

May 1970

Land Question

1. Nisga Case:

2. Aboriginal or Native Title In Indian sense
In law

Canada { 3. Early British policy
4. Royal Proclamation

bc { 5. Early colonial policy - Vancouver Island 1849-66
5a " " " " British Columbia 1858-71

← Sproat & Indians

6. Confederation -

7. ^{Gangra} The Fight: 1876 Dufferin speech (1910 Laurier)

1877 ← Land Act disallowed
back down: settle on reserves

8. Indian Act : 1887
: Nisga Petition 1913
: Allied Tribes 1916-26

9 Senate - House Committee 1927

10 Treaty No. 8

10 Rebirth of Indian Act

11. Claim gains legal strength (White & Bob)
Government shows willingness (Indian Claims Act 1963, 1965)
(Leaving willing to negotiate Confederation)

12 Government less sympathetic - White Paper
- Claims Commissioner

13 Claim loses legal strength - Desmond Baker
- Nisga case

INTRODUCTION

Land Question

The term The Indian Land Question is the one which has come to be hallowed by usage for a situation we have had around in BC for a long, long time. Most of the time the question has struck most people as a bizarre dredging up of ancient history, for isn't it a little late to debate whether or not the Indians still own the lands of the Province? But every once in a while it has reared up as a ^{love} real legal problem - and now is one of those times.

... I probably ...

Aboriginal title

What the Land Question is about is the concept of aboriginal title (Indian title, native title). It is ^{still} not quite clear what aboriginal title ^{includes} is, but it is clear that it includes the rights to hunt and fish for food which the Indians have owned from time immemorial. A working definition might be "the rights to occupancy and use of the lands which the Indians own by virtue of their being the original inhabitants".

... not a very good term

never extinguished

The Land Question arises from the fact that the aboriginal title to most of the land of BC has never been extinguished. That doesn't mean of course that the Indians still own the land. The Crown owns the land, but the Crown's title is still incomplete, for it is still subject to these Indian rights. In the long view of history, this is still unfinished business, and it is going to have to be finished. And the time for finishing it seems to be getting very close.

... THEM

What I want to do is present a historical, rather than a legal view of this question. It is ^{These are almost the same} not just that I want to avoid time-consuming legal arguments with Bill Hobbs (because I quite enjoy them), but I want to suggest later that a course of action may be legally right, but perhaps historically wrong.

301-2-12 day
Feb 20 '68

LAND QUESTION

1. Yesterday 10:30 Mr. Justice Schultz County Court
Squamish Hunting Case Discon & Baker
- real long reasons for judgment
- Indians lost
Give detail.

anybody see morning paper?

2. Reading: Duff - pp 60-71
so-called

3. "The Land Question" - in some detail, not just because I'm involved, but

- a) It evokes a sense of history
 - is Royal Proclamation still speaking?
 - what James Douglas said in 1864 and not doing in 1968 - parts of same (unfinished) dialog
- b) It is the grievance on which BC Indians are concentrating all attention now.

Philip Paul said on TV Land Question had to be settled first where the action is

It concerns (rights relations of Indians to land)

2 aspects

- a) Indian Reserves - why BC policy has been different
- b) Indian title "ABORIGINAL TITLE" Native title

Define it { (not sovereignty)
(not ownership of real estate & resources)
[the ^{special, vested} rights to occupancy and use of the land which they own as original inhabitants]

Involves: 1. Treaties (most BC non-treaty)
2. Hunting & Fishing rights - in dispute
will involve 3. Indian Claims Act

Indian title has not been extinguished - unfinished business

2 Differences are results of different colonial policies

1849-1871 VI & BC were separate British colonies from Canada.
we have to go back in history to see how policies developed

Early British Policy:

- recognize aboriginal rights to land
- extinguish them by TREATY
- compensation (Treaty payments) and RESERVES.

Royal Proclamation, Geo. III, 1763 (seems like old history, but just last year
Mr Justice Norris said it is still in force)

- turned this policy into law for British North America (force of statute)
" a moral responsibility into a legal one
- after temporary defeat of French, making laws for colonies
and "Indian Territories" west of them

1. reserved to the Indians as their hunting grounds the lands
which had not been purchased by the Crown (Colonial
{HBC grant
including "all the lands and territories lying to the Westward
of the sources of rivers which fall into the sea from the
W. and NW.
2. Indians were not to be disturbed in their possessions of such lands
- were to be purchased only by the Crown
- at a special public meeting or assembly (Treaty)

For our area: 1. reserved it as Indian territory (Mr Justice Norris)
2. specified manner by which Crown could
purchase it - by treaty -
[Treaties not yet made]

Does it apply?
or at all speaking?

Douglas' colonial policy.

Had been in the area for HBC for many years, an old hand with Indians, a long distance from London.

1849 VI granted to HBC to colonize (Douglas was Chief Factor)

50 Blanchard - quit

1851 Douglas governor & Chief Factor

1858 " " of BC as well - until 1864

1851 } VI } BC
1858 }
1864 }

1864-71 Other governors 1866 united. 1871 Confederation.

Moral British Policy -

1. Recognized and bought Indian rights as settlement progressed

TREATIES

2. Protected Indians by setting aside RESERVES.

Treaties - (14)

1850-51 Victoria - Sooke

1852 Saanich Ft Rupert

1854 Nanaimo

} White & Bob case, to Supreme Court, has recognized them as treaties

Lead one.

- gave up tribal territories described

- kept reserves

- kept hunting rights (some but doesn't apply)

" fishing rights (but Feds have taken it away)

(9 bands 1500 people on VI now under these treaties)

Douglas

1860-64.

Reserves without Treaties

1860 - Settlement moving to Cowichan, Chemainus

- Douglas needed 3000 £

- everybody agreed, but nobody paid.

NO MORE TREATIES.

Douglas successors in BC denied Indian title, need for treaties

Reserves - laid out anyway

- on VI & after 1858 on mainland

Reserves without Treaties

aim - to satisfy all Indian claims by giving reserves.

generous

successors thought them too generous

Denied any title

letter

Needless to say, I am going to have to skip over a lot of history very lightly, so that I can concentrate on a few of the most significant climaxes and turning points. ~~If anyone feels that I have misinterpreted history, we can return to the question later.~~

All of us, no matter how casually we are connected with Indian matters, are aware that the situation of the Indians of BC is in some ways different from that of other Indians in Canada:

Differences

1. Indian Reserves- numerous 1620 in Bc of 620 in rest of Canada
small about 20 ac per person, rather than 160 or so.
2. Mostly something called "non-treaty" Indians.

These differences arise from our different Colonial background, 1849-71, and the policies of that time. *and we have to go back in history to see how they developed.*

stem from Colonial policies

British Policy, before that ¹⁸⁴⁹ time and since, was to:

British Policy

- recognize rights of native people to occupancy and use of land
- extinguish them by treaty
- give compensation (and usually reserves of land)

TREATIES
RESERVES

-1763 Royal Proclamation of George III made this policy the law *for British North America*

①

(relevant parts) said in effect: (Yes, it applies)

1. -reserved to the Indians as their hunting grounds the lands which had not been ceded to or purchased by the Crown, including specifically
 - all lands lying to the westward of the sources of the rivers which flow into the sea from the west and northwest (includes BC, VI)
 2. *Indians were not to be disturbed in their possession of such lands*
 - such Indian Territories were only to be purchased by the Crown, at a special meeting or assembly held for the purpose (ie a treaty)
public
- (for our area: 1. *received it as* made it Indian territory 2. could only be altered by Crown and by treaty)

Colonial History:

- 1849 VI granted to HBC (until 1867) Douglas chief factor
- 1850 Blanshard
- 1851 Douglas Governor and Chief Factor (until 1858)
- 1858 " also BC Gov
- 1864 " retired
- 1866 Two colonies joined 1871 Confederation

Douglas the boss 1849-1864 Douglas on main side

Douglas' Policy

Despite distance from London, etc he embarked on the usual British policy:

- 1. Recognized that the Indians had ownership rights which should be bought as the land was opened up for settlement. **MADE TREATIES.**
- 2. Protected the Indians interest, by setting aside adequate land for their use and benefit. **SET UP INDIAN RESERVES.**

Reserves with Treaties

Douglas Treaties (yes, they are "treaties") ~~map~~ (and still in force)

Where and when: 1850, 1851, 1852, 1854 See map for areas 14 treaties
Rupert Nanaimo
Vic-Sooke Saanich

Terms: Read Treaty

Gave up { do consent to surrender, entirely and forever (to JD of the HBC) the whole of the lands situate and lying between...
 Our villages etc { ...ourvillage sites and enclosed fields are to be kept for (Reserves) our own use,...and surveyed

1850-54 Res with Treaties

We are at liberty to hunt over ^{the} unoccupied lands, and carry on our fisheries as formerly. (Hunting rights not given up)

1860 Settlement ^{moving} getting up to ^{Chimarraud} Cowichan and Saltspring
Douglas needed 3000 pounds to buy Indian rights
Everybody recognized Indian Title, but nobody wanted to pay: Assembly : Col. Sec.

No money, no more treaties *TREATIES CEASED TO BE MADE*
(Successors denied Ind Title, no need to make treaties)

Reserves

Treaties of 1850s granted reserves

1850-1854
Reserves with Treaties

1854-64 - Reserves without Treaties

VI and Mainland, Douglas laid out many reserves **RESERVES WITHOUT TREATIES**

Policy (Letter to Powell) Gave Indians all they asked for, hoping this would satisfy their claim to title.

Later Colonial Government - no reserves.
This was the new departure in British practice, where we went wrong.

Confederation 1871

Article 13: "The charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit" went Dominion.

Dominion was to pursue a policy "as liberal as that hitherto pursued by the BC govt"

Province was to convey tracts of land to Dominion as Indian reserves.

Planta, Prov Commissioner, explained to them about Article 13, and Cornwall Dom Comm said: "It is well for you to understand that there is no probability of your views as to the land being entertained"

C. Russ: ...When they made the laws that you speak about they had never been to see us,... I would like to ask, sirs, if there was one chief of the Nass present when that law was made... Why, they never even sent us a letter to tell us it was done. You see these chiefs present laugh. 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.

Next day, David Mackay explained carefully:

"What we don't like about the Government is their saying this: We will give you this much land. How can they give it when it is our own? ...They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land that way, and yet they say now that they will give us so much land - our own land."

(explained why they laughed)

No one ever does that, claiming property that belongs to other people.

Indians realized that the 2 govts had made some kind of arrangement without consulting them, and realized they would have to fight it themselves.

After Confed, if policy was to satisfy all Ind. claims by generous reserve policy, Allotment of Indian Reserves 1876-1938 had to set up reserves.

I can only touch briefly on the setting up of Indian Reserves after Confederation.

The main point I want to make is that they were RESERVES WITHOUT TREATIES and that the Indians (third party) never accepted the basic premise adopted.

Two Commissions. 1. 1876-1908 2. 1913-16

1876 Allotment Commission 1877-80 Sproat 1880-98 O'Reilly 1908 halted.

1912 McKenna-McBride agreement: set new rules for "full and final settlement" (Indians not consulted, and didn't concur)

5 man Indian Reserve Commission 1913-16 4 vol report

1924 ratified

1938 conveyed by order in council to Dominion as final settlement.

Knowledge of
Indian Claim to Native Title to 1926

Indians organized: Nishga Land Committee, Nishga Petition (1913)
(set out claims of Nass River Indians, and wanted them tested in highest court - Judicial Committee of Privy Council)

Spurred delegation 1906
Friends of the Indians - 1910 On.

People making promises (Governor General down) re Privy Council. 1910 - Laurier
Petitions, Delegations

Reassertion 1950's until present

Rebirth of Native Claims a byproduct of a growth of Indian organizations ^{inter-tribal} _{purely Indian}

1. Native Brotherhood [pp 105-107] of BC.

1931 Pt Simpson

1942 joined Kwakiwaka PCNFA - Vancouver coast-fishermen

1946 Native Voice first issue - New Indian Act
many issues - focusing on Land Question

Kay Williams - Pres. on Regional Advisory Council.

2. North American Ind Co - 1945 offshoot Andrew Paul

Interior Salish & Fraser Valley

Kno Gottfriedson Pres.

3. Nushka Tribal Council - revival of 1911 Land Committee

1955 reformed

4 Nass Villages

Frank Calder

4. So. Vancouver Island Tribes ^{Tribal Federation} - estab. 1965 for White & Bob
Coast Salish of V.I.

Wilson Bob → Vancouver Island Tribal Federation

5. West Coast Allied Tribes

Jack Peters

6. Kitwanoct Tribes Peter Williams

1966 Confederation of Native Indians of BC forming - for Land Question
all united on this issue (Allied Tribes reborn)

Stimulation of US Claims in US & Alaska

I want to backtrack briefly and just mention Treaty No. 8:

1899 a regular Canadian treaty of the kind that continued to be made until 1923.²¹
Tribes: all those trading at Ft St John and Ft Nelson (Beavers and Slaves)
; bringing them under the treaty, 1900-1914 Beavers
1910-1961 Slaves.

1. Area covered is in doubt (Map)

Map shows to Pacific Drainage
Treaty says to central range of Rocky Mountains
Slave and Beaver territory is smaller still.
Anthropological evidence will be required to settle it.

2. Significance: Precedent of the Dominion, without consulting the Province,
accepting the responsibility of recognizing and extinguishing native
title to land in BC.

Bears on the question of who is to pay for title to rest of BC.
Answer: Dominion (BC has fully discharged its obligations by
providing reserve lands as agreed)

Rebirth of the Land Claim after it died in 1926

Native Brotherhoods, a rallying point 1930s NBBC - 1931
Native Voice 1946- NAIB - 1945
Nishga Tribal Council revived 1955 on this issue Confederation 1966
All are united on this issue
Stimulation of United States example in settling Indian Claims in US and Alaska.

Now approaching another great climax; two possible solutions: to settlement

- 1. Indian Claims Commission
- 2. Court cases involving Indian hunting rights (esp Nanaimo case)

Indian Claims Commission: my comments will be brief.

1961 Joint Committee of House and Senate on Indian Affairs recommended

"An Indian Claims Commission should be established to hear the Brit
Col and Oka Indian land questions and other matters, and that the cost
of counsel to Indians for the two land questions specified above, be
borne by the Federal Treasury".

(specified BC Land Question, and said costs should be paid by Govt)

1963 Bill C 130 Indian Claims Act introduced but not passed into law (kite).

-did not carry out recommendation that BC Land Question be studied.

-provided that claims had to be made by bands (in my view the land
question can't be settled this way. Bands are too small to hire
lawyers and anthropologists to present their land claims)

-certain conditions re classes of claims, rules of evidence, makeup of the Commission, that have given rise to much discussion.

-Frank Howard MP introduced a private bill C 67 setting up a Court of Claims, with an international flavour, with BC land question specifically on the agenda. But it was withdrawn.

Mr Nicholson, Min Cit and Imm, has promised to introduce a new bill next session.

1965 Bill C-123 Indian Claims Act

1. Commissioners 15. (one a legal Indian)

2. 5 classes of claims:

1. That lands were taken from the Indians by the Crown 'without any agreement or undertaking to give compensation therefor':

3. Claims to be made by bands (180 bands)

Financial Assistance for claims & appeals.

Died when the election called.

Faults (Guy Williams) - no provision for Indian Organizations to make claims

Boyer - written proof impossible to get

Nanaimo Indian Hunting Case which is very much in the news right now

1964

(Norris judgment obtained last week) (Supreme Court today granted leave to appeal)

Significance: the concept of aboriginal title is being strongly upheld in the courts.

I am going to boil it down to 3 minutes.

Facts: Two Nanaimo Indians were fined by magistrate for having carcasses of deer shot out of season contrary to Prov. Game Act.

Appealed to County Court (by Tom Berger) on 3 grounds:

1. 1854 Treaty with Douglas confirmed right to hunt (Sec 87 Indian Act "subject to the terms of any treaty..." provincial laws apply to Indians.)
2. Aboriginal title, incl hunting rights, still in force.
3. Royal Proclamation of 1763 confirmed aboriginal right, and still in force.

Swencisky Judgment (March 1964) on every issue, found in favour of Indians. a courageous far reaching document that went much farther than it had to

1. Document of 1854 was a treaty (so exempted Indians from Game Act) Also gave them a vested right to hunt.
2. Royal Proclamation of 1763 applied to VI (Lands lying to the westward of the sources of the rivers which fall into the sea from the w and nw.) - confirmed hunting rights, which have never been abrogated.
3. Aboriginal Title still remains as a burden on the Crowns underlying title; recognized and protected by the Royal Proclamation, and still in force.

by including these implications included all BC tribes

Furthermore, Province gave up the power to legislate on Indian rights (hunting rights) in 1871.

Crown Appealed to BC Court of Appeal. Decision Dec 15, 1964

LORD SHEPPARD DAVEY NORRIS SULLIVAN

Court Split:

Lord Sheppard	}	dissented
Davey Sullivan Norris		
	}	majority, ruled in favour of Indians.

} single judgment
} Reasons 52 pages
3 months late
another great document
a great step in settling question

Crown appealed again - Supreme Court.

Ruling last week in favour of Indians

Where do the three issues stand now?

1. Aboriginal Title:

Swencisky had said it is still in force.

X Davey -didn't rule on it (but noted Crown argument admitting hunting
Sullivan rights "which formed part of the aboriginal rights of the
Indians over the soil" and which existed until (supposedly)
extinguished by legislation. 87 plus Game Act)

first time BC has admitted aboriginal rights

X Sheppard -no mention of aboriginal title
Lord

Norris 8 pages Aboriginal rights existed from time immemorial, have never
been surrendered or extinguished.

only one who dealt with it

2. Royal Proclamation:

Swencisky said it applied and is still in force.

Davey-Sullivan didn't mention it

Sheppard-Lord: No. Did not apply (this left Appeal Court against it)

Norris: 16 pages. It confirmed aboriginal title, it applied to Vancouver
Island, it has never been repealed.

His research enormously strengthened this arm of the argument:

- referred to all lands claimed by Britain
- pointed out that the coast was claimed by Drake 1579 New Albion
- showed that Vanc Island was part of the Indian territories
referred to in Proclamation.

3. Was it a Treaty?

Swencisky had said yes.

Davey-Sullivan: Yes HBC was an instrument of Imperial Policy

Sheppard-Lord: No. neither in form nor substance a treaty.

Norris: Yes. for same reasons as Davey. 19 pages of elaboration

*3 for
2 against*

In the light of the history and circumstances it is difficult to conceive
of a term which would be more appropriate to the engagement entered into.

...it was just as much an act of state as if it had been entered into
by the Sovereign herself.

Supreme court will have to deal with all three issues, and that means the Indian
Land Question will be considered in the highest court in the land.

What happens now? Brotherhood now meeting

Land Question (concl)

Several trends are moving toward its settlement

1. Last time traced growth of Indian Organizations
Mishya T.C. 1955 interesting NBBC } on Land Question
NAIB }

West Coast Allied Tribes
A.V.I. Tribal Federation

forming Confederation } to negotiate land claims
of End User
Committee
Indians are as ready as they
will ever be

2. Today - 2 other aspects

- a) Indian claim gained legal strength in courts
may legally prove aboriginal title exists
- b) Gov't willing and anxious to settle,
(a different story from the past)

Then will speculate on how ^{should} can it be settled?

3. In Law: White & Bob case 1964-65 ^{Concept of aboriginal title}
^{strengthened in law}

- ^{Cliff White} ^{Debra Bob} ^{for deer out of season}
- ^{under (Provincial) Game Act}

- Tom Berger appealed to Nanaimo County Court: 3 grounds

1. Treaty ^{1854 Douglas} Sec 87 Ind Act; ^{prov laws don't apply} } or

2. Aboriginal Title - still in force, never surrendered
including right to hunt

3. Royal Proclamation - guaranteed - applied
still in force

Implications and Comments:

1. Indians of BC can legally hunt and fish for food without restriction.
(Power to regulate their rights lies solely with the Dominion Govt)
2. This is an intolerable situation. The only way it can be remedied is for the Dominion Government to make treaties (as envisaged in the Royal Proclamation)
 - to extinguish aboriginal title.
 - to extinguish the existing Vancouver Island treaties.
3. When the time comes for the Indians to prove their aboriginal title, the effective evidence will be anthropological.
(This is why I want to finish Volumes 3 to 9 of my Indian History)
4. Treaty-making should not be done on a band-by-band basis, but for the Indians as a whole.
5. This is the last great Indian grievance. VOTE, ALCOHOL, POTLATCH grievances have all been settled. Their sense of grievance has focussed on this. It should be settled too.
6. I began by suggesting that a course of action could be legally right but historically wrong.

To me there is something wrong in the present position of the Province. It should not be fighting its own Indian citizens on a matter which is beyond its power to solve.

The only way it can win this case is to destroy the Indian strongholds

- treaties
- native title
- royal proclamation

This would antagonize the Indians and do more harm than good.

I suggest that instead, the Province should bring all its guns to bear on Ottawa to get on with the unfinished business of settling this longstanding problem, for only Ottawa has the power to do so.

When we get our settlement, we can begin to think about becoming white men.

Province has always been cast in role of villain - & here again it is BC vs Indians

Diason & Baker

2 Squamish mill workers To Van

Hunted deer up Sq valley - no permit - closed season - caught

Fined - magistrate

Appeal - County Court (Vanc) Berger Schultz

Grounds: aboriginal title } beyond provincial jurisdiction
Royal Proclamation }

Duff testified it was within Squamish territory

20 miles up 3 miles from Cherkamoo village 60 on Pemberton

Quoted Hill-Tout & Bennett

Defeated

1. Aboriginal title - my testimony not based on first hand knowledge - conjecture, not fact, ∴ not proved
2. Royal Proclamation - didn't apply to Squamish

∴ subject to Provincial Wildlife Act ∴ guilty

Appeal ? don't know

From Commission on Claims of the Allied Tribes.

The basic point in wanting aboriginal title recognized:

1. We were never conquered

2. Q. Supposing the aboriginal title is not recognized?....

A. (Kelly) Then the position that we would have to take would be this: that we are simply dependent people. Then we would have to accept from you, just as an act of grace, whatever you saw fit to give us.

p. 160 ...And, perhaps, if we are turned down now, if this Committee see fit to turn down what we are pressing for, it might be another century before a new generation will rise up and begin to press this claim.

p.95 (Paull) "...We were never conquered. And we should not be submitted to anything that a conquered people or nation has to put up with."

(In summary: We were not conquered. We want our position to be recognized so that we can negotiate from a position stronger than that of conquered and dependent people)

Lack of documentary or other evidence of the aboriginal title to BC.

(All O'Meara gave them was the legal and constitutional arguments, no actual evidence that the Indians exercised rights to the lands of BC)

THIS HAS TO BE ANTHROPOLOGICAL EVIDENCE, of the sort I am preparing.

like to start and finish with

1. Mikya Case - Mikya asked BC Supreme Court for a declaration that their aboriginal title had never been extinguished
- (Gould) - rejected - appealed to BC Court of Appeal - 3 judges
 - rejected again (now will appeal to Supreme Court of Canada)
- a very severe blow to Indians land case

It says:

a) Not a thing that can be handled in the courts

aboriginal rights } have to be incorporated into law
treaty rights } before the courts can deal with them
(never done in BC)

b) Royal Proclamation of 1763 never applied to BC

c) Sovereign government (1858 Colony of BC 1871)

can extinguish native title - when it wants

- in any way it wants

- without consent of Indians

- " compensation

d) Policy of Colony of BC not to recognize native title
not to buy rights to land

to set aside reserves

Proclamations and laws regarding land extinguished
any native title before confederation

a very severe decision - back 100 years

Will be appealed, and argued all over again

The Land Question

This will be informal

Long, very complicated history (not over yet)
I can just touch on some important events

Mingo case. Court of Appeal.
(Principles)

1. Royal Proclamation does not apply to B.C.
2. Indian title and aboriginal rights, ^{also treaty rights} cannot be considered in a court of law unless the Govt incorporates them into the law
3. If Indian title ever existed, it has been extinguished
(If it did exist it was nothing more than a usufruct, dependent on goodwill of the Sovereign)
4. Sovereign government can extinguish it at pleasure, in any manner, and without consent or compensation
Each case different
5. The sovereign govt. 1858-71 was Colony of B.C. Its policy of setting aside reserves extinguished Indian title.

If there ever was an Indian title (whatever that might be) it was extinguished by 1871 (they don't admit it)

2 Native Title what is it? special rights to occupy and use land, vested in native people.

Special legal conce: a concept of British law

- doesn't mean Indians own the land

Europeans took sovereignty by discovery & settlement

- In law: ^{a burden on the Crown's title} a personal and usufructuary right

dependent on goodwill of the sovereign"
- what land rights Indians had after British took the country.
- what Indians give up when they made treaties

(Michie case) - don't admit it existed

- Crown can extinguish it - at will

- without consent

- " compensation

Has been extinct since 1858

Then what has all the argument been about?

Indians (non-treaty) say it has never been extinguished in BC.

Gov't of BC denied it existed

" " Canada recognized it

This is what the "BC Land Question" is about

Indians want their title recognized, so they can negotiate a settlement with government.

6. Confederation - see typed copy
- Indian admin. → Ottawa

← Leads -
subject to any interest on -

7. Canada's Policy - the long debate -

a) 1876 Dufferin speech
1910 Laurier ← 1884 Land Act

b) 1877 Was an anterior David Mills

} Effect was to
assure Indians
they had a title,
and that it would
be sent to Judicial
Committee.

8. Indians take action themselves

- 1887 Commission

- 1913 Nishga Petition

- 1926 Allied Tribes 1916-26

9. 1927 Senate - House Committee.

- rejection of claim

- BC Special

10 Treaty No 8 1899-1910

Precedent: Fed. Govt went ahead and made treaty in part of BC.

11. More Indian Action

Nashua 1955 — Gov passing out Forest Man. Licenses
Native Brotherhood of BC. in their territory

attempts to unite all Indians of BC on this question

Confederation — full part
Union of BC Chiefs

11. Claim gets stronger

a) legal strength

White & Bob

Supreme Court (treaty)

Norris Judgment (aboriginal title & Royal Procl.)

b) Government shows willingness to settle
being willing to negotiate

Indian Claims Acts 1963, 1965

Setbacks 1969

12. Trudeau changes his mind

- White paper
aboriginal rights too general to deal with
- Indian Claims Commission
excludes aboriginal rights from Terms Conference

13. Claim loses legal strength (after White & Bob)

- Fishing cases
- Hunting case - Brown & Baker rejects Indian title
- Nechga case

What Now?

1. Meech Lake → Supreme Court

2. New legal approaches: Native Rights in Canada

3. Counterproposals - (Brown Paper)

politics, not law

Indians now have political power

NISHGA CASE: B.C. COURT OF APPEAL

A brief summary of the judgments of Justices Davey, Tysoe and MacLean
May 7, 1970

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).

Each case involving aboriginal title 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).

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 recognizable 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).

W. Duff
Dept. of Anthropology & Sociology
U.B.C.

So it is the last great grievance
all Indian attention is now focussed on it.

1965 - Native Claim gains legal strength - most important case

White & Bob - Nanaimo.

significance: concept of aboriginal title is being upheld in courts

2 Nanaimo Indians fined magistrate deer out of season 1900 Game Act
Berger appealed to Nanaimo County Court, on 3 grounds

1. Treaty - rights 1854
Sec 87 Indian Act - provincial laws don't apply. } if not
2. Aboriginal Title - still in force, never surrendered
3. Royal Proclamation - applies, still in force
confirmed hunting rights

March 2

Today I am going to deal with the unfinished business of the Land Question.

We have dealt with Indian Reserves
We have dealt with Indian Title - to 1927

I was talking about the rebirth of the Title Question

the example of the US and Alaska in settling Indian Claims

the Native Brotherhood: a common issue
the Native Voice
the Nishga tribal council
the Kitwancool land committee

A big problem waiting for a solution

Before I get to two possible solutions, I want to go back to

Treaty No. 8 see book

1899

Terms:

Tribes: All those trading at Ft Nelson and Ft St John (Slaves and Beavers)
Bringing them under the treaty
Loose end: how much area did it cover?

Significance: a precedent of Dominion recognizing and paying for Indian title to lands in BC. It bears on question of who would have to pay to extinguish title to rest of BC. Answer seems to be Dominion. BC has discharged its obligations by providing reserve lands.

Two ways in which Land Question may be settled:

1. by Govt setting up an Indian Claims Commission
2. by legal necessity arising out of Nanaimo hunting case.
(it is not clear what "Indian title" is, but it does include hunting and fishing rights, and these are in legal issue in the courts)

Indian Claims Commission:

1961 Joint Committee of House and Senate on Indian Affairs recommended

An Indian Claims Commission should be established to hear the British Columbia and Oka Indian land questions and other matters, and that the cost of the counsel to Indians for the two land questions specified above, be borne by the Federal Treasury.

1963 two bills were introduced

C-67 Canada Court of Indian Claims Act private bill Frank Howard

invoked above recommendation and also UN Charter
a court not a commission (basically the Exchequer Court)
judge from International Court of Justice
court initiative in studying BC Land Question, and pay costs

(did not pass - withdrawn)

lets fly - to get response of Indians
C-130 Indian Claims Act Minister of Citizenship and Immigration

5 man Indian Claims Commission

Chairman and at least one other be a judge or lawyer (Canadian)

5 classes of claims:

1. lands taken without agreement or compensation
2. reserve land disposed of with too little compensation
3. Indian moneys improperly handled by crown officer
4. Crown failed to carry out terms of treaty or other agreement
5. Crown officer caused any harm to Indians

Claims can be made only by BANDS

2 year time limit on making claims

EVIDENCE must be written, contemporaneous to time claim arose, or corroborated oral evidence

If claims of 2 or more bands, in opinion of Commission, arise out of same matter, they may be heard together

Awards to be paid into band funds

Howard's reaction:

Commission should include an international jurist
a native Indian member
an anthropologist

kinds of claims should not be limited to 5

nor to bands (individuals, tribes, etc)

evidence in writing is sometimes impossible to get

costs should be borne by Government

Wording is unfortunate

Kitwancool reaction (an example happens if each band tries to grapple)

my friend Peter Williams

read sections

My comments:

Doesn't carry out Joint Commission recommendation to deal with BC Land Question

Can't expect bands to present their land claims- too small to hire lawyers and anthropologists

Evidence (contemporaneous written evidence and corroborated oral evidence) is ANTHROPOLOGICAL

this is why I am preparing Vols 3-9

What happens next:

Recognize
1. Establish explicitly that native title is still in effect in non-treaty areas.

- more court cases - Hunting cases ?
- Wishga Claim ?

} Legal proof would help, but even if it doesn't come, the fact remains that the native title was not extinguished by Treaty, & Indians are organizing.

2. Extinguishment of native title by treaty, negotiation

It then can either - remain in force - be extinguished

NEGOTIATE SETTLEMENT OF BC LAND QUESTION (surrender of title)

- should be for whole province, not band by band
- negotiate with Confederations - then satisfy by bands
- compensation on per capita basis

Compensation
- included rights to hunt & fish
- other benefits

3. Claims Commission to tie up loose ends band by band

A Proposal to settle the BC Indian Land Question

1. Native title to BC lands is unextinguished
2. It can only be extinguished by treaty
 - historical precedents
 - so other Indians of Canada will understand
3. It should be done with one treaty
4. What native title is - general - rights to occupancy and use of land
 - what it was, and legal definitions - Privy Council - Alaska
 - what it should be in 1967 - the guaranteed right to enjoy full benefits of 1st class citizenship in Canada
5. The Terms of Treaty No 12
 1. Recognition and extinguishment of title to lands }
 2. Indian lands (more reserves or compensation) }
 3. Indian legal rights - hunting - fishing - Charter rights
 4. The right to first class citizenship
 - compensation (sweat the pot)
 - real equality in education, health, welfare.

Alternate Proposal

- To keep our native title, and just bring the wording up to date

: the guaranteed right to enjoy the full benefits of first class citizenship in modern Canada

This right we won't ^{trade} relinquish for a few million dollars and a few acres of land.

By phrasing native title in modern terms as above, we can bolster up the justification for the super services requested in Hawthorn Report

1. Native Title means the right to a good life

It was - the rights to occupancy and use of the lands
and ~~to~~ reserved to them as their hunting grounds
for that right

In law - it is "a personal and usufructuary right
dependent on the goodwill of the Sovereign"
a communal usufructuary right

It is not: sovereignty
: absolute ownership

It is 'a right other than that of the Province in the lands';
a burden ^{resting} upon the sovereignty of the Crown

It includes hunting and fishing rights
What else it includes is not clear

What it is now is even harder to define, or how it is to
be evaluated

In Alaska, calculated dollar value ^{to Indians} as of 1867 according to
their methods and standards of life then.

This ignores historical fact that it is still alive, and
should be measured by some contemp standard

It is not the present real estate value of all the lands
the present dollar value of lands & resources. ^{that the} ~~nevertheless~~

It was the right to pursue a good life. It is now the right
to a first class living, either as Indians or in the greater community

What a Treaty would do

For the Government

1. Extinguish native title to lands
2. Remove a grievance
3. Confirm the special status of Indians
Turn vested rights into treaty rights

For the Indians

1. Recognize native title
2. Confirm special status
Canadians - plus aspects

But Government has already gone part way
(cf. eg. Treaty Indians of Canada)

1. Reserves - lands set aside
2. Indian Act & IAB
3. 1926-7 - Settlement - BC Special in lieu of treaty payments
(Compensation)

40 yrs
100,000
4 million

Has not yet: (or insufficient)

- lands (cf 160 ac/person)
- Vested special rights - hunting & fishing
- Compensation for territories

How much? - value to Indians at time of contact?
- present real estate value?

Get back to real definition of Indian title: the right to make
a good living on this land. ^{enjoy benefits of} ^{first class} ^{citizenship}
the rights to occupancy & use of the land

- equal health
welfare
education
government services
i.e. special

} as a matter of right
not as charity. ^{guaranteed}

1763

Notre Dame

- made laws by force.
- no protest

Deutscher

Extinguished title

1. lands (reserves)
2. Compensation for lands
3. Rights - hunt, fish
4. Annuities
 - loan, annuities
 - annuity

[annuity]

Subject

The rights & title of ownership & the right to the land (to make a protest)

BC

(Unextinguished)

1. Unextinguished
2. (no compensation)
3. (fourth rights)
4. (BC special)

[annuity]
- annuities
- annuity

Unextinguished

No explicit compensation
Unextinguished title
annuity, legal rights
be special

Treaty 12

Extinguished title

1. More land or cash compensation
2. Compensation
3. Land rights
4. Compensation

Compensation

- education
- health, housing
- welfare
- economic - do any other request

Unextinguished title

Compensation for title
Land rights
Compensation for title
The rights to land
The rights to land
The rights to land

Indian Claims Act (cont'd) Present situation

Gov't committed to one, and rest of Indians of Canada are pressing for it

Lang withholding it at request of BC Indians - willing to meet represent 75% of BC Indians to talk "so called" Land Question

Has said he can't wait long - sometime in 1968

How can it be solved?

my view, also legal counsel & Indians

1. Treaty — The Confederation Group
2. Claims Act

Precedent - Treaty No. 8

Land Question - comments

- How are we to look at this long fight?

A smoke-screen, legal argument while whites took land, changed economic system, and put Indians into a satellite relationship.

Tell what Indians said:

- Maguenna to Cook

Koweto Kowen 1829

- Ashants to Sproat (1860)

- Kelly to 1926 Commission
Paul

- Neagachup to Commission

- How are we to view this whole thing?