

## THE LEGACY OF TREATY MAKING:

### RECONCILIATION OR A NEW ERA OF “DIVIDE AND CONQUER”<sup>1</sup>

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#### BACKGROUND: TREATY MAKING IN BRITISH COLUMBIA PRE-1991

The history of British Columbia’s treatment of Aboriginal peoples has been, for the most part, dismal. The British Colonial Government, at the time of development of British Columbia and following the Oregon Boundary Treaty between Britain and the United States in 1846, had a policy of entering into treaties with the Aboriginal peoples that had lived, worked, and governed the territory in the far-flying reaches of what was developing into the British Empire. The first Governor of the Colony of British Columbia, James Douglas, entered into treaties with nations on the south and north ends of Vancouver Island. These treaties, later known as the “Douglas Treaties”, were similar to treaties that had been made in other parts of the British Empire at that time. However, as a result of the fierce resistance of the Maori in New Zealand and their successful battles against the British, the British Colonial Office effectively exhausted its funds for the purposes of treaty making. The Treaty of Waitangi was signed in 1846 and the Colonial Office told Governor Douglas that he would have to raise the funds to make treaties in British

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<sup>1</sup> The origins of the term “divide and conquer” have been disputed. Some suggest that it first originated in China, while others believe Philip II, King of Macedonia (382-336 B.C.) was the first to employ the strategy against the Greek city-states. Virtually every influential monarch and military strategist up to the Second World War has either used or been credited with the development of the term, from Julius Caesar, to Napoleon, to Louis XI of France.

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Columbia. The Colonial Office would no longer finance treaty making, although it had been British policy to enter into treaties since before the time of the Royal Proclamation of 1763.

Unfortunately for Aboriginal peoples of British Columbia, this refusal to finance the cost of treaty making led to the abrupt halt of the treaty-making process. Governor Douglas’s successor in addressing Aboriginal land issues, Joseph Trutch, the Chief Commissioner of Lands and Works, had a completely different view of the rights of Aboriginal peoples and it certainly did not include the concept that the “civilized” Europeans would enter into treaties with the Aboriginal peoples of British Columbia.<sup>3</sup> The Trutch legacy of denial continued until 1971.

#### THE NISGA’A BREAKTHROUGH: *CALDER* v. *THE QUEEN*

In 1970, Prime Minister Pierre Trudeau dismissed the concept of Aboriginal title as too vague and uncertain to be recognized in Canadian law. To his credit, when the Supreme Court of Canada determined that Aboriginal title did exist in British Columbia in *Calder v. The Queen* in 1972<sup>4</sup>, the Prime Minister changed Canada’s policy with respect to Aboriginal title and the necessity to make treaties in those parts of Canada in which treaties had not occurred.<sup>5</sup>

Because of the federal nature of our country in which the provinces controlled “property and civil rights” and the Federal Government was responsible for “Indians and lands reserved for Indians”, Canada needed the provinces to cooperate with respect to the provision of lands as part of any treaty settlement. The Federal Government developed a Comprehensive Claims Policy,

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<sup>3</sup> In an 1867 Report on the Lower Fraser Indian Reserves, Trutch remarked that “The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them...” Trutch, Report on the Lower Fraser Indian Reserves, 28 August 1867, Joseph Trutch, Papers, Manuscripts and Typescripts, Special Collections, University of British Columbia Library (SC). Also in British Columbia, *Papers Connected with the Indian Land Question, 1850-1875*, Victoria, 1875, pp. 41-43, and cited by Robin Fisher, “Joseph Trutch and Indian Land Policy,” *B.C. Studies*, No. 12, Winter 1971-72, p. 1.

<sup>4</sup> *Calder v. The Queen* [1960] SCR 892 [*Calder*].

<sup>5</sup> Those parts of Canada at that time included almost all of Canada north of the 60<sup>th</sup> parallel, most of British Columbia and Quebec.

but in British Columbia there remained another 19 years of denial after the *Calder* decision. In fact, in the Constitutional Conference of 1982 when section 35 was put into the *Constitution*, the then Premier of British Columbia, Bill Bennett, agreed to the provision on the basis that there was no Aboriginal title in British Columbia.<sup>6</sup>

#### THE DEVELOPMENT OF TRI-PARTITE TREATY MAKING IN BRITISH COLUMBIA

In June, 1990, after 20 years of rejection of the concept of Aboriginal title, notwithstanding the Supreme Court of Canada’s acknowledgment that Aboriginal title did exist<sup>7</sup>, the government of British Columbia in the dying days of the Social Credit regime of Premier Vander Zalm came to a momentous agreement with the Aboriginal peoples of British Columbia to engage in treaty making.

British Columbia had been the last of the former British colonies to acknowledge that the lands over which it asserted sovereignty were not “*terra nullius*”<sup>8</sup> at the time of the arrival of the first British explorers in 1778. Under the Tripartite Agreement between British Columbia, Canada, and the Aboriginal nations of British Columbia as represented by the First Nations Summit, it was agreed that there would be established a BC Treaty Commission which would be the “keeper of the process.”

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<sup>6</sup> In short, the Attorney General of British Columbia took the position that those in the Supreme Court of Canada in the *Calder* case who stated that Aboriginal title had been extinguished represented the law in British Columbia.

<sup>7</sup> In delivering judgment for the majority, Judson J. stated: “Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a ‘personal or usufructuary right’. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.” *Calder supra* note 4 at p. 329.

<sup>8</sup> The term “*terra nullius*” refers to a legal doctrine which allowed European nations to take over unoccupied lands if there were no Aboriginal people already on those lands. See *Amodu Tijani v. Secretary*, Southern Nigeria, [1921] 2 A.C. 399 (P.C.).

## THE 5% SOLUTION

In the provincial election that followed within a year of this Agreement, then leader of the NDP and future Premier, Mike Harcourt, was questioned about the NDP’s policy regarding treaty making. Given that these were the early days of treaty-making in British Columbia, having to give up lands and resources to the Aboriginal peoples was a completely new concept. The Social Credit and other right-wing candidates attempted to generate fear-mongering by suggesting the NDP would give away the whole province.

It was in this context that Mike Harcourt advised that First Nations land holdings would be proportional to their population and lands claimed, amounting to less than 5% of British Columbia.<sup>9</sup> This statement would come to haunt and frustrate the treaty process. However, even more significantly, it was the genesis of what became the infamous development of “overlap conflicts” between Aboriginal nations who had lived and worked side-by-side for millennia.

## NISGA’A TREATY NEGOTIATIONS

As described above, the Federal Government had entered into treaty making. However, its policy was to allow one treaty negotiation at a time to proceed within the geographic boundaries of any particular province. In the case of British Columbia, the Nisga’a treaty negotiations had been ongoing between Canada and the Nisga’a since 1973 with very little result. The Province of British Columbia, after the change in its treaty-making policy in 1991, agreed to accelerate

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<sup>9</sup> “The Benefits and Costs of Treaty Settlements in British Columbia: A Summary of the KPMG Report” Ministry of Aboriginal Affairs, British Columbia.

and become involved in the Nisga’a treaty process, but it would be outside the “made in BC treaty making policy”. Nevertheless, the “5% solution” stated by then Premier Harcourt resulted in a new generation of Nisga’a negotiators to expand enormously the “Aboriginal title territory of the Nisga’a”. They did this by claiming that the Nisga’a traditional territory was not only in the lower part of the Nass River, but included the entire Nass Watershed.

Such a position was the inevitable consequence of being told they would only be allowed 5% of the land that they claimed. After 20 years of negotiating and asserting their title through to the Supreme Court of Canada, the Nisga’a suddenly double the size of their traditional territory for the purposes of treaty negotiations.

#### ASSERTION OF TERRITORY: THE MADE IN BC SOLUTION

At the time of entering into the Tripartite Agreement for treaty making in British Columbia, several Aboriginal nations in British Columbia had already filed their applications with the Government of Canada and, for the purposes of those applications, stated the traditional territory upon which they relied. Under the previous Comprehensive Claims Policy, Canada required that it do an internal assessment to establish the strength of claim made by the Aboriginal groups. Their claims were then accepted for treaty-making purposes. Many of the neighbours of the Nisga’a and the Nisga’a themselves had passed through this comprehensive claims policy process and successfully asserted title to areas where it was well established that they held Aboriginal title prior to 1846 over the original area claimed.

The next case of Aboriginal title following the Nisga’a decision in *Calder* was advanced by Aboriginal nations of north central British Columbia, the Gitksan and the Wet’suwet’en, and is

known as *Delgamuukw v. The Queen*.<sup>10</sup> That case had been commenced by the Gitksan and the Wet’suwet’en whose application to enter into the treaty-making process had been accepted by the Government of Canada in November 1977, but who had not been able to come to the table because of Canada’s policy of negotiating with only one nation at a time. Furthermore, the Government of British Columbia’s continued denial of Aboriginal title through the 1970s and the 1980s meant that there was no ability to negotiate for control over lands and resources. After great debate and consideration, the Gitksan and Wet’suwet’en Chiefs decided in 1982 to commence an Aboriginal title case. This case went through several pre-trial procedures at which British Columbia had attempted to block the case on every occasion. It finally went to trial in May 1987. It continued until June 1990 and the judge reserved the decision until March 18, 1991. It was while the case was under reserve that the BC Treaty Process Agreement was entered into. There was a great deal of speculation that the trial judge would find that the Gitksan and the Wet’suwet’en held Aboriginal title to their traditional territory in north central British Columbia.

The Aboriginal peoples thought that there did not need to be proof of Aboriginal title to a territory prior to entering into the treaty process because they did not want all of the Aboriginal nations of British Columbia to have to face the costs and delays of a long trial such as *Delgamuukw*. They were successful on that score and the “made in BC treaty process” provided that Aboriginal nations only had to show a map which was their Statement of Intent or “SOI map” to show their territory.

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<sup>10</sup> *Delgamuukw*, the late Albert Tait, was one of the many hereditary Chiefs and elders born in the 19<sup>th</sup> century and whose parents had recalled the arrival of the first white man into Gitksan territory. Gisday’wa, the leading Wet’suwet’en Chief in the case, had worked intensely with Maxlaxleh (Johnny David) who was a Wet’suwet’en and the oldest witness in the case as he had been born in the early 1890s. These two Chiefs made a dramatic opening statement in *Delgamuukw v. The Queen*, 40 DLR (4<sup>th</sup>) 685 (BCSC), reproduced in Gisday’ Wa and Delgam Uukw, *The Spirit of the Land: The Opening Statement of the Gitksan and Wet’suwet’en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987*. Gabriola, B.C.: Reflections, 1992.

This was the second pillar for the foundation of overlaps. There was no longer any reason for Aboriginal nations to limit their territorial claim for treaty making to traditional territory which they could clearly establish as theirs. If they wished to conclude an agreement in which they had substantial control over a significant portion of their traditional territory, due to the “5% solution”, they had to expand their claim to include areas over which Aboriginal title was not clearly established.

#### THE LEGACY OF FINAL AGREEMENTS

In the early days of treaty negotiation, the combination of these two pillars for the overlap policy led to widespread overlaps, and the media attacked the BC Treaty Process and Aboriginal peoples on the basis that they were claiming 150% of British Columbia.<sup>11</sup>

However, there was no real reason for there to be conflict between Aboriginal nations as the area that would ultimately be negotiated as “treaty settlement lands” would be much smaller than the SOI map submitted.

#### TREATY CREATION OF WILDLIFE MANAGEMENT AREA

In 1999, after almost 30 years of negotiations, the Nisga’a brought Canada and British Columbia to the finalization of a treaty. The Nisga’a could stand proud that they had finally accomplished a treaty after all these decades, but the issue of the expansion of their territory after Harcourt’s

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<sup>11</sup> As mentioned by CBC News: “Native bands in B.C. say their land was taken from them without treaty, negotiation or payment. Native groups have therefore claimed most of the province as their ancestral home.” From “In Depth: Aboriginal Canadians, B.C. treaty referendum” CBC News Online, July 2, 2004.

5% Solution suddenly became an important feature of the treaty. Along with treaty entrenchment of “Treaty settlement lands” in which the Nisga’a would have control over the lands, there needed to be an area over which it was recognized that they could exercise their Aboriginal hunting rights. In fact, they negotiated quotas for gain in this much broader area and gave themselves priority for hunting under the treaty. The governments of Canada and BC both agreed to accept, for the purpose of the Wildlife Management Area<sup>12</sup>, the expanded claim of the Nisga’a. This was the first example of what became entrenched within treaty making policy. All of a sudden the SOI maps, which were never proven to belong to the Aboriginal nation at the treaty table and had never been intended to be entrenched within the treaty, became entrenched for the purposes of the exercise of Aboriginal rights.

#### A TALE OF TWO CONFLICTS: THE NISGA’A BOUNDARY

This conflict first came to a head with the first treaty that was signed even though it was not within the BC Treaty Process. The Nisga’a asserted their claim to a Wildlife Management Area which encompassed the entire Nass Watershed. This engulfed almost the entire traditional territory of the Gitanyow, their closest neighbours on the inland, and a large swath of territory of the northwestern Gitksan territory.

Paradoxically, the Gitksan had established their traditional Aboriginal territory in *Delgamuukw v. The Queen* and, although the trial judge did not accept the full extent of that territory for Aboriginal title purposes, the Supreme Court of Canada remitted the case back to trial in 1997 on the basis that the trial judge made several errors of law in his interpretation of the evidence. The

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<sup>12</sup> Referred to as the Nass Wildlife Area in the Nisga’a Final Agreement.



Gitanyow, whose territory was heavily impacted, participated fully in the Provincial Legislature Committee’s review of the Treaty before its approval and also in the Federal Committee’s review of the Treaty. They attended in Ottawa and at committee hearings to demonstrate the severe impact of the Wildlife Management Area on their rights.

The Gitanyow also commenced a proceeding to challenge the treaty process after the Nisga’a Agreement in Principle [“AIP”] was signed. The Nisga’a AIP was lauded as a great breakthrough as it was the first treaty entered into in which British Columbia was a party since the Douglas Treaties in the 1850s. The concept was that the Agreement in Principle would set out the key elements of the Final Agreement.

The Gitanyow were compelled to take the Nisga’a to court because of the Wildlife Management Area. The Gitanyow were successful in establishing that the Crown had a duty to negotiate in good faith. The foundation for their claim that the Crown had not negotiated in good faith was that they were negotiating with both the Nisga’a and Gitanyow over the same land base.

Justice Williamson of the BC Supreme Court recognized in *Luuxhon v. Canada* on a hearing based on the affidavits that the Crown did have a duty to negotiate in good faith when negotiating treaties.<sup>13</sup> He followed up on the comments of Chief Justice Lamer in *Delgamuukw v. The Queen* where Chief Justice Lamer stated:

By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105 [S.C.R.; p. 178 C.N.L.R.], s. 35(1) ‘provides a solid constitutional base upon which subsequent negotiations can take place’. Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated

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<sup>13</sup> *Luuxhon v. Canada* 66 B.C.L.W. (3d) 165, [1998] 4 CNLR 47 (BCSC) [*Luuxhon*].

settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s. 35(1), ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’<sup>14</sup>

However, the Court determined that the issue of whether or not the fact that the Crown was negotiating a treaty over the same land with two Aboriginal groups and was proposing to benefit one group to the detriment of another by allowing a large Wildlife Management Area required a full trial. Although the Crown initially appealed the decision, the BC Court of Appeal ruled that it would hear the appeal only after the trial on the merits as to whether there was a determination that in fact the Crown had acted in bad faith. That case has not gone to trial and, as a result, the issue remains outstanding as to whether or not the conduct of the Crown in entering into treaty negotiations with neighbouring Aboriginal groups and relying on the SOI map over the same territory and entrenching those SOI boundaries is a breach of its duty to negotiate in good faith.

## PART TWO: EFFORTS TO RESOLVE TWO OVERLAP CONFLICTS

For Aboriginal nations the issue of overlap conflicts appears to arise and become a matter of priority in specific situations. First, if one of the nations is in court, and the Crown or a proponent relies on a competing claim to challenge that nation’s Aboriginal title or rights, they will have a strong motivation to enter into negotiations with their neighbours on a common boundary.<sup>15</sup> In two Aboriginal title cases, *Delgamuukw v. The Queen* and *Tsilhqot’in Nation v. British Columbia*, the Crown attempted to use the issue of overlaps. However, in the first case, *Delgamuukw v. The Queen*, agreements were reached in advance of trial between the Gitksan

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<sup>14</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [*Delgamuukw*] at p. 86 as cited in *Luuxhon*, supra note 13 at para. 6.

<sup>15</sup> *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700 [*Tsilhqot’in Nation*]; see also *Delgamuukw* supra note 14.

and the Wet’suwet’en Plaintiffs and their respective neighbours and therefore, in effect, there was no overlap. The Federal Crown in that case attempted to use their analysis of the Comprehensive Claims from neighbouring nations as a challenge. This evidence was never produced publicly and was not relied upon by the trial judge.

However, it is important to keep in mind the statement of Chief Justice Lamer with respect to shared exclusive Aboriginal title in the Supreme Court of Canada’s *Delgamuukw* decision. The Chief Justice stated:

...many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations.<sup>16</sup>

In the second case of *Tsilhqot’in Nation*, the Tsilhqot’in were asserting a claim to a relatively small portion of their territory. However, the Crown once again attempted to rely on overlaps. This led the Tsilhqot’in to enter into agreements with some of their neighbours including the Homalco to resolve overlap issues. The outcome of that Agreement was made public through the court process by the Tsilhqot’in and also in the treaty process by the Homalco Nation. It was one of the successful negotiations of overlaps.

The second situation in which overlap issues become a matter of serious concern relates to the acceptance in final treaty agreements in British Columbia of the SOI claimed territory for the purposes of exercising Aboriginal rights. This started with the Nisga’a Treaty and has continued in follow-up treaties. In these cases where the Aboriginal neighbour, whether in treaty

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<sup>16</sup> *Delgamuukw*, *supra* note 14 at para. 185.

negotiations themselves or separate from treaty negotiations, challenges the decision, the courts have been extremely reluctant to interfere with the treaty-making process.<sup>17</sup>

#### THE FIRST RELIANCE ON ASSERTED TERRITORY IN FINAL TREATIES: THE NISGA’A EXAMPLE

In the Nisga’a case, as described above, the Nisga’a, when the Province entered into the treaty negotiation process, expanded the area over which they had previously asserted Aboriginal title and this became known as the Nass Wildlife Area. The area encompasses the vast majority of the traditional Aboriginal territory of the Gitanyow.

The historical evidence with respect to the foundation for the boundaries of these two territories was comprehensively and exhaustively documented in a book in which the writer was involved and the principal author was Neil J. Sterritt.<sup>18</sup> As the author states:

The documentary record of the Gitanyow is extraordinary for the consistency of the territories claimed, the unrelenting commitment to their system of land tenure, and the sophisticated fashioning of Euro-Canadian law to suit their ends, as, for example, in the registration of the bulk of their territory as a single “Kitwancool” trapline. Their cartographic legacy is also unparalleled. Their maps show an intimate knowledge of the geographic features in their territories, their territorial boundaries and the locations of their fishing, camping and hunting sites and their many ancient villages. In doing so, they also provide an invaluable historical record of ancestral lands and tribal boundaries in the Nass and Skeena Watersheds. Tribal Boundaries (p. 59)<sup>19</sup>

Because the governments of Canada and British Columbia were proposing to agree with the Nisga’a to incorporate the expanded Nisga’a territory and Nass Wildlife Area which would

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<sup>17</sup> *Semiahmoo Indian Band v. Canada* [1997] F.C.J. No. 842; and *Luuxhon*, *supra* note 13.

<sup>18</sup> Tribal Boundaries in the Nass Watershed, UBC Press, 1998 [“Tribal Boundaries”]

<sup>19</sup> Tribal Boundaries not only describes but shows reproductions of original maps prepared from the early 1900s, including maps prepared by both Nisga’a and Gitanyow (e.g. Gitanyow Territorial Map 1918, p. 66; Gitanyow territorial map (from Ditchburn blueprint, 1920), p. 68).

overwhelm the Gitanyow territory, the Gitanyow commenced proceedings in the BC Supreme Court challenging that Canada and British Columbia had a duty to negotiate in good faith when entering into treaties. The Gitanyow also claimed that Canada and British Columbia were in breach of that duty because they were negotiating the same territory with two Aboriginal groups without disclosing to the Gitanyow the agreement with the first group, the Nisga’a. The Provincial Crown argued that there had to be a full trial as to whether or not there was a right in section 35 that the Crown had an obligation when entering into treaty negotiations to negotiate in good faith.<sup>20</sup> Mr. Justice Williamson in his decision relied upon the comments made by Chief Justice Lamer in *Delgamuukw* in which he stated “... the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.”<sup>21</sup>

Justice Williamson of the BC Supreme Court went on to state in *Luuxhon*:

I reject the submission that “reinforced by the judgments of this court” can mean only judicial enforcement of executed agreements. That such agreements will become treaties and will be enforceable is contemplated by s. 35 of the *Constitution Act, 1982*. I do not read the recommendations of the BC Task Force, nor the subsequent Treaty Commission Legislation, as ousting the jurisdiction of the court from its important task of ensuring that the Crown does not fail in its fiduciary obligation to Aboriginal peoples.

I conclude that the Crown in right of Canada and in right of British Columbia in entering negotiations with the Gitanyow Nation, pursuant to the BC treaty process, has a duty to negotiate in good faith.<sup>22</sup>

On this basis he granted the declaration and awarded costs to the Gitanyow. The Crown parties proposed that they would facilitate meetings between the Gitanyow and the Nisga’a. Unfortunately, no resolution was accomplished and the Gitanyow were left with only a non-

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<sup>20</sup> *Luuxhon*, *supra* note 13.

<sup>21</sup> *Delgamuukw*, *supra* note 14 at p. 1123, para. 186, as cited in *ibid.* at para. 1.

<sup>22</sup> *Ibid.* at paras. 64 and 65.

derogation clause of the Nisga’a Treaty which states that nothing in the treaty would affect the Aboriginal rights of any other Aboriginal nation.

The balance of the *Luuxhon* case was remitted for trial, but did not proceed to trial.

Twelve years later, the provincial Crown and BC Hydro are moving forward with the Northern Transmission Line [“NTL”] which will go through both Nisga’a Treaty Settlement Lands and Gitanyow traditional territory. Gitanyow has negotiated agreements with the province and BC Hydro. As part of the accommodation, BC Hydro has agreed to provide direct awards to the Aboriginal groups through whose territory the NTL will pass 49 kilometres of the direct award within Gitanyow territory has been given to the Nisga’a.

Unfortunately, as a result of the finalization of a treaty and the incorporation of the Nass Wildlife Area, the Federal and Provincial Crown have been successful in creating a legacy of divide and conquer between two Aboriginal nations who had historically stood side by side in the defence of their common interests for the recognition of Aboriginal title.

#### A STORY OF SUCCESS: THE TSILHQOT’IN-HOMALCO AGREEMENT

The Tsilhqot’in and the Homalco are neighbours even though their traditional territories are extremely different. The Homalco are a sea-going people and their traditional territory encompasses, *inter alia*, all of Bute Inlet. The Tsilhqot’in territory stretches from west of the Fraser River through the Tsilhqot’in Plateau. The Tsilhqot’in took an Aboriginal title case, *Tsilhqot’in Nation*, to the BC Supreme Court.<sup>23</sup> Canada and British Columbia relied on

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<sup>23</sup> *Tsilhqot’in Nation*, *supra* note 15.

“overlapping claims”. The Tsilhqot’in invited the Homalco who had filed a Statement of Intent in their treaty negotiations encompassing part of the Tsilhqot’in territory to sit down and negotiate.<sup>24</sup> It was agreed that the negotiations would take place in a neutral area (the Fraser Valley) and would involve not only the political leadership from both nations, but elders as well. During the course of a three-day session elders from both Nations initially sat only with the members of their own Nation. Then they started to share breakfast, lunch and dinner with elders from the other nation. During the course of these informal discussions it became clear not only what was common but what was different. The Homalco elders remembered that there was a Tsilhqot’in child who had been adopted and raised at Church House, halfway down Bute Inlet. They also recalled that their elders had gone up to the lakes at the headwaters of the Homathco River, far above where the Tsilhqot’in wars occurred, for spiritual practices and had often stayed there for up to a year.

These two incidents from the oral history of both nations explained why the Tsilhqot’in were claiming far down the Inlet and why the Homalco were claiming up into the Tsilhqot’in plateau. An agreement was reached whereby the Tsilhqot’in would continue to be invited to share in the ocean salmon resources which would be provided by the Homalco from Bute Inlet. At the same time, the Homalco would be invited to utilize the lakes up on the plateau. However, it was also recognized that these two examples did not establish Aboriginal title but were the foundation for a mutual sharing between the two Aboriginal Nations within their respective territories. A boundary was agreed upon and ultimately it was presented in the Tsilhqot’in case by the Tsilhqot’in, and the amended Homalco boundary was presented to the BC Treaty Commission for the purpose of treaty negotiations. There was mutual success and, in this case, a clear

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<sup>24</sup> The author acknowledges that he represented the Homalco in these negotiations.

demonstration of the section 35 right of Aboriginal self-government. This is a model which many nations will hopefully advance.

#### CONCLUDING REMARKS

As different Aboriginal nations have entered into treaty agreements, the issue of the SOI maps has become an increasingly aggravating factor. Unless there is a concerted effort to resolve these issues and the BC Treaty Commission takes on an active role in assisting the parties to come together, there is the potential for many more disputes which will go on for decades between Aboriginal neighbours.

On the other hand, the Aboriginal nations themselves have to determine whether they are motivated to enter into treaties of peace and friendship with their neighbours to settle their boundary issues.

This is a critical question for most Aboriginal Nations and is of significant importance not only for the Aboriginal Nation of British Columbia but also for the Crown in order to achieve success in a proper treaty-making process.