Nanaimo Case

April 3 Saturday

Today - finish Nanaimo hunting case.

Mr. Justice Norris' reasons for judgment

You will recall:

County Court. Swencisky.

BC Court of Appeal

Lord Sheppard dissented

Sullivan Norris Davey majority

Davey-Sullivan - same

3 main issues: 1. Aboriginal Title

2. Royal Proclamation 1763

3. 1854 Treaty

(follow Norris' order)

Aboriginal Title

Sparrow - Aboriginal title remains as a burden on the sovereigns underlying title. It was recognized and protected by the Royal Proclamation, which is still in force.

Davey - Sullivan — didn't rule on aboriginal title

but Crown admitted hunting rights "which formed part of the aboriginal rights of the Indians over the soil" which existed until (supposedly) extinguished by valid legislation [Sec 87 + Game Act]

(something Provincial has never been done before)

Sheppard - Lord } no mention.

Rowe - pp 8-15

Quotes Chief Justice Marshall on this. Discovery gave title against all other European governments, which title might be consummated by possession. Gave sole right to acquire the soil from the natives. Native rights never entirely disregarded "They were admitted to be the rightful occupants of the soil". Title subject only to the Indian right of occupancy.
Quotes Lord Watson, St Caths case: All Roy Proc reserved to Indians was "a personal and usufructuary right, dependent upon the good will of the Sovereign" Crown owned "a present proprietary estate in the land, upon which the Indian title was a mere burden".

Sec 109 BNA Act says All lands... shall belong to the several Provinces... subject to... any interest other than that of the Province in the same"
Abo rights (confirmed by treaty) did not pass to Province, as they were "an inteerest.."

Abo right is a very real right and is to be recognized although not in accordance with the ordinary conception of such under British law.

These rights have been vested in them from time immemorial, which white persons have not had, viz., the right to hunt out of season on unoccupied land for food...

Aboriginal rights existed in favour of Indians from time immemorial
Said rights have never been surrendered or extinguished

Royal Proclamation:

Lwenicky: "all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest ..." includes V.I.

This gave the Indians hunting rights, which have not been abrogated. "The right of the Indian to hunt today, as he was free to do in 1763, is still in force"

Davey - Sullivan } don't even mention Royal Proclamation

Sheppard - Lord } Proclamation did not apply to V.I. It was unknown. Indians were not "tribes of Indians with whom we are connected, and who live under our protection"

(Until Norris, the only Appeal Judges on this point dissented)

Norris - pp 15-8' "...was decalaratory and confirmatory of the aboriginal rights and applied to Vancouver Island" "The principles there laid down continued to be the charter of Indian rights through the succeeding years to the present time" has the force of a statute and has never been repealed
led to policy of treaties with reserves
Proclamation referred to all Indians on lands over which GB CLAIMED dominion "that land being the unlimited west- the territory which was then and for over a century after the Treaty known generally as Indian Territory." Expansion into it was anticipated. Extent not known, but British had claimed it. Drake's 1579 claim to New Albion included NW Coast, followed by Cook and Vancouver.

Administration of justice was later extended into Indian Territory. In 1849 "that part of the said Indian Territories called Vancouver's Island" was excluded from these statutes and its own laws set up

VI was part of the Indian Territories referred to in the Proclamation, so it applied to VI and so far as the Indian hunting rights are concerned, it has never been repealed.

Dominion Gov is guardian of the Indian interest and solely can take surrender of it
What was reserved to them was not mere possession but also the use of the lands
All our Indian lore tells us (these uses)..

Exhibit 8 a TREATY ? (under Sec 87 Indian Act)

Swearesky: Yes. Douglas signed as official of HBC, not as Governor. But he was operating under the restrictions of the 1763 Proclamation; HBC was the only constituted authority in the Colony: the agreement was a "treaty" w sec 87.

(Also, it was a solemn agreement which gave Indians a vested right to hunt which is still in force)

Davey - Sullivan: Yes - The HBC was an instrument of Imperial policy, and in buying Indian land it was carrying out a long standing policy. This was more than just a private agreement. - For Sec 87 it was a "treaty".

Sheppard - Lord: No. Neither in form nor substance a treaty. The Crown was not a party, since it had given up its interest to the lands.

Lord: it is an 'agreement' for the sale of land. If Sec 87 had meant to include treaties and agreements, it would have said so.

Nemetz - pp 31-50 Agrees with Davey, it is a treaty. Goes on. Shouldn't be judged by modern rules of construction. It was informal as life was informal. Its unusual nature does not detract from it being a treaty. It was understood as a treaty by all concerned. ".. in the light of the history and circumstances it is difficult to conceive of a term which would be more appropriate to describe the engagement entered into." Douglas capacity is of no importance. Hbc had all the powers necessary to make treaties. "Not withstanding the informality of the transaction on the part of the HBC, it was just as much an act of state as if it had been entered into by the Sovereign herself". Douglas was only one with power, and had to make treaty.

Inst Public Admin

THE INDIAN LAND QUESTION Talk to Public ~~Affairs~~ ~~Institute~~.

In the long view of history, an unresolved problem that still has to be resolved.

Differences of BC Indians: 1. Reserves. 2 "Non-treaty" Reasons historical.

British Policy: Reserves with treaties. 1763 Proclamation.

Colonial History.

Governor Douglas' policy: a. Pre-1860 Treaties with reserves The Treaties. VI only
b. Post 1860 Reserves without treaties.
Later Colonial Policy: denial of Indian title.

Article 13 + See 109 BNA Act

Indian Reserves: Reserves Without Treaties. 1876-1908 Commission
1912 McKenna-McBride (an agreement between 2 of the 3 parties)
1913-16 Commission, ratified 1924, finalized 1938.

Indian title:
1877 unrest in Interior. Mills to Powell. Feds realize that title not extinguished; stuck with Douglas policy of reserves without treaties.

1887 NWC comission, expression of Indian view. They still own the land.

1887-1926: The debate swells: Speeches, petitions, delegations
Nishga Petition 1913
Allied Tribes 1916. Claims of the tribes.

1926 Joint Commission: an unsatisfactory climax

Purpose, Circumstances, Climate (OMeara and the Commission)

The basic point of recognizing title (Kelly and Stevens, p. 160)

The lack of evidence of title (Stevens, p. 161) ie anthropological evidance.
(Fn, quote Malcolm McLeod)

Results

Rebirth of the Title Claim

The Native Brotherhood and the Native Voice

Nishga Tribal Council

The Example of the United States including Alaska

1961 Joint Commission
1963 C 130 and reactions to it. — shortcomings

Nanaimo hunting case and its implications -

Summary and comments.

Implications of Nowegijick's Judgement

1. Ensures that Supreme Court will deal with all Treaty issues (before, it only had to deal with "Treaty")

2. Backs Swencisky views and strengthens them
   Whole weight on side of Indians
   even new aspects:
   - Drake's claim -
   - concept of claim
   - V.I. as "Indian Territory"

3. Indians of B.C. can hunt and fish for food without regulation
   sale
   - power to regulate is federal

   The right to hunt & fish for food is still regarded as a legitimate Indian right

4. Treaties will have to be made to extinguish aboriginal title and Royal Proclamation
   (= as envisaged in Royal Proc.

Ireland: Mar 10

The Royal Proclamation may not have been valid international law, but it was an expression of national law. Therefore international disputes on whether the Crown actually had sovereignty are irrelevant: as British territories became better known (and sovereignty firmed up) the law continued to speak.

March 2: Norris was smart in basing Royal Proclamation on the concept of title
CLAIMS. Sequence is 1. claim 2. possession 3 settlement
Proclamation applied to all areas claimed by Britain, and this included VI because of Drake's claim to New Albion and to the Proclamation itself.

Comments on Indian Land Question

1. The effective evidence will be anthropological "The anthropologist id the only scientist with the highly technical training required to obtain evidence of the facts as revealed only by gathered oral traditions"

2. There is something historically (if not legally) wrong with the present stance of the Provincial Government. It should not be fighting its own citizens on a matter which it does not have the power to solve. It should be pressing the Federal Government to finish the unfinished business.

3. The land question should be fought for the Indians of BC as a whole, not band by band. Compensation to band funds on a per capita basis?

4. This is the last great grievance

The present importance of the Land Question is that it is perhaps
THE LAST OF THE GREAT INDIAN GRIEVANCES.
Two decades ago there were several outstanding grievances. The Indians had no VOTE, and no say in the running of their country or their affairs. They were prohibited from using ALCOHOL. Certain of their native customs were prohibited by law: the POTLATCH. There was much more reason then for calling them SECOND CLASS CITIZENS.

But these other grievances have disappeared, and the only issue on which the geheral sense of grievance can focus is THE LAND QUESTION. Hunting and fishing rights are part of this, and always have been. But not all of it. What the Indians want is RECOGNITION of their title, and a gesture EXTINGUISHING it. Maybe they will demand compensation, but maybe they will be satisfied with recognition.

- Settlement of Land Question will generate more grievances
- "Prejudice" "Discrimination"

IMPLICATIONS

1. If ABORIGINAL RIGHTS have not been extinguished

(as Crown admitted, but said that Indian Act and Game Act extinguished them)

then All BC Indians except Treaty 8 still have rights to hunt and fish for food, not subject to government restriction

Treaties will have to be made (or specific Federal legislation?)

2. If ROYAL PROCLAMATION applied to BC and is still in force,

then the non-treaty lands are still reserved for the Indians as their hunting grounds. All except treaty Indians have unrestricted right to hunt and fish.

Treaties will have to be made.

3. If DOUGLAS TREATIES are treaties and still in force,

then these treaty tribes still have the right to hunt over unoccupied lands and carry on their fisheries as formerly (in the areas of the treaties).

New treaties, or specific federal legislation, will be necessary.

In general, all Indians of BC could use County Court decisions to hunt and fish with no restrictions. They are not doing it, because don't realize position, waiting for appeal, or don't choose to. If they wanted, they could use this as a lever to get treaties.

At Nanaimo: what is required: 1. Treaty to abrogate Douglas treaty (vested rights)
No. that gave this up by Douglas Treaty { 2. " " " native title - as set out in 1763 Proclamation

WHAT DATE should be taken for extinguishment of Indian Title?

If Indians still held (or still hold) their native title, since it has not been extinguished, then the title should be recognized AS IT IS TODAY. They held their title, which they had gained and held by traditional means (tribal warfare, sale -as in Tsimshian cases-, abandonment and displacement as in Chilcotin/Algatcho cases). These traditional means have continued to operate to some extent even to the present (wanderings of Athapaskan bands,).
Also, since the agreement will have to be made with existing Indian groups, it should be related to their recent past.

To say that the native title should be extinguished as of the date that Britain assumed absolute title to the land confuses the two very different concepts of title. Britain assumed title to the entire area, not to each of the tribal areas separately. The Indians retained whatever it was they had owned all along, and retained the right to transfer it as they had in the past.

It could be said that no tribal reshufflings have taken place since the Reserves were established, hence a good cutoff date would be 1916 for most of the Province. The only exceptions might be recent Athapaskan shifts and places where the reserves did violence to the actual native title (eg Nass mouth?).

Value depends on aboriginal uses, and is not increased by white man's developments (eg oil, gas, coal, etc). It is only for measuring the land concerned that 1916 should be used. It is only to the extent that it was used for aboriginal uses that value should be paid. (Or its value

To put it another way, perhaps, native title should be recognized as of date of occupation, subject however to any changes which the Indians themselves have made in it. It should be valued according to native uses before white settlement.

Time of white occupangy may be taken as of the time when in Canada they would have made a treaty: when the country was opened up for occupancy. No fixed date. Thus it wouldn't be 1763, or 1846, but it would be for various times on Vancouver Island (1850 on) and BC (1858 on). It might be well to take 1849 as the date for Vancouver Island and 1858 for the rest of B.C. That is, about 1850

Indian Title (the "Land Question")

1. What does Indian title now include?
   - purely aboriginal rule of land? as per 1763? as per 1846? 1849? 1858? 1871?
   - at time of Confederation? } farming, furs
   - at time of opening for settlement? }
   - present day resources? → used by Indians? all?

2. What date should be taken for extinguishment?

Can "Indian title" change in nature since time of contact to present?
Since Indians have retained native title to present
The areas over which the Indians had sovereignty have changed [but changed because of the white man's presence]
Since legally it is a burden on the underlying sovereignty of the Crown, should it be as of the time the Crown took sovereignty?

Whose responsibility is it to extinguish native title? (Answer: Dominion)

Canada assumed charge of Indian affairs with Article 13 of Terms of Union in 1871. With that went the power and the responsibility of extinguishing Indian title. The Province has fully discharged its responsibility by transmitting ~~thousands~~ Indian reserve lands to the Dominion. The Dominion, by Treaty 8, has set a precedent of recognizing and wxtinguishing Indian title to lands in B.C. The burden of the land question today rests upon the Dominion.

(This view, that the Province had discharged its part of the duty, was stated in the proceedings of the 1926 Committee)

Also Sec 109 BNA Act - subject to "any interest other than that of the Province

How?

It has the power to do it by specific legislation. but that would anger Indians.

But if it is to recognize the concept of native title, the 1763 Proclamation, and the recommendation of the 1961 Joint Commission, it will have to do it by negotiation and treaty.

distinguish 'rights' from 'title'

1. Distinguish between "aboriginal title" (the anthropological facts of prewhite ownership) and "aboriginal rights" (the rights recognized in British law as flowing out of aboriginal title, and referred to, misleadingly, as aboriginal title)

2 Once established to exist, aboriginal title does not have to be further defined, because it does not affect the ways in which aboriginal rights have been dealt with in law. The courts have never found it necessary to define the old native title, having reclassified it as a 'personal and --- right".

3. The old Indian title to lands has been extinguished by occupation. The aboriginal rights are what in the rest of Canada have been extinguished by treaty.

4. On southern Vancouver Island (Douglas treaties) and Peace River (Treaty 8) the aboriginal rights were recognized and extinguished. Some incidents of aboriginal title were confirmed.

5 The Nishga have aboriginal rights based on their aboriginal title. These rights have never been extinguished by treaty.

6 The cases show that aboriginal rights are embedded in British law — similar to common law rights — and cannot be taken away except by treaty or express statute.

VCC

The Indian Land Question

1. The Fact
   The Nishga Statement of Claim
2. British (Canadian) Policy
   Royal Proclamation
   Canada treaties

3 BC Policy (Crown Colony)

4 Confederation: two policies in conflict
   Dufferin, Laurier, 1887 Sec of State
   Reserve Commission

5 The Indian case:
   - 1887 Commission
   - 1913 Petition
   - 1926 Commission

6 Renewed Nishga action
   1955 The Nishga Tribal Council
   1969 - BC Supreme Court decision
   1970 - BC Court of Appeal -

7 So where does it stand?
   a) Supreme Court - a test case for entire issue
   b) aboriginal title - a red herring.
      It was a dead issue before Confederation