

# The Politics of Aboriginal Title in British Columbia: from the Referendum to the Truth and Reconciliation Commission

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## *Abstract*

Over the course of the last decade and a half, we have interrogated key intersections of the political economy of natural resource development and ongoing geographic strategies of colonialism in BC. Studying Gordon Campbell's obstructionist referendum on treaty rights and his subsequent pivot to campaign for a "new relationship" taught us that reconciliation in the context of neoliberalism will necessarily be incomplete, particularly in the context of insecure provincial territorial sovereignty. Studying both Northern Gateway pipeline proponents' discursive and legal strategies for fixing territory for the investment of capital and First Nations' politics of refusal and assertions of sovereignty in the face of these strategies has reinforced and highlighted for us the fact that the BC polity rests upon an unstable material-ideological foundation of land and title arrangements. Underlying differences in understandings of property, and how these differences have been used to secure citizenship for some and undermine it for others, raise once more the fundamental question of what are desirable core geographical organizing principles for the relationship between indigenous peoples and settler society in Canada generally, and BC in particular? Our analyses of the (post)colonial geographies of lands and resources in BC suggest that unsettling British Columbia's status quo will require reengagement with the foundational geographies envisioned by indigenous parties to treaties with settlers on Turtle Island through the metaphor of the two-row-wampum.

## *Introduction*

British Columbia is, at root, an assemblage of social relations to the land. It is a colonial construct in that it relies on the dispossession of Aboriginal peoples from their territories; it is a capitalist construct in that the land and resources herein have been commoditized and entered into markets; and these are joined in a political economy whereby property has been both a tool of dispossession and a key means of generating wealth and exercising citizenship. These complex and fraught realities are the necessary context for understanding the politics of land and natural resource development in the province and Aboriginal challenges to this regime. Today, and in this context, our aim is to raise once more the fundamental question of what are desirable core geographical organizing principles for the relationship between indigenous peoples and settler society in Canada generally, and BC in particular? By drawing on our analyses over the last decade of the (post)colonial geographies of lands and resources in BC, we suggest that unsettling British Columbia's status quo will require reengagement with the foundational geographies envisioned by indigenous parties to treaties with settlers on Turtle Island – in particular, through the metaphor of the two-row-wampum. In doing so, we also highlight

the deeply entrenched settler systems which require confrontation if just and sustainable outcomes to the 'land question' are to be finally achieved.

In the Spring of 2002, the settler government of British Columbia held a referendum on treaty and land claim negotiations. Under the premiership of Gordon Campbell, citizens were given a series of statements with which to agree or disagree, many of which were skewed towards avoiding the historical complexity of the province's territorial claims. The legal reality was that most of the territory claimed as British Columbia had never been ceded by its Aboriginal inhabitants, by treaty or any other means. It was a conscious decision by the provincial and federal governments not to proceed further with treaties, after the earlier Douglas Treaties and the numbered treaties that covered much of Western Canada's territorial claims. The first modern-era treaty with the Nisga'a, signed in 1998, was for Campbell only further evidence of the high cost and disruption of addressing indigenous claims; prior to forming government in 2001, he challenged the Nisga'a Treaty in court.

The referendum was his effort to steamroll forward, to free natural resource development from its entanglements with Aboriginal land claims and open it to global investors with greater certainty, to move to a "post-political" moment and geography: 'we hit the re-set button, and it's a level playing field again.' Both Canadian law and the political mobilization of indigenous peoples, however, were not on his side. The supportive results of his referendum, in which the majority of the 35% who participated expressed a similar impatience and frustration with the treaty process, would not be enough to settle the question.

By 2003, Campbell had had an epiphany worthy of the Grinch, and over the next few years he began to explicitly champion a 'new relationship' between settlers and Aboriginal peoples. Central to this new relationship, he claimed, would be recognition of Aboriginal title. His goals remained the same: to resolve the outstanding contestation of Aboriginal title into order to establish certainty of the Crown's territorial sovereignty and thus enable the development of natural resources by private interests. Campbell took on individual responsibility for rebuilding relationships and made personal connections with First Nations leaders and communities. He took the lead in drafting the federal government's 2005 Kelowna Accord that was to invest in Aboriginal housing, health and education. By 2005, Aboriginal leaders publically acknowledged Campbell's efforts and offered their trust and cooperation towards a new relationship that would recognize Aboriginal title.

But alas, the Canadian Constitution tripped up the Premier's plans - a not uncommon political event in the Canadian federation. Government lawyers advised Campbell that recognition of Aboriginal Title lay within the purview of the Federal government - BC lacks the jurisdictional authority Campbell would require. Then, in 2006, a newly elected federal government elected to withdraw federal support for the Kelowna Accord. Thus, by 2009 Campbell's Recognition and Reconciliation Act disintegrated while still in the drafting stages.

Given that Campbell's efforts wrecked on the shoals of federal disinterest, it is with no small degree of irony that the years following the election of Stephen Harper's Conservative government saw the issue of land and title in BC elevated to the level of national conversation. Keen to establish Canada as an "energy superpower" Harper and his Ministers, particularly Natural Resources Minister Joe Oliver, spent a good deal of energy from 2010 through 2013 promoting the necessity and benefits of a pan-Canadian energy economy which tied regions of the country together through oil transport infrastructure.

Of particular interest for the story at hand are the multiple attempts to secure oil transport to Pacific tidewater by transit through pipeline across BC territory via the Northern Gateway and Trans Mountain projects. In the case of the former, while keen to paint opposition as solely emanating from environmentalist quarters and aimed at undermining national development, Harper and his ministers could not keep BC's unstable property regime out of view. First Nations organized and communicated territorial sovereignty in direct and deliberate response to the expressed federal intent to incorporate unceded territory into the circuits the globalized energy industry.

Backed by several supportive rulings from the Supreme Court of Canada, First Nations in BC muddied the simple environment versus economy narrative advanced by Harper, Oliver, and others in the Conservative government of the day. Such was the federal government's mis-read of the situation that the Premier of BC, Christy Clark, confronted Harper with a list of both environmental AND aboriginal land claims demands before her government would offer support for pipeline infrastructure crossing BC's landmass.

All of this has been bookended at the Federal level by the Truth and Reconciliation Commission addressing the horrors of the Residential School experience and the inquiry into missing and murdered indigenous women along the 'Highway of Tears.' These are attempts to reconcile the settler state with aboriginal presence and reality. However, again not without irony, they were established parallel to the handing down of court rulings, such as *Tsilhqot'in*, which continue to challenge the territorial sovereignty of the crown.

That's a settler timeline. While it is not inaccurate, it is incomplete. It ignores Aboriginal perspectives regarding not just political positions over land claims, but more fundamental chronologies of occupation and sovereignty.

A timeline from the perspective, broadly speaking, of Aboriginal peoples in the territory claimed by BC would identify the 2002 referendum as another pointless act of settler political aggression against Aboriginal title. As the Union of BC Indian Chiefs (UBCIC) president Chief Stewart Phillip put it at the time, the referendum was an "immoral exercise" (Rossiter and Wood 2005, 360), and its "questions reflected recycled positions of the Province that have either been rejected by the Courts or have proven to be non-starters at the negotiating table over the last ten-year period."

"In the event that the Provincial government continues to refuse to accommodate our aboriginal title and rights interests and continues to attempt to manipulate the

aboriginal title and rights policy agenda, we can expect more serious conflict on the land and subsequently more litigation.”

“In our view, the Provincial government runs the real risk of creating the conditions that may very well cause the final collapse of the struggling BC Treaty process by virtue of the fact the responses to the referendum questions shall create unacceptable pre-conditions to future treaty negotiations. Consequently, the BC referendum on treaty making may very well prove to be a ‘mill stone’ as opposed to the ‘milestone’ proclaimed by Premier Campbell...” (UBCIC Media release 2002).

Phillip and other chiefs burned referendum ballots in protest. While they took time to call out the referendum as “racist,” several nations were also busy in the courts, challenging the Crown’s claim to their unceded land. Critical court decisions in 2004 [*Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit Nation v. British Columbia*] and 2005 (*Mikisew Cree First Nation v. Canada*) confirmed their assertion of the existence of Aboriginal title (though not specific claims), and of the duty of the Crown (both provincial and federal, as appropriate) to consult with Aboriginal peoples who claimed affected land. These court successes suggested that although the legal path was costly and exhausting, it was still more productive than political paths of negotiating with either the federal or provincial governments.

The Joint Review Panel established for the purposes of assessing the Northern Gateway pipeline similarly has a counter-narrative. The campaigns, declarations and JRP presentations by First Nations constituted more than a simple opposition to the pipeline project; they refused the premise, and instead reflected and reproduced a countertopography and a state of legal pluralism. Their testimony articulated a detailed and specific set of claims to territory, backed by an abundant set of social, political, economic, and ecological relationships to the land.

We argue that what was presented at the JRP is a politics of refusal that takes Aboriginal geography and governance as its starting point, rather than a reactionary politics that starts with settler norms and institutions. For many, participation in the JRP did not constitute any recognition of the panel’s authority, but only a recognition of an opportunity to speak publically and assert their claims to a settler audience. In their statements to the public and in hearing after hearing, assertions of sovereignty are made for specific areas, those areas are mapped out in detail, and the reminder is given that the territory remains unceded. By occupying the space of the JRP to assert territorial sovereignty, rather than to discuss or negotiate specific impacts of the pipeline, First Nations continued to affirm their sovereignty. They took the opportunity to educate the JRP on the realities of political geographies in BC: that, despite the many, varied efforts of settler governments and resource companies to pretend otherwise, the territorial claims of First Nations persist.

In other words, if we acknowledge a longer history, the referendum and these natural resource disputes are just the latest links in a historical chain of a failure to build a

relationship of trust, and of repeated efforts to erase Aboriginal land claims, basically by steamrolling over them or wishing them away.

We need to incorporate these multiple historical geography timelines into our analyses of British Columbia. Their differences need to remain standing, rather than trying to weave them into a common narrative. Indeed, it needs to be recognized that these perspectives are in some ways mutually exclusive national claims, and they have regularly and necessarily collided, although settler governments have with equal regularity refused to acknowledge the basis for the collision.

Note that Canadian law alone is a sufficient frame to demonstrate need to act, highlighting as it has the need to acknowledge the lack of treaties and undermining of Aboriginal territorial sovereignty. But this is not to excuse the exclusion of Aboriginal legal and governance systems, which already exist within the province. Settler theoretical, legal and political frameworks are insufficient – serious engagement must involve settler listening and drawing on insights from articulations in court cases, protests, and Aboriginal theory. Inspiration can also be drawn from other places in which geographies of settler colonialism / indigenous dispossession are being reimagined (from Maori/Pakeha agreements, co-management in NZ – some of which already exists in BC, but need to go beyond this).

We might think of this, especially in light of the Calls to Action of the Report of the Truth and Reconciliation Committee, as “marching orders” for settler governments (and their citizens). It is no wonder, surely, that the TRC’s calls to action include the education of lawyers and law students (27 and 28), public servants (57), journalism students (86), and the corporate sector (92) on “the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations.” Number 45 called for a “Royal Proclamation of Reconciliation to be issued by the Crown” which would “**reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown;**” one specific aspect of such a Proclamation would be to “Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.” And finally, number 47, calls for all levels of government “to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.”

Aboriginal title is a settler issue, it is a settler responsibility; as then-Governor General Adrienne Clarkson reminded us some time ago, and as indigenous peoples continue to assert, “We are all treaty people.” The TRC speaks to the country’s obligations as a whole; BC has further particular responsibilities, as the lack of treaties has left the question of territorial sovereignty “open” – that is, the territorial claims of the Crown are precarious, and the (ongoing) territorial claims of indigenous peoples have not been extinguished.

We would argue that there is one reality that settler governments and citizens have yet to fully (even partially) wrap their minds around: reconciliation will involve land. Whatever separate or shared or consociational governance structures emerge for its management, some of what is now claimed as Crown land will need to be restored to its Aboriginal claimants. Central to this will be the requirement to face up to the uneven development of liberal land markets and resultant capital accumulation across the province. Simply put, not all land in BC is valued equally from a market perspective – the Lower Mainland in particular has been the location of intense wealth creation. While not the only valuation relevant or possible, land as commodity (even ‘staple’ in the Innisian tradition) rests at the center of liberal democratic settler society. Thus, establishing co-existing polities/sovereignties with different land/resource valuations will pose a challenge to interests in the status quo. It is this economic logic driving the (neo)liberal politics which continue to be on display as the ‘land question’ is engaged by politicians from Campbell though to and including Trudeau.

This sounds like a political position. (As the sage Stephen Colbert has said: “Reality has a liberal bias.”) Well, we want to emphasize that it is an academic position – it is a question of ethics but it is also a question of facing up to the full historical record, acknowledging that even according to the standards of Canadian law, settler governments have claimed territory in British Columbia with no legal basis for doing so. We would go further still, echoing Audra Simpson, and insist that even the presence of treaties is evidence of violence. Why, she asks, would indigenous peoples ever agree to give settlers their land? What conditions did settler governments and individual settlers/communities create that such agreements were ever considered?

## References

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