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# PERSPECTIVES ON THE B.C. INDIAN LAND QUESTION

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A couple of centuries ago the lands and waters of this part of North America were owned by the native Indians, by concepts of ownership which they mutually understood and accepted (and which anthropologists can more or less accurately describe). Today the Indians neither rule the country nor own it. The only lands they own, and that in a restricted sense, are the Indian reserves. Their former rights to the occupancy and use of their tribal territories have been almost completely eroded away. The country, in short, has been taken away from the Indians. Or so it would seem on the face of things.

However we have reached a time when the Indian people are finding more effective ways of organizing and putting forward their own points of view. In their view they have not given up all their aboriginal rights to the land. They are not satisfied with the treatment they have received in the past, and they consider the whole matter of a fair settlement of the land question as unfinished business. Furthermore, it is business of the highest priority, to be dealt with even before such important matters as the rewriting of the Indian Act.

It is necessary to take another hard look at the sequence of historical and legal events that did occur, and ask again some deceptively simple questions. If the land was "taken" from the Indians, when did this actually occur, and by what exact means? What Indian rights remain unextinguished? How can a valuation be placed on what the Indians have lost? If compensation was given in the past, was it sufficient? What terms would be appropriate for a final settlement?

In what sense have the Indian rights to the land been in fact "taken"? Britain's assumption of sovereignty did not in itself extinguish the Indian rights. The policy of the Crown has since been to confirm - or at least recognize - an "aboriginal title", and at appropriate times to negotiate its extinguishment by treaty. The Indians of B.C., with minor exceptions, have never entered into treaties with the Crown, nor have they knowingly been parties to any other transactions purporting to extinguish their aboriginal title. Laws have been passed over the years which have had the effect, step by step, of diminishing their aboriginal rights, but that has been a process of infringement and impairment of their aboriginal title, not its extinguishment. (In the Nishga case, now going to the Supreme Court, the judgments so far seem to be saying a different thing: that there is no room in the system of laws regarding land for such a concept as aboriginal title. This does not necessarily negate the aboriginal title which is recognized by the Crown as a matter of policy.) Indian reserves were allotted to B.C. bands, but these were reserves without treaties. The basis of allocation was never negotiated with the Indians, and the adequacy of the reserves remains an open question. The act of allocating reserves did not in itself extinguish the aboriginal title. The Indian people still maintain that their aboriginal title remains unextinguished, and that a just settlement in keeping with the times should be negotiated. In this sense, the country has not been "taken" from the Indians; nor has it been fully paid for.

The historical and legal developments which have led up to the present situation may be described in a number of steps, as outlined briefly below.

1. Sovereignty. By "discovery" and settlement Britain acquired sovereignty over the region. This did not in itself extinguish the land rights of the native people, but it did give the Crown the sole right to deal with them for the extinguishment of their aboriginal title.

2. Crown Policy. The Crown's intentions regarding the native people have been most clearly expressed by its acts of policy, such as the Royal Proclamation of 1763 and subsequent Indian treaties. The policy has clearly been to recognize and compensate for the aboriginal title. The implementation of this policy has not yet been completed.

3. Policy vs. Law. Concurrently, a concept of "aboriginal title" came to be established in British law. Its effects, however, may have been nullified by other laws within the system. The decisions so far in the Nishga case seem to say that the laws established to administer lands may leave no room for the concept of an aboriginal title. In this narrow legal sense, aboriginal title may have been extinguished. The date of extinguishment may be that of the Crown's first explicit proclamation or statute involving lands. This question of law is not yet finally settled. At any rate, the Crown continued to recognize aboriginal title as a matter of policy.

4. Crown Policy: Treaties. The policy of the Crown continued to be expressed in Canada by a series of negotiated treaties, the most recent of which was Treaty No. 11 in 1921. Of direct interest to the B.C. Indians was Treaty No. 8 in 1899, as it included lands within the Province and stands as a precedent to prove that the Crown recognizes the aboriginal title and the need to extinguish it. The treaties, in their terms, reveal the Crown's intentions regarding the future well-being of the Indian people. They are still in force, and should be interpreted in terms appropriate to the present day. It is to be presumed that the Crown's intentions are the same for all the Indian people, even those who do not yet have treaties.

5. Law: the Attrition of Indian Rights. Over the years a multitude of laws and regulations have had the effect of diminishing, step by step, the customary rights of the Indians to the use of the lands and waters. Aboriginal rights, treaty rights, and rights implicit in the locations of many of the Indian reserves have been unilaterally and without compensation eroded away. While this process can impair aboriginal rights, it cannot extinguish aboriginal title.

6. Reserves: Inadequate Compensation. Elsewhere in Canada, reserves were allotted pursuant to treaties, as part of the compensation for the extinguishment of aboriginal title. In B.C., despite early intentions, treaties were not made, and reserves were allotted on a unilateral basis by the governments. The basis of allotment was never negotiated with the Indians nor accepted by them. There was nothing in the procedure of allotting reserves that purported to extinguish aboriginal title or impair other Indian rights. The allotment of the reserves (mostly in the 1880s) and the assessment of their adequacy (1913-16) were done at a time when the Indian population was at its lowest ebb; it has since more than doubled. A great number of the places reserved were the bases from which the people exploited their entire territories, and the understanding at the time was that hunting, fishing and other rights would continue. With the attrition of these rights, these reserves became token acreages of worthless land. At present, reserves provide an adequate land base for only a few bands, leaving most bands poor. When reserve land becomes valuable, part of the value often derives from its exemption from provincial legislation, an unfortunate source of dissension with neighbouring municipalities. In summary the reserves do not constitute adequate compensation for the loss of aboriginal title, and do not provide an adequate land resource on which to base Indian economic development.

7. Present Grievances. Since Colonial times, the land question in its various aspects has been the main source of dissension between the Indians and the governments. The general sense of grievance which the Indian people have felt because of their unequal sharing in the benefits of society has, correctly enough, been focussed on the taking away of their lands and rights. As an actively-pursued issue, it has waxed and waned in a cyclical fashion. We are now in a time when it is once again the main single grievance.

It has always been a problem to find specific terms in which to express the grievance, however the following concepts are involved.

The aboriginal title of the non-treaty Indians has never been formally recognized, nor extinguished by negotiation. Since they have never been a party to a negotiated settlement, the Indians maintain that their aboriginal title remains unextinguished, and that they are entitled to its benefits or just compensation for its extinguishment. The treaties which were made elsewhere in Canada may have been unjust transactions, and may not have been fully honoured, however they do stand as formal agreements which recognize special Indian rights, and can presumably be updated to speak in present-day terms. The non-treaty Indians have no such formal Crown promises in exchange for the loss of their lands. Aboriginal rights, the special Indian rights deriving from the aboriginal title, have been taken away without negotiation or compensation.

8. Settlement. A single, comprehensive settlement of the land question should be negotiated with the non-treaty Indians of B.C., and the existing treaties should be updated or renegotiated so that all the Indian people are on an equal footing. The entire performance of the Crown in carrying out its intentions and obligations to the Indian people should be taken into account.

Valuation of what the Indians have lost should not be calculated on the basis of the market value to white men at the time of taking. That would be an ethnocentric approach which would fail to take account of the Indian values in the lands and waters. It should be conceived as value to the Indians - the resource base for a rich cultural life - and it should be updated to apply to present and future conditions. What was lost to the Indians was not just acres of land, it was an entire way of life. The only just compensation for the loss of a rich cultural life of the past is the guaranteed basis for a rich cultural life by the new standards of the present and future.

Perhaps the settlement now being negotiated in Alaska provides the best available model of a solution in keeping with the times. It includes financial compensation for aboriginal rights taken in the past, compensation in the form of lands and/or royalties for the extinguishment of the aboriginal title that still exists, an adequate amount of land for the present and future needs of the native people, and the protection of traditional rights to hunt and fish by means of appropriate ecological controls.

The beneficiaries of the settlement should not be just those who are arbitrarily defined as Indians by the Indian Act, but all the recognized descendants of the native inhabitants (in legal terms, perhaps, those people who would be recognized as Indian in the sense in which the word is used in the B.N.A. Act).

## 1. Sovereignty

Britain's sovereignty over the parts of North America which it acquired was established by "discovery", settlement, and the defeat of the claims of other European nations such as France and Spain. Sovereignty brought Crown ownership of all the lands, subject however to the existing rights of the people already occupying them (Indians, Eskimos, French, Metis). It gave to the British Crown the sole right to extinguish the aboriginal title of the native peoples.

For the Indians, the establishment of British sovereignty determined the citizenship they would thereafter have, and the legal system they would thenceforth adhere to; but it did not at one stroke extinguish all of their existing rights to the land.

## 2. Crown Policy

The policy to which the Crown committed itself in North America (Canada) was one that recognized and confirmed an Indian title to the lands, and at appropriate times extinguished that title by negotiation (treaty). By the treaties the Crown committed itself to pay compensation for the lands and to make additional provision for the perpetual well-being of the Indian people.

This policy was made law in British North America by the Royal Proclamation of 1763. Among other things, the Proclamation reserved the Indian territories to the Indians:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid (emphasis added)....

It also specified the manner in which Indian ownership was to be extinguished:

> ...if at any time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that purpose by the Governor or Commander in Chief of our Colony....

Canada's policy of negotiated treaties followed consistently from this.

## 3. Policy vs. Law

The Crown's policies and the Crown's laws have not always worked towards the same ends - the left hand has not always known what the right hand was doing. By establishing a legal framework to control the alienation of Crown lands, the Crown may (unilaterally, unintentionally, without expressly saying so, and without compsensation) have extinguished aboriginal title in the sense recognized within the law. The moment when that occurred may have been the moment when the Crown proclaimed an act which presumed that the Crown owned all the lands (such an act, in some of the Alaska cases, has been called a "taking act"). This seems to be the position taken by the courts so far in the Nishga case. In setting up a system of laws for the mainland colony of British Columbia, Gov. Douglas made a number of proclamations (including, on February 14, 1859: "...All of the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee"). The courts are holding that such a proclamation leaves no room in the law for the concept of aboriginal title.

If this view is upheld by the Supreme Court, the decision will have curious implications for the parts of Canada in which treaties were made. It could mean that the aboriginal title of the treaty Indians had been legally extinguished before the treaties were made. It might mean that the Royal Proclamation of 1763, since it presumed to deal with Indian lands, was a "taking act" that legally extinguished the pure aboriginal title (replacing it in the Indian territories with a Crown reservation).

However the Crown itself, in its acts of policy, seems never to have taken that view. It has proceeded to negotiate treaties for the purpose of extinguishing the aboriginal title.

From the Indian point of view, it has always been incomprehensible that they could lose their rights to the lands without conquest, treaty, or some other transaction to which they were a knowing party. A Nishga Indian said to a Royal Commission in 1887: "We cannot believe the words we have heard, that the land was not acknowledged to be ours. We took the Queen's flag and laws to honour them. We never thought when we did that that she was taking the land away from us." Also, "Set it apart; how did the Queen get the land from our forefathers to set it apart for us? It is ours to give to the Queen, and we do not understand how she could have it to give to us".

What are the Indian people to think of the finding by Mr. Justice Tysoe in the Nishga case that upon Gov. Douglas' proclamation in 1858 they became in law trespassers on lands in the Colony other than those set aside as reserves (there were no reserves at that time).

## 4. Crown Policy: Treaties

Despite the fact that no treaties have yet been made for most parts of British Columbia, it is useful to examine the treaties made elsewhere in Canada, because they provide the clearest expression of the Crown's intentions and policy with regard to the Indian people.

First, the Crown did recognize the existence of an aboriginal title and expressly extinguished it, paying compensation in the form of gifts and perpetual annuities. Second, the times at which treaties were made were not set by any legal act, but were selected pragmatically when white settlement encroached upon Indian lands (obviously, the legal basis for entering into treaties had been established a long time earlier). Third, the treaties were negotiated: later treaties yielded the Indians more benefits than earlier ones. Finally, the provisions uniform to all the treaties reveal the intentions of the Crown:

a. to preserve, to as great a degree as possible, existing Indian rights such as those of hunting and fishing over their former tribal territories,

b. to secure sufficient reserve lands for Indian use, both as bases from which to exploit their entire territories by traditional methods, and as agricultural and other land useful for the new ways of life, and

c. to provide the Indians with services in the form of economic aid (symbolized by ammunition for hunting, net twine for fishing, farm animals and implements), medical care, and education.

Treaty Indians elsewhere (for example, the writers of the "Red Paper" in Alberta) maintain that the treaties must be interpreted

a. as they were understood by both parties at the time, not just as published in the formal written version; that is, to include promises made verbally, and

b. in terms appropriate to the present day; for example, the "medicine chest" clause implies free medicare.

Since it can be assumed that the Crown holds the same obligations for all of the Indian people, including those not under treaties, the implications of the treaties are of interest to the B. C. Indians as well.

It might even be suggested that the treaties expressed Crown intentions which, if interpreted in modern terms, could provide the basis for settlement of the B.C. land question: recognition of aboriginal title and appropriate compensation for its extinguishment, negotiation as the means of achieving settlement, preservation of traditional rights to as great a degree as possible, an adequate land base for present and future needs, and formal commitments by the Crown with regard to Indian economic development, health, and education.

Fourteen of the 190 B.C. bands have treaties. They fall into two groups: the four bands of the Fort St. John Agency in north-eastern B.C., who were brought under Treaty No. 8 between 1900 and 1910; and ten bands on Vancouver Island (Sooke, Beecher Bay, Esquimalt, Songhees, three Saanich bands, Nanaimo, and two Fort Rupert bands) with whom James Douglas made treaties between 1850 and 1854.

The position of the bands under Treaty No. 8 is essentially the same as that of the treaty Indians of Alberta, with whom they should perhaps ally themselves to have the treaties updated and fully honoured. The main question still at issue is how much land within B.C. is covered by Treaty No. 8; it is certainly much less than is shown on the official maps.

While the White and Bob case established that the Vancouver Island transactions are treaties as that term is understood for the purposes of Section 87 of the Indian Act, they should not be considered as having the same status as Treaty No. 8. They conveyed little of value to the Indians (a single payment of three blankets to each adult male), and the rights they promised "to hunt over the unoccupied lands and to carry on our fisheries as formerly" have been rendered quite meaningless. They should probably be considered now as unconscionable acts of the Crown, to be renegotiated as part of the general settlement of the land question in the province.

## 5. Law: the Attrition of Customary Rights

> "Year after year the white law against the Indians is getting heavier and heavier on us." (Evidence, 1913-16 Reserve Commission, Seshaht Band)

As the years have gone by, the rights of the Indians to exploit the lands and waters of their tribal territories in their customary ways (rights having their origin in aboriginal title) have been slowly and by almost imperceptible steps taken away. Hunting and fishing regulations have become progressively more stringent in their content and application, making it more difficult to obtain food. Depletion of resources by commercial exploitation has made the situation worse. (The changing situation was pointed out again and again to the Reserve Commission of 1913-16, which should have made major adjustments in the kinds of lands allotted, but did not.)

> "Sometimes we are very hard up for grub during the closed season because we can't go and shoot elk and deer for our own use. All we have is fish to eat, and outside the Japanese are fishing in the sea." (Pacheenaht Band)

> "...and another thing, about the hunting of deer and ducks. They tell us we cannot shoot any more ducks and deer. The Indians do not go out to shoot everything, they only go out to shoot for their grub, and they kill just enough for their own use. The game warden came around here and told us we cannot shoot deer and ducks.... (Opichisat)

The places where Indians were able to go to select a log for a canoe, or gather berries for food, or dig clams, or strip bark for making baskets, or plant a garden, or even gather firewood, have one after another been prohibited to them.

> "If we go out here on the beach and pick up a drift log, some white man comes along from the logging company and says, 'you can't cut that, if you do you'll get into trouble'..." (Pacheena)

The Indians felt that it was their natural rights which were being taken away, rights which they had been promised would continue.

> "We have claimed this river ever since the Indians were made. The Government or the Fishery Inspectors did not bring the fish into the river.... The salmon were here even before we were. We claim the salmon ourselves, and it shouldn't have anything to do with the whites.... When this earth was made, and this river with salmon in it, and the forest with deer in it and all things for our use, they were made for us.... (Seshaht Band)

> "Many years ago the big men told all the Indians they could fish in this river all they wanted for their food, but now these white people try to stop us..... (Opitchisat Band)

In part, this attrition of Indian rights was done unintentionally. The laws and regulations were not written to apply only to Indians, and do not state expressly that Indian rights are thereby diminished. As a result, it is often difficult to pinpoint when and how the prohibitions came to apply. (A recent example of the inintentional diminution of Indian rights is perhaps the establishment of the West Coast National Park, which brings a large area - including 22 Indian reserves - under a new legal status. The change from a rather casual combination of provincial and federal laws to the stringent control of a powerful federal law probably diminishes many Indian rights to the use of lands both on these reserves and off them.)

We all lose rights by such processes. However what must be kept in mind is that the Indian rights are special, vested, charter rights derived from their aboriginal title. Such rights are not to be taken away without the Crown's express statement of that intent, and the payment of appropriate compensation.