NISHGA CASE: B.C. COURT OF APPEAL

A brief summary of the judgments of Justices Davey, Tysoe and MacLean

The Nishga ask for a declaration that their aboriginal title to their tribal territories has not been extinguished. Such a declaration would embody two assumptions: (1) that an aboriginal title enforceable in the courts had existed, and (2) that it had never been extinguished (MacLean).

~~Cases~~ Each case involving aboriginal title ~~have been~~ has to be considered in its own historical background and on its own particular facts. The buying of native rights is not a principle embodied in the laws binding this Court (Davey). Indian title cannot be recognized in the courts unless it has previously been recognized by the legislative or executive branch of the Government (Tysoe). The Nishga would have to establish that the Crown ensured to them aboriginal rights enforceable in the courts (Davey). There has been no recognition of Indian title in B.C. which has statutory force (Tysoe). If a wrong was done in the course of taking sovereignty, it is not a wrong that the courts can consider. Rights held before cession, and even rights stipulated in a treaty of cession, cannot be enforced in the courts unless the Government incorporates these rights in the law. Even treaties have to be sanctioned by legislation (Tysoe).

Aboriginal rights are not legal

The Royal Proclamation of 1763 has never applied to B.C. (unanimous).

If Indian title ever existed in law, it was only a right of occupancy, not ownership (MacLean). It cannot be said to have been anything more than a personal and usufructuary right dependent on the goodwill of the Sovereign (Tysoe). The exclusive authority to extinguish it rested in the Government, and it could do so at pleasure, in whatever manner it chose, without the consent of the Indians and without any legal obligation to pay compensation (Tysoe, MacLean). The sovereign authority over the area from 1858 to 1871 was the Colony of British Columbia. Extinguishment was a matter of policy, and the policies could differ in different colonies. Governor Douglas made the Vancouver Island treaties not because he recognized an Indian title, but because of considerations of policy (Davey). Mere policy regarding the Indians, and their statutory rights, are different things (Tysoe). Extinguishment raises political, not justiciable issues. Aboriginal title affords the Indians no claim recognizeable in a court of law (MacLean).

The policy evolved in the Colony of B.C. on the basis of correspondence with London was to set apart reserves, with the intention of settling the Indians permanently in villages. This policy necessarily involved the extinguishment of Indian title. As a result of the proclamations and legislation, Indians became in law trespassers on lands other than reserve lands (Tysoe). The policy was not to pay in money for the surrender of lands. No colonial legislation recognized Indian title; the opposite was the case. The legislation left no room for a conflicting interest such as Indian title (MacLean). "Actions speak louder than words", the execution of the policy extinguished any Indian title (Tysoe). Article 13 of the Terms of Union was duly carried out: a great many reserves were set apart (Tysoe).

Going to Supreme Court. Indians of No. Babine are intervening