

# HONOURING THE QUEEN'S FLAG:

## *A Legal and Historical Perspective on the Nisga'a Treaty*

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THE CONTROVERSY OVER THE NISGA'A TREATY has had more than its share of overheated rhetoric and politically inspired manoeuvres. Some critics of the treaty have described it in wildly inaccurate ways, recommending solutions that range from ones that are too vague to be taken seriously to ones that are simply a form of recycled colonialism (although their proponents invariably see them as new and innovative). This in turn has caused some supporters of the process to respond by downplaying even thoughtful criticisms, making the treaty seem almost too good to be true. Controversies are like that, especially if both sides come to believe that slogans are more effective than information.

As a result, it is easy to forget that the agreement signed on 4 August 1998 is years overdue. It is also, by any reasonable standard, a good one. This of course does not mean that it is a perfect agreement or even the best in the circumstances. As a product of human negotiation, it naturally has flaws; and although there is unlikely to be a consensus as to what these are, one is certainly the failure to resolve the overlap dispute between the Nisga'a and their neighbours, the Gitanyow.<sup>1</sup> Moreover, in time the treaty – like the BNA Act and most other significant documents – will no doubt come to be interpreted in ways unimagined by its drafters. Still, when one looks around the world at how other nations have come to grips with their colonial past, the Nisga'a treaty stands out as a model of compromise and moderation.

<sup>1</sup> The Gitanyow case has recently been published: see Neil J. Sterritt, et al. *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998). Because the Gitanyow have commenced a court action, it should also be noted that Article 34 of Chapter 2 of the Final Agreement contemplates the possibility that a court might one day determine that another First Nation's constitutional rights are adversely affected by some provision of the agreement. [See also Sterritt, this issue.]

Why, then, such shrill opposition? Partly, I think, because the history of what, since at least 1875, has been described as the BC Indian Land Question is not well known and because the legal context in which all this is taking place is not well understood. As a result, compromise is seen as capitulation, and change as a form of betrayal.

This lack of context reveals itself in a number of ways. For example, those who oppose the treaty because they think that their governments have conceded too much to the Nisga'a often speak as though Aboriginal title is a legal myth rather than a reality. They fail to appreciate the emptiness at the heart of the theory of sovereignty that Canada has traditionally used to assert its control over Aboriginal peoples, and, as a consequence, they see government modification of that theory as somehow legally unjustified. For them, the allocation of resources produced by the history of the last century – so long as significant parts of that history are overlooked – should not be altered by what they see as recently “invented” law. On the other hand, those who oppose the treaty because governments have demanded too much of the Nisga'a patronize the Aboriginal people who negotiated and ratified it, and seem to believe that law, as they see it, should stand aloof from the changes wrought by history. The result is that an impoverished view of where law and history have brought us confronts an idealized and rigid one. Both attitudes have deep roots, but in this essay I wish mainly to address the former.

For the Nisga'a, what they were up against began to become clear as early as 1887, when a royal commission visiting the Nass Valley told them that the government did not regard them as having any legal right to their lands. At a meeting at Nass Harbour the chiefs at first reacted with laughter; but when they realized that the commissioners were serious, their amusement quickly turned to astonishment, then anger. One of them explained that they simply could not believe what they were hearing. “We took the Queen’s flag and laws to honour them,” said Charles Russ. “We never thought when we did that that she was taking the land away from us.” Earlier in his presentation to the commission Russ had stated that the Nisga'a were willing to give up most of their land, so long as what remained – together with a limited right to self-government – was confirmed by treaty. “We want,” he said, “the words and hands of the chiefs on both sides, Indian and Government, to make a promise on paper – a strong promise – that will be not only for us, but for our children and forever.” Do that, he said, and “it will be finished.” But the answer

was no. "It is as well for you to understand," said the commissioner for the province, "that there is no probability of your views as to the land being entertained."<sup>2</sup> So instead of a treaty, the Nisga'a got tiny reserves, the Indian Act – and a cause.

A hundred and eleven years later, one imagines that Charles Russ would have been pleased to see all the flags at the signing ceremony at New Aiyansh, even though they were Canada's rather than the Queen's. The treaty, moreover, is pretty much what the chiefs had asked for at Nass Harbour so long ago: it confirms Nisga'a ownership of a small portion of what they claim as their traditional territory and includes a limited, but nonetheless significant, form of self-government. Perhaps most important of all, the province of British Columbia is finally acknowledging that Aboriginal title is compatible with Crown sovereignty and that the province's long-standing opposition to this view is, and always has been, legally wrong. But it has taken over a century of struggle to arrive at this place, and that much time muddies the waters.<sup>3</sup>

## 1. POLITICS AND LAW

When European settler populations began to compete seriously with the indigenous inhabitants of the globe for the limited land and resources in their various colonies, two broad bodies of opinion emerged. On the one hand, colonists tended to oppose what are now called Aboriginal rights and, through their local governments, to ignore or actively undermine such rights. On the other hand, military administrators and the imperial governments they served tended to see themselves as a bulwark against colonial excesses and as preservers of Aboriginal rights – at least, so long as preservation was necessary to facilitate assimilation or, at least, integration. Naturally, as the military threat posed by Aboriginal peoples diminished over time, the settler outlook tended to displace the imperial one.

Probably the most important legal document promulgated by an imperial power in this context was the Royal Proclamation of 1763. Issued by George the Third, it provided that settlers could acquire

<sup>2</sup> Papers Relating to the Commission appointed to enquire into the state and condition of the Indians of the North-West Coast of British Columbia (*BC Sessional Papers*, 1888), 432-33.

<sup>3</sup> For a more detailed account of the early history of the BC Indian Land Question, see Hamar Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927," in *Essays in the History of Canadian Law*, vol. 6: *British Columbia and the Yukon*, ed. Hamar Foster and John McLaren (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 1995), 28-86.

Aboriginal lands only if the Indian nation that owned the lands had first voluntarily sold them in a formal ceremony – a treaty – to the British Crown. It also prompted many Indians to side with the Crown against the colonies, which eventually became the United States of America, both in the Revolutionary War and in the War of 1812. Although the chiefs at Nass Harbour were unaware of the Proclamation when they expressed their astonishment at the government's refusal to recognize their ownership in 1887, they soon discovered it. And when they did, they realized that they could base their claim upon British law as well as their own. So in 1913 the Nisga'a Land Committee, with the help of a lawyer or two, petitioned the British Crown for recognition of their title, relying extensively upon George the Third's broad statement of principle. The committee and its successor, the Nisga'a Tribal Council, took similar action after the First World War and again in the 1960s and 1970s, when they took the famous *Calder* case all the way to the Supreme Court of Canada.

This contrast between local opposition to Aboriginal rights and imperial support for them is why responsibility for relations with Aboriginal peoples was assigned to the central government, rather than to the states or provinces, in federations such as the United States and Canada. The former was seen to be more like the imperial government it was replacing: sufficiently removed from the scene to be more capable of fair dealing than the settler governments, which tended to regard Aboriginal people as competitors. And when courts found themselves having to choose between these two approaches to Aboriginal rights, more often than not they backed the imperial one.

Thus, in the early years of the nineteenth century, the Supreme Court of the United States ruled that Indian tribes were "domestic dependent nations" that owned their traditional territories, governed themselves, and were immune from state, but not federal, law.<sup>4</sup> A few years later the New Zealand Supreme Court described Aboriginal title as one of the oldest imperial principles and ruled that, at least in peacetime, such title could not be extinguished unless the Aboriginal owners freely consented. Australia's legal history is rather different, but even in Canada the law tended towards the support of Aboriginal rights.<sup>5</sup> In 1888 the Judicial Committee of the Privy Council, the

<sup>4</sup> For more detail, see Hamar Foster, "Canadian Indians, Time and the Law," *Western Legal History* 7 (1994): 69; and "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases," *Manitoba Law Journal* 21 (1992): 355-63, at 343.

<sup>5</sup> The New Zealand and Australian cases are described in Hamar Foster, "Indigenous Peoples and the Law: The Colonial Legacy in Australia, Canada, New Zealand, and the United

highest court in the British Empire, advised the Crown that provincial governments in Canada could not use Indian lands within their province as a source of revenue until the Aboriginal title to such lands had been extinguished.<sup>6</sup> These courts all cited British law and practice in support of their conclusions.

But of course declaring the law is one thing, making it work is quite another. In a sense, the judges who upheld Aboriginal title and self-governance rights so long ago seem almost like judicial King Canutes, helplessly opposing a seemingly relentless tide of land- and resource-hungry Europeans. And the politicians had a way of reading these decisions that diminished them or made them seem inapplicable. Perhaps that is why, in the public mind, this legal tradition was largely forgotten – or, more likely, never learned in the first place: the cases and the legal and political reality upon which they were based tended to be erased, or at least dimmed, by events. For example, soon after the US Supreme Court affirmed the rights of the Cherokee to maintain their territories and laws against the state of Georgia, President Andrew Jackson is supposed to have remarked that the chief justice had made his decision, let the chief justice enforce it. Eventually, expansionist forces prevailed and the Cherokee were marched west of the Mississippi, thousands dying along the way. The New Zealand Supreme Court's early defence of Aboriginal title was equally tenuous. Indeed, the case seems to have effectively disappeared for more than a century – a century in which millions of acres of Maori land were either confiscated or obtained through tainted transactions.

The Nisga'a, as we have seen, had a foretaste of the politics of Aboriginal title when the Royal Commission visited them in October of 1887. Some of them had discovered this even earlier, when they travelled to Victoria in February of that year to lay their concerns before the government of British Columbia. Denied the aid of their usual interpreters because Premier William Smithe and his administration did not trust the missionaries, the delegation, which included Tsimshian representatives from Port Simpson, had to designate one of their own to interpret across what was already a gulf of misunderstanding. One result was that both sides left the

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States," in *Asia-Pacific Legal Development*, ed. Douglas M. Johnston and Gerry Ferguson (Vancouver: UBC Press, 1998), 466, at 477-86.

<sup>6</sup> The case is *St. Catherine's Milling Co. v. R.* (1888), 14 AC 46 (JCPC). This aspect of it is described in Hamar Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is Delgamuukw v. British Columbia 'Invented Law'?" *The Advocate* 56 (1998): 221.

meetings frustrated: the Nisga'a felt rebuffed, and the government's representatives were confirmed in their view that all would be well were it not for a few missionaries and other agitators.

The tenor of that meeting became clear when the delegation confronted the premier with the fact that Canada had made treaties with the Indians of the Prairies: Smithe's response was simply to ask where they had heard this. Nisga'a John Wesley said they had read it in a law book. Smithe replied he had never seen such a book. "There is no such law either English or Dominion that I know of," he told them, "and the Indians or their friends have been misled."<sup>7</sup>

So it is hardly surprising that this meeting lives on in Nisga'a tradition as one in which they were not only turned down but insulted. Refused an audience at the legislature, they were obliged to listen while the premier described them as having been little better than animals when Europeans arrived on their shores. They also had to try to make sense of his assertion that British law knew nothing of Aboriginal title or self-government and of his apparent ignorance of treaties made elsewhere. In fact, Ottawa had made seven treaties with the Algonkian and Athapaskan peoples east of the Rockies, and, as we shall see, Aboriginal title was very much a part of British law.<sup>8</sup> So when the Nisga'a and Tsimshian asked for a treaty that would confirm their title to a portion of their lands and enable them to govern their communities as non-Aboriginal peoples did (i.e., without reference to the Indian Act), they were not acting unreasonably.

The tension between a judicial tradition that assigns legal status to Aboriginal rights and a political tradition that does not has come to a head in the late twentieth century; and, by and large, the judicial tradition has prevailed – at least on paper. Indeed, recently the case that the Nisga'a took to the Supreme Court of Canada twenty-five years ago was cited with approval by the Malaysian Court of Appeal. But, for our purposes, comparisons with former colonies that are now liberal democracies – notably the United States, New Zealand, and Australia – are probably more relevant.

<sup>7</sup> Report of Conferences between the Provincial Government and Indian delegates from Fort Simpson and the Nass River (*BC Sessional Papers*, 1887), 255-6.

<sup>8</sup> In Section 3, below. But the Nisga'a may have misunderstood their hosts when they assumed that the meeting was not at the legislature because the government deemed them unworthy. It seems more likely that Smithe wanted it to be held at his house because he had been stricken with an illness that, within months, would kill him. (He did tell them, however, that their ancestors had been "little better than wild animals that rove over the hills.")

In the United States, an Indian Claims Commission was established after the Second World War to deal with grievances, both legal and otherwise. Soon afterwards, the United States Supreme Court breathed new life into the old decisions, affirming – although not always consistently – the view that the tribes are sovereign entities with governmental powers. It is partly for this reason that every US president since Richard Nixon has publicly declared that the tribes have the right of self-determination, including the right to “become independent of Federal control without being cut off from Federal concern and Federal support.” As the leading textbook on federal Indian law in that country states, it is a basic legal principle that a tribe’s governmental powers “are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”<sup>9</sup> In short, because Aboriginal sovereignty pre-dates the Constitution of the United States, it does not depend upon it; and in recent years the US Congress has, in some respects, become a better protector of tribal sovereignty than the current Supreme Court.

In New Zealand, tribal sovereignty has fared less well. But the Waitangi Tribunal and the courts have developed a claims process and a jurisprudence based upon the principles of the Treaty of Waitangi, signed by Great Britain and a number of the Maori chiefs in 1840, that has transformed that country. Commercial fisheries have been transferred, compensation has been paid, and land has been returned – although returning the latter is difficult, given New Zealand’s particular history. Nonetheless, the courts and the legislature, as a result of tribunal recommendations, have decreed that if the Crown transfers public land to a third party, and if the Tribunal subsequently concludes that it should be restored to Maori, it will be – with the Crown paying compensation to that third party.

Compensation for Maori, however, is more problematic. For example, although the Waitangi Tribunal concluded that, based on legal principles, the claimants in just one set of claims are entitled to billions of dollars, it was presented with evidence that paying this sum was probably impossible. So the Tribunal recommended instead that, if the claimants are required as a matter of policy to settle for less, they should not have to sign a full and final release of their

<sup>9</sup> See David H. Getches and Charles F. Wilkinson, *Federal Indian Law: Cases and Materials*, 2nd ed. (St. Paul: West Publishing Co. 1986) 152, 277.

claims. In other words, if legal principles do not govern the amount of compensation, they should not govern the rest of the settlement.<sup>10</sup>

Even in Australia, where the judicial tradition in favour of Aboriginal rights is weakest, a transformation of sorts has occurred. In 1992 the High Court ruled in *Mabo v. Queensland (No. 2)* that Aboriginal or Native title is a part of Australian law, prompting the Commonwealth government to pass legislation defining Native title and to set up a tribunal to handle claims. Subsequent court decisions have recently strengthened the *Mabo* doctrine and provoked vociferous opposition. A constitutional crisis of sorts was only narrowly avoided recently when amendments that water down the original legislation finally squeaked through.<sup>11</sup>

So Aboriginal title and governance are not ideas that are confined to British Columbia, or even to Canada. However, in British Columbia they are now very much in the public eye because, for the first time in the province's history, governments are taking the legal rights behind these ideas seriously. That there were occasions in this history when we almost came to where we now find ourselves is less well known.

## 2. MISSED OPPORTUNITIES

Possibly the first missed opportunity was in 1875. British Columbia had been part of Canada for only four years, and its government was already at loggerheads with Ottawa over the transcontinental railway and the size of Indian reserves. At Confederation in 1871 the Dominion had become responsible for Indian policy in the province, and the Terms of Union required British Columbia to provide land to Ottawa for reserves. On the Prairies, the treaties made in the 1870s were assigning up to 640 acres per family; but there was less arable land in British Columbia, so the Dominion requested only eighty acres west of the mountains. The province refused. Notwithstanding that BC law permitted settlers to pre-empt up to 320 acres and effectively denied Indians the right to pre-empt any land at all, the government insisted that ten acres per family was sufficient. Although by 1874 Ottawa had come down to twenty, the two sides then

<sup>10</sup> *The Taranaki Report: Kaupapa Tuatabi*, WAI 143 (Wellington: GP Publications, 1996), 314-15. This is a point worth noting, given that damages for past infringements of Aboriginal title and rights apparently do not form part of the Nisga'a treaty.

<sup>11</sup> See Foster, "Indigenous Peoples and the Law," and, more recently, Heather E. Maconachie, "Aboriginal Title: The Australian Experience," *The Advocate* 56 (1998): 697.



deadlocked over whether this figure should be restricted to reserves not yet confirmed.

A large part of the problem was that, by then, Ottawa had realized that, except for a small part of Vancouver Island, the colony of British Columbia had not made treaties. As a result, the province very likely could not give clear title when it transferred land to the Dominion for Indian or railway purposes, and there was rising discontent among Aboriginal people there. So when British Columbia's new Crown Land Act was referred to Telesphore Fournier, the dominion minister of justice, he was quick to note that it made no mention of the Royal Proclamation and made no provision for Aboriginal title. Fournier therefore recommended that the Act be disallowed, and the Dominion Cabinet accepted that advice.

But Ottawa soon relented. In retrospect it seems likely that Dominion officials were already despairing of getting British Columbia to cooperate in any attempt to make treaties and extinguish Aboriginal title. And that Ottawa, putting indisputable political considerations above disputed legal ones, was unwilling to proceed unilaterally, either by making treaties or by going to court. The disallowance, therefore, was designed to get the province to be more reasonable on the reserve question and to tone down its complaints about the railway. If so, it worked for a time. British Columbia agreed that a joint reserve commission would be established to allot Indian reserves and that there would be no fixed acreage formula. The justice minister who succeeded Fournier thought, as Fournier had, that a provincial law purporting to deal with land subject to Aboriginal title was probably unconstitutional. But, for practical reasons, Edward Blake went along.<sup>12</sup>

In 1877 another member of the Dominion Cabinet who was a prominent lawyer also noted that Aboriginal title had not been extinguished in British Columbia and warned that one day it might become necessary to do so. A few years afterwards, David Mills, now in Opposition, told Parliament that Aboriginal title was protected by law and that even if they acted together, Ottawa and British Columbia did not possess constitutional authority to remove that protection.<sup>13</sup> So these issues are not new.

<sup>12</sup> An opinion subsequently confirmed in the St. Catherine's case (see n. 6) and, more recently, by the Supreme Court of Canada in *Delgamuukw v. British Columbia* (1997), 153 DLR (4th) 193 (scc).

<sup>13</sup> These opinions are referred to in more detail in Foster, "Letting Go the Bone" (above n.3) and "Roadblocks and Legal History, Part II: Aboriginal Title and Section 91(24)," *The Advocate* 54 (1996): 531.

Indeed, in 1925 the senior Indian Affairs official in British Columbia, who was seeing his own efforts to establish a treaty process here founder, wrote his superiors in Ottawa to express his frustration with the local government's intransigence. One of the biggest mistakes the Dominion had made, William Ditchburn ruefully concluded, was in not continuing the disallowance of the 1874 British Columbia Crown Land Act "until some provision had been made for the cession of the Indian title."<sup>14</sup> Today, many British Columbians would no doubt agree.

The Royal Commission that Charles Russ addressed in 1887 had been specifically instructed to avoid any consideration of Aboriginal title, so that opportunity was also missed. The next one came just before the First World War. By 1908 the Nisga'a had a lawyer, and British Columbia and Ottawa were miles apart on a number of issues affecting Indian lands. There were also protests over homestead grants to veterans of the Boer War on the Skeena River and in the Bulkley Valley – the traditional territory of the Gitksan and Wet'suwet'en, who would become the plaintiffs in *Delgamuukw* some eighty years later. These events convinced Prime Minister Wilfrid Laurier that there was unfinished business in British Columbia, so when he met with a delegation of chiefs that summer in Ottawa, he told them that their rights would be protected. A year later the Indian Rights Association and the Interior Tribes of British Columbia, both of which were organizations dedicated to Aboriginal rights issues, were established, and in March of 1909 the Cowichan sent lawyers with a petition to London. Soon afterwards the Laurier government, no doubt prompted by the growing (although still numerically insignificant) involvement of lawyers on the Aboriginal side, decided to seek independent legal advice.

That advice came in the form of a 100-page report and was formally submitted to the minister of the interior in the summer of 1909. This report concluded (1) that Aboriginal title is a property right; (2) that such title probably existed, unextinguished, to lands outside Indian reserves in British Columbia; and (3) that neither the provincial nor the Dominion government, even if they acted in concert, could extinguish it without Aboriginal consent.<sup>15</sup> In reaching this conclusion

<sup>14</sup> W.E. Ditchburn to D.C. Scott, 8 December 1925, National Archives of Canada (NAC), RG10, vol. 3820, file 59,335, part 3A. Of course, bureaucrats and politicians (and lawyers) may say what they will about the law; what matters is what the courts say, and this is discussed in Section 3, below.

<sup>15</sup> Which is what David Mills had maintained twenty years earlier. My description of this legal opinion will soon be published as "A Romance of the Lost: Tom MacInnes' Role in

the author of the report, lawyer T.R.E. McInnes, relied upon the Royal Proclamation of 1763, British imperial law and policy, and two of the United States Supreme Court decisions referred to above.

When Laurier proposed in 1911 that these important questions be referred to the Supreme Court of Canada, Premier Richard McBride of British Columbia said no – a policy that the editors of the Prince Rupert *News* described as “worthy only of a set of claim jumpers.” So Ottawa, acting as trustee for the Aboriginal title-holders who claimed their lands were being granted away, took steps to bring a lawsuit on its own against a randomly selected homesteader in the Skeena. This strategy, a form of which had been used in most of the great Indian title cases of the nineteenth century, avoided any need for provincial consent and would oblige British Columbia to defend its grant in court. It might even have led, ultimately, to a definitive judicial pronouncement on Aboriginal title. Laurier, however, decided to fight the 1911 Dominion election on the issue of free trade, and his government was defeated. When he left office, he seems to have taken any enthusiasm for further court action with him. So another opportunity was lost, and some of the Wet’suwet’en people who for years had been farming the land that had been granted to war veterans in the Bulkley Valley were ejected, their houses and other property burned to make room for the new owners.<sup>16</sup>

When the Conservative government in Ottawa that had been elected in 1911 came to deal with the province on Indian land matters, it also tried to include the vexing question of Aboriginal title. Premier McBride, however, remained adamant. Insofar as Aboriginal title to land outside existing Indian reserves was concerned, the province’s opinion was that there was no such thing and that, as McBride put it in a newspaper interview, it was “too late to discuss the equity of dispossessing the red man in America.”

The two governments did want to resolve their ongoing differences respecting the reserves, however. Ottawa needed British Columbia to cede full control over them, and British Columbia wanted a significant amount of prime agricultural and other land removed from them and transferred to non-Aboriginals. So the Dominion relented once again, agreeing that another reserve commission would be

the History of the BC Indian Land Question,” in *Essays in the History of Canadian Law*, vol. 9: *In Honour of R.C.B. Risk*, ed. G.B. Baker and J. Phillips (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 1999).

<sup>16</sup> See Sheila Peters, *Canyon Creek: A Script* (Smithers: Creekstone, 1998).

established and that, just as in 1887, it would have no authority to consider Aboriginal title. The document produced by this body, the famous McKenna-McBride Report, prompted the formation of the Allied Indian Tribes of British Columbia – a group that, perhaps even more than the Nisga'a Land Committee and other Aboriginal organizations, dominated the Indian Land Question in British Columbia until 1927. Many of the leaders and members of these organizations were, moreover, much more amenable to policies of integration, and even assimilation, than their counterparts are today.

But the Nisga'a and the Allied Tribes were in a difficult spot. Negotiating a solution was an exercise in frustration, because British Columbia would not participate and it was unlikely that Ottawa would proceed unilaterally. Nor, by this time, would the imperial authorities consider intervening without Ottawa's consent. On the other hand, going to court also presented serious problems. The Judicial Committee of the Privy Council in London would not hear the Nisga'a case, or any other, unless it had first been heard in the Canadian courts. But of course British Columbia would not consent to this, and Ottawa was no longer willing to pursue Laurier's litigation strategy. In 1914 the Dominion did propose a court reference that would avoid these problems, but it attached conditions – such as requiring the Allied Tribes to fire their lawyer and accept the conclusions of the McKenna-McBride Report, in advance and sight unseen – that most Aboriginal groups, including the Nisga'a, decided were unacceptable.<sup>17</sup>

Still, both negotiation and litigation strategies were pursued, and throughout the 1920s hopes ebbed and flowed about whether a solution could be found. Meetings were held, funds were raised, and, in the end, the Allied Tribes successfully petitioned for a hearing before a joint parliamentary committee in Ottawa. British Columbia, true to form, refused to attend. But by then the Dominion government was also at the end of its patience, and the committee turned down the Allied Tribes' request either to recognize Aboriginal title or to remove the obstacles preventing the issue from being submitted to the courts. Because the Indian population of British Columbia in the late 1920s was at its lowest ebb in recorded history, it seems reasonable to suggest that this influenced at least some of the politicians who denied the Allied Tribes' petition. They thought that

<sup>17</sup> See R.M. Galois, "The Indian Rights Association, Native Protest Activity and the 'Land Question' in British Columbia, 1903-1916," *Native Studies Review* (1992) 8:1-34, at 20-2.

they did not need to act because Indians, and therefore the Indian Land Question, would soon disappear altogether.

In that same year – 1927 – Parliament passed an amendment to the Indian Act that effectively made it a criminal offence for anyone to raise funds from Indians for the purpose of pursuing claims against government. Because the Nisga'a Land Committee and the Allied Tribes could not survive without such fundraising, and because Indian agents appear to have given the new law a very broad interpretation back on the reserves, these organizations faded away. As did yet another opportunity to resolve the Indian Land Question.

In retrospect, it is unfortunate that the lawyer who acted for the Nisga'a and the Allied Tribes, A.E. O'Meara, was not a better advocate. He did not have the confidence of all the Nisga'a, and his weak advocacy skills served only to irritate the opinionated and generally unsympathetic politicians whom he spent more than twenty years lobbying. But as events seventy years later have confirmed, his grasp of the law of Aboriginal title was sound. And he did not give up. Within weeks of the committee's decision, O'Meara was back on the Nass, trying to raise funds for his continuing attempt to get the Nisga'a case before the courts. When he died suddenly in 1928, Dominion officials were studying police reports of his activities and preparing to lay a charge against him under the new law. They needn't have bothered. By then many Nisga'a had ruefully concluded that the law, like the politicians, had little to offer them.

### 3. THE LAW OF ABORIGINAL RIGHTS

Several months after Premier Smithe met with the Nisga'a and Tsimshian delegation that visited Victoria in February of 1887, the Royal Commission began its work. And whenever the issue of Aboriginal title came up – and it did, often – the commissioners carried out their instructions not to discuss it by saying that, according to the BNA Act and the Terms of Union, all the land belonged to the Queen. As we have seen, the idea that Confederation had somehow obliterated Aboriginal title was legally a radical one, even in 1887, and was quite inconsistent with what Fournier, Blake, and Mills had stated in the 1870s and 1880s. It also shocked and angered the Nisga'a.

But the commissioners were of the view that such a reaction was to be expected. Those “who understand the Indian character,” they told their governments, know that an Indian becomes “morose” and

“unyielding” if he thinks his rights are being interfered with; and “no amount of reasoning will enable him to disabuse his mind of his possibly ill-conceived convictions.”<sup>18</sup>

What were the “possibly ill-conceived convictions” that had made Charles Russ and his fellow chiefs so “unyielding”? In 1887, they were their own property laws: one early missionary reported that he had found the idea of ownership so strong among the Nisga’a that he could not procure land for his mission. “Every mountain, every valley, every stream was named, and every piece belonged to some particular family.” But, as we have also seen, the Nisga’a would soon discover that in some important respects these laws were not so very different from the principles contained in the Royal Proclamation. The problem was that in Canada these principles had not received very much judicial elaboration, and the political view that Indian title was purely a matter of morality or policy had filled the resulting vacuum. As lawyer T.R.E. McInnes put it in his 1909 report, the ordinary Canadian citizen knows little about the law of Indian title, so it “comes rather as a surprise to be told that Indians have or claim to have any inherent title to land in Canada.” Even “the ordinary lawyer looks askance at the Indian title,” he said, because it does not fit easily with what is taught in law school about property rights.<sup>19</sup>

Yet in 1888, a year after the Nisga’a were rebuffed, the Judicial Committee of the Privy Council made the ruling referred to earlier: that is, that provinces could not use land subject to Indian title as a source of revenue until that title was extinguished. The reason the Court gave was that Indian title is an interest in land other than that of the province, and, as such, s. 109 of the BNA Act made the province’s title subject to it.<sup>20</sup> But the Court also spoke of Indian title as “a mere burden” on the province’s underlying interest and implied that the Royal Proclamation of 1763, rather than recognizing Indian title, created it. This meant that when the bar against land claims was finally lifted in the 1950s and the Nisga’a were finally able to bring their case before the courts, the law was unclear. The BC government could argue that Indian title was less than full ownership and that somehow Aboriginal rights depended upon the good will of the Crown rather than upon the law of the land.

<sup>18</sup> *BC Sessional Papers* (1888), 422-3.

<sup>19</sup> T.R.E. McInnes, Report on the Indian Title in Canada with special reference to British Columbia, 20 August 1909, NAC, RG 10, series B-8, vol. 11208, file 1.

<sup>20</sup> See Foster, “Aboriginal Title and the Provincial Obligation to Respect It,” above n.6. Section 109 provides that all lands and resources that belonged to the colonies that make up the

An even better strategy was simply to ensure that Indian title did not come before the courts again. The province accomplished this by refusing to consent to the proposal that it be referred to the Supreme Court. In 1927 Ottawa did so by prohibiting the raising of funds for land claims.

So it was not until the 1960s, after the law against fundraising had been dropped, that the Nisga'a brought their case to court. But by then all the commissions and meetings that took place in the fifty years between 1887 and 1927 were long forgotten. And the politicians and judges, like the rest of the population, had received their education during the period of silence that followed the enactment of the land claims prohibition in 1927. As a result, when the case came to trial, the Nisga'a lost, hands down. So they appealed – and lost even more definitively (3:0) in the Court of Appeal. The relevant case law was brought to the court's attention, but the judges' attitude may be gleaned from the following passage in one of the judgments, which deals with the principle that Aboriginal title exists and is recognized by the common law, whether governments choose to recognize it or not:

Whatever may be the law in [the United States and New Zealand], it is clear ... that there is no such principle embodied in our law. In each case it must be shown that aboriginal rights were ensured by prerogative or legislative Act, or that a course of dealing has been proved from which that can be inferred.

One of the judges added that the passing of homesteading and other land laws in the colonial era meant that the Indians of British Columbia “became in law trespassers on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves.”<sup>21</sup> In short, Aboriginal title was not a legal right but a matter of executive grace.

Opposed by virtually every First Nation in British Columbia, who were understandably afraid that the Nisga'a were bent on dragging everyone's title towards a legal disaster, they pressed on to the Supreme Court of Canada. There they achieved a remarkable but complex victory. Six of the seven judges disagreed with the Court of Appeal, stating that Nisga'a title did not depend upon government recognition;

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provinces of Canada shall belong to those provinces, “subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.”

<sup>21</sup> *Calder v. Attorney General of British Columbia* (1971), 13 DLR (3rd) 64 at 67, 94.

instead, these judges affirmed that Aboriginal occupation amounted to a form of title that was enforceable at common law, whether the government acknowledged this or not. But three of the six went on to hold that the colonial homesteading laws that had so impressed the lower courts had, albeit implicitly, extinguished Nisga'a title.

It is the reasons of the seventh judge that make *Calder v. Attorney General of British Columbia* such a revealing case. He ruled that he did not need to consider Aboriginal title or extinguishment, because British Columbia, alone among the provinces, still required plaintiffs to seek consent before they could sue the Crown. The Nisga'a did not have such consent, so their case was not properly before the court. The three judges who were of the view that Nisga'a title had been extinguished agreed – so, technically, the Nisga'a lost, 4:3.<sup>22</sup>

But six of seven judges had said that Aboriginal title was a part of Canadian law, and three of those six had said that the Nisga'a still enjoyed title to their traditional lands. The message in that was clear to almost everyone except the lawyers advising British Columbia, so Ottawa put a land claims policy in place, and negotiations began – negotiations that British Columbia stayed away from until 1990-1. In the meantime, the Constitution of Canada was amended in 1982 to provide that existing Aboriginal and treaty rights are recognized and affirmed, and between 1988 and 1997 the Supreme Court of Canada decided a series of cases that built, significantly, upon *Calder*. These cases state that Aboriginal title is more than merely the right to enjoy and occupy land; it is a right to the land itself (*Canadian Pacific v. Paul, Delgamuukw*). That Aboriginal title could be extinguished before 1982 only by federal legislation, and then only if the intention to do so was “clear and plain” (*Sparrow, Delgamuukw*). That, after 1982, even the federal government cannot extinguish Aboriginal rights, only regulate them, and then only if such regulation can be justified according to a judicially imposed test (*Sparrow, Van der Peet, Gladstone*). And that the Crown owes a legally enforceable duty to Aboriginal peoples to deal with them and their lands as, in effect, a trustee would (*Guerin, Sparrow*).

Although these cases do not decide that there is an Aboriginal right to a form of self-government, the Supreme Court of Canada has left this question open and encouraged negotiations. Further, the court has defined Aboriginal rights in terms of distinctive practices that are integral to the particular Aboriginal culture, and it

<sup>22</sup> *Calder v. Attorney General of British Columbia* (1973), 34 DLR (3rd) 145.



has defined Aboriginal title as collective ownership. It is therefore difficult to conceive how a collectivity can manage its lands and preserve its culture without some authority to govern. Self-governance is, in effect, the most basic Aboriginal right.

#### 4. THE TREATY

Shaped by history and by the constitutional provisions and judicial rulings described above, the Final Agreement signed on 4 August 1998 was years in the making. What, then, are we to make of the criticisms currently being directed at it by those who say it goes too far? There are too many issues to canvas here, so I will restrict myself to the ones that seem to have generated the most controversy.

Before beginning, however, it is necessary to stress something that is absolutely fundamental. When Canadians decided to have their Constitution provide that existing Aboriginal and treaty rights are recognized and affirmed, this was a profound constitutional change. A unanimous Supreme Court of Canada said as much nine years ago in the *Sparrow* case when it described s. 35 (1) as “a solid constitutional base upon which [treaty] negotiations can take place” and as giving Aboriginal peoples “constitutional protection against provincial legislative power.” The Court also said that even federal legislative powers must now “be read together with s.35(1).” Of course, neither the Supreme Court nor the Nisga’a treaty questions the continuing sovereignty of the Crown. But in *Sparrow* the justices did quote with approval the statement that s. 35 (1) “renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”<sup>23</sup> All this must be borne in mind in assessing charges that the Nisga’a treaty unconstitutionally diminishes provincial jurisdiction or in some other way dilutes Crown sovereignty.

##### *(a) Is treaty government “race-based”?*

The Constitution already provides that certain persons – Aboriginal persons – have constitutional rights that other Canadians do not. So even if this is a racial classification, it pre-dates the Nisga’a treaty.

But in the treaty “Nisga’a” is not a racial classification. What “race” are the Nisga’a? Linguistically and culturally, they have much in com-

<sup>23</sup> *R. v. Sparrow* (1990), 56 CCC (3rd) 263 at 285, 288.

mon with (some would say they are almost indistinguishable from) the other Tsimshian peoples of the region, including the Tsimshian proper and the Gitksan. But neither of these groups is part of the treaty, nor can members of these groups run for a seat in the Nisga'a government or vote in a Nisga'a election – even if they reside on Nisga'a land. Nor are the Nisga'a racially “pure” – whatever that means. They have intermarried with Europeans and other settlers for at least 200 years and with their Aboriginal neighbours for thousands more. The treaty, moreover, provides that Nisga'a citizenship is to be determined by Nisga'a law, which does not appear to preclude widening the franchise in the future. Prejudice against Indians may be based upon race, but treaties are based upon property rights and sovereignty: in this case, property rights and sovereignty that have long been ignored and denied.

The Supreme Court of the United States took this approach to treaties in the 1830s. More recently it has ruled that any preference in US legislation respecting Indian tribes is not racial but political because it is based upon the “quasi-sovereign” status of the tribes.<sup>24</sup> Our courts have yet to say this in so many words, but the Supreme Court of Canada has ruled that Aboriginal rights are not based upon race; most derive from practices, customs, and traditions that are integral to the distinctive Aboriginal *culture* of the group claiming the rights. The exception is Aboriginal title, which depends partly upon Aboriginal law and partly upon proof of collective occupancy of territory when the sovereignty of the British Crown was declared. If this can be established, then Aboriginal title has been established; and Aboriginal title according to *Delgamuukw* is collective ownership, a “right to the land itself.” Collective ownership necessarily involves management of that land by the collective – in short, a form of self-government.

The point of the Nisga'a treaty is to translate the rather vague Aboriginal rights that the Constitution recognizes the Nisga'a already have into treaty rights that are more clearly defined and enforceable. To be sure, the self-government provisions of the treaty go beyond the existing case law; how could it be otherwise? The courts have clearly said that it is better to put meat on the bones of Aboriginal rights through the treaty process than by litigation, although litigation will obviously continue to play a role. In this connection it may be worth remembering that when Aboriginal fishing negotiations failed south of the border, opponents of Aboriginal rights discovered that

<sup>24</sup> *Morton v. Mancari*, 417 US 535 (1974).

the courts were prepared to interpret nineteenth-century treaties as guaranteeing the tribes up to 50 per cent of the entire commercial fishery.<sup>25</sup> That is not what the Nisga'a are getting.

If, then, the objection is not really to "race-based" government, perhaps it derives rather from a belief that the principle of equality before the law is being violated. But, historically, in British Columbia this idea has been more of a flag of convenience than a true principle. It was invoked both to justify subjecting Aboriginal people to the criminal law and to deny their title to their territories (no "special" rights). It was, however, conspicuously absent when these same people were prohibited from voting and pre-empting land as settlers could (special *restrictions* on rights were a different matter). As the Supreme Court put it in 1990, history has shown all too clearly that Aboriginal people "are justified in worrying about government objectives that are superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights."<sup>26</sup>

The point, I suppose, is that there is something distinctly hypocritical about stripping a people of their resources and then describing a complex and careful attempt to restore some of those resources as "apartheid" or as a violation of equality before the law. In any event, the Nisga'a have agreed that the Charter of Rights and Freedoms, which on its face binds only the federal and provincial legislatures, will also apply to the new Nisga'a government. And the Charter states that the rights and freedoms it guarantees, including equality before the law, are subject to Aboriginal or treaty rights – including treaty rights that may be acquired after 1982. Legally, therefore, we have had this debate. And in this regard it is significant that, after due deliberation, the BC Civil Liberties Association announced in December that it supports the limited form of self-government set out in the Nisga'a treaty.

*(b) Is the treaty a "giveaway" by "compliant politicians"?*<sup>27</sup>

The Nisga'a will be getting about 8 or 9 per cent of what they say are their traditional territories, and for reasons dictated by the passage of time it seems likely that many other First Nations may have to settle for less. So, once again, some context might prove useful.

<sup>25</sup> *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 US 658 (1979).

<sup>26</sup> *R. v. Sparrow*, above n. 23 at 288.

<sup>27</sup> Mel Smith, *Times-Colonist* (Victoria), 11 June 1996.

Indian lands in the US as a whole (including Alaska) amount to almost 5 per cent of the total land mass. In Canada, however, all the Indian reserves south of 60° (i.e., excluding the recent northern land claims agreements) total only half as much land as does the Navaho reservation in Arizona (a state that is nearly 27 per cent Indian land). This amounts to only 0.5 per cent of Canada's land mass – about ten times less than in the US. Yet Aboriginal people in the southern forty-eight states constitute a smaller percentage of the population than do Aboriginal people in Canada.

In British Columbia, Indian reserves constitute about 0.35 per cent of the province – about seventeen times less than they do in the neighbouring state of Washington, where nearly 6 per cent of the land is Indian. So if the amount of land acknowledged to be Aboriginal at the end of the current treaty process increases to the 5 per cent suggested some time ago by the current provincial government, we will simply have matched our neighbours' long-standing allocations.<sup>28</sup> Calling the treaty a “massive” giveaway therefore seems somewhat strained.

Neither is it a “giveaway.” The government is not “giving” this land to the Nisga'a. A premise of treaty-making as an alternative to litigation is that the land may have been subject to Aboriginal title all along; if so, it is Nisga'a land and, as such, comes under exclusive federal, not provincial, jurisdiction. All the province has is an interest that, as the Judicial Committee of the Privy Council said in 1888, does not entitle it to use the land as a source of revenue until the Aboriginal title has been removed.

Indeed, perhaps one of the most interesting aspects of the Nisga'a treaty, albeit one that the critics who think the treaty too generous do not mention, is how much it seems to concede to British Columbia. The federal government is assuming most of the cost. The issue of provincial liability for infringing upon the Aboriginal title of the Nisga'a for over a century has been set aside.<sup>29</sup> And the Nisga'a are acknowledging that provincial as well as federal laws apply to their Nation and their treaty lands (subject to the paramourcy of Nisga'a law in a limited and defined number of situations). Yet if there were

<sup>28</sup> *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, part 2 (Ottawa: Canada Communication Group, 1996), 423; Getches and Wilkinson, *Federal Indian Law*, above n.9 at 13; and Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990), 94.

<sup>29</sup> In *Delgamuukw*, the Supreme Court of Canada made it clear that Aboriginal title has an economic component and that “fair compensation will ordinarily be required” when it is infringed.

no treaty and those lands were judicially determined to be Aboriginal title lands, the province would, in all likelihood, have no jurisdiction over them at all. This is because Aboriginal title lands are “lands reserved for the Indians,” under the BNA Act, and the policy of that Act was to “ensure uniformity of administration” by putting all Indian title lands under the legislative control of “one central authority”: that is, Ottawa. Jurisdiction is transferred to the province only if Ottawa accepts a surrender of the Indian title to the lands, which then cease to be “reserved for the Indians.” Then, and only then, do the lands become provincial lands subject to provincial jurisdiction.<sup>30</sup>

*(c) Does the treaty amend the Constitution?*

Another issue that has dominated the news lately is the question of whether the treaty amends the Constitution, thus requiring the province to hold a referendum pursuant to the Constitutional Amendment Approval Act, 1991. This statute states in its preamble that it was passed because “Canadians are involved in reassessing the Constitution of Canada.” And at that time, we were: the Charlottetown Accord was being negotiated and formal constitutional amendments were being proposed that had to be made in compliance with the amending formula contained in the Constitution Act, 1982.<sup>31</sup> If the Nisga’a treaty were a formal amendment, Canada and the provinces would also have to hold a conference pursuant to s. 35.1 of the Constitution Act, 1982. But this has never been done with any treaty.

This is because the Constitution Act, 1982, not only “recognizes and affirms existing aboriginal and treaty rights” (s. 35 [1]). It also provides, in s. 35 (3), that the expression “treaty rights” includes rights that now exist by way of land claims agreements and rights that “may be so acquired.” These provisions are one of the reasons that the courts have recommended treaties as the best way to reconcile Crown sovereignty with Aboriginal rights: the Constitution itself provides

<sup>30</sup> The quoted phrases are from *St. Catherine's Milling Company v. R.* The question whether the treaty can, as it does in Article 10 of Chapter 2, simply stipulate that Nisga’a lands are no longer “reserved for the Indians” within the meaning of the Constitution is a complex one that cannot be addressed here. It would seem, however, that if treaties that extinguish Indian title have this effect (*St. Catherine's*), so can the sort of transformation of that title contemplated by the treaty.

<sup>31</sup> The Accord, which was rejected in a national referendum, contained explicit Aboriginal self-government provisions. But it is not at all clear how relevant these provisions were to the result. That is the trouble with referendums on complex matters. Indeed, some treaty First Nations opposed the Accord on the ground that it implied that their rights did not exist without formal acknowledgment. See “Message to All Canadian From First Nations of Treaty 6 and 7,” *Globe and Mail*, 24 September 1992.

a way to do this, a way that is quite independent of the ponderous and ill-suited amending formula. A treaty therefore does not amend the Constitution; rather it gives form to “existing” rights and brings the new and much more detailed formulation of these rights within the constitutional protection afforded by s. 35 (1). It was precisely this aspect of s. 35 (i.e., entrenching them first and defining them later) that some provinces objected to in 1980-1. But these objections did not carry the day, and treaties do not amend the Constitution.

The truth is that, were it not for the referendum requirement in the Constitutional Amendment Approval Act, no one would be seriously maintaining that the treaty is a constitutional amendment. The whole treaty process is premised upon the proposition that s. 91 (24) of the Constitution Act, 1867 (the federal power over Indians and Indian lands in the BNA Act), and s. 35 (1) of the Constitution Act, 1982, are sufficient authority for treaties. (Prior to 1982 treaties were made pursuant to s. 91 [24] alone.) But if these provisions and any part of the Nisga’a treaty based upon them are not sufficient authority for enacting a particular law, we have not amended the Constitution. We have simply failed to make a law that passes constitutional muster. This is not the same as amending the Constitution, nor is it, as some have suggested, a “de facto” amendment. A “de facto” amendment is simply an unconstitutional law.

Now, it may be that, one day, a court will hold that one or more provisions of the treaty are unconstitutional. Certainly arguments could be made that the treaty affects the division of powers between the federal and provincial governments, notwithstanding that it clearly states in Chapter 2, Article 8, that it does not. Such arguments, however, generally focus upon ss. 91 and 92 of the Constitution Act, 1867, which set out federal and provincial authority, and ignore or downplay s. 35 of the Constitution Act, 1982, which recognizes and affirms Aboriginal rights. The better view is that, if anything has affected the division of powers, it is s.35(1), not the treaty.

The arguments against the treaty also rely upon the fact that, in *Delgamuukw*, the Supreme Court of Canada declined to consider whether s. 35 included self-government. I would suggest, to the contrary, that such reasoning fails to appreciate the significance of what happened in *Delgamuukw*. In that case the British Columbia Court of Appeal ruled that there is no constitutional space for a third level of (Aboriginal) government. Yet, instead of simply affirming that ruling or expanding upon it, as they did with respect to

Aboriginal title, the justices of the Supreme Court left it for another day and urged the parties to negotiate a treaty. It seems to me that the Court wants the parties to negotiate self-government and will ultimately hold that s. 35 (1) includes a limited right of self-government. As the chief justice put it:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* ... to be a basic purpose of s.35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”

This suggests that s. 35 (1) does authorize us to make space in our Constitution for a sovereignty that, in North America, is much older than that of the Crown, although under the law it is limited by that of the Crown. The Court also said that, because of factual uncertainties at trial, *Delgamuukw* was not the right case “to lay down the legal principles to guide future litigation” on self-government and that rights to self-government, if they exist, “cannot be framed in excessively general terms.”<sup>32</sup> The clear implication is that if treaty negotiators can achieve a significant degree of specificity, the Court will be slow to say that s. 35 (1) does not have a governance component.

In the United States, this is old news: tribal sovereignty pre-dates the US Constitution and, with a number of important exceptions, tribal land is an “enclave” that is not subject to state, as opposed to federal, law. Moreover, tribal governments are not subject to the Bill of Rights, and the decisions of tribal courts dealing with issues such as equality before the law are generally not reviewable in the federal courts.<sup>33</sup> In contrast, the Nisga’a treaty provides that Nisga’a government is subject both to the Charter of Rights and, apparently without exception, to the jurisdiction of Canada’s courts. Should it turn out, as some have argued, that the treaty cannot make the Charter apply to Nisga’a government, this should not affect the constitutionality of the treaty itself.

<sup>32</sup> The Court was referring to its earlier decision in *R. v. Pamajewon*, [1996] 2 SCR 821. In that case the court assumed, without deciding, that s. 35 (1) does include self-government, but it ruled that high-stakes casino gambling did not meet the test for an Aboriginal right. The appellants in *Pamajewon* had simply proclaimed their right to engage in this activity and had declined the offer of a provincial licence. The Nisga’a, on the other hand, have negotiated a detailed and comprehensive treaty, and legislative authority over land management and cultural preservation are much more likely to qualify as Aboriginal rights.

<sup>33</sup> See *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978), dealing with the Indian Civil Rights Act, 1968, which was enacted as a bill of rights that did apply to the tribes. In the US, however, Aboriginal rights – although inherent – may still be extinguished by Congress.

## 5. HOLDING FAST

In 1878, Premier Smithe told Justice Henry Crease of the BC Supreme Court that he had no sympathy for the “iconoclastic tendency of the age.” Instead of “endeavouring to pull down that which has been the growth of centuries,” he continued, “I would pertinaciously act upon the old precept, ‘Prove all things, holding fast to that which is good.’”<sup>34</sup>

Yet Smithe was quite content to pull down all sorts of things that were the growth of centuries; he just did not see it that way. He also does not seem to have realized that the Nisga’a and Tsimshian chiefs who came to see him in 1887 were, in their way, very much like him. Faced with the prospect of changes to their way of life, which were coming at a pace that the premier and his friends would never have to endure, they too wanted to “hold fast.” At the same time, they recognized that to achieve this goal they had to adapt, to deal with divisions within their community that were much deeper than any within the settler community, and to swallow hard while they made difficult, almost unbearable, choices. As Charles Russ said when the Royal Commission visited the Nass a few months later, if “we make a mistake now, we are making it not only for ourselves but for our children, who will suffer.” And they did suffer. The Nisga’a have paid a high price and waited a long time for that “strong promise on paper” that Smithe found so unthinkable. How much longer should they wait, and with what effect upon the treaty process and upon the province generally?

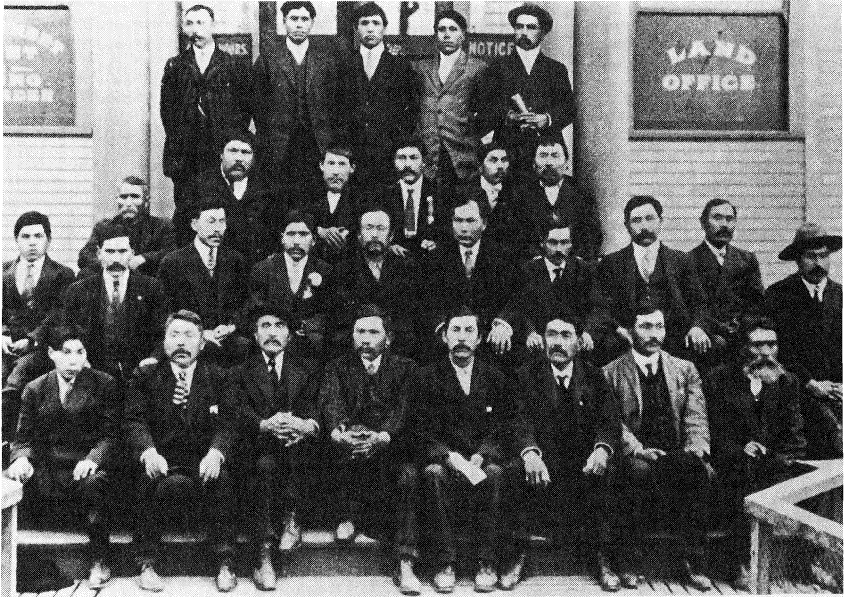
If the Nisga’a treaty is delayed by the legal action taken by the Gitanyow, so be it. Such litigation may result in the sort of overlap negotiations between these two neighbours that have so far proved elusive. But other challenges, for example those launched by the Liberal Party and the Fisheries Survival Coalition, seem to me to be rather different. These go to the heart of what the Nisga’a have asked for since 1887 and, when coupled with the demand for a referendum, reveal a political philosophy with roots that reach back to colonial times. Even the formal reasons advanced for saying no to the Nisga’a – that our law, our Constitution, are too small for what the treaty proposes – are the same as those given by Smithe and the Royal Commission.

Surely, this cannot be. Surely, the history of Aboriginal rights law in this country over the past twenty-five years is persuasive evidence

<sup>34</sup> Smithe to Crease, 14 August 1878, British Columbia Archives, Add mss 54, folder 12/66.



that s. 35 (1) is large enough to accommodate this agreement. We have placed Aboriginal rights in our Constitution. We have negotiated modern treaties in northern Canada. Our courts have made it clear that Aboriginal title and rights, although based upon old doctrines and principles, form a vital part of Canadian law and need to be reconciled with traditional constitutional ideas. And the Nisga'a have been at the negotiating table for twenty years. If this is not long enough, and if s. 35 (1) is not large enough, British Columbians will want to know what is. They will also want to know what should be done in the meantime.



Nisga'a Land Committee, 1913, reproduced with permission. *Nisga'a: Peoples of the Nass River* (Vancouver: Douglas & McIntyre, 1993), 133.