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Dispossession by Treaty, Dispossession by Statute

Indigenous Title in Eastern and Western Canada

DANIEL DIAMOND AND DOUGLAS SANDERSON
(AMO BINASHII)

Introduction

To bring insight to the development of land rights in Canada, this chapter compares how various manifestations of the British Crown took very different approaches to Indigenous-held lands during the early and middle encounter periods (1500–1800) in eastern North America, as compared to the nineteenth-century encounters in Australia and British Columbia. We trace just a few contextual differences to demonstrate motivations for British Columbia's denial of Indigenous claims to land in opposition to earlier British policy. We then demonstrate how the introduction of the Torrens system of land-title registration, first proposed and adopted in Australia in 1858, proved the perfect vehicle to ensure that Indigenous claims did not survive the assertion of a title interest by settler and colonial officials. The vastly different circumstances of government officials in the pre-Confederation era, compared with those in post-Confederation British Columbia, go a long way to explaining the profoundly different regimes of land management and, eventually, registration by colonial officials on the East and West Coasts of what we now call North America.

While critical analyses of the Indigenous-settler encounters across Canada have produced a significant literature on the *theoretical* justifications for land appropriation, very few scholars have addressed the *legal mechanisms* that converted Indigenous lands into the privately held property of European settlers. We show how the transition to settlement required that Indigenous claims to land be sidelined to make room for increased European settlement, and how the Torrens system facilitated the *en masse* appropriation of Indigenous lands in western Canada. This

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contrasts to eastern Canada, characterized by a steady acquisition of Indigenous lands by the Crown and private entities, in a long series of what are termed the Peace and Friendship treaties. The legal mechanisms for appropriation have implications for how lands are reclaimed today.

British Land Law before the Nineteenth Century

In the common law, land plays a unique role distinct from property in chattels. The first mention of land as property is found in St. German's *Doctor and Student* published in 1530 (Jones, 2018) where, for the first time, land was "equated with property, rather than treated as a special case." Even so, it takes a while for this practice to become standard. Coke's *Reports*, published from 1600 to 1615, treat property in goods separately to ownership of land. Coke's *Institutes*, from 1628, uses the terms more interchangeably, and generalize land and goods as property (Jones, 2018).

Land and property were distinct because their treatment under the law was fundamentally different. Specifically, "[i]n theory, land was held for a feudal lord, and could not be devised by will. In practice, land can sustain many overlapping claims by many individuals, and be used casually or regularly by many others" (Jones, 2018, p. 194). Jones found the 1600s was marked by a shift from qualitative to quantitative measurements of land (p. 197). By the early 1600s, Gunter's chain, twenty-two yards made of one hundred links, was used to plan the entirety of the British Empire (Jones, 2018, p. 194). Despite this shift towards quantitative measurement, the fungibility of land as a commodity was severely constrained well into the nineteenth century because the process of buying and selling land was expensive, rudimentary, and slow.

Land conveyancing was largely governed by contract (Pottage, 1994). Validity of title turned on the soundness of contracts, through which ownership was conveyed from one party to another (Pottage, 1994). In practical terms, this meant lawyers would evaluate "the plausibility of a paper title against a practical sense of property which had arisen from land use, and which lay in local memory" (Pottage, 1994 p. 363). Put simply, a prudent purchaser of land needed to ensure that the purported owner had a valid title to sell. Since there was no registry that the owner could reference to demonstrate that they had legal title to the land, the seller had to provide documentation illustrating a valid chain of title going as far back as possible. Yet, this documentation could not be relied on in isolation. Lawyers would evaluate the likelihood that the

paper documentation was legitimate, and weigh that against knowledge of land use embedded in local and community memory (Pottage, 1994).

For example, as one senior ordnance survey officer explained to the Registration and Conveyancing Commission, even in cases where it is easy to show title, through deeds and paper documentation, showing the exact boundaries of the property down to the very border "depend[ed] on the evidence of tenants, and old laborers, and persons of great age, and to the practice that may have prevailed with different occupiers" (Pottage, 1994, p. 364).[1] Indeed, lawyers relied heavily on community knowledge. Accordingly, until the early nineteenth century, land surveyors would be accompanied by local residents as their knowledge was essential to creating an accurate estate map. Land was not a particularly fungible form of property.

Feudal property relationships, lawyers, and the aristocracy slowed the transition towards a commoditized and fungible real-property regime based on registration in the United Kingdom. Primarily, this is because the aristocracy, still land-rich from feudal property arrangements were not inclined to make the alienation of their vast estates any easier. "As Stone and Stein note, in 1833, '24 peers in the realm of England' each held estates in excess of 100,000 acres" (Bhandar, 2015, p. 272). Lawyers, in turn, resisted a system of land registration because the time-consuming nature of title research was profitable (Bhandar, 2015). This was the deed registration system imported to the American colonies.

British–Indigenous Relationships to Land from the Sixteenth to Eighteenth Centuries

The assertion of Crown sovereignty over distant lands was just that – an assertion – which, without more, such as an actual occupation or sale, provided no rights to land. This was widely accepted in European, and certainly British, encounters with Indigenous Peoples (Banner, 2005). Royal Charters were certainly granted, but upon arrival, colonists, or Hudson's Bay Company (HBC)[2] traders, did their best to secure their

[1] Cited from the evidence that Capt. Yolland reported in the First Report of the Registration and Conveyancing Commission, PP(1850) XXXII (p. 591). Pottage notes that this may overstate the difficulties of conveyancing, because members of the Commission were enthusiastic in their advocacy of large-scale land surveys.

[2] In 1670, the Hudson's Bay Company was granted a Royal Charter over a tract known as Rupert's Land, which would in time be revealed to be a territory larger than the Holy

interests through treaty or purchase. Certainly almost no one in the eastern colonies imagined that the lands before them were barren or unused. Applying a doctrine of possession, based on an imagined empty landscape, would have struck anyone as ludicrous (Banner, 2005). Before 1763, purchases of Indian lands were ordinary contracts entered into by individual colonists, corporations and towns, as well as governors and other Crown representatives. Whatever else the colonists might have called the Indigenous population, it was clear that they understood Indigenous Peoples as proprietors and owners of their lands (Banner, 2005).

The tension of *imperium* and *dominium* (the assertion of sovereignty and the actual possession of property) was resolved in North America through Crown assertion of British sovereignty in the form of patents for land purchases – patents guaranteeing the right to land only if the patent was coupled with a purchase of sale from the relevant Indigenous party. In this way, the British could say that their sovereignty extended in some jurisdictional sense, even if no Indigenous party on the ground was even remotely aware of visitors from another continent, or of their assertion of sovereignty. After 1763, the *Royal Proclamation*'s[3] prohibition on the sale of Indian land to anyone other than the Crown created a distinction between Indigenous and settler held lands. Until then, the two property interests were treated identically – but after 1763, Indigenous title came to be seen as something different than the sort of title that settler people held in the lands they called fee simple.

Roman Empire at its height. The grant provided an exclusive monopoly over the trade of furs and minerals within a watershed that stretched from the Rocky Mountains in the West to James Bay in the east, encompassing a land mass of some 3.9 million square kilometers. Though technically a mere corporation acting pursuant to the grant of the Royal Charter, the HBC established trading posts along the coast and eventually in the interior, which were empowered to empanel courts though never did, and at one point would also be placed in charge of the Empire's outpost on Vancouver Island, and over the interior of what would become British Columbia.

[3] George R., Proclamation, October 7, 1763, reprinted in RSC 1985, App II, No. 1. The Royal Proclamation of 1763 drew a line that was to separate Indian and settler-held lands. To the east were the colonies, and to the west was Indian country. The Proclamation declared that henceforth only the Crown could buy or obtain Indigenous lands – settler-to-Indian contracts were discouraged and not enforced. The boundary line was continually moved further west until the American Revolution, after which any pretense to the protection of Indian lands was set aside in favor of a murderous campaign of dispossession and relocation in the United States, and further treaty engagement between Indigenous Peoples and the Crown to the north in Canada.

One consequence of this pattern of land acquisition was that, even after 1763, a very large number of titles to land traced their purchase to an original Indigenous seller. After 1763, and as a consequence of the *Royal Proclamation*'s requirement that land be ceded first to the Crown, and all subsequent land grants traced to grants from the Crown. After the *Proclamation* was issued, contracts for sale of Indian lands were void unless the sale was via a treaty negotiated with the Crown.

Once purchased, the Crown would then issue patents to would-be landowners. But the British found themselves still bound by treaty relationships with their military allies. Since the early seventeenth century, the British had been engaged in a complex and deepening alliance with an Indigenous confederacy known as the Five Nations. The formal name for the British–Five Nation relationship was the Covenant Chain, described as a symbolic silver chain that bound the parties in a military and trade alliance (Morito, 2012). After 1763, the British attempted to further their influence in the west through an extension of the Covenant Chain relationship.

Under William Johnson's term as Superintendent of Indian Affairs, this influence was possible because Johnson was himself deeply enmeshed in an Indigenous worldview. Johnson had an Indigenous wife, spoke Indigenous languages, and had taken the time to read through volumes of reports on and histories of treaty making between his predecessors and Indigenous nations. Johnson employed Indigenous diplomatic protocols and processes to affirm peace with Indigenous nations. After his death, Johnson's relations carried on, but over time the various governors general and superintendents of Indian Affairs grew slowly less familiar with the details of a once-close and sustained relationship between the Crown and its Indigenous allies.

The annual treaty meetings and distribution of presents came to be seen as an unnecessary expense, and by 1836 it was possible for Sir Francis Bond Head to remark that "on our part, little or nothing documentary exists – the promises which were made, whatever they might have been, were almost invariably verbal; those who expressed them are now moldering in their graves" (Head, 1836, as cited in Corbiere, 2019). The once vital Covenant Chain relationship was now no longer even a distant memory – the commitments of the *Royal Proclamation* became rote and boilerplate, when they were remembered at all.

After 1850, the Crown began a series of treaty negotiations for lands that became Canada. The treaty regime after 1850 used boilerplate language in treaties with distinct Indigenous nations – giving an almost spooky uniformity to these treaties. Except in the west, where, throughout most of

British Columbia, land was both unpurchased and not subject to treaty. Future property interests in British Columbia would turn not on the need to formally recognize original Indian title, as was the case in the east, but rather on the need to eliminate all prior Indigenous claims. Without treaty or purchase, it was hard to imagine how this could be accomplished.

Relations to Land in Australia: The Torrens System

Unlike in the United Kingdom and eastern North America, land in Australia was conceptualized as a fungible commodity "without any owners, to be claimed, partitioned, securitized and cultivated" (Bhandar, 2015, p. 256). In practice, this meant that a more efficient system of land conveyancing was needed to accommodate the increasing number of land transactions. Indeed, the colony "required something less costly, less artificial, something which [. . .] may [be] handle[d] with more freedom and rapidity" (Torrens, 1859, p. 4). By this time, the commoditization of Australian land was already well underway. To illustrate, the "Colonization Commissioners for South Australia noted that by 1839 (three years after the first settlers had landed on the coast St. Vincent's Gulf) 250,320 acres of public land had been sold for the sum of £229,756" (Bhandar, 2015, p. 267). Yet, without a centralized registry, the system was almost as cumbersome to manage as that in the United Kingdom. Flaws in title could still be passed down from owner to owner without their knowledge, the risk of fraud and forgery was high, and ownership still needed to be traced as far back as possible to confirm the buyer was receiving valid title to land. Consequently, the expense, difficulty, and legal uncertainties of land conveyancing under the British law were perceived as a barrier to the settlement of the Australian colony.

With this problem in mind, Robert Torrens, a member of the House of Assembly for the City of Adelaide, devised a centralized land-registry system based on the "shipping system, where funded property was bought and sold within a system of registration" (Bhandar, 2015, p. 258). Bhandar (2015) noted that Torrens emphasized that there was no difference in principle between land and other forms of property for the purposes of conveyancing (pp. 258–259). The Torrens system was made into law under the *Real Property Act* 1858.[4] This supported the

[4] *An Act to simplify the Laws relating to the transfer and encumbrance of freehold and other interests in Land, House of Assembly*, South Australia, 1858. See www.foundingdocs.gov.au/item-sdid-43.html.

process of British settlement in the Australian colony, as land transactions were now relatively easy and inexpensive. The Torrens system was popular with already landed Australian settlers because it made ownership of land more attainable for the majority of citizens (Taylor, 2008). Moreover, "the settler colony of South Australia was the ideal space for the imposition or trialling of this technique, treated, as it was, as a *terra nullius*" (Bhandar, 2015, p. 256). The treatment of Indigenous lands as legally empty, without owners or sovereigns in Australia, stands in stark contrast to the well-established colonial practice in eastern Canada. Indeed, rather than acquire rights to Indigenous lands through treaty and purchase, in Australia the very existence of Indigenous ownership was, and arguably still is, simply denied.

Relations to Land in British Columbia

Prior to the mid-nineteenth century, European presence in Canada's westernmost province, British Columbia, was minimal and primarily dedicated to fur trading. Europeans were limited to geographically small settlements, with equally small populations; and there was neither the motivation nor the ability to claim ownership of vast swaths of Indigenous lands. In addition, Indigenous Peoples were not passive victims; they actively asserted claims to land and land ownership. Thus, European settlement cannot be characterized as the acquisition of "empty" lands. Indigenous Peoples did not simply occupy the land, extracting resources as they made seasonal rounds of their traditional territories. Indigenous Peoples adapted to the changing economic and political landscape by engaging in European-style agrarian farming and capitalism. Nevertheless, as we discuss in the following section, racist discourses of the "savage" Indian painted Indigenous Peoples as incapable and uninterested in agrarian capitalism – such that their lands were considered "wastelands" and thus legally empty and open for appropriation by European settlers.

In the west, the years between 1800 and 1858 are characterized by Robin Fisher as the "fur trade era." During this period, Indigenous Peoples and settlers enjoyed a reciprocal and mutually beneficial relationship with minimal conflict. Fisher (1977) suggested that Indigenous Peoples "to a large extent controlled both the trade and their culture, and European traders did not attempt any major interference with their way of life. The mutually beneficial nature of the land-based fur trade was indicated by the continued absence of interracial conflict" (p. 24). Several factors underpinned this dynamic.

Indigenous Peoples were skilled hunters and trappers, and they provided the HBC with their desired otter, marten and beaver pelts (Fisher, 1977). The power dynamic between the two groups was relatively stable because Indigenous Peoples were skilled and competitive bargainers. Both American and Russian traders provided alternative trading options and thus economic competition was intense (Fisher, 1977). In recognition of this fact, the Northwest Company introduced a debtor system which was continued by the HBC after it took control of the area. Under this system, Indigenous communities were supplied with goods and equipment in the fall, with the understanding that they would pay for the goods with pelts in the coming spring (Fisher, 1977).[5]

The mutually beneficial nature of the relationship encouraged many Indigenous communities to engage in the fur trade for the benefits to be gained, and the settler population in the region was still dwarfed by the surrounding Indigenous communities. As a result, some Indigenous groups were able to resist participation in the fur trade. For example, in 1829, the HBC built a fort in Tsilhqot'in territory, in central British Columbia, with an eye to engaging them in the fur trade. Yet, the Tsilhqot'in,

> according to their representative, could see no advantage in the presence of whites and expected them to leave the fort so that they would have the opportunity to burn it down. In reply, the head trader had to concede that the Indians were at liberty to act as they pleased, to hunt or not to hunt, because there was no compulsion in the trade. Essentially, the Chilcotin [*sic*] opted out of the fur trade, and there was little that the company could do but recognize the fact by abandoning the post in 1844. (Fisher, 1977, p. 35)

This passage is significant, demonstrating the power of local Indigenous communities to actively and confidently assert control over their territories. Moreover, the small population of HBC trading posts rendered the traders highly vulnerable. Fisher (1977) believes it is likely that Indigenous Peoples could have destroyed them, but refrained from doing so because the settler presence was valued.

Indigenous Nations such as the Haida engaged with settlers and other Indigenous communities through alternative economic means. Indeed, Indigenous Peoples in British Columbia participated in both agrarian-

[5] It is possible that what was viewed as a "debtor" system by HBC fur traders was viewed by Indigenous communities as a necessary act of generous gift-giving that creates and sustains positive relations between two communities.

style capitalism and sophisticated trading relationships with European settlers. For example, the Haida grew potatoes and manufactured carvings and cedar canoes for sale (Fisher, 1977). HBC reports indicate that by 1836, the Haida engaged in large-scale potato farming, and by 1860, potato farming had spread to the majority of Indigenous communities in the interior of what would become British Columbia (Thomson, 1994).

Importantly, during this era there was no incentive for settlers to alter Indigenous Peoples' traditional ways of life. Indeed, exactly the opposite, settlers had "a considerable investment and interest in keeping much of the Indian way of life intact. Obviously it did not want to see the kind of radical change that would prevent the Indians from being efficient fur hunters. For this reason there was little intrusion on Indian land during the fur-trading period" (Fisher, 1977).

The very existence and maintenance of the fur trade turned, in some sense, on Indigenous Peoples remaining in control of hunting grounds that supplied the HBC with pelts. Thus, the economic pull of a steady supply of furs was substantial enough to render ineffectual calls for increased efforts at "civilizing" Indigenous Peoples (Fisher, 1977).

There was even a grudging respect for the property laws of Indigenous nations along the coast. A mass "culture area" of interconnected peoples, speaking a wide variety of unconnected language groups, bound coastal nations through familial bonds expressed and given shape in the form of totemic and house identities (Graeber & Wengrow, 2021). Land in these communities was the property of a House Chief – a title that provided exclusive rights to direct labor and to allocate resources within a defined property boundary or within the House Chief's territories. Ascension to the status of House Chief required a long history of study of, and immersion into, the cultural histories of the House to which one belonged, and further required not only the affirmation of House members, but even more importantly, the approval of neighboring House Chiefs whose interests were intertwined through marriage (Mills, 1994).

Although interests in particular fishing spots or berry-gathering areas descended matrilineally, broader control over border maintenance and the allocation of hunting resources fell to the House Chiefs whether they be male or female. Upon first seeing Gitxsan and Wet'suwet'en communities, HBC Chief Trader William Brown remarked that these were "men of property," just as traders along the East Coast referred to Indigenous Peoples as "proprietors" (Banner, 2005, p. 22).

Property law disputes within a House clan were resolved at the level of the House Chief. Disputes involving other House Chiefs required the

gathering of regional chiefs to assemble in a regional *potlatch* (Mills, 1994). There, House business was discussed and settled, and the wealth and acumen of the Chiefs were demonstrated through a massive redistribution of wealth in the form of almost competitive gift giving called *potlatch*. With each gift, a House chief affirmed his or her ability to master the reciprocal relationship to the lands – one of "perpetual gift exchange" – such that the wealth of the people fed the land, and the land fed the people in abundance (Daly, 2007, p. 271).

Indigenous Peoples were not merely inhabiting the land: they were owners, stewards, sovereigns, and lawmakers over their traditional territories. As such, they actively asserted rights over their traditional territories, embraced aspects of agrarian cultivation, and engaged in trade relationships with both settlers and other Indigenous communities. At that time, European encroachments on Indigenous lands were minimal and allowed to occur because the trading relationship was mutually beneficial.

Indigenous–Settler Relationships in the Transition to Settlement

With a looming threat of American expansionism, the colony of Vancouver Island was established in 1849 through Royal Charter to HBC for the purpose of settling a colony of the United Kingdom (Martin, 1849). Despite the Oregon Treaty, signed by the United Kingdom and the United States in 1846, and settling boundaries on the west coast, the Colonial Office feared their interests, protected by assertions of sovereignty, were of little force or effect in comparison to physical occupation and settlement (Wrinch, 1932). HBC had the capital and administrative reach to oversee and regulate the process of European settlement in the area (Wrinch, 1932).[6]

The colony was barely more than a fur trading post, with little appeal for settlers, and "by 1852, as few as 435 emigrants had been sent to the colony, [and] only 11 had purchased land, and another 19 had applied for land" (Fisher, 1977, p. 58). Nearly all of the settlers were servants of the HBC (Blanshard, 1851, as cited in Fisher, 1992). Despite the HBC and Colonial Office's efforts, immigration and settlement of the colony remained stagnant until the Fraser River gold rush in 1858. While most

[6] Citing C. Grey (1849, June 29) in the House of Lords.

of the new immigrants were miners seeking gold, many developed ties to the region and sought to settle there. As settlement of the Colony expanded, competition between settlers and Indigenous Peoples for land, and particularly the highest quality farmlands, increased. Besides mining, new settlers primarily engaged in agriculture as a means of subsistence. This created tensions, because "[a]gricultural settlement was destructive to the Indian's methods of food gathering. In the Fort Victoria area, for example, Indian camas grounds were broken up by the plough" (Fisher, 1977, p. 66). Indigenous Peoples were also utilizing agrarian techniques for producing food, and serious competition emerged for the most arable sections of land.

Just weeks after the HBC received the Royal Grant, and in keeping with the general tenor of British land policy in the East, James Douglas, Chief Factor for HBC, and soon-to-be Governor of the Vancouver Island Colony, wrote to the HBC secretary in London making it clear that arrangements would have to be made for the purchase of Indigenous lands, as had been the well-established practice in Eastern Canada for over a century (Douglas, 1849).

The HBC replied by citing a report compiled by the Committee of the House of Commons examining claims of the New Zealand Company. Within, it was argued that Indigenous Peoples "had only 'qualified Dominion' over their country, consisting of a right of occupancy but not title to land" (Fisher, 1977, p. 66). Accordingly, Douglas was permitted to engage in treaty-making with Indigenous Peoples with respect to lands that had been cultivated or had houses built by the year 1846 when they came under the sovereignty of Great Britain.[7] All other land was to be regarded as waste and therefore available for colonization (Fisher, 1977). Douglas set about negotiating treaties with local Indigenous communities. In total, Douglas made fourteen treaty agreements between 1849 and 1854.

By 1854, Douglas had acquired more land than could be effectively settled and defended (Harris, 2002). Engaging in treaty-making was a time-consuming endeavor, and a process that required the Crown's commitment to substantial annual gift giving to Indigenous treaty partners. Thus, further treaty-making was likely not a priority unless there was actual need and use for the lands to be acquired. Interestingly, Douglas maintained a policy until 1859 for compensating Indians for

[7] 1846 is the date of the signing of the Oregon Treaty with the United States.

the surrender of their lands. Yet, this policy would end in both intent and practice because in 1858 the severing of the colony's ties with the HBC reduced the amount of goods available[8] for purchasing Indigenous lands.

In illustration of this rapid swing in policy toward Indian lands, John Trutch, Chief Commissioner of Lands and Works for British Columbia in 1864, wrote that "the Indians had to [be] relieved of as much land as possible so that it could be 'properly' and 'efficiently' used by European farmers" (Fisher, 1977, p. 162). Later, Trutch argued that the lands reserved for Indigenous Peoples were "entirely disproportionate to the numbers or requirements of the Indian tribes," and that it was "very desirable ... that it should be placed in possession of white settlers as soon as practicable" (Fisher, 1977, p. 163).[9]

By 1866, the reserves of the Shuswap peoples were adjusted so that a forty-mile stretch of land was reduced to three reserves each of no more than four square miles, a unilateral process that would have been unimaginable during the earlier era in the east. Further reductions soon after totaled 40,000 acres (Fisher, 1977, p. 163). Yet, rendering lands as legally empty or wasted was insufficient to get land into the hands of settlers.

The Torrens title system of land registration was implemented under the *Land Registry Act* 1860.[10] Under the Act, any person who possessed title that had been registered for a period of five years was deemed

[8] Cole Harris provided the best explanation for why Douglas stopped. By 1854, Douglas had acquired more land than he could effectively settle and defend.

[9] See Good to Trutch, (1865, Sept. 26). British Columbia, Colonial Secretary, Outward Correspondence, September 1860–May 1872, Letters to Lands and Works Department, PABC.

Reserves were not coextensive with Indigenous communities understanding of the boundaries of their traditional territories. These were allotted with some measure of consultation with Indigenous communities, but ultimately decisions were made by colonial administrators. We emphasize the reduction of reserve lands because this represents erasure of Indigenous land rights that were clearly recognized and affirmed by colonial administrators. For a more fulsome discussion of the reserve creation process, see Diamond (2022) and Harris (2002).

[10] *Land Registry Act* 1860. Despite the title, the Act did not receive Royal Assent until January 18, 1861. Later that year, the *British Columbia Land Registry Act*, which was similar but did not create indefeasible titles, was implemented on the mainland colony of British Columbia. Registered titles, however, were still privileged over non-registered interests. The Torrens system was implemented on the mainland in 1870 after the colonies united. Colony of British Columbia, *British Columbia Land Registry Act*, August 26, 1861 (25 Vict.), Appendix to the Revised Statutes of British Columbia, 1871, no. 20.

"absolutely and indefeasibly entitled to the interest in respect of [that land]" (*Land Registry Act 1860*, s. 20). In simple terms, five years after registering a newly created title to lands the owner had an exclusive right to land that was unaffected by any other unregistered interests (i.e., Indian land interests).

Bhandar (2018) observed that "the most radical aspect of a system of title by registration is that it renders all prior ownership claims irrelevant" (p. 95). Taylor (2008) argued that what separated the Torrens systems from other systems of deed registration is that it made deeds easier to find – it did not cure any defects in the title.

Validation versus Elimination of Indigenous Claims

By 1875, Télesphore Fournier, the Minister of Justice in Ottawa, now aware that Indigenous lands in British Columbia were, with the minor exception of the fourteen Douglas treaties, not acquired in accordance with the established protocol of purchase through treaty, reprimanded Lieutenant-Governor Trutch. He recommended that *An Act to Amend and Consolidate the Laws Affecting Crown Lands* in British Columbia be disallowed and postponed until the last possible date because it ignored Indigenous land rights (Hodgins, 1896). Ultimately, the federal government and British Columbia agreed to the creation of a joint commission to address the allotment of Indian reserves. Yet Harris (2002) maintained that the Joint Indian Reserve Commission had little interest in casting doubt upon vast swaths of settler land titles and were determined to leave sufficient land open for further settlement.

We may never fully know why colonial policy was set aside, but we can point to four points of context. First, the relationship between Indigenous Peoples and settlers was, on the West Coast, recent and shallow compared to the hundreds of years old relationships in the east. In British Columbia, Indigenous and settler families were not intermarried, contacts were comparatively few, and there was no motivation for anything more complex than a commercial trading relationship. As the rhetoric of race began to influence relations between colonial officials and Indigenous Peoples, there was no long history to buffer growing racism. The language of efficiency and waste came to dominate the characterizations of Indigenous lands and what to do with them. In the east, settler colonial deeds of possession could be traced to original Indigenous possession, and so to question the validity of Indigenous title was to cast doubt upon every subsequent purchaser. But in the west, as in Australia,

there were no prior settler titles, and each new title was to be based on occupation of land noted in a centralized registry. Settler claims to land were in direct competition with Indigenous histories and patterns of occupation. Valid titles thus depended not on a valid chain of prior titles, but rather a complete wiping clean of any prior owners, and a fresh start with settler names on the deeds. In this, Australia and British Columbia found themselves in identical positions – and so it is no surprise they are the first and second jurisdictions to adopt the most efficient methodology for eliminating Indigenous title to the land: the issuance of indefeasible title under the Torrens system.

Contemporary Indigenous Land Rights Claims and Their Relationship to Torrens Title

Of course, the issue of Indigenous land claims has never gone away. Indigenous communities in British Columbia have actively asserted their rights to land throughout the nineteenth, twentieth, twenty-first centuries. Most notably, in *Tsilhqot'in Nation v. British Columbia* (2014), the Tsilhqot'in successfully brought a claim for Aboriginal title over a large portion of their traditional territories.

Aboriginal title is grounded in Indigenous legal systems, derived from Indigenous use, occupancy, and control of their lands prior to the Crown's assertion of sovereignty (*Tsilhqot'in Nation*, 2014). Nevertheless, the Supreme Court of Canada described the content of Aboriginal title as analogous to ownership rights, rather than a jurisdictional or sovereign authority over the land. As a result, Aboriginal title claims have overlapped – and may continue to overlap, as well as come into conflict with fee simple ownership rights of property owners in contemporary British Columbia.

Importantly, in *Tsilhqot'in Nation*, the plaintiffs carefully drew the borders of their claimed territory to exclude any overlap with privately owned lands held in fee simple. Hence, the Supreme Court was not required to consider this issue of conflict and primacy.

Nevertheless, in some cases avoidance of overlap between Indigenous land rights and privately owned and registered property is simply not possible. This was the case of the Grace Islet dispute in British Columbia, where the Cowichan Nation sought a declaration of title for ancient burial grounds on fee simple lands (which were threatened by development) (Borrows, 2015). This dispute was settled out of court by the Cowichan and the provincial government, "to avoid potentially

precedent-setting litigation that favourably pitted Aboriginal title against 'private' ownership" (Borrows, 2015, p. 99). As such, the relationship between overlapping Aboriginal title rights and privately owned and registered fee simple under the Torrens title system remains an open question.[11]

Registrability of Aboriginal Title

Thus far, attempts by Indigenous communities to register their Aboriginal title rights under the Torrens title system have been rejected by the courts. In *Skeetchestn Indian Band and Secwepemc Aboriginal Nation v. Registrar of Land Titles* (*Skeetchestn Indian Band*, 2000),[12] the plaintiffs appealed a decision by the Registrar of Titles to refuse to register "a certificate of pending litigation against certain lands in the Kamloops Land Title District, which many years ago, the Crown had granted in fee simple." In addition, the plaintiffs also sought a declaration that they held Aboriginal title rights over the land in question. Relying on a proceeding associated with the *Delgamuukw* case, indexed as *Uukw* (1988), the Court noted that the claim for Aboriginal title is "upstream of the certificate of indefeasible title" (in *Skeetchestn Indian Band*, 2000, para. 50), exists outside the four corners of the legislative framework of the *Land Titles Act* and is therefore not an interest capable of registration.

The Court added that "Aboriginal title is not marketable and is therefore not registerable" (*Skeetchestn Indian Band*, 2000, para. 20). In simple terms, the idea is that Aboriginal title is an interest that arises outside the legislative framework of the *Land Titles Act*, and therefore cannot be registered. In addition, because Aboriginal title lands are only alienable to the Crown, they are not marketable and incapable of registration.

The important point for our purposes is that the Torrens title system continues to secure settler land rights from competing Aboriginal title claims. This has two major implications. First, as Aboriginal title interests cannot be registered, landowners and prospective landowners alike may not receive notice that certain lands held in fee simple are currently or likely to be the subject of an Aboriginal title claim. The presence of a current or impending Aboriginal title claim is likely to alter the market value of the land. Second, allowing for registration of Aboriginal title

[11] For fruitful discussions of how overlapping Aboriginal title and private property rights claims might be resolved, see Borrows (2015) and Sanderson and Singh (2021).

[12] *Skeetchestn Indian Band v. Registrar of Land Titles (Kamloops), (2000) 143 B.C.A.C.*

interests on lands regulated under the *Land Titles Act* would notify and motivate Aboriginal title claims to be proactively addressed by the provinces and the federal government. A potentially fruitful and simple solution, then, would be to amend the *Land Titles Act* to make possible the registration of Aboriginal title interests. Landowners and Indigenous claimants alike would benefit from the notice, and the ability to register a claim.

Conclusion

The legal nature of Indigenous tenure in what we now call British Columbia is unique. But the use of property law and land title regulation, as efficient tools of dispossession, is a common theme in spaces wherever settlement encountered prior occupiers – as, for example, shown in the Aotearoa New Zealand chapter elsewhere in this book. There a Native Land Court was designed to identify customary title holders, and to convert customary titles into fee simple titles. These fee simple titles could then be bought and sold on the open market, thereby making it possible for settlers to acquire said titles. Likewise, as shown by Koné, in the Democratic Republic of Congo Indigenous land rights were totally denied by a legal regime that viewed all lands not held by settlers as "vacant" and therefore the property of the state. In each of these spaces, Indigenous communities were dispossessed of their lands through law, policy, and bureaucracy, rather than brute force or conquest.

Righting historical wrongs is a complex but achievable goal. Our intervention should be viewed as an initial step in this process – namely, to accurately and coherently identify the wrong in order to illuminate avenues for redress. In the context of Indigenous dispossession in British Columbia, this requires an empirical analysis of the laws and policies that facilitated dispossession.

While British policy toward Indigenous land in North America remained constant after 1763, the actual practice varied by region and era. Along the eastern seaboard and around the Great Lakes, Indigenous claims to land were affirmed, which enabled Indigenous sellers to engage with British and colonial buyers. In British Columbia, virtually no Indigenous rights to land were recognized by treaty, and direct purchases of Indigenous land were essentially non-existent.[13] The one hundred or so

[13] A few direct purchases were made but these purchases were quickly outlawed and deemed to be invalid. See Douglas to Lytton, March 14, 1859, in Victoria, Government

years between the colonial experience in the eastern Americas and the west coast of British Columbia provide context for the differing treatments.

During these intervening years, social and political theories began casting Indigenous Peoples as backwards and inferior, which promoted discourse around Indigenous lands as being waste due to inefficient use. In British Columbia, there was no long history of Indigenous–settler alliances or even any need for such alliances – the relationships were almost purely commercial, in sharp contrast to close relationships in the east that the British enjoyed with their Indigenous military and commercial allies during the seventeenth and eighteenth centuries. The lack of close bonds made it easy for late nineteenth-century colonists to make (racist) assumptions about Indigenous Peoples and their relationships to land. Perhaps more importantly, once Indigenous title to land had been recognized as it was in the east and around the Great Lakes, future deeds for the same land could be traced to an original Indigenous seller. To deny Indigenous rights to land would thus jeopardize the long chains of settler title made after purchase from an Indigenous seller. Precisely the opposite situation obtained in the West: there, valid setter title turned on the complete erasure of Indigenous interests in the land – *terra nullius* – because without purchase, no settler interests in fee could be recognized.

The history we present here in this chapter is important for understanding the current distribution of land rights in British Columbia and has implications for how we might think about contemporary Aboriginal title claims, because it is clear that Indigenous lands were taken without consent or sale. The vast disparity in the treatment of Indigenous lands by colonial officials between the seventeenth and mid-nineteenth centuries strongly suggests that official policy had changed, and so that perhaps even if immoral, the settlement of British Columbia was at least legal. But this is not the case, and the settlement that occurred was wrong in both law and policy.

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