

# Archives and Justice: Willard Ireland's Contribution to the Changing Legal Framework of Aboriginal Rights in Canada, 1963–1973



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RÉSUMÉ Malgré leur rôle essentiel dans l'acquisition, le classement, la préservation et la diffusion de documents culturels et légaux importants, les contributions des archivistes canadiens en matière de droits humains et de justice sociale au Canada et dans le monde ont souvent été négligées. Pourtant, ces contributions ont influencé le discours public et légal par rapport aux questions telles les droits des Autochtones et elles ont résonné dans les décisions judiciaires qui sont aujourd'hui à la base de notre connaissance de ces questions. Étant donné leur accès à une information plus poussée du contexte historique et de l'histoire des documents d'archives, les archivistes apportent souvent des perspectives uniques; cependant, on prend souvent pour acquis cet accès au contexte et à l'histoire. La vie et la carrière de Willard Ernest Ireland (1914-1979), archiviste provincial de la Colombie-Britannique de 1940 à 1974, illustre bien cet oubli. On a peu écrit au sujet d'Ireland et de l'influence de sa carrière, non seulement sur la préservation de l'histoire, mais aussi sur la création même de celle-ci. Ce texte examinera les contributions clés de Ireland à deux causes judiciaires, *Regina v. White and Bob* et *Calder v. The Attorney General of British Columbia*, causes critiques pour l'établissement d'un fondement légal pour les droits des Autochtones au Canada.

ABSTRACT Despite their pivotal roles in collecting, organizing, preserving, and disseminating important cultural and legal records, the contributions of Canadian archivists to the pursuit of human rights and social justice in Canada and the world

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have often been overlooked. Yet these contributions have shaped the public and legal discourse about such issues as Indigenous rights, and have echoed in the court decisions that form the basis of our understandings of these issues today. Because of their access to information about the deeper historical context and archival history of records, archivists often have unique insights to offer; this access to critical context and history, however, often seems taken for granted. The life and career of Willard Ernest Ireland (1914–1979), British Columbia’s Provincial Archivist from 1940 to 1974, is an example of this oversight. Little has been written about Ireland and the influence of his career not just in preserving history but also in actually making it. This paper will examine Ireland’s key contributions to two twentieth-century legal cases, *Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia*, cases that were critical in establishing the legal basis for Indigenous rights in Canada.

## Introduction

For generations, Canadian archivists have been silent partners in the pursuit of social justice. Despite their pivotal roles in collecting, organizing, preserving, contextualizing, and disseminating significant records, these contributions have often been overlooked, not only by the public, but by archivists themselves. Archives and archivists not only organize and preserve the historical record, they support social justice by their contributions to such critical issues as Indigenous rights, through a rich understanding of the history of archives and records. It is hoped that this article will make a small contribution to filling that large gap still present in Canadian archival history.<sup>1</sup>

One outstanding example of the role that archives and archivists can play in the search for social justice can be found in the career of Willard Ernest Ireland, British Columbia’s Provincial Archivist from 1940 until his retirement in 1974. Ireland’s work underscores the critical role archivists can play in public affairs through a deep knowledge of the complex provenance of records, including their historical and societal origins. As Provincial Archivist, Ireland was able to draw on his considerable understanding of the broader history surrounding important archival records to support local oral tradition,

1 For a discussion about the roles – visible and invisible – of archivists in social justice and human rights, see Tom Nesmith, “Archivists and Public Affairs: Toward a New Archival Public Programming,” in *Better Off Forgetting?: Essays on Archives, Public Policy, and Collective Memory*, eds. Cheryl Avery and Mona Holmlund (Toronto, 2010), pp. 169–91. In “The Archive(s) Is a Foreign Country: Historians, Archivists, and the Changing Archival Landscape” (*Canadian Historical Review*, vol. 90, no. 3 [September 2009], pp. 497–534, 510–11), Terry Cook argues that the writing of history begins when the archivist decides what to keep and what to forget. See also, Joan M. Schwartz and Terry Cook, “Archives, Records and Power: The Making of Modern Memory,” *Archival Science* 2 (2002), pp. 1–19, and Randall Jimerson, “Archives for All: Professional Responsibility and Social Justice,” *American Archivist*, vol. 70, no. 2 (2007), pp. 252–81. See also Verne Harris, *Archives and Justice: A South African Perspective* (Chicago, 2007).

as well as two early and pivotal Indigenous social justice claims. He was able to combine his knowledge of the history and the records of the region together with his archival experience to unearth a complex web of archival material. Ireland's understanding of the broader social origins of records bridged silences in the archival record to corroborate Indigenous claims and advance social justice in his time and into the future.<sup>2</sup>

Despite Ireland's popularity as a public speaker, his role as editor of the *British Columbia Historical Quarterly*, and a career that spanned more than three decades, little has been written about his influence not only in preserving history, but in actually making it. A few of British Columbia's archivists have received some public attention but, to date, no one has discussed Ireland's work.<sup>3</sup> Notwithstanding this relative obscurity, Ireland's contributions to two twentieth-century legal cases (*Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia*), clearly demonstrate the importance of the deeper contextual and historical understanding of records that archivists

- 2 Although, ideally, contextual information about records includes knowledge of the custodial and archival history of those records, both of which greatly assist archivists in how they do their work, the custodial and archival history of the records Ireland drew on in these cases was not available in the material researched. As an example, the British Columbia Archives is only able to speak with confidence about the custodial and archival history of the crucial Douglas Treaty document for the period since 1974. Further research has not turned up any information about the record from the early 1870s (when it – or a very similar version of it – was copied into a published volume) until 1963 (when Ireland drew on his own knowledge of James Douglas's signature to authenticate the document, and not its custodial or archival history, see later in this paper). British Columbia Legislature, *Papers Connected with the Indian Land Question 1850–1875* (Victoria, 1875). A scanned copy of this publication is available at <http://www.archive.org/details/papersconnectedw00britala> 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](http://www.canadiana.org/ECO/SearchResults?id=1d5ef354be785d38&query=9_00281&range=text&bool=all&subset=all&pubfrom=&pubto) (both accessed on 26 March 2010). Anne ten Cate of the British Columbia Archives notes that “Items with old manuscript catalogue call numbers ... were added to our holdings before 1974, and we have very little documentation regarding provenance. As [the treaties] are part of the Fort Victoria Fonds, our analysis has determined that they were created by the Hudson's Bay Company.... I've checked the accession records for MS-0772 and MS-2040 ... However, neither the provenance or the custodial history is indicated on the Accession Control Record” (personal communication, 14 April 2010).
- 3 Terry Eastwood has written about R.E. Gosnell and E.O.S. Scholefield (“R.E. Gosnell, E.O.S. Scholefield and the Founding of the Provincial Archives of British Columbia, 1894–1919,” *BC Studies* 54 [Fall 1982], pp. 38–62; Robin G. Kierstead (“J.S. Matthews and an Archives for Vancouver, 1951–1972,” *Archivaria* 23 [Winter 1986–87], pp. 86–106) and Daphne Sleigh (*The Man who Saved Vancouver: Major James Skitt Matthews* [Surrey, 2008]) have both written about the colourful Major J.S. Matthews; and Terry Cook has written about W. Kaye Lamb (“An Archival Revolution: W. Kaye Lamb and the Transformation of the Archival Profession,” *Archivaria* 60 [Fall 2005], pp. 185–234). See also biographies in *The Archivist*, <http://www.collectionscanada.gc.ca/publications/archivist-magazine/015002-2141-e.html> (accessed on 26 March 2010), and *Archivaria* 15 (Winter 1983): “Archives and Libraries: Essays in Honour of W. Kaye Lamb.”

have to offer, and the critical role this can play in the pursuit of social justice.



**Figure 1: Provincial Archivist. Willard Ireland, ca. 1953.** Credit: Image B-07393, courtesy of BC Archives.

In a 2008 feature article the *Victoria Times Colonist* described Ireland as the “Indiana Jones of documentary evidence.”<sup>4</sup> Despite this rather flamboyant accolade, Ireland’s career was, for the most part, accomplished but conventional for his times. Born in Vancouver in 1914, he grew up in British Columbia, entering the University of British Columbia at the age of fifteen.<sup>5</sup> Following

4 “Archivist a Guardian of B.C. Records: Historical Sleuth Uncovered Vital Pieces of our Province’s Past,” *Times Colonist* (3 November 2008), <http://www.timescolonist.com/Archivist+guardian+records/929204/story.html> (accessed on 26 March 2010).

5 Ibid; G.E. Mortimore, “Willard Ireland, Architect of the Archives,” *Daily Colonist* (2 March 1952), p. 4; “Willard E. Ireland” [speech, 1971], [http://www.sfu.ca/ceremonies/files/Citations/1971\\_-\\_Willard\\_E.\\_Ireland\\_Citation.pdf](http://www.sfu.ca/ceremonies/files/Citations/1971_-_Willard_E._Ireland_Citation.pdf) (accessed on 26 March 2010); Bob Broadland, “A Man for All Missions: Willard Ernest Ireland,” *Museum Roundup* 53, (1935), pp. 9–14, 9–12; Biography: “Willard Ireland Fonds,” <http://memorybc.ca/index.php/informationobject/show/rad/29118> (accessed on 26 March 2010); Willard Ireland, *British Columbia, The United States, and British American Union* (Master’s thesis, University of Toronto, 1935); British Columbia Legislative Assembly, *Hansard* (7 March 1974), <http://www.leg>

graduation with a degree in history, he took teacher training, then attended the University of Toronto, graduating with an MA in history at the age of twenty-one. Named the Alexander Mackenzie Scholar that year, he pursued research in the Hudson's Bay Company Archives and the United States National Archives, then taught high school English.<sup>6</sup> In September 1940, Ireland was hired to replace W. Kaye Lamb as the provincial archivist for British Columbia. Both Lamb and Ireland represented the relatively new trend toward the professionalization of the archives, and of historians as archivists in Canada.<sup>7</sup> From 1942 to 1945 Ireland served in the Royal Canadian Air Force.<sup>8</sup> Returning to his job as archivist late in 1945, he was also appointed Provincial Librarian in 1946.<sup>9</sup> Nicknamed "The Oracle," Ireland was known for his ability to come up with an answer to almost any query. Ireland's career as Provincial Archivist and Librarian was continuing apace when, in 1963, Thomas Berger approached him for help in what would become a critical Aboriginal rights case.<sup>10</sup>

In the early twentieth century, Indigenous Canadians had pursued legal issues relating to Aboriginal title and land claims. But changes to the 1927 Indian Act made these activities effectively impossible. As Douglas Harris noted:

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.<sup>11</sup>

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- bc.ca/HANSARD/30th4th/30p\_04s\_740307p.htm (accessed on 27 March 2010).
- 6 "Archivist a Guardian of B.C. Records"; Mortimore, "Willard Ireland, Architect of the Archives," p. 4; Broadland, "A Man for All Missions," pp. 9–12; "Willard Ireland Fonds."
  - 7 Cook, "An Archival Revolution," p. 191. John Gosie, who served as provincial archivist and librarian came from a library background in Scotland. "Personal," *The Library World* 14 (1912), p. 307; Willard Ireland Testimony in the *Regina v. White and Bob* case, 1963, transcript provided by the Supreme Court of Canada [possibly from Appeal Books], p. 25. Copy in possession of author.
  - 8 Mortimore, "Willard Ireland," p. 4; Broadland, "A Man for all Missions," p. 9.
  - 9 "BC Archives Reports," *British Columbia Annual Reports* 73–0097, Department of the Provincial Secretary, 1972, U24, and 1974, W 18. Microfiche in the Legislative Library of Manitoba. See also typescript, [http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/71058/llbc\\_ar\\_1974.pdf](http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/71058/llbc_ar_1974.pdf) (accessed on 26 March 2010).
  - 10 Berger would later become one of Canada's most respected and outspoken defenders of Indigenous rights.
  - 11 "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal," *BC Studies: The British Columbian Quarterly* 162 (Summer 2009), pp. 137–38, <http://ojs.library.ubc.ca/index.php/bestudies/article/view/272/337> (accessed on 26 March 2010). In an interview at a conference to mark the thirtieth anniversary of the 1973 Calder decision,

Two early trials in British Columbia, *Regina v. White and Bob* (1963) and *Calder v. the Attorney General of British Columbia* (1969, Supreme Court Decision 1973) were pivotal in this reopened legal discourse. The decision in *Regina v. White and Bob* was important not only because it recognized the “Douglas Treaties”<sup>12</sup> 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. *Calder*, in particular, confirmed the existence of Aboriginal title, and opened the doors to the acceptance of Aboriginal land claims by the Canadian government.<sup>13</sup> Ireland would be an important actor in both these cases.

### ***Regina v. White and Bob***

On 7 July 1963, Nanaimo band members Clifford White and David Bob shot six deer while hunting to feed their families. As they returned to their reserve, the pair were stopped by a game warden and charged under provincial hunting regulations. On 23 September 1963 the case came up before the magistrate in Nanaimo. The pair was tried, found guilty, and fined. Bob was able to pay the \$100 fine, but White could not, and was sent to the Oakalla Prison farm for forty-five days. Maisie Hurley, a vocal advocate for Indigenous rights, arranged to pay White’s fine. It was at this point, Thomas Berger relates, that “Maisie came to my office and announced I had two new clients.”<sup>14</sup> The case and the ensuing 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.<sup>15</sup>

From the start, Berger was faced with a problem; there was no question

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Frank Calder recalled, “But then it stopped right there in 1927 after we met 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.” Hamar Foster, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver, 2007), p. 41. Douglas Sanders, “The Nishga Case,” *The Advocate* 36 (February/March 1978), pp. 121–36, 128–29.

- 12 What are today known as the “Douglas Treaties” are a set of fourteen agreements, signed between Indigenous groups on Vancouver Island, and HBC Governor James Douglas in the early 1850s. The agreements do not actually include the word “treaty,” but address access to, and use of, land by non-Indigenous signatories, and compensation and retained rights for Indigenous signatories. The treaties are discussed in greater depth later in this paper.
- 13 “Frank Calder and Thomas Berger: A Conversation,” in Foster, *Let Right be Done*, p. 38; Sanders, “The Nishga Case,” p. 125.
- 14 Thomas Berger, *One Man’s Justice: A Life in the Law* (Vancouver, 2002), pp. 87–88; Sanders, “The Nishga Case,” pp. 125–26.
- 15 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*, ed. Donald N. Abbott (Victoria, 1981), pp. 49–64, 49.

that the men had shot the deer during closed season. Searching for the basis for an appeal, Berger travelled to the Nanaimo reserve and attended a conference with the band. As the meeting unfolded, Berger realized that this was not just a matter between two men and the Crown; it involved the entire community. 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.”<sup>16</sup>

But proving a treaty would be no easy task. From its very earliest days as a province, British Columbia had been known for its resistance to Aboriginal treaties.<sup>17</sup> 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 Aboriginal land transfers on Vancouver Island, transcribed and somewhat edited, in *Papers Connected with the Indian Land Question 1850–1875*.<sup>18</sup> But the texts of the documents did not include the word “treaty.” And they were apparently concluded, not with the Crown, but with the Hudson’s Bay Company.<sup>19</sup> Berger realized that the history of colonization in British Columbia, the larger social provenance, a rich understanding of the events and people relating to the history surrounding records that extends beyond their archival provenance to include their broader rich context, would be essential to his case if he was to prove that these documents were in fact treaties, and not simply conveyances.<sup>20</sup>

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 near present-day Victoria. There were fourteen agreements, 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.”<sup>21</sup>

Berger’s research turned to the history of the colony. At the time of the

16 Berger, *One Man’s Justice*, p. 88.

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

18 The format of the edited, printed documents belies the complex history of the treaties and their problematic form. Wilson Duff notes that, “[t]he 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,” *BC Studies* 3 (Fall 1969), pp. 3–57, 8.

19 Berger, *One Man’s Justice*, pp. 88–89.

20 Ibid.; BC Legislature, *Papers Connected with the Indian Land Question 1850–1875*, p. 158.

21 Berger, *One Man’s Justice*, pp. 89–92.

agreements, 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 a representative of the Crown when he undertook these agreements.

On 5 November 1963 Berger wrote to Ireland asking if the originals of the treaties he had found in the printed *Papers Connected with the Indian Land Question 1850–1875* were housed in the Provincial Archives. On 8 November, Ireland responded that they were, adding,

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."<sup>22</sup>

Berger had just discovered that the "treaty" that he had hoped would support the oral history of the Nanaimo Band, and the legal defence of White and Bob's hunting rights, was, in fact, "a blank piece of paper and 159 X marks."<sup>23</sup>

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 inscribed wording 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 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.<sup>24</sup>

On 26 November 1963, Ireland replied:

Naturally I have no objection to appear as a witness with the record-book if neces-

22 British Columbia Archives [hereinafter BCA], GR-1738, box 14, file 1, Correspondence, Thomas Berger to Provincial Archives [hereinafter GR-1738].

23 Berger, *One Man's Justice*, pp. 90, 93.

24 BCA, GR-1738.



sary.... 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 devise; 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.<sup>25</sup>

In 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 *Reconveyance of Vancouver Island*, dated 3 April 1867. These documents were critical to Berger's showing 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."<sup>26</sup> Berger began to engage Ireland in a series of research questions related to the case.<sup>27</sup> 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.<sup>28</sup>

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 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,

25 Ibid., "Ireland to Berger, 2 December 1963." Ireland did ask that Berger subpoena him.

26 Ibid., "Ireland to Berger, 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*, p. 92.

27 See, for example: BCA, GR-1738, "Berger to Ireland, 29 November 1963"; "Berger to Ireland, 25 March 1965"; "Ireland to Berger, 29 March 1965"; "7 April 1965"; "Berger to Ireland, 8 April 1965"; "Ireland to Berger, 12 April 1965." This last letter is particularly interesting, as in it Ireland seems to challenge a government spokesperson 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."

28 Broadland, "A Man for All Missions," pp. 10, 13.

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.

Finally, Barclay’s dispatch continued: “The right of fishing and hunting will be continued to them...”<sup>29</sup>

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’s promises to the Indigenous signatories in the agreements, including their 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.<sup>30</sup>

To assert that the Nanaimo agreement conveyed the same meanings as the other thirteen, Berger turned to other archival documents. The key lay in the conclusion of Douglas’s dispatch to Archibald Barclay on 16 May 1850 in which he wrote:

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.<sup>31</sup>

Douglas, it seems, had had the conveyances marked on blank sheets so that he could later add the exact wording of the agreement once he received it from Barclay. The “Douglas Treaties,” collected together in a bound volume, were, as described 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

29 Berger, *One Man’s Justice*, p. 93.

30 *Ibid.*, p. 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. Sidney L. Harring, *White Man’s Law: Native People in Nineteenth-century Canadian Jurisprudence* (Toronto, 1998), p. 191; Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver, 2000), p. 13. See also Dennis F. K. Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa, 1981), for more information on the parallels between the two countries; <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/C-B/treC-B-eng.asp> (accessed on 28 March 2010).

31 Quoted in Berger, *One Man’s Justice*, p. 94.

less than half of the blue, lined, foolscap-sized pages; the rest remain blank. The Fort Rupert and Nanaimo treaties are 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.<sup>32</sup>

As Berger continued to mine the archives' colonial correspondence to piece together the context of the treaties, his position seemed to be improving. His research supported the idea that the document was indeed intended to be an agreement with the same "boilerplate" 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 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. Duff suggested consulting the census that Douglas had directed in the early 1850s. This 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."<sup>33</sup>

The case was heard before Judge H.A. Swencisky in March 1964. 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; that the agreement had not been made only 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."<sup>34</sup> That is, Douglas was acting for the Crown.

At the trial, Ireland provided photostatic copies of the "Instruction to

- 32 Duff, "The Fort Victoria Treaties," pp. 3–57, 8–9. The treaties are still held in the BCA; see MS-0772, Hudson's Bay Company, Fort Victoria, Originals, 1850–1860, 1 cm; microfilm (neg.); 1850–1860, 35 mm [A01285(6)]; <http://search.bccarchives.gov.bc.ca/sn-22FD117/view/Fonds/find%2Bfort%20victoria%2B%2B%2B%2B/1> (accessed on 27 March 2010).
- 33 The original of the Douglas census was held by the Bancroft Library at Berkeley. Presumably, Ireland may have had a copy of this census, as he noted the archives has a copy in correspondence in 1968. BCA, GR-1738, "Ireland to Berger, 18 December 1968"; "Berger to Ireland, 25 March 1965"; Berger, *One Man's Justice*, pp. 98–99.
- 34 Berger, *One Man's Justice*, pp. 99–101; Thomas Berger, personal Q.C. 11 March 2010. My thanks to Justice Berger for suggesting some valuable sources for this paper. See also: Harris, "A Court Between," p. 140; Sanders, "The Nishga Case," p. 126.

James Douglas, Chief Factor, 1849, by Hudsons [sic] Bay Company,” the “Letter, May 16, 1850, James Douglas to Hudsons [sic] 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*.<sup>35</sup> 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.<sup>36</sup>

Berger then asked:

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 ... 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 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.”<sup>37</sup>

Berger asked Ireland: “Now that is ... the pencil writing that corresponds, presumably to the pencil writing that preceded the other treaties in the book. Am I correct?”<sup>38</sup> 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? Ireland answered, “Correct. In almost each instance there are ... similar pencil notations in the book to indicate the area in the generality covered by the treaty, that was ultimately inscribed in the book.”<sup>39</sup>

The discussion turned to the signatures at the end of the document; of “Charles Edward Stewart, in charge of Fort Nanaimo; Richard Golladge,

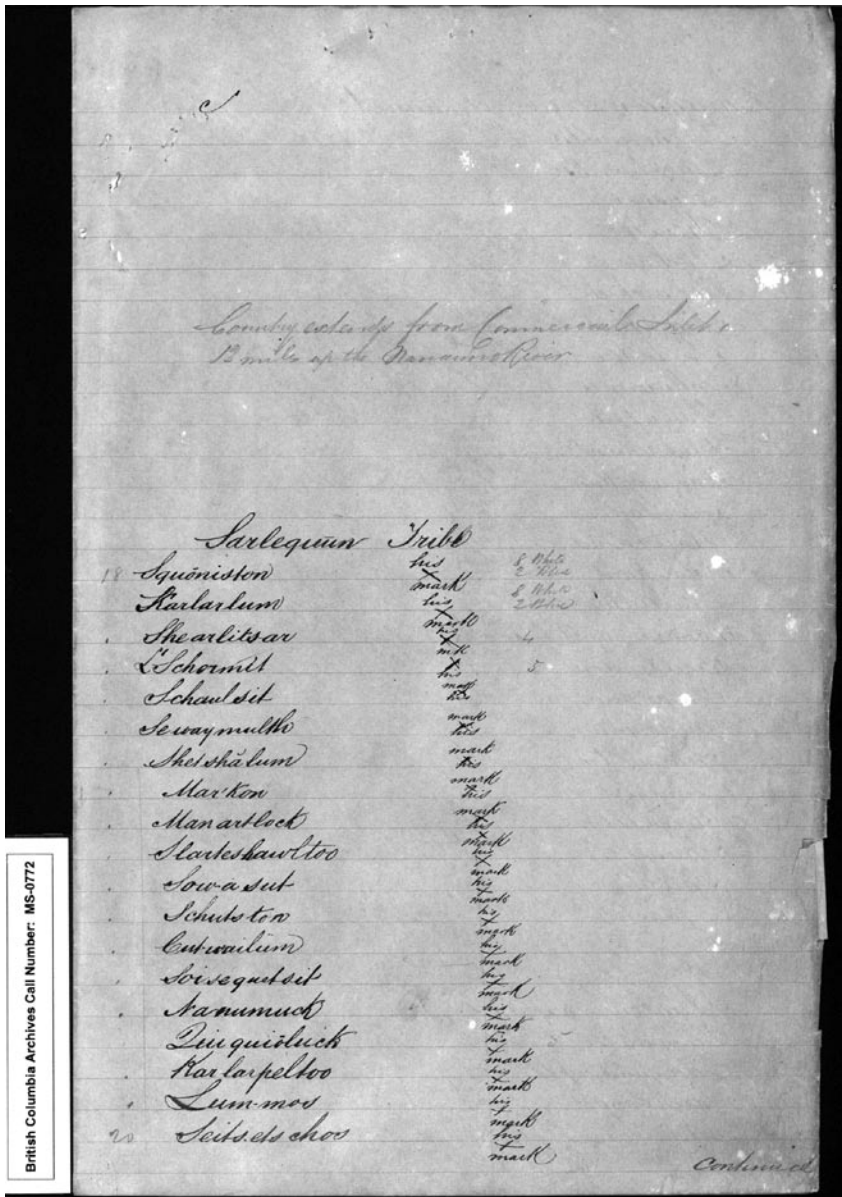
35 Willard Ireland Testimony, *R. v. White and Bob*, pp. 25–28.

36 *Ibid.*, p. 28.

37 *Ibid.*, pp. 28–29. Occasionally in the court transcripts the testimony stumbles slightly. Where this has happened, ellipses will be used to improve readability.

38 *Ibid.*, p. 29.

39 *Ibid.*



**Figure 2: Digital Reproduction of the page from the Douglas Treaty, showing the agreement with the Sarlequun tribe. Credit: Image MS-0772, Fort Victoria Fonds, courtesy of BC Archives.**

Hudsons [*sic*] Bay Company service; George Robinson, Manager of the Nanaimo Coal Company; and James Douglas, Governor of Vancouver Island.” Berger asked, “Do you regard those names as the signatures of the parties, or as copies of their names?” 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.”<sup>40</sup>

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

Ireland’s response established the context, 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 ... 1875 produced in that document.... [Here Berger clarified that Ireland was referring to *Papers Connected with the Indian Land Question, 1850–1875*, and a related publication of the same material in the *British Columbia Sessional Papers*.]

Discussion now turned to the form, context, and contents of *Papers Connected with the Indian Land Question, 1850–1875* and how the somewhat edited, printed document related to the original documents, then returned to the question of what the X marks in fact represented.<sup>41</sup>

When questioned about the notations about blankets beside some names in the document, Ireland suggested that the signatories were compensated with the blankets noted.<sup>42</sup> 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,<sup>43</sup> his testimony showing that the agreement made the provision for compensation to the Indigenous

40 Ibid., pp. 30–31.

41 Ibid., pp. 31–32.

42 Ibid., pp. 32–33.

43 Ibid., p. 33.

signatories that was needed for the agreement to be binding.

Ireland next described a copy of a transcript of a census of the “Nanaimo Indians” from the Bancroft Collection at the University of California (Berkeley) noting that, in this census, there were, in the Nanaimo area, 159 “Men with Beards”; the number corresponding with 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, 1850–1875*.

Ireland was then cross-examined by Mr. Cunliffe for the Crown.<sup>44</sup> Cunliffe drew Ireland’s testimony away from the specific documents he had introduced and to a more general discussion of the history of British Columbia.<sup>45</sup> 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.”<sup>46</sup> Ireland’s testimony, under cross examination, proceeded to the history of European contact in the region, and claims to the region by both Spain and Great Britain, as well as the limits of Russian and American claims. Of particular consequence, Ireland discussed the license under which the HBC conducted its trade in the region, agreeing that this gave them no proprietary rights.<sup>47</sup>

As Berger’s further questioning returned to the pencilled note pinned to the 1854 Nanaimo agreement and its relationship to the pages bearing the 159 names and marks, Ireland advanced his 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.<sup>48</sup>

Besides his argument 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 also 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.”<sup>49</sup> Recalling the case, Berger wrote:

44 Most likely 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.

45 Ireland Testimony, *R. v. White and Bob*, p. 37.

46 *Ibid.*, p. 38.

47 *Ibid.*, pp. 38–46.

48 *Ibid.*, p. 48.

49 Berger, *One Man’s Justice*, pp. 99–101.

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 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.<sup>50</sup>

Judge Swencisky returned 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.<sup>51</sup>

As Berger noted, "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."<sup>52</sup>

Ireland's ability to contextualize archival material with a broader understanding of its social provenance and its rich context, transformed a list of 159 names into a meaningful document. 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 Ireland's testimony was based on his reasoned and measured opinion, and his understanding of the history and context of the region and relevant documents. Both his opinion and his understanding were respected in the decision of the court.

### **British Columbia Appeals the White and Bob Decision**

British Columbia's attorney general appealed the decision, and the defendants

50 Ibid., p. 102.

51 See transcript, *Regina v. White and Bob*, <http://library2.usask.ca/native/cnlc/vol06/629.html> (accessed on 27 March 2010).

52 Berger, *One Man's Justice*, p. 102.



found backing from the Native Brotherhood.<sup>53</sup> 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 concern for Berger. On 25 March 1965, Berger wrote to Ireland asking if he could locate a lost document related 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 30<sup>th</sup>, 1869, relating to the Songish Reserve.”<sup>54</sup> Quoting from the printed text, Berger noted that the document stated:

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.<sup>55</sup>

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.<sup>56</sup>

Ireland responded on 29 March: “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.”<sup>57</sup> Through a tightly argued chain of logic based on Ireland’s knowledge of the records, their creators, and the activities of the Colonial government, Ireland concluded that “the Correspondence books of

53 Sanders, “The Nishga Case,” p. 126.

54 BCA, GR-1738, “Berger to Ireland, 25 March 1965.”

55 Ibid.

56 Ibid.

57 Ibid., “Ireland to Berger, 29 March 1965.”

the House of Assembly has [*sic*] 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.”<sup>58</sup> Attaching copies of the documents that he argued were, in fact the correct ones, Ireland 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.”<sup>59</sup>

Working with the material that Berger and Ireland had carefully gathered and contextualized, the Appeals Court upheld the trial court’s decision. Justice Thomas Norris wrote a concurring judgement that was included in Justice Davey’s majority decision. In it Norris went beyond the question addressed by Justice Davey writing that, “Aboriginal rights existed in favour of Indians from time immemorial,” and concluding that “the said rights have never been surrendered or extinguished.”<sup>60</sup>

The Crown appealed to the Supreme Court of Canada, which rendered its judgement without leaving the bench. The appeal was dismissed; the curious document with 159 Xs and no text was a treaty; and land claims were now on the radar of a much wider public. But, despite the earlier decision by Norris, the Supreme Court had not ruled on the existence of Aboriginal rights, only on the existence of a treaty.<sup>61</sup>

58 Ibid.

59 Ibid.

60 Berger, *One Man’s Justice*, pp. 102–104; Sanders, “The Nishga Case,” p. 126.

61 Berger, *One Man’s Justice*, pp. 104, 106. See also Michael Lusztig, “Native Peoples,” in *Canadian Studies in the New Millennium*, eds. Patrick James and Mark J. Kasoff, (Toronto, 2007), pp. 100–125, 108; Berger, “Wilson Duff and Native Land Claims,” p. 57; Sanders, “The Nishga Case,” p. 126; Foster, *Let Right be Done*, p. 276.

*Calder v. The Attorney General for British Columbia*

In the late 1960s Indigenous efforts to assert their Aboriginal rights were gaining momentum. Land claims served as a focus for attempts by British Columbia's Indigenous communities to try to form a unified political organization. When it appeared these attempts were failing, the Nisga'a of the Nass River Valley on British Columbia's mainland decided to pursue the matter of Aboriginal rights themselves. The Nisga'a planned to present the courts with the arguments that Aboriginal title existed, and that the Nisga'a had never surrendered this title. By this time, Crown land in British Columbia was held by the Crown in right of the Province; consequently, the claim had to be made against the British Columbia Attorney General, even though "jurisdiction over 'Indians, and Lands Reserved for the Indians' lay with the Federal government."<sup>62</sup>

Frank Calder, descendant of a long line of exceptional Nisga'a leaders, was the first Status person to attend UBC and the first to sit in the provincial legislature.<sup>63</sup> 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 as members of the community in an attempt to get a court ruling that they did, in fact, possess Aboriginal title, and that this title had never been extinguished. Berger, now head of the opposition New Democratic Party, took the case for Calder, also a New Democratic Party member. On 30 October 1968, Berger 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...."<sup>64</sup> Once again, Ireland provided research, experience, and his studied opinions.<sup>65</sup>

Referring back to the *Regina v. White and Bob* case, Berger reminded Ireland of the "early dispatches that passed between Governor Douglas and

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

63 Calder was also the first Indigenous person to sit in the federal parliament, 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\\_FCaldер.htm](http://www.protocol.gov.bc.ca/protocol/prgs/obc/2004/2004_FCaldер.htm), or the Canadian Encyclopaedia, <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=FCE&Params=A1ARTA0001168> (both accessed on 27 March 2010).

64 BCA, GR-1738.

65 See, for instance *ibid.*, "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."

the Colonial Secretary to show that the native title had always been recognized by the Crown.”<sup>66</sup> Berger was getting to the heart of the matter 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.<sup>67</sup> 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.”<sup>68</sup>

Berger wrote: “The most useful of those dispatches was that which Governor Douglas sent to the Colonial Secretary, dated March 25<sup>th</sup>, 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 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 land question.”<sup>69</sup> Once again, Ireland’s knowledge of both history and the records was being called upon to support Berger’s key arguments: 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.”<sup>70</sup>

66 Ibid., “Berger to Ireland, 30 October 1968.”

67 Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver, 2000), p. 14.

68 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), pp. 1–43, 6.

69 BCA, GR-1738, “Berger to Ireland, 30 October 1968.”

70 Ibid., “Berger to Ireland, 2 January 1969.”

Ireland realized when he looked at the documents Berger had requested, that there was more to be found than originally anticipated. Telephoning Berger's secretary, Ireland got 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 of his research, Ireland sent Berger an additional one hundred pages of evidence from the Royal Commission's report.<sup>71</sup>

The case, although nominally against the province, was really about federal 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 involved.<sup>72</sup> In April 1969, in a courthouse packed with Indigenous people, law students, and media, the Calder case began in the British Columbia Supreme Court in Vancouver. 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 into Confederation in 1871, positing that a series of laws enacted in that period were 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.)<sup>73</sup>

Wilson Duff gave evidence for the Nisga'a, much of it from the noted anthropologist Marius Barbeau's field notes preserved in the National Museum (now Museum of Civilization) in Ottawa. As with *Regina v. White and Bob*, Berger also subpoenaed Ireland as a witness.<sup>74</sup> 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, which Ireland had identified in his pre-trial research. Ireland also introduced secondary material written about the area, including the field notes of anthropologist

71 Ibid., "Ireland to Berger, 9 January 1969."

72 Sanders, "The Nishga Case," pp. 126–27.

73 Berger, *One Man's Justice*, pp. 114–15; Foster, *Let Right be Done*, p. 43.

74 BCA, GR-1738, "Subpoena 3456/67, Supreme Court of British Columbia, 25 March 1969." This subpoena includes an extensive list of documents Ireland was required to produce in court, including the Douglas census he had provided in *Regina v. White and Bob*. Sanders, "The Nishga Case," p. 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*, vol. 43, no. 2 (2001), pp. 191–200; Nancy Ann Pylypchuk, "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources," *Archivaria* 32 (Summer 1991), pp. 51–77, 59.

Frank Boas, a book of local vocabularies from the 1880s (the *Handbook of Indians of Canada*)<sup>75</sup> and the 1913 Nishga petition to the Privy Council. He also introduced and explained the context of the report of the *McKenna McBride Royal Commission*, 1913–1916. Up to this point, neither Berger nor Ireland had discussed the *Royal Proclamation of 1763*, and whether it applied to the land in question, but the court’s attention was now turned to this critical issue.<sup>76</sup>

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 proclamation of George III of 1763 applies to his clients?”<sup>77</sup> In his pleading, Berger had asserted that the *Royal Proclamation*, which recognized Aboriginal title, did, in fact, apply to the disputed region. But this assertion was controversial, and it was up to Berger to prove that the *Royal Proclamation* did, in law, apply to this case. Discussion turned to who, if anyone, would question Ireland about the *Royal Proclamation*.<sup>78</sup>

Next, Brown cross-examined 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. Coming to the critical issue of whether the area was in fact 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?”<sup>79</sup> Ireland’s 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 in the region.<sup>80</sup>

Brown continued 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, leading to questions about the presence of the Hudson’s Bay Company. Once more, the question of what position James

75 Probably. James White, ed., *Handbook of Indians of Canada*, published as an Appendix to the *Tenth Report of the Geographic Board of Canada* (Ottawa, 1913).

76 Willard Ireland Testimony, found in [Calder Case] Appeal Book, vol. 1, University of British Columbia Rare Books and Special Collections, Thomas Berger Fonds, Box 100, file 1, pp. 79–85; Foster, *Let Right be Done*, p. 43.

77 Ireland Testimony, [Calder] Appeal Book, p. 85.

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

79 Ireland Testimony, [Calder] Appeal Book, p. 87.

80 *Ibid.*, pp. 87–96.

Douglas occupied in relation to the Company and Colony came to the fore.<sup>81</sup> As the line of questioning 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.”<sup>82</sup>

Brown questioned Ireland about the pre-Confederation development of reserves in the region, actions that might suggest the establishment of British central control, a critical part of the Crown’s key argument that, “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.”<sup>83</sup> 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: “Is it true that the Indians considered their usufruct title, as it has been described, as simply something that didn’t belong to any individual but was a communal concept?”<sup>84</sup> Berger interceded, noting that, “I don’t necessarily disagree with the premise on which that question is based, but I think we have reached the point where Mr. Ireland’s expertise may have been exhausted.”<sup>85</sup> Rephrasing, Brown asked Ireland: “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.”<sup>86</sup>

Over the course of two days, Ireland had introduced a broad range of records into evidence, testified as to the context of that material, and discussed what was known and what was likely regarding the history of exploration and colonization of the area, finally testifying about the collective nature of Aboriginal title. Much as in *Regina v. 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 by Berger himself. Beginning his re-examination, Berger queried Ireland about 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 of the Crown, and that the region included in this colonization included the Nisga’a territory, Berger would have gone a

81 Ibid.

82 Ibid., p. 98.

83 Berger, *One Man’s Justice*, p. 119.

84 Ireland Testimony, [Calder] Appeal Book, pp. 101–102.

85 Ibid., p. 102.

86 Ibid.

long way to showing that the Nisga'a possessed Aboriginal title. But proving this was far from straightforward.

Berger asked if there was "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," before the end of the 1700s; Ireland responded that there was, indeed, some evidence to suggest that, but he was not able to say if it was conclusive or not.<sup>87</sup> Ireland continued, noting that there were issues between Drake's statements and the printed versions of Drake's voyages, "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.<sup>88</sup> 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, asked Berger. Ireland expressed his belief that Drake was an explorer and colonizer, not merely a privateer.<sup>89</sup> Once again, Ireland's testimony had gone far beyond certifying copies of documents for the court; it had touched on many of the contextual issues that were key in establishing the Nisga'a case.

The Calder Case took place in a larger context of confusion and unrest surrounding Indigenous issues than the earlier *Regina v. White and Bob* case. In April, following the trial, but before the judgement in *Calder*, Indigenous leaders from across Canada met in a three day conference in Ottawa. The conference identified the resolution of treaty and Aboriginal claims as a clear priority, and asked for federal funding to pursue this. In June the federal government tabled its "White Paper on Indian Policy," in the House of Commons. Controversially, the White Paper proposed repealing the *Indian Act*, and the end of any distinct legal status for Indigenous peoples.<sup>90</sup> And in August, Prime Minister Trudeau gave a speech to the Liberal Association of Vancouver where he stated:

87 *Ibid.*, p. 104.

88 *Ibid.*

89 R.P. Bishop, "Drake's Course in the North Pacific," *British Columbia Historical Quarterly* 3 (1939), pp. 151–82.

90 Emma Butt and Mary C. Hurley, "Specific Claims in Canada," Government of Canada, Law and Government Division (1 April 2006), <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0618-e.htm> (accessed 27 March 2010). "Citizens Plus" (also known as "The Red Paper"), the Indigenous response to the "White Paper," rejected Trudeau's arguments in part by asserting that there was an historical basis for their distinct rights. Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver, 2000); Sanders, "The Nishga Case," pp. 12–13.



It is inconceivable, I think, that in a given society one section of a society should have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties among ourselves.... Indians should become Canadian as all other Canadians. This is the only basis on which I see our society can develop as equals. But [A]boriginal rights, this really means saying, “We were here before you. You came and cheated us, by giving us some worthless things in return for vast expanses of land, and we want to reopen this question. We want you to preserve our [A]boriginal rights and to restore them to us.” And our answer – our answer is “no.” ... If we think of restoring [A]boriginal rights to the Indians, well what about the French, who were defeated at the Plains of Abraham? ... We will be just in our time. That is all we can do. We will be just today.<sup>91</sup>

In the courts, *Calder* failed. In his decision, given in October 1969, Mr. Justice Gould dismissed the Nisga’a case, ruling 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.”<sup>92</sup>

Gould cited specifically from Ireland’s monograph in one part of the decision.<sup>93</sup>

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 Nisga’a appealed 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 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

91 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto, 2002), pp. 102–103; Sanders, “The Nishga Case,” p. 13.

92 Transcript of the decision, *Calder v. The Attorney General for British Columbia* (1969), <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> (both accessed on 28 March 2010).

93 Transcript of the decision, *Calder v. The Attorney General for British Columbia*.

1970, wrote: "I think you need the Instructions more than the Commission, but will try to send you both."<sup>94</sup>

As Ireland found and copied all the documents Berger had requested, Berger again turned to him for clarification of the records, and particularly the restrictions on the powers of the governors that each of the commissions entailed.<sup>95</sup> Despite Ireland and Berger's extensive research, 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 Nisga'a appealed to the Supreme Court of Canada.<sup>96</sup>

*Calder* marked the first time the Supreme Court would address the question of the existence of Aboriginal title. In their ruling, given in February 1973,<sup>97</sup> three of the Supreme Court justices recognized that the Nisga'a currently held Aboriginal rights in the land, and three did not. The deciding vote in the case was cast on a procedural point: that *Calder* had not sought leave from the Attorney General of British Columbia to pursue the action. And so, at that level, the plaintiffs did not prevail.<sup>98</sup>

However, 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. Mr. Justice Emmet Hall, speaking for himself and two other justices held that title existed, had not been extinguished, and could still be asserted. At one level, the case failed, with three justices ruling that title had been extinguished, and one rejecting the appeal on a procedural point. But despite this, the Supreme Court of Canada's decision upheld the existence of Aboriginal title. Based on the archival evidence and Berger's carefully constructed research and arguments, supported by Ireland's knowledge of both the history and the documentary legacy of British Columbia, six Supreme Court justices held that Aboriginal title existed.<sup>99</sup>

The decision was an important boost to the legal credibility of all Aboriginal claims. Trudeau met with *Calder* and the Nisga'a Tribal Council, conceding that Aboriginal people may have had more "legal rights" than he

94 BCA, GR-1738, "Berger to Ireland, 3 February 1970"; "Ireland to Berger, 6 February 1970."

95 Ibid., "Berger to Ireland, 3 February 1970"; "Ireland to Berger, 6 February 1970"; "Berger to Ireland, 16 February 1970."

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

97 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> (accessed on 28 March 2010).

98 Sanders, "The Nishga Case," p. 130; Berger, "Wilson Duff and Native Land Claims," pp. 62–63.

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

had believed.<sup>100</sup> In August 1973, Jean Chrétien, Minister of Indian Affairs and Northern Development, tabled a statement in parliament acknowledging that the government should compensate Aboriginal people for what he termed their loss of “traditional interest in land.”<sup>101</sup> 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.<sup>102</sup>

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.<sup>103</sup>

## Conclusion

Willard Ireland went well beyond keeping some distant past alive with his contributions to *Regina v. White and Bob* and *Calder v. The Attorney General of British Columbia*. His deep appreciation of the rich, social provenance and context surrounding the records, acquired through his more than two decades in the British Columbia Archives, his education as a historian, and work in writing and editing British Columbia history advanced Aboriginal rights in their own time, and for the future. His actions in both legal cases clearly show the impact that archives and archivists can have on reconciling our relationships with our sense of justice. His ability to contextualize and relate records through their shared history offered the courts a narrative that supported Indigenous history and Aboriginal rights. As the Provincial Archivist, Ireland not only preserved the physical records he gathered together for these two cases; he also highlighted and preserved the social memory and the history

100 Sanders, “The Nishga Case,” p. 130; Berger, “Wilson Duff and Native Land Claims,” pp. 62–63; Berger, *One Man’s Justice*, p. 126.

101 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,” p. 132.

102 Berger, “Wilson Duff and Native Land Claims,” p. 63.

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

that made them relevant. To quote former national archivist Ian Wilson, “Archivists, as custodians of social memory, cannot be spectators, we take part in the creation of memory by the records we preserve. We are active participants.”<sup>104</sup>

104 “Governor General to Open Exhibition at the National Archives,” [http://www.lac-bac.gc.ca/03/0371\\_e.html](http://www.lac-bac.gc.ca/03/0371_e.html) (accessed on 25 June 2010).