Doctrine of Discovery and *terra nullius*,” and “iii. Full adoption and implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the framework for reconciliation.”<sup>70</sup> Adopted in 2007, UNDRIP declares that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” (Article 26.1); and that governments should establish with Indigenous peoples a “fair, independent, impartial, open and transparent process” to resolve land issues (Article 27); and that “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”<sup>71</sup>

The Crown’s tenuous legal claim to sovereignty over British Columbia is further eroded by the fact, now widely recognized, that the settler state in the province refused to negotiate treaties with First Nations for over 130 years. And, as is shown in the case of the WSÁNEĆ Nation, the few treaties that did exist (Douglas Treaties, 1850–54) are contested as land exchange agreements.<sup>72</sup> Furthermore, after joining the Canadian federation in 1871, the BC legislature immediately passed revisions to the electoral code, prohibiting First Nations and Chinese Canadians from voting in 1872, leaving a minority of ten thousand white settlers to dominate the estimated forty thousand Indigenous and Chinese people then in the province. This was a province like no other – a particularly

<sup>70</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), 4–5.

<sup>71</sup> United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (New York: United Nations, 2007), 10. The BC government introduced legislation in October 2019 to implement UNDRIP, the first provincial government to do so.

<sup>72</sup> For a full discussion of this question, see Neil Vallance, “Sharing the Land: The Formation of the Vancouver Island (or ‘Douglas’) Treaties of 1850–1854 in Historical, Legal and Comparative Context” (PhD diss., University of Victoria, 2015).

virulent form of settler colonialism that crystallized as an illiberal and arguably illegal regime based on white supremacy.<sup>73</sup> Whether such a regime can even argue that it held de facto sovereignty is open to question, but that is beyond the scope of this article.<sup>74</sup> These circumstances, specific to the history of the Pacific Coast, have given rise to the current moment, in which resolution of the question of sovereignty is essential.

#### MOVING FORWARD

Regarding the title of this article – “Whose Land Is It?” – we argue that studying the worldviews of the WSÁNEĆ and Mowachaht/Muchalaht nations as expressed in their own languages allows us to better understand their relationships to each other and to the land. We further suggest that the notion of sovereignty and related laws of governance were in place long before “British Columbia” came into existence and that these nations have persisted in defending their lands since contact. We conclude, therefore, that the WSÁNEĆ and Mowachaht/Muchalaht Nations have every right to exercise sovereignty over their traditional territories and that this transcends, legally and otherwise, any claims to sovereignty by the Crown.

The evidence cited at the beginning of this article also suggests that the WSÁNEĆ and Mowachaht/Muchalaht are not alone: many other First Nations have also sought to regain control over the traditional territories, a struggle that has become acute in this province because of its peculiar location on the Pacific and the late arrival of the settler colonial state. First Nations in this province today cast this historical movement as a struggle for sovereignty: “The concepts of sovereignty and reconciliation are central to understanding the purpose of consultation and accommodation.”<sup>75</sup> As we have tried to demonstrate, the case for settler sovereignty, both legally and ethically, is not tenable in light of First Nations claims and the history of the Crown’s actions in British Columbia. Rather than First Nations having to go to court to make a title claim, perhaps it is time that the Crown be brought to trial and be obliged to prove by what right it can claim sovereignty over the province?

<sup>73</sup> John Price has argued this in previous work: see “Canada, White Supremacy and the Twinning of Empires,” *International Journal* 68, no. 4 (2013): 628–38.

<sup>74</sup> On this question, see McNeil, “Indigenous and Crown Sovereignty in Canada.”

<sup>75</sup> First Nations Leadership Council, *Advancing an Indigenous Framework for Consultation and Accommodation in BC: Report on Key Findings of the BC First Nations Consultation and Accommodation Working Group* (Vancouver: First Nations Leadership Council, 2013), 11.

The question remains, how can we move forward? The WSÁNEĆ and Mowachaht/Muchalaht are actively engaged in rebuilding their nations. A great deal of effort and energy is going into language and cultural revitalization, into finding the economic resources necessary to sustain their communities, and into finding ways to get the government to engage in nation-to-nation negotiations. These efforts will no doubt continue in conjunction with various efforts, legal and otherwise, to regain sovereignty.

So, too, will efforts at reconciliation, and in that sense there is much to recommend the recent publication *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*.<sup>76</sup> This edited volume contains many excellent articles and is an important contribution to the discussion of current challenges in Indigenous-settler relations. Suggesting that “Indigenous people do not generally accede to the binary worldview that spawns separation resurgence,” the editors cautiously advance “reconciliation *and* resurgence” (emphasis in original) as “unique, place-based, kin-centric, and relational ways Indigenous people conceive and enact transformative change.”<sup>77</sup> This latter description is important and accords with our findings but should not be cast in opposition to the demand for sovereignty. Raising the spectre of “separation resurgence” is particularly unhelpful, especially at this critical juncture on the coast.

Indigenous resurgence is occurring across Canada, but in this province it has its own particular dynamics, and today the very specific term “sovereignty” is now regularly being invoked in relationship to reconciliation, as is seen in this statement by the First Nations Leadership Council in British Columbia: “The term ‘reconciliation’ is often used to evoke what must occur to improve and structure the relationship between Aboriginal Peoples and the Crown. It is often not emphasized, however, that reconciliation in the context of the relationship between Aboriginal Peoples and the Crown is about sovereignty.”<sup>78</sup> We concur.

Our reading of history is that First Nations have done what it takes to survive regardless of the state of reconciliation and will continue to do so. For us, moving reconciliation forward will depend very much on the degree to which the settler government in this province is willing to recognize, in words and actions, Indigenous sovereignty over the land. This is a daunting transformational project. As Glen Coulthard points out in *Red Skin, White Masks*, the colonial state’s *raison d’être* has been to

<sup>76</sup> Michael Asch, John Borrows, James Tully, eds. *Resurgence and Reconciliation: Indigenous – Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).

<sup>77</sup> *Ibid.*, 7.

<sup>78</sup> First Nations Leadership Council, *Advancing an Indigenous Framework*, 11.

seize Indigenous land for settlers and for natural resource extraction by powerful corporations.<sup>79</sup> Whether we, Indigenous and non-Indigenous residents in this province, can break the cycle of unsustainable and destructive practices of resource extraction will depend on the degree to which Indigenous sovereignty and ways of being in the world are embraced. The transformation of the state's role is conceivable but extremely challenging and would require foundational (including constitutional) change. This can only occur if non-Indigenous people embrace the principle, validity, and thus righteousness of Indigenous sovereignty, including the recognition of First Nations right to self-determination and self-governance. Such recognition will potentially relieve the pressure for non-sustainable economic development and open up a new era, one in which reconciliation can rapidly proceed and people can together find ways to implement the place-based, relational ways of being one with the earth.

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<sup>79</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 7.