***TO SHARE, NOT SURRENDER: INDIGENOUS AND SETTLER VISIONS OF TREATY MAKING IN THE COLONIES OF VANCOUVER ISLAND AND BRITISH COLUMBIA*, PETER COOK, NEIL VALLANCE, JOHN SUTTON LUTZ, GRAHAM BRAZIER & HAMAR FOSTER, EDS. (VANCOUVER: UBC PRESS, 2021)**

The book is a collection of articles that aim to explain why treaty-making did not continue after 1854 in Vancouver Island and did not gain force in the whole territory of British Columbia. The collection is a product of the questions and discussions proposed at the "First Nations, Land, and James Douglas: Indigenous and Treaty Rights in the Colonies of Vancouver Island and British Columbia 1849–1864" conference, at the University of Victoria, in 2017. Before this book, academic literature had not explored the particularities of treaties with Indigenous peoples of the island in relation to the history of treaty-making in Canada. Neither, had it explained in-depth why the territory of British Columbia, more broadly, had not been subjected to treaties. The book explores a combination of factors that might have led to this particular context — including: the influence of James Douglas (Hudson's Bay Company's chief factor and later Vancouver Island colony's governor and British Columbia colony's governor); the politics between the Hudson's Bay Company (HBC), the British Crown, and the colonies concerning purchasing Aboriginal title; and the rush for settlement and economic development in the region.

James Douglas' personal and professional background and his moral and political orientation had significant influence over the history of treaty-making in British Columbia. Douglas was raised in the Guianas and had a multi-racial ancestry, which might have led him to see issues of British imperialism more broadly, not constrained to Vancouver Island. He had been a fur trader and was married to a Cree woman. His liberal humanitarian principles, such as fairness to all people, oriented his relationship with the Crown, Indigenous peoples, and settlers. However, as Laura Spitz explains in her chapter, Douglas had to combine his idealism with the pragmatism of a colonial project, through which not all persons are seen as the same. Humans were the "functional equivalent of 'law-abiding British subject[s].'"[1] The colonization project dictated practices of humanization and dehumanization in law and determined who was entitled to land and for what purposes. For Douglas, Indigenous peoples would be assimilated naturally to the new growing British Columbia society.

Nevertheless, the law on Aboriginal title already represented an obstacle (a burden) to colonization at that time. The British Crown recognized Indigenous peoples' interest over land and made clear through the Grant Charter that the HBC was obligated to extinguish Aboriginal title by purchasing land.[2] Over a century later, in the *Calder v. Attorney General of British Columbia*, decision, the Supreme Court of Canada recognized that Aboriginal title has always been part of the law in Canada.[3] And in the 1997 *Delgamuukw v. British Columbia*, decision, Aboriginal title was recognized as an enforceable legal right.[4] Through different perspectives and historical facts, the book demonstrates how the obligation to

---

1 Laura Spitz, "Colonialism, Law, and the Social Construction of Humanity on Vancouver Island, 1849–64" in Peter Cook et al, eds, *To Share, Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021) 49 at 68.

2 Legislative Assembly of British Columbia, "1849 – Vancouver Island Becomes a Colony," online: <www.leg.bc.ca/dyl/Pages/1849-Vancouver-Island-Becomes-a-Colony.aspx>.

3 [1973] SCR 313.

4 [1997] 3 SCR 1010.

extinguish Aboriginal title had been constant in the minds of the colonizers, at least until 1864, when Douglas retired. The tension between British sovereignty and prior Indigenous occupation was already an irreconcilable legal issue at that time. So much so that the politics between Douglas and the Assembly (who had control of the land revenue and who would pay for the purchase title) and between Vancouver Island and the HBC (who had title to unsold land) would affect the end of treaty-making. Purchasing Aboriginal title required expenses that neither the Colony, nor the British Crown, was willing to pay.

Douglas secured fourteen treaties between 1850 and 1854 in Vancouver Island. Nine of the treaties were aimed at purchasing land for settlement in Victoria and five treaties across the island were for specific resource extraction and development circumstances. The book offers an interesting and lively account of the gatherings and "conversations" that might have led to the treaties. From the 1850 treaty, for instance, there is, in fact, no official record of the terms of the agreement, let alone the perspectives of the Indigenous chiefs and elders involved. Douglas offered blankets and coins to the local Indigenous leaders and asked in return that they marked an "x" on a blank piece of paper. Later, the treaty terms were formulated at the HBC's headquarters in London and then sent back to Douglas. Most likely, not only in 1850 but in all treaty "negotiations" on the island, Indigenous chiefs may have interpreted payments as an act of recognizing their authority instead of purchasing land.

Regarding its format, it is unimaginable that such a document would be acceptable in law, even at that time. Indeed, a contract between British citizens would have easily been considered null had it been designed that way. It is appalling that an issue of so high public interest — First Peoples ceding land to the HBC or the Crown — was treated in such a precarious and devious way. Regarding the substance of the treaties, it is clear from the historical analyses offered by the book authors (and by sheer logic) that it was never the intention or manifestation of Indigenous peoples to surrender their land. It would be insane to agree to the terms of the "agreements" in return for some money or goods. Indigenous peoples had the clear view that they would need their lands to survive. Why would they surrender them?

Throughout Douglas' mandate as governor, the emerging colonial legal system was under extreme pressure to fulfill the goals of fast colonization in a vast territory. When Douglas became the governor of the colony of British Columbia, his intentions to negotiate and sign treaties had to be put on hold to attend to settlement and resource extraction issues. Sarah Pike explains that Douglas adopted an unsurveyed land system to satisfy Indigenous and settlers' interests, at least provisionally. British subjects could claim, occupy, "improve" the land, and then receive a Crown grant in fee simple, without obligation to pay until the government surveyed the land. "Indian" reserves and settlements were not available to settlers to pre-empt. However, it was unclear what an Indian settlement was and what types of land "improvements" Indigenous peoples would have to implement to protect their interests.

Douglas intended to minimize immediate conflicts between settlers and Indigenous peoples through this system, but believed that the extinguishment of Aboriginal title could still be negotiated with time. According to Pike, "[t]he new mainland colony's unsurveyed land system allowed it to wait for the outcome of the older and more sophisticated colony's

steps to extinguish Aboriginal title in the districts settled by the new immigrants."[5] Douglas expected Indigenous peoples to apply pre-emption to assert their right over land, putting them on an equal footing with settlers. In practice, the system served as an effective tool to distract from the burdensome questions of Aboriginal title to ensure a broad occupation of the British Columbia territory and allow the Crown some political legitimacy to assert its sovereignty.

I see at least two interrelated paradoxes in the history of treaty-making in British Columbia, as described in the collection — one regarding the question of Aboriginal title and the surrendering of land through treaties and the other regarding James Douglas' ideals and participation in this story. First, separating Indigenous peoples from their traditional territories was a requirement for the development of the colonies. Even though the British Crown recognized Indigenous interest over land and the need to extinguish Aboriginal title, it put in place a system that allowed immediate occupation of Indigenous lands by settlers as if this was an inevitable process. As it often is, the law was unable to catch up with the facts of economic pressure. To this day, it is a contradiction that the Crown asserts its sovereignty to authorize resource extraction and "development" on traditional Indigenous territories while it makes all possible efforts to deny Aboriginal title.

A second paradox is the co existence of Douglas' agency as an HBC's chief factor (and later the colonies' governor) with the social, cultural, and economic systems that directed the history of treaty-making in British Columbia and Vancouver Island. Keith Carlson argues that "Douglas's tenure as governor was … liminal" in a liminal world.[6] Would history be different if, for instance, Richard Blanshard had not resigned and Douglas had not become the island's governor? Douglas might have envisioned Indigenous peoples and settlers sharing the land and living in reciprocal relationships. His discourse might have contributed to him gaining the trust of many Indigenous Nations and leaders. But, in practice, he has substantially undermined Indigenous peoples' interests by pushing forward treaties that excluded Indigenous voices and used devious methods to secure "agreements." He was part of a project much bigger than himself, with a clear strategy of separating Indigenous peoples from their traditional territories.

Finally, how would Canadian law be different if historical treaties were signed in British Columbia more broadly? I would point to two legal implications of those historical facts to the creation and application of the law in British Columbia. One is that Indigenous peoples have historically and consistently claimed title over traditional lands. As opposed to claims of treaty rights' infringements in areas covered by historical treaties (such as in northeast British Columbia), First Nations in most British Columbia have asserted their ownership leading to a particular evolution in the case law regarding Aboriginal title. The *Tsilhqot'in Nation v. British Columbia*, decision has recognized Aboriginal title for the first time in Canadian legal history.[7]

---

[5] Sarah Pike, "The Colony of British Columbia's Unsurveyed Land System" in Cook et al, *supra* note 1, 247 at 275.

[6] Keith Thor Carlson, "'The Last Potlatch' and James Douglas's Vision of an Alternative Settler Colonialism" in Cook et al, *ibid*, 288 at 290.

[7] 2014 SCC 44.

The second implication is the current presence of a more dynamic and multi-faceted setting for negotiations of government-to-government agreements between the Crown and First Nations, around land and resources, compared to the rest of the country. I believe that title claims and Indigenous peoples' resistance to protect title over time, through blockades, protests, and court cases, have created a unique context in which the Crown has had to enter into agreements with First Nations in regard to specific areas and resources, despite disagreements regarding the title of those lands. As a result, I believe this history has contributed to Indigenous legal systems thriving and becoming more visible to settlers and settler governments.

Rebeca Macias Gimenez
PhD (University of Victoria)
Postdoctoral Fellow (Faculty of
Law, University of Alberta)