

**ARCHIVES, WILLARD IRELAND, *REGINA V. WHITE AND BOB*, AND *CALDER*
V. THE ATTORNEY GENERAL OF BRITISH COLUMBIA, 1963-1973,
AND THE EXPANSION OF ABORIGINAL RIGHTS IN CANADA**

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Abstract

This thesis explores the important role that archivists can and have played in the expansion of Aboriginal rights in Canada. Although this role has often been overlooked in scholarly research, archives and archivists have been active participants in creating history. This thesis argues that the roles played by British Columbia Provincial Archivist Willard E. Ireland (1914-1979) and the Provincial Archives of British Columbia in two pivotal Aboriginal rights legal cases of the 1960s and 1970s (*Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia*) show that the role of archivists and archives in the pursuit of Aboriginal rights is neither passive nor neutral, and as such, deserves greater awareness and study than it has received in the past.

Beginning with their place as custodians of the hegemonic record of the assimilative policies and practices of the Canadian state, Euro-Canadian-style archives in Canada have been a nexus for the narratives and relationships between Indigenous and non-Indigenous Canadians. By the mid-twentieth century, archives became an important source of historical material essential to establishing Aboriginal Title in legal transactions.

In the 1960s and 1970s, particularly through *White and Bob* and *Calder*, Canadians began to confront the serious Aboriginal rights issues that the situation of Indigenous people raised -- the continuing legacy of the earlier assimilationist policies that still informed Indigenous/non-Indigenous relationships. Recent archival scholarship has pointed out the role archives have always played in the social narrative, and the fact that archives can no longer lay claim to an assumed neutrality, but rather must engage

with their decisions of what to collect, and how material is arranged and disseminated. But little work has been done on the history of the relationship between archives and Aboriginal rights in Canada. Often seen as the passive custodians of the historical record, archives and archivists have largely escaped the attention and scrutiny of historical research.

Following on the heels of the use of archives and archival records in establishing Aboriginal rights, archival records, and the archives themselves, are being re-imagined as sources for confronting the harm of assimilationist policies and institutions, and particularly the Residential Schools system in Canada. They have been used in recent decades to seek reparations and explore healing in new and imaginative ways. As such, archives have become significant, if often overlooked, players in the search for social justice and reconciliation in Canada. From the role of archives in the Royal Commission on Aboriginal peoples, to the Residential Schools Settlement, and the resulting creation of the Truth and Reconciliation Commission, archives as institutions have moved from being the often passive source of research material to consciously explore their potential as actors in the social narrative in Canada.

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Introduction

This study explores the significant role that archivists can play and have played in the assertion of the rights of Indigenous people in Canada.¹ The power of archives as actors in Aboriginal rights discourses, and as active agents and witnesses to the past in the present and for the future, has profound implications for the continuing negotiation of Indigenous/non-Indigenous relationships in Canada. This study undertakes an examination of the role of archivist Willard Ireland and the Provincial Archives of British Columbia he headed in two pivotal legal cases in the 1960s and 1970s that launched the legal effort to establish Aboriginal² rights in Canada (*Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia*). It considers how a growing understanding of the history of archives and records has influenced the twentieth- and twenty-first century discourse on Aboriginal rights in Canada.

The role of archives in the pursuit of Aboriginal rights is neither passive nor neutral and deserves greater awareness and study than it has received in the past. Despite

¹ It is beyond the scope of this thesis to explore Aboriginal rights cases specifically involving the Inuit and metis. But, despite this, the principles that have developed and emerged through the cases discussed herein have had an impact on all Aboriginal rights in Canada in various ways.

² This thesis uses the term “Aboriginal” when referring to the legal meaning of that term in Canadian law, as in “Aboriginal rights,” and “Aboriginal Title.” These rights emanate from *the Royal Proclamation of 1763*, and therefore can be problematized in their relationship to, and dependency upon, the power of the hegemonic state. This study uses the term “Indigenous” to refer to Canada’s first peoples, or in reference to the first people of other countries. It uses the term “Indigenous rights” to refer broadly to the rights of Indigenous people to exist, both in the most basic physical sense of that word, and in terms of culture, language, health, beliefs, education, land use, and self-determination. Unfortunately, it is beyond the scope of this study to discuss the complex relationships between Indigenous and Aboriginal rights other than to briefly note that Indigenous actors have effectively and strategically used Aboriginal rights to further their pursuits of Indigenous rights including self-determination. Human rights are individually held, as opposed to Aboriginal and Indigenous rights, which are held collectively. Human rights can be problematized as emanating from a European source. At the same time, heightened sensitivity to human rights has contributed to an overall increased awareness of Indigenous and Aboriginal rights, and human rights have also been used effectively by Indigenous groups in pursuing their own specific rights.

archivists' pivotal roles in collecting, organizing, preserving, contextualizing, and disseminating significant records, their contributions to history have often been overlooked, not only by the public, but by archivists themselves. Yet archives and archivists have not only organized and preserved the historical record; their work has also supported social justice through their contributions to such critical issues as Aboriginal rights.

This Introduction offers an overview of the early history of the pursuit of Aboriginal rights in Canada and the development of legal writing and legal case law. It looks briefly at the history of Aboriginal Title claims in Canada in the early twentieth century, when Indigenous groups pursued recognition of their claims by direct appeal to the government and in the courts, and then at the period from 1927 to 1951 when provisions in the *Indian Act* made it all but impossible for Indigenous people to pursue the official recognition of Aboriginal Title.

Chapter One, "A number of rifle shots on Vancouver Island': *Regina v. White and Bob*," explores historical and legal scholarship on claims issues in the 1950s and 1960s. In 1950, the Public Archives of Canada developed its first consolidated Indian Affairs records inventory, and a microfilming project was begun to bring copies of the pre-1870 Hudson's Bay Company Archives to Canada. Further developments including the 1951 *Indian Act*, the Hawthorn Report and the White Paper drew added attention to these issues. Chapter One also introduces the British Columbia Archives, Willard Ireland's background and career, his appointment as Provincial Archivist, and the emergence of *Regina v. White and Bob* in 1963.

Chapter two, “‘I am certain it was intended as a treaty’: Willard Ireland’s Contributions to *Regina v. White and Bob*,” explores Ireland’s key contributions to the British Columbia law case of *Regina v. White and Bob*. Beginning in the 1960s, a series of pivotal cases explored the nature and persistence of Aboriginal Title. In *Regina v. White and Bob*, Ireland identified, researched, and contextualized archival records that were essential to the establishment of key judgements in the pursuit of Aboriginal rights. Most notably, Ireland’s work and knowledge helped to support the oral history of the Nanaimo band in asserting in court a treaty right to hunting on unoccupied lands at a time when oral history was regarded not as history but as hearsay in the courts in Canada. The resulting decision not only supported the right of the defendants to hunt, based on an existing treaty, but marked a milestone in the legal recognition of treaty rights in Canada.

Chapter three, “‘I think the learned Archivist knows his way around’: *Calder v. The Attorney General of British Columbia*,” explores Ireland’s contributions to another pivotal legal case, *Calder v. The Attorney General of British Columbia*. In 1969 Frank Calder and the Chiefs of the Nisga’a sued the Attorney General of British Columbia in an attempt to clarify their rights under Aboriginal Title.³ Thomas Berger took the case for Calder. Ultimately, the *Calder* case marked the first time the Supreme Court of Canada considered the existence of Aboriginal Title. In the end, the Supreme Court decided against Calder et al.. In its decision, however, the court recognized Aboriginal Title as existing, laying the groundwork for a new day in Aboriginal rights in Canada.

³Frank Calder demonstrated exceptional leadership in education and politics in British Columbia and Canada, being the first Status Indian to attend the University of British Columbia, to sit in the provincial and federal legislatures, and to be a Minister of the Crown. For a brief biography of Calder, see the Order of British Columbia’s website at http://www.protocol.gov.bc.ca/protocol/prgs/obc/2004/2004_FCalder.htm or *The Canadian Encyclopedia* at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001168>.

The Conclusion (“Archives as Actors”) considers the role archives have taken on since the *Calder* decision in actively engaging in the exploration of Aboriginal rights in Canada. Through current initiatives and partnerships like that between the Legacy of Hope Foundation and Library and Archives Canada, which resulted in 2002 in the exhibition “Where are the Children? Healing the Legacy of the Residential Schools”, archives and archivists are embracing a more pro-active and public role in Aboriginal rights discourses. A significant part of this is the ability to understand material in the context of its history and societal provenance. In this way, records that had once represented the hegemony of the state can now be used to challenge that hegemony. In this context, the importance of a richer understanding of the larger societal forces behind the creation of records, or the societal provenance of records, and of the history of their selection and retention is once again foregrounded. This chapter concludes with a discussion of the future of relationships between Indigenous peoples and archives.

Beginning as custodians of the hegemonic record of the assimilative policies and practices of the Canadian state, Euro-Canadian-style archives have become a nexus for narratives and relationships between Indigenous and non-Indigenous Canadians. As archivist Laura Millar has argued in regard to the relationship between archives and Indigenous peoples in British Columbia, Indigenous people have drawn on archives for over a century to provide evidence of their own histories in a form that was more easily understood and accepted by Europeans and Euro-Canadians.⁴ Throughout the twentieth century, archives became increasingly important to Indigenous people in their pursuit of land claims, treaty relationships, capacity building, reparation and reconciliation.

⁴ Laura Millar, “Subject or object? Shaping and reshaping the intersections between aboriginal and non-aboriginal records,” *Archival Science* 6, no. 3-4 (2006), 329-350; see especially, 339.

In Canada, the use of historical documents in relation to Aboriginal rights in a legal context appears to have emerged in the late nineteenth century with the heavily publicized *St. Catherine's Milling* case, where the *Royal Proclamation of 1763* featured prominently. While the case was about Aboriginal rights, it did not engage any Indigenous participants; however, its citation of the *Royal Proclamation* may have been the catalyst for the appearance of the *Proclamation* in other legal claims following the court's decision.⁵ Although Indigenous people employed historical documents by arguing for their rights in legal environments early in the twentieth century, changes to the *Indian Act* in 1927 prohibiting fund raising or hiring legal counsel to pursue any issue related to land claims without the written permission of the government made access to these venues all but impossible. This remained the case until 1951 when the *Indian Act* was once again changed.⁶

Beginning in the 1960s, Canadians began to confront (and be confronted by) the serious rights issues that the situation of Indigenous people in Canada raised -- the continuing legacy of earlier assimilationist policies that still informed Indigenous/non-Indigenous relationships. One early British Columbia legal case, *Regina v. White and Bob* (1963, Supreme Court of Canada 1965), established the existence of Aboriginal treaty rights independent of the "whim" of government. The success of this case supported further Aboriginal challenges. Tensions came to a head with the 1969 "White Paper" presented by the nascent Trudeau federal government. The White Paper incited

⁵ Hamar Foster and Benjamin L. Berger, "From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the *British Columbia Indian Land Question*" in *The Great Experiment: Law and Legal Culture in British Settler Societies*, Hamar Foster, Benjamin B. Berger, and A.R. Buck, eds. (Vancouver: University of British Columbia Press, 2008), 240-267, 252; Hamar Foster, personal communication, 11 December 2010.

⁶ Douglas Harris, "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal," *BC Studies* (Summer 2009), 137-138.

heated debate, rejecting the idea of unequal citizenship, special rights, and by extension, treaties and land claims, and setting the groundwork for the last phase of assimilation. It rejected historical arguments for unique Aboriginal rights and claims, and advanced assimilation in the form of equality as fundamental to a “just society.” In support of this view, Pierre Trudeau argued that Canada should learn to forget, and “not try to undo ... the past.” Quoting John F. Kennedy, and evoking the American Civil Rights movement, Trudeau stated “We will be just in our time. This is all we can do. We must be just today.”⁷

This assimilationist point of view that dismissed the history of Aboriginal Title in Canada did not go unchallenged. The Indian Association of Alberta, supported by the National Indian Brotherhood, responded with its own paper - *Citizens Plus*, more commonly known as the “Red Paper,” which asserted a separate Indian identity, and rejected assimilation. *Citizens Plus* was soon followed by Harold Cardinal’s *The Unjust Society*. Cardinal, who had also been a key player in authoring the “Red Paper,” stated that Canadians “will have to accept and recognize that we are full citizens, citizens plus.”⁸ The White Paper was withdrawn by the federal government in 1973. The “modern era” of Aboriginal history-writing by Indigenous and non-Indigenous authors was born in this tumultuous time. Cardinal’s *The Unjust Society*, Howard Adam’s *Prison of Grass*, and Daniel Paul’s *We Were not the Savages* all engaged history in their criticisms.⁹

⁷ Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000), 52.

⁸ *Ibid.*, 164.

⁹ Jarvis Brownlie, “First Nations Perspectives and Historical Thinking in Canada,” in *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada*, Annis May Timpson, ed. (Vancouver: University of British Columbia Press, 2009), 21-50, 31-32.

Also in 1973, the Supreme Court of Canada made a landmark decision on Aboriginal Title when it handed down its decision in the *Calder* case. In *Calder* the Supreme Court ruled that the claimant was possessed of Aboriginal Title, highlighting the fact that unique Aboriginal land rights, and therefore claims, were in part historically based, that is, they depended upon the premise that the claimants had occupied the land before settler incursion, and had not surrendered the land by treaty. Significantly for the aspirations of the Trudeau government, the Supreme Court ruled that Aboriginal rights existed independent of Crown recognition. Once again, the relationship between Aboriginal distinctiveness and history came to the fore. Not long after the *Calder* decision, the Berger Commission began hearings into the effects of a proposed oil pipeline that was planned to run through Indigenous traditional territory in Canada's Arctic.¹⁰ These, too, confronted questions of Aboriginal land rights in the light of historical occupancy.

Since the 1970s, non-Indigenous scholarly interest has turned increasingly to Indigenous history and the history of Indigenous-non-Indigenous relationships. Spurred by political influences and rising public awareness, the growth of the civil rights movement, especially in the United States, the American Indian Movement, an emerging awareness of Indigenous issues in many nations and the decolonization movement worldwide, these trends were also supported in western Canada, as historian J.R. Miller notes, by "the urban migration of First Nations groups in search of employment opportunities that had been going on at least since the post-war years, which brought Native peoples into the presence and consciousness of non-Natives, including

¹⁰ Frank Fischer, *Citizens, Experts, and the Environment: the Politics of Local Knowledge* (Durham, NC: Duke University Press, 2000), 231.

academics.”¹¹ Reflecting this movement, in 1979, historical researcher James Morrison wrote an article for *Archivaria* on the history of Aboriginal claims and the specific archival resources that were most useful to their pursuit.¹²

In the 1970s, trends in Britain and France in the writing of social history, and the acceptance of Ethnohistory (which had begun in the United States in the 1940s and 1950s with the rise of land claims commissions) as a discipline not only influenced what histories were written, but how they were written. Ethnohistorians, reading “against the grain,” sent historians back to the records and texts with which they were already familiar to tease out multiple meanings. Historians, ethnohistorians, and historical geographers, including Arthur Ray, took advantage of archival fur trade records, especially the Hudson’s Bay Company Archives’ records that had only recently been microfilmed by the Public Archives, to write histories that recognized Indigenous people as central actors in economic, geographic, and social history. The rise of academic lawyers added to the mix of professionals who were now looking at historical records in an entirely new way.¹³ Oral history began to emerge as a way of finding balance in sources and perspectives.¹⁴ Increased interest in Indigenous issues led to greater historical concern with contemporary topics such as treaties, and the creation of Indian policy. In Canada, reflecting the trend of the development of archival practice as a separate albeit related

¹¹ J.R. Miller, *Reflections on Native-Newcomer Relations: Selected Essays* (Toronto: University of Toronto Press, 2004), 13-36, 19.

¹² James Morrison, "Archives and Native Claims," *Archivaria* 9 (Winter 1979-80), 15-32; see also for an archivist's contribution to this early archival literature, Bill Russell, "The White Man's Paper Burden: Aspects of Records Keeping in the Department of Indian Affairs, 1860–1914," *Archivaria* 19 (Winter 1984-85).

¹³ Miller, *Reflections on Native-Newcomer Relations*, 20, 21; Ted Binnema with Susan Neylan, "Arthur J. Ray and the Writing of Aboriginal History," in *New Histories for Old: Changing Perspectives on Canada's Native Pasts*, Ted Binnema and Susan Neylan, eds. (Vancouver: University of British Columbia Press, 2007), 1-17, 3-4.

¹⁴ Miller, *Reflections on Native-Newcomer Relations*, 20-25.

profession, the Association of Canadian Archivists was formed from the former Archives Section of the Canadian Historical Association.¹⁵

In recent decades, legal cases, drawing heavily on historical testimony, have spurred historical and legal advocacy scholarship. As historians Ted Binnema and Susan Neylan have observed,

A year before the Supreme Court overruled [Justice] McEachern's judgement [in *Delgamuukw*], the nationwide Royal Commission on Aboriginal Peoples issued its report (1996), highlighting the utility of historical study and education about Native history as central to achieving social justice and reconciliation for First Nations in Canada. The commissioners observed that 'questions of voice, research, evidence, and the way history is used in the litigation process' have emerged as issues of direct concern to Native historiography and in the lives of contemporary First Nations. ... [Arthur] Ray and his colleagues, who have acted as expert witnesses in such cases at (sic) *Delgamuukw* and *Powley*, effectively demonstrate how history research has the potential to function as a mechanism for acknowledging and addressing the wrongs done to First Nations in this country over the last five hundred years or more.¹⁶

In the late 1980s, *Regina v. Delgamuukw* generated significant controversy on two levels. First, the British Columbia trial court dismissed Indigenous oral history as acceptable evidence, and similarly dismissed the value of historical expert witness testimony in favour of largely uncontextualized documentary sources. Second came the Supreme Court's decision on the appeal of *Delgamuukw*, which allowed for the possibility of oral testimony in the courts in some circumstances. Within the academy, *Delgamuukw* drew out a sometimes impassioned dialogue on the reliability of records, and the role of historians in providing richer context for those records, and also provoked discussions of the relationship between historians and archives, postcolonialism and postmodernism. As historian Adele Perry has argued

¹⁵ Association of Canadian Archivists website, "About Us," <http://archivists.ca/content/about-us>

¹⁶ Binnema with Neylan, "Arthur J. Ray and the Writing of Aboriginal History," 1-17, 12.

Historians' critiques also underestimate the extent to which [trial judge Justice] McEachern's recapitulation of tired settler wisdom was enabled by available scholarly knowledge and practice. The yearning for a 'total archive' and the belief that historians have or should have one that can genuinely substitute for the likes of McEachern's may begin to take us where that critique may and perhaps must lead us. And that is to a postcolonial practice of history – one that acknowledges and utilizes the distinctive possibilities of all archives and embraces rather than denies the interpretative challenges posed to mainstream historical methodology by the Indigenous archive, alternative ways of reading the written one, and the simple admission that the ways we know the colonial past are not only multiple but necessarily and unevenly partial.¹⁷

History written by Indigenous authors, while more robust than ever, continued to come largely from “non-professional” authors, including oral history projects, with some work being done collaboratively between Indigenous individuals or communities and the academy. Storytelling venues and media increasingly offered a new way of disseminating histories to a wider public audience.¹⁸

The interest in and embedding of Indigenous history in the academy suggests opportunities, but fundamental issues remain. As historian Jarvis Brownlie notes

Make no mistake – Aboriginal people did not have to read Michel Foucault to understand the meaning of hierarchical observation and the way that knowledge collection underpinned the control exercised over them by the Department of Indian Affairs. Given these historical realities, there are some challenges for First Nations people who seek a place for their own forms of knowledge and their own emancipatory political projects in the Western-oriented academy that our universities represent.¹⁹

In the 1990s, as stories of Indian Residential Schools abuses emerged more often and more prominently in mainstream media, archival literature began to reflect an interest in records both by and about Indigenous people, record keeping, and ways of knowing.

¹⁷ “The Colonial Archive On Trial: Possession, Dispossession, and History in *Delgamuukw v. British Columbia*,” in *Archive Stories: Facts, Fictions, and the Writing of History*, Antoinette Burton, ed. (Durham, N.C.: Duke University Press, 2005), 343-344.

¹⁸ Miller, *Reflections on Native-Newcomer Relations*, 26-28.

¹⁹ Brownlie, “First Nations Perspectives and Historical Thinking in Canada,” 33.

Bill Russell wrote about record keeping practices in the Canadian government's Indian Affairs department, noting that a study of the record keeping structures and their changes “in turn, gives us glimpses of Indian Affairs officials’ view of the role of their department in both the government and society at large.”²⁰ Shawna McRanor argued for increased participation by Indigenous communities in the archival process by looking at how oral records could be reliably included in and understood and authenticated by archives.²¹ In a similar vein, Mary Ann Pylypchuk²² considered how Indigenous documentary records could be more appropriately addressed. More recently, in her M.A. thesis, Rita-Sophia Mogyorosi has explored the post-1950 phenomenon of the creation of Indigenous archives that use both Euro-Canadian and Indigenous records in British Columbia.²³ Pylypchuk has also considered legal evidentiary issues relating to Indigenous records, and how different cultural understandings of records can be respected and preserved. In “The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources,” Pylypchuk touched briefly in one article on the testimony of Willard Ireland in the *Calder* case.²⁴

In the new millennium, following in the footsteps of Bill Russell, both Sean Darcy and Brian Hubner looked at Indian Affairs records once more, focusing on the

²⁰ Bill Russell, "The White Man's Paper Burden," 50-72, 51.

²¹ Shawna McRanor, "Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations: Implications for Archival Practice," *Archivaria*, 43 (Spring 1997), 64-88.

²² Mary Ann Pylypchuk, "A Documentary Approach to Aboriginal Archives," *Archivaria* 33 (Winter 1991-92), 117-124.

²³ "Coming Full Circle?: Aboriginal Archives in British Columbia in Canadian and International Perspective," (M.A. Thesis, Department of History (Archival Studies), University of Manitoba, 2008), 7-8. At University of Manitoba MSpace at <http://mspace.lib.umanitoba.ca/handle/1993/3118>.

²⁴ Mary Ann Pylypchuk, *Archivaria* 32 (Summer 1991), 51-77, see especially 59.

“evolution” of the central registry system of the department.²⁵ Hubner also wrote about the representation of Indigenous people in the Canadian census, arguing that

A census is made to collect information on populations and individuals that can then be used to configure and shape social and political relations between those being enumerated and the creators of the census. However, the human objects of the census are not just passive integers and they have resisted its creation in a number of ways, including being ‘missing’ when the census is taken, refusing to answer the questions posed by enumerators or even driving them off Aboriginal territory.²⁶

Increasingly, archival writing on the subject of Indigenous archives, archivists, and archival records is reflecting a postmodern sensitivity to the possibility of multiple perspectives and multiple voices embodied in one object. Laura Millar has written about many of the issues around the intersections of Indigenous and non-Indigenous records, record keeping, and ways of knowing by considering archives, the history of record keeping, and the relationship between oral and documentary records in British Columbia in “Subject or object? Shaping and reshaping the intersections between aboriginal and non-aboriginal records.”²⁷ Millar’s work demonstrates not only the subjectivity of all records and record keeping, but the problems inherent in attempting to position oral and written records as discrete forms of knowledge. Recently, archivist Raymond Frogner made a careful study of the *North Saanich Treaty* (one of the “Douglas Treaties.” The Nanaimo Treaty, which featured strongly in *Regina v. White and Bob*, is also part of this group of treaties). Frogner argues that, while archivists cannot hope to account for all the

²⁵ Sean Darcy, “The Evolution of the Department of Indian Affairs’ Central Registry Record-Keeping Systems, 1872-1984,” *Archivaria* 58 (Fall 2004), 161-72; Brian Hubner, “ ‘An Administered People’: A Contextual Approach to the Study of Bureaucracy, Records-keeping and Records in the Canadian Department of Indian Affairs, 1755-1950.” (M.A. Thesis, Department of History (Archival Studies), University of Manitoba, 2000). At University of Manitoba MSpace at <http://mspace.lib.umanitoba.ca/handle/1993/2381> .

²⁶Brian Hubner, “ ‘This is the Whiteman’s Law’: Aboriginal resistance, bureaucratic change and the Census of Canada, 1830–2006,” *Archival Science* 7 (2007), 195-206, 195.

²⁷ *Archival Science* 6, no. 3-4 (2006), 329-350.

possible contexts and relative truths represented by an archival record, they can describe records in a way that juxtaposes the contexts of the record's creation, while engaging greater Indigenous participation in archiving.²⁸ In the areas of historical and legal scholarship, Andrew Woolford's look at the treaty-making process in British Columbia in *Between Justice and Certainty: Treaty Making in British Columbia*²⁹ discusses the legal context of land claims, particularly in British Columbia, a province that is unusual in Canada (and particularly in the Canadian West) in its resistance to treaty agreements with Indigenous groups.

All of these authors have contributed to understanding the overarching environment, including the opportunities that archives may offer Indigenous people in pursuing their rights through both the courts and public perception, and trends in the relationships between archives and Indigenous interests. Yet studies to date have overlooked the significance of Ireland's role in *White and Bob* and *Calder*.³⁰ A few of British Columbia's archivists have received some attention. Terry Eastwood has written about British Columbia's earliest provincial archivists, R.E. Gosnell and E.O.S. Scholefield,³¹ Robin G. Kierstead and Daphne Sleight have both written about the colourful City of Vancouver Archivist Major J.S. Matthews,³² and Terry Cook has written about W. Kaye Lamb in "An Archival Revolution: W. Kaye Lamb and the

²⁸ Raymond Frogner, "Innocent Legal Fictions: Archival Convention, Aboriginal Identity and the 1852 North Saanich Treaty," *Archivaria* 70 (Fall 2010), 45-94.

²⁹ (Vancouver: University of British Columbia Press, 2005).

³⁰ Pylypchuk does mention this case and Ireland's testimony briefly in "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources," *Archivaria* 32 (Summer 1991), 51-77.

³¹ Terry Eastwood, "R.E. Gosnell, E.O.S. Scholefield and the Founding of the Provincial Archives of British Columbia, 1894-1919". *BC Studies* no. 54 (Fall 1982), 38-62., reprinted in *Canadian Archival Studies and the Rediscovery of Provenance*. Tom Nesmith, ed. (Metuchen, N.J. : Scarecrow Press, 1993), 109-131.

³² Robin G. Kierstead, "J.S. Matthews and an Archives for Vancouver, 1951-1972," *Archivaria* 23, (Winter, 1986-1987), 86-106; Daphne Sleight, *The Man who Saved Vancouver: Major James Skitt Matthews* (Surrey, BC: Heritage Group Distribution, 2008).

Transformation of the Archival Profession."³³ Willard Ireland's contributions, however, challenge the ongoing perception that archives are passive bodies, wells into which researchers and lawyers may dip their buckets to draw out useful bits of evidence. Although Mogyrosi's work does show the active and intentional development of archives by Indigenous people, the history of the active role of archives and archivists in contextualizing records remains to be further developed. A study of the contributions Ireland made to *Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia* helps to fill in this gap.

This study of Ireland's role in *White and Bob* and *Calder* contributes to the emerging field of modern archival history. As archivist Christy Henry notes, earlier archival history, exemplified by work in the 1970s and 1980s, concerned itself with a limited audience composed largely of archivists. This style of archival history supported professional education and identity development within the archival community, but had little resonance outside the profession. More recently there has been a trend to a broader vision of archival history that has begun to encompass questions of social memory and memory making, their impact on the present and the future, and the part that archives and archivists can and do play in the creation of social reality. This new archival history, which began to take hold in the early 2000s, broadened archival history's focus to include a postmodernist understanding of how archival decision making can affect individuals and society as a whole, and how archives reflect the societies in which they are

³³ *Archivaria* 60 (Fall 2005), 185-234. See also biographies in *The Archivist*: At: <http://www.collectionscanada.gc.ca/publications/archivist-magazine/015002-2141-e.html>. Accessed 26 March 2010, and *Archivaria* 15: *Archives and Libraries: Essays in Honour of W. Kaye Lamb*.

embedded, identifying the archivist as an important actor. To date, the new archival history remains an underdeveloped field.³⁴ This thesis hopes to make a contribution to it.

A growing body of writing, influenced by postmodern thinking examines the role of archives as actors in society and in the creation of social memory -- by authors including Tom Nesmith, Terry Cook, Verne Harris, Randall Jimerson and others. In “The Archive(s) Is a Foreign Country: Historians, Archivists, and the Changing Archival Landscape,” Terry Cook argues that the writing of history begins when archivists decide what records to keep and what to forget (or destroy).³⁵ Tom Nesmith has argued for the importance of understanding societal provenance, an idea which has particular resonance with the intercultural uses of records in Indigenous/non-Indigenous relationships, and in the shifting meaning of records from instruments of state hegemony to evidence supporting rights, and for the importance of understanding the rich history of the archives and records that can be provided by archivists.³⁶ These considerations help to position the important (and unavoidable) role of archives as actors in social justice issues, although in a more general sense than the focus on Aboriginal rights (and particularly Willard Ireland’s contributions to *White and Bob* and *Calder*) that this thesis addresses.

³⁴ Christy Morgan Henry, “Toward the Archives of Archives: The New Archival History, Accountability and the Documentation of Archival Appraisal,” (M.A. Thesis, Department of History (Archival Studies), University of Manitoba, 2009), 30-42.

³⁵ *Canadian Historical Review*, 90: 3 (September 2009), 497-534, 510-511.

³⁶ Tom Nesmith, “Archivists and Public Affairs: Toward a New Archival Public Programming,” in *Better Off Forgetting?: Essays on Archives, Public Policy, and Collective Memory*, Cheryl Avery and Mona Holmlund eds. (Toronto: University of Toronto Press, 2010). See also his “Reopening Archives: Bringing New Contextualities into Archival Theory and Practice,” *Archivaria*, 60 (Fall 2005), 259-274; “Still Fuzzy, But More Accurate: Some Thoughts on the ‘Ghosts’ of Archival Theory,” *Archivaria* 47 (Spring 1999), 136-150, and “What’s History Got to Do With It?: Reconsidering the Place of Historical Knowledge in Archival Work,” *Archivaria* 57 (Spring 2004), 1-27.

Background

The history of the pursuit of Aboriginal rights in Canada extends back before Confederation. Beginning in the late eighteenth century, Canada's Indigenous people turned to the law as one avenue to pursue their rights, and to redress the infringement of those rights by the colonial settler society. This, argues historian Sidney L. Harring, was a direct result of the intersection of longstanding issues around the marginalization of Indigenous peoples, including poverty and lack of access to political power, and the fact that many of the issues that cut deeply for Indigenous people, including property and resource rights and legal and political sovereignty, are embedded in the common law, so that the law offered a natural place to turn to redress challenges to these rights.³⁷

But the courts were not the only tool that Indigenous people employed. Law professors Hamar Foster and Benjamin L. Berger argue that

in the nineteenth century, indigenous peoples across the British Empire were subject to severe limitations on their right to vote, their eligibility for elected office, and their access to the courts. Furthermore, the doctrine of sovereign immunity, which permitted title lawsuits against the Crown only if the Crown consented, further restricted indigenous peoples' capacity to seek justice through conventional democratic and juridical means. Nor were these disabilities confined to the nineteenth century.³⁸

In the face of these challenges, Indigenous people also resorted to petitions, memorials and letters to raise their concerns and redress what they felt were encroachments on their rights.³⁹

Early petitions, often composed with the help of missionaries, showed a distinct style, usually begging for recognition of specific issues, rather than identifying or

³⁷ Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998), 4.

³⁸ Hamar Foster and Benjamin L. Berger, "From Humble Prayers to Legal Demands," 240-267, 243.

³⁹ *Ibid.*, 241-243.

asserting particular legal claims or rights under the law. “Instead,” state Foster, Buck and Berger

appeals to colonial justice were made in the religious, philosophical, and moral sense of that term. The petitioners’ ancient occupation of their lands and traditional activities were stressed, the facts of their grievances were recited, and those in authority over them were implored to do what was right. Sometimes legal arguments were made, but they invoked the law of nature or God rather than the law of the land.⁴⁰

In the early twentieth century, however, as some Indigenous people became more educated in and familiar with Euro-Canadian systems, and communities began to engage lawyers to help them write their arguments, things began to change.⁴¹ Foster suggests that this shift, which took place in the early twentieth century, was heralded in British Columbia by the arguments of Haida leader Peter Kelly, who reasoned “that petitions drafted by the clergy, begging for grace and understanding, had in the past been

⁴⁰ Ibid., 244.

⁴¹ Ibid. See, for other examples, Keith D. Smith, *Liberalism, Indigenous Communities in Western Canada, 1877-1927* (Edmonton: Athabasca University Press, 2009); and Arthur J. Ray, Jim Miller, and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2002), 36, 191; Norman D. Shields, “Anishinabek Political Alliance in the Post-Confederation Period: The Grand General Indian Council of Ontario, 1870 – 1936” (M.A. thesis, Department of History, Kingston: Queen's University, 2001), 10, 137; Edmund Jefferson Danziger Jr., *Great Lakes Indian Accommodation and Resistance during the Early Reservation Years, 1850-1900* (Ann Arbor, MI: University Of Michigan Press, 2009), 227; Robin Jarvis Brownlie, *A Fatherly Eye: Indian Agents, Government Power and Aboriginal Resistance in Ontario, 1918-1939* (Don Mills: Oxford University Press, 2003), 91; Linda Pertusati, *In Defense of Mohawk Land: Ethnopolitical Conflict in Native North America* (Albany: State University of New York, 1997); William Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002), 222. Wicken's comments raise the point that the use of petitions may not only have been a response to the legal and political positions Indigenous people found themselves in, but may also have had resonance in cultural processes and rhetorical forms that engaged ideas of relationships and obligations in defining and resolving issues. See, for example, Laura Peers and Jennifer S.H. Brown, “There is no end to relationship among the Indians': Ojibwa Families and Kinship in Historical Perspective,” *The History of the Family* 4: 4 (December 1999), 529-555 and Jean Friesen, “Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest, 1869-76” in *The Spirit of the Alberta Indian Treaties*, Richard Price, ed. (Montreal: Institute for Research on Public Policy, 1974), 203-213.

singularly ineffective.... He thought that such petitions should be replaced by demands, formulated politely by Indians themselves, for legal rights.”⁴²

It is difficult to say exactly how much use was made of archives, archivists, or archival records, either by Indigenous people themselves, or by lawyers, missionaries, and others who contributed to the assertions of their rights during the nineteenth and early to mid-twentieth centuries. Both Foster and retired law professor Dale Gibson believe that the use of archival sources by Indigenous individuals or communities during this period may have been quite limited. Foster suggests that the use of archives may have begun only slowly in the early twentieth century, and Gibson notes that the courts of the time often did not engage in historical enquiry.⁴³

The potential use of archives for research relating to Aboriginal rights in this period was complicated by a number of factors. First, archives themselves were only just emerging on the Canadian landscape. Although Nova Scotia had an archivist as early as 1857, he operated more as historian than archivist during the nineteenth century.⁴⁴ Canada’s national archives was created in 1872, as the Archives Branch of the Department of Agriculture, which focused on a vast array of cultural material.⁴⁵ In British Columbia, early efforts at archiving were undertaken by provincial librarian, and later

⁴² Hamar Foster, "A Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question," in *Osgoode Society Essays in the History of Canadian Law: In honour of R.C.B. Risk*, David H. Flaherty, G. Blaine Baker, Jim Phillips eds. (Toronto: University of Toronto Press, 1999), 171-212, 176.

⁴³ Hamar Foster, personal communication, 11 December 2010; Dale Gibson, personal communication, 21 December 2010.

⁴⁴ Eastwood, "R.E. Gosnell, E.O.S. Scholefield," 43.

⁴⁵ Ian E. Wilson, "'A Noble Dream'? The Origins of the Public Archives of Canada," *Archivaria*, 15 (Winter 1982-83), 16-35, 16.

archivist, R.E. Gosnell, as early as 1893, but it was an uphill, underresourced struggle with patchy results.⁴⁶

Throughout the nineteenth century and well into the twentieth, archives and archivists worked to get control of recently created versus very old government records. It was not until 1903 that the federal Archives merged with the Records Branch of the Department of the Secretary of State, which had focused on administrative government records. When Arthur Doughty was named Dominion Archivist and Keeper of the Records in 1904, he found himself faced with the challenge of actually gaining control over the government records the archives had so recently been tasked with keeping.⁴⁷ But Doughty could not compel federal agencies to place their records in the Archives. The first transfer of records from Indian Affairs to the custody of the Archives did not happen until 1907 and resulted from the agency's initiative. Until then, many of the department's records had been languishing in inappropriate and often inaccessible storage.⁴⁸

In British Columbia, under Provincial Archivist E.O.S. Scholefield and his predecessors, the archives had amassed a sufficient body of records to spark enthusiastic historical scholarship by the early twentieth century. However, despite the goal of Scholefield to create “a scholastic retreat for the student, the scholar, and the historian,”⁴⁹ the archives was so disorganized that it remained closed to the public for much of the first decades of the century.⁵⁰ As historian Chad Reimer writes, “John Forsyth and John Hosie had failed to discipline the rich but ill-organized collection that E.O.S. Scholefield had

⁴⁶ Eastwood, “R.E. Gosnell, E.O.S. Scholefield,” 40.

⁴⁷ Jim Burant, “Doughty’s Dream: A Visual Reminiscence,” *Archivaria* 48 (Fall 1999), 117-130, 117.

⁴⁸ Bill Russell, “The White Man’s Paper Burden,” 50-72, 67.

⁴⁹ Quoted in Chad Reimer, *Writing British Columbia History, 1784–1958* (Vancouver: University of British Columbia Press, 2009), 51.

⁵⁰ Eastwood, “R.E. Gosnell, E.O.S. Scholefield,” 56.

amassed. ...W. Kaye Lamb [who became provincial archivist in 1934] quickly realized that the archives lacked an accurate record of its own holdings and that, without such a record, serious historians would be greatly hampered in their research efforts.”⁵¹ As well, throughout this period, the transfer of government records depended on the good will of government officials. With no legislated transfer or disposal authority, archivists struggled to try to gain authority over government records well into the twentieth century. Relevant records, even if they were in fact historical, may have been impossible to identify or locate, or resided in government or private offices long after they could have been transferred to an archive.⁵²

Adding to this already complicated landscape, many records relating to the earliest history of Canada were housed in Europe.⁵³ Beginning in the 1870s, the federal archives undertook an extensive programme to identify, calendar, and copy these records, but the process was slow. An example of the issues this situation created can be seen in the 1890 petition by Six Nations (Haudenosaunee) Chiefs to their “Brother Chief” the Duke of Connaught.⁵⁴ The letter requested, in part, an array of copied and published

⁵¹ Reimer, *Writing British Columbia History*, 122.

⁵² Terry Cook, “An Archival Revolution: W. Kaye Lamb and the Transformation of the Archival Profession,” *Archivaria* 60 (Fall 2005), 185–234, 30; Eastwood, “R.E. Gosnell, E.O.S. Scholefield,” 43.

⁵³ In the case of British Columbia, they were in the Hudson’s Bay Company’s Archives (then in Britain) and in the Bancroft Collection in California. It was not until the early twentieth century that the British Columbia Provincial Archives undertook a similar program under E.O.S. Scholefield. Scholefield accessed, copied, and published records and indexes from both Britain and the United States. Reimer, “Writing British Columbia,” 50-51.

⁵⁴ Since Connaught had been adopted into the Six Nations community and made a chief during a visit to Canada in 1869, this reference to him was not at all allegorical. See Canada, *Official Reports of the Debates of the House of Commons of the Dominion of Canada, first session – fifth Parliament* 46 Victoriae, (Ottawa: Maclean, Roger & Co. 1883), 1099.

documents they believed supported their claims to self government, including a copy of the Haldimand Proclamation of 1784.⁵⁵ Their petition ended with the request

Brother Chief – We also solicit your Royal Highness through your love of Justice to cause it to present us copies of our treaties and the State papers also of or relating to the Six Nations; 1st Four folio volumes recording all the solemn treaties and transaction of the Indian affairs, and the patents according to the date of treaties; 2nd, patents 30 July 1684, April 14 Patent May 1st of the same year.

1761, March 25 patent April 13

1762 May 29 patent June 10

1763 Sept. 9 patent Sept, 23

And a copy of our Deed issued by Sir Frederick Haldimand the year 1783 or 1784 for the Six Nation Mohawk of the township of Tyendinaga Reservation, and we will look forward with pleasure knowing that your Royal Highness will do all you can to further our requests and to have the articles addressed in our names to our Post Office.⁵⁶

⁵⁵ Letter to HRH the Duke of Connaught from the Chiefs of the Six Nations, 1890, Library and Archives Canada (LAC), RG10 Indian Affairs records, vol. 2284, file 57169-1 Political Status of Six Nations, 1890-1920, See “Item 50” and following at:

http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayItem&lang=eng&rec_nbr=2077839&rec_nbr_list=2083341,2083376,2083362,2077840,2077838,2083304,2083218,2077839,2911724,157474

See especially: Item 55: <http://data2.archives.ca/e/e210/e005239349.jpg>.

This petition also suggests another issue in identifying when archival sources may have been used in the pursuit of Indigenous rights in Canada. The petition includes a number of quotes from William Johnson, for instance, stating that the Canadian government’s claim to be able to pass laws binding on the Six Nations without their consent was “contrary according to Sir William Johnston’s (sic) letter to the Earl of Dartmouth December 16th, 1773, saying, ‘Indeed it is the first instance wherein the Six Nations were induced to make the atonements required by our laws, for as they derive no benefit from and are not admitted to partake of them, they think it particularly hard to deviate from their own ancient usages in such cases, which were even confirmed by agreement between them and the white people at the first settlement of the country and generally practised to the present time.’”

LAC RG10 Indian Affairs records, vol 2284, file 57169-1 Political Status of Six Nations, 1890-1920, See Item 54 at

http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayEcopies&lang=eng&rec_nbr=2077839&title=HEADQUARTERS%20-%20CORRESPONDENCE,%20REPORTS,%20MEMORANDA%20AND%20NEWSPAPER%20CLIPPINGS%20REGARDING%20THE%20POLITICAL%20STATUS%20OF%20THE%20SIX%20NATIONS.©=e005239348&back_url=%28%29.

Despite the use of quotation marks, there is no indication of the source for this and other quotes in the petition. It is possible that the source of this quote was a published volume containing transcriptions of Colonial documents: John R. Brodhead, Berthold Fernow, Edmund B. O’Callaghan, *Documents Relative to the Colonial History of the State of New York; Procured in Holland, England and France... And published by the New York State Legislature*, Volume 8 (New York: Weed, Parsons, 1857), 405.

⁵⁶ Petition to Prince Arthur, Duke of Connaught, from Joseph I. Brant and others of Tyendinaga, 20 April 1891, LAC, RG10, Indian Affairs records, vol. 2284, file 57, 169-1NAC RG10 Indian Affairs records, vol 2284, file 57169-1 Political Status of Six Nations, 1890-1920, [Petition] to HRH the Duke of Connaught from the Chiefs of the Six Nations, 1891. See “Item 50” and following at:

As early as 1873, Douglas Brymner, Canada's first national Archivist, identified the importance of the Haldimand papers to Canadian history. The papers, which were held by the British Museum in London, included the Haldimand Proclamation requested by the Six Nations in their petition to Connaught.⁵⁷ From 1879 to 1888, under the Archives' supervision, the Haldimand papers were calendared and transcribed. By 1908, an extensive calendar of Haldimand's papers had been created and published by the archives in Ottawa, but the transcriptions themselves were only transferred to Canada in the period from 1914 to 1931.⁵⁸

Connaught referred the request for documents to the Colonial Office, which searched its records with meagre results. In the end, its record office was only able to report that

an exhaustive search has been made for the documents enumerated in said enclosed letter, but that none of the patents described can be found entered in the Great Seal Docquet Books. The limits of the Indian Reservations appear to be fully defined by the Proclamation of the 7th October 1763, a copy of which is enclosed herewith. Neither is the deed of Sir Frederick Haldimand of 1783 or 1784 referred to, to be found in this Department.⁵⁹

http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayItem&lang=eng&rec_nbr=2077839&rec_nbr_list=2083341,2083376,2083362,2077840,2077838,2083304,2083218,2077839,2911724,157474

See especially Items 55 and 56:

<http://data2.archives.ca/e/e210/e005239349.jpg>

<http://data2.archives.ca/e/e210/e005239350.jpg>

⁵⁷ Douglas Brymner, "Canadian Archives," in American Historical Association, *Papers of the American Historical Association*, Volume 3 (G.P. Putnam's Sons, 1889), 395-407, 398.

⁵⁸ Charles McLean Andrews, comp. *Guide to the Manuscript Materials for the History of the United States to 1783*, Papers (Washington, DC: The Carnegie Institution, 1908), 21661-21882: Haldimand. Library and Archives Canada, Additional Manuscripts 21661-21892, "Custodial History," at

http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayItem&lang=eng&rec_nbr=105513&rec_nbr_list=105513,105525

⁵⁹ Headquarters - Correspondence, Reports, Memoranda and Newspaper Clippings Regarding the Political Status of the Six Nations, RG10, Indian Affairs records, vol 2284 file 57,169-1, Letter form From J.J. Cartwright, Record Office to Colonial Office, 25th June, 1891. At:

<http://data2.archives.ca/e/e210/e005239332.jpg>. Accessed 03 January 2011. The copy of the Royal Proclamation referred to in this correspondence was made from records in the British Public Record Office. See: Headquarters - Correspondence, Reports, Memoranda and Newspaper Clippings Regarding the

The petition of the Six Nations to their Brother Chief, the Duke of Connaught, clearly demonstrates that the petitioners saw a value in historical records, even if their efforts to gain access to them went largely ignored. Finding nothing in the records of the Colonial Office in Britain, the matter was referred back to Canada, and then to the Department of Indian Affairs for further research and resolution. Tiring of the long silence from Canada, the Six Nations Chiefs contacted Connaught again, but the reply they received from Indian Affairs, as their query was again passed back to Canada, was simply a reiteration of the letter from the Colonial Office. There is no evidence that any significant effort was made in Canada to locate the documents or copies of the documents the Chiefs requested.⁶⁰

Nor was this sort of obstructionism unique. The relative inaccessibility of the historical records to Indigenous people and communities continued well into the early twentieth century. For example, federal government officials went out of their way to keep from Aboriginal groups an important volume of early documents relating to land claims entitled *Papers Connected with the British Columbia Indian Land Question*, a document that would also later become important in the *White and Bob* case. Political science professor Paul Tennant writes:

In their internal correspondence federal officials at times discussed the benefits of withholding information from [Haida Chief Peter] Kelly and [Squamish leader Andrew] Paull, and the two were in fact prevented by [Deputy Superintendent of Indian Affairs D.C.] Scott and others from obtaining a copy of the vitally informative *Papers Connected with the*

Political Status of the Six Nations. RG10, Indian Affairs records, vol 2284 file 57,169-1 at: <http://data2.archives.ca/e/e210/e005239333.jpg> .

⁶⁰ Ibid. See: Items 57 to 75 inclusive. At:

http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayItem&lang=eng&rec_nbr=2077839&rec_nbr_list=2083304,2083218,2077839.

British Columbia Indian Land Question, the compilation of documents published in 1875 that provided the authoritative record of the land question's early years.⁶¹

The importance of this publication and the historical records it reproduced is underscored by the efforts governments were willing to make to keep the volume from Indigenous representatives. In 1927, Andy Paull and lawyer Arthur O'Meara appeared before a Special Joint Committee of the Senate and the House of Commons to examine the *Indian Act*. The commission had been called as a response to a petition by the British Columbia Allied Tribes in 1919.⁶² While appearing before the committee, Paull and O'Meara were deliberately kept from viewing a copy of the 1875 volume by federal officials. As Paull and O'Meara stood before the committee, their submission was repeatedly interrupted by government representatives. When some of their evidence was challenged as being presented without context, O'Meara left the hearings to search out the parliamentary library copy of the documents he needed. As he did, Paull took the opportunity to state

There is a book that has been published many years ago, which contains all the dispatches in colonial days with the Imperial Government. All those dispatches are contained in that book and we have been trying all the time since I have been associated with this matter to get a copy of it. I have been to the Department, and Dr. Scott could not let me have it. I have been to the Library, and they have not got it there. I know that Commissioner Ditchburn has that book; and I would ask to have access to it.⁶³

It was only when British Columbia's Indian Commissioner W. E. Ditchburn and federal Deputy Superintendent of Indian Affairs Duncan Campbell Scott were directly

⁶¹ Tennant, *Aboriginal Peoples and Politics*, 102.

⁶² Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada* (Toronto the Indian-Eskimo Association of Canada, second edition, 1972), 189.

⁶³ Quoted in Brendan F.R. Edwards, " 'I Have Lots of Help behind Me, Lots of Books, to Convince You': Andrew Paull and the Value of Literacy in English," *BC Studies* 164 (2009), 7-30, 20.

questioned by committee members that Scott reluctantly allowed, “I have no copy of this book, but this one for myself. I have no objection to allowing them to look at this book. I thought Mr. O’Meara was referring to something original from the Imperial Government.”⁶⁴ Even at this point, Ditchburn and Scott resisted having a copy of the book placed into evidence, as this would have allowed O’Meara and Paull access to it. Instead, they allowed passages from their copies to be read into evidence.⁶⁵

The volume Paull and O’Meara were struggling to obtain, *Papers Connected with the British Columbia Indian Land Question*, had itself an uncertain beginning. Created not at the instigation of the British Columbia government, but rather at the insistence of the opposition party of the day, the government had tried all means fair or foul to keep the documents it contained from public access from the very beginning. Few copies of the book had been printed, and they were limited to a very restricted distribution.⁶⁶

In 1927, changes to the *Indian Act* made the pursuit of Aboriginal rights through the courts almost impossible. As law professor Douglas Harris states:

Claims to Aboriginal and treaty rights all but disappeared from Canadian courts in the second quarter of the twentieth century. A 1927 amendment to the *Indian Act*, repealed in 1951, prohibited the raising of funds to pursue land claims without leave from the Department of Indian Affairs. The effect was to bar claims to Aboriginal rights, with the result that these rights were largely unknown to the judiciary in British Columbia when, in the 1960s, Aboriginal peoples and their legal counsel began to reassert them in the courtroom.⁶⁷

⁶⁴ Ibid. O’Meara returned from the Parliamentary Library empty handed.

⁶⁵ Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990), 107-108.

⁶⁶ Millar, “Subject or object?,” 329-350, 342. Despite the best efforts of the British Columbia government to prevent the creation of the book and then to limit its distribution, by 1888 the Nisga’a had somehow managed to obtain a copy of it. Edwards, “I Have Lots of Help behind Me’,” 21. Hamar Foster, “Letting Go The Bone,” 28-86, 48. But here again, the documents reproduced in the book were historical, but not clearly archival; in fact, in 1888, British Columbia did not yet have a provincial archives.

⁶⁷ Harris, “A Court Between,” 137-138. In an interview at a conference to mark the thirtieth anniversary of the 1973 Calder decision, Frank Calder recalled, “But then it stopped right there in 1927 after we met

From 1927 to 1951 Indigenous people were left with making the best use they could of letters, memorials, and petitions to pursue their rights. But they did not forget the importance that documentary records held for Euro-Canadian officials. When Andrew Paull appeared before the *Special Joint Committee of the Senate and House of Commons Appointed to Examine and Consider the Indian Act* in 1946, he stated with obvious irony, “Perhaps my words will not convince you. Here is one of these documents with you [sic] representatives of former years, signed on parchment, signed at command of the government, and it is a treaty you broke, and I charge you with having broken these treaties – you and all the members of your committee.”⁶⁸ Despite the difficulties faced by Indigenous Canadians in accessing archival sources, and the challenge modern researchers face in identifying how they accessed historical records when they did, it is clear that Indigenous people in the nineteenth and early twentieth centuries valued historical documents and engaged them in a variety of ways in pursuit of their rights.⁶⁹

defeat in 1927. Of course, I was only twelve years old then. Not too long afterwards, we were told that no lawyers were supposed to take up anymore of this [land rights] question.” Quoted in “Frank Calder and Thomas Berger, a Conversation,” in *Let Right be Done: Aboriginal Title, the Calder case, and the Future of Indigenous Rights*, Hamar Foster, Heather Raven, and Jeremy Webber, eds. (Vancouver: University of British Columbia Press, 2007), 37-53, 41. Douglas Sanders, “The Nishga Case,” *The Advocate* 36, (February/March 1978), 121-136, 121. It should be noted that the restrictions imposed by the new *Indian Act* were a direct response to the activities of Indigenous people and groups, including the Allied Tribes, and the Six Nations, who both not only pursued their rights within Canada, but took their claims to Great Britain, and, in the case of the Six Nations, to the League of Nations. Miller, *Reflections on Native-Newcomer Relations*, 190; Tennant, *Aboriginal Peoples and Politics*, 102; Gibson, *A New Look at Canadian Indian Policy*, 242.

⁶⁸ Edwards, “I Have Lots of Help behind Me,” 13. The treaty Paull held was Treaty Three. Treaty Three, part of treaties volume 1846, was part of the first set of documents transferred into the custody of the federal Archives in 1907, but it is not clear where Paull got this copy. See Library and Archives Canada, Archivanet: http://www.collectionscanada.gc.ca/databases/treaties/001040-119.01-e.php?&sisn_id_nbr=266&interval=20&&PHPSESSID=no0r9upkq1gu5c80khtair6972; and “Scope and Content,” notes part of Treaties and surrenders [textual record, object], Accessed through Archivanet: http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayItem&lang=eng&rec_nbr=133621&back_url=%28%29

⁶⁹ It is beyond the scope of this thesis to examine how archival sources were used in cases between 1927 and 1951 that affected Aboriginal rights, but were neither instigated by Indigenous people nor did they

Beginning in the mid-twentieth century, following changes in the 1951 *Indian Act*, Canada's Indigenous peoples and the Canadian legal system once again began to explore issues that had been silenced since 1927. Ranging from the legal basis for Aboriginal Title, to who possessed it, and how it might be expressed, the legal discourses of the mid to late twentieth century form a significant part of the foundation of our current understanding of Aboriginal rights, and extend forward in the expression of those rights through landmark legal agreements and decisions such as the Residential Schools Settlement, and the creation of the Truth and Reconciliation Commission of Canada. Two early cases, *Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia* were pivotal in establishing the existence of Aboriginal Title and Aboriginal rights in the Canadian courts. *Calder*, in particular, opened the doors to the acceptance of Aboriginal land claims by the Canadian government. A seemingly unlikely player in these battles was Willard Ireland, British Columbia's Provincial Archivist from 1940 to 1974. While much of Ireland's personal history might suggest the cliché of the "invisible archivist," his testimony in both these cases is a clear demonstration of the role that archives and archivists could play as actors in discourses about Aboriginal rights.

involve their participation. For examples of this, see Foster, "A Romance of the Lost," 171-212. Foster states that MacInnes made use of archival records in his report, personal communication, 11 December 2010. The report does reference material that appears to have come from the Public Archives. AMICUS No. 5377961 T.R.E. McInnes, "Report on the Indian Title in Canada, with special reference to British Columbia" (Ottawa : Dept. of Indian Affairs, [1909]). Dale Gibson notes that historical and archival records figured in *Re: Eskimos* [1939] S.C.R. 104, where the federal government applied to the Supreme Court to determine whether "Eskimos" were Aboriginal, and therefore a federal responsibility, and an early Aboriginal rights case, the *St. Catherine's Milling* case. While both of these cases were important in respect of Aboriginal rights, in neither case were Aboriginal people directly involved in prosecuting the matters in question. Dale Gibson, personal communication, 21 December 2010. It is important to note here that the ongoing efforts of Indigenous people during this period were significant in instigating the changes to the 1951 *Indian Act*. For more on this, see, for instance: Katherine Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994) (see particularly, Chapter 9).

Chapter One: “A number of rifle shots on Vancouver Island”: *Regina v White and Bob*

In the years following World War II, Indigenous efforts to assert and protect their rights gradually regained the momentum that had been lost with the 1927 changes to the *Indian Act*. But it was not until the 1960s that legal challenges asserting Aboriginal rights began to pick up speed. This chapter will look at the legal history of Aboriginal rights in the mid-twentieth century, as well as the early career of British Columbia’s Provincial Archivist at that time, Willard Ireland. In 1951, against a national and international backdrop of heightened awareness of and concern about human rights precipitated by the events of the Second World War (and exemplified in Canada’s signing of the *United Nations Universal Declaration of Human Rights* in December 1948), and consistent pressure by Indigenous groups to have their rights recognized, amendments to the *Indian Act* once again allowed Indigenous people to hire legal counsel and lobby on their own behalf. These changes opened up access to legal avenues and lobbying opportunities for Indigenous people and communities in Canada for the first time in more than twenty years.¹

At the same time, interest in community development and efforts to regain control over contested space, meaning, and their own autonomy, led some Indigenous people into Euro-Canadian archives or encouraged them to create their own versions of these. In her

¹ Robert Alexander Innes, “‘I’m On Home Ground Now. I’m Safe’: Saskatchewan Aboriginal Veterans in the Immediate Postwar Years, 1945-1946,” *The American Indian Quarterly* 28, 3&4 (2004), 685-718, 718; J.H. van den Brink, *The Haida Indians: cultural change mainly between 1876-1970* (Brill Academic Publishers, 1974), 145; Harris, “A Court Between,” 137-138; Hamar Foster, in *Let Right be Done*, Foster, Raven, and Webber, eds., 41, 56; Sanders, “The Nishga Case,” 121-136, 121; James W. St. G. Walker, *“Race,” Rights and the Law in the Supreme Court of Canada: Historical Case Studies*. Osgoode Society for Canadian Legal History (Waterloo: Wilfrid Laurier University Press, 1997), 197.

study of Aboriginal Archives in British Columbia, “Coming Full Circle?: Aboriginal Archives in British Columbia in Canadian and International Perspective,” Rita-Sophia Mogyorosi locates this move in the mid-twentieth century “Aboriginal revival” period. The creation of archives (and memories) that were controlled by Indigenous communities allowed some to tap into the long-standing Western tradition of archives as a pillar of state power, while retaining local control.² Indigenous people engaged documentary sources, as Mogyorosi notes, to “rebuild their identities, reinterpret misconceptions about their cultures, and in particular, prove in courts of law (where their oral histories continued to be misunderstood) that their title to their traditional lands and their rights continued to exist.”³ Mogyorosi characterizes this step in the creation of Indigenous archives as a reaction to legal and social needs at the time.⁴

In this context of increasing awareness of Aboriginal rights, and renewed Indigenous access to legal avenues, in the 1960s Indigenous leaders turned to the courts to continue their fight to have their rights recognized.⁵ In British Columbia, where the public discourse about Aboriginal rights had been all but silent since the late 1920s, public awareness of Indigenous issues emerged only slowly, even after the 1951 *Indian Act* amendments. And, as Hamar Foster notes, “More ominously, the intervening years of silence [from 1927 to 1951 had] created the impression that something was being

² Verne Harris traces this connection between archives and state power to the classical Greek period. Verne Harris, *Archives and Justice: A South African Perspective* (Chicago: Society of American Archivists, 2007), 78.

³ Mogyorosi, “Coming Full Circle?,” 3-4.

⁴ *Ibid.*, 3-4, 32-35. This has continued on, so that by 2006, Laura Millar noted that most First Nations in British Columbia had developed some capacity for holding archival records over the past three decades, although few were stand-alone operations. Millar, “Subject or object?,” 345.

⁵ Foster “Letting Go The Bone,” 31.

invented.”⁶ It was in this atmosphere of confusion, contest, and even confrontation that British Columbia’s Provincial Archivist Willard Ireland provided advice and testimony in support of the co-accused, in the case of *Regina v. White and Bob*.

If ever an archivist could be said to have hidden in plain sight, it was Willard Ernest Ireland. Ireland was a popular public speaker, editor of the *British Columbia Historical Quarterly*, and British Columbia’s Provincial Archivist for more than three decades. Still, little has been written about Ireland and the influence of his career not just in preserving history, but in actually making it. Yet Ireland’s contributions to *Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia* make Ireland an archivist worth noting.

In 2008, the *Victoria Times Colonist* featured an article about Ireland’s lengthy career, describing him as the “Indiana Jones of documentary evidence” for his role in locating an 1869 British Columbia petition to the American government for annexation to the United States.⁷ Despite this rather flamboyant accolade, Ireland’s career was, for the most part, quite conventional for his times. Born in Vancouver, British Columbia, on 4 January 1914, Ireland was the son of Methodist minister Howard Ireland.⁸ While Ireland was growing up, his family moved frequently from charge to charge in British Columbia and Ireland grew up in Kamloops, New Westminster, Chilliwack, and Victoria. Despite

⁶ *Ibid.*, 31.

⁷ “Archivist a guardian of B.C. records: Historical sleuth uncovered vital pieces of our province’s past,” *Times Colonist* November 3, 2008.

⁸ During the nineteenth and early twentieth centuries, some missionaries, particularly Methodist and Anglican missionaries, joined the struggle for Aboriginal rights. In fact, Indigenous leader Haida Chief Peter Kelly was a Methodist lay preacher. Hamar Foster, “We Are Not O’Meara’s Children: Law, Lawyers and the First Campaign for Aboriginal Title in British Columbia, 1908-1928” in *Let Right Be Done*, Foster, Raven, and Webber, eds., 61-84, 63, 68. In fact, Hamar Foster and Benjamin Berger quip in “From Humble Prayers to Legal Demands” that “even a cursory visit to the archives will reveal that the ‘meddlesome priest’ is as familiar a figure in nineteenth- and early twentieth-century British Columbia as in the England of Henry II.” 243.

all this moving, he finished high school and entered the University of British Columbia at the age of fifteen.⁹ Following graduation with a Bachelor of Arts degree in History, he took teacher training from Victoria College, and then went to the University of Toronto, graduating with an MA (history) at age twenty-one, with the thesis, "British Columbia, The United States, and British American Union."¹⁰ In 1934, Ireland and Helen R. Boutilier organized the Graduate Historical Society of the University of British Columbia.¹¹ In his last Master's year, Ireland was named the Alexander Mackenzie Scholar, and following graduation, he pursued research in the Hudson's Bay Company Archives in London and the National Archives in Washington, D.C. (where he located the Annexation Petition of 1869 that the 2008 *Times Colonist* article alludes to, and arranged for a photostatic copy to be made). Ireland went on to teach English at South Burnaby High School from 1938 to 1940.¹²

In September of 1940, British Columbia's Provincial Archivist W. Kaye Lamb left the provincial archives to become archivist at the University of British Columbia.

⁹ "Archivist a Guardian of B.C. Records"; G.E. Mortimore, "Willard Ireland, Architect of the Archives." *Daily Colonist* 2 March 1952, 4; "Willard E. Ireland," speech presented in 1971 when Ireland received an honorary Doctorate from Simon Fraser University. At: http://www.sfu.ca/ceremonies/files/Citations/1971_-_Willard_E._Ireland_Citation.pdf; Bob Broadland, "A Man for All Missions: Willard Ernest Ireland," *Museum Roundup* 53, 9-14, 9-12; Biography: "Willard Ireland fonds," At: <http://memorybc.ca/index.php/informationobject/show/rad/29118>. Willard Ireland, "British Columbia, The United States, and British American Union," (M.A. thesis, Department of History, University of Toronto, 1935). Ireland also worked for a year towards his Ph.D., planning a dissertation on British Columbia's entry into Confederation, but did not complete it. Mortimore, "Willard Ireland," 4; British Columbia Legislative Assembly, "Hansard," 7 March 1974.

¹⁰ "Archivist a Guardian of B.C. Records"; "Willard E. Ireland;" Mortimore, "Willard Ireland," 4; Broadland, "A Man for All Missions" 9-12; Biography: "Willard Ireland fonds;" Mortimore, "Willard Ireland, 4.

¹¹ See historical note at the University of British Columbia Archives: The Graduate Historical Society was established in April 1934 to "encourage among graduates in history an interest in the discussion of historical subjects." The Society served as a gathering place for former University of British Columbia history graduates and recognized the best student in the History graduating class through the endowment of a prize. Helen R. Boutilier (Arts '34) served as the first president of the society which existed only until 1944. At: http://www.library.ubc.ca/archives/u_arch/gradhist.html.

¹² "Archivist a Guardian of B.C. Records;" Mortimore, "Willard Ireland," 4; "Willard E. Ireland;" Broadland, "A Man for All Missions" 9-12; Biography: "Willard Ireland fonds."

Lamb and Ireland both represented a relatively new trend towards the professionalization of archives, and of university educated historians being employed as archivists in Canada. British Columbia's R.E. Gosnell, and federal archivists Douglas Brymner and Arthur Doughty, Ontario's Alexander Fraser, and Quebec's Pierre-Georges Roy had all come from journalism to become archivists. As Terry Cook notes, citing W. Kaye Lamb,

‘It was not until the 1930s,’ Lamb observed, ‘that trained historians took over.’Yet despite this growing professionalization, there were still only four provincial archivists in Canada when Lamb started in 1934, and he doubted ‘if there were more than a dozen individuals in Canada who were designated as archivists....’¹³

Even in the 1930s and 1940s, archiving in Canada was a relatively recent phenomenon. British Columbia's provincial archives can trace its roots back to 1893, when Premier Theodore Davie appointed the province's first legislative librarian, sometimes journalist and historian R.E. Gosnell. In 1894, an act authorizing an expenditure for the legislative library included the authority to create a Bureau of Statistical and Historical Information whose purpose included the collection and compilation of “data relating to the history of the Province.” Gosnell found himself “cleaning up ‘with pitch fork and wheelbarrow’ the mass of ‘newspapers and Blue Books ... thrown into an outside passage and heaped up there for years,’” including the “original journals of the Hon. J.S. Helmcken.” Turning his attention to the Provincial Secretary's office, he found a trove of records sharing a room with a sooty chimney. This level of chaotic organization continued into the 1930s, when W. Kaye Lamb was

¹³ Cook, "An Archival Revolution," 191. Ireland's professionalized vision of an archives would put him at odds with “old school” archivists like Vancouver's Major J.S. Matthews. Sleight, *The Man who Saved Vancouver*, 125. John Hosie, who served as provincial archivist and librarian came from a library background in Scotland. “Personal” *The Library World*, Volume 14 (1912), 307. Willard Ireland testimony in *Regina v. White and Bob*, 1963, transcript provided by the Supreme Court of Canada (possibly from Appeal Books), 25. Copy in possession of author.

appointed provincial archivist, making public access to the archives' records all but impossible well into the twentieth century.¹⁴

What the archives lacked in order it made up for, however, in collecting. While many of the cultural and government records it collected, which would play important roles later in supporting Indigenous claims, may not have been easily found, the province's first two archivists, R.E. Gosnell, and E.O.S. Scholefield, both undertook ambitious local collecting and copying programs so that these records were at least preserved. Both Gosnell and Scholefield saw the primary role of the archives as supporting the writing of history, but a history that focused largely on fur trade, colonial, and early settler history. It is possible, however, that lawyer T.R.E. McInnes may have drawn on the archives when he wrote his 1909 "Report on the Indian Title in Canada with Special Reference to British Columbia," for the federal government. McInnes' report supported the claim that in British Columbia there existed "Indian Title" independent of treaty, and that that title had not been extinguished.¹⁵

Lamb and Ireland not only represented the new trend to appointing professional historians as archivists. In British Columbia their careers also marked the beginning of the trend to "home grown" archivists. Both Lamb and Ireland had received their early university training at the University of British Columbia. At the same time, historical scholarship in and about British Columbia, championed by Lamb, was changing --

¹⁴ Eastwood, "R.E. Gosnell, E.O.S. Scholefield," 40-41; Cook, "An Archival Revolution," 190.

¹⁵ Eastwood, "R.E. Gosnell, E.O.S. Scholefield," 40-56; Hamar Foster, personal communication, 11 December 2011. T.R.E. McInnes [aka MacInnes], "Report on the Indian Title in Canada." For more on this, see: Foster, "A Romance of the Lost," 171-212. McInnes' report does reference historical material, but it is difficult to identify the actual sources of the material cited in his report.

opening up in its own right, embracing the fields of religious, social and economic history.¹⁶

Across Canada, the new group of historian-archivists embraced a distinctly Canadian vision of “total archives.” Combining public and private records, and textual and non-textual material, they saw the role of archives as securing the raw materials, as Tom Nesmith writes, “so that academic history could be written, in order to obtain the cultural, educational, and political benefits of such historical knowledge.”¹⁷ Lamb and then Ireland inherited an archives very much embedded in this trend. Noting the 1934 death of provincial archivist John Hosie, historian George Brown remarked that “British Columbia has in its archives built up a collection of historical materials which is an asset not only to the province but to the dominion as a whole.”¹⁸

Writing about his own early experiences, Lamb described the challenges this “total archives” approach presented:

I was very much on my own, and there seemed to be no one to whom I could turn for advice....Hopefully I turned to Hilary Jenkinson’s *Manual of Archives* [sic¹⁹] *Administration*, the only publication in the field available to me – indeed, I believe that at the time it was the only publication of the kind in English. But it took such a narrow view that it was of little or no assistance; in Jenkinson’s view only official documents that had been continuously in official custody were entitled to be designated as archives. It was obvious that he would have looked upon the Provincial Archives of British Columbia, with its small collection of

¹⁶ “Introduction,” in *Historical Essays on British Columbia*. J. Friesen and H.K. Ralston eds. (Montreal: McGill-Queen’s Press, 1980), xxi; Cook, “An Archival Revolution,” 192. Marking Ireland’s retirement in 1974 with a speech in the Provincial House, The Hon. E. Hall, Provincial Secretary particularly noted: “He was educated in various schools in British Columbia, so he’s an archivist of the province born in the province.” “Hansard,” 7 March 1974.

¹⁷ Tom Nesmith, “What’s History Got to Do With It?: Reconsidering the Place of Historical Knowledge in Archival Work,” *Archivaria* 57 (Spring 2004), 1-27, 7.

¹⁸ George W. Brown “Provincial Archives in Canada,” *Canadian Historical Review* 16:1 (1935), 1-18, 8.

¹⁹ “[sic]” found in article quoted.

official records and its much larger accumulation of historical manuscripts, transcripts, etc., as being little better than an archival dog's breakfast.²⁰

When Ireland succeeded Lamb as provincial archivist in 1940, beginning a career that would span more than three decades and five premiers, he inherited a diverse collection of textual and material objects and government and private documents that covered both the pre- and post-Confederation periods.

In 1939, just before his appointment as Provincial Archivist, Ireland had written his first article for *The British Columbia Historical Quarterly*, "The Evolution of the Boundaries of British Columbia,"²¹ an article that would prove so important later in his career that it was cited in the decision of *Calder v. The Attorney General of British Columbia*.²² As provincial archivist, he also became editor of *The British Columbia Historical Quarterly*, beginning his tenure in 1941.²³ *The British Columbia Historical Quarterly* had been launched in 1937 under Lamb and reflected the emerging historical and archival professionalism of the time. As historians Jean Friesen and H.K. Ralston note, the *Quarterly*, co-sponsored by the Provincial Archives and British Columbia Historical Association, "came to reflect the growing diversity of interest in British Columbia history, especially in social, economic and religious history, although the overwhelming bias was still toward the fur trade and gold rush eras."²⁴

²⁰ Cook, "An Archival Revolution," 190.

²¹ *British Columbia Historical Quarterly*, (October 1939): 263-282.

²² A transcript of the decision is available at: <http://library2.usask.ca/native/cnlc/vol07/017.html> .

²³ "Notes and Comments," *Canadian Historical Review*, 21:4 (1940), 451. Under Ireland, the *British Columbia Historical Quarterly* continued to publish until its 1958 issue. The later issues, however, became more sporadic, and the last issue, although dated to 1958 was not in fact published until 1962. The *British Columbia Historical Quarterly* was succeeded in 1968 by the *BC Historical News*. Ann Yandle, "BC Historical News: A Short History," *British Columbia Historical News*, 37:4, 2004, 2.

²⁴ "Introduction," *Historical Essays on British Columbia*, Friesen and Ralston, eds., xxi. John Forsyth, provincial archivist in the 1920s, stated in 1925 that "The history of British Columbia is inseparable from that of the Hudson's Bay Company." Dave Obee, "Hudson's Bay Archives Illuminate Victoria's Past," *Times Colonist*, January 10, 2010. At:

In 1941, Ireland joined the British Columbia Indian Arts and Welfare Society. Art and Design professor Ronald Hawker describes the society as typifying

a social reform ideology popular at that time in British Columbia. It emphasized the use of study groups, cooperation, and citizenship education in an effort to improve impoverished sections of Canadian society. It relied upon models from England and the United States, and it recognized the potential of the popular value of First Nations 'art.'²⁵

The society was a moving force behind a successful arts program at the Inkameep School during the interwar years.²⁶ Ireland's perspective on the society is suggested in a review he wrote of a book created by the society, *Panchromatic Photographic Reproductions of Twenty Charts prepared for use in the Indian Schools of B.C., by direction of the Indian Affairs Office, Ottawa:*

Early in January, 1940, a small committee was formed concerned with the revival of Indian tribal arts in British Columbia as a contribution to Canadian culture. The publication of *The Tale of the Nativity* (reviewed in the January issue of this Quarterly), was one of the accomplishments of this industrious committee. A commission was received ... to prepare twenty large charts in colour, of fine examples of the various tribal forms of carvings, paintings, weaving, basketry, and beadwork.

The charts were primarily intended for circulation in the Indian Schools of the Province in order to show the children the accomplishments of their forebears.... As an illustration of the range of the former arts and crafts of our native tribes this series of charts is unmatched. Fortunately panchromatic photographs, coloured and uncoloured, have been prepared for the entire series.²⁷

<http://www.timescolonist.com/entertainment/books/Hudson+archives+illuminate+Victoria+past/2425563/story.html#ixzz0jJiQils8>.

²⁵ Ronald W. Hawker, *Tales of Ghosts: First Nations Art in British Columbia, 1922-61* (Vancouver: University of British Columbia Press, 2003), 87.

²⁶ For more information about the Inkameep programme, see the Virtual Museum of Canada exhibit at: <http://www.virtualmuseum.ca/Exhibitions/Inkameep/english/story/index.php>

²⁷ Willard Ireland, "Review: *Panchromatic Photographic Reproductions of Twenty Charts prepared for use in the Indian Schools of B.C., by direction of the Indian Affairs Office, Ottawa. British Columbia Historical Quarterly*" (April, 1941), 159-160. The innovative Inkameep arts program ended in 1942, when teacher Anthony Walsh resigned to join the war effort. In 1943, Walsh's replacement "burned the children's art, denouncing Walsh's teaching practices as backward and detrimental to the process of 'civilizing the children.'" <http://www.virtualmuseum.ca/Exhibitions/Inkameep/english/story/index.php>

During Ireland's tenure as provincial archivist, the archives acquired works by a number of noted Indigenous artists who had connections with the society, including Judith Phyllis Morgan, George Clutesi, and Francis Batiste.²⁸

Although Ireland published some articles, mostly on famous British Columbia figures, boundaries and territories, and colonial and fur trade period history, his contributions to writing were more often in the form of book reviews in the *British Columbia Historical Quarterly* and his editorship of that journal. Some of Ireland's writings in the *Quarterly* reveal a sensitivity to Indigenous issues that may, in part, explain his later willingness to contribute to *White and Bob* and *Calder*. Chad Reimer has identified one theme in British Columbia historiography before 1958 as seeking "to impose the hegemony of an Anglo group..." by denying Indigenous people "a history altogether."²⁹ Ireland, however, offers a counter example. In 1941, Ireland began a book review with the statement: "The history of the Indian in the Pacific Northwest normally does not make pleasant reading, for few aboriginal peoples have been made the victims of more inhuman maltreatment." Continuing the review, Ireland noted that the author's "sympathetic appreciation of Indian practices and customs made easier the task of

²⁸*Regina Leader Post*, 30 July 1949, 16. See also, the British Columbia Archives "Time Machine:" <http://www.bcarchives.gov.bc.ca/exhibits/timemach/galler03/frames/morgan.htm> http://www.bcarchives.gov.bc.ca/sn-AADDA9/exhibits/timemach/galler03/frames/morgan_g.htm http://www.bcarchives.gov.bc.ca/exhibits/timemach/galler03/frames/clutes_g.htm; and <http://www.bcarchives.gov.bc.ca/exhibits/timemach/galler03/frames/batiste.htm>. "In 1951 the Provincial Archives of British Columbia obtained several Francis Batiste paintings through the B.C. Indian Arts and Welfare Society and were 'particularly happy to be able to add these to [the] permanent collection.'" (Willard Ireland to M. Baird, March 14, 1951, B.C. Archives, Batiste Artist File)." Francis Batiste," At: <http://www.bcarchives.gov.bc.ca/sn-1F67ABB/exhibits/timemach/galler03/frames/batiste.htm>

²⁹ Reimer, *Writing British Columbia History*, 151.

reviewing with proper historical perspective the tragic details of an Indian war.”³⁰ In a review of *Maquinna the Magnificent* in 1946, Ireland noted that its author

has sensed the epic quality of the life of Maquinna, the chief of the Nootkans. Consequently his story unfolds not as a narrative of the great visitors to Nootka — British, Spanish, or American — but as a chronicle of the native peoples. All the great explorers and traders — Cook, Hanna, Strange, Meares, Haswell, Colnett, Martinez, Haro, Vancouver, and Quadra, to mention but a few — appear upon the scene and their activities are described with a fine sense of historical proportion. But, throughout, it is the reaction of Maquinna, Callicum, his friend, or Comekela, ‘the travelled one,’ to these intruders which is emphasized. Events and people thus take on a new significance: Meares becomes responsible for returning Comekela to his people rather than the builder of the North West America; the burning of Yuquot seems more distressing than the ‘Spanish Insult to the British Flag’; the murder of faithful Callicum raises more resentment against the conduct of Martinez than does his mistreatment of Colnett; Alberni becomes more human in his role of peace-maker. The threads of the career of Maquinna are skilfully woven into the fabric of a majestic historic tapestry — a career which reaches its zenith in the brother-in-friendship era of Quadra and Vancouver and descends into the tragic period of decline culminating in the massacre on the Boston.³¹

In the late 1950s, Ireland and anthropologist Wilson Duff worked on a project to preserve Gitanyow totem poles and oral histories, foreshadowing their future work together in *White and Bob* and *Calder*.³²

As provincial archivist, Ireland served a broad constituency. He and his office offered assistance to students and writers, politicians, protocol officers, and old-age

³⁰ Willard Ireland, “Review: *War Chief Joseph*,” *British Columbia Historical Quarterly* (October 1941), 311. In a book review in 1952, Ireland chided the author for his omission of Indigenous peoples, stating that “the title of the volume definitely includes the people of the Province, and it is to be regretted that only scant attention is paid to the original Indian inhabitants of the region—a subject of curiosity, if not genuine interest, elsewhere. Similarly, one might have expected some reference to some of the minor ethnic groups and religious sects that have contributed to the development of the country, particularly, for example, the Doukhobors and the Mennonites.” Willard Ireland, Review: *British Columbia: Its History, People and Industry*. *British Columbia Historical Quarterly* (January to April, 1952), 107-110.

³¹ Willard Ireland, “Review: *Maquinna the Magnificent*,” *British Columbia Historical Quarterly* (July 1946), 250-251.

³² Neil J. Sterritt, Robert Galois, *Tribal Boundaries in the Nass Watershed* (Vancouver: University of British Columbia Press, 1998), 92. It is interesting to note that in 1963 Ireland was a pallbearer at the funeral of Mungo Martin. Martin was a distinguished Kwakwaka'wakw leader and artist, perhaps best known for his work with totem poles. *American Anthropologist* 65:4 (August 1963), 894–896.

pension applicants who had never had a birth certificate and needed alternate proof of age.³³ Nicknamed “The Oracle,” Ireland had a reputation for being able to come up with an answer to almost any query. Dealing with such a broad range of enquiries, Ireland, when he was approached one day in 1963 by a young and as yet unknown Thomas Berger with a research question related to a legal case he had taken on, may not have had any inkling of how important that question would be.

Regina v. White and Bob (1963, Supreme Court 1965) and *Calder v. The Attorney General of British Columbia* (1969, Supreme Court 1973) were pivotal cases in the legal discourse that reopened following the 1951 changes to the *Indian Act*. *Regina v. White and Bob* was important both because it recognized the Douglas Treaties as treaties under Canadian law, but also because it opened the possibility that Aboriginal Title might be recognized as a legal interest in current law. The *Calder* decision accepted the argument that Aboriginal Title existed, and opened the doors to the acceptance of Aboriginal land claims by the Canadian government.³⁴ Willard Ireland became an important actor in both these cases.

Paul Tennant notes that

Until 1963 no court case arising in British Columbia had involved aboriginal rights in any significant way, and none had involved Indian title. Cases arising elsewhere in Canada had involved aboriginal rights, but few had concerned aboriginal title. Since 1963 the most important aboriginal rights cases in Canada have arisen in British Columbia, and the most notable of these have concerned aboriginal title. The changes were initiated by a number of rifle shots on Vancouver Island in 1963.³⁵

³³ Mortimore, “Willard Ireland,” 4; Broadland, “A Man for All Missions,” 9.

³⁴ “Frank Calder and Thomas Berger: A Conversation,” in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Hamar Foster, Heather Raven, and Jeremy Webber, eds. (Vancouver: University of British Columbia Press, 2007), 38; Sanders, “The Nishga Case,” 125.

³⁵ Tennant, *Aboriginal Peoples and Politics*, 218.

On 7 July 1963, Nanaimo band members Clifford White and David Bob went hunting for food for their families. On the south slope of Mount Benson, on Vancouver Island, the pair shot six deer. As they returned to their reserve they were stopped by a game warden and charged under provincial hunting regulations. On 23 September 1963 the case came before the magistrate in Nanaimo. The pair was found guilty and fined. Bob and his family were able to raise the \$100 fine, but White could not, and was sent to the Oakalla Prison farm for 45 days. Maisie Hurley, a vocal advocate for Aboriginal rights, and the widow of lawyer Tom Hurley (who had once employed a young Thomas Berger), arranged to pay White's fine. It was then, Berger relates, "that Maisie came to my office and announced I had two new clients."³⁶ The case and the resentment it aroused in local Indigenous communities led to the formation of the Southern Vancouver Island Tribal Federation. The federation backed the appeal of the conviction.³⁷

From the start, Berger was faced with a problem. There was no question that the men had shot the deer during closed season. Looking for the basis for an appeal, Berger travelled to the men's Nanaimo reserve and attended a conference with the band. It was at this meeting that Berger realized that this was not just a matter between two men and the Crown. It involved the entire band. In his memoir, Berger recalled

The elders told me that the members of the Nanaimo band had, under an old treaty, the right to hunt in the closed season. What treaty? I had never heard of such a treaty, but if it existed that would make a difference.³⁸

³⁶ Thomas Berger, *One Man's Justice: a Life in the Law* (Vancouver: Douglas & McIntyre, 2002), 87-88; Sanders, "The Nishga Case," 125-126.

³⁷ Thomas R. Berger, "Wilson Duff and Native Land Claims," in *The World Is as Sharp as a Knife: An Anthology in Honour of Wilson Duff*, Donald N. Abbott, ed. (Victoria: British Columbia Provincial Museum, 1981), 49-64, 49.

³⁸ Berger, *One Man's Justice*, 88.

This was no easy task. From its earliest days as a province, British Columbia had been known for its resistance to Indigenous treaties.³⁹ Aboriginal rights cases had been dormant for more than two decades in Canada and, as Kent MacNeil states, if “Canada’s attitude to Aboriginal land claims in the 1960s” could be described “as unreceptive, the attitude of British Columbia at the time – and, indeed, since before the province joined Confederation in 1871 – can more appropriately be termed hostile.”⁴⁰ A small part of British Columbian land east of the Rocky Mountains was included in Treaty No. 8, but other than that, there were no numbered treaty lands in British Columbia. Berger was able to track down records of Indigenous land transfers on Vancouver Island, transcribed and somewhat edited, in *Papers Connected with the Indian Land Question 1850-1875*.⁴¹ But the texts of the documents, known today as the “Douglas Treaties,” did not include the word “treaty.” And they were made, apparently, not with the Crown, but with the Hudson’s Bay Company. Berger realized that the history of colonization in British Columbia, in effect, the larger societal provenance of the documents, would be essential to his case if he was to prove that these documents were in fact treaties, and not simply conveyances.⁴²

³⁹ Ibid.; Terry Eastwood, “The Indian Reserve Commission of 1876 and the Nanaimo Indian Reserves,” *B.C. Historical News* 12 (February 1979): 8-16.

⁴⁰ Kent MacNeil, “Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence,” in *Let Right be Done*, Foster, Raven, and Webber, eds., 129-152, 130.

⁴¹ Published by the British Columbia legislature. Victoria [B.C.]: R. Wolfenden, 1875. An online scanned copy of this publication is available at: <http://www.archive.org/details/papersconnectedw00britiala>, or through Early Canadiana Online, CIHM/ICMH collection numérisée -- no. 9_00281 http://www.canadiana.org/ECO/SearchResults?id=1d5ef354be785d38&query=9_00281&range=text&bool=all&subset=all&pubfrom=&pubto= The format that the edited printed documents take belie the complex history of the treaties and their problematic form. Wilson Duff notes that “The treaties themselves, somewhat edited to tidy them up, were published by the provincial government in 1875 and have attained a certain historical stature in that form. It is the original hand-written documents, however, that are the legal versions.” Wilson Duff. “The Fort Victoria Treaties.”8.

⁴² Berger, *One Man's Justice*, 88-89; *Papers Connected with the Indian Land Question 1850-1875*, 158.

On the surface, the documents represented a transaction between James Douglas as a representative of the Hudson's Bay Company and fourteen Indigenous groups on Vancouver Island in and nearby present-day Victoria. Fourteen agreements were created in the years between 1850 and 1854. The language of the agreements was essentially consistent and included, for the Indigenous signatories, whose names were each followed by an "X," the "liberty to hunt over the unoccupied lands."⁴³ Berger's research turned to the history of the colony. James Douglas was the Hudson's Bay Company governor. But he also became the colony's governor after the resignation of Governor Blanshard in 1851, and this fact shed a new light on the documents. Berger believed that he could argue that Douglas was acting both in his capacity as Hudson's Bay Company governor and as a representative of the Crown when he undertook the agreements, but he would need the support of archival documents if he was to make his case.

⁴³ Berger, *One Man's Justice*, 89-92.

Chapter Two: “I am certain it was intended as a treaty”: Willard Ireland’s Contributions to *Regina v. White and Bob*

On 5 November 1963 Berger wrote to Willard Ireland asking if the originals of the treaties reproduced in the printed *Papers Connected with the Indian Land Question 1850-1875* were housed in the Provincial Archives. Ireland quickly responded that they were. Furthermore, he added:

In most cases the treaty is fully inscribed followed by the signatures, including all Indians by their marks. In the case of the Saalequun purchase the inscribed wording of the treaty is not present, but in pencil and penned (sic) to the page is the wording ‘A similar conveyance of country extending from Commercial Inlet, 12 miles up the Nanaimo River’ and this is followed by no less than 159 Indian signatures (by mark) grouped under six or seven Chiefs.¹

Ireland’s letter went on to describe the form of the rest of the document. As Berger recalled in his memoir, he had just discovered that the “treaty” was, in fact, “a blank piece of paper and 159 X marks.”²

The Berger/Ireland correspondence now located in the British Columbia Archives shows a lively interest on both their parts, and suggests that they also met in Ireland’s office from time to time to discuss the case. Ireland seems to have taken on the task of identifying the relevant documents in his and other archives with a keen interest, often

¹ Correspondence, “Thomas Berger to Provincial Archives,” British Columbia Archives, GR-1738, box 14, file 1. 8 November 1963. The “Douglas Treaties,” collected together in a bound volume, were, as described in an article in 1969 by anthropologist Wilson Duff, “in the Provincial Archives in a large, hardcover notebook, inscribed ‘Register of Land Purchases from Indians.’ The Songhees, Klallam, Sooke, and Saanich treaties, in the order in which they were made, form the first part of the book. They fill less than half of the blue, lined, foolscap-sized pages; the rest remain blank. The Fort Rupert and Nanaimo treaties were written on separate sheets of the same paper and are attached to pages inside the book. The treaty book was evidently made up by Douglas himself, since most of it, including the title on the front cover, is in his distinctive hand. Sections of the texts of the treaties ... are in another hand and a few scribbled notations have been added at a later time.” Duff, “The Fort Victoria Treaties”, *BC Studies* 3 (Fall), 1969, 3-57, 8-9. The treaties are still held in the British Columbia Archives, see: MS-0772, HUDSON’S BAY COMPANY. FORT VICTORIA. Originals, 1850-1860, 1 cm; microfilm (neg.), 1850-1860, 35 mm A01285(6).

² Berger, *One Man’s Justice*, 90, 93.

replying to Berger's queries within days. On 21 November 1963, Berger wrote to Ireland thanking him for his letter "outlining the treaty made between the Governor of Vancouver Island and the Sarlequun Indians." Clarifying the point that there was no text of the agreement anywhere in or on the document, Berger asked Ireland, "can you tell me where the inscribed wording of the treaty is to be found or if it exists at all." Asking for a certified copy of the document Ireland had located in the Archives, Berger finished his letter saying

In view of the fact (as I gather) that the treaty made with the Sarlequun Indians does not appear fully inscribed in the 'Register of Land Purchases from Indians', it may be that you cannot supply me with a copy of the treaty certified to be true. If so, it may be necessary for me to call you as a witness when the appeal comes before the County Court; in that event, I would call upon you to produce the 'Register of Land Purchases from Indians' in order to let the Court determine whether there was in fact a treaty made with the Sarlequun Indians. Would you let me know whether you would have any objection to this.³

On 26 November 1963, Ireland replied:

Naturally I have no objection to appear as a witness with the record-book if necessary.... I presume that you are aware of the policy behind these treaties, that James Douglas was acting as agent of the Hudson's Bay Company which by terms of the Royal Grant was sole proprietor of Vancouver Island; that he was not acting as the governor of the colony of Vancouver Island; that he had instructions from the Company to extinguish the Indian title by this device; and that in the case of earlier treaties he reported his action to the Company in London. Despite the absence of the text of the treaty I am certain it was intended as a treaty and that the intended wording was to be similar to the other treaties.⁴

On 2 December 1963 Ireland sent Berger certified copies of the Royal Grant of Vancouver Island to the Hudson's Bay Company, dated 13 January 1849, and of the

³ Correspondence, "Thomas Berger to Provincial Archives," British Columbia Archives, GR-1738, box 14, file 1.

⁴ Ibid. Ireland did ask that Berger subpoena him, allowing him to bring archival documents with him, and to present as an expert witness. Ireland to Berger, 2 December 1963.

Reconveyance of Vancouver Island, dated 3 April 1867. These documents were critical to Berger showing, in his own words, that “Douglas was not taking off one hat and then putting on the other – metaphorically speaking. He always wore two hats. The Crown’s interests were wholly mingled with the interests of the company. He could sign the conveyances as chief factor, but it made no difference – he remained the governor.”⁵

Berger began to engage Ireland in a series of research questions related to the case, questions that Ireland promptly responded to.⁶ With Ireland’s well-earned reputation for a “photographic memory,” his ability to combine “through his organized mind a terrific sense of recall and timing with a marvellous faculty for interpreting history so that others can understand and appreciate it,” and his immense personal knowledge of the archives and of British Columbia’s colonial history, Berger could not have chosen a better ally. Ireland’s knowledge of the societal provenance of relevant records allowed him to contextualize the records and to make important connections.⁷

Berger recalled:

We enlisted the provincial archivist, Willard Ireland, a historian, in the search for the true meaning of the document. He pointed us towards a letter that Archibald Barclay, the secretary of the Hudson’s Bay Company in London, had sent to Douglas in December 1849. In it, Barclay authorized Douglas to take conveyances from the Indians. He gave him copious instructions on compensating the Indians for their land, the chief

⁵ Ibid. 2 December 1963. (Unfortunately, the letter by Berger to Ireland requesting these copies is missing from the Berger correspondence file held by the British Columbia Archives.) Berger, *One Man's Justice*, 92.

⁶ See, for example: Correspondence, “Thomas Berger to Provincial Archives,” British Columbia Archives, GR-1738, box 14, file 1: Thomas Berger to Willard Ireland, 29 November 1963; Thomas Berger to Willard Ireland, 25 March 1965; Willard Ireland to Mr. T.R. Berger, 29 March 1965; Thomas Berger to Willard Ireland 7 April 1965; Thomas Berger to Mr. W. Ireland, 8 April 1965; Willard Ireland to Mr. T.R. Berger, 12 April 1965. This last letter is particularly interesting, as in it Ireland seems to challenge a government statement stating: “Quite frankly I do not understand the Provincial Government spokesman’s suggestion as to ‘other arguments (sic)...made on the mainland of B.C. between Hudson’s Bay Company and the Indians’ would have to be recognized under the judgement for I know of no ‘other arguments (sic)’ than Treaty No. 8 which was negotiated by the Federal government.”

⁷ Broadland, “A Man for All Missions,” 10, 13.

object of these instructions being to ensure that the scale of compensation should be limited. Then Barclay went on to say: 'The Natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown.' This stipulation was in keeping with what had been British policy since 1763. That is, the Crown did not recognize any sales of land by the Indians to private persons. Only the Crown could acquire Indian land. Given Barclay's letter, the company was behaving suspiciously like the Crown itself.⁸

In this dispatch, Barclay continued: "The right of fishing and hunting will be continued to them...."⁹

Barclay's instructions, written in 1849, and acknowledged by Douglas with a receipt in 1850, predated any of the documents. Douglas had used Barclay's instructions in negotiating the conveyances. But Berger was still left with the problem that, while thirteen of the conveyances documented Douglas' promises, including the right to continue to hunt and fish, the fourteenth, the critical document covering the Nanaimo band, was a set of 159 names followed by Xs. It had no such text.¹⁰ To assert that the Nanaimo agreement conveyed the same meanings as the other 13, Berger had to turn to other archival documents.

The key lay in the conclusion of Douglas' dispatch to Archibald Barclay of 16 May 1850, in which he wrote:

⁸ Berger, *One Man's Justice*, 93.

⁹ *Ibid.*, 93.

¹⁰ *Ibid.*, 94. The text supplied to Douglas by the British Colonial Office was a "boilerplate" treaty text that was also used in New Zealand by the New Zealand Company in a similar scheme that sought to promote British colonization through the activities of private companies. Harring, *White Man's Law*, 191; Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: University of British Columbia Press, 2000), 13. See also Dennis F. K. Madill, "British Columbia Indian Treaties in Historical Perspective," *Indian Affairs and Northern Development*, 1981, for more information on the parallels between the two countries. At: <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/C-B/trcC-B-eng.asp>

I attached the signatures of the Native Chief's [sic] and others who subscribed the deed of purchase to a blank piece on which will be copied the contract or Deed of conveyance, as soon as we receive a proper form, which I beg may be sent off by return of Post.¹¹

Douglas, it seems, had had the conveyances marked on blank sheets, to be able to add the exact wording of the agreement once he received it from Barclay.

As Berger continued to correspond with Ireland, mining the archives' colonial correspondence, trying to understand the context of the treaties, his position seemed to be improving. Archival evidence supported the idea that the document was indeed intended to be an agreement with the same "boiler plate" text as the other thirteen agreements. Berger's next task was to link White and Bob with the band who had signed the Nanaimo agreement. For this he and Ireland went together to enlist the help of Wilson Duff, curator at the Provincial Museum.

Duff was well acquainted both with North West Coast Indigenous culture, and the British Columbia Indigenous land question. He suggested consulting the census that Douglas had directed in the early 1850s. The census showed four groups at Nanaimo, with a total of 159 "Men with beards." The treaty must have been signed by all the men from these four groups. Berger concluded that "all the Indians at Nanaimo who could claim descent from any of the tribes that lived there in 1854 could claim the right to hunt. And my clients were undoubtedly descended from Indian people who had lived there in 1854."¹²

¹¹ Quoted in Berger, *One Man's Justice*, 94. The term "men with beards" corresponded to the number of men signing the treaty, suggesting that the designation related to being an "adult" member. Berger, *One Man's Justice*, 99.

¹² Presumably, Ireland may have had a copy of this census, as he notes the archives has a copy in correspondence in 1968. Correspondence, "Thomas Berger to Provincial Archives," British Columbia Archives, GR-1738, box 14, file 1, Ireland to Berger, 18 December 1968. Berger to Ireland, 25 March 1965. Berger, *One Man's Justice*, 98-99.

The case was heard in March 1964 before Judge H.A. Swencisky. Berger drew on both Duff and Ireland for their expert knowledge. Calling on Ireland as a witness, Berger brought his hard-won historical understanding of the context of the documents to bear. Ireland presented the curious 1854 agreement, and Berger argued that Douglas was acting as both Colonial and Hudson's Bay Company governor and that the agreement was not only made for the benefit of the Hudson's Bay Company, but, in the words of the other related agreements, the land became the "entire property of the white people forever."¹³ That is, Douglas was acting for the Crown.

At the trial, Ireland provided photostatic copies of the "Instruction to James Douglas, Chief Factor, 1849, by Hudsons (sic) Bay Company," the "Letter, May 16, 1850, James Douglas to Hudsons Bay Company," and a copy of a published facsimile of the Royal Grant of Vancouver Island to the Hudson's Bay Company (HBC), the original of which was held by the HBC, as well as a copy of the Reconveyance of Vancouver Island from the HBC to the Crown. As "exhibit 8" in the case, Ireland produced the "Register of Land Purchases from Indians." Describing the form of the book and its context, Ireland explained:

The treaties begin in 1850 and were progressively entered in this book, or this would be my assumption, and prior to the inscribing of the actual treaty there is an indication, in pencil, as to what treaty would follow on the pages. When we come to the particular treaty covering the Nanaimo area, you will notice that it is inscribed – is inscribed on pages that have been tied into the book.¹⁴

Berger then asked Ireland:

¹³ Berger, *One Man's Justice*, 99-101; Thomas Berger, personal communication, 11 March 2010. I thank Justice Berger for suggesting some valuable sources for this paper. See also: Douglas Harris, "A Court Between," 140; Sanders, "The Nishga Case," 126.

¹⁴ Ireland Testimony, *Regina v. White and Bob*, 25, 25-28.

You opened the book at a place where there is a piece of paper pinned to the pages that have been tied in, and on the piece of paper that was – has been pinned to the pages that have been tied in, the following words appear:

'A similar conveyance of country extending from Commercial Inlet twelve miles up the Nanaimo River, made by the Sarliquin tribe, signed Squamiston and others.'

Have I read accurately what has been written on that piece of paper?

Ireland confirmed that he had, and Berger continued: “And there is a seal on the piece of paper. Can you tell his Honour what that is?” Ireland identified the seal as that of the Colonial Secretary of British Columbia, and Berger noted that the seal, then, could not have been affixed before 1866, when the Vancouver Island community became part of the Colony of British Columbia. He also noted that there was an inscription written in pencil on the pages pinned into the book that read: “Country extending from Commercial Inlet twelve miles up the Nanaimo River.”

Berger asked Ireland: “Now that is the pencil -- the pencil writing that corresponds, presumably to the pencil writing that preceded the other treaties in the book. Am I correct?” Berger’s questioning had hit a critical issue in the case. Could these loose pages, little more than 159 names with Xs marked next to them, be understood as a treaty? Was this document essentially the same as the other thirteen agreements? Would the court accept this interpretation of what was, at its heart, a very ambiguous record? Ireland answered, “Correct. In almost each instance there are -- there is similar pencil notations in the book to indicate the area in the generality covered by the treaty, that was ultimately inscribed in the book.”¹⁵ With Ireland’s testimony, Berger next established for the court that the pages consisted of 159 names with Xs, preceded by the phrase

¹⁵ Ireland Testimony, *Regina v. White and Bob*, 28- 29.

“Sarliquin Tribe,” and that the total group of people represented by these names may, in fact, have been from a number of “tribes,” and, finally, that the document was signed at “Fort Nanaimo or Coalvilletown” 23 December 1854 (the document had been dated the 23rd day of September, but September had been crossed out and the later date added). Ireland then provided photostatic copies of the Nanaimo documents, and a sample of a complete agreement from the book for context as exhibits in the case.¹⁶

The discussion turned to the signatures at the end of the document: those of “Charles Edward Stewart, in charge of Fort Nanaimo; Richard Golladge, Hudsons [sic] Bay Company service; George Robinson, Manager of the Nanaimo -- ...” Here Berger was unable to read the rest of the signature, but Ireland offered that Robinson “was the manager of the Nanaimo Coal Company, and I think it [the illegible part of the signature] was a question of squeezing it in, and obviously he was referring to the Nanaimo Coal Company.” Finally, they came to the signature of “James Douglas, Governor of Vancouver Island,” and Berger asked, “Do you regard those names as the signatures of the parties, or as copies of their names? Or their signatures?” Ireland replied, “I believe all four to be their signatures. I would have to admit that I haven’t compared them all fully, but the “James Douglas” one I would be quite certain to subscribe to in that way.”¹⁷

Ireland went on to explain the notations about blankets marked in pencil on the document. Berger asked:

Now, Mr. Ireland, am I right in saying that in this document, which consists of a series of pages that have been tied into the register of land purchases from Indians, the body of the treaty -- the wording of the treaty does not appear, except for the reference to it in the paper with writing in

¹⁶ Ibid., 29-30.

¹⁷ Ibid., 30-31.

pencil, with the seal of the Colonial Secretary of British Columbia pinned to those papers?

Ireland's response established the context, or history of the record, the connection between the more developed agreements in the book and the loose pages that represented the Nanaimo agreement. His reply was carefully measured:

That is substantially correct. Leaving aside for the moment the portion that has been pinned, yes. This is essentially the same form as what occurred previously in the book. Because of the seal that is used – again this is my opinion or interpretation – this particular piece of paper was written on and attached to this document at the time the whole series of treaties were in 18 -- 1875 produced in that document, because of the -- [here Berger clarified that Ireland was referring to *Papers Connected with the Indian Land Question, 1850 to 1875*, and a related publication of the same material in the British Columbia *Sessional Papers*.]

The discussion now turned to the form, context, and contents of *Papers Connected with the Indian Land Question, 1850 to 1875* and how the somewhat edited printed document related to the original documents. The inquiry then returned to the question of what the X marks and notes about blankets in fact represented.¹⁸ Ireland suggested:

Your Honour, the tabulation which was previously referred of as to the number of the three types of blankets – it is presumably the consideration involved in the treaty. And in certain instances, opposite a specific case – name they have indicated in – for Squamiston, the first signature -- eight white and two blue, -- for -- and for the second signature, eight white and two blue, as a consideration --¹⁹

Ireland added that he believed that, where particular blankets were noted next to certain names, these marks indicated that those people had received that many blankets in addition to the standard number given to each person whose name appeared on the page,

¹⁸ Ibid., 31-32.

¹⁹ Ibid., 32-33.

his testimony showing that the agreement made the provision for compensation to the Indigenous signatories that was needed for the agreement to be legally binding.

Ireland's testimony continued. He described a copy of a transcript of the census of the "Nanaimo Indians" that Duff had recommended. The census was held in the Bancroft Collection at the University of California (Berkeley). Ireland noted that in this census there were, in the Nanaimo area, 159 "Men with Beards," the number corresponding to the 159 signatures on the agreement. He also produced an 1861 petition from the House of Assembly of Vancouver Island to the Colonial Secretary and connected it with a transcript of the document in the published *Papers Connected with the Indian Land Question, 1850 to 1875*.²⁰

At this point the court adjourned for lunch, reconvening in the afternoon, when Ireland was cross-examined by Mr. Cunliffe for the Crown.²¹ As Tennant explains,

In the 1960s, with Indians in court and judges listening to arguments in support of aboriginal rights, the province was compelled for the first time to prepare arguments in defence of its historic position.²²

Cunliffe drew Ireland's testimony away from the specific documents he had introduced and their context and relationships to a more general discussion of the history of British Columbia.²³ Here, Berger objected to Ireland's testimony arguing that "Mr. Ireland hasn't been qualified as an historian, and I would submit, with respect, we could glean this information from the history books." He continued, however, that he would have no objection to the questioning if it was understood that "I don't admit Doctor --

²⁰ Ibid., 33, 34-36.

²¹ Probably Donald Cunliffe, son of Frank S. Cunliffe, Q.C. who had worked with the Nanoose Band in 1938. Robert Harvey, Q.C., personal communication 14 April 2010.

²² Paul Tennant, *Aboriginal Peoples and Politics*, 216.

²³ Ireland Testimony, *Regina v. White and Bob*, 37.

Mr. Ireland's qualifications, and that I will later submit, if necessary, that any history book relating to the development of Vancouver Island is just as much to be given weight by Your Honour as what Mr. Ireland may say in this regard."²⁴

Under cross examination, Ireland's testimony proceeded to the history of European contact in the region. Beginning with the arrival of Captain Cook in 1776, Ireland noted that "prior to that time there had been nationals of other countries off the coast, but this would be what would be known as the first land-fall involving Vancouver Island, and consequently British Columbia."²⁵ His testimony then discussed claims to the region by both Spain and Great Britain, and the limits of Russian and American claims. He explained the relationships between the Crown and both the Hudson's Bay Company and North West Company, as well as the amalgamation of the two companies in 1821. Of particular consequence, Ireland discussed the licence under which the HBC conducted its trade in the region, and agreed that this gave them no proprietary rights. Ireland testified that in 1843 "white" colonists began to settle in the area, but that the colonization efforts of the Crown and HBC had never been extensive.²⁶ Next, Ireland's testimony returned to the 1854 Nanaimo agreement, and the history of the discovery of coal in the region, the progression of colonization in the 1850s, and the eventual reconveyance of the area to the Crown.

Berger then re-examined Ireland, clarifying that the testimony Ireland had "been good enough to talk about for the last half hour" was based on "your reading of histories of this part of the world, written by other people, as well as upon the examination from

²⁴ Ibid., 38.

²⁵ Ibid., 39.

²⁶ Ibid., 38-46.

time to time of historical documents in your possession?” Berger went on, “it would be fair to say, I suggest, that some of the things you have told his Honour may be disputed by certain historians?” After some discussion in the court about the propriety of Berger’s line of questioning on re-examination, Berger continued:

Would you agree with me that the history of the development of this area, which subsequently became British Columbia, would – such as the history written by Professor Ormsby,²⁷ a few years ago, be as reliable as any of the evidence you have given to us in this past half hour regarding the history of the – [at this point, Ireland agreed]²⁸

Berger moved on in his re-examination by discussing other histories of British Columbia written by British Columbians, mentioning particularly one written by County Court Judge “Howell.”²⁹ As Berger asked Ireland if he regarded the judge’s work as reliable, Cunliffe interceded, “This may have been the wrong place to ask this.” Ireland responded that as far as he had “ever been called upon to check,” the judge’s writing was reliable.³⁰

Testimony returned to the pencilled note pinned to the Nanaimo agreement and its relationship to the pages bearing the 159 names and marks. Ireland advanced his own opinion that the pencilled writing was made contemporaneously “to the document upon which it was written,” relating the practice to the other documents in the register. Berger then wrapped up his questioning with a discussion of how many “white settlers” there had been in the area, and Ireland stepped down as a witness.³¹

²⁷ Berger was referring to Margaret Ormsby, A. *British Columbia: A History* (Macmillan, 1958).

²⁸ Ireland Testimony, *Regina v. White and Bob*, 46-47.

²⁹ It is likely that this is a transcription error, and that the man they were discussing was, in fact, Judge Frederick William Howay, who was a noted avocational British Columbia historian in the early twentieth century.

³⁰ Ireland Testimony, *Regina v. White and Bob*, 47.

³¹ *Ibid.*, 48.

Willard Ireland's extensive testimony introduced key records needed to establish that a treaty existed, although the document was not so named. His ability to contextualize archival material transformed a list of 159 names into a meaningful document. Despite Berger's obvious misgivings, under cross examination his description of the history of the region was important to the question of when the land had come under the control of the Crown. Much of what Ireland testified to was based on his reasoned and measured opinion, and his understanding of the history and context of the region, Colonial period administration in British Columbia, and the documents he had identified and presented to the court. The strength of the collection of documents that supported Berger's arguments was the result of Ireland's rich understanding of the records and their social context. Both Ireland's opinion and the connections he had made were upheld in Judge Swencisky's judgement.

Besides arguing that White and Bob had hunting rights that derived from the 1854 treaty negotiated by Douglas and the 159 signatories to the Nanaimo agreement, Berger advanced another argument at trial. He offered that, if the agreements were not treaties, then the land had not been surrendered: "If there was no treaty, if the Indians had not rights under the conveyance at Nanaimo, then neither did the province.... If we could establish that Aboriginal Title and Aboriginal rights had never been extinguished, then we could argue that the right to hunt had never been extinguished.... This theory brought us into the midst of the Indian land question."³² Recalling the case, Berger wrote:

I did my best to lay before the judge the tangled history of the Indian land question in B.C. I pieced together the evidence that Wilson Duff and Willard Ireland had assembled. I realized that all those faces in the gallery belonged to people who had a stake in the outcome. It wasn't any longer a

³² Berger, *One Man's Justice*, 99-101.

question of whether or not the charges laid against Clifford White and David Bob were to be dismissed, or even whether or not the treaties were to be upheld. The Native people in the gallery sensed that, for the first time in the twentieth century, Aboriginal rights were being treated as something more than a quaint and faintly amusing notion but one of no consequence in the practical world. Guy Williams, president of the Native Brotherhood of B.C., shook hands with me as the trial concluded and told me he had never thought he would live to see the Indian land question aired in a court of law.³³

Swencisky summarized his decision stating:

Briefly, to summarize the effect of my judgment, I hold that the document filed as ex. 8, though not signed by Governor Douglas in his capacity as Governor, is, nevertheless, a Treaty and, as a result, the two accused are entitled to the benefit of the exception contained in s. 87, of the *Indian Act*.

I also hold that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the *Proclamation of 1763*, has never been abrogated or extinguished and is still in full force and effect.³⁴

As Berger writes, “Judge Swencisky accepted the evidence of Ireland and Duff and ruled for the Indians.... Clifford White and David Bob had been acquitted; they and the Nanaimo Indian band were jubilant. But no less jubilant were the other Indians of southern Vancouver Island who had made treaties with Governor Douglas.”³⁵

It was not long before British Columbia’s attorney general appealed. The defendants received backing from the Native Brotherhood of British Columbia.³⁶ During the appeal process, the question of whether James Douglas did, indeed, wear the “two hats” of governor of the Hudson’s Bay Company and governor of the Colony remained a

³³ Ibid.,102.

³⁴ See transcript, *Regina v. White and Bob*, at <http://library2.usask.ca/native/cnlc/vol06/629.html> .

³⁵ Berger, *One Man’s Justice*, 102.

³⁶ Sanders, “The Nishga Case,” 126. The British Columbia Native Brotherhood was established in 1931. It represents a group of British Columbia coastal communities and remains active to this day. Its mandate is to support the “betterment” of Indigenous people. Native Brotherhood of British Columbia website, “NBBC Backgrounder.” At: <http://www.nativevoice.bc.ca/about.htm>.

concern to Berger. On 25 March 1965, Berger wrote to Ireland asking for clarification of a statement made in Ireland's "The Evolution of the Boundaries of British Columbia." At the same time he asked whether Ireland could locate a lost document relating to material published in *Papers Connected with the Indian Land Question, 1850-1875*, the "dispatch sent by the Chief Commissioner Lands and Works to the Colonial Secretary (of B.C.) on December 30th, 1869, relating to the Songish Reserve." Quoting from the printed text, Berger noted that the document stated that

It is certain that the tract of land known as the Songish Indian Reserve, was formerly set apart by the competent authority of the Hudson's Bay Company's agent, acting on behalf of the Crown, for the perpetual use and benefit of the Indians of that tribe; and that this land is now held in trust by the Crown, acting under a solemn obligation, as guardian of the rights of the Indians in this respect.

Berger continued:

It seems to me clear that the Chief Commissioner was here speaking of the early 'treaties' made between Douglas and the Indians and Victoria.... With his dispatch the Chief Commissioner enclosed a Memorandum You will see that ... the Chief Commissioner referred to an Address from the Legislative Council of Vancouver Island to Douglas (in his capacity as Governor) relating to the question of the removal of the Indians from the Songish Reserve. He also refers to Douglas' reply, and at the conclusion of that paragraph he says that he is enclosing the Address and Douglas' reply. There follows a note that the enclosure (containing the Address and the reply) cannot be found.

It seems obvious that Governor Douglas said in his reply (to the Address) that he made the 'treaties' with the Indians at Victoria on behalf of the Crown, and it would be of great assistance in the White and Bob case if Douglas' actual reply could be located. With this in mind, I thought I would bring this to your attention and see if you had any knowledge of the fate of the missing enclosure.³⁷

³⁷ Correspondence, "Thomas Berger to Provincial Archives," British Columbia Archives, GR-1738, box 14, file 1, Berger to Ireland, 25 March 1965.

Ireland went straight to work on Berger's question, and by 29 March, he was able to reply, "I am confident that the whole thing stems from a mistake in the Chief Commissioner's Memorandum when he refers to the Address from the Legislative Council when it should have been from the Legislative Assembly." Through a tightly argued chain of logic based on his knowledge of the records and the structure and history of the activities of the Colonial government, Ireland was able to conclude that "the Correspondence books of the House of Assembly has two documents which I am sure are the ones in question since the summary in the Papers to which you refer relate to these Documents." Attaching copies of the documents that Ireland argued were, in fact, the correct ones, he added:

Governor Douglas sent his correspondence with the House of Assembly to the Colonial Office on February 9, 1859 and a copy of that despatch is attached herewith and I feel paragraph 3 may be pertinent. The Victoria Gazette notice to which reference is made appeared in the issue of January 22, 1859 and contains the statement: '... And whereas, the title to the said land commonly known as the Indian Reservation is vested in the Crown.....'

In replying to the Governors (sic) despatch, the Colonial Secretary Carnarvon said:

'... In the case of the Indians of Vancouver's Island and British Columbia Her Majesty's Government earnestly wish that when the advancing requirements of colonization press upon lands occupied by members of that race measures of liberality and justice may be adopted for compensating them for the surrender of the territory which they have been taught to regard as their own.'³⁸

³⁸ Correspondence, "Thomas Berger to Provincial Archives," British Columbia Archives, GR-1738, box 14, file 1, Ireland to Berger, 29 March 1965. On 7 April, Ireland was also able to answer the first query in Berger's letter, which related to when the land in question was "claimed" by the Crown. Ireland's thorough and tightly argued response shows that he was familiar with the complex issues relating to "possession," and how land could be considered to be claimed by a colonial power, that is, when the Crown would have understood itself to have taken control of the region, as well as the available scholarship on exploration and settlement available to him at the time. Ireland to Berger 7 April 1965. An excellent modern work on the ways that various colonial powers conceived of legitimate colonial possession is Patricia Seed, *Ceremonies*

Ruling three to two, the appeals court upheld Judge Swencisky's decision. Justice Thomas Norris wrote a concurring judgement that went beyond the question addressed by Justice Davey's majority decision as to whether the Douglas agreements were treaties. In his judgement, one that drew on historical matters introduced in testimony (including the scope of Drake's voyage and the relationship between the Hudson's Bay Company and the Crown) Norris wrote that "Aboriginal rights existed in favour of Indians from time immemorial," concluding that "the said rights have never been surrendered or extinguished."³⁹ The Crown appealed to the Supreme Court of Canada. The Supreme Court rendered its judgement without leaving the bench. The curious document with 159 Xs and no text was a treaty. The appeal was dismissed, and land claims, which had long been the concern of Indigenous people, were now solidly on the radar screens of a much wider public. Ireland's willing co-operation with the Nanaimo Band and with Bob, White, and Berger was critical to the success of the case. The archival documents Ireland identified and contextualized for Berger and for the courts were far from self-explanatory. Accordingly, the web of documentary evidence and contextual commentary he wove into a coherent narrative was essential if the documents were to be fully understood. Ireland's work opened the floodgates to a new wave of Aboriginal treaty, land, and rights claims. But, despite the earlier decision by Justice Thomas Norris, the

of Possession in Europe's Conquest of the New World, 1492-1640 (Cambridge: Cambridge University Press, 1995).

³⁹ Berger, *One Man's Justice*, 102-104; Sanders, "The Nishga Case," 126.

Supreme Court had not ruled on the existence of Aboriginal rights, only on the existence of a treaty.⁴⁰

⁴⁰ Ibid., 104, 106. See also: Michael Lusztiq, "Native Peoples," in *Canadian Studies in the New Millennium* eds. Patrick James and Mark J. Kasoff, (Toronto: University of Toronto Press, 2007), 100-125, 108; Berger, "Wilson Duff and Native Land Claims, 57; Sanders, "The Nishga Case," 126; Foster, *Let Right be Done*, 276.

Chapter Three: “I think the learned Archivist knows his way around”: *Calder v. The Attorney General of British Columbia*

The collegial relationship Ireland and Berger had formed during *White and Bob* did not end there. Ireland made major contributions to the landmark case *Calder v. The Attorney General of British Columbia*. The consequences of that case were significant. Following the Supreme Court decision in *Regina v. White and Bob* in 1965 efforts by Indigenous groups to assert their Aboriginal rights were gaining momentum. Land claims were a significant concern for Indigenous people in the 1960s, and served as a focus for attempts by British Columbia’s Indigenous communities to form a unified political organization. When it appeared these attempts were failing, the Nisga’a decided to pursue the matter of Aboriginal rights themselves. As Berger recalled in 1966, “Frank Calder and the four chiefs of the Nisga’a villages crowded into my walk-up law office on Georgia Street to tell me that they wanted to proceed with a lawsuit to prove that their Aboriginal title had never been extinguished.”¹ What the Nisga’a were looking for was a clear legal decision that there existed a pre-existing right to legal title to the land, and that that title could only be extinguished by explicit action.²

The decision to go to court at this point was a risky one. Other bands declined to support the Nisga’a’s bid, fearing that it was too soon to proceed on the question of the existence of Aboriginal Title in British Columbia. If the case were lost, they reasoned, the loss could set precedent against any future efforts to have Aboriginal Title recognized.³

¹ Berger, *One Man’s Justice*, 112. It should be here noted that the Nisga’a decision to pursue a case at this time was a strategic, not a reactionary one. Tennant, *Aboriginal Peoples and Politics*, 129.

² Tennant, *Aboriginal Peoples and Politics*, 219.

³ Berger, *One Man’s Justice*, 112.

Berger writes, “Why did the Nisga’a come to me ... I think ... the main reason was that I had been successful in *White and Bob*. In that case, the door to recognition of Aboriginal Title had been opened a crack by Justice Norris. The Nisga’a wanted to see if we could open it wide.”⁴ As part of the arguments Berger had prepared for the *White and Bob* case, he and his team had reasoned that, if the Douglas agreements were not treaties, then Aboriginal Title had not been extinguished, and still existed. In the case of the Nisga’a, there had never been any agreement or treaty. “If,” reasoned Berger, “Aboriginal title still existed in B.C., its footprint would cover most of the province.”⁵ The decision to take this matter to the courts was new territory in the mid-1960s. Berger recalled that when he attended the University of British Columbia’s law school in the 1950s Aboriginal rights were not taught as a part of the school’s curriculum: “It was the lawsuit brought by the Nisga’a in 1967 the so-called Calder case, and decided by the Supreme Court of Canada in 1973, that finally placed Aboriginal rights on the law school curriculum and, more importantly, on the Canadian agenda.”⁶

The Nisga’a, who lived in British Columbia’s mainland Nass River valley, planned to present the courts with the argument that Aboriginal Title existed, and that the Nisga’a had never surrendered this title. Rather than waiting to answer a charge in the courts, the Nisga’a decided they would pursue the matter themselves. By the late 1960s in British Columbia, Crown land was held by the Crown in right of the Province, so the claim had to be pressed against the British Columbia Attorney General, even though

⁴ Ibid., 112.

⁵ Ibid., 112-113.

⁶ Ibid., 113.

“jurisdiction over ‘Indians, and Lands Reserved for the Indians’ lay with the Federal government.”⁷

Frank Calder and the Nisga’a chiefs decided to sue the Attorney General of British Columbia on behalf of the Nisga’a and on their own behalf in an attempt to get a court ruling that they possessed Aboriginal Title, and that this title had never been extinguished.⁸ Berger, now head of the opposition New Democratic Party, took the case for Calder, also a New Democratic Party member. Once again Berger turned to Ireland for archival help. On 30 October 1968, he wrote to Ireland asking if “the archives contain any documents, such as early dispatches or censuses, which show that from the time when white exploration and settlement began the Nishgas were in fact in occupation of the Nass River Valley,” as well as for “any dispatches relating to the Indian land question, and specifically to the question of extinguishing the Indian title....”⁹ Once again, Ireland contributed his research and opinion to the case.¹⁰

These documents would be key in establishing occupancy, essential in establishing a claim to the land. Referring back to the *White and Bob* case, Berger

⁷ Sanders, “The Nishga Case,” 126; Berger, “Wilson Duff and Native Land Claims,” 57; Gordon Gibson, *A New Look at Canadian Indian Policy: Respect the Collective, Promote the Individual* (Vancouver: The Fraser Institute, 2009), 243.

⁸ Frank Calder demonstrated exceptional leadership in education and politics in British Columbia and Canada, being the first Status Indian to attend the University of British Columbia, to sit in the provincial and federal legislatures, and to be a Minister of the Crown. He descended from a long line of exceptional Nisga’a leaders. For a brief biography of Calder, see the Order of British Columbia’s website at http://www.protocol.gov.bc.ca/protocol/prgs/obc/2004/2004_FCalder.htm or the *Canadian Encyclopedia* at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001168>.

⁹ Correspondence, “Thomas Berger to Provincial Archives,” British Columbia Archives, GR-1738, box 14, file 1. It is interesting to note that the correspondence between Ireland and Berger was always on a formal basis until 11 April 1969. On that date, in a cover letter to Berger’s cheque covering Ireland’s expenses incurred when he testified in the Calder case, Berger began addressing Ireland as “Willard,” and the two used first names in correspondence following that date.

¹⁰ See, for instance: Berger to Ireland, 30 October 1968; 1 November 1968; Ireland to Berger 18 November 1968; Berger to Ireland 2 January 1969; 9 January 1969; 18 February 1969; 18 December 1968; 3 February 1970; 16 February 1970; Ireland to Berger 23 February 1970.

reminded Ireland of the “early dispatches that passed between Governor Douglas and the Colonial Secretary to show that the native title had always been recognized by the Crown.” Here Berger was getting to a critical point in any argument about Aboriginal Title. Under British law, the Crown could take possession of land if it could argue that the land was *terra nullius*, or unoccupied. Over time, “unoccupied” had come to mean not just completely vacant; it could also include land that was occupied by people who were not an “organized society,” as judged under British common law.¹¹ Berger’s query also spoke to the requirement that, to prove Aboriginal Title that is “cognizable at common law,” the plaintiffs must show “That the occupation was to the exclusion of other organized societies.”¹²

Berger wrote to Ireland: “The most useful of those dispatches was that which Governor Douglas sent to the Colonial Secretary, dated March 25th, 1861 (no. 24). In the second paragraph of that dispatch he pointed out that the native Indian population of Vancouver Island had distinct ideas of property in land and mutually recognized the several exclusive rights in certain districts.” Noting that the despatch in question related to Vancouver Island, and not the area now under question on the mainland, Berger continued, “However, some other dispatches do refer to the rights of the Indians living on the mainland. For example, those numbered 12, 62 and 49 in the booklet on the land question.” Berger then asked Ireland, “Would you let me know if the archives contain any dispatches relating to the Indian land question, and specifically to the question of extinguishing the Indian title, apart from those appearing in the booklet on the Indian

¹¹ McKee, *Treaty Talks in British Columbia*, 14.

¹² Douglas Elias, “Rights and Research: The Role of the Social Sciences in the Legal and Political Resolution of Land Claims and Questions of Aboriginal Rights,” *Native Law Reporter*, 1, (1989), 1-43, 6.

land question.”¹³ Once again, Ireland’s knowledge of both BC history and the history of the records was being called upon to support Berger’s key argument: that Aboriginal Title had existed at the time the Crown took control of the region, and that that title had not subsequently been extinguished.

In the following months, Ireland provided Berger with census figures and made an extensive set of copies of information from the evidence presented to the 1913-1916 *Royal Commission on Indian Affairs for the Province of British Columbia*. On 2 January 1969, Berger wrote to Ireland to ask for “print outs of the microfilm of any other evidence that was given before the Commission by any other Bands of the Nishga Tribe,” adding “Let me express my appreciation for the co-operation that you and your staff have extended to us in connection with the preparation of this case.”¹⁴

Ireland’s research extended well beyond simply filling copy requests. Realizing, when he looked at the documents Berger had requested, that there was more to be found than originally anticipated, Ireland phoned Berger’s secretary to get permission to make “somewhat more [copies] than you requested as the examination of (sic) the film indicated that the evidence regarding the Kincolith band frequently made reference to the Nisgah tribe.” As a result, Ireland was able to send Berger an additional 100 pages of evidence from the Royal Commission’s report.¹⁵

The case, although nominally against the province, really dealt with significant federal Indian Affairs issues. Berger asked Jean Chrétien, then Minister of Indian Affairs, to intervene on behalf of the Nisga’a. But the federal government declined to become

¹³ Correspondence, “Thomas Berger to Provincial Archives,” British Columbia Archives, GR-1738, box 14, file 1. Berger to Ireland 30 October 1968.

¹⁴ Ibid., Berger to Ireland 2 January 1969.

¹⁵ Ibid., Ireland to Berger 9 January 1969.

involved.¹⁶ As Berger states, “At the time the Nisga’a filed their suit, Canadians believed that claims to Aboriginal Title were nothing more than make-believe. Prime Minister Pierre Trudeau, speaking in Vancouver on August 8, 1969, said: ‘Our answer is no. We can’t recognize Aboriginal rights because no society can be built on historical ‘might have beens.’”¹⁷

The Calder case began in the British Columbia Supreme Court in 1969. The case opened in Vancouver, in a court house packed with Indigenous people and media. A class of law students from the University of British Columbia came to observe arguments on a topic that had not even been discussed at the school a decade earlier. Arguing the case for the Crown before Justice Jay Gould, Douglas McKay Brown, a leading civil litigator in British Columbia, agreed that the Nisga’a had occupied their land and derived their living from it since time immemorial. But, he argued, there never was such a thing as Aboriginal Title, or, alternately, if there was, that it had been extinguished between the time when a mainland colony had been established by the British in 1858 and when British Columbia entered Confederation in 1871. He posited that a series of laws enacted in that period was consistent with the (unstated) intent to extinguish Aboriginal Title. (Once British Columbia entered Confederation, Brown conceded, it would only have been the federal government that could have acted to extinguish Aboriginal Title.)¹⁸

Wilson Duff gave evidence for the Nisga’a, much of it also from archival sources, such as anthropologist Marius Barbeau’s field notes in the Marius Barbeau Archives in the National Museum (Museum of Civilization) in Ottawa. As with *White and Bob*,

¹⁶ Sanders, “The Nishga Case,” 126-127.

¹⁷ Berger, *One Man’s Justice*, 114.

¹⁸ *Ibid.*, 114-115; Foster, “Let Right be Done,” 43.

Berger subpoenaed Willard Ireland as a witness.¹⁹ And, much as he had in *White and Bob*, Berger focused his questions for Ireland on the introduction and contextualization of archival records, including the various censuses and instructions relating to the pre-Confederation period in the region that Ireland had identified in his pre-trial research. In his capacity as provincial archivist, Ireland presented and certified as true, a set of documents that demonstrated consistent occupation of the land in question by the Nisga'a, including several censuses and a vocabulary.

Ireland also introduced secondary material written about the area, including the field notes of anthropologist Franz Boas, a book of local vocabularies from the 1880s, and the *Handbook of Indians of Canada* published in 1913. Also from 1913, Ireland introduced the Nisga'a's own petition to the Privy Council, and he introduced and explained the context of the records of the McKenna McBride Royal Commission, 1913-1916, which, unlike the published report, included Indigenous testimony. Up to this point, neither Berger nor Ireland had discussed the *Royal Proclamation of 1763*, but the court's attention now turned to this critical question.²⁰

As Berger's examination of Ireland came to a close, Brown interceded to ask, "I wonder if I might ask my friend to indicate whether he is taking the position that the

¹⁹ Subpoena 3456/67, Supreme Court of British Columbia, 25 March 1969, Correspondence, "Thomas Berger to Provincial Archives," British Columbia Archives, GR-1738, box 14, file 1. This subpoena includes an extensive list of documents Ireland was required to produce in court, including the Douglas census he had provided in *White and Bob*. Sanders, "The Nishga Case," 127; for more on Duff's use of these archives, see Derek G. Smith, "The Barbeau Archives at the Canadian Museum of Civilization: Some Current Research Problems," *Anthropologica* 43:2, 2001, 191-200; Mary Ann Pylypchuk, "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources," *Archivaria* 32 (1991), 51-77, 59.

²⁰ Willard Ireland Testimony, found in Calder Case Appeal Book vol. 1, in Thomas Berger fonds, Box 100, file 1, University of British Columbia Rare Books and Special Collections, 79-85; Foster, "Let Right be Done," 43.

proclamation of George III of 1763 applies to his clients?”²¹ In his pleading, Berger had asserted that the *Royal Proclamation*, which recognized Aboriginal Title, did, in fact, apply to the disputed region. This assertion was controversial, and it was up to Berger to prove that the *Royal Proclamation* did, in law, apply to this case.²² Brown continued, “The only reason I ask is that my learned friend doesn’t get a right to re-examine his witness on the subject simply by refraining from asking questions about the relevant subject in chief.”²³

The discussion turned to who, if anyone, would ask Ireland about the *Royal Proclamation*. Berger argued:

... if my learned friend proposes to cross-examine Mr. Ireland about the application of the Royal Proclamation of 1763 to the North Pacific Coast and in particular to the area marked on exhibit 2, I will object to his following that course and if he is then allowed to do that I may seek an opportunity to re-examine on that point.

As discussion continued, Berger asserted that

The question of whether [The Royal Proclamation] applies to the North Pacific Coast or was made to apply to the North Pacific Coast is one to be determined by the examination of the Royal Proclamation itself and the course of the historical development in British North America by examining the Imperial Statutes and by examining the judgements of the courts of law in this country and in the United States, and in particular the judgement of his lordship Mr. Justice Norris in the case of Regina vs. White and Bob. Mr. Ireland is a historian, he may have a view he wishes to express on this subject. If Mr. Brown can induce your lordship to allow him to ask Mr. Ireland about it, I don’t propose to ask Mr. Ireland about it, I am not trying to get the last word.²⁴

²¹ Ireland Testimony, Calder Appeal Book, 85.

²² See Foster, “Let Right be Done,” for a fuller discussion of the *Royal Proclamation* and how it related to the *Calder Case*.

²³ Ireland Testimony, Calder Appeal Book, 85.

²⁴ *Ibid.*, 86-87.

Brown now stepped in to cross-examine Ireland. Just as in *White and Bob*, while Berger's examination of his witness had focused on archival and secondary records and their context, the discussion on cross-examination turned to historical issues. Brown questioned Ireland at length, and in detail, about the history of navigation, exploration, and colonization in the region. Establishing Ireland's expertise in this area, Brown asked "Has the Northwest Coast of America been among particular subjects, and the expansion of this area, been among the particular subjects to which you have addressed your attention?" Ireland answered, "Yes." Brown continued, "Are you the author of a paper entitled, 'Evolution of the Boundaries of British Columbia?'" Again Ireland answered "Yes." Coming to the critical issue, whether the area was under British control at the time of the 1763 *Proclamation*, Brown asked, "Are you familiar with and have you studied the historical documents and data and evidence in relation to any voyages that were made in the vicinity of the coast of British Columbia prior to 1763?"²⁵ Ireland's subsequent testimony addressed the voyages and credentials of Sir Francis Drake and Captains Cook and Vancouver, as well as others, all critical questions in determining when or whether British control had been established.²⁶ As Ireland's testimony about sea exploration of the region ended, the court adjourned for the day.

The following morning, Brown opened his cross-examination of Ireland with questions about the overland exploration of the area, and the subsequent establishment of the fur trade and fur trade forts, and the presence of the Hudson's Bay Company. Once more, as it had in *White and Bob*, the question of what position James Douglas occupied in relation to the Company and Colony came to the fore. As the line of questioning

²⁵ Ibid., 87.

²⁶ Ibid., 87-96.

proceeded, Berger expressed concern that there was some confusion between the colonies on Vancouver Island and the mainland, and then, later, the combined colonies. When Brown offered to clarify, the Court responded: “I think the learned Archivist knows his way around. I wouldn’t worry too much about this point.” Berger quipped, “I am not worried, my lord. I am worried about my learned friend,” to which Brown replied, “Yes. I can demonstrate my ignorance without any trouble at all.”²⁷

Brown questioned Ireland about the pre-Confederation development of reserves in the region, actions that might suggest the establishment of British central control. This was a critical part of the Crown’s key argument that, as Berger summarized, “the pre-Confederation statutes passed by the Colony of British Columbia, which enabled the Crown to make grants of land to the settlers had put an end to Aboriginal Title before B.C. entered Confederation.”²⁸ Brown also enquired whether there was any evidence that the Nisga’a had ever attempted to exercise Aboriginal Title as individuals rather than as a collective right. In particular, Brown asked Ireland, “Do you know of any instances in history where British Columbia Indians, not referring to Treaty Indians, I am referring to the Nishga group of Indians or others comparable to them, have endeavoured to convey by conveyance something called an Indian title?” Ireland asked for clarification of the question.²⁹

Brown continued, “Is it true that the Indians considered their usufructum title, as it has been described, as simply something that didn’t belong to any individual but was a communal concept?” Berger interceded, noting that “I don’t necessarily disagree with the

²⁷ Ibid., 87-96, 98.

²⁸ Berger, *One Man’s Justice*, 119.

²⁹ Ireland Testimony, Calder Appeal Book, 99-100, 102.

premise on which that question is based, but I think we have reached the point where Mr. Ireland's expertise may have been exhausted." Rephrasing, Brown asked Ireland a more directly documentary question: "Have you come across any attempt by an individual Indian to pass a title to a so-called Indian right either by will or intestacy? Have you ever seen any document that purports to pass a title by an individual Indian?" Ireland replied, "I have never seen any such document."³⁰

Over the course of two days, Ireland had introduced to the court a broad range of records that he had helped identify through his rich understanding of both the archives and the contexts of its records. He had woven these records together in a coherent narrative with contextual and relational information, discussing what was known and what was likely regarding the history of exploration and colonization of the area, and finally about the collective nature of Aboriginal Title. Much as in *White and Bob*, Berger seemed eager to isolate Ireland's testimony on historical questions while under cross-examination by Brown from his testimony under examination in chief by Berger himself. Beginning his re-examination, Berger stated:

I would like to re-examine with regard to the matter my learned friend, Mr. Brown, questioned the witness about yesterday. I called this witness to produce certain documents in his capacity as Archivist and my learned friend has now cross-examined him in his capacity as a historian and I should like to re-examine him, not at length, but with regard to the points that were made in his capacity as an historian.³¹

Berger then queried Ireland on issues relating to Drake's establishment of New Albion in 1579. As the establishment of New Albion clearly pre-dated the *Royal Proclamation of 1763*, if it could be shown that Drake had established a colony on behalf

³⁰ Ibid., 101-102.

³¹ Ibid., 102.

of the Crown, and that the region included in this colonization included the Nisga'a territory, Berger would have gone a long way to showing that the Nisga'a possessed Aboriginal Title. But proving this was far from straightforward.

Berger asked: "Now, Mr. Ireland, is there any evidence that those in authority in Great Britain regarded New Albion as extending north of Nootka, that is, extending as far north of the region of the North Pacific Coast, which is the subject of this law suit?" Ireland asked in reply: "Well, what year are you referring to?" and Berger clarified, "At any time prior to the end of the 18th century and if so, when was the earliest indication of that?" Ireland responded that there was, indeed, some evidence to suggest that, but he was not able to say if it was conclusive. Ireland continued, "the basis, of course, in Drake, the statements in his printed accounts, are at variance because of the conditions in England at that time and consequently the printed version is altered, as we now know, by subsequent documents that have come to light," concluding that his own position was that the northern limit of Drake's voyage was approximately 48 degrees north latitude.³²

The question of Drake's credentials was the next issue Ireland addressed. Was Drake a "buccaneer," acting on his own behalf for nothing more than personal gain, or was he an agent of the Crown? Did his travels and his creation of a colony establish control of the region on behalf of the Crown, or was he simply privateering? Ireland, agreeing with an article by R.P. Bishop published in 1939 in the *British Columbia Historical Quarterly*, expressed his belief that Drake was an explorer and colonizer, not

³² Ibid., 104.

merely a privateer.³³ Finally, Berger asked if Sir Alexander Mackenzie had employed Indigenous guides, and Ireland confirmed that he had.³⁴

After a brief re-cross examination, and as the court prepared to recess, Brown asked that he be allowed to recall Ireland as “He informs me he inadvertently deprived Captain Cook of the honour of introducing the Hilton Hotel Chain to Hawaii and could he just make a correction?” After clarifying some information about the northern extent of exploration by other early maritime explorers, and following some discussion about how certain archival material could be entered as exhibits without having the actual archival records absorbed into the court system, Ireland stepped down as witness.³⁵ His testimony had gone far beyond certifying copies of documents for the court. It touched on many of the issues critical to establishing the Nisga’a case.

Indigenous leaders from across Canada met in May of 1969 in a three-day conference in Ottawa to discuss possible federal changes to the *Indian Act*.³⁶ The conference identified the resolution of treaty and Aboriginal claims as a clear priority, and asked for federal funding to pursue this. In June, however, the federal government tabled its “White Paper on Indian Policy” in the House of Commons. The controversial White Paper proposed repealing the *Indian Act*, and ending any distinct legal status for Indigenous peoples.³⁷ Indigenous groups were shocked by this apparently unilateral decision to abolish rather than amend the act.³⁸

³³ R.P. Bishop, “Drake's Course in the North Pacific,” *British Columbia Historical Quarterly* 3 (1939), 151-182.

³⁴ *Ibid.*, 104-109.

³⁵ Ireland Testimony, Calder Appeal Book, 107-110.

³⁶ Tenant, *Aboriginal Peoples and Politics*, 145-149.

³⁷ Emma Butt, Mary C. Hurley, “Specific Claims in Canada,” Government of Canada, Law and Government Division, 1 April 2006. At: <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0618-e.htm> . The Indigenous response to the

In the courts, *Calder* failed. Mr. Justice Gould, in dismissing the Nisga'a case, ruled that Aboriginal Title had existed, but had been extinguished by colonial legislation passed before Confederation. In his judgement, however, he commended Duff and Ireland stating "Drs. Ireland and Duff are scholars of renown, and authors in the field of Indian history, and records," noting that

For source material on this subject I am specially indebted to the excellent monograph of Dr. Willard Ireland, Provincial Archivist for British Columbia, supplied as ex. 20 in these proceedings, and originally published in the *British Columbia Historical Quarterly*, vol. III, 1939, under Title 'The Evolution of the Boundaries of British Columbia.'³⁹

Gould quoted specifically from Ireland's monograph in one part of the decision.⁴⁰

Indigenous organizations were now even more wary of aligning themselves with the case, fearing that it was premature and might adversely affect future attempts to establish Aboriginal Title in the courts. The *Calder* case traveled to the British Columbia Court of Appeal. On 3 February 1970 Berger wrote to Ireland asking for "a copy of Douglas' first commission as Governor of the new Colony in 1858, together with any changes in the terms of his commission that there may have been, and the commissions of each of his successors as Governor down to the entry of British Columbia into Confederation." With these documents, Berger was hoping to show that, by the terms of

"White Paper," "Citizens Plus" (also known as "The Red Paper) rejected Trudeau's arguments in part by asserting that there was an historical basis for their distinct rights. Cairns, *Citizens Plus*, 52. Tennant notes, "Ordinarily, in keeping with federal government terminology and for reasons having nothing to do with race, the standard government term 'white paper' would have been applied to the policy statement. Chrétien and his officials were astute enough to take steps to avoid the term. They themselves refrained from mentioning it and misleadingly presented the policy statement as a 'green paper.' In fact, the copy mailed out to Indian bands across the country did have a green cover. The steps failed. The policy pronouncement was promptly and properly labelled 'the white paper.'" *Aboriginal Peoples and Politics*, 150.

³⁸ Tennant, *Aboriginal Peoples and Politics*, 150.

³⁹ Transcript of the decision, *Calder v. The Attorney General of British Columbia* (1969), At: <http://library2.usask.ca/native/cnlc/vol07/017.html>. The Supreme Court decision is also available at the Supreme Court website: <http://csc.lexum.umontreal.ca/en/1973/1973scr0-313/1973scr0-313.html>.

⁴⁰ *Ibid.*

these commissions, neither Douglas nor any of his successors had ever had the power to extinguish Aboriginal Title. Ireland, in a letter dated 6 February 1970, and noting a meeting the two had held in Ireland's office the day before, wrote "I think you need the Instructions more than the Commission, but will try to send you both."⁴¹

As Ireland found and copied all the documents Berger had requested, Berger again turned to him for help in understanding and contextualizing the records, and particularly the restrictions on the powers of the governors that each of the commissions entailed.⁴² Despite the extensive research of Ireland and Berger, the appeal court not only agreed with the earlier decision that any title the Nisga'a may have held had been extinguished, but further stated that the Nisga'a had never held Aboriginal Title. The case moved to the Supreme Court of Canada.⁴³

In 1972, the Social Credit government in British Columbia fell, and Frank Calder became a minister in the new New Democratic Party government. Trudeau's Liberals won re-election at the federal level, but with a fragile minority government. Conservative campaign literature during the federal election had promised that the Tories would consider Aboriginal claims. *Calder* marked the first time the Supreme Court would consider the question of the existence of Aboriginal Title.

In their ruling, given in February 1973,⁴⁴ three Supreme Court justices recognized that the Nisga'a currently held Aboriginal rights in the land, and three did not. The

⁴¹ Correspondence, "Thomas Berger to Provincial Archives," British Columbia Archives, GR-1738, box 14, file 1. Berger to Ireland, 3 February 1970; Ireland to Berger 6 February 1970.

⁴² *Ibid.*, Berger to Ireland 3 February 1970; Ireland to Berger 6 February 1970; Berger to Ireland 16 February 1970.

⁴³ Sanders, "The Nishga Case," 129; Berger, "Wilson Duff and Native Land Claims," 62-63; Berger, *One Man's Justice*, 127.

⁴⁴ Dated 31 January 1973. The decision is available at the Supreme Court website: <http://csc.lexum.umontreal.ca/en/1973/1973scr0-313/1973scr0-313.html>

deciding vote in the case was cast on a procedural point -- that Calder had not sought leave from the Attorney General to pursue the action. And so, at that level, the case failed.⁴⁵ But, relying heavily on Wilson Duff's testimony, Mr. Justice Wilfred Judson, on behalf of himself and two other justices, accepted the claim that the Nisga'a had had Aboriginal Title before contact, deciding only that it had subsequently been extinguished. Justice Emmet Hall, speaking for himself and two other justices held that title existed, had not been extinguished, and could still be asserted. Based on the archival evidence and Berger's carefully constructed research and arguments, developed and supported by Willard Ireland's knowledge of both the history and the documentary legacy of British Columbia, six Supreme Court justices held that Aboriginal Title did exist.⁴⁶

The decision was an important boost to the legal credibility of all Aboriginal claims. Prime Minister Trudeau met with Calder and the Nisga'a Tribal Council, conceding that Aboriginal people may have more "legal rights" than he had believed.⁴⁷ In August 1973, Jean Chrétien, Trudeau's Indian Affairs and Northern Development minister, tabled a statement in Parliament acknowledging that the government should compensate Aboriginal people for what he termed their loss of "traditional interest in land".⁴⁸ Two hundred years separated the *Royal Proclamation of 1763* and *Regina v. White and Bob*. In the last decade of his career, Willard Ireland had been an integral part

⁴⁵ Sanders, "The Nishga Case," 130; Berger, "Wilson Duff and Native Land Claims," 62-63.

⁴⁶ Sanders, "The Nishga Case," 130; Berger, "Wilson Duff and Native Land Claims," 62-63; Berger, *One Man's Justice*, 126.

⁴⁷ Sanders, "The Nishga Case," 130; Berger, "Wilson Duff and Native Land Claims," 62-63; Berger, *One Man's Justice*, 126.

⁴⁸ Department of Indian Affairs and Northern Development, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People," Communiqué, 8 August 1973; Sanders, "The Nishga Case," 132.

of two signal legal cases that ushered in an era of legal exploration of Aboriginal rights.

As Berger states:

Thus *White & Bob* and the *Nishga* case opened up the whole question of native land claims in Canada. All over Canada native people are advancing their claims today. It is part of the unfinished business of our country and the consequences will take years to unravel. These cases demonstrated the relevance of anthropological and historical knowledge to the proving of native land claims.⁴⁹

It is difficult to know how well Ireland's willing actions in helping Berger and his clients were received by his employer. Ireland's career consistently demonstrated a sensitivity to Indigenous people and Aboriginal rights that could not always be found in the British Columbia government. An unpublished typescript written by Deputy Minister of Lands for the Province of British Columbia David Borthwick, who gave evidence and presented exhibits in the *Calder* case on behalf of the Crown, concludes with a simplistic description of Indigenous people that would appear to support the idea that Indigenous people lacked the social structure to be considered an "organized society" at the time they entered into treaties with the Canadian government:

Prior to Confederation the Indians were generally an unsophisticated aboriginal people if compared by the white man's standard. His concept of land use and ownership was not thought of in terms of land titles or money as were those of the white man even a hundred years ago; rather to the Indian of that day the land (and the sea) was an integral part of his culture and provided the basic necessities to sustain his life. He could not at that time keep himself alive by sitting at a desk making marks on paper as could many of his white contemporaries. ... The Indians of British Columbia place a great emphasis on their alleged aboriginal title. It is interesting to note that the treaties which were made by the Dominion Government to extinguish the Indian title were not negotiated in the normal sense of the word, with the Indians - the terms of the Treaty were in the main set unilaterally by the Federal Government and the Treaty was merely signed by the tribal leaders. The consideration received by the Indians for what land rights they may have had was little more than

⁴⁹ Berger, "Wilson Duff and Native Land Claims," 63.

nominal. These treaties were made many years ago when the level of sophistication and education of the Indian was low - the lack of normal two-party negotiation of treaties was good evidence of this.

Borthwick's conclusion was dismissive. He argued that since Indigenous people now had an understanding of the value of their land, no government could be expected to negotiate with them in a "meaningful" way:

It is obvious that no Government at this point in time could hope to negotiate a treaty to extinguish a native title, even if it did exist, in the same manner or on the same terms as was carried out so many years ago by the federal authority. The Indian of today is extremely conscious of real estate values - this alone would preclude any meaningful negotiation from Government point of view.⁵⁰

This off-hand dismissal of Aboriginal rights by Borthwick, a deputy minister in the British Columbia government, was consistent with Sanders' observation when he wrote that "[legal counsel] Douglas McK. Brown appeared for the Province of British Columbia, and hardly appeared to take the case seriously."⁵¹ Following the Supreme Court of Canada's decision in *Calder*, the existence of Aboriginal Title could no longer be dismissed.

In 1974, after serving 34 years as provincial archivist, Willard Ireland retired. The event was noted with good humour in the Legislative Assembly, Liberal MLA Pat McGeer stating on a more serious note that "Ireland has been the banker of B.C.'s history, and future generations are going to be even more grateful than we are for the 34 years he has put in collecting memorabilia about B.C." In the tributes that followed his retirement, Ireland was gently teased for his legendary desk piled high with material so chaotic that

⁵⁰ GR-0631, British Columbia. Provincial Secretary. "Notes on Indian Land Question, (in) British Columbia." Prepared by David Borthwick. Received from Provincial Archivist, 1974. Two copies of the typescript, one with some notations, were placed in the archives in 1974 by "the Provincial Archivist."

⁵¹ Sanders, "The Nishga Case," 133.

only he could make sense of it. On 16 January 1974 about 150 civil servants gathered at the legislature to wish Ireland well. Deputy Provincial Secretary Lawrie Wallace, Provincial Secretary Ernie Hall, and Premier Dave Barrett all made brief speeches, Barrett noting, “Willard always pursued with vigour and determination those things that he felt were right, and he was invariably right.”⁵²

Ireland’s sudden death on the 27th of January 1979 at the age of 65⁵³ was marked in *The Scribe*, the “Official Newsletter of the Jewish Historical Society of B.C.” with the words:

It is with regret we learn of the recent death of Dr. Willard E. Ireland, former Provincial Librarian and Archivist. Dr. Ireland always welcomed students, researchers and societies and was very generous with his personal help to one and all.

His scholarly and sincere deportment gave a personality to his departments, which will always be remembered as “The Ireland years.”⁵⁴

The *British Columbia Historical News*, the successor to the *British Columbia Historical Quarterly* that Ireland had edited for so many years published a brief, factual obituary.⁵⁵

Was Ireland’s decision to help Berger represent the interests of the Nanaimo and Nisga’a bands against the British Columbia government one of pure professional obligation? As mentioned in chapter one, many things in his life suggest that he had a genuine interest in and respect for the history and rights of Indigenous people. When asked whether he felt Ireland’s work on *White and Bob* and *Calder* was done out of duty, or because of sympathy for the issues the cases represented, Justice Thomas Berger

⁵² Broadland, “A Man for All Missions,” 9; “Archivist a guardian of B.C. records.”

⁵³ British Columbia Archives, Vital Event registration number 1979-09-002325. At: <http://search.bccarchives.gov.bc.ca/sn-5B220FD/view/Deaths/find-adv%2B%20givennames%3D%28willard%29%20AND%20surname%3D%28ireland%29%20%2B%2B%2B%2B/1>

⁵⁴ *The Scribe*, 1:1 (March 1979). At: http://www.jewishmuseum.ca/assets/2008/6/8/1979_03.pdf

⁵⁵ *British Columbia Historical News*, 12:3 1979, 13.

responded, “I am afraid that all I can add is that Willard seemed distinctly sympathetic to our cause. My impression is that he cooperated with us, not out of merely a sense of bureaucratic duty, but because he thought the cause meritorious.”⁵⁶ This view is supported by Ireland's 1971 convocation address when he was given an honorary doctorate by Simon Fraser University. He gave the address as the Calder case travelled through the appeals process. Ireland quoted from Simon Fraser's journals, concluding with Fraser's words: “Yet in those places there is a regular footpath impressed, or rather indented, by frequent travelling upon the very rocks.” Ireland continued:

In a sense this can be read as a denial of the role which history has assigned him -- the discoverer of his river -- by his reference to the ages-old procession of Indian people along the precipices of the canyon. Surely for them the days of our neglect and our injustices, of our ignoring their role in the development of this province, must soon be ended. But in a very simple and dramatic way Fraser reminds us, as we often need to be reminded, of his acknowledgment and acceptance of the fact that man lives not in insulation from those around him now nor severed from those who have preceded him.⁵⁷

Decades after the Supreme Court ruled against the plaintiffs, the *Calder* case remains an important part of Canadian consciousness. Writing in 2007, Michael Asch asked:

What is it about *Calder* that it remains, thirty years on, a crucial guide for the present and future? In my view, it lies particularly in the understanding that it conveys about our current relationship with indigenous peoples and the kind of rethinking we need to do to square that relationship with our sense of justice.⁵⁸

⁵⁶ Personal communication, 3 December 2010.

⁵⁷ “Convocation Address by Willard Ireland,” 1971, 6. Simon Fraser University Archives, file F-91-3-0-0-5, “Convocation” (1971). With thanks to archivist Rita Mogyorosi of the Simon Fraser University Archives and Records Management for help in locating and scanning this speech.

⁵⁸ Michael Asch, “Calder and the Representation of Indigenous Society in Canadian Jurisprudence,” in *Let Right be Done*, 101-110, 101.

As important as the *Calder* case has been to the slow process of the realization of Aboriginal rights in Canada, it has been important to Aboriginal people at a personal and community level as well. As Berger writes:

the belief of the Native peoples that their future lay in the assertion of their common identity and the defence of their common interests proved stronger than anyone realized. Policies worked out by the practical men and women in Ottawa, without any knowledge of the true state of mind of Native people, were annulled as events impinged on the bureaucratic construct. The policy of the government was overthrown by the Native peoples' determination to reject it. A principal instrument in that overthrow was the suit brought by the Nisga'a people to establish their Aboriginal title.⁵⁹

With his contributions to *Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia*, Willard Ireland went beyond keeping the past alive. Ireland understood the societal provenance of the records in his care, and their relationships with records in other repositories. He understood the context of the creation of the institutional records – the functions, structures, processes, record keeping systems, and anomalies in their formal “order.” He had an archivist’s grasp of particular records, the history and record making actions of an institution – located in, and informed by, social context. This specialized understanding of records, record making, and archives themselves advanced Aboriginal rights in their own time, and for the future. His actions in both of these cases clearly show the impact that archives and archivists can have on squaring our relationships “with our sense of justice.”

⁵⁹ Berger, *One Man's Justice*, 114.

Conclusion: Archives as Actors

Since the 1960s, archives have continued to build on the foundations created by the mid-twentieth century use of archival records in legal cases in pursuit of social justice and Aboriginal rights. Just as *White and Bob* and *Calder* opened the door to Aboriginal rights claims in the courts and in public discourse, they also opened the doors of Canada's various state archives a little wider. In 1973, close on the heels of the *Calder* decision, the Public Archives of Canada (now Library and Archives Canada) began a comprehensive programme to accession, index, microfilm, and disseminate Indian Affairs records. This initiative represented perhaps the greatest increase in access to these critical records since they were first indexed in 1951, as copies of the new indexes and microfilm copies of many of the records were distributed to provincial and regional archives throughout Canada.

As much as these records have been transformed from their original purpose -- the creation of a single national Euro-Canadian narrative -- to be a support for Aboriginal rights, archives themselves have changed in the past decades. Since 1973, archives and Aboriginal people have continued to explore and re-imagine their relationships to each other and to archives and archival records, generating significant changes in how records and archives themselves have been and are being re-imagined since the Supreme Court rendered its decision on *Calder*.

Many records, and the archives that house them, began their lives as part of attempts to create and maintain a unified hegemonic national narrative. Canada's own national archives was born amid, as Ian Wilson writes, "the excitement of nation building

and the problems of linking the separate historical traditions of each of the provinces. That historical writing and the evolution of a national consciousness were inextricably linked,” notes Wilson, “seemed commonplace.”¹ Records were created and collected, in large part, as evidence of and material for a unifying national story.

Key records relating to Indigenous people reflect this search for a single national identity as well. As archivist Brian Hubner has demonstrated, from 1755 to 1950 “the expanding bureaucracy of the Department of Indian Affairs, its records-keeping systems, and the records it produced were powerful tools in the hands of Canadian attempts to assimilate First Nations people. In documenting the progress of assimilationist programmes ... the records-keeping systems of the department were also a key enabling tool in this ‘civilizing’ process.”² These records, argues archivist Bill Russell, were not created solely out of a bureaucratic operational need. The records also reflected the need of the Indian Affairs Department’s own bureaucrats to document their part in the national narrative, a sense of “the genesis of a perception of an ‘historical’ dimension to their records that transcended simple operational value.”³ Hubner notes that “Recorded communication was an integral part of the process of assimilation and the archiving of these records aimed to preserve the record of this process.”⁴ Predictably, these records, created about and not by Indigenous people, do not reflect Indigenous understandings of memory and history, and Euro-Canadian-style archives did little to serve the cultural needs of Indigenous people during this time.⁵

¹ Wilson, “A Noble Dream?,” 17.

² Hubner, “ ‘An Administered People,’ ” 92.

³ Russell, “The White Man’s Paper Burden,” 52.

⁴ Hubner, “ ‘An Administered People,’ ” 1.

⁵ Mogyorosi, “Coming Full Circle,” 7-8.

As settlement encroached on Indigenous lands, communities increasingly pursued remedies to pursue their rights, including land claims, and the documentary records that would support their claims. This continued until changes to the 1927 *Indian Act* made legal approaches and lobbying efforts by Indigenous people all but impossible, a situation that would continue until mid-century.⁶ For various reasons, not all historical documents were housed in archives at this time, and many records that were had not been adequately accessioned or even indexed. But whether in archives or other locations, during the later nineteenth and early twentieth centuries, while Euro-Canadian officials did little to facilitate Indigenous access to records, there is evidence that Indigenous people and their representatives still managed to find and make use of historical records, perhaps most notably, the *Royal Proclamation of 1763*.⁷ An important example of this in British Columbia is the history of *Papers Connected with the Indian Land Question 1850-1875*, a compilation of copies of documents originally created to facilitate the colonial aspirations of a settler society. Although the British Columbia government originally resisted making the documents reproduced in the *Papers* public, publishing them only under duress from the opposition, and printing very few copies, ensuring limited distribution, the *Papers* still came to play a key role in Indigenous resistance to colonization and rights claims.⁸ Despite the many challenges access to historical records posed, efforts by Indigenous community representatives to access and use historical

⁶ Douglas Harris, "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal" *BC Studies: The British Columbian Quarterly* (Summer 2009), 137-164, 137-138; Douglas Sanders, "The Nishga Case," 121-136, 121; Walker, "Race," *Rights and the Law in the Supreme Court of Canada*, 197.

⁷ Hamar Foster and Benjamin L. Berger, "From Humble Prayers to Legal Demands, 252.

⁸ Tennant, *Aboriginal Peoples and Politics*, x, 102, 107, 130.

records during the later nineteenth and early twentieth centuries clearly demonstrate the value they placed on these records.

On the heels of changes to the *Indian Act* that removed many of the most onerous restrictions pertaining to access to legal avenues for rights pursuit, in 1951, under the leadership of Dominion Archivist W. Kaye Lamb,⁹ a programme by the Public Archives of Canada to create and publish inventories of their collections began with Indian Affairs records. It aimed to¹⁰

Make it possible for research workers at a distance to ascertain with some precision what papers are preserved in the Public Archives, and to judge with some accuracy whether the department has in its custody significant material relating to any particular topic¹¹

This move opened the door to greater historical research using both pre- and post-Confederation Indian Affairs records that stretched back to the eighteenth century, and, in turn, greater awareness of Indigenous history.¹² As well, in 1950, the Public Archives of Canada began a programme to microfilm the pre-1870 records held by the Hudson's Bay Company Archives in Britain. Spanning a period of 200 years, the Hudson's Bay Company records offered some of the earliest records of post-contact life in the vast territory covered by the company's charter. Microfilming the records so that they were available in Canada not only opened these records to Indigenous claimants, it proved a valuable source to historians who were beginning to write histories that included

⁹ Lamb had been appointed Dominion Archivist in 1948. Cook, "An Archival Revolution," 188.

¹⁰ T.R. Schellenberg, "Review," *The American Archivist*, 15: 2 (Apr., 1952), 159-161.

¹¹ Circular issued with the published inventory of Indian Affairs records in 1951, quoted in Cook, "An Archival Revolution," 221.

¹² *Annual Report 1973-1974*, 57; 1951 PAC *Annual Report*, Queen's Printer, 20. The result was *Preliminary Inventory, Record Group 10 Indian Affairs*. (Ottawa. King's Printer and Controller of Stationery, June 1951). Terry Cook, "Indian Legacy, First Nations' Future," 5. Manuscript paper prepared for *The Archivist* 1-2:1974-75 Terry Cook, "Indian Legacy, Aboriginal Future," *The Archivist* 112 (1996): 2-6. (Also in a French version). With thanks to Terry Cook for sharing his manuscript of this paper.

Indigenous actors. At the same time, Indigenous communities embarked on their own archiving initiatives, a part of their broader efforts to secure greater self-determination.¹³

June 1969, when the Trudeau Liberal government presented its “White Paper on Indian Policy” in the House of Commons, marked what Douglas Elias has called “the beginning of the contemporary era in the development of law and policy pertaining to aboriginal rights and native title.” The “White Paper” proposed repealing the *Indian Act*, and the end of any distinct legal status for Indigenous peoples.¹⁴ In 1969 as well, the Calder case, which drew on both archival material and the testimony of the British Columbia Provincial Archivist Willard Ireland, began to make its way through the courts.¹⁵ Although the “White Paper” was so unpopular that by 1971 the federal government had to abandon plans to implement it, it was not until 1973, when the Supreme Court ruled on the Calder case, affirming the existence of Aboriginal Title, that Jean Chrétien tabled the government’s “Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People,” and established an Office of Native Claims to address land claims issues through negotiation.¹⁶

¹³ See T.R. Schellenberg’s “Review,” 159-161.

¹⁴ Elias, “Rights and Research,” 1; Emma Butt, Mary C. Hurley, “Specific Claims in Canada,” Government of Canada, Law and Government Division, 1 April 2006. At: <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0618-e.htm> . The Indigenous response to the “White Paper,” “Citizens Plus” (also known as “The Red Paper,”) rejected Trudeau’s arguments in part by asserting that there was an historical basis for distinct Aboriginal rights. Cairns, *Citizens Plus*, 52; Morrison, “Archives and Native Claims,” 16.

¹⁵ Berger, *One Man's Justice*, 119; Sanders, “The Nishga Case,” 128-129. See also transcripts of the Court decisions: <http://library2.usask.ca/native/cnlc/vol07/017.html> ; <http://library2.usask.ca/native/cnlc/vol07/091.html> and <http://csc.lexum.umontreal.ca/en/1973/1973scr0-313/1973scr0-313.html> .

¹⁶ Morrison, “Archives and Native Claims,” 22-23; Elias, “Rights and Research,” 2; Department of Indian Affairs and Northern Development, “Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People,” Communiqué, 8 August 1973.

As the Calder decision was handed down, and the Office of Native Claims was being established, the Public Archives of Canada mounted an ambitious project to “arrange, index, and microfilm records of the Indian Affairs Branch.”¹⁷ Records were identified, accessioned, microfilmed and indexed. Indexes were computerized, and microfilm was copied and made available across the country through other archives and interlibrary loan.¹⁸ By 1979, the Archives was able to report considerable progress in this undertaking:

Indian Affairs (RG 10); the computer-assisted indexes for Schools Files and Black (Western) Series Registry files are now available in both microfilm and microfiche format. The Red (Eastern) Series, 135 metres of central registry files covering the years 1872-1964, has been keyboarded and transferred to computer tape. Editing and correction of errors remain before the final index is available to researchers.¹⁹

Throughout this time archival records were a key component in supporting and redressing the loss of the rights of not only communities but also individuals. As Terry Cook has noted:

The individual rights and privileges of aboriginal people are also documented in these records, from establishing their and their ancestors very status, for example, as Treaty Indians and therefore their entitlements to attendant Treaty benefits, on through to records concerning adoption, estate and trust fund management of Indian monies, reserve land and its allocation and resource use, band definition and establishment, and every conceivable social programme, from housing to education, health to arts and crafts.²⁰

Provincial and private archives held sources that could be useful to Indigenous people in the pursuit of personal and community rights as well. At a personal level, baptismal, marriage and death registers could help to prove claims to Indian status.

¹⁷ Public Archives of Canada, *Annual Report*, 1973-1974, 1.

¹⁸ Terry Cook, “Indian Legacy, First Nations’ Future.”

¹⁹ Public Archives of Canada, *Annual Report*, 1978-79, 6

²⁰ Terry Cook, “Indian Legacy, First Nations’ Future.”

Provincial archives such as the British Columbia Archives held documents that were critical in land claims cases, and the Hudson's Bay Company Archives held records that spanned the pre-Confederation to Confederation periods. Religious archives could also be valuable in rights claims at the community and personal level.²¹ But for all the possible interactions between Euro-Canadian archives and Indigenous peoples, relationships continued to reflect the archives' role as a source of records for research. Researchers could descend on the archives to seek the building blocks of legal arguments or personal claims. Despite the fact that the Trudeau government had established a claims process in 1973, the slow pace and complex bureaucracy involved in the process steered many claims to the courts.²² The essential conditions for meeting the legal proof of a claim made archival material indispensable.²³ They required that Indigenous people

show the courts that they are native people, with a line of history grounded in the lands and resources claimed, and with a culture geared to the occupation and use of particular lands and resources. They must show a current and ongoing involvement in those lands and resources. They must show that the way they now use those resources is consistent with tradition.²⁴

²¹ Morrison, "Archives and Native Claims," 26-29; See also, for instance, Foster, *Let Right be Done*; Sanders, "The Nishga Case," 121-136; Berger, "Wilson Duff and Native Land Claims, 49-64; Cook, "Indian Legacy, First Nations' Future."

²² Douglas, "Rights and Research," 3.

²³ It was not until the 1997 *Delgamuukw* decision, when the Supreme Court of Canada reversed a lower court decision against the plaintiffs on the basis that the judge had not given enough weight to oral evidence, privileging instead, written archives, that non-documentary sources were given standing in Canadian courts. Perry, "The Colonial Archive on Trial," 325-350, 331.

²⁴ Douglas, "Rights and Research," 4. This set of conditions for proving Aboriginal Title was articulated in what would come to be called the "Baker Lake Test," (named after a 1979 decision in the federal court of Canada in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*). The "test" asks:

- Whether they were members of an organized society
- Whether the organized society occupied the specific territory over which title is claimed
- Whether the occupation was to the exclusion of other organized societies
- Whether the occupation was an established fact at the time sovereignty was asserted by England

With the development of the Internet, many archives have added specific Aboriginally themed content and special areas to their websites, not only making the sites more accessible, but also increasing awareness of Aboriginal rights issues among all of their users.²⁵

The political climate in the 1980s, reflecting an increased awareness of Indigenous issues, particularly following the inclusion of Aboriginal rights in the 1982 Constitution Act, and an increased concern about sexual impropriety in orphanages and schools, created a space where some Indigenous people began to feel that they could publicly discuss the abuses they suffered in the Residential Schools system.²⁶ As the public discussion of Residential Schools abuses increased, the copious records in archives, notably the Indian Affairs records in the now renamed National Archives of Canada, and schools records in some religious archives, became a focus of attention.

Michael Asch, "Post-Calder, Canada's Judiciary Struggles to Reconfigure Native Rights," *Cultural Survival Quarterly* 28.1 (Spring 2004) . At <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/canada/post-calder-canada-s-judiciary-struggles-reconfigure> Accessed 08 January 2011; Karen E. Lohead, "Reconciling Dispossession?: The Legal and Political Accommodation of Native Title in Canada and Australia," (PhD Diss., Political Science Department, Simon Fraser University, 2005), 200. While the courts have identified a range of Aboriginal rights as derived from the distinctiveness of Aboriginal people, particular rights, such as Aboriginal Title still require proof of historical practices. In the case of Aboriginal Title, for instance, proof of occupancy of the land in question is required. See James Tully, "The Struggle for and of Freedom," in *Political Theory and the Rights of Indigenous Peoples* , D. Ivison, P. Patton , and W. Sanders, eds. (Cambridge: Cambridge University Press, 2000), 36-59, 47. For a discussion of the current relationship between distinctiveness and the exercise of specific practices that are central to that distinctiveness, see Brian Slattery, "A Taxonomy of Aboriginal Rights," *Let Right be Done: Aboriginal Title, the Calder case, and the Future of Indigenous Rights*, in Hamar Foster, Heather Raven, and Jeremy Webber, eds. (Vancouver: University of British Columbia Press, 2007), 111-128.

²⁵ For example, see: Library and Archives Canada: <http://www.collectionscanada.gc.ca/aboriginal/index-e.html> ; The United Church of Canada Archives : <http://www.united-church.ca/aboriginal> ; British Columbia Archives: http://www.royalbcmuseum.bc.ca/BC_Research_Guide/BC_First_Nations.aspx .

²⁶ John Milloy, *A National Crime: The Canadian Government and the Residential School System – 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999), xiii.

With roots that reach far back into colonial policy, and reflect the early Canadian search for a single, homogenous national narrative, the Indian Residential Schools system of the nineteenth and twentieth centuries in Canada was founded on, as John Milloy writes, Canada's "self-imposed 'responsibility' for Aboriginal people set out in Section 91:24 of the British North America Act of 1867."²⁷ The project began in earnest in 1879, when the now infamous *Davin Report*, prepared by journalist Nicholas Flood Davin, recommended that a system of Industrial Schools be instituted to fulfill the "sacred trust" this "responsibility" engendered. As Davin wrote his report, there were already a dozen mainly denominational boarding schools in Manitoba, Ontario, the Territories and British Columbia. The policy of assimilation and the use of schools to accomplish this not only offered Euro-Canadians the intangible rewards of moral certainty, but also promised long-term economic benefits through integrating Indigenous people into the Euro-Canadian economy. To realize these goals, the system was built upon a partnership between the state and a number of religious denominations -- the state being the senior partner, and responsible for setting policies, providing funding, and monitoring standards of care.²⁸ Through almost a century, the Residential Schools system operated with the overt goal of assimilating Indigenous children. Underfunded, and unevenly supervised, the schools and the system itself were never without their detractors. But it was not until Canada's Centennial year in 1967 (when the Canadian Welfare Council issued a scathing

²⁷ Ibid., 298-299.

²⁸ Ibid., xiii-xiv, 6-9; J. R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996), 102-103.

report about the schools) that the Department of Indian Affairs began in earnest to phase the system out. The last residential school finally closed its doors in 1986.²⁹

The summer of 1990 has been coined Canada's "summer of discontent." A standoff in Oka, Quebec, the ultimate failure of the Meech Lake Accord, and scandals about sexual impropriety in religious-run schools and orphanages in the Maritimes combined to create an atmosphere of tension and unrest, as well as opportunity. In the fall of 1990, Grand Chief Phil Fontaine went public with his own story of abuse at the Fort Alexander Residential School.³⁰ In 1991, the Canadian government established a *Royal Commission on Aboriginal Peoples*. Its long-awaited report, released in 1996, drew heavily on archival sources to make a scathing condemnation of the Residential Schools system. It recommended that the government form a commission of inquiry to further investigate the operation and legacy of the schools.³¹

In 1998, as part of its response to growing public concern over the legacy of the Residential Schools system the Government of Canada established the Aboriginal Healing Foundation. The Foundation was given a \$350 million federal grant "to support community-based healing projects that addressed the legacy of physical and sexual abuse at residential schools." Recognizing that its ten-year mandate was not enough to address the consequences of over a century of abuse and neglect by the Residential Schools

²⁹ Milloy, *A National Crime*, xvii, 289-292.

³⁰ *Ibid.*, 297-298, 302-303; Jack Glenn, *Once Upon an Oldman: Special Interest Politics and the Oldman River Dam* (Vancouver: University of British Columbia Press, 2000), 74.

³¹ The commission's report is published online at <http://www.ainc-inac.gc.ca/ap/rrc-eng.asp>; Milloy, *A National Crime*, 302-304; *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, Marlene Brant Castellano, Linda Archibald and Mike DeGagné, eds. (Aboriginal Healing Foundation, 2008), 2. At: <http://media.knet.ca/node/3522>.

system, the Foundation established the Aboriginal Healing Charitable Foundation to continue its work. This name was changed in 2001 to the Legacy of Hope Foundation.³²

Archival materials remained important in addressing the legacy of the Residential Schools. In 2002 the Legacy of Hope Foundation entered a ground-breaking collaboration with Library and Archives Canada and Onondaga artist Jeff Thomas to mount the exhibit, *Where Are the Children? Healing the Legacy of the Residential Schools*. With objectives that included self-empowerment, and “to give Aboriginal people the opportunity to begin to understand the residential school experience through viewing the photographs of the places to which Aboriginal children were taken,” the exhibit, curated by Thomas, was inspired by the need of Indigenous youth to understand this chapter in their own histories. In its creative function, its proactive focus, its cultural sensitivity and its active partnerships with Indigenous peoples and communities, this exhibit marked a significant change not only in the use of archival material but in the whole relationship between Euro-Canadian archives and Indigenous people.³³

The exhibit served to highlight the changing, collective, and collaborative nature of the meaning of archival materials. Although many of the over sixty images in “*Where Are the Children? Healing the Legacy of the Residential Schools*” were originally created and subsequently preserved to document the “vanishing Indian,” and the federal Indian

³² Legacy of Hope website: “About Us: History.” At: <http://www.legacyofhope.ca/Who.aspx> ; *Where Are the Children? Healing the Legacy of the Residential Schools*. Catalogue of the exhibit, 16. At: <http://www.legacyofhope.ca/assets/watc-websize.pdf> ; Laurence J. Kirmayer, Gail Guthrie Valaskakis, *Healing Traditions: The Mental Health of Aboriginal Peoples in Canada* (Vancouver: University of British Columbia Press, 2009), 25.

³³ In 1993 Australia mounted an exhibition: *The National Archives of Australia: Exhibition for the International Year for the World’s Indigenous People: Between Two Worlds – The Commonwealth Government and the Removal of Aboriginal Children of Part-Descent in the Northern Territory*. While this exhibit was intended to further reconciliation, it was also a celebration of the International Year for the World’s Indigenous People, thus, in a sense “serving two masters.” Catherine Nicholls, “Exhibiting Evidence: A Case Study,” *Archivaria* 55 (2003), 27-42, 27-31.

Affairs Department's role in the planned efforts at the "benign" assimilation of Aboriginal children, the collection goes far beyond documenting residential schools to create spaces where Aboriginal and non-Aboriginal Canadians can confront the profoundly painful consequences of assimilationist government policies that have left a legacy of pain and damage to be borne by future generations. The exhibit reflects a democratization of the archives, which as Derrida states, "can always be measured by this essential criterion: the participation in and the access to the archive, its constitution, and its interpretation."³⁴

To create the exhibit, Thomas mined the collections of the National Archives of Canada (now Library and Archives Canada), other archives, and federal government *Sessional Papers* to bring together images and deepen understandings of residential schools and the children who attended them in a provocative and challenging exhibition that offers no easy answers. One of the striking features of the exhibit's historical photographs, most taken by non-Indigenous photographers in the years from 1880 to the 1960s, is the way that the children, many looking directly into the camera, are frozen in time, conveying a strong sense of unresolved tension. The last part of the exhibit draws on recorded and transcribed oral histories and photographs by Thomas, as well as family photographs, to highlight the multiplicity of meanings that photographic images can offer to different viewers. The exhibit suggests hope, presenting the stories of survivors, role

³⁴ Quoted in Harris, *Archives and Justice*, 310.

models for a possible future. But the story has no conclusion. The exhibit instead challenges the viewer to move towards justice.³⁵

First displayed at Library and Archives Canada in 2002, *Where Are the Children? Healing the Legacy of the Residential Schools* then toured Canada until 2005. It can be now be viewed online.³⁶ The exhibit exposes the archive as a place, as Derrida writes, where archiving consciously “produces as much as it records the event,” where the archives intentionally realizes its capacity to, in the words of Randall Jimerson, be “active agents in the process of shaping our knowledge of the past.”³⁷ In the exhibit catalogue, then National Archivist Ian Wilson described it as looking to the societal roles of archives, rejecting the idea that archives somehow exist outside of the society they document, and suggesting that they make a conscious decision to join it.³⁸ Archives cannot be and never have been detached collectors of the neutral evidence of the actions of their masters. In *Where Are the Children? Healing the Legacy of the Residential Schools* archives perform the role of a key mediator of the past for present society, bringing to new life the three-fold mandate that Wilson outlines, “to acquire, preserve and make accessible public and private records of national significance.” The exhibit represents the recontextualization of the archival space, both figuratively and physically, and, as Foundation Chairman Georges Erasmus states, the “renewal of nations and reconciliation of peoples.” Erasmus notes in a distinctly postmodern moment,

³⁵ *Where Are the Children?* Catalogue of the exhibit, 16-25; J. Keri Cronin, “Exhibition Review Article: Assimilation and Difference: Two Recent Exhibitions of Archival Photographs,” *Archivaria*. 54:2 (Fall/Winter 2002), 130–141, 132.

³⁶ Kistabish, “Message,” *Where Are the Children?* Catalogue of the exhibit, 4. See the exhibit and related resources online at <http://www.wherethechildren.ca/>; Cronin, “Exhibition Review Article: Assimilation and Difference,” 135-136.

³⁷ Jacques Derrida, (Eric Prenowitz, translator), *Archive Fever: A Freudian Impression* (Chicago: University of Chicago Press, 1998), 17; Jimerson, *Archives Power*, 19.

³⁸ Ian Wilson, “Message,” “*Where Are the Children?*” Catalogue of the exhibit, 9.

“Dedicated to the service of the nation’s identity, the Archives gathers what has been as an endowment to what will be.”³⁹

Meanwhile, the search by Residential School survivors for recognition, reconciliation and reparation continued. As part of their response to the growing pressure by residential schools survivors, the federal government established an out-of-court dispute resolution program, but the program had only managed to resolve 147 claims out of nearly 2000 applications by the summer of 2005. By September 2005 there were 12,455 tort claims filed in the courts and several class action suits were growing. Some Indigenous people began discussing the idea of a Truth and Reconciliation Commission along the lines of the South African model. In 2006, the Residential Schools Settlement Agreement was ratified between many of the survivors and the federal government, the churches that had been involved in the system, and Aboriginal organizations, including the Assembly of First Nations. The settlement included a “common experience payment” and the creation of a Truth and Reconciliation Commission.⁴⁰

Canada’s Truth and Reconciliation Commission, established under a mandate outlined in “Schedule ‘N’” of the Indian Residential Schools Settlement, is part of an increasing number of such “truth commissions” worldwide. In her 2001 book *Unspeakable Truths: Confronting State Terror and Atrocity*, Priscilla Hayner identified twenty-one such commissions.⁴¹ Writing in 2009, archival studies professor Randall C.

³⁹ Georges Erasmus, “Message,” “*Where Are the Children?*” Catalogue of the exhibit, 6, 9.

⁴⁰ Kirmayer and Valaskakis, *Healing Traditions*, 25. Information about the Indian Residential Schools Settlement is available at the “Official Court Website,” located online at <http://www.residentialschoolsettlement.ca/>.

⁴¹ A transcript of schedule “N” can be found at http://www.trc-cvr.ca/pdfs/SCHEDULE_N_EN.pdf.

Jimerson found that “nearly two dozen truth commissions have been established, most in South and Central America and Africa.”⁴²

The appearance of truth commissions on the international human rights landscape coincided with a heightened self-awareness among archivists of the important relationships between archives and human rights.⁴³ In 2003, the International Council on Archives established a working group on *Archives and Human Rights*,⁴⁴ and the years since the turn of the millennium have seen international conferences on the relationship between archives and human rights in South Africa, Norway, and the United States.⁴⁵ In 2009, in its *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General* the United Nations Office of the High Commissioner for Human Rights recognized the importance of archives in the pursuit and preservation of human rights stating:

4. When a period characterized by widespread or systematic human rights abuses comes to an end, people who suffered under the old regime find themselves able to assert their rights and they begin dealing with their past. As they exercise their newly freed voices, they are likely to make four types of demands of the transitional State, namely demands for truth, justice, reparations and institutional reforms to prevent a recurrence of violence. Each of these demands relies on the availability of archives.

5. The recognition that archives and archivists play a central role in undergirding human rights has grown over the last decade.⁴⁶

⁴² Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001), 14-15. My thanks to Joseph Weiss for sharing a draft paper on this subject, and for his insights about it. Randall C. Jimerson, *Archives Power: Memory, Accountability, and Social Justice*. (Chicago: Society of American Archivists, 2009), 264.

⁴³ Jimerson, *Archives Power*, 21; Harris, *Archives and Justice*, 203.

⁴⁴ See the working group’s webpage at <http://www.ica.org/groups/en/node/37> .

⁴⁵ Jimerson, *Archives Power*, 360.

⁴⁶ Report available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf> is interesting to note that while truth and reconciliation commissions followed profound regime change in many countries like South Africa, this is not the case in Canada. I thank Joseph Weiss for bringing this to my attention.

Canada's Truth and Reconciliation Commission was established on the following principles: "accessible; victim centred; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair; respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians."⁴⁷

Simply stated, the Truth and Reconciliation Commission of Canada summarizes its mandate as

to learn the truth about what happened in the residential schools and to inform all Canadians about what happened in the schools. The Commission will document the truth of what happened by relying on records held by those who operated and funded the schools, testimony from officials of the institutions that operated the schools, and experiences reported by survivors, their families, communities and anyone personally affected by the residential school experience and its subsequent impacts. The Commission hopes to guide and inspire First Nations, Inuit, and Métis peoples and Canadians in a process of truth and healing leading toward reconciliation and renewed relationships based on mutual understanding and respect.⁴⁸

To fulfill this mandate, the Truth and Reconciliation Commission is preparing an historical record of the operations and policies that shaped the Residential Schools system. It is creating a public report of its activities, including recommendations, and "Establishing a national research centre that will be a lasting resource about the Indian Residential Schools legacy." The commission's functions include statement gathering, hosting a number of national events, providing support to local community events, and co-ordinating document collection and undertaking research, the results of which will be

⁴⁷ "Mandate for the Truth and Reconciliation Commission," http://www.trc-cvr.ca/pdfs/SCHEDULE_N_EN.pdf.

⁴⁸ Truth and Reconciliation Commission website: <http://www.trc-cvr.ca/about.html>.

included in the holdings of the planned National Research Centre and the commission's own report.⁴⁹

The Truth and Reconciliation Commission's mandate creates specific duties in relation to archiving. For instance, the

Commissioners are authorized and required in the public interest to archive all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation.⁵⁰

The Truth and Reconciliation Commission's mandate includes the function of "witnessing in accordance with Aboriginal principles."⁵¹ The questions this responsibility to witness raise suggest the complex relationships between remembering and forgetting, and narrative, relationships, and responsibilities that archives are, by their nature a part of. In a speech delivered at a formal "Witnessing the Future" ceremony in 2009, engaging then Governor General Michaëlle Jean as a witness, Commissioner Justice Murray Sinclair stated:

In Aboriginal and European traditions one of the most significant honours one can bestow is to invite a person to bear witness to an important occasion or event or process. The event may include a ceremony, such as a wedding or a naming, with the witness being asked to observe and to account to others in the future for the significance and the validity of the event. Indeed the status of the witness often enhances the event even further. In agreeing to bear witness to an event, the witness undertakes to verify not only that it occurred but that it was important and that it was undertaken with appropriate solemnity. Being asked to fill such a role demonstrates mutual respect, and establishes important relationships.⁵²

⁴⁹ Truth and Reconciliation Commission website: <http://www.trc-cvr.ca/about.html>.

⁵⁰ Truth and Reconciliation Commission website: <http://www.trc-cvr.ca/overview.html>.

⁵¹ Ibid.

⁵² Murray Sinclair, "Remarks at Witnessing the Future Ceremony, Thursday, October 15, 2009." At: http://www.trc-cvr.ca/pdfs/TRC_Chair_Murray_Sinclair_speech.pdf.

As a witness to the profound consequences of the Residential Schools system in Canada, the commission has inherited an archival mandate that opens, as Derrida says of the trajectory of all archives, “out of the future.”⁵³ As Jimerson notes, “Archival records ... represent the nexus of memory and forgetting, of power and accountability, of oppression and justice.”⁵⁴ Archives witness.

In preserving the records created and collected by the Truth and Reconciliation Commission, its archives engage with both individual and collective rights. Individually, archives help victims to understand the context of their victimization. Collectively, archives can act as witnesses to history and against the recurrence of such victimization.⁵⁵

As Louis Bickford, director of the International Centre for Transitional Justice, states:

By creating human rights archives, [human rights activists] suggest that they can help construct a narrative of the past which gives adequate emphasis to the pain and suffering of victims of human rights abuses. Archives are thus seen as both an activists’ tool ... but also as a source of ammunition on a broader and more complex battlefield: the battlefield of historical memory.⁵⁶

In its role as creator of its archive, the Truth and Reconciliation Commission has the opportunity to bring healing. As Verne Harris notes, archives can help people to “tell the story not to then forget what happened, but tell it so that the pain, guilt, anguish, hatred, and so on – as lived experience can be forgotten.”⁵⁷ Built on a long history of interactions between Indigenous and non-Indigenous people, and relationships between archives and power, the archives that the Truth and Reconciliation Commission will create has the potential to take up Nelson Mandela’s challenge:

⁵³ Harris, *Archives and Justice*, 39.

⁵⁴ Jimerson, *Archives Power*, 278.

⁵⁵ *Ibid.*, 264.

⁵⁶ Quoted in Jimerson, *Archives Power*, 358.

⁵⁷ Harris, *Archives and Justice*, 395.

All of us tend to associate archives and museums with a remembering of the past. But that is only part of their work. If justice is their most important shaping influence, then they are also about making the future.⁵⁸

As Tom Nesmith argues, records and archiving are “the products of open-ended processes of knowing, and participate in processes of knowing as active agents in them.”⁵⁹ Archives have changed and been changed and are still changing as they reflect and are reflected in their relationships with Indigenous peoples. Over its history, Canada’s archives and their records have been used as sources of hegemonic power and as resources to challenge that power. As part of its mandate, the Truth and Reconciliation Commission will collect records that have meant many different things to many different people. But it is the archives taken as a whole, with its creators and co-creators, its records and contextualities, its open-endedness, that has the power to support social justice, to bear witness to human rights, and to actively participate in its own creation. Through its creative potential, the archives of the Canadian Truth and Reconciliation Commission has the opportunity to build on the past and contribute to the future not only of its records but of the creative relationship between archives and human rights themselves.

The meanings of archives and their relationships with Canada’s Indigenous people have changed and been changed by their stakeholder communities. Archives have moved from a vision of the archive as the neutral institutional custodians of the historical record, to sources of documentary records that can be mined for the raw material to support (and challenge) Aboriginal Rights claims. Archival records are being interrogated in support of social justice and human rights, and increasingly realizing their potential to

⁵⁸ Quoted in Jimerson, *Archives Power*, 278.

⁵⁹ Tom Nesmith, “Reopening Archives,” 261.

create spaces where Canadians can confront difficult issues and try to work out painful questions. Archives have begun to consciously engage in their own creative acts and open up their democratic potential.

Despite the changes that have happened in the last few decades, opportunities for meaningful dialogue about the relationships between archives, and particularly Euro-Canadian archives remain. Recently, archivist Michelle Rydz has explored more inclusive models for Indigenous community participation in archiving in her thesis “Participatory Archiving: Exploring a Collaborative Approach to Aboriginal Societal Provenance.”⁶⁰ Just as anthropologist and historian Nicholas Dirks argues with respect to the structure and organization of state archives

The archive is a discursive formation in the totalizing sense that it reflects the categories and operations of the state itself.... The state produces, adjudicates, organizes and maintains the discourses that become available as the ‘primary’ texts of history.⁶¹

Archives, all archives, whether state or not, are not simply a collection of specific and discrete documents. The organization of the archives and its archival records are part of the history it validates and substantiates or challenges, making it critical that we examine how archives identify and maintain the “primary texts of history,” including those embedded in its own internal structuring. The very act of imposing the archival structure used by the hegemonic state on Indigenous archives is itself an act of hegemony.

While more inviting and inclusive strategies for Euro-Canadian archives offer promise, other options deserve reflection. In the past thirty years, Indigenous people

⁶⁰ (MA Thesis, University of Manitoba, Department of History (Archival Studies), 2010). At University of Manitoba’s MSpace: <http://mspace.lib.umanitoba.ca/handle/1993/4247>

⁶¹ Nicholas Dirks quoted in “Epilogue, “Archive Fever and the Panopticon of History” in *Dwelling in the Archive: Women Writing House, Home, and History in Late Colonial India*, Antoinette Burton, ed. (Oxford: Oxford University Press, 2001), 140.

have increasingly pressed for greater self-determination and recognition, which has in turn informed discourses about the nature of Indigenous/state relationships. This move to self-determination and self-government has naturally led to questions about how much self-determination can exist in a state that continues to 'hold the all the cards'. Discourses about the tensions between the small "I" liberal order state and both Indigenous and Aboriginal rights have particular resonance for archives.

Political scientist Glen S. Coulthard has explored Indigenous-state relationships in the light of Frantz Fanon's critique of Hegel's master-slave dialectic. Coulthard's criticism of the idea that the small "I" liberal order politics of recognition can undermine the domination of the state in Indigenous-state relationships⁶² questions the idea that inclusion in an archives, even well-intentioned inclusion, does not amount to self-determination. Even those archives that are created and run by Indigenous communities operate within the context of their overarching relationship with the state and cannot be completely autonomous. This in turn informs the relationships that archives create, reflect, validate, and rehearse. As media and communications professor Gail Guthrie Valaskakis notes, "We construct who we are in the process of identifying with the images and narratives that dominate our ways of seeing and representing the world around us The narratives we express are windows on who we are, what we experience, and how we understand and enact ourselves and others."⁶³ Archives are a critical part of how we construct, rehearse and conserve those windows.

⁶² Glen S. Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada," *Contemporary Political Theory* (2007) 6, 437–460.

⁶³ "Telling Our Own Stories: the Role, Development and Future of Aboriginal Communications," in *Aboriginal Education: Fulfilling the Promise*. Marlene Brant Castellano et al, eds., (Vancouver: University of British Columbia Press, 2000), 76-96, 76. My thanks to Wendy Smith for alerting me to this paper and Valaskakis's work.

Laura Millar argues convincingly that today in Canada Indigenous oral and documentary histories are inextricably connected.⁶⁴ But while it is true that Indigenous and non-Indigenous Canadians share a history and have therefore influenced and been influenced by each other, Indigenous people have also created, and continue to create, their own ways of knowing, and archivists are beginning to think about these important differences more deeply. As the work of Julie Cruikshank and others has demonstrated, and is so well summed up by Mrs. Annie Ned, “You tell different stories from us people.”⁶⁵

Oral histories, for instance, not only represent sources of information, but also an entire cultural learning system. While some forms of knowledge may lend themselves to traditional Euro-Canadian forms of archiving, some may not. The very way that an archive is constructed and constructs itself is part of the information it contains. An example of this can be seen in efforts to archive Indigenous oral history. As Verne Harris, archivist at the Nelson Mandela Foundation in Johannesburg notes, positivistic visions of orality as “memory which must be recorded before it is lost” engage “a worrying tendency to underestimate, or simply not to grasp, the problematic of converting orality into material custody.”⁶⁶ This, argues Harris, creates three issues: a failure to recognize orality as history in favour of viewing it as source; a failure to respect orality’s fluidity and the importance of the function of recitation as part of meaning; and an unwillingness

⁶⁴ Millar, “Subject or Object?” 345.

⁶⁵ Mrs Annie Ned, 1982. Quoted in Julie Cruikshank, Angela Sidney, Kitty Smith, and Annie Ned, *Life Lived Like a Story: Life Stories of Three Yukon Native Elders* (Vancouver: University of British Columbia Press, 1991), 355.

⁶⁶ Verne Harris, *Exploring Archives: An Introduction to Archival Ideas and Practice in South Africa* 2nd ed., (Pretoria: National Archives of South Africa, 2000), 93. See also, for example, Jean-Guy A. Goulet, *Ways of Knowing: Experience, Knowledge, and Power Among the Dene Tha* (Vancouver, University of British Columbia Press, 1998).

“to engage indigenous conceptualizations of orality not as memory waiting to be archived, but as archive already.”⁶⁷

Canadian archives, the basis of so much historical and political power, are only beginning to address issues of voice, and voices, and, in some ways remain in a similar position to those in post-apartheid South Africa. As Harris observes of the post-apartheid archives, Indigenous ways of knowing remain largely unknown, and this silence largely uncontested. But in South Africa Harris contends that “black South Africans are beginning to achieve a representative presence” as professional archivists.⁶⁸ In Canada, despite the work of respected figures like anthropologist Julie Cruikshank on the importance of cultural context in understanding Aboriginal oral testimony, of Brendan Edwards and Rita Mogyrosi on the importance of archives and other information resources relevant to Aboriginal people,⁶⁹ and of Verne Harris’ insights into the importance of stakeholder communities in shaping archives, there is much yet to do to follow through on such work. As historian Mary Jane McCallum notes:

The professionalization of history also has wider implications beyond classrooms and universities in determining how our historical resources are preserved, protected, accessed, and used in places like museums, archives, and parks as well as in publishing and skilled historical rights and claims research. These are important domains of both popular and professional Aboriginal history in Canada, and they continue to be, with few exceptions, organized along the lines and objectives of professional historical models. While some have been variably “receptive” to Indigenous knowledge, none have been seriously confronted by Indigenous professional historical labor.⁷⁰

⁶⁷ Harris, *Exploring Archives*, 93.

⁶⁸ *Ibid.*, 96.

⁶⁹ Cruikshank also notes that the women involved in creating *Life Lived Like a Story* were motivated by wanting to leave stories in a format that the next generations of their families would be able to access and relate to. Cruikshank, *Life Lived Like a Story*, 16.

⁷⁰ Mary Jane Logan McCallum, “Indigenous Labor and Indigenous History” *The American Indian Quarterly* 33:4, 2009, 523-544, 537. McCallum’s observations highlight the scope of stakeholder communities in this dialogue. Historians engage not only the academic and legal communities, but popular

Archives are at a point where the memory located in archives and records is being challenged, re-imagined, and reorganized. This is a liminal time, and that liminality offers opportunities to interrogate basic epistemologies, methodologies, theories, and archives. Without the voices of Indigenous scholars, both historians and archivists, it is difficult to know how Indigenous epistemologies can and will be interpreted and integrated in the field of archives. There is ample room for rich and exciting dialogue about what constitutes a source, a record, and an archive, and how these essential pieces create and are created by their communities. Archives can no longer be imagined as a neutral and passive institution, they are constitutive of the reality they seek to preserve. As Derrida has written, “One will never be able to objectivise it with no remainder. The archivist produces more archive, and that is why the archive is never closed. It opens out of the future.”⁷¹ Questions about the effects of group identity, gender, and significant issues of context in records will all benefit from a more robust dialogue engaging Indigenous professional and non-professional voices. Such a dialogue could go a long way to addressing the marginalization Indigenous forms of archive, memory, and history have experienced

A careful consideration of the history of relationships between Indigenous people and archives in the past can be an important part of imagining the future. The story of how Willard Ireland’s rich sense of both the historical and archival context of archives and records contributed to *Regina v. White and Bob* and *Calder v. The Attorney General*

understanding of history, including Aboriginal community perceptions of Western-style history, and through these stakeholders, the political arena. These constituencies, in turn, influence what is preserved and perceived of as having enduring historical value.

⁷¹ *Archive Fever*, 68.

of British Columbia not only suggests how these relationships have worked in the past, it opens the door to the increasingly re-imagined use of archival records and the archives for the future, suggesting their potential to not only support and respond to the pursuit of Aboriginal and Indigenous rights in Canada, but to engage in that dialogue actively and fully.

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