FACULTY OF LAW,
UNIVERSITY OF TORONTO

Toronto 181, Canada

September 24, 1971

Mr. Thomas R. Berger,
Thomas R. Berger & Company,
Barristers & Solicitors,
Ste. 210-198 West Hastings Street,
VANCOUVER 3, B.C.

Dear Tom:

Re: Calder Appeal - Supreme Court Factum

Following are a few thoughts on the factum you sent along for comment.

At page 11 of the factum it is stated that "the title to all public lands in the Province, ever since ... 1871, has been held by the Crown Provincial". That is not strictly correct, the two notable exceptions being the transfer of public lands to the Dominion in the Railway Belt and in the Peace River Block, both of which were eventually re-transferred to British Columbia.

As to the Peace River Block, a point that is perhaps worth making and which, I think, reinforces your argument concerning Treaty 8 (at pp. 59-61), is that at one point federal Crown lands legislation applied to this block of land in the Peace River District of British Columbia, and this legislation, moreover, contained provisions making specific reference to "Indian title": see e.g., the Dominion Lands Act R.S.C. 1886, c. 54, sec. 4 (making the Act inapplicable to territory to which "Indian title" had not yet been extinguished) and c. 56, sec. 2 (defining the Block as Dominion lands). You have not dealt with this line of federal enactments making specific reference to Indian title, and I wonder if there is not some important yardage to be gained there.

At pages 21 and 22 you discuss Tillamooks, but frankly I do not think you can expect to get very much out of that decision in light of the later Supreme Court decision in Tee-Hit-Ton. In the latter decision as I recall (and without stopping to dig out the report), Reed J. specifically disagreed with the reasoning of Vinson C.J. in the earlier case set out in the second half of the first paragraph on page 21 of the factum. Tillamooks is not quite distinguished out of

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existence, but is made to depend on the special jurisdictional Act of 1935 passed for that particular tribe of Indians. (Tillamooks #2 had already decided that the recovery was not based on the Fifth Amendment).

Tee-Hit-Ton would seem to be the controlling decision, and appears to stand for the proposition that the courts will not compensate for "unrecognized" Indian title unless a congressional intention to do so can be found in the terms of the special jurisdictional act. The Tlingit case provides another example where the courts were able to discover such congressional intent, based on another special jurisdictional Act of 1935 (not the same Act considered in Tillamooks), and of course it has been held that the Indian Claims Commission Act of 1946 also contemplates compensation for extinguishment of aboriginal title: Otoe v. Missouria, and the Lipan Apache case. (The cases you cite at p. 29, et seq., of actions against third parties are, I think, distinguishable on that basis).

The U.S. cases, therefore, are a mixed blessing on the question of a legal right to compensation for unrecognized Indian title. But they are consistent with the existence of aboriginal title and this at least can be emphasized. In Tee-Hit-Ton the Court did not question the existence of aboriginal title but simply seems to be saying that the question of compensation for its extinguishment should be left to Congress. As you know, Congress is currently grappling with the terms of a settlement for aboriginal title in Alaska, and the figures being bandied about are pretty substantial. (The current Administration proposal is for a total payment of $1,000 million, plus 40 million acres of land.)

At page 20 you raise the question of why treaties were made with a people who had no "legal" rights. One answer that might be made, I suppose, is that it was a policy aimed at maintaining peaceful relations together, possibly, with recognition of a moral obligation. In other words, the objective may have been not so much the avoidance of legal liability as minimizing the risk of lost scalps. But now I am getting into devil's advocacy!

At pp. 40-42 you deal with the Act of State doctrine. I entirely agree that the doctrine has no place whatsoever in this context, and I would think you should have no problem with that issue in the Supreme Court.

.../...

Again, on the issue of "recognition" (p. 42, et seq.), might there not be some value in noting the references to 'Indian title' in federal legislation? As in the case of Treaty 8, it is a form of governmental recognition, although not recognition by the government you are suing as defendant in these proceedings.

Let me know if I can assist in any way before this comes on. I hope you can arrange to visit us in Toronto on your way to or from Ottawa. If you think there would be any value in kicking the case around with two or three of us here in Toronto on your way up to Ottawa, I would be glad to arrange it.

With best regards,

Yours truly,

K. Lysyk,
Professor.

KL:rrp

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29th September, 1971.

Professor Wilson Duff,
Department of Anthropology
and Sociology,
University of B.C.,
Vancouver 8, B.C..

Dear Wilson,

Thanks for your note.

The same day, I received a note from Ken Lysyk, and I enclose a copy of it because he dealt with the same problem that you did.

I am now advised that the Calder appeal will be heard on November 24th, so I will have another month or so to consider what changes I can make in the Factum to strengthen the case.

I would be very pleased to come out to speak to the students. I apologise for screwing things up last term. I can speak to the students on October 22nd, 1971, at 1.30 p.m., if this suits you.

Yours sincerely,

Thomas R. Berger

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