1.0 Summary (max 200 words)

The 14 Vancouver Island Treaties (1850-54) are the only colonial-era treaties written on the Northwest Coast of British North America. They offer a unique documentary description of indigenous societies on Vancouver Island on the cusp of a permanent relationship with settler society. With a royal charter to promote settlement on the Colony of Vancouver Island, the Hudson’s Bay Company negotiated documents to recognize and remove certain indigenous rights to land use and title for the purpose of colonial development. For settlers the documents legally enshrine the birth of English colonial settlement on the Northwest Coast of North America. For First Nations the treaties are not simple land title records; they represent highly valued oral agreements negotiated to peacefully accommodate western expansion.

Today the Canadian Constitution supports the Treaties. The documents represent Canada’s multicultural, indigenous identity. They defend the rights of indigenous societies with valued languages and cultures unique to the world. This legal accommodation has inspired colonial societies worldwide. They memorialize indigenous peoples’ shared global colonial experience and highlight the international concept of postcolonial treaty relationships; concepts that also inspire UNESCO’s work to preserve indigenous languages, defend human rights, and promote cultural diversity.

2.0 Nominator

2.1 Name of nominator (person or organization)
Royal British Columbia Museum (RBCM)

2.2 Relationship to the nominated documentary heritage
Public Institution housing the Treaties.

2.3 Contact person(s) (to provide information on nomination)
Jack Lohman

2.4 Contact details

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<thead>
<tr>
<th>Name:</th>
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<tr>
<td>Jack Lohman</td>
<td>Royal British Columbia Museum</td>
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<td></td>
<td>675 Belleville Street, Victoria, B.C. V8W 9W2</td>
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3.0 Identity and description of the documentary heritage

3.1 Name and identification details of the items being nominated
If inscribed, the exact title and institution(s) to appear on the certificate should be given

Name: The official title written on the treaty register is “Register of Land Purchases from Indians.”

Identification Details: Combined, the Vancouver Island Treaties consist of 14 documents contained in a single book and two separate files. The volume is a standard, foolscap sized, lined register, with a leather spine. The Hudson’s Bay Company (HBC) used this kind of register to record business transactions, keep inventories, and log daily operations of a company office (see photo on line, Section 3.3). James Douglas wrote 11 of the treaties into the register, one for each of his self-styled “tribes” with whom he made agreements. The others were written on separate sheets of paper.

Each treaty numbers between two and six pages depending on the detail of the signatories, for a total of 37 pages. Because Douglas made use of a template the main body of the treaties’ text is virtually the same. The 11 treaties in the register represent 27 consecutive pages; the rest of the register is blank. The list of First Nations names represents one of the earliest efforts to record in detail the nature and composition of First Nations societies on the West Coast of North America. The treaties identify the following First Nations on southern Vancouver Island as grouped by James Douglas (square brackets refer to current ethnography) along with the date of each document’s creation:

[Ethnological Group: Coast Salish; Language Family: Salishan]

1. Teechamitsa (April 29, 1850), 2 pages;
2. Kosampsom (April 30, 1850), 3 pages;
3. Swengwhung (April 30, 1850), 3 pages;
4. Chilcowitch (April 30, 1850), 3 pages;
5. Whyomilth (April 30, 1850), 3 pages;
6. Chekonein (April 30, 1850), 4 pages;
7. Kakyaakan (May 1, 1850), 2 pages;
8. Chewhaytsum (May 1, 1850), 3 pages;
9. Soke (May 10, 1850), 2 pages;
10. South Saanich (February 7, 1852), 2 pages;
11. North Saanich (February 11, 1852), 4 pages.

Three other treaties were signed on separate, detached pages. The two Kwakwə̓k’wəkw [current ethnological group] treaties, Queackar and Quakeolt in Douglas’ words, signed near current-day Port Hardy on northern Vancouver Island, have been preserved in a
They use the same template for the layout and the content of the text. The third treaty references an Aboriginal group described by Douglas as Sarlequun or Saalquun and located near present-day Nanaimo, a Coast Salish First Nation known today as Snuneymuxw. There are two drafts of the treaty referencing this group and they have been placed in their own unique folder for preservation purposes. Each version of this treaty is six pages in length. In the Snuneymuxw case, there is no text, but rather an introductory paragraph and a list of names representing leaders of the tribe. In 1964, the BC Court of Appeal ruled \[R. v. White and Bob (1964), 50 D.L.R. (2\textsuperscript{nd}) 613\] these pages should be understood as a treaty like the other 13. The three treaties written on separate sheets of paper and originally attached to the register break down as follows.

**Ethnological Group: Kwakwaka'wakw; Language Family: Wakashan**

12. Queackar (February 8, 1851) 3 pages
13. Quakeolth (February 8, 1851) 3 pages

**Ethnological Group: Coast Salish; Language Family: Salishan**

14. Sarlequun (December 23, 1854) 6 pages x2

There are several important features of the original documents that merit comment. Most treaties are prefaced by a kind of introductory prologue, written in the hand of Sir James Douglas. The commentary in these prologues describes briefly the area of land concerned in the treaty and the name of the “tribe” to use Douglas’ word. These comments were later adapted to form the titles of the treaties in the 1875 published version [Papers Connected with the Indian Land Questions, 1850-1875, Victoria: Government Printer 1875. Reprinted, Victoria: Queen’s Printer for British Columbia, 1987]. They were also used as titles in two contemporary federal government reports [Report of the Superintendent of Indian Affairs for British Columbia for 1872 and 1873 (Ottawa, 1873) and H.L. Langevin’s Report on British Columbia (Ottawa, 1872]. In archival terms these commentaries are annotations of execution summarizing the transactions addressed in the treaty. It may be that the annotations represent the input of the Native representatives and were done in their presence; but it is more likely that Douglas wrote the paragraphs after discussions as both an aide mémoire and a means of clarifying areas he had not entirely surveyed. Whatever their original purpose they were the decisive detail for the treaties’ titles. Each treaty carries the phrase “the land shall be properly surveyed hereafter.” Most likely, the annotations were made in the course of carrying out the subsequent steps of the transaction in which the documents participate. Finally, there does not exist many, if any other, land treaties with indigenous peoples that contain marginalia written after the negotiated deal is made. Particularly when the marginalia carries subsequent weight in the interpretation of the treaties.
Another important documentary feature of the original treaties is known in archival terms as the “attestation.” This is where the document identifies the author, writer, and cosigner. To represent Native signatories, Douglas wrote phonetic renderings of Native names. These Aboriginal participants “signed” the documents with a “uniform ‘X.’” (quote from Chief Justice Lambert in the Supreme Court of Canada’s *R. v. Bartleman* [*R. v. Bartleman*, [1984], 55 BCLR, 78 at 90] decision relying on the North Saanich Treaty, written in February 1852). Douglas struggled to identify representatives to cite ownership for the land. He acknowledged the indigenous communities had “distinct ideas of property in land,” but struggled to approximate this to the European concept of private property. These lists of names were Douglas’s approximation of local Native governance and organization. It represents one of the earliest colonial attempts to legally recognize the existence of an indigenous system of governance amongst the various indigenous groups in the region. (See Section 5.2 “World Significance”). This documentary feature is significant for three important reasons. First, in the 1875 published government version the lists of representative names are not included, rather they are referenced in a single phrase, e.g. “Signed Hookoowitz, his x mark, and 20 others,” in the case of the “Kosampson” treaty. We know from Douglas’s correspondence with the HBC that in the first nine treaties the representative names were added to blank pieces of paper and the text was later added at Fort Victoria without the presence of the First Nations representatives (see Section 3.4 History/Provenance: Treaties’ Provenance, p. 10). The agreements were in fact oral transactions held at Fort Victoria and subsequently documented. It is reasonable to assume Douglas created the other five treaties in the same manner. Second, the phonetic rendering of names is an important resource for the identity of First Nations on the West Coast. Many names on the original documents, in spite of their poor phonetic rendering, can be identified. An important ruling in the BC Court of Appeal has made a valuable commentary on the treaties’ annotations:

> There are many common law rules about the importance that is to be attached to the text of an agreement that has been reduced to writing. But where the text of the agreement was created by one party long after the agreement was made, and where the text is written in a language that only one party can understand, I do not think that any of those rules relating to textual interpretation can have any application. [*R. v. Bartleman*, [1984], 55 BCLR, 78 at 90].

Chief Justice Lambert, presiding judge in the case, also noted the “crosses on the document were not put there by the Indians.” Lambert’s observation was later quoted in the Canadian government’s *Royal Commission Aboriginal Peoples* in 1996. His support to move treaty interpretation out of the textual parameters of the common law rules of evidence points to the modern reconciliation of the colonial legacy. It is perhaps the Treaties’ greatest conceptual contribution to modern international indigenous jurisprudence.
Third, it is worthwhile noting that in international aboriginal jurisprudence the concept of recognizing indigenous peoples as living in organized societies thereby capable of claiming title to land, arrived much later than the recognition in the Vancouver Island Treaties. In 1971 the Australian court in its *Milirrpum v. Nabalco Pty.* decision [(1971) 17 FLR 14] ruled the pre-existing Yolngu peoples of Australia were “uncivilized inhabitants in a primitive state of society.” lacking a system of legal governance and therefore incapable of claiming title. The concept of a more flexible understanding of treaty relationships is significant because several countries recognize or are beginning to recognize the concept of aboriginal title including Australia, New Zealand, the United States, Nigeria, and Malaysia.

A fuller analysis of each individual treaty reveals further distinct details, but these are the most significant and unique elements of physical form and content in the 14 Vancouver Island treaties. Looked at from an international perspective, the treaties hold several common features found in treaties signed between the British Crown and indigenous peoples around the globe in the second wave of colonial expansion in the 19th century. But in their unusual marginalia, the body of text added after the negotiations, and the lack of formal details and symbols the treaties are unique. Finally the Treaties served not just the requirements of colonial common law, but it forced indigenous peoples to articulate their traditions and values in the unfamiliar technology of writing. It is an early example of the colonial legal system’s textual requirements, the gradual loss of unwritten, intangible indigenous tradition, and the decline in local language and culture.

### 3.4 History/provenance

**The Legacy of James Douglas**

**Biography:**

Sir James Douglas’s family origins embody the important idea that colonialism spoke with many voices in diverse locales. Douglas’s personal history touches regions as diverse as West Africa and sub-Arctic North America. John Douglas, Sir James’ father, was part of a prominent Glaswegian family who owned sugar plantations in Guyana where John pursued his business. James Douglas’ mother was Martha Ann Tefler a Creole woman born in Barbados who was known in her day as “free coloured,” a free person of mixed European and African ancestry. James Douglas was born in Demerara, Guyana in 1803. He began working with the Hudson’s Bay Company (HBC) in 1821 and he directed various posts across what became northern, sub-arctic Canada. James Douglas married Amelia Connolly on April 27, 1828. Amelia’s mother was Miyo Nipiy, a Swampy Cree Native woman and the daughter of a prominent Cree chief. Her first language was Swampy Cree; she also spoke the local native language, Saulteux. Douglas’ marriage ceremony was held in the tradition of the region’s northern Cree, *wikihtowin*. Amelia was known in Cree as *dpihtawikosan*, meaning a “mixed-blood” child. In
1828 HBC Governor George Simpson transferred Douglas to Fort Vancouver, the head office of the HBC’s massive Columbia District covering the northwest coast of North America. It is located at the mouth of the Columbia River in present day Washington State. By 1838 he was personally responsible for the entire district and in 1840 he received the commission of Chief Factor, the highest position for field service in the HBC. While still in principle a trader, he began to advocate against the local practise of native slavery. Sir James Douglas’s wide variety of experiences included a personal and professional relationship with indigenous societies before the writing of the Vancouver Island treaties. His personal journey from Guyana to the aboriginal communities of British North America uniquely prepared him for his administrative responsibilities on Vancouver Island. A product of the North American fur trade, he brought with him an international perspective and an indigenous understanding quite unlike most significant officials in the British Empire. While at heart a pragmatic trader, his background influenced his desire to recognize the rights of First Nations societies on Vancouver Island.

Douglas’ Native Land Policy
The British Colonial Office left Douglas with considerable independence to formulate an approach to native land policy on the Colony of Vancouver Island. The Colonial Office recognized Douglas’ experience and knowledge of the region’s land and its peoples was the best option for establishing a colonial settlement on the Island colony. Moreover, the Colonial Office so poorly knew the Island Douglas’ experience was one of only a few options for successful settlement. Unfortunately, there is no single written source defining Douglas’ Native land policy for Vancouver Island or for the province of British Columbia. He did not keep detailed diaries, nor did he write policy papers outlining his approach to dealing with aboriginal rights and title. To complicate matters the Colonial Office was not of a single mind on the title rights of the Vancouver Island indigenous peoples. The best one can use as a source for Douglas’ approach to native rights and title is to consult his speeches and correspondence. Although he was notorious for tailoring his views to his audience, the RBCM holds a piece of correspondence in which Douglas offers his most complete articulation of his views on indigenous title. In 1874, ten years after retiring as Governor of the Colony of British Columbia, Douglas responded to an inquiry from I.W. Powell, Indian Superintendent of the province of British Columbia, requesting Douglas to explain his land policy while Governor. In a response to a question on planning reserves he wrote:

The principle followed in all cases was to leave the extent and selection of the land entirely optional with the Indians who were immediately interested in the Reserve. The surveying officers having instructions to meet their wishes in every particular, and to include in each Reserve, the permanent Village sites, the fishing stations, and Burial Grounds, cultivated land, and all the favourite resorts of the Tribes in short, to include every piece of ground, to which they has acquired an equitable title through continuous
occupation, tillage, or other investment of their labour. This was done with the object of securing to each community their natural or acquired rights, of removing all cause for complaint on the ground of unjust deprivation of the land indispensable for their convenience or support, and to provide, as far as possible, against the occurrence of agrarian disputes with the white settlers…these Reserves should be the common property of the Tribe, and that the title should remain vested in the Crown, so as to be inalienable by any of their own acts…[and finally] contemplating the probable advance of the Aborigines in Knowledge and intelligence, and assuming that a time would certainly arrive, when they might aspire to a higher rank in the social scale, and feel the essential wants and claims of a better condition, it was determined to remove every obstacle from their path, by placing them in the most favourable circumstances for acquiring land, in their private and individual capacity, apart from the Tribal Reserves. They were, therefore, legally authorized to acquire property in land, either by direct purchase at the Government Offices, or through the operation of the pre-emption laws of the Colony, on precisely the same terms and conditions, in all respects, as other classes of her Majesty’s subjects. ["Douglas to Powell," 14 October 1874, Sir James Douglas Correspondence Outward, BCA]

Douglas’ remarkable views, loosely captured in the Vancouver Island Treaties, were a high water mark in the recognition of indigenous rights and title in commonwealth countries worldwide. His argument for recognizing and guarding the rights of native peoples with the goal of fostering indigenous/settler relationships would not be seen again amongst his peers in the global colonial program for a century. This perspective is unique and merits recognition in an international forum such as the Memory of the World Register.

The Geopolitical Treaty Context:
There was a 70-year period between Captain Cook’s initial Nootka landing in 1778 to the establishment of the first British colony on the Northwest Coast in 1849. This interim period was one of trade in the enormous region known in international diplomacy as the Oregon Territory. Vancouver Island formally entered the European field of imperial rivalry during the Nootka Sound Crisis of 1789-1794. The Crisis turned on issues of international sovereignty and rights to trade between Spanish and British empires. It highlighted colonial settlement over itinerant trading as the new model of Aboriginal trade economy. It therefore marked the encroaching “sequestration of Native land and life.” Settlement and trade constructed informal sovereign regional parameters for decades until British and American imperial law recognized international sovereignty on the Pacific coast of North America through the Oregon Treaty of 1846. The treaty recognized the 49th parallel as the sovereign division between the United States and British North America. The treaty makes no mention whatsoever of the legal status of the indigenous peoples in the region.

Recognizing the threat from the high influx of American settlement south of the 49th parallel, the British Colonial Office decided to assign to the HBC the functional responsibility of establishing a colony on Vancouver Island. The HBC was given a private grant to settle Vancouver Island, it was unusual because it was a proprietary colony in an era of free trade.
The company was granted a right of fee simple to settle the land through commercial means, received exclusive trading privileges but otherwise laws and jurisdiction remained with the Crown. This jurisdictional division explains greatly why the Vancouver Island treaties are such unique hybrids in form and understanding. They have no colonial antecedents or descendants on Vancouver Island. No precedents supplied by the Colonial Office or based on the treaty experience of Upper Canada contributed to the formation of the oral or written version of the Vancouver Island Treaties. The written versions are an amalgam of Hudson’s Bay Company policies, verbally negotiated aboriginal accommodation, and an 1848 agreement in the Maori Language between the British Crown and the Ngai Tahu people of New Zealand (The Kemp Deed). This also explains why the treaties are absent a royal seal and why the pomp and circumstance of most imperial treaties of the era is absent. The Treaties’ creative context can also be accessed through a presentation the author made for the Friends of the BC Archives. It is a detailed study of the making of treaties from the archival perspective: http://bit.ly/1gwQDjM.

**Treaties Provenance:** The Vancouver Island treaties were written over a period of five years from 1850 to 1854. The first nine treaties were completed by a process Douglas described to London based HBC Secretary Archibald Barclay as “a convention of the tribe.” As Douglas had observed in a letter to the HBC London office in 1849, “I would also recommend, equally as a measure of justice, and from regard to the future peace of the colony, that the Indians’ fisheries, village sites and fields should be reserved for their benefit and fully secured to them by law.” First Nations groups were requested to visit Fort Victoria where undocumented discussions were held concerning the transfer of rights to title, fishing, hunting and other rights over specific areas of Vancouver Island. An Iroquois/Métis trader, Thomas Williams (AKA Tomo Ouamtonmy or Tomo Antione), facilitated discussion with a rough understanding of local indigenous languages. A variety of HBC goods were offered to the visiting Native groups and the amount, in sums not matching the HBCs private inventory but nevertheless accounting for a 300% mark-up for non-HBC employees, are stated in the text of most of the resulting treaties (with the important exception of the North Saanich treaty which does not cite a sum paid). The names of representatives of vaguely defined local indigenous groups were phonetically transcribed. Once the transcriptions were made it is believed the register remained at the Fort and Douglas added the main body of text to the documents. This is confirmed by a letter Douglas sent to Archibald Barclay on the 16th of May 1850 in response to advice from Barclay on keeping registers of land title [HBCA, A.11/72, *Fort Victoria Correspondence*, Douglas to Archibald Barclay, 16 May 1850]. Douglas journeyed to Fort Rupert and Nanaimo to obtain treaties from the local Kwakwaka’wakw and Coast Salish First Nations in 1851 and 1854. He brought back the treaties to Fort Victoria. Although Douglas was
advised to return copies of land title documents to London, such copies have never been found in either the Hudson's Bay Archives or the British Colonial Office Archives in London. As is the case with many required legal processes, this appears to be one he did not follow. He also does not appear to have made copies for the local First Nations groups, a usual and prescribed practice that occurred in the making of the Numbered Treaties on the Canadian Prairies, and in most other British colonial settings worldwide during the second wave of British colonialism in the 19th century. The unique circumstances of local necessity, HBC Company policy, and Crown interests fashioned unique Treaties.

4.3 Legal status

Provide details of legal and administrative responsibility for the preservation of the documentary heritage

As the official repository of the Government of British Columbia, the Royal BC Museum holds official administrative and legal responsibility for the safekeeping, preservation, and public access of the Vancouver Island Treaties.

4.4 Accessibility

Describe how the item(s) / collection may be accessed

The treaties have been digitized and they are available online at the following address:
http://www.bcarchives.bc.ca/Content_Files/Files/Guides/FortVictoriaTreaties.pdf

For hi-resolution, the RBCM has a password protected Flikr site where all the treaties are kept. This link is normally for internal use only and should not be shared http://flickr.com/gp/36463010@N05/F2yXJ8

Facsimiles are available to researchers who visit the institution.

All access restrictions should be explicitly stated below:

For preservation purposes, the treaties in the original version are not available for research. The RBCM has made full colour facsimiles available for researchers who wish to closely inspect the documents. If digital and analogue surrogates are not adequate for the needs of the researcher, special arrangements can be made to have the treaties removed from the Archives vault and presented for inspection.

There are no legal or cultural factors that restrict access.

4.5 Copyright status
Describe the copyright status of the item(s) / collection

The treaties have been published as government documents in 1875. According to the Copyright Modernization Act [Bill C-11] [S.C. 2012, c.20] the documents are in the public domain.

5.0 Assessment against the selection criteria

5.1 Authenticity:

The custodial history, preservation, and use of an archival document teach us about its relevance and significance for its guardian institution and the greater society where it resides. The custodial history of the Vancouver Island Treaties is not completely known; a careful look at why there is such uncertainty highlights the Treaties’ evolving cultural significance for indigenous peoples and their relationship with settler society. It is notable that around the world in countries with a colonial legacy, it is only in the post-colonial era, when settler societies renew their relationships with local indigenous communities that treaties and land cessation documents become significant archival records in their public archives.

To promote and safeguard records’ authenticity archivists keep careful accession files. These files describe the records’ provenance, custodial history, and the details of the records’ accession into an archives. The care given to such administrative records is a good indication of the cultural values placed on the archival documents. The first archivists of the BC Archives – R.E. Gosnell (1894-1909), E.O.S. Scholefield (1910-1919) and W. Kaye Lamb (1934-1940) – recorded accession files. This was done in a limited manner reflecting the method of the period. Kaye Lamb introduced the first formal accession registers. But Willard Ireland, archivist for the province of British Columbia from 1940 to 1974, and the archivist who testified to the authenticity of the Vancouver Island Treaties at the ground breaking 1964 R. v. White and Bob trial, did not continue this practice. At trial, Thomas Berger, defence counsel for Messrs’ Bob and White of the Snuneymuxw First Nation, called Ireland as an expert witness concerning the treaties. Ireland confirmed the archives held the originals. What was never discussed is how the register found its way into the archives. Had anyone asked Ireland this question of archival practice, he would not have been able to answer. There is no direct record of the archives accessioning the treaty register. Berger describes finding mention of the Treaties in the BC Sessional Papers during research for trial and only upon request did Ireland confirm the BC Archives held the original documents. The treaties held significant impact for the development of Aboriginal jurisprudence in commonwealth countries worldwide and their use in R. v. White and Bob set the stage for this influence. In reliably establishing the authenticity of the Treaties, we can also gain insight into the drive for indigenous rights in post-colonial jurisdictions around the globe.

The treaties were written and originally stored at Fort Victoria. After custody in Fort Victoria in the early 1850s, archival documents demonstrate the treaties were, by 1869, in the possession of the Office of the Department of Lands and Works. There is no document noting the
circumstances or when the Department of Lands and Works accessioned the treaty register into its offices. In his 1863 testimony to the Colony of Vancouver Island Select Committee appointed to inquire into the state of Crown Lands, Colonial Secretary W.A.G. Young explained to inquirers how he kept for Governor Douglas the records of the local land reserve of the Church of England. Like the Church Reserve records, the Colonial Secretary was responsible to safeguard land title information such as the treaty register. But the records of the Colonial Secretary do not tell us how the Treaty Register was managed. In the same Committee inquiry, the first Surveyor General for the Colony of Vancouver Island, J.D. Pemberton, claimed remarkably that, although he had heard of the treaties, he had never seen the treaty register and did not know of its location. Six years later, Pemberton’s successor and former assistant, Mr. W.B. Pearce, in 1869 wrote an inventory of vital land documents. The list includes the treaty register, noting it is in “the safe” in the Crown Lands office (BC Archives, C/AB/30.71). Following their creation at Fort Victoria, this is the first known documented statement of the treaties’ location.

As mentioned above, in 1872 H.L. Langevin’s Report on British Columbia, a federal Government publication, referenced the treaties in a section titled “Memorandum of treaties made with Indian tribes for purchase of their lands.” The section included excerpts from the main text of the original agreements. The documents were again referenced by title in a federal report titled Report of the Superintendent of Indian Affairs for British Columbia for 1872 & 1873. Two years later, after certain resistance, the BC government published transcribed copies of the treaties in a publication titled Papers Connected with the Indian Land Question, 1850-1875. The transcriptions were slightly edited versions of each treaty. Although the treaties were for a time in the custody of the Queen’s Printer for this publication, they were at some point returned to Lands and Works. This is confirmed by a letter from the Dominion Superintendent of Indian affairs, Dr. I.W. Powell, who in April 1875 requested R. Beaven, Chief Commissioner of Lands and Works, to allow him “to inspect the treaties contained in the record book at present in your office.” This is the last confirmed 19th century citation of treaties’ location. Until the 1964 R. v. White and Bob trial, all further references to the treaties were generally made to the 1875 publication. And it is well known government officials prevented Aboriginal access to even this document on more than one occasion. For example, the spokesmen of the Allied Indian Tribes of BC tried unsuccessfully to acquire a copy of Papers Connected with the Indian Land Question during the 1927 parliamentary hearings into land claims. But in this case as in others we learn little or nothing of the treaties’ custodial history. The original documents return to public discourse when oral history tells us in 1963 Ireland brought the original register of treaties to Nanaimo to show the members of the Snuneymuxw First Nation as part of the discussion for the R. v. White and Bob trial. This is the earliest mention in the 20th century of the originals’ location in the BC Archives. In 1933, for example, in a rare government citation of the treaties, qua treaties, Premier Tolmie presented typed copies of the North and South Saanich treaties to the Saanich Pioneer Society on the occasion of their inaugural ceremonies.
However, close inspection of the typed copies indicates they were copied from the 1875 publication and not the originals. Most likely the treaties were transferred from the Department of Lands and Works to the BC Archives in one of many bulk transfers of colonial records from government departments in the early 20th century. To speculate, in June 1933 J. Hosie, Provincial Librarian and Archivist wrote the following to Deputy Provincial Secretary Walker: “both Mr. Gosnell and Mr. Scholefield – provincial archivists between the years 1908 and 1919 – were allowed to remove from various Government Departments quantities of documents of the old Colonial days for their better preservation and treatment. These have been carefully indexed and made accessible.” It is very possible that in this 11-year window the treaties entered the archives. A careful examination of the British Columbia Sessional Papers’ annual “Report of the Archives” does not reveal the documents listed for this period although several annual reports provide item level accession lists including colonial documents. That staff did not uniquely identify the treaties’ accession might speak more to contemporary cultural convention: at a time when BC settler society was building an archives to document the history and identity of European settlement and the creation of a European settler society on the Northwest Coast of North America, documents which supported the rights and identity of First Nations were not a high priority. The spotty custodial history of the treaties suggests a global feature of indigenous land title agreements in mid-19th century colonial jurisdictions: their importance is located in the attempt to establish, build and shape ongoing relationships with indigenous peoples, and the treaty’s significance is only realized over time as indigenous/settler relationships evolve. This has led to their so-called contemporary “rediscovery” in several global colonial jurisdictions after their original archival acquisition was not given appropriate care and attention. A good example of this is the 1840 Treaty of Waitangi. This document, already accepted into the UNESCO Memory of the World Register, was created in multiple copies. Although some versions of the signed originals were lost, today the remaining documentation is closely guarded as some of the most important founding documents of New Zealand. Similarly, the Douglas Treaties, which have already received constitutional status in the 1982 Constitution, should hold a foundational status for indigenous peoples relationships with the British colonial presence in the Pacific Northwest.

Despite the uncertainty of the register’s custodial history there can be no doubt the treaties are authentic. The numbers of signatories for the bands closely approximate Douglas’ formal and informal censuses from this period. Furthermore, the names of the signatories on several treaties have been identified. The handwriting of James Douglas, and several of his clerks, including Joseph William McKay and Richard Golledge, has also been authenticated. Cross-indexing the colonial correspondence with the content of the treaties to coordinate events also supports the treaties authenticity. Finally, oral histories from the various First Nations signatory communities approximate the circumstances of the events as Douglas described them in his colonial correspondence. This examination of the custodial history and authenticity of the Treaties
demonstrates their changing value in the consciousness of Canadian society. It is a trajectory similar to the UNESCO endorsed Treaty of Waitangi in New Zealand and reflects the international recognition of the indigenous experience of colonialism around the globe.

5.2 World significance

Is the heritage unique and irreplaceable?

The Vancouver Island Treaties hold unique characteristics and qualities of world significance that are irreplaceable. They are the only treaties signed during the colonial era of British Columbia settlement history. This means they are the only documents to directly address indigenous rights and title in the history of the colonial settlement west of the Canadian Rockies of North America. For this reason, the documents are highly valued by local contemporary indigenous communities (Witness the Application’s Band Council Resolutions and the endorsement of the Union of BC Indian Chiefs). But there are two more important features that add to their international value. First the treaties offer a distinct ethnographic profile of cultures globally unique and internationally valued; and second, the Treaties are significant taproots in the conceptual evolution of the aboriginal post-colonial jurisprudence worldwide.

**Ethnographic Profile:** The documents are valuable as sources of indigenous demography and ethnography at a time when local aboriginal societies were decimated by European diseases. By the mid-19th century, European born epidemics had drastically impacted the lives of millions of indigenous peoples in the “new world.” European exploration carried disease across the western hemisphere with dramatic impact. By some estimates, the population of the western hemisphere fell by 90 per cent with the introduction of European diseases in the 18th and 19th centuries. Epidemiology traces the introduction of European disease to the West Indies to the island of Hispaniola in 1518. The epidemic devastation of Aztec civilization is well documented in the thorough records of the colonial aggression of Cortez. The Incan civilization of Peru and Chile also holds a well-documented record of European born colonial epidemics. The records of epidemics of European provenance on the northwestern coast of North America are less documented. This makes the Vancouver Island treaties vital and unique census documentation at a time of unprecedented demographic change. Native oral histories, combined with colonial documentation – diaries, informal correspondence, local surveys – describe indigenous experiences of epidemics on the Northwest Coast. In the region of the Vancouver Island Treaties, what is known today as southwestern British Columbia, disease driven depopulation began with the smallpox epidemic of 1782. The local indigenous populations underwent similar depopulation rates as other indigenous groups in the western hemisphere. Some writers suggest a rate as high as 90 per cent depopulation places the pre-epidemic population of the region eventually known as British Columbia at about 200,000. Historical geographer Cole Harris has asked the rhetorical question “how is it that the smallpox epidemic of 1782 is not part of the lore of modern British Columbia?”
These colonial epidemics went far to depict the indigenous peoples of the northwestern cordillera of North America as a vanishing group of people. The common colonial discourse depicted local indigenous peoples as incapable of adaptation to the challenges of modernity: economy, technology, social organization. This discourse suited the contemporary acquisitive and assimilating settler project. The other reason this great depopulation is generally unreferenced is a simple lack of documentary evidence of Aboriginal demography. Robert Galois has observed there exist only 11 sources of aboriginal census data for Vancouver island in the first half of the 19th century. These have become known as the “HBC censuses.” Aside from these idiosyncratic and incomplete sources of demographic data there are very few records to cite. This paucity of demographic information on the local indigenous peoples depicted in the Vancouver Island Treaties makes these documents irreplaceable.

In addition to documenting the decline to near extinction of communities of Kwakwaka’wakw, Nuchah-nulth, and Coast Salish peoples, the treaties offer a profile of these communities as they were about to be profoundly studied and influential in international anthropology, their art celebrated and displayed in museums and universities around the world. The treaties claim to recognize indigenous governance in the common phrase “the chiefs of the family of …, acting for and with the consent of our people, who being here present have individually and collectively confirmed and ratified this our act.” This reference to indigenous governance precedes by only a few decades the popular international anthropology that intensely and competitively collected Northwest coast artefacts. These masks, totem poles, ceremonial songs and other cultural works also represented indigenous governance practices in non-textual societies; they comprise the unwritten side of the Treaties. The Treaties introduce a colonial period when their unique art and culture became known across the globe. Museums and universities in Germany (Museum fur Volkerkunde), France (Musée de l’Homme), England (The British Museum) and the United States (The Smithsonian), competitively practiced “salvage anthropology” convinced of the need to collect the vanishing arts, culture and heritage of Northwest Coast indigenous peoples, some of the most diverse concentrations of indigenous peoples on Earth. The treaties represent the introduction of the deleterious colonial settlement experience for indigenous peoples on the Northwest Coast; ironically, it also introduced the period when the unique art and culture of the region’s peoples became internationally renowned and studied.

Colonial Jurisprudence: Section 3.0 describes the documentary form of the treaties. This form, in its templates and stock phrases, captures in detail the mid-19th juridical function of colonial treaties of the British Crown. This section argues the treaties form a taproot for modern aboriginal jurisprudence around the globe. By the mid-19th century, a thoroughgoing Crown sovereignty replaced the more flexible jurisdictional practices of earlier British Imperialism. Early in the 19th century, English Crown representatives entertained a kind of local trusteeship involving the local political entities in areas such as the princely states of India and aboriginal bands in North
America. These early imperial relationships held a feudal character in their informality and accommodation of local social organization. But in the mid to late nineteenth century, in global indigenous polities under British control, the Crown began to assert greater control over local sovereignty. This is expressed in common treaty templates. Around the globe, the British Imperial program employed similar Crown charters and treaties to proclaim British colonial sovereignty: West Africa, New Zealand, and North America. The Colonial Office's recycled templates for charters. The Vancouver Island Treaties' notification, an introductory element of most charters, was not only common in most Canadian Aboriginal treaties, but it is also found in many nineteenth-century colonial documents such as the Agreement with the chief of Battaré, February 18, 1858, concerning colonial jurisdiction on the West Coast of Africa. Scholars have recognized similarities in the form of mid-nineteenth century treaties between the Crown and West African societies and the forms of treaties used in New Zealand with, for example, the Ngai Tahu people. When the British Crown offered the Hudson's Bay Company a ten-year charter to develop and settle the Colony of Vancouver Island the company used a similar formula found in British treaties and charters around the world. The notification in the Charter of Vancouver Island reads, “To All to Whom these Presents Shall Come….” This notification is also reproduced in such diverse colonial contexts as land title documentation on the West Coast of Africa in the Convention with Barra, Cession of Territory November 18, 1850. The scope of the distribution and the similarity of these charters indicate that they were international Crown templates of possession. The indigenous element was filled in for appropriate local, legal articulation. This suggests the creation of the Vancouver Island treaties is representative of a worldwide English Imperial program. It highlights the international character of the treaties’ value while at the same time acknowledging the importance of unique local indigenous experience. There are numerous international examples of British imperial representatives claiming for the Crown imperium over indigenous people’s territories in the mid-19th century. In 1861, for example, with a similar template, the King of Lagos ceded his territory to the English Crown. P.G. McHugh has observed in 1892 alone, using similar documentary formulas, “the Crown entered into seven treaties of cession with various chiefs in Central Africa.” Within this international web of indigenous treaties, the 14 Vancouver Island Treaties are the only indigenous treaty agreements with the Crown in the colonial era to account for the region of the northwest cordillera of North America west of the Canadian Rockies. They not only built on the international environment noted above, but as the product of a company running a proprietary colony, they also contain a character unlike most other mid-nineteenth century colonial treaties, making them unique on the international stage. In their form, the Vancouver Island Treaties fit the practise, the juridical function, of mid-19th century Crown treaties worldwide Over time, Canadian society's cultural understanding of the Vancouver Island Treaties has evolved. To create evidence of jurisdictional legitimacy the Crown required brokered and negotiated representations of colonial contact. In many modern jurisdictions that evolved from
colonial settlement, the documents that resulted from this colonial brokerage are the subject of strong and conflicting opinions indicating the wide spectrum of legal and political values attached to, and enflamed by, these cultural representations of colonial experience. Once the formulas for colonial empire and indigenous dispossession, today they are evidence of our multicultural constitution and cultural diversity. The modern cultural understanding of the treaties has focussed on constitutional evolution and negotiation with the treaties forming a valuable fulcrum for discussion. The contemporary terms commentators have used to describe 19th century treaties with indigenous societies in North America indicate how such documents have contemporary constitutional values not contemplated at the time of their creation. The terms include “real estate conveyances”; “forms of contract”; “constitutional documents”; “a kind of legal self-annihilation”; “Indian Magna Charta”; and “the hidden constitution of Canada.” In the cultural consciousness of Canadians, like other global post-colonial jurisdictions, such treaties have moved from politely ignored antiquarian curiosities of ethnocentrism, to vital building blocks for multicultural, post-colonial societies. The modern historical consciousness of indigenous and settler societies places a greater historical emphasis on the concept of recognition and accommodation between greatly diverse societies. As oral agreements negotiated in the ad hoc manner of a commercial agreement, the Treaties provenance uniquely supports the contemporary concept of intersocietal dialogue prominent in international aboriginal jurisprudence.

Recognition of the diversity and intersocietal engagement embodied in the Vancouver Island treaties is a relatively recent phenomenon. But First Nations communities have always maintained their own understanding of the creation, meaning and use of the treaties. Neil Vallance has recently argued in his unpublished PhD Dissertation (untitled and in process) that the aboriginal memory of the treaty event has been successfully silenced in the early twentieth century through strict textual interpretations of the treaties. This is a common history across colonial jurisdictions worldwide. However, in the informality and uniqueness of the Vancouver Island Treaties is also found traces of oral testimony for agreements that were, unlike most colonial-era agreements, oral in original form. For example, a newspaper interview given in 1934 by Chief David Latass discloses the mid-nineteenth century views of Saanich First Nations (near Victoria) on how to resolve the growing tensions between the needs of his people and those of the newly arrived colonists:

When Douglas met with Chief Hotustun in 1852, and discussed with him and his subchiefs the allotment of lands to the Hudson’s Bay Company, it was arranged that lands not needed by the natives might be occupied by the whites. The Indians were to have reserved to their use some choice camping sites, were to have hunting rights everywhere and fishing privileges in all waters, with certain water areas exclusively reserved to the use of the tribes. In return for the use of meadowlands and open prairie tracts of Saanich, the white people would pay to the tribal chieftains a fee in blankets and goods. That was understood by us all to be payable each year.

The Latass extract highlights the differences of opinion between Douglas and Saanich Chiefs.
concerning how, and by whom, land was to be allocated and managed. Sharply divergent accounts of historical meetings between First Nations and the Crown are common across Canada, and attempts to reconcile them are ongoing. The difficulty may be the result of past privileging of the colonial narrative over First Nation accounts, an imbalance that is difficult to redress given the preponderance of colonial documents in the nation’s archives. The situation is particularly acute in the case of the Vancouver Island Treaties. The oral testimonies currently in existence cover only the Saanich Treaties, as told by David Elliott senior (1983) and Gabriel Bartleman (1987). However, both are based on hearing the history as related by Chief David Latass at band meetings in the 1920s and 1930s.

Tucked away in the archival record are examples of First Nation spokespeople attempting to explain their recollection of the Treaties to non-First Nation audiences. Unfortunately, at the time they spoke, their audiences were unable to listen, and their message was ignored. David Latass was one of those First Nation elders who tried to communicate his understanding of the treaties. The accounts are few, and they are not without problems, but perhaps to no greater degree than the records left by Douglas, Finlayson and McKay. There are four which have been “reduced to writing” over time. Two are by David Latass describing the 1850 Fort Victoria treaties and the 1852 North Saanich Treaty (both published in 1934), the third and fourth, by Snuneymuxw elders Dick Whoakum (transcribed in 1913) and Quen-Es-Then (first published in 1933) respectively, describe the Nanaimo treaty of 1854. They all carry similar messages of cultural accommodation, intersocietal engagement, and negotiated jurisdiction. International jurisprudence has recognized the idea of intersocietal law inspired by recent interpretations of oral histories of the Vancouver Island treaties. When the Canadian Constitution recognized aboriginal treaties its stated purpose was “reconciliation.” This has lead scholars, jurists and indigenous leaders to begin to search for a jurisprudence that finds modes of co-existence that organically and through iterative processes of negotiation give rise to workable norms that structure governance. This modern interpretation of aboriginal treaties, built on the model of the indigenous oral remembrance of the Vancouver Island Treaties, has become a mode of understanding for aboriginal participation in post-colonial states worldwide. As noted in Professor Jeremy Weber’s endorsement, “the ad hoc, informal features of the Vancouver Island treaties described in the application – undocumented negotiations, absence of formal protocols, ceremonies, and seals –places emphasis on the evolving social relationship between settler and indigenous societies; a scenario Sir James Douglas envisioned when he anticipated indigenous communities would ultimately adapt to the new social arrangements and jurisdictional hierarchies of settler society encapsulated in the treaties he helped formulate.” This is a unique characteristic of the Treaties which contributes to the United Nations support of indigenous rights and is supported by the First Nations letters of endorsement and the support of the Union of BC Indian Chiefs.
5.3 Comparative criteria:

1 Time

**A Time of “Significant Social or Cultural Change”:**

For a period of time in the early 19th century, there was a strong social movement in England to address the negative effects of colonialism on indigenous peoples worldwide. Such colonial concern was most clearly expressed in the British Parliament’s 1837 *Report of a Select Committee on Aboriginals* [Great Britain, House of Commons “Report from the Select Committee on Aboriginals,” *Parliamentary Papers, 1837*, June 1837, vol. 7]. There was also a growing movement promoting indigenous peoples’ ability to recognize and benefit from the advancements of western European civilization. This was the perspective of Herman Merivale, Permanent Undersecretary at the Colonial Office and Drummond Professor of Political Economy at Oxford. The Aborigines Protection Society, based in London, was the principal organization promoting this concept. They were closely associated with the Christian Missionary Society and the Liberal Party of England. These spokespeople successfully promoted, for a short time, a concept of an enlightened colonialism bringing the benefits of a humane and civilized society. These ideals of liberal humanitarianism grew out of Enlightenment concepts that also informed the recently successful English anti-slavery movement. Many members of the Aborigines Protection Society had been active in the anti-slavery movement. Combined, the Aborigines Protection Society, protestant reform groups and political officials successfully promoted their liberal humanitarian ideals in both parliament and the Colonial Office. In 1835 they influenced the colonial policy of Lord Glenelg to abandon the new South African province of Queen Adelaide. Shortly thereafter another high water mark was reached when the movement asserted the need for colonial settlers to recognize the Aboriginal right to title in New Zealand. This informed the creation of the 1840 *Treaty of Waitangi*, a significant precedent of some thematic influence for the *Vancouver Island Treaties*. (More specifically, the New Zealand South Island purchases articulated in the Kemp Deed formed the template for the *Vancouver Island Treaties*). But by the time of the *Vancouver Island Treaties*, the Colonial Office was moving away from the concept of humanitarian colonialism. Colonial policy could not overcome the inherent contradiction of enlightened colonialism. The humanist movement’s political success was reduced by mid-century indigenous resistance movements in New Delhi, South Africa, and New Zealand and growing indigenous conflicts in the Oregon Territory. These international influences resulted on Vancouver Island in a hybrid form of treaties influenced by both the earlier humanitarian colonial ideals, and the harsher economic realities of placing settlers on colonial lands around the globe already occupied by pre-existing societies. The colonial land policy of Australia backed even further away from the liberal humanitarian approach to colonialism in the early 19th century. Australian
colonial land policy was structured around the concept of Terra Nullis, meaning the continent was empty and the land unoccupied at the time of discovery. As a result, Australian colonial settler society did not create treaty documents to account for Aboriginal title. The legal concept of Terra Nullis was not overturned in Australian Aboriginal jurisprudence until the 1992 Australian High Court decision Mabo and Others v Queensland (No. 2) when it was replaced with the concept of common law Aboriginal title. The decision cited the above mentioned R. v. White and Bob as an important precedent. Such was the significant degree of cultural change encapsulated in the treaties. It is reflected in the awkward attempts Governor Douglas made to recognize Native governance and to represent indigenous communities as wilfully “surrendering” their title. This is captured in the opening phrase, a notification similar in all treaties, of the Kakyakan treaty:

Know all men, we, the chiefs of the family of Ka-ky-aakan, acting for and with the consent of our people, who being here present have individually and collectively confirmed and ratified this our act. Now know that we, who have signed our names and made our marks to this deed on the first day of May, one thousand eight hundred and fifty, do consent to surrender, entirely and for ever,.....

The treaties are evocative of a time when British colonial policy was attempting to establish settler colonies around the globe. These colonies confronted the reality of indigenous communities living on the land with their own unique cultures as organized societies. The text of the Vancouver Island treaties embodies the inherent contradiction of the mid-nineteenth century British colonial project. The treaties attempt to recognize indigenous identity and rights while at the same time addressing the economic reality of colonial settlers requiring previously occupied lands. It would not be long after the Vancouver Island Treaties were created that settler polities began to forcefully assert their jurisdiction. This came most powerfully in the form of residential schools for aboriginal children, the Indian Act to manage daily aboriginal affairs, and reservations where aboriginal peoples were direct to reside. There would be no other similar treaties in their region of North America. The form and tone of the Vancouver Island Treaties is unique in this sense.

2 Place

Physical Environments: At the time of encounters with settler societies on the Northwest Coast of North America, the local indigenous population was enjoying a trading relationship with colonial visitors. The establishment of settled European communities highlighted different conceptions of land and its proper use. This is in fact the challenge at the heart of the treaties: the colonial project to turn Earth into property. The treaties in fact present a caricature of how local First Nations used the land. The treaties all contain references to local “village sites and enclosed fields” which is an imported concept of land use that did not accurately apply to the various First Nations groups on Vancouver Island. The phrase “the land itself, with these small exceptions becomes the entire property of the white people for ever...” reduces the First Nations conception of land and its use to two ill-defined “exceptions.” Local First Nations lived in several locations predicated on the collection of food and resources available by season. In fact, the concept of a permanent village site with farms was likely
inspired by the land use practices of the Maori, expressed in Maori-oriented documents such as the Treaty of Waitangi and Kemp Deed (the template for the Vancouver Island Treaties) created in the 1840s. The physical descriptions for the lands the First Nations ceded are so cursory Douglas uses the phrase “the land shall be properly surveyed hereafter.” For this reason is it difficult to say with accuracy what exactly the Aboriginal peoples ceded in terms of land rights and definitive locations.

What is clear is that the boundaries of the lands loosely identified in the treaties were never dutifully respected when Douglas began to survey Vancouver Island and distribute property for settlement. The Joint Indian Reserve Commission (1876-1878) found no reserves in areas described in some of the areas covered by agreements. As the Commission concluded, “it was unfortunate that lands were not assigned to these Indians in accordance with the spirit of the agreement of 1850.” By the late 1850s there were several small reserves in the area of Victoria, which later became the capital of the province. The approach of providing the minimal space for traditional Aboriginal locations was also a common approach in Southern Australia. In the end, Douglas and the colonial legislature seemed to view the lands in small reserves as held in a kind of government trust. Reserves were moved for the public (i.e. settler) good when necessary. For example as late as 1911, Songhees reserves in the capital city of Victoria were moved as the city expanded. All this means the Treaties hold crucial information for modern, on-going treaty negotiations. In September 1992 the governments of Canada and British Columbia and the First Nations Summit agreed to create the British Columbia Treaty Commission. The Commission began with 29 statements of intent to negotiate treaties with First Nations. Today there are 60 First Nations negotiating treaties with the governments of Canada and British Columbia through the independent Commission process. In 1998, the governments of Canada, British Columbia, and the Nisga’a Nation initialled the Nisga’a Final Agreement, British Columbia’s first modern treaty and the first since the Vancouver Island Treaties; notwithstanding a small area of the northeast corner of British Columbia covered in the 1899 Treaty 8. Although stated with vagueness and inaccuracy, there is nevertheless a kind of title in the Treaties explicitly located on the land and held by indigenous communities. The details of physical environment captured in the Treaties are fundamental to the contemporary indigenous groups negotiating title. This importance is underscored in the recent United Nations Declaration on the Rights of Indigenous Peoples.

3 People

Depiction of “Social” and Political Development” and “Great Movements”:
The Impact of the Vancouver Island Treaties on Aboriginal jurisprudence

The Vancouver Island Treaties were written during a period of great transition in the English common law. By the mid-nineteenth century, modernism brought an encompassing, positivist focus to common law. Common law colonial jurisprudence, and its documentary by-products, became at once more detailed and encompassing. The new positivist perspective introduced a more doctrinaire
and intrusive tone to colonial expressions of sovereignty. This was most influentially expressed in the work of 19th century British legal theorist John Austin (i.e. The Province of Jurisprudence Determined, 1832). Whereas pre-nineteenth-century British expressions of imperial sovereignty recognized and even collaborated with the endemic polity, through the lens of nineteenth-century legal positivism, sovereignty’s focus became increasingly absolutist and assimilating. This new perspective found expression in legal instruments such as codes, land acts, and surveys – modernist devices designed to detail both the nature of Native custom and British colonial sovereignty’s broadening control. Sovereignty’s positivitization compelled British representatives and Aboriginal societies to reconcile and articulate their expansive social differences in more measured textual detail. Struggling to negotiate such fundamental elements of identity as land and culture, Aboriginal and Crown representatives created legal fictions: documents purporting to be evidence of mutual expressions of rights and title where none existed. This assimilating and enfolding approach to colonial sovereignty became the common theme in colonial agreements with indigenous peoples. The Vancouver Island Treaties are unique in the sense that they were one of the first sets of colonial treaties to express this encompassing sovereign approach. It served to create, in the words of philosopher James Tully, “Empires of Uniformity.”

With this theme of assimilating authority in mind, for several reasons the Vancouver Island Treaties' have held symbolic and important effects on Aboriginal jurisprudence in Canada and in other international jurisdictions. First, the Treaties were influential in having aboriginal rights recognized in the Canadian Constitution. A unique situation cited in other post-colonial jurisdictions where indigenous rights movements are active. The most influential decision on federal government policy leading to the repatriation of the Canada Constitution was Calder v. British Columbia (Calder v. British Columbia (Attorney General) [1973] S.C.R. 313, [1973] 4 W.W.R). Justice Hall in his Calder decision cited with approval the R. v White and Bob case noting "It is of importance that in all those areas where Indian lands were being taken by the Crown treaties were negotiated and entered into between the Crown and the Indian tribe on land then in occupation.” (Calder at page 389). The effect of these treaties was discussed by Davey J.A. (as he then was) for the majority in White and Bob as follows at p.197:

It was the long-standing policy of the Imperial government and of the Hudson's Bay Company that the Crown or the Company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, were made with various bands and tribes of Indians for the purchase of their lands. These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the Crown and the Hudson's Bay Company in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard Ex. 8 (1854 Sarlequun Treaty) as a mere, agreement for the sale of land made between a private vendor and a private purchaser. In view of the notoriety
of these facts, I entertain no doubt that Parliament intended the word “treaty” in sec. 87 to include all such agreements, and to except their provisions from the operative part of the section.”

From this decision began the evolution towards the 1982 incorporation of Aboriginal rights into the constitution. As noted, this constitutional entrenchment is singular in commonwealth jurisdictions.

Second, noting the fundamental significance of the Treaties to Canadian aboriginal jurisprudence, “there is no doubt that Canadian jurisprudence on aboriginal rights and title has influenced the law on these subjects in both New Zealand and Australia, and that courts in both countries have cited Canadian case law.” (Correspondence with Professor Hamar Foster, University of Victoria Faculty of Law, March 5, 2014). Perhaps the first court to do so was the northern territorial court in *Milirrpum v. Nabalco* (1971) (see Douglas’ Native Land Policy, pp. 8-9), regrettably citing the BC Court of Appeal judgment in *Calder*, holding that there was no aboriginal title in BC. This was later overturned. A better example is the NZ Court of Appeal decision in *Te Runanganui o Te Ika Whenua Inc. Society v. AG* in 1994, in which the court referred both to Canadian law founded on *R. v. White and Bob* and *Mabo*. In 1985, P.G. McHugh, Cambridge Professor of common law, published a study of Maori Fishing rights (“Maori Fishing Rights and the North American Indian,” 6 *Otago Law Review, [1985]*) in which he cites J.A. Norris’s decision on appeal in *R. v. White and Bob* as one of Canada’s most exhaustive judgments on the origin and nature of Indian hunting and fishing rights and recommends the work for consideration in a New Zealand context. In 1992, writing in Australia’s high court, Justice Gummow stated in the *Mabo* decision “The Common Law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.” Finally, in 1998, in the Australian high court decision, *Fejo v. Northern Territory*, the court acknowledged the appellants use of case law from Canada and the United States. It also notes indigenous Australian appellants increasing reference to Canadian case law in their claims. While the decision cautioned care when considering “overseas authorities” where cases might be influenced by local laws and treaty contexts, the decision nevertheless acknowledges a matrix of international laws and UN sanctioned rights that should not be ignored and may actually reflect the evolving values of Australian society.

Third, the Treaties have formed the basis for the most thorough legal definition of indigenous treaty in any international jurisdiction possessing a colonial historical legacy. The signing of the Vancouver Island Treaties did not introduce a welter of treaty signings across mainland British Columbia or even on the rest of Vancouver Island; the province evolved settlement without official transfer of Native title. Over time, the British Columbian and Canadian governments established a reserve system to allocate lands for Aboriginal communities. As a consequence, most of the Aboriginal political history in British Columbia in the twentieth century has been a history to re-assert Aboriginal self-determination within the interpretive legal parameters of settler society common law. Accordingly,
there is a fundamental genealogy of aboriginal treaty jurisprudence that goes back to R. v. White and Bob. In 1964 Justice Wilson of the BC Supreme Court held in the case R. v. White and Bob that the Vancouver Island treaties held legal status as treaties. (R. v. White and Bob [1964] B.C.J. No. 212 50 D.L.R. (2d) 613 British Columbia Court of Appeal). As Neil Vallance has recently noted, “the legal definition of the term ‘treaty’, as used to describe agreements in Canada between First Nations and the Crown, was first formulated in the 1964 BC Court of Appeal case, R. v. White and Bob. The decision by Justice Wilson affirmed the treaty status of the written version of the last of the fourteen Vancouver Island Treaties, entered into with the Snuneymuxw First Nation in 1854.” In Justice Wilson’s words, the last of the 14 Vancouver Island Treaties, at issue at trial, was not a treaty in the meaning of “two or more independent states acting in sovereign capacities,” it was also not an agreement of “individuals dealing with their private and personal affairs;” rather, “its meaning lies between those extremes.” This definition subsequently influenced the depiction of aboriginal treaties as sui generis, as articulated by Chief Justice Dickson of the Supreme Court of Canada in the 1985 R. v. Simon case [a Supreme Court of Canada decision in Nova Scotia, [1985] 2 SCR 387]. Justice Dickson cited R. v. White and Bob as his authority for this characterization. This was crucial to the constitutional status of First Nations on Vancouver Island because Section 35 of the Constitution Act, 1982 stated “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.” The Calder v. the Attorney General of British Columbia (1973) supreme court decision, again referencing R. v. White and Bob, was influential in convincing the federal government to include section 35 in the Constitution Act. As of 1982, the Vancouver Island Treaties, by virtue of their influence on jurisprudence, therefore held constitutional relevance and weight. Aboriginal groups appealing to international law are significantly assisted because they can point to a document recognizing their rights in domestic common law, constitutionally entrenched. In 1990 Chief Justice Lamer, in his 1990 R. v. Sioui decision expanded further on the concept of sui generis treaties as inspired by R. v. White and Bob. Lamer defined the sui generis treaty as “the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.” Justice Dickson in R. v. Simon had also noted, “it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties.” This suggests there is a clear connection between the Vancouver Island Treaties and international aboriginal jurisprudence. The United Nations “Treaty Reference Guide” (1999) provides a list of typical examples of treaties. Amongst the list is the term, modus vivendi, defined as “an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in an informal way, and never requires ratification.” This is a worthwhile depiction of colonial events on Vancouver Island. The treaties constituted an acknowledgement by the “white people” that they were no longer guests, and henceforth would have to negotiate the terms of their continued occupation of land as changing circumstances required. The Dictionary of Diplomacy (2012) adds to this formula a degree of cynicism, noting “interim agreements
tend to be popular because they can be presented both as the only way to advance to a final settlement and the only way to forestall one.”

In her recent Ph.D., “I smooth’d him up with fair words:” Intersocietal Law, from Fur trade to Treaty,” (Osgoode Hall Law School, 2012) Jana Promislow has developed this line of thought. She has interpreted the modus vivendi approach to offer “a working intersocietal space in which normative expectations that were shared at the level of practice were not always shared at the level of meaning … with no particular requirement that the meanings behind these convergences were ever sorted out.” Promislow argues this is an approach “that attends to historical interpretation of mutual intentions to enter into and maintain treaty relations, but does not rely on common intentions regarding the meaning and scope of the terms of that relationship to define treaty rights.” This allows for viewing treaties as ongoing narratives, “dynamic ongoing constitutional processes.” In the jurisprudence surrounding the international interpretation of indigenous treaties, the Vancouver Island Treaties are one of the earliest examples of an important perspective on treaty interpretation. Moreover, as noted above this is the remembrance of Chief David Latass in his discussions on the oral history of the treaties in 1934, this has been a consistent indigenous viewpoint of the meaning of the Vancouver Island Treaties.

The decision in R v. White and Bob, served to introduce what is today described as the post-colonial period of Aboriginal jurisprudence in Canada. The concept of common law Aboriginal title is now recognized across commonwealth nations where the British colonial project set up settler communities. The “great political movement” encapsulated in the Vancouver Island Treaties, is a broader consciousness of the nature of consensus across First Nations and settler communities. Rather than a strict interpretation of the documents’ meaning, a general understating of the unwritten negotiation and accommodation that went into the documents creation is now highlighted, recognizing the role of First Nations in the agreements and thereby their identity in the Canadian constitution as indigenous peoples. Today in postcolonial jurisdictions worldwide, the notions of treaty federalism is one strand of theorizing that relies on the interaction of settler legal systems with indigenous agency as captured and memorialized in treaties. Modern treaty interpretation worldwide has shifted from simply defining sources of aboriginal rights, in statutes and case law, to an approach that supports reconciliation. This jurisprudence, with important roots in the Vancouver Island Treaties, is also clearly linked to current United Nations programmes concerning indigenous peoples around the globe. Finally, this approach, as embodied in the remembrance of the Vancouver Island Treaties, is supported in the United Nations Declaration on the Rights of Indigenous Peoples adopted in September 2007.
6.1 Rarity

Until the Government of British Columbia created the BC Treaty Commission in 1992 the Vancouver Island Treaties were the only extant treaties concerning First Nations land title in British Columbia. They cover less than 3% of the land area of Vancouver Island.