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EXECUTIVE SUMMARY

This paper is the result of a Community Governance Project within the Masters of Arts in Indigenous Governance program at the University of Victoria. The Community Governance Project was conducted in conjunction with the Tsawout First Nation. The Tsawout First Nation is a part of the Saanich Nation and is a party to the North Saanich treaty, one of fourteen Douglas treaties negotiated on Vancouver Island. This Community Governance Project is intended to serve as the first phase of research that aims to illuminate the meaning of the Tsawout First Nation's Douglas treaty.

Specifically, this paper provides an overview and analysis of secondary and published primary sources that interpret the meaning of the Douglas treaties. The purpose is to provide a foundation for conducting further literary and oral research on the Tsawout First Nation's Douglas treaty. There is an Annotated Bibliography, which presents a comprehensive list, and brief summaries, of secondary and published primary sources that discuss the Douglas treaties. Following the Annotated Bibliography there is an analysis of these materials. The analysis focuses on two major themes that permeate all the writings about the Douglas treaties: 1) the surrender of land; and 2) the protection of rights.

The analysis of the materials in the Annotated Bibliography show that the literature interpreted the Douglas treaties in one of three ways: 1) through the written text of the treaties; 2) through oral history; and 3) through both written and oral history. Most of the sources fell under the first category, accepting the treaties as they are written and concluding that they represent a purchase of indigenous lands. There was only one source that interpreted a Douglas treaty primarily through the oral history. This was the documentation of the Saanich oral history. It stated that the treaty was about peace and friendship and not a surrender of land. The authors that used both oral and written history gave evidence that the indigenous peoples did not knowingly surrender their lands. They also found that the protection of hunting and fishing rights, as found in the text of the Douglas treaties, were a part of the oral agreements made during the treaty negotiations.

Assuming a treaty requires the consent of both parties, it is necessary to consider what the parties agreed to when the Douglas treaties were made. There is ample evidence to show that the indigenous peoples did not know what the treaty document said, so the written treaty is not a reliable representation of the treaty agreements. The literature that uses the written treaty to define its meaning is, therefore, not presenting reliable conclusions about the Douglas treaties.

Oral history and written documentation that give evidence to the oral agreements made when the Douglas treaties were negotiated is absolutely essential for interpreting their meaning. Since there is only one source of documented oral history, further research into the oral history of the Douglas treaties is important to verify and expand on what this source tells of the treaty.

Archival information on the Douglas treaties is also extremely valuable. Authors such as Arnett and Hendrickson show how records kept by Douglas and others involved with the Douglas treaty negotiations reveal their intentions and what was communicated to the indigenous peoples during the negotiations. Further archival research may or may not reveal more information than what is already found in secondary sources, but given its merit, it is a worthwhile endeavor.

This paper concludes with four recommendations for the next phases of research on the Tsawout First Nation's Douglas treaty. These recommendations arise out of the analysis of the materials in the Annotated Bibliography and from the experiences of working with the Tsawout First Nation. The Tsawout First Nation has a strong affiliation with the other First Nations in the Saanich Nation. It was felt that this affiliation would be beneficial to the research project since the North Saanich treaty is so similar to the South Saanich treaty, the other Douglas treaty made with the Saanich Nation. It was also felt that there was a need to design a consultation process which would ensure the involvement of the Saanich Nation in future research.

As a result, the recommendations are as follows, that:

1. The research project should focus on both the North Saanich treaty and the South Saanich treaty, and be called the "Saanich Treaties Research Project";

2. The Saanich Treaties Research Project should be conducted in conjunction with the Saanich Nation;

3. A committee made up of members of the Saanich Nation and the Indigenous Governance program should be established to ensure ongoing communication and consultations during the course of the research project; and

4. Future research within the Saanich Treaties Research Project should focus on oral histories and archival resources.

INTRODUCTION

Between 1850 and 1854 there were fourteen treaties negotiated between various indigenous peoples on Vancouver Island and the British Crown. The negotiator for the Crown was James Douglas, and as a result, these treaties have become known as the Douglas treaties.

The Douglas treaty documents state that the respective indigenous peoples surrendered their land in exchange for some blankets and other items which are given a monetary value. They also provide protections for the indigenous peoples' hunting and fishing rights. The treaties are signed by the indigenous leaders with the mark of an X beside their name. The following is a copy of the North Saanich Douglas treaty. Although this is the copy of just one Douglas treaty, all fourteen of them are the same, except for specific names, locations and amounts of payment.

Saanich Tribe – North Saanich

> Known all men, that we the chiefs and people of the Saanich Tribe, who have signed our names and made our marks to this deed on the eleventh day of February, one thousand eight hundred and fifty-two, do consent to surrender, entirely and forever, to James Douglas, the agent of the Hudson's Bay Company in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying as follows, viz: - commencing at Cowichan Head and following the coast of the Canal de Haro North-west nearly to Saanich point, or Qua-na-sung; from then following the course of the Saanich Arm to the point where it terminates; and from then by a straight line across country to said Cowichan Head, the point of commencement, so as to include all the country and lands, with the exceptions hereafter named, within those boundaries.
>
> The conditions of or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.
>
> We have received, as payment [amount not slated].
>
> (Signed) Hotutstun his X mark and 117 others
>
> Witness to signatures,
>
> (Signed) Joseph William McKay
>
> Clerk H.B.Co's. service

R. Golledge, Clerk

(Papers Related to Indian Land Question, 1875, p.10)

There is more to the Douglas treaties, however, than what is found in the text. Oral history and other historical information reveal that the Douglas treaties were seen by the indigenous peoples as peace and friendship agreements, and did not include a surrender of land title. Historians have speculated that James Douglas was shrewd in his negotiation tactics by creating oral agreements that were quite different from what was later drafted onto paper. Furthermore, it is not clear how the hunting and fishing rights protected in the treaty should be translated into modern-day rights.

Given the lack of clarity about the meaning of the Douglas treaties, the Tsawout First Nation, who are a party to the North Saanich Douglas treaty, expressed an interest in having research conducted on the meaning of their treaty. This paper is the first phase of a research project that aims to illuminate the meaning of the Tsawout First Nation's Douglas treaty. Specifically, this paper provides a comprehensive overview and analysis of secondary sources that interpret the meaning of the Douglas treaties.

There are eight sections that make up this paper.

Part One provides some background information on the Douglas treaties. This section presents the historical background and current legal status of the treaties. Part One ends by discussing how the Douglas treaties relate to the current British Columbia Treaty Process.

Part Two gives a description of the Community Governance Project. It describes how the project was developed, the parties involved and the overall objectives.

Part Three describes the research methods used for developing this paper.

Part Four of this paper is the Annotated Bibliography. This is a listing and brief summary of all the secondary and published primary sources that were found that discussed the Douglas treaties.

Part Five is an analysis of the materials cited in the Annotated Bibliography. This section reveals the various ways in which the Douglas treaties have been interpreted in secondary sources.

Part Six contains the conclusions reached from conducting the analysis.

Part Seven is a discussion about my experience working for the Tsawout First Nation and the lessons I learned in carrying out this Community Governance Project.

Part Eight gives my recommendations for future research. These recommendations are based on the conclusions I reach in Part Five and the lessons learned in Part Six.

PART 1: THE DOUGLAS TREATIES

HISTORICAL BACKGROUND

In 1846, the Treaty of Washington was signed between the British and the Americans. This treaty created the boundary dividing the west coast of North America, leaving Vancouver Island under British control. To secure its ownership over the territory, the British encouraged new settlement on Vancouver Island. The Hudson's Bay Company was granted control over land and settlement in the new colony. James Douglas was the Company's Chief Official and, therefore, took on this responsibility.

With plans to encourage new settlement on Vancouver Island, the British had two main incentives to negotiate treaties with the surrounding indigenous peoples. The first was to maintain peace in a volatile setting. With the Vancouver Island colony only recently established, the British feared an invasion from the Americans. There was also the likelihood of invasions from the Haida, Tsimpsean and Tlingit from the north coast. Furthermore, battles were erupting between the indigenous peoples and the Americans just to the south. The British relied on good relations with the indigenous peoples on Vancouver Island to ensure the stability of their colony. Negotiating treaties was a way to diffuse conflicts that may have arisen due to the presence of the new settlers.

The second incentive was to gain legal title to the land. Under British imperial policy, before settlement could take place on the colony of Vancouver Island, the aboriginal title to the land had to be extinguished. This policy came from the Royal Proclamation of 1763, which states that the indigenous peoples will not be disturbed on their lands, and their lands will be reserved to them unless they are ceded to or purchased by the Crown. Therefore, the British had a legal obligation to extinguish aboriginal title before it could allow colonists to settle on Vancouver Island.

Consequently, by 1850 James Douglas had received instructions from the Hudson's Bay Company, acting on behalf of the Crown, to negotiate land conveyance agreements with the indigenous peoples who lived around the Hudson's Bay post, Fort Victoria. By the spring of 1850, Douglas had completed nine of these agreements. Douglas negotiated the agreements by presenting the indigenous leaders with blankets and other items, and promising that their people could continue to hunt on unoccupied land and carry out their fisheries as they had in the past. He formalized the agreements by having them signed by the indigenous leaders by marking an X beside their name.

These first nine Douglas treaties were actually signed by the indigenous leaders before the content of the treaty was written on the paper. Douglas had not yet received specific instructions regarding what the agreements

should say. He, therefore, had the leaders mark their X on a blank piece of paper, and later on added the text of the treaty.

The indigenous leaders likely agreed to signing a blank document because the written terms would have had little significance to them. Their culture was based on oral communication, and gave the highest regard to verbal promises, especially when given by someone like Douglas who was high within his ranks. The content of the treaty for the indigenous peoples was, therefore, the oral agreement made with Douglas during the negotiations.

Douglas continued in the treaty making process with indigenous peoples on Vancouver Island to resolve disputes, maintain peace, and ensure British access to the territories. In 1851, there was speculation of coal deposits at the north end of Vancouver Island. To ensure British access to these resources, Douglas negotiated two treaties with two Kwakiutl communities in this area at Fort Rupert. In 1852, two treaties were made with the Saanich Nation, located on the Saanich Peninsula at the southeast end of Vancouver Island. These negotiations arose out of a protest from the Saanich people over the establishment of a sawmill near their territory. The final Douglas treaty was made with the Snuneymuxw people in Nanaimo in 1854. Similar to Fort Rupert, the British had interests in the coal found in that area.

The text used for all fourteen Douglas treaties was taken from similar agreements that were previously negotiated between the British and the indigenous peoples in New Zealand. The British had also sought the extinguishment of aboriginal title in New Zealand through the negotiation of land conveyance agreements. The wording for these conveyances were used as the template for the Douglas treaties. The British did this to ensure that the Douglas treaties would effectively extinguish aboriginal title in accordance with English law.

While the British wanted to extinguish aboriginal title and ensure peaceful relations, the indigenous peoples had their own incentives to enter into the Douglas treaties. With the arrival of new settlers and the new presence of the British on their land, the indigenous peoples near Fort Victoria had an interest in protecting their land and ensuring the continuation of their hunting and fishing practices. The first nine treaties that were negotiated for the lands around Fort Victoria provided the indigenous peoples with the assurance of these protections. This is apparent in both the text of the agreement and in the oral agreements that Douglas reported he had made.

The indigenous peoples from the Saanich Peninsula were also experiencing changes from the arrival of the settlers and the establishment of the British colony. Their reasons for making a treaty with Douglas was primarily to maintain peaceful relations. Hostilities were growing and when Douglas came forward with an offering of blankets and other goods, the Saanich leaders accepted them as a gesture of peace.

Records show that the negotiation of the Nanaimo treaty was lengthy and that it took great efforts from Douglas to reach an agreement. In a correspondence between Douglas and Archibald Barclay, the Hudson's Bay secretary, Douglas described the negotiations as troublesome when discussing "Indian rights".

> [Douglas] reported to Barclay that the negotiations had been accompanied by "considerable discussion", and in response to the company's request in January 1853 that he extinguish native claims to the coal fields at Nanaimo, he replied, "I shall attend to their instructions, as soon as I think it safe, and prudent to renew the question of Indian rights, which always give rise to troublesome excitements, and has on every occasion been productive of serious disturbances." (Hendrickson, 1988, p.7)

There is no record of the Nanaimo treaty, only a brief summary of the agreement written by Douglas and the signatures of the parties. It has been speculated however, that the X's on this agreement have been forged.

Overall, the indigenous peoples engaged in the Douglas treaties to protect their livelihoods and communities from the changes that were arising from the establishment of the British colony. They had an interest in maintaining peaceful relations, and the practice of treaty-making to ensure peace was common within their cultures. It cannot be assumed that the indigenous peoples understood or accepted the written terms of the treaty. Given the high value they placed on the land and the resources they depended on for survival, it is not likely they would have easily agreed to surrender their ownership and control over these lands.

The Douglas treaties were looked upon positively by the indigenous peoples. Other indigenous peoples on Vancouver Island requested that they also have an opportunity to negotiate a treaty with the Crown. However, the British would not comply. Due to financial limitations, the British restricted their negotiations to areas that were only needed at that time. Then, after the last Douglas treaty was negotiated in 1854, the Crown altered its policies and practices toward indigenous peoples in British Columbia. No further treaties were negotiated. Aboriginal title that was previously recognized was ignored, and the government no longer felt compelled to negotiate treaties. Vancouver Island united with the mainland and the province of British Columbia was established. The *Indian Act* was passed and applied to all "Indians", including those with treaties. The indigenous peoples with Douglas treaties were not treated differently from other indigenous peoples in British Columbia. Their treaties were disregarded. It required legal action to bring the Crown to recognize the Douglas treaties and uphold its treaty promises.

CURRENT LEGAL STATUS OF THE DOUGLAS TREATIES

The legal status of the Douglas treaties has been expressed through three different court cases. These are *R v. White and Bob* (1969); *R v. Bartleman* (1984); and *Claxton v. Saanichton Bay Marina* (1989). Each of these cases has provided certain legal recognitions of the Douglas treaties.

The *R v. White and Bob* case was the first legal affirmation that the Douglas treaties are in fact "treaties" in accordance with the law. The court permitted the Douglas treaty beneficiaries, White and Bob, to hunt in accordance with their treaty rights rather than under provincial regulations. This legal recognition of the Douglas treaties has gained further significance since the passing of the 1982 *Constitution Act*. Section 35 of the Constitution recognizes and affirms existing aboriginal and treaty rights. Therefore, today the rights recognized under the Douglas treaties are constitutionally protected, and cannot be unilaterally extinguished by any party.

The *R v. Bartleman* case is about the Douglas treaty right to "to hunt over the unoccupied lands" as stated in the text of the treaties. The conflict over the definition of that right arose when a member of the Tsartlip Indian Band, a beneficiary of the Saanich Douglas treaty, was arrested for hunting out of season on lands that were not conveyed in the treaty. The Tsartlip person brought the case to court on the grounds that he had a treaty right to hunt within all of his traditional hunting grounds, not simply those lands that were ceded under the treaty. To further complicate the matter, the land where he was hunting was privately owned. Therefore, the court had to determine first, whether the right to hunt on unoccupied lands only applies to the lands that were conveyed in the treaty or to all lands within the Saanich traditional hunting grounds, and second, whether privately owned lands can be considered unoccupied.

The final ruling of this case was in favour of the Tsartlip hunter in both respects. The court ruled that the treaty right to hunt is not limited to the lands ceded within the treaty, but extends to all the traditional hunting grounds of the Tsartlip person. Furthermore, the court stated that although the land in question was privately owned, it still qualified as "unoccupied" in accordance with the Douglas treaty. This was because the land was open to hunters during the hunting season, was not fenced off, nor was there any sign that opposed trespassing.

The *R v. Bartleman* case serves as a legal precedent that ensures Douglas treaty beneficiaries can hunt on all their traditional hunting lands in accordance with their treaty rights. It also provides some clarity as to what is meant by "unoccuppied lands".

The 1989 *Claxton v. Saanichton Marina* case examined the treaty right to "carry on our fisheries as formerly" which is set out in the text of the Douglas treaties. The dispute was over the Saanichton Marina Ltd.'s proposal to construct a marina within Saanichton Bay, and whether or not this was in violation of the Saanich peoples treaty right to fish. The court ruled that the construction of the marina would derogate from the Saanich people's treaty right to fish. This was because the Saanichton Bay is a traditional fishing area for the Saanich people, and it was shown that the construction of the marina in this bay would seriously harm the fish and other sea life. While the ruling did not declare that the Douglas treaty provides a proprietary right to fishing areas, it does definitively assert that the treaty protects the right of the Saanich people to carry out their traditional fisheries. In this situation, the fishing area needed to be protected from development to protect that right to fish.

The legal status of the Douglas treaties can be somewhat deciphered through these three cases. The Douglas treaties are recognized as treaties, the right to hunt on unoccupied lands includes all lands in the respective First Nation's traditional hunting grounds, and the right to carry out fisheries as formerly ensures the protection of traditional fishing sites from degradation. However, there has not been a court case regarding the surrender of lands within the Douglas treaties or the "village sites and enclosed fields" that were meant to be kept for the use of the indigenous peoples. Furthermore, the question of the governing rights of Douglas treaty beneficiaries has never been raised within the courts. The legal status of these aspects of the treaties is therefore less clear.

While the courts have given some legal weight to the Douglas treaties, the legal system has some inherent limitations as a mechanism for recognizing and enforcing treaty rights. The courts are adversarial by nature: always creating a winner and a loser, regarding the conflict of understanding. In 1991, however, a new option arose for indigenous peoples to have their Douglas treaty rights recognized in the eyes of the law. This was through negotiations under the British Columbia Treaty Process.

BRITISH COLUMBIA TREATY PROCESS

The British Columbia Treaty Process was established in 1991, after more than a century of indigenous peoples in British Columbia demanding the opportunity to negotiate a treaty with the Crown. The process is designed to facilitate negotiations between a First Nation, the provincial government and the federal government. A treaty has not yet been completed under the process. However, the Nisga'a Nation have recently ratified their Final Agreement, which stands as the first modern treaty to exist in British Columbia. Although the Nisga'a Final Agreement was not negotiated under the British Columbia Treaty Process, it still provides the framework for understanding what future modern treaties will likely entail.

The Nisga'a Final Agreement is a two hundred and fifty-two page document that sets out how land and jurisdictional authority will be divided among the Nisga'a First Nation, the province, and the federal government. The Nisga'a were required to surrender all their aboriginal rights and titles in exchange for the provisions set out in the agreement. The federal and provincial incentive for signing such an agreement was to gain legal certainty regarding the rights and titles of the Nisga'a people. This is why they required the Nisga'a to extinguish all aboriginal rights and titles that are not set out in the agreement. The incentive for the Nisga'a Nation was to have long awaited recognition over their title to land and governing rights.

The British Columbia Treaty Process presents a similar opportunity to all First Nations in British Columbia, as was taken on by the Nisga'a. There are currently fifty-one First Nations engaged in the process. However, there are serious disputes over fundamental components of the agreements, such as land quantum, fiscal transfers and governing rights. After ten years of negotiations under the British Columbia Treaty Process, still no Final Agreements have been made.

Those First Nations with a Douglas treaty have the opportunity to negotiate a modern treaty under the British Columbia Treaty Process. The modern treaty would replace their Douglas treaty altogether. This means that any outstanding rights within the Douglas treaties that are not represented in the new Final Agreement would be lost. Since the extent of the rights that exist under the Douglas treaties is not clear, these First Nations would risk extinguishing treaty rights that may go far beyond what the modern treaties have to offer. The current opportunity to enter into the British Columbia Treaty Process therefore gives more significance to the task of understanding the meaning of the Douglas treaties.

PART 2: COMMUNITY GOVERNANCE PROJECT

In the Masters of Arts in Indigenous Governance program at the University of Victoria, a student has the option of doing either a Thesis or Community Governance Project as his or her final requirement to complete the program. The objective of the Community Governance Project is to have the student work closely with an indigenous community and conduct research that will be of use to the community. The Community Governance Project requires the student to spend at least ten hours a week working within the indigenous community. A member of the community is chosen to work with the student and sit on the student's committee for the oral defense. This paper is the result of a Community Governance Project with the Tsawout First Nation, who are part of the Saanich Nation on Vancouver Island.

The Saanich Nation is located on the south-eastern tip of Vancouver Island. They are made up of four Indian Act Bands, and they are a party to two Douglas treaties: the North Saanich treaty and the South Saanich treaty. One of these Indian Bands, the Tsawout First Nation, expressed an interest to the Indigenous Governance Program of the University of Victoria in having research done on the meaning of their Douglas treaty. This was how the focus of my Community Governance Project became directed to doing research on the Douglas treaties.

In designing this Community Governance Project, the Director of the Indigenous Governance Program and I met with the Chief and Council of the Tsawout First Nation. During this meeting, I was struck by the high regard the Tsawout Chief and Council gave their Douglas treaty. They clearly believed that their treaty with Canada held important protections for their community and culture and that many of their treaty rights were currently being ignored or violated. This sentiment seemed to be recently fueled by meetings they had with the Mi'kmaq from New Brunswick, who had recently won a court battle regarding their treaty rights to fish. The Tsawout Chief and Council felt their treaty was similar to the Mi'kmaq treaty and that it also deserved a more extensive recognition for protecting rights to hunting and fishing. They also expressed concern for the lack of awareness about their treaty among the general public and among their own community. It was felt that increasing awareness about the treaty was an important component to having the treaty fully recognized and enforced.

One of the required reading materials in the Indigenous Governance Program is a book called *The True Spirit and Intent of Treaty 7*. This book provides an extensive compilation of historical research on Treaty 7. Its primary focus was to represent the views of the indigenous peoples who are a party to the treaty through the recording of their oral history. In addition, the book provided an analysis of the political circumstances in North America when the treaty was negotiated. It brought together the historical and political research and the oral histories in a way that successfully illuminated the meaning of Treaty 7.

The True Spirit and Intent of Treaty 7 is an extremely useful tool for implementing a treaty. Its publication increases the opportunity for the general public to educate themselves about Treaty 7. The book also provides a source of information that could be used within the courts, for curriculum development in schools, or broader public education campaigns. These uses seemed to meet the objectives expressed by the Tsawout First Nation to increase the understanding, awareness, and enforcement of their treaty. Therefore, it was agreed that the Tsawout First Nation and the Indigenous Governance Program would work together to develop a

similar document. It was decided that a series of Community Governance Projects carried out by Indigenous Governance students would focus on developing a comprehensive study of oral histories and written materials that closely examine the meaning of the Tsawout First Nation's Douglas treaty.

My role was to conduct the first phase in this overall project. The first logical step in conducting research on the Tsawout First Nation's Douglas treaty was to do a search of all existing literature on the topic. My Community Governance Project was, therefore, to research secondary and published primary sources that discuss the meaning of the Douglas treaties. The research was extended to look at all the Douglas treaties because of their similarities. The objective of the research was to provide a comprehensive and accessible overview and analysis of what has already been written on the Douglas treaties. The purpose of such an overview and analysis was to provide a foundation for conducting further literary and oral research in the next stages of the research project.

PART 3: RESEARCH METHODS

To conduct research on all the existing secondary and published primary sources that discuss the Douglas treaties, I needed to establish certain boundaries that would allow the research to be thorough yet achievable within a limited time frame. Through consultation with people in the Tsawout First Nation Administrative Office, I decided to focus my research efforts on the text collections in the following locations.

Tsawout First Nation Administration Building
Tsawout First Nation Resource Centre
Saanich Adult Education Resource Centre
University of Victoria Main Library
University of Victoria Law Library
Federal Treaty Negotiation Office (Victoria branch)
Ministry of Aboriginal Affairs

I focused my research on sources that provided direct commentary on the Douglas treaties. Although general historical and political analyses can be used to contribute to an understanding of the Douglas treaties, this would have expanded the scope of my research beyond my capacity to conduct it thoroughly.

After three months of researching the materials in these locations, I developed an Annotated Bibliography. The Annotated Bibliography cites all of the materials that discuss the meaning of the Douglas treaties. The format for the Annotated Bibliography is such that the sources cited could be accessed easily. The summaries include a brief description of the material, focusing particularly on the descriptions the author provides about the Douglas treaties. The page numbers noted are where direct commentary on the Douglas treaties can be found. The Annotated Bibliography presents a comprehensive list, and brief summaries, of secondary sources that discuss the Douglas treaties.

The Analysis was developed after the completion of the Annotated Bibliography. I organized the texts from the Annotated Bibliography according to how they interpreted the meaning of the Douglas treaties. To keep the analysis of these materials focused and consistent, I concentrated the discussion on two major themes that permeated all the writings about Douglas treaties: 1) the surrender of land; and 2) the protection of rights.

PART 4: ANNOTATED BIBLIOGRAPHY

1. **Arnett, Chris. The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849 – 1863.** Burnaby: Talonbooks, 1999.

Text form: Book
Location: University of Victoria Main Library, call no. E78 B9A76
Commentary on Douglas treaties: pp. 30 - 50
Summary:
This is a recent text on the history of indigenous and non-indigenous relations on Vancouver Island and the Gulf Islands. Arnett provides an in depth discussion of the Douglas treaties. He looks at the historical context, the indigenous oral histories, and the records of correspondence between Douglas and his authorities to derive his analysis of the treaties. He states that ultimately, the Douglas treaties were a way for both indigenous nations and the British to secure land and resources and maintain peace.

Arnett also points out the conflicting views that the indigenous peoples and Douglas held with regards to the Crown's assertion of sovereignty. He describes two different definitions of sovereignty: 1) nominal sovereignty, meaning the theoretical dominion of a sovereign that "reigns but does not govern"; and 2) substantive sovereignty, which refers to the actual dominion of a controlling power over the whole of a country. (p.35) He then states,

> Undoubtedly, Douglas had the latter [substantive] meaning in mind when he forged his agreements, but it is likely that the former [nominal] meaning was closer to the understanding of the Songees, Clallum and Sooke – a recognition of British nominal sovereignty in exchange for confirmation and acknowledgment of their substantive sovereignty over ancestral lands and resources. (p.35)

Overall, this text provides a contemporary and thorough analysis of the Douglas treaties. The full text of a generic Douglas treaty is provided. The written version of the treaties is not taken for granted. Instead, background written and oral historical evidence is used to provide a full picture of how the treaties were negotiated and what they meant to each party.

2. **Berger, Thomas R. "Wilson Duff and Native Land Claims." The World is as Sharp as a Knife: An Anthology in Honour of Wilson Duff.** Ed. Donald N. Abbot. Victoria: British Columbia Provincial Museum, 1981.

Text form: Book
Location: University of Victoria Main Library, call no. E78 B9W67

Commentary on Douglas Treaties: pp. 49 - 56
Summary:
Berger's contribution to this book discusses Wilson Duff's testimonies in various court cases regarding aboriginal rights and titles. He discusses Duff's testimony in the 1965 *R v. White and Bob* British Columbia Court of Appeal case, regarding the Nanaimo Douglas treaty. Berger describes this court case and the negotiation of the Douglas treaties. In describing the Douglas treaties he states,

> At a meeting with the chiefs and the peoples of each tribe, [Douglas] would explain to the Indians that he wanted their land. He told them he did not want their village sites, nor did he want their cultivated fields. But he did want the remainder of their land. He told them, however, that they would always have the right to hunt over all of the unoccupied lands they were giving up, and the right to carry on their fisheries. (p.50)

The text of the South Saanich treaty is provided as an example. Berger describes the legal strategies used to have the court agree that the agreements made between Douglas and the indigenous peoples were in fact "Treaties" in accordance with the *Indian Act*, and that White and Bob were beneficiaries of these treaties.

3. **British Columbia Papers Connected with the Indian Land Question, 1850 – 1875**. Victoria: Richard Wolfenden Government Printer, 1875.

Text form: Book
Location: University of Victoria Main Library, call no. E78 B9 B85 1875
Commentary on Douglas Treaties: pp. 5 - 11
Summary:
This publication is a compilation of papers regarding the "Indian Land Question" in British Columbia. It provides the text of the fourteen Douglas treaties negotiated between 1850 and 1854. The rest of the papers are dated 1858 and onward. They deal with the British government's policy toward Indian lands in British Columbia. The papers provide information regarding the Indian land reserve policy implemented by James Douglas and his successor, Joseph Trutch. There is a list of the reserves that were surveyed within BC by 1871 for the purpose of pursuing the reduction of reserve sizes. The reduction of Indian reserve sizes was later implemented throughout BC, including the reserves under the Douglas treaties.

The text of the treaties is the only direct information on the Douglas treaties. The other information shows some indication of Douglas's desire to negotiate treaties for the sake of maintaining peaceful relations with the indigenous peoples.

4. **Cail, Robert E. Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871 – 1913.** Vancouver: University of British Columbia Press, 1974.

Text form: Book
Location: University of Victoria Main Library, call no. HD319 B7C35
Commentary on Douglas Treaties: pp. 171 – 173
Summary:
Although this book focuses on a time frame after the Douglas treaties were made, there is some discussion of the treaties. The Teechamitsa Treaty is quoted in its entirety as an example of a Douglas treaty. The author also provides a brief analysis of the indigenous peoples' perspective about Douglas's negotiations for reserve lands. He points out the indigenous peoples had a different way of perceiving land ownership.

> Whatever Douglas's intent was, it is now evident that the Indians never really understood what was happening. To them, the legal concept of individual ownership in land was meaningless. As Douglas suggested, they did understand the principle of usufruct, and the rival Chieftains thought they were yielding to white interlopers only the right to use the land, not the right to anything called "exclusive private ownership". It was this misunderstanding which gave rise to the request from the Indians throughout the province as years went for an increase in the size of their reserves. (p.173)

This quote does not specifically address Douglas treaty negotiations, but can apply to the understanding that the indigenous peoples may have had when entering into the Douglas treaties.

5. **Duff, Wilson. "The Fort Victoria Treaties."** BC Studies 3 (1969): 3 – 57.

Text Form: Journal
Location: University of Victoria Main Libriary, call no. FC 3801 B18
Commentary on Douglas Treaties: pp. 3 - 27 and 51 - 55
Summary:
The purpose of the article is to "take a hard look at the Fort Victoria treaties in light of the assembled information on Songhees history and ethnography." (p.4) Duff concludes that the treaties are faulty as ethnographic records. The first part of the article focuses on the treaties. Copies of the treaties and a rough map of Douglas treaty lands are provided. The article then focuses on the place names and history of the Songhees people, making reference to the ethnological inaccuracies of the treaties. In his conclusion he gives an analysis of the treaties. He states that they have provided little benefit for the indigenous peoples, and resulted in the loss of their aboriginal title.

Duff's analysis of the treaties is dated. Since his article was written, the treaties have been proven, through various court cases, to carry some weight for protecting the native peoples' right to hunt and fish. Duff also fails to provide any analysis of the indigenous peoples' perspective of the treaties. The article does, however, provide a close analysis of the lands set out in the treaties and other details provided in the text of the treaties.

6. Duff, Wilson. The Indian History of British Columbia: The Impact of the White Man. Victoria: Royal British Columbia Museum, 1997. (Revised Edition)

Text form: Book
Location: University of Victoria Main Library, call no. E78 B9D8 1997
Commentary on Douglas Treaties: pp. 85 - 86
Summary:
In his overall discussion of the Indian history in British Columbia the author highlights the fourteen Douglas treaties as the beginning of the Crown's Indian Administration. The treaties are briefly described as a surrender of land "to the white people forever". He goes on to describe the other aspects of the treaties as follows:

> The Indians' village sites and enclosed fields were to be reserved for their use (but the Crown retained absolute title to these reserves). Each family was paid compensation amounting to about 2 pounds 10 shillings, and it was understood that the Indians were to retain their right to hunt over unoccupied lands and to carry on their fisheries as formerly. (p.86)

Overall, the information provided on the treaties is brief and based solely on the written text of the treaties.

7. Elliot, Dave Sr. Saltwater People, as told by Dave Elliot, Sr. Edited by Janet Poth. School District No. 63(Saanich), 1983.

Text form: Book
Location: University of Victoria Cirriculum Laboratory, call no. 970.4 E435 1990
Commentary on the Douglas Treaties: pp. 69 – 73
Summary:

Saltwater People provides documentation of the oral history on the Saanich treaty. Elliot is from the Saanich Nation. He describes the events that led up to the signing of their treaty, and what the Saanich leaders understood as the meaning of the treaty. For example, he notes that just prior to the

negotiation of the treaty, the Saanich people demonstrated their protest of a new saw mill, run by the Hudson's Bay Company, that was logging near their territory. In addition, a Saanich boy had recently been shot for crossing Douglas's property. (p.46) Elliot describes how the Saanich leaders attended the meeting with James Douglas, and agreed to the treaty with the understanding that it was a way to keep the peace amongst growing hostilities.

Elliot also describes how the Saanich leaders came to mark their X on the treaty document, which signified their agreement to the terms of the treaty. The document was in English and had not been translated for the Saanich people. However, the leaders put faith in the verbal agreement that had been made during the negotiations. Elliot notes, "It wasn't until much later they found out they were signing their land away by putting those crosses out there. They didn't know what it said on that paper." (p.47)

Saltwater People offers a documentation of Saanich oral history on a Douglas treaty. Within his descriptions, Elliot demonstrates how the Saanich people relied on the oral agreement as their understanding of the treaty, and how the written version of the treaty cannot be trusted to represent that agreement.

8. Fisher, Robin. <u>Contact and Conflict: Indian-European Relations in British Columbia, 1774 – 1890</u>. Vancouver: University of British Columbia Press, 1977.

<u>Text form</u>: Book
<u>Location</u>: University of Victoria Main library, call no. E78 B9F57
<u>Commentary on Douglas Treaties</u>: pp. 66 – 68, 171 – 172
<u>Summary</u>:
The basis for Fisher's interpretation of the Douglas treaties is the written text of the treaty. He states the treaties were based on current British opinion about the nature of aboriginal title. The indigenous peoples did not fully understand these concepts of land ownership and, therefore, did not understand the implications of the treaties. The validity of the land surrender is not questioned, but the author notes that the indigenous peoples were more likely to think that they were surrendering their use of the land, not their title.

There is also a brief mention of Joseph Trutch's interpretation of the treaties. Trutch believed that the Crown never acknowledged Indian title to the land but simply negotiated agreements to secure friendly relations. Fisher states this is contrary to Douglas's view that he was purchasing land and to the indigenous peoples' view that the treaties were more than just a declaration of friendship.

9. Fisher, Robin. "Joseph Trutch and Indian Land Policy." <u>BC Studies</u> 12 (1971–72): 3–33.

Text form: Journal
Location: Saanich Heritage Office
Commentary on Douglas Treaties: pp. 3 - 8
Summary:
The introduction of the article provides a brief description of the Douglas treaties. They are described as land surrenders "entirely and forever" in return for a few blankets and the reservation of land for their use. (p.3) The author also points out the implicit recognition of aboriginal title that the treaties represent. The article presents the relations between Douglas and the indigenous peoples as positive, and demonstrates the change in this relationship when Douglas's successor, Joseph Trutch, arrived.

Through contrasting Douglas's and Trutch's approach toward relations with the indigenous peoples, the article discusses Douglas's character and how he conducted his business. For example, Fisher notes that Douglas was aware that the indigenous peoples had precise concepts of their territorial boundaries, and he would acknowledge this ownership in the negotiations. (p.18) He also "wanted the law to operate with the least possible effect on the character and temper of the Indians . . ." (p.6) and therefore sought to protect the indigenous peoples' way of life within the treaties. These insights on Douglas's perspectives provide some indication that Douglas acknowledged indigenous ownership of land and assured some protections in his negotiations of the treaties.

10. **Foster, Hamar. "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849 – 1927"** Essays in the History of Canadian Law. Edited by Hamar Foster and John McLaren. Vol. 2, British Columbia and the Yukon. Toronto: University of Toronto Press, 1995.

Text form: Journal
Location: University of Victoria Main Library, call no. KA83 E85
Commentary on Douglas Treaties: pp. 39 – 56
Summary:
The discussion on the Douglas treaties looks at three questions:

> What did the parties to these agreements think they were doing, and to the extent this can be divined, did their actions conform to the state law at the time? ? Why did the making of these agreements cease so early in the colony's history? ? Once officialdom adopted the view that there was no Indian title to be extinguished, how did its representatives explain the Douglas treaties? (p.39)

The article, as a whole, looks at the role of law regarding the Indian Land Question in British Columbia. The Douglas treaties are described as a paradox, an irony and a mystery. A paradox, because they purported to convey lands that the colonial officials had said the Indians did not own. An irony, because they were consistent with case law on aboriginal title at the time, which recognized

that aboriginal title existed independently from the recognition of the sovereign. However, this recognition of aboriginal title within case law and within the Douglas treaties was not reflected in the British Columbia Indian Land Policy for the next 135 years. Finally, they were seen as a mystery because, for no clear reasons, the negotiation of the treaties stopped after 1854. The article describes the historical context of the time when the treaties were negotiated, the views of various colonial officials, and includes the perspective of the Saanich Nation from their oral history.

The discussion of the Douglas treaties is used to lead up to a more in depth discussion on the Indian Land Question as a whole in British Columbia. None the less, the description of the Douglas treaties provides an analysis of both the written and oral version. With reference to the Saanich oral history on the treaty, Foster highlights the indigenous peoples' perspective that the treaty was primarily for peace, friendship and the security of their livelihoods. (p.41)

11. Foster, Hamar. "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title." U.B.C. Law Review 23 (1989): 629 - 650.

Text form: Journal
Location: University of Victoria Law Library, call no. K25 N5282
Commentary on Douglas Treaties: all pages
Summary:
The article looks at the ruling of the Saanichton Bay Marina case and the history of the negotiations of the Douglas treaties. It highlights the court's acknowledgment that "the Indians 'could not have thought of [such a transaction] as a purchase,' and would not have regarded the woollen goods they received as payment for land." Foster then goes on to conclude that,

> What seems much more likely is that they believed that they were agreeing to peaceful relations, to share the right to harvest certain resources, and to allow a limited number of colonist to occupy some of the lands the were not themselves occupying." (p. 632)

He takes this view from the oral history recorded in *Saltwater People* and from discussions with Earl Claxton Jr. of the Saanich Nation.

The article goes on to discuss the 1840 Treaty of Waitangi in New Zealand and how it influenced the policy for negotiating treaties on Vancouver Island. It also reviews the background, arguments, and decisions of the Saanichton Bay Marina case. This case focuses particularly on the right, protected within the treaty, to fish as formerly. In the concluding section, Foster critiques the court's underlying theory of aboriginal and treaty rights: that these rights are brought to life solely by sovereign recognition. The legal contradictions of such a theory is described. The author also derives legal

evidence to demonstrate that the treaties were based on a relationship of equality between the indigenous peoples and the Crown.

12. Foster, Hamar. "British Columbia: Legal Institutions in the Far West, from Contact to 1871." Manitoba Law Journal 23 (1996): 293 - 340.

Text form: Journal
Location: University of Victoria Law Library, call no. K13 A5591
Commentary on Douglas treaties: pp. 297, 319 – 320
Summary:
The main focus of the article is on the existence and use of British law in British Columbia prior to confederation. There is only a brief discussion about the Douglas treaties. It states the treaties were modelled after the New Zealand Treaty of Waitangi, and that the written version was added afterwards to the blank paper with signatures. With respect to the significance of the written version, Foster is explicit.

> The text was added later. But this hardly mattered. Neither party could speak the language of the other, and such communication as took place was probably in the Chinook trade jargon, an exceptionally poor instrument for explaining land as a commodity. (p.319)

It then states that the oral history of the Salish bands that signed the treaties saw the agreement as a bond of peace and friendship that conveyed no title.

This brief discussion of the Douglas treaties clearly brings to question the validity of the surrender of land. It also highlights the conflicting policies of the British colonists regarding the recognition of aboriginal title in British Columbia.

13. Hendrickson, James E. The Aboriginal Land Policy of Governor James Douglas, 1849 – 1864. Paper delivered to the 5th BC Studies Conference, November 1988.

Text Form: Photocopy
Location: Ministry of Aboriginal Affairs, Aboriginal Relations office
Commentary on Douglas Treaties: pp. 4 – 9
Summary:
This is an extensive paper on the aboriginal land policy implemented by James Douglas. The discussion regarding the Douglas treaties only takes up a few pages of the twenty-seven page document, but it is, nonetheless, informative. Hendrickson provides quotes from archival documents that depict the development of the policy toward indigenous peoples beginning in 1849. He describes the grant of

Vancouver Island to the Hudson's Bay Company and the British Parliamentary view on aboriginal title. The British were hesitant to have an official policy for the indigenous peoples because they did not have enough information on the indigenous population or the extent of the lands they occupied. They felt making a policy without knowing this information could impede the progress of colonization. They were clear, however, that there was a requirement to extinguish Indian title to allow for new settlement. This obligation was understood by James Douglas and guided his negotiations of the Douglas treaties.

Hendrickson also provides the quotes from the correspondences between Douglas and Arhcibald Barclay, the Hudson's Bay Company's secretary, that explain the instructions for negotiating the treaties. The written text of the Douglas treaties largely reflect these instructions.

Further correspondences between Douglas and his authorities reveal that Douglas "did not find negotiating with the natives the simplest or most straightforward exercise." (p.7) In particular, Douglas states that "the question of Indian rights . . . always gives rise to troublesome excitements and has on every occasion been productive of serious disturbances" (p.7)

Hendrickson also discusses the historical and political context of the time, noting the increasing numbers of invasions from the Haida, Tsimpsean, and Tlingit from the north coast during the 1850's, and the outbreak of open warfare between the whites and natives in Washington Territory in 1855. Douglas's response to this tense atmosphere was to ensure "friendship" with the indigenous peoples for the sake of the Colony's security.

Overall, Hendrickson's paper provides a variety of information contributing to the understanding of the Douglas treaties. He notes the British recognition of and desire to extinguish aboriginal title. He also points to evidence that the negotiation of treaties entailed long discussions and the issue of aboriginal rights was not easily addressed. Finally, it was clear that the threat of war existed, and maintaining peaceful relations with the indigenous peoples was vitally important to the Vancouver Island colony.

14. Hendrickson, James E. ed. "Journals of the House of Assembly, Vancouver Island 1856 – 1863" Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia 1851 – 1871. 2 Victoria: Provincial Archives of British Columbia, 1980.

Text form: Journal
Location: University of Victoria Main Library, call no. J110 H293 v.2
Commentary on Douglas treaties: pp.6, 71 – 72
Summary:
On August 12, 1856, James Douglas, then the Governor, made a speech to the House of Assembly. He stated that he would "continue to conciliate the good will of the native Indian Tribes". He describes this as a duty of humanity. He also says it is important for the protection of the colony from the potential threat the indigenous peoples would become if they were enemies. While he is not speaking

of negotiating treaties specifically, he is articulating his reasons for "continuing" his past practices that included the making of fourteen treaties.

On February 8, 1859, James Douglas addressed the House of Assembly regarding the application to relocate the Songhees reserve away from the Victoria Habour. Douglas defended the rights of the Songhees people to remain on that land given the "solemn" nature of the agreement between the Crown and the Songhees. He states,

> When the Settlement of Victoria was formed certain reservations were made in favour of the native Indian tribes. They were to be protected in their original right of fishing on the Coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown Lands; and they were also to be secured in the enjoyment of their village sites and cultivated fields. . . .the faith of the Government is pledged that their occupation shall not be disturbed.
>
> For that reason the Government will not cause them to be removed, because it is bound by the faith of a solemn engagement to protect them in the enjoyment of those Agrarian rights. (p.71 – 72)

He goes on to assure the Government that the title of the reserve lands is vested in the Crown, not the indigenous peoples.

These transcripts offer confirmation that the treaties were "solemn engagements" according to Douglas and also important mechanisms for maintaining peace.

15. Indian and Northern Affairs Canada. Information Sheet: Douglas Treaties. April 4, 1997

Text Form: Photocopy
Location: Federal Treaty Negotiation Office
Commentary on Douglas Treaties: pp. 1-2
Summary:
This two page information sheet provides a brief overview of the Douglas treaties. It states that the treaties were negotiated because "while the Crown held absolute title to the land, Aboriginal people had some proprietary rights that needed to be extinguished through treaties" (p.1) The treaties are described as extinguishing aboriginal title in exchange for reserve land, some money and a few blankets. It also states the "Aboriginal people retained hunting and fishing rights on unoccupied lands . . ." The concluding paragraph states that there is some question regarding the signing of the Douglas treaties, their interpretation, and implementation.

Overall this summary emphasizes the extinguishment of aboriginal title that occurred through the treaties and does not elaborate on the rights protected. It clarifies that the First Nations who are beneficiaries of the Douglas treaties can enter into negotiations under the current British Columbia Treaty Process.

16. La Violette, Forrest E. The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia. Canada: University of Toronto Press, 1961.

Text form: Book
Location: University of Victoria Main Library, call no. E78 B9L3
Commentary on Douglas Treaties: pp. 9-10
Summary:
This book only gives a brief mention of the Douglas treaties, but the author does provide an analysis of the colonial policies toward indigenous peoples in British Columbia during that era. The discussion of the Douglas treaties is a prelude to a more detailed analysis of Douglas's Indian land reserve policy. The author notes that the Indian land question was given prominence during the time the Douglas treaties were made because of the potential threat the indigenous peoples were to the survival of the colony.

The historical evidence demonstrates the instability of the colony on Vancouver Island and the corresponding need to maintain peaceful relations with the indigenous peoples.

17. Lane, Barbara. "The Douglas Treaties on Vancouver Island, Government Policy and Saanich Indian Fisheries." Paper prepared for the Supreme Court of British Columbia. BETWEEN: Louis Claxton, Chief of the Tsawout Indian Band, on behalf of himself and all other members of the Tsawout Band (Plaintiffs) AND: Saanichton Marina Ltd. and Her Majesty the Queen in Right of the Province of British Columbia (Defendants).

Text form: photocopy of submission made to the Claxton v. Saanichton Bay Marina case
Location: Tsawout Resource Centre, File 200 – 00 General
Commentary on Douglas Treaties: all pages
Summary:
The first part of the paper focuses on the question of whether the North Saanich Douglas treaty of February 11, 1852, was concluded on behalf of the Hudson's Bay Company, the Crown or both. The paper provides a history of international relations at that time, specifically describing the impact the Treaty of Washington (1846) had on the making of the Douglas treaties. The author provides documentary evidence that the Douglas treaties were an implementation of imperial policy carried out by the Hudsons Bay Company. Thus, concluding that the Douglas treaties were negotiated on behalf of the Crown.

The paper then discusses the fishing rights of the Saanich people that were protected under the treaty. It notes, contrary to the hunting rights that are limited to unoccupied lands, the fishing rights are unqualified. A quotation from Douglas's correspondence with his colonial authority elaborates on what he meant the treaty to protect. "I informed the natives . . . that they were at the liberty to hunt over unoccupied lands and carry on their fisheries with the same freedom as when they were the sole occupants of the country."(p.18) The conclusion of this discussion is that the treaty did not place any explicit limitations on the indigenous peoples fisheries.

The paper thoroughly examines the treaty and what it meant to each party, with a particular focus on the treaty's protection of fishing rights. Lane demonstrates how the fisheries is central to the Saanich peoples culture and way of life, which illuminates the significance of the protection of fishing rights within the treaty.

18. MacEachern, Zandra L. "Claxton v. Saanichton Marina Ltd." Canadian Native Law Reporter 3 (1989) 46 - 58.

Text form: Journal
Location: University of Victoria Law Library, call no. Rep-Can A8 C32N382 1989
Commentary on Douglas Treaties: all pages
Summary:
This is the decision of the British Columbia Court of Appeal in favour of Chief Louis Claxton of the Tsawout First Nation. The case resulted from the proposed development of the Saanichton Marina, which was to be located in a traditional fishing area of the Saanich people. According to the Tsawout First Nation, this development was in conflict with their treaty right to fish as formerly. The court agreed and ordered the Saanichton Marina to stop its development.

The ruling has the following sections: Background and Terms of the Treaty, The Saanich Indians, Was the 1852 Agreement "A Treaty"? The Effect of the Treaty, The Nature of Indian Treaty Rights – Case Law, and The Effect of the Proposed Marina on Fishing Rights.

Overall, the case affirms that the 1852 agreement between James Douglas and the Saanich people was a treaty with the Crown, and that this treaty protects the rights of the Saanich people to fish as formerly. The fishing rights do not include a propriety right to the fishing areas, but do protect the sites from any infringement on the Saanich people's ability to fish there. The proposed development of the Saanichton Marina was deemed to be such an infringement, and was therefore ordered to stop.

Upon affirming that the 1852 agreement is a treaty, other case law in interpreting treaties applied to the interpretation of this Douglas treaty. Case law sets out certain general rules that treaties should be given fair, large and liberal construction in favour of the Indians, should not be construed technically but in the sense understood by the Indian people, and any ambiguity should be interpreted against the drafter. As

well, as the honour of the Crown is involved, no sharp dealings should be sanctioned, and evidence of conduct as to how the parties understood the treaty should be used to give the treaty content. (p.50) Using these guidelines for interpreting the Douglas treaties, led the court to examine a broad range of evidence, beyond the written text of the treaty.

19. Madill, Dennis. British Columbia Indian Treaties in Historical Perspective. Research Branch Corporate Policy, Indian and Northern Affairs Canada, Ottawa, 1981

Text form: Book
Location: University of Victoria Main Library, call no. E78 B9M27
Commentary on Douglas Treaties: pp. 1 – 31, 67 – 73
Summary:
This text provides a lengthy overview of the Douglas treaties. It discusses the historical background that motivated the British to engage in treaty negotiations. The threat of invasion from the south was prominent and the British relied on good relations with the native peoples for the stability of their colony on Vancouver Island. There is also a description of the written treaties, including copies of each. The meaning of the treaties is interpreted strictly from the written text. Correspondence between Douglas and his authorities is analysed to provide some insight on how the negotiations occurred and what Douglas's reasoning was behind the provisions set out in the treaties. This analysis points out that Douglas was seeking to protect the indigenous peoples' village sites and way of life from encroaching settlers to ensure the maintenance of peaceful relations. There are also some comparisons made between the Douglas treaties and Treaties Number 1 and 2 negotiated in Ontario in1871.

20. Miller, J.R. Skyscrapers Hide the Heavens: A History of Indian – White Relations in Canada. Revised Edition. Toronto: University of Toronto Press, 1989.

Text form: Book
Location: Saanich Adult Education Resource Centre, call no.E78.C2 M54
Commentary on Douglas Treaties: pp.145 – 146
Summary:
This book examines the history of relations between indigenous and non-indigenous peoples in Canada, and provides a brief description of the Douglas treaties. The author places James Douglas in a positive light, stating that "his administration stands out as singularly intelligent in comparison with others elsewhere on the continent and with those who came after him." (p.146) He explains how Douglas was successful in maintaining peaceful relations between the indigenous peoples and the new white settlers. One way he did this was by securing land for settlement through the negotiation of the Douglas treaties. According to Miller, Douglas's sole purpose for these treaties was to permit settlement, however, the intentions of the indigenous peoples is less clear.

> What the Indians understood the treaties to mean, and what their motives for negotiating were is less clear. That they understood that they were agreeing to total and exclusive ownership – alienation, to use the English legal term – of land by the European power seems unlikely. (p.145)

This commentary on the Douglas treaties does not provide any significant detail or analysis of the meaning of the treaties. It simply provides a brief description of why they were negotiated by Douglas, and raises the question about the understanding and intentions of the indigenous peoples.

21. Morale, Robert. **James Douglas meet Delgamuukw: The Implication of the Delgamuukw decision on the Douglas Treaties.** Prepared for the Delgamuukw/Gisday'wa National Process of the Assembly of First Nations. Vancouver, 2000.

Text form: Unpublished paper
Location: Tsawout Lands and Resource Office, or at www.delgamuukw.org/research/research.htm
Commentary on Douglas treaties: all pages
Summary:
The article is about the Supreme Court of Canada decision in *Delgamuukw* v. *The Queen* [1997] and how it affects the Douglas treaties. The *Delgamuukw* ruling is about the recognition of aboriginal title, and the article focuses on how the court's definition of aboriginal title applies to Douglas treaty lands. Specifically, the article asks the following questions. "What assistance does *Delgamuukw* provide in determining what lands are subject to aboriginal title? What aboriginal title lands did the Douglas treaty people give up in the treaty process? What, if any, aboriginal title land has survived the treaty process?" (p.1)

The paper concludes that aboriginal rights and titles were not extinguished through the Douglas treaties. Therefore, those beneficiaries of the treaties have their treaty rights in addition to aboriginal rights and titles. The outstanding question from the article is what lands were included in the treaty negotiations.

> The lands subject to aboriginal title include the village sites, lands surrounding in the form of fields and the traditional hunting and fishing grounds. The real issue is what territory was included in this land base. (p.25)

Morale suggests that confirmation on the location of these lands would point to where the Douglas treaty beneficiaries have aboriginal title. He recommends using oral histories about the treaty negotiations to determine this land base.

22. "R v. Bartleman" Canadian Native Law Reporter 3 (1984) 114 – 133.

Text form: Journal
Location: University of Victoria Law Library, call no. Rep-Can A8 C32N382 1984
Commentary on Douglas Treaties: all pages
Summary:
This case is a ruling by the British Columbia Court of Appeal. It confirms the right of a member of the Tsartlip Indian Band to hunt on unoccupied lands within his traditionally territory by virtue of the North Saanich Douglas treaty. The case confirms two aspects of the treaty. The first is that the right to hunt protected by the treaty is not limited to the lands conveyed to the Crown, but extends to all the traditional hunting areas of that First Nation. Second, the case defines "unoccupied lands" as lands where there is uncultivated brush, no livestock, and no fence or boundary. This means the land could be privately owned, but also considered "unoccupied".

The reasons for the decision provide a useful summary of legal precedents for interpreting treaties. These instruct the court to not construe the treaties according to the technical meaning of their words, but "in the sense in which they would naturally be understood by the Indians" and any doubtful expressions should be construed in favour of the Indians. (p.127) Also, oral tradition must be accepted as evidence regarding the meaning of the treaty and any appearance of "sharp dealings" by the Crown must not be sanctioned. Finally, the court must consider how the parties acted after the conclusion of the treaty as evidence of what the treaty entailed.

The ruling provides guidelines for interpreting treaties that favour the perspectives of the indigenous peoples. The outcome of this decision has confirmed an aspect of a Douglas treaty that is neither clearly reflected nor in conflict with the written text.

23. Slattery, Brian. "R v. White and Bob" Canadian Native Law Cases, 1960 – 1970 (1988) 630 – 683.

Text form: Journal
Location: University of Victoria Law Library, call no. A8 C32N37 v.6
Commentary on Douglas treaties: all pages
Summary:
This case is regarding the Nanaimo Douglas treaty. It confirms that the agreement is a "Treaty" in accordance with the meaning of that term in the *Indian Act*. As a result, the hunting rights protected by the treaty were deemed paramount over the conflicting Provincial hunting regulations. The case examines the historical evidence indicating that although the treaties were negotiated via the Hudsons Bay Company, they were negotiated upon the instructions of the British Crown and reflect the Crowns imperial policy toward native peoples at that time.

24. Tennant, Paul. Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849 –1989. Vancouver: University of British Columbia Press, 1990.

Text form: Book
Location: University of Victoria Main Library, call no. E78 B9T376
Commentary on Douglas Treaties: pp.17 - 26
Summary:

This text looks at the legal context under which the Douglas treaties were negotiated. Tennant states that the legal incentive for the British Colony to negotiate treaties with indigenous peoples stem from Britain's recognition of aboriginal title. He sites the *Royal Proclamation of 1763* as Britain's recognition of existing aboriginal title in what is now Canada. The *Royal Proclamation* required the Crown to negotiate treaties with the indigenous peoples as the means to extinguish their aboriginal title. The indigenous peoples' ownership of the land was to be respected and not encroached upon by European settlers. Since new settlers were important for the stability of the British Colony on Vancouver Island, measures were taken to have the aboriginal title extinguished. This resulted in the negotiation of the Douglas treaties.

Tennant's discussion about the Douglas treaties lays the foundation for highlighting the injustices faced by the rest of the indigenous peoples when the Crown ceased the negotiation of treaties in British Columbia. The Douglas treaties are evidence of the Crown's recognition of aboriginal title, and are therefore taken as evidence that aboriginal title still exists where treaties were not negotiated. Tennant's focus does not analyse the meaning of the Douglas treaties from the indigenous peoples' perspective, nor does he explore the possibility that the extinguishment of aboriginal title through the Douglas treaties is not justifiable. His focus is primarily on the assertion that aboriginal title still exists in most of British Columbia.

PART 5: ANALYSIS

The following is an analysis of the materials cited in the Annotated Bibliography. The purpose is to reveal pervasive understandings of the Douglas treaties found within these texts. This is done by looking at how the sources interpreted two major themes within the Douglas treaties: the surrender of land and protection of rights.

In reviewing the materials, it became apparent that the authors used one of the following three different methods for interpreting the meaning of the Douglas treaties:

1. Interpreting the treaty primarily through the written treaty;
2. Interpreting the treaty primarily through the oral history; and

3. Interpreting the treaty through both oral and written history.

The method of interpretation used affected the conclusions the authors reached about the meaning of the Douglas treaties. The materials are therefore organized into these categories. The following is a discussion of how the sources under each category interpreted the surrender of land and the protection of rights within the Douglas treaties.

INTERPRETING THE TREATY PRIMARILY THROUGH THE WRITTEN TREATY

Most of the sources cited in the Annotated Bibliography used the written version of the treaty to interpret its meaning. The authors in this category are Thomas Berger, Robert E. Cail, Wilson Duff, Robin Fisher, James Hendrickson, Forrest E. La Violette, Dennis Madill, and Paul Tennent.

The majority of these materials were written twenty to thirty years ago, and some only briefly mention the Douglas treaties. The article by Hendrickson and the book by Tennent are exceptions. Hendrickson's and Tennent's texts were both written within the last thirteen years and provide a critical and extensive analysis of the treaties. However, they still endorse the written treaty as the foundation for understanding what the Douglas treaties mean.

Surrender of Land

Interpreting the Douglas treaties through the written version led these authors to conclude that the indigenous peoples surrendered their lands to the British. This is taken for granted without question. One example is James Hendrickson, who provides a detailed analysis of the Douglas treaties in his article, *Aboriginal Land Policy During the Tenure of James Douglas.* He examines a range of written historical evidence which help to clarify the meaning of the Douglas treaties. He does not, however, question the extinguishment of title that the written treaty represents. This is apparent in his concluding paragraph when he asks,

> How much difference would signing more treaties [in British Columbia] have made? Would the history of the past 130 years really have changed that much had they been continued? Would native people actually be that much better off today *if they had been persuaded to sell their title cheaply in the 1860's*? (Hendrickson, 1988, p.27, emphasis added)

Henderickson assumes, as did the other authors in this category, that the indigenous peoples who signed the Douglas treaties sold their title to the land.

Many of these authors acknowledged the likelihood that the indigenous peoples did not understand what was written in the treaty. For example, in his book *Contact and Conflict,* Robin Fisher notes,

> It is unlikely that the Indians comprehended the full import of the phrase "entirely and forever". In the pre-settlement period the Indians had no way of learning about European concepts of land ownership, and the signatories of the treaties probably thought that they were surrendering the right to the use of the land rather than title to it. (Fisher, 1977, p.67)

Yet Fisher still definitively concludes that "with the small exception of village sites and enclosed fields, the land had become 'the entire property of the white people for ever'", making direct reference to the text of the treaty. However glaring the evidence may have been to Fisher that the written treaty could not have been understood by the indigenous peoples, he was not deterred from seeing the Douglas treaties as representing a surrender of land.

While the written treaty is clear that land title is being surrendered to the Crown, it is not clear about the location of those lands. Wilson Duff highlights this point in his article *The Fort Victoria Treaties.*

> It is a point of some importance that the treaties were made at the fort, and not "on the ground". It means, for example, that the boundaries of tribal lands were settled on the basis of verbal descriptions. It is doubtful that Douglas had an accurate map to work with, and even if he had it is even more doubtful that the Indians could read it. Their mental maps and his had to be reconciled, as did any confusions which arose over land marks, directions and distances. Such confusions are apparent in several of the descriptions in the treaties, making it impossible to map the territories in anything more than a schematic way. (Duff, 1969, p.24)

Using the text of the treaty as the main source for interpreting its meaning brought Duff to conclude that the indigenous peoples did convey their lands to the Crown, however, the exact location of these lands cannot be identified. Duff attempts to sketch a map of the locations, but admits that it is only a rough estimate.

By accepting the written treaty as a valid representation of the Douglas treaties, these authors were not compelled to question the validity of the land surrender. They are left, however, with only a rough outline of which lands were surrendered and which lands were to be kept as "village sites and enclosed fields" for the indigenous peoples. Most of the authors, however, do not dwell on these points. Instead they accept that the indigenous peoples lost their aboriginal title to the land through the signing of the Douglas treaties, and move on to discuss implications these treaties have had on the "Indian Land Question" in British Columbia.

Protection of rights

The Douglas treaties state that the indigenous peoples are at liberty to hunt over the unoccupied land, and carry on their fisheries as formerly. Generally, the authors that relied on the written treaty to interpret its meaning do not provide an extensive analysis of the protection of rights under the treaties. When they are discussed, they are interpreted in accordance the current legal recognition of those rights. For example, *The Fort Victoria*

Treaties, by Wilson Duff, states that the hunting rights under the treaty overrule provincial game laws, but the right to carry on fisheries as formerly has gradually eroded. (p.54) This interpretation reflects the legal status of those rights at that time. When Duff wrote the article, the hunting rights under the Douglas treaties had been legally recognized as treaty rights, but there had been no legal definition given to the fishing rights.

Wilson Duff and Native Land Claims, by Thomas Berger, is another article that refers to the protection of rights under the Douglas treaties. The article is about the 1965 *R v. White and Bob* ruling regarding the right to hunt which is set out in the Douglas treaties. Berger's article explains this case, showing the legal argument for recognizing the hunting rights as treaty rights, thereby making them paramount over provincial hunting regulations.

The other authors in this category give little regard to the protection of rights under the Douglas treaties. They are stated, as they read within the text of the treaty, and no further analysis of their meaning is given.

INTERPRETING THE TREATY PRIMARILY THROUGH THE ORAL HISTORY

Saltwater People, by John Elliot Sr., was the only source found that relied primarily on oral history to provide an interpretation of a Douglas treaty. In his book, Elliot devotes some discussion to the negotiation of the Saanich treaty in 1852. Elliot tells the stories of what he had learned from the Saanich elders about how the treaty was negotiated and what the Saanich leaders understood the treaty to mean.

Surrender of Land

According to Elliot, the Saanich people engaged in a treaty with James Douglas primarily to maintain peaceful relations with the new settlers. Hostilities were growing due to the logging that was taking place near their territory. In addition, a Saanich boy had recently been shot while crossing Douglas's property. When Douglas came forward with an offering of woolen blankets and other goods, the Saanich leaders received them as a gesture of peace. Gift giving was common within the tradition of the Saanich people to maintain good relations.

Elliot also explains that the Saanich leaders marked their X on the piece of paper provided by Douglas with the understanding that it was the sign of the cross, "the sign of their God . . . the highest order of honesty." (p.72) They marked their X with the understanding that it symbolized an agreement to the oral promises made by Douglas. There was no way of understanding what the document itself said.

This understanding of the treaty given by Elliot comes from his knowledge of the oral history on the Saanich Douglas treaty. This oral history describes the treaty as an important agreement of peace and friendship. Elliot concludes that the written treaty was drafted dishonestly and that the Saanich people did not agree to surrender their land to the British.

Protection of Rights

Elliot does not speak of oral history regarding the protection of hunting and fishing rights under the treaty. It is therefore unclear whether there is an oral history regarding these promises that exist in the written text.

He does, however, acknowledge this aspect of the treaty when discussing how the Crown "did not even live up to its own words". He talks about how the promises embodied in the written text were not kept, and the Saanich people became increasingly marginalized from their land and ability to carry out traditional practices.

> One after the other – land, fishing rights, hunting rights were legislated away. . . The treaty with James Douglas said we could hunt and fish as formerly. We can't. It doesn't live up to its promises. (Elliot, 1983, p.73)

Elliot regards the written treaty simply as promises that the Crown made. He indicates that the Crown should live up to these promises. When he speaks about the treaty, however, he refers to the oral agreement made with Douglas to maintain peace and friendship. Whether or not the oral agreement included the protection of hunting and fishing rights for the Saanich people is not said.

INTERPRETING THE TREATY THROUGH BOTH ORAL AND WRITTEN HISTORY

This method of interpretation was used by the Canadian courts and by the authors Chris Arnett, Hamar Foster, and Robert Morale. A written submission made to the Supreme Court of British Columbia by Dr. Barbara Lane also falls under this category.

The courts have developed legal principles as guidelines to determine the meaning of treaties made with indigenous peoples in Canada. These principles state: 1) when there is a conflict over the meaning of a treaty the courts must give fair, large and liberal construction of decisions in favour of the Indians; 2) the courts must not construe the treaty technically but in the sense understood by the Indian people; 3) any ambiguity should be interpreted against the drafter; 4) as the honour of the Crown is involved, no sharp dealings should be sanctioned; and 5) evidence of conduct as to how the parties understood the treaty should be used to give the treaty content. These principles have brought the courts to considered both oral and written history when interpreting the meaning of the Douglas treaties.

A submission made to the court by Dr. Barbara Lane relies heavily on historical documents that reveal Douglas's intentions when he negotiated the treaty. Lane also uses oral testimony of the Saanich people to verify her statements regarding the location of the Saanich peoples traditional fishing sites. She uses this information to give definition to the fishing rights under the Douglas treaties.

The articles by Hamar Foster and Robert Morale and the book by Chris Arnett point to evidence that indicate the indigenous peoples did not know what the written treaty said, and did not understand the legal implications of marking an X on the treaty document. There is even speculation that the X's were forged in some cases,

and definite evidence that the paper was blank for the signing of the first nine treaties. Given this information, these authors are drawn to go beyond the text of the Douglas treaties to interpret their meaning.

The materials by Foster and Arnett provided extensive commentary on the oral history and various historical documents that reveal how the Douglas treaties were made. However, their writings do not come to one conclusion about the meaning of the Douglas treaties. Instead, they present the indigenous perspective of the treaties and the perspective of the British, highlighting the contrasting views. Morale was the only author that looked at both perspectives and then came to a conclusion about how the Douglas treaty should be interpreted.

Surrender of Land

Both Arnett and Foster conclude that the indigenous peoples did not understand or agree to the land surrender that is depicted in the written treaty. They provide a broad scope of evidence and extensive discussion to support this view.

Arnett, in his book *The Terror of the Coast,* explains how the indigenous peoples' perspectives on land ownership and their strong connection to their territories would have affected their decision to make a treaty with James Douglas.

> The question arises as to whether or not the native people of southern Vancouver Island knew what they were doing when they made these agreements with Douglas. Given the economic and spiritual significance of their ancestral territories, plus the fact that they did not share European concepts of land ownership, it is likely that the "Chiefs and headmen" were unaware of hwunitum [the white people's] intentions. Hwulmuhw [indigenous] leaders, however, were not opposed to hwunitum settlement, and, like their counterparts in New Zealand, recognized the value of making agreements with the most powerful nation on earth as a means of establishing peace in a region plagued by ongoing wars. (Arnett, 1999, p.34)

Arnett reasons that the indigenous peoples entered into the treaties to secure access to their territories, maintain peace, and form an alliance with a powerful nation. He goes on to state that the treaties signified "a confirmation of their ownership over ancestral village sites and the food gathering resources which were the foundation of their economy." (p.35) Although Arnett believes that the indigenous peoples did not agree to sell their land, he does not say whether or not the surrender clause in the written treaty is valid.

Foster also presents the indigenous view of the treaties and how they differ from the written treaties. In his article *The Saanichton By Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title,* he references the Saanich oral history as told by John Elliot Sr., and Earl Claxton Jr. He concludes that the indigenous peoples likely believed "they were agreeing to peaceful relations, to share the right to harvest certain resources, and to allow a limited number of colonists to occupy some of the land they were not themselves occupying." (p.632) Like Arnett, Foster believes that the indigenous peoples did not

knowingly surrender their land to the British, but does not explicitly conclude that this invalidates the surrender clause within the treaty.

Arnett and Foster imply that the Douglas treaties were not about a surrender of land, because this is not how the indigenous peoples understood the treaties. Yet, they do not come to a final conclusion on this point. Instead, they leave the reader with two versions of the treaties: one that is about peace and co-existence and does not surrender aboriginal title; and the other where the treaty is the purchase of aboriginal lands by the British.

The article, *James Douglas meet Delgamuukw: The Implication of the Delgamuukw decision on the Douglas Treaties*, by Robert Morale, differs from the materials by Arnett and Foster because it reaches a conclusion about the question of land surrender. The article considers oral and written history and states that when the indigenous peoples entered into the Douglas treaties they surrendered lands they were not traditionally using. (p.8) The Douglas treaties, therefore, represent a surrender of some lands.
Morale's article specifically addresses the question of whether aboriginal title land has survived the Douglas treaty process. He uses the recent *Delgamuukw* ruling to determine where aboriginal title may still exist on Douglas treaty lands. He notes that the Douglas treaties are evidence of the Crown's recognition that the indigenous people owned all the land. This is why the Crown sought a land surrender through the negotiation of treaties. He then reasons that since the treaty states that the land is surrendered "with the exceptions hereafter named", those exceptions are lands where a court would recognize aboriginal title.

Morale interprets the surrender of land within the Douglas treaties to exclude not only the village sites and enclosed fields, but also the hunting and fishing grounds that were regularly used by the indigenous peoples.

> The Douglas Treaty states that the Lekwungen people that entered into these treaties maintained exclusive control of their village sites and enclosed fields. They also retained the right to hunt over unoccupied lands and to carry on their fisheries as formerly. The land that they surrendered were the "waste lands"; all lands other than their village sites and enclosed fields and tracts of land regularly used for hunting and fishing. (Morale, 2000, p.16)

Morale's article states that aboriginal title could be recognized by a court to exist on the indigenous peoples' village sites, enclosed fields and hunting and fishing grounds. The challenge is to prove to the court where those parcels of land were when the treaties were made.

Court rulings on the Douglas treaties were another source that used oral histories and written evidence to interpret the meaning of the treaties. None of these rulings address the question of whether the treaty represents a surrender of land, but there has been indications that a court may see the surrender clause as invalid.

Previous court cases have stated that when there is a conflict over the meaning of a treaty, the courts must seek evidence that demonstrates how the indigenous people understood the treaty at the time. Furthermore, if there is evidence of "sharp dealings" by the Crown, the resulting agreements cannot be sanctioned.

Regarding the evidence of how the indigenous peoples understood the treaties, a trial judge has already acknowledged that "the Indians could not have thought of such a transaction as a purchase, and would not have regarded the woolen goods they received as payment for land." (Foster, p.632, 1989) The courts have also recognized the questionable nature of how the treaties were signed. First, that they signed a blank piece of paper, and also that the signatures on the Nanaimo Treaty appear to be forged. (R. v. Bartleman, 1984, p.123) These incidents could be interpreted as "sharp dealings" by the Crown.

While there has not been a court case regarding the land surrender in the Douglas treaties, legal precedents give some insights on how the courts would interpret the surrender clause. Given that the court must consider how the indigenous people understood the treaty, and that the indigenous peoples could not have known what the treaty document said, the courts would be required to provide further evidence than the written treaty to confirm the validity of the land surrender.

Overall, the article by Morale was the only source in this category that comes to a conclusion about the meaning of the surrender clause in the Douglas treaties. It states that the indigenous peoples surrendered land they were not traditionally using. Foster and Arnett imply the land surrender was not valid because the indigenous peoples did not agree to it, yet they do not explicitly make this statement. The courts have establish principles for interpreting treaties that favour the indigenous peoples' understandings, but they have not yet been required to rule on the issue of land surrender.

Protection of Rights

The written version of the Douglas treaties explicitly provides for the protection of hunting and fishing rights. The treaties state that the indigenous people "are at the liberty to hunt over unoccupied lands, and to carry out our fisheries as formerly". The greatest amount of commentary on the meaning of this phrase was found in court rulings.

There have been three court cases that interpret the protection of rights provided in the Douglas treaties. The first was the 1969 *R v. White and Bob* case. In this case, the court had to determine the legal status of the right to hunt which is set out in the Douglas treaties. At that time, these agreements were not yet recognized as treaties. The court looked at a variety of historical evidence and determined that the agreements made between James Douglas and the indigenous peoples should be regarded as treaties. This decision effected the status of the hunting and fishing rights protected under the agreement. Those rights were recognized as treaty rights, which made them paramount over provincial regulations. Today, treaty rights may also be paramount over federal laws.

The following two cases gave further definition to the hunting and fishing rights protected by the treaties. The first of these was the 1984 *R v. Bartleman* ruling by the British Columbia Court of Appeal. This case required the court to interpret the meaning of the right "to hunt over the unoccupied lands". The court ruled on two aspects of this right. First, it stated that although the land in question was privately owned, it is still to be regarded as "unoccupied" thereby allowing the treaty right to hunt to apply. The land was deemed unoccupied because it was not fenced off, and it was open to hunters during the hunting season.

The court also ruled that the hunting rights protected by the Douglas treaties apply to all unoccupied lands within the traditional hunting grounds of the Douglas treaty beneficiaries. It disputed the argument that the hunting rights should only apply to lands that were specifically ceded within the treaties. This decision was arrived at through considering oral history and a range of historical documents.

The judge set out six reasons for interpreting the treaty right to hunt to apply to all traditional hunting grounds. First, he looked at how the indigenous peoples would have seen the treaty. Restricting a continued right to hunt to only those lands conveyed in the treaty would have severely limited the Saanich peoples' hunting grounds, therefore jeopardizing their livelihoods. This is not something the judge felt the Saanich people would have agreed to. The court, therefore, put emphasis not on the technical reading of the treaty, but on a reasonable assessment of what the indigenous party would have consented to.

Second, the judge considered the Saanich oral history, which supported the interpretation that the hunting rights applied to all traditional hunting grounds. Oral history was therefore accepted by the courts as valid evidence for interpreting the treaty.

Third, the judge looked at the treaty promise to "carry on our fisheries as formerly" which is coupled with the hunting rights in the text of the treaty. Many of the treaty lands conveyed did not include lakes, rivers, or streams. Therefore, the fishing rights must have applied outside conveyed lands, leading to the conclusion that so should the hunting rights.

The last three reasons mentioned in the case all arise from historical documents which demonstrate that Douglas understood the hunting rights to apply to all the traditional hunting grounds, and not merely the lands ceded. This was derived from written correspondences between Douglas and his authorities, and from a speech Douglas made to the House of Assembly.

Overall, the court sought consistency between the text of the treaty, the oral history, and other historical evidence. It also attempted to look at the treaty from the perspective of the indigenous people. A common denominator among all this evidence was found and then used to make a decision. This approach is also evident in the *Claxton v. Saanichton Bay Marina* case.

The 1989 *Claxton v. Saanichton Bay Marina case* examined the Douglas treaty right to "carry on our fisheries as formerly". The court ruled that the fishing rights included protecting a traditional fishing site from development activities that would harm the marine environment. This was because if the traditional fishing site

was destroyed, then the Tsawout people could no longer fish "as formerly", as promised within their Douglas treaty. This ruling relied on the text of the treaty, which established that the Tsawout people have the treaty right to fish as they have in the past. It used oral history to verify that the area in question, the Saanichton Bay, is a traditional fishing site for the Tsawout people. As with the *R. v. Bartleman* case, the court used both oral and written evidence to arrive at its decision.

According to the courts, the hunting and fishing rights protected by the Douglas treaties have extensive application. The right to hunt on unoccupied lands extends to all traditional hunting grounds of the respective indigenous people, and the right to carry out fisheries as formerly includes protecting traditional fishing sites from environmental degradation. These rulings have given clarity to the legal weight that the Douglas treaties can provide for protecting the traditional practices of the indigenous peoples who are a party to the treaties.

The written submission to the Supreme Court of British Columbia by Dr. Barbara Lane was used in the *Claxton v. Saanichton Bay Marina* case. The latter part of this paper examines the fishing rights under the Tsawout people's Douglas treaty. She refers to historical documents that give evidence of Douglas' intentions when he included the phrase "carry on our fisheries as formerly" within the treaty. Lane also uses oral testimony to describe the traditional significance of the fisheries for the Tsawout people. She concludes that the fishing rights within the treaty are less restrictive than the hunting rights. The hunting rights only apply to unoccupied lands, whereas the fishing rights may be exercised as they had been in the past and are not given any explicit limitations.

The published articles and book which look at both oral and written history on the Douglas treaties also provide an analysis of the hunting and fishing rights set out in the treaty. Arnett refers to evidence that Douglas promised the indigenous peoples these protections when he negotiated the treaties. He sites a letter written by Douglas regarding the negotiation of the first nine Douglas treaties which states,

> I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country. (Arnett, 1999, p.33)

Given this information, and the fact that hunting and fishing were central to the economy and culture of the indigenous peoples, Arnett concludes these promises were a significant part of the Douglas treaties for the indigenous peoples.

In his article *The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title*, Hamar Foster examines the court decision on the Tsawout people's treaty right to carry out their fisheries as formerly. He is critical of this decision's underlying theory of aboriginal and treaty rights. The court states that the Tsawout are grantees of the fishing rights under the treaty. This implies that the treaty rights are brought to life solely by sovereign recognition. Foster disputes this theory. He states that the Tsawout people have lived and fished in Saanichton Bay for as long as anyone knows, which means their right

to fish existed prior to the treaty as an aboriginal right. The Crown did not grant the Tsawout people the right to fish through the treaty, they confirmed it. (p.649) Although Foster does not say so, his argument could also apply to the hunting rights, since they too have been practiced since time immemorial.

The materials in this category give extensive commentary on the hunting and fishing rights protected under the Douglas treaties. The courts have given definition to their meaning, stating that the hunting rights apply to all the traditional hunting grounds, and that unoccupied lands may be privately owned. They also interpret the right to carry on fisheries as formerly to protect traditional fishing sites from environmental degradation. Lane examines the fishing rights under the treaties and notes that they are not given any explicit limitations. Arnett demonstrates that the protection of the hunting and fishing rights were part of both the written treaty and the oral agreement. This gives those rights stronger conviction, since he argues earlier that the indigenous peoples did not know what the written treaty said. Finally, Foster makes the argument that the rights are not granted to the indigenous peoples, but recognized and confirmed by the treaty. Thereby saying that they exist as aboriginal rights as well as treaty rights.

PART 6: CONCLUSIONS

Secondary and published primary sources that discussed the Douglas treaties interpreted the treaties in three different ways: 1) through the written text of the treaties; 2) through oral history; and 3) through both written and oral history. The method of interpretation affected how the text presented the surrender of land and protection of rights clauses within the treaties.

The majority of the sources found interpreted the Douglas treaties through its written text. These sources concluded that the treaties represent a purchase of indigenous lands and the protection of indigenous hunting and fishing rights, as stated in the treaty document. However, almost all of these sources were written twenty to thirty years ago. The method of interpretation used by these sources have since become contrary to legal principles for interpreting treaties, which place less emphasis on the text of the treaty and more emphasis on how the treaty would have been understood by the indigenous peoples at the time. Furthermore, most of the writings that interpreted the Douglas treaties through the text, only briefly discussed the treaties and did not offer an in depth analysis of their meaning.

There was only one source that relied primarily on the oral history to interpret the meaning of a Douglas treaty. This was the documentation of Saanich oral history, as told by John Elliot Sr. This depiction of the Saanich Douglas treaty stated that the treaty was about peace and friendship not a surrender of land. It did not speak about the protection of hunting and fishing rights. Given that this was the only oral history on the Douglas treaties found in secondary sources, more research is needed to reveal what the indigenous oral history says about the meaning of the Douglas treaties.

The more recent and expansive writings on the Douglas treaties used both oral and written history to interpret their meaning. By referring to the Saanich oral history as told by Elliot, the cultural values of the indigenous peoples, and the records of correspondence between Douglas and his authorities, these sources questioned the validity of the land surrender depicted in the treaty documents. The protection of hunting and fishing rights, however, were seen as part of the treaties. There was evidence to show that Douglas promised the indigenous peoples these protections. Also, given the importance of hunting and fishing to the indigenous peoples, the authors saw the protection of these rights as the motivating factor for the indigenous peoples to enter into the Douglas treaties.

Assuming a treaty requires the consent of both parties, it is necessary to consider what the parties agreed to when the Douglas treaties were made. There is ample evidence to show that the indigenous peoples did not know what the treaty document said, so this is not a reliable representation of the treaty agreements. The literature that uses the written treaty to define its meaning is therefore not presenting reliable conclusions about the Douglas treaties.

The literature that relied on oral history or both oral and written history presented more reliable interpretations of the Douglas treaties. These authors sought evidence of what the parties agreed to when the treaties were

made. Given that the indigenous peoples could not have known what was written in the text of the Douglas treaties, the literature that revealed evidence of the oral agreements made during the negotiations provide a more accurate representation of the Douglas treaties.

Oral history and written documentation that give evidence to the oral agreements made when the Douglas treaties were negotiated is absolutely essential for interpreting the meaning of the Douglas treaties. Since there was only one source of documented oral history, further research on the oral history about the Douglas treaties would be useful to verify and expand on what the one source presented.

Archival information on the Douglas treaties is also extremely valuable. Authors such as Arnett and Hendrickson show how records kept by Douglas and others involved with the Douglas treaty negotiations reveal their intentions and what was communicated to the indigenous peoples during the negotiations. Further archival research may or may not reveal more information than what is already found in texts, but given its merit, it is a worthwhile endeavor.

PART 7: LESSONS LEARNED

From September to December, 2000, I spent two days a week working in the Tsawout First Nation Administrative Office. During this time, I was researching materials on the Douglas treaties and developing my analysis of these materials. I shared an office with the Tsawout First Nation Lands Manager. Spending time in the Tsawout First Nation office allowed me to become familiar with the Tsawout community and learn of some people's perspectives on their Douglas treaty.

During my time there, it quickly became apparent that the Tsawout First Nation has a strong connection to the other First Nations that are part of the Saanich Nation. I learned that all the of the Saanich Nation share the same high regard for their Douglas treaties. This observation was re-enforced by learning about the actions that the Saanich people have taken to assert their treaty rights. Members of the Saanich Nation have launched two court cases to assert their treaty rights. Also, all four First Nations within the Saanich Nation decided not to enter into the British Columbia Treaty Process, on the basis that they already have a treaty that needs to be recognized and respected. As my research progressed, I began to feel that I was doing my work for the benefit of the entire Saanich Nation not just the Tsawout First Nation.

Since my work was to conduct literary research, I did not have many opportunities to interact with the community. Most of my time was spent in the office, reading the various materials I had gathered. My interactions were mainly through informal discussions with people around the office. Were it not for doing my work in the Tsawout office, my research would have been in complete isolation. Although the informal method of consultation occurred, a more structured form of consultation would have provided more involvement from the community in the course of my research.

Overall, the Tsawout First Nation community was welcoming and supportive to the research I was conducting. I enjoyed my time out in the community and feel my research benefitted from my spending two days a week at the Tsawout First Nation office.

PART 8: RECOMMENDATIONS

When my Community Governance Project was designed, it was understood that the research would be used to contribute to a longer term research project that would focus on understanding the meaning of the Tsawout First Nation's Douglas treaty. The following are my recommendations for this long term research project. These recommendations stem from the conclusions and lessons learned that were expressed in Part Six and Part Seven of this paper.

First of all, I recommend that the long term research project be call the "Saanich Treaties Research Project" and extend its focus to both of the Douglas treaties within the Saanich Nation: the North Saanich treaty and the South Saanich treaty. There would be little benefit from narrowing the research to only the North Saanich treaty, which is the treaty that the Tsawout First Nation are a party to. The North Saanich and South Saanich treaties are identical in writing except for payment amounts and the cited locations. They were both made with members of the Saanich Nation and were negotiated only days apart. Given the similarities between the treaties and the political ties between all the communities within the Saanich Nation, it is logical to focus the research on both of the Saanich treaties.

Second, given that the research will look at both of the Douglas treaties made within the Saanich Nation, I recommend that the Saanich Treaties Research Project be carried out in conjunction with the Saanich Nation. Although this Community Governance Project was initiated with the Tsawout First Nation, researching the Saanich Douglas treaties will lead to working with the other Saanich communities. Also, research on these treaties is relevant to all members of the Saanich Nation. Therefore, the existing affiliation between the communities within the Saanich Nation could be used to provide direction, input and approval of the Saanich Treaties Research Project.

Third, I recommend that a committee, made up of members of the Saanich Nation and the Indigenous Governance Program, be established to oversee the research carried out under the Saanich Treaties Research Project. This committee would provide the necessary structure to ensure that ongoing communication and consultation between the researcher, the Indigenous Governance Program and the Saanich Nation will occur. The committee would last for the duration of the Saanich Treaties Research Project and meet regularly with the students as they carry out their research.

Finally, I have developed an outline for the research to be conducted in the Saanich Treaties Research Project. The first phase has been completed and forms the content of this paper. The following phases include researching oral histories and archival sources on the Saanich treaties. This is only a rough outline, and will likely be altered through future consultations between the Saanich Nation and Indigenous Governance Program.

Each phase is meant to be carried out by an Indigenous Governance student through his or her Community Governance Project.

SAANICH TREATIES RESEARCH PROJECT OUTLINE

Phase 1: Background Research

Develop an annotated bibliography of secondary and published primary sources that discuss the Douglas treaties.
Analyze the materials to reveal the pervasive understanding of the Douglas treaties found within the texts.

Phase 2: Preparation for Oral History Interviews

Carry out a consultation process with the Saanich communities to determine:
a) the objective of the oral history interviews;
b) interview questions; and
c) who should be interviewed for oral history on the treaties.
Using this information and through studying oral history research methodologies, develop the research methods for conducting oral history interviews.

Phase 3: Oral History Interviews

Conduct interviews
Transcribe
Provide analysis

Phase 4: Archival Research (this could be done simultaneously with Phase 2 and 3)

Conduct archival research Douglas treaties, specifically looking for:
a) information that reveals the historical and political context of when the Douglas treaties were negotiated; and
b) records of what occurred during the treaty negotiations.

Phase 5: Finalize Project

Compile information to create an overall picture of the meaning of the Saanich Douglas treaties.

Provide recommendations for how this information could be used to increase awareness and enforcement of the Saanich Douglas treaties.

In summary, my four recommendations are as follows:

1. The research project should focus on both the North Saanich treaty and the South Saanich treaty, and be called the "Saanich Treaties Research Project";

2. The Saanich Treaties Research Project should be conducted in conjunction with the Saanich Nation;

3. A committee made up of members of the Saanich Nation and the Indigenous Governance program should be established to ensure ongoing communication and consultations during the course of the research project; and

4. Future research within the Saanich Treaties Research Project should focus on oral histories and archival resources.