The Nishga Case

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The early political history of the British Columbia Indian land issue has been well documented.[1] The legal strength of the Indian claim was never directly raised in the courts until the 1960's. It was the basic issue in the case of *Calder v. Attorney-General of British Columbia*, argued first in the British Columbia Supreme Court in 1969 and decided in January of 1973 by the Supreme Court of Canada.[2]

It may seem improbable that a legal question as basic to colonial settlement as Indian aboriginal land rights should survive unresolved through Canadian history from first colonization to the present. In the United States the legal question whether aboriginal occupancy alone gave rise to legal real property rights appears to have first been directly faced by the United States Supreme Court in 1955.[3] In Australia the question was first directly faced in 1971.[4]

In the context of denying any Indian land rights in the Six Nations Reserve, the Upper Canada Court of Queen's Bench stated in 1851: "We cannot recognize any peculiar law of real property applying to the Indians — the common law is not part savage and part civilized."[5] These words seem an apt description of the early attitude of the Canadian courts on the subject of Indian land rights. In the first major Indian case after confederation, the Ontario Court of Common Pleas made a gratuitous aside about the land rights of Indians:

[1] See F. E. La Violette, *The Struggle for Survival*, University of Toronto Press, 1961; G. E. Shankel, *The Development of Indian Policy in British Columbia*, unpublished thesis, University of Washington, 1945; *British Columbia, Papers Connected with the Indian Land Question, 1850-1875*, Victoria, 1875; Peter A. Cumming, ed., *Native Rights in Canada* (2nd Edition), Indian Eskimo Association, 1972, Chapter 17.

[2] (1970) 8 D.L.R. (3d) 59 (British Columbia Supreme Court); (1970) 13 D.L.R. (3d) 64 (British Columbia Court of Appeal); decided by the Supreme Court of Canada on January 31, 1973 (as yet unreported).

[3] *Tee-Hit-Ton Indians v. U.S.* (1955) 348 U.S. 272; see also *Lipan Apache v. U.S.* (1967) 180 Ct. Cl. 487.

[4] *Milirrpum v. Nabalco* (1971) 17 F.L.R. 141.

[5] Robinson, C. J., in *Sheldon v. Ramsay*, 9 U.C.Q.B. 105 at 123.

The British Crown has invariably waived its right by conquest over all the lands in the Province until the extinguishment of what the Crown has been pleased to recognise as the Indian title, by a treaty of surrender of the nature of that produced in this case; until such extinguishment of that title the Crown has never granted any such lands. . . .

Prior to the execution of this treaty or surrender, Her Majesty was seised of the lands therein mentioned in right of her Crown, but by a usage which never had been departed from the crown had imposed upon itself this restriction, that it never would exercise its right to sell or lease those lands, or any part of them, until released or surrendered by the Indians, for the purpose thereby of extinguishing what was called the Indian title. . . .[6]

In this judgment, Mr. Justice Gwynne is saying that the Indians have no rights. The British Crown owned the land both before and after any treaty with the Indians. It owned the land by right of conquest. It is merely a policy, a usage, a waiver of rights by the Crown that led to a policy of treaties with Indians for the surrender of their "Indian title."

The classic Canadian expression of the notion that treaties were founded on benevolence or pragmatic politics, and not on legal rights, is found in the judgment of Chancellor Boyd in the trial judgment of the *St. Catherines Milling* case, the most significant Canadian case on Indian land rights. Counsel for the Attorney-General of Ontario argued: "We say that there is no Indian title at law or in equity. The claim of the Indians is simply moral and no more. They have no legal or equitable estate in the lands . . ."[7] Counsel referred to British Columbia and Quebec, major areas of the country where treaties had not been entered into:

Compare the case of British Columbia and its admission into the Union . . . All executive action has not been withheld in the other Provinces, until Indian titles have been dealt with. This should be judicially recognized by the Court. Surrenders are not usual in Lower Canada . . . In this Province (Ontario), Indians are consulted only out of endeavour to satisfy the Indians. This, however, is mere matter of practice. The British Columbia Sessional Papers for 1876 collect Indian papers for British Columbia for a number of years. See at p. 11, by which it appears a fee in Indians was never acknowledged; their title is of a possessory nature, satisfied by allocating reserves.[8]

Chancellor Boyd saw no legal basis for Indian land rights:

The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the

[6] *Church v. Fenton* (1878) 28 U.C.C.P. 384 at 388.
[7] (1885) 10 O.R. 196 at 199.
[8] *Ibid.*, p. 200.

continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated "justly and graciously", as Lord Bacon advised, but no legal ownership of the land was ever attributed to them.[9]

The basic apparent contradiction that needed to be explained was the existence of treaties in Ontario and the Northwest and the lack of treaties in British Columbia, Quebec and the Maritimes. Chancellor Boyd provided an explanation, based on the different state of the Indians in the different areas.

At the time of the conquest, the Indian population of Lower Canada was, as a body, Christianized, and in possession of villages and settlements, known as the Indian Country." By the terms of capitulation they were guaranteed the enjoyment of these territorial rights in such lands which, in course of time, became distinctively and technically called "Reserves." . . .

But in Upper Canada the native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration and protect both red and white subjects so that their contact in the interior might not become collision. A modus vivendi had to be adjusted. The course of civilized colonization in the North-West at this day presents, in its essential features, a counterpart of what was going on in the now thickly-populated areas of Upper Canada at the beginning of this century. And the manner of dealing with the rude red-men of the North-West, in the way of negotiating treaties for the surrender of their lands, and conciliating them in the presence of an ever-advancing tide of European and Canadian civilization, is but a reproduction, or rather a continuation and an expansion of the system which had commended itself as the most efficient in Old Canada.[10]

He concedes that the tribes in Nova Scotia and New Brunswick "have been comparatively neglected." The Upper Canadian policies have been the "crowning glory" of Canadian Indian policy. The clinching argument appears to be the real property consequences of recognizing an Indian title to land:

But in order to emphasize this *reductio ad absurdum* aspect of the case, let what little is known of the people in this remote region be recalled: when the treaty was made, the land it deals with formed the traditional hunting and fishing ground of scattered bands of Ojibbeways, most of whom presenting a more than usually degraded Indian type . . . Divided into thirty bands,

[9] *Ibid.*, p. 206.

[10] *Ibid.*, p. 210-11.

they numbered, all told, some 2,600 or 2,700 souls. These only remained as representatives of the primitive possessors of the whole 55,000 square miles of territory, whose claim of occupancy thereon was extinguished by the treaty.[11]

If the whole of the area was Indian country, each individual Indian would have owned over 9,200 acres, a thousand fold more land than they were entitled to under the reserve system created by the treaty.

The *St. Catherines Milling* case dealt with Treaty 3, the Lake of the Woods area covering part of northwestern Ontario and southeastern Manitoba. The dispute concerned the effect of the treaty. The treaty stated that the Indians ceded and transferred their tribal territory to the Crown in the right of Canada. Ontario claimed that the Indians had no transferrable title and that after the treaty the Crown in the right of Ontario owned all the land surrendered by the treaty. If there were any Indian rights they had ended and Ontario owned the land. The federal government had assumed that the treaty meant what it said and had transferred property rights from the Indians to the federal Crown. As a result they had issued a timber licence to the St. Catherines Milling Company. The Province of Ontario took the company to court to stop them from cutting timber pursuant to the licence. The nature of Indian rights were raised in a post-treaty situation, where the real conflicting parties in interest were the Province of Ontario and the Government of Canada. Indian people were never directly represented in the litigation.

Chancellor Boyd resolved the conflict by holding that the Indians had no rights and therefore could convey nothing to the federal government by treaty. The federal licence to the St. Catherines Milling Company was invalid for the federal government had no rights to grant. The treaty is so meaningless, in legal terms, that a refusal by the Indians to sign would not have stopped colonial expansion:

> While in their nomadic state they may or may not choose to treaty with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them.[12]

Chancellor Boyd finds support in the practices in British Columbia after it entered confederation in 1871. Underlying the whole of British Columbia policy, he said:

[11] *Ibid.*, p. 227.

[12] *Ibid.*, p. 229.

... there is an affirmance of the constitutional propositions that the claim of the Indians by virtue of their original occupation is not such as to give any title to the land itself, but only serves to commend them to the consideration and liberality of the Government upon their displacement ... [13]

The judgment of Chancellor Boyd is praised by the judges in the Ontario Court of Appeal[14] and by the majority judges in the Supreme Court of Canada.

In the Supreme Court of Canada, counsel for the St. Catherines Milling Company argued that colonial policy in Canada had always recognized Indian land rights:

All this country was once occupied by Indian tribes. On its discovery by Europeans the discoverers acquired a right of property in the soil provided that discovery was followed by possession ...

In case of conquest the only test as to the title of the conqueror is found in the course of dealing which he himself has prescribed. When he adopts a system that will ripen into law he settles the principle on which the conquered are to be treated.

In Canada, from the earliest times, it has been recognized that the title to the soil was in the Indians, and the title from them has been acquired, not by conquest, but by purchase.[15]

To rationalize historical policies, counsel argued that Indians in Quebec were treated as conquered by the French, and that confederation was not designed to reopen Indian policy questions which had been settled in the Maritimes by that date. The consistent policy, then, was an Upper Canadian consistent policy, now to be applied by the Dominion government to the northwest.

Counsel for the Province of Ontario exploited, in argument, the historical inconsistencies:

In the Province of Quebec no surrenders have ever been obtained from the Indians. If the contention of the appellants is correct, then the grants for nearly the whole of that province are of no effect. Such contention, however, has never been put forward.[16]

The uncivilized character of the indigenous tribes was used as an argument:

[13] *Ibid.*, p. 232.
[14] (1886) 13 O.A.R. 148.
[15] (1887) 13 S.C.R. 577 at 580.
[16] *Ibid.*, p. 593.

It is a rule of the common law that property is the creature of the law and only continues to exist while the law that creates and regulates it subsists. The Indians had no rules or regulations which could be considered laws.[17]

The majority of the Supreme Court of Canada expressed their agreement with the judgment of Chancellor Boyd. Mr. Justice Strong, dissenting, put forward a view of the origin of treaty making rooted in the practical politics of colonial history. The policy, thus created, he argued, had ripened into a rule of law.

I will shortly refer to what appears to have led to the adoption of the system of dealing with the territorial rights of the Indians. To ascribe it to moral grounds, to motives of humane consideration for the aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise. Its true origin was, I take it, experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies. That the more liberal treatment accorded to the Indians by this system of protecting them in the enjoyment of their hunting grounds and prohibiting settlement on lands which they had not surrendered, which it is now contended the British North America Act has put an end to, was successful in its results, is attested by the historical fact that from the memorable year 1763, when Detroit was besieged and all the Indian tribes were in revolt, down to the date of confederation, Indian wars and massacres entirely ceased in the British possessions in North America, although powerful Indian nations still continued for some time after the former date to inhabit those territories. That this peaceful conduct of the Indians is in a great degree to be attributed to the recognition of their rights to lands unsurrendered by them, and to the guarantee of their protection in the possession and enjoyment of such lands given by the crown in the proclamation of October, 1763, hereafter to be more fully noticed, is a well known fact of Canadian history which cannot be controverted.[18]

The Judicial Committee of the Privy Council, then the highest court of appeal of Canada, ruled in 1888 that the Indians had had a property right in their lands prior to the signing of Treaty 3 in 1873. Lord Watson ascribed the right to the Royal Proclamation of 1763 and described it as "a personal and usufructuary right, dependant upon the good will of the Sovereign."[19] That right was ended by the treaty. Nothing was transferred. The right was a real property right and could be described as an

[17] *Ibid.*, p. 597.

[18] *Ibid.*, p. 609.

[19] (1889) 14 A.C. 46 at 54.

"interest other than that of the Province"[20] in the land. When that interest was ended, the province had full ownership of the land. The Judicial Committee never dealt with the question of how Indian rights were ended, if indeed they had been, in non-treaty areas such as British Columbia and Quebec. They said that the Indians rights flowed from the Royal Proclamation. Perhaps they assumed that the Royal Proclamation had not applied to the Maritimes, Quebec and British Columbia. Perhaps they assumed that the Indians lost their personal and usufructurary rights whenever their actual use of the land ended, whether by treaty or by displacement. No suggestion of an answer to that question emerges from the decision.

A series of cases after the *St. Catherine's Milling* case contributed little to an understanding of the legal character of Indian aboriginal land rights. In 1897 the Judicial Committee of the Privy Council referred to the land portions of the Indian treaties as ordinary mercantile transactions.[21] While the description is remarkably pedestrian, it does suggest forcefully that the Indians had something with which to transact. In 1921 the Judicial Committee stated that Indian rights to land set aside as an Indian reserve were the same as the Indian rights to land described in the *St. Catherines Milling* case: a personal and usufructuary right.[22] It now became possible to have the nature of Indian aboriginal rights described by judicial descriptions of Indian rights to reserve lands. Judicial opinion on reserve land rights has not, however, been uniform. The Ontario Supreme Court in 1934 said that the Crown could do whatever it wished with reserve land as a result of prerogative powers.[23] In contrast the Exchequer Court stated in 1964:

> For all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the title in fee simple. Neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute.[24]

20 The words are taken from section 109 of the British North America Act, 1867, the section giving the ownership of the land and natural resources to the provincial governments subject to any interest other than that of the province. The Judicial Committee, by holding that the Indian title is an interest other than that of the province within the meaning of this section are affirming the legal, real property character of the Indian usufructuary title.

21 *Attorney-General of Canada v. Attorney-General of Ontario* (1897) A.C. 199 at 211.

22 *Attorney-General of Quebec v. Attorney-General of Canada* (1921) 1 A.C. 401.

23 *Point v. Dibblee* (1934) 2 D.L.R. 785.

24 *Brick Cartage v. The Queen* (1965) 1 Ex. C. R. 102 at 105.

The British Columbia Indian aboriginal rights issue was first raised in the courts in *Regina v. White and Bob* as a defence to a charge of hunting deer out of season, contrary to provincial laws. In 1963 two Indians were discovered with six deer in the area around Nanaimo on Vancouver Island. They appeared before Police Magistrate Beevor-Potts in Nanaimo and were convicted. Maisie Hurley, the widow of Vancouver lawyer Tom Hurley was the editor of the *Native Voice*, the newspaper of the Native Brotherhood of British Columbia, the coast organization headed by Guy Williams. Tom Hurley had defended Indians on many charges during his lifetime. Maisie Hurley contacted Tom Berger, a Vancouver lawyer who had, at one time, worked for Tom Hurley. Tom Berger handled the appeal of the case, a rehearsing before County Court Judge Swencisky in Nanaimo. Two expert witnesses were called: Wilson Duff, then provincial anthropologist for the Province of British Columbia, and Willard Ireland, provincial archivist. Wilson Duff gave evidence that the lands where the Indians had been hunting were within the traditional tribal territories of the Nanaimo Indians. Willard Ireland produced an Indian Treaty of 1854 dealing with the Nanaimo area. The document was very curious for it had no text, simply a set of signatures. The text, it was concluded, must be identical with the other southern Vancouver Island treaties, it being one of the series of 14. A second curious feature of the treaty was that it was signed by James Douglas as chief factor of the Hudson's Bay Company and not as governor of the colony of Vancouver Island. The position of the Crown was that the document was not a treaty because of its form and because it was not signed on behalf of the Crown.

The convictions were reversed. Judge Swencisky held that the document of 1854 was a treaty and its protection of hunting rights was effective by reason of a provision of the Indian Act.[25] He went on to hold:

"I also hold that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the Proclamation of 1763, has never been abrogated or extinguished and is still in full force and effect."

Interest began to increase in the case. The appeal to the British Columbia Court of Appeal was backed by the Native Brotherhood. The Appeal Court decision was handed down in December of 1964.[26] Chief Justice Davey wrote the leading judgment for the majority, holding that the document of 1854 was a treaty and that the Indian Act prevented pro-

[25] Indian Act, R.S.C. 1970, Ch. I-6, Section 88.

[26] 50 D.L.R. (2d) 613.

vincial laws from being applied to derogate from treaty protected hunting rights. Mr. Justice Norris wrote a long judgment concurring with the majority judgment. He went beyond the treaty question and ruled, as Judge Swencisky had, that the Indians' aboriginal rights had legal force. The judgment made a number of historical assertions, from the extent of Drake's voyage to the role of the Hudson's Bay Company as an arm of imperial policy. The question whether the Royal Proclamation of 1763 applied to British Columbia was emerging as possibly a decisive legal issue. Norris ruled that it did apply, suggesting British discovery of British Columbia before 1763.

The Supreme Court of Canada judgment in 1965 represented a minimal adjudication.[27] The court decided, at the end of argument for the Crown, that the document of 1854 was a treaty. No argument on aboriginal rights was necessary and none occurred. The judgment was a mere four or five lines. The court agreed with the judgment of Chief Justice Davey in the British Columbia Court of Appeal.

Another attempt to litigate the land issue was decided upon. Rather than waiting to raise the legal arguments as a defence in a charge of some kind, the Indians would go to court asking for a declaration that their aboriginal rights were in existence. Since it was the Crown in the right of the province which owned the land and natural resources, a claim of Indian aboriginal title was an assertion of property rights against the province. This was so even though jurisdiction over "Indians, and Lands Reserved for the Indians" lay with the federal government. It was worked out that Frank Calder and the chiefs of the Nishga tribe would sue on their own behalf and on behalf of the members of the Nishga tribe for a declaration that their aboriginal rights to their traditional lands had never been extinguished and continued in force. Historically the Nishga were appropriate plaintiffs. They had been very active in the early assertions of the land claim. Additionally, the area was one with few white encroachments. The case had interesting political implications. Tom Berger, who was now head of the provincial New Democratic Party, the official opposition party, was handling a case for Frank Calder, himself a New Democratic member of the legislature. On the other side was the Attorney-General of British Columbia, a member of the Social Credit cabinet, though the real claim was against the federal government, a party never directly represented in the litigation. Tom Berger did ask Jean Chretien, the Minister of Indian Affairs, to intervene in the case to support the Nishga claim, but the federal government was unwilling to

[27] 52 D.L.R. (2d) 481.

play that role (as it was unwilling to play a similar role, later, in the James Bay litigation).

The government of British Columbia chose to use Mr. Douglas McK. Brown as their lawyer. Mr. Brown, a private practitioner with a leading Vancouver law firm, had won the British Columbia Electric Company expropriation case against the Social Credit government in 1963. That had apparently impressed the government for after that his services were secured on a number of occasions.

In April of 1969 the *Calder* case began in Vancouver. The chiefs and elders from the Nass River area came down to attend the trial. Frank Calder gave evidence that, in his opinion, even the land under the Vancouver Court House was still Indian land. Wilson Duff, now a member of the faculty of the University of British Columbia, stressed, in his evidence, that the Nishga had had clear notions of ownership of land. Mr. Brown seemed frustrated in cross-examination, for the major documentary source for Duff's evidence was the unpublished field notes of Marius Barbeau located in the National Museum in Ottawa. Willard Ireland, the provincial archivist, testified. He described the evolution of the boundaries of British Columbia, thereby establishing the period when the Nass River area came within British colonial jurisdiction.

Two events occurred between the trial and the judgment. At the end of April a three-day conference of Indian leaders from all across Canada began in Ottawa. The federal government had held seventeen regional consultations with Indian leaders to discuss amendments to the Indian Act. The Ottawa meeting was the last meeting in the series and brought together representatives from all the regional meetings. This meeting was probably the most representative national meeting of Indian leaders held in Canada to that date. A series of questions had been posed by the government about specific sections of the Indian Act. But the meeting did not discuss the Indian Act. Over three days of patient discussions a consensus evolved: a priority was assigned to the resolution of treaty and aboriginal claims, a national committee was selected to direct the research, and a request was to be made to government for funding. The committee was composed of six members, representing the Maritimes, Quebec, Ontario, the Prairies, British Columbia and the two territories. When the minister of Indian Affairs asked what the relationship of the committee was to the proposed National Indian Brotherhood, the meeting defined the relationship as that of an autonomous sub-committee. Later at the founding meeting of the National Indian Brotherhood, the committee was accepted as a committee of the Brotherhood.

A second important event occurred within a few weeks. In June the federal government tabled its statement on Indian Policy in the House of Commons. The text refers to the "National Indian Committee on Indian Rights and Treaties." Therefore the text could not have been printed until after the final consultation meeting at which the National Committee was established. The government must have had the text virtually completed before the consultation. Certainly it did not address itself either to the questions the government had asked the Indians to discuss (for now the Indian Act was to be repealed) or to the priority that the Indians had set (treaties were to be terminated and aboriginal rights in non-treaty areas were not even claims, much less rights.)

One of the great paradoxes was that the only Indian leader in Canada who supported the white paper was Frank Calder. Perhaps it was his attitude of self-reliance and independence that led him to favour the ending of special status and the achievement of "equality." But he certainly was not in agreement with the government attitude toward land claims.

Without question, the white paper was the most creative thing that has happened in the area of Indian policy in Canada in living memory. Politicians, of all parties, praised the statement when it was tabled in the House of Commons. They began to realize the extent of their ignorance when the Indians came out strongly in opposition. None of the politicians had anticipated the Indian reaction. The Liberals, who have frequently had to squirm on Indian policy in the years since 1969, still like to remind the opposition spokesmen that they praised the new policy when it was first presented.

The federal government began to fund Indian organizations to hold discussions on the government's proposals. That evolved quickly into a policy of funding Indian organizations as continuing political organizations.

Mr. Justice Gould of the British Columbia Supreme Court handed down his judgment in the *Calder* case in October of 1969.[28] He held against the Nishga claim. In his view, whatever territorial rights the Nishga had could not have survived the establishment in the colony of British Columbia of general land legislation. He did not say whether Canadian law recognized the concept of aboriginal title. If it did, the title of the Nishga had been extinguished before 1871. The decision of Mr. Justice Gould was appealed to the British Columbia Court of Appeal.

[28] (1970) 8 D.L.R. (3d) 59.

Mr. Justice Norris was no longer on the bench and the British Columbia Court of Appeal unanimously rejected the appeal in May of 1970.[29]

The year following the publication of the federal government's white paper was one of intense organizing and political activity by Indian people. By the summer of 1970 the National Indian Brotherhood was a reality and every province and territory had a status Indian organization. British Columbia, that impossible province, had probably a half dozen different organizations in the spring of 1969. By the summer of 1970 a group of young Indian leaders had established the Union of British Columbia Indian Chiefs. They acted as hosts to the general assembly of the National Indian Brotherhood in Vancouver in 1970. George Manuel a Shuswap Indian from the interior of British Columbia was elected head of the Brotherhood, replacing Walter Dieter of Saskatchewan.

Frank Calder and the Nishga Tribal Council remained aloof from the new Union of British Columbia Indian Chiefs. The Union, predictably, organized around the land issue. They hired E. Davie Fulton, the former Conservative Minister of Justice, as their lawyer. The union was a new beginning. Fulton was not contaminated by prior connection with any particular Indian organization.

The idea of the Indian organizations intervening in the *Calder* case to support the Nishga claim was broached within the National Indian Brotherhood, but rejected at the general assembly in Vancouver in the summer of 1970. Indian reaction, outside the Nass Valley, seemed uniformly apprehensive about the case. (The case was premature. It might adversely affect Indians in the rest of Canada. The case should at least be delayed until the National Committee on Indian Rights and Treaties had a chance to complete some research.) The information was conveyed to Frank Calder that the Indian organizations would like to have the case delayed, but he refused. This was the Nishga's case. The torch had been passed down to him by his father and he stood for his people. He was openly critical of other Indian organizations.

In the spring of 1971 the Union of British Columbia Indian Chiefs and the Indians of Quebec Association initiated a series of meetings on the subject of aboriginal title. The Union of British Columbia Indian Chiefs was moving towards the presentation of their aboriginal title claim. The Indians of Quebec Association was expressing concerns that would eventually take shape in the litigation over the James Bay Power project. In September of 1971 a short paper, entitled "Aboriginal Title," was agreed to by Indians representing most areas of Canada.

[29] (1970) 13 D.L.R. (3d) 64.

The *Calder* case was heard by the Supreme Court of Canada in November 1971. Although the full court of nine was supposed to sit on the case, some chance happening resulted in a bench of only seven. The Chief Justice (Fauteaux) and Mr. Justice Abbott, two of the Quebec members of the Court, did not sit. Tom Berger, who had now been involved with this argument since at least 1963, had achieved excellent control of historical and legal materials. The case was to be his last for he had just been invited to accept an appointment to the British Columbia Supreme Court. Douglas McK. Brown appeared for the Province of British Columbia, and hardly appeared to take the case seriously.

In the same month that the *Calder* case was argued, the Union of British Columbia Indian Chiefs approved the final draft of its land claim, a document entitled "Claim Based on Native Title." It incorporated as an appendix the "Aboriginal Title" statement worked out nationally in September. The presentation of the claim to the prime minister and certain of the federal cabinet took place in July 1972. Frank Calder telegraphed the prime minister, protesting the fact that he would meet with the Union while the Nishga land case was still pending before the Supreme Court of Canada. Prime Minister Trudeau made reference to this during the presentation and indicated that a government reply might have to wait for a decision from the Supreme Court.

Two elections took place in 1972. In British Columbia the New Democratic Party came to power under Dave Barrett. Frank Calder became a minister without portfolio in the new cabinet. He was now a member of the government that he had taken to court. Frank Calder, as a cabinet minister, had to mend a few fences with the Indian organizations from which he had remained aloof. He appeared at the annual meeting of the Union of British Columbia Indian Chiefs in Prince Rupert in November of 1972 and gave a charming speech recounting the old days when he and other British Columbia Indian leaders went to Coqualeetza boarding school in the Fraser Valley. He said that if the Nishga won their case it would be a day not simply for the Nishga to celebrate but for all Indians in British Columbia.

There was a second election in 1972. The Trudeau government was humbled, but remained, precariously, in power. One of the areas where there seemed a clearly definable difference in the policies of the Liberals and the Progressive Conservatives was on the question of aboriginal title. The Tories in their campaign literature said they would recognize abori-

[30] See *Nesika*, newspaper of the Union of British Columbia Indian Chiefs, October 1972, page 3.

ginal claims. In British Columbia during the election campaign Trudeau said he doubted that aboriginal claims could be proven in law.[30] The Indian policy issue was not significant in the campaign, but it became significant soon afterwards. The James Bay case began in court in Montreal in the late fall of 1972. Though the action was against the provincial government, the federal government came under attack for not protecting the interests of the Indians in the face of provincial actions. The Mackenzie Valley pipeline proposal also included unresolved questions of Indian land claims.

In January 1973, the Supreme Court handed down judgment in the Calder case. Three judges held that the Nishga had aboriginal rights; three held that they did not. The seventh judge rejected the claim for procedural reasons and made no comment on the aboriginal rights question.

Mr. Justice Judson, holding against the Nishga claim, stated that the Royal Proclamation of 1763 did not apply to British Columbia, and said that the *St. Catherines Milling* case should not be taken to mean that the Royal Proclamation was the exclusive source of Indian Title. He stated:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right."

This was a rather refreshing demystification.

Mr. Justice Judson went on to rule, approving the trial judgment of Mr. Justice Gould, that the introduction of general land legislation in the colony prior to 1871 constituted a termination of whatever rights the Nishga Indians had to land outside of reserves.

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

Quoting from a decision of the United States Supreme Court, Mr. Justice Judson accepted the idea that the matter "gratuities for the termination of Indian occupancy" was a question for the politicians, not the courts.

Mr. Justice Hall wrote the judgment supporting the Nishga claim. He

attempted, initially, to rise above the cultural biases evident in certain other judicial pronouncements about Indian people:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species. This concept of the original inhabitants of America led Chief Justice Marshall in his otherwise enlightened judgment in *Johnson* v. *McIntosh*, (1923) 8 Wheaton 543, which is the outstanding judicial pronouncement on the subject of Indian rights to say, "But the tribes of Indians inhabiting this country were fierce savages whose occupation was war..." We now know that the assessment was ill-founded. The Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of "civilized" Europe of the 16th and 17th centuries. Marshall was, of course, speaking with the knowledge available to him in 1823. Chief Justice Davey in the judgment under appeal, with all the historical research and material available since 1823 and notwithstanding the evidence in the record which Gould J. found was given "with total integrity" said of the Indians of the mainland of British Columbia:

> ...They were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property.

In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.

Mr. Justice Hall, like Mr. Justice Judson, attempted to demystify the real property notions involved in the claim. He points out that possession is of itself proof of ownership.

Prima facie, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore the burden of establishing that their right has been extinguished rests squarely on the respondent.

It was conceded by counsel in the case that if there was an Indian title, it had not been expressly extinguished by treaty, prerogative act or legislation. Mr. Justice Judson held that the rights, if any, could be extinguished implicitly by the bringing into force of general land legislation. Mr. Justice Hall held that there was a legal Indian title based on aboriginal possession and that such a property right could only be taken away

expressly. The general land legislation, never mentioning Indian rights, could not effectively deprive the Indian people of their land.

The peculiar split decision of the Supreme Court of Canada served to increase dramatically the legal credibility of Indian land claims. Both Frank Calder and the National Indian Brotherhood took the position that the Supreme Court of Canada had, in effect, tossed the ball into the politicians' court.

Prime Minister Trudeau met with Frank Calder and representatives of the Nishga Tribal Council and, separately, on the same afternoon, with representatives of the Union of British Columbia Indian Chiefs and the National Indian Brotherhood. The prime minister described the Supreme Court judgment as meaning that "perhaps" the Indians had more "legal rights" than he had thought when the government had prepared its policy statement in 1969. He still refused to use the terms "aboriginal title" or "aboriginal rights." He advised the Indians to speak of "legal rights."

In February the Yukon Native Brotherhood presented their land claim to the prime minister. The Yukon is a non-treaty area and the claim, necessarily, was based on an assertion of "legal rights" arising out of aboriginal occupancy of the land. Prime Minister Trudeau praised the paper and the government appointed a negotiating team to meet with the Yukon Indians. Meetings began in the spring of 1973 and the third negotiating meeting is scheduled for October 1973.

The "Aboriginal Title" paper drafted in 1971 became the subject of a debate in the House of Commons on Wednesday, April 11, 1973. The opposition majority in the Standing Committee of the House of Commons on Indian Affairs and Northern Development had passed a motion approving the principle of aboriginal rights as more fully set out in the 1971 paper. The motion was talked out in the House and never came to a vote.

In June, final arguments were presented in Quebec Superior Court in the application by the Indians of northern Quebec for an interlocutory injunction against the James Bay power project.

In April the Indian chiefs of the Northwest Territories submitted a caveat, or notice of a claim of aboriginal title, to the registrar of the land titles system in the Northwest Territories. The registrar referred the question of the validity of the claim to Mr. Justice Morrow of the Supreme Court of the Northwest Territories. Mr. Justice Morrow began hearings on the claim in July of 1973, flying into isolated Indian communities to take evidence from elderly Indian people who had been present at the signing of Treaty 11 in the early 1920's.

On August 8, 1973, the federal government's about face on aboriginal land claims became official. In 1969 it had said it would recognize "lawful obligations" but that "aboriginal claims" were not specific claims capable of direct remedy. Now, Mr. Chretien announced, the government had accepted the principle that there ought to be compensation for the loss of an Indian "traditional interest in land." This statement was directed to claims in British Columbia, northern Quebec, the Yukon and the Northwest Territories. Other non-treaty areas, southern Quebec and the Maritimes, were described as being different, apparently because of their history of French sovereignty.

After announcing the new policy, Mr. Chretien answered questions by newsmen. He acknowledged that he had had difficulties with the governments of the two provinces concerned, Quebec and British Columbia. It was very difficult, he said, to get the province of Quebec to agree to a settlement. He said that he had written to the province of British Columbia "many months" before about the Nishga claim and still had not received an answer to his letter. In spite of this lack of co-operation, Mr. Chretien expected the provincial governments involved to pay a share of the compensation required to settle the claims on the basis that the provinces would benefit from the settlement. He anticipated "some difficulty" from the provinces over land issues if the provinces did not "realize what was in their best interest. . . ."

Predictably, one of the criticisms levelled at the new policy by George Manuel, President of the National Indian Brotherhood related to the role of the provincial governments. He expressed his fear that Indians were again going to be a political football, tossed between the federal and provincial governments. The constitutional power of settling Indian claims lay with the federal government, as Mr. Chretien had acknowledged. The Judicial Committee of the Privy Council had ruled in 1910 that provincial governments did not have to compensate the federal government for negotiating a treaty which gave clear title to land to a province.[31] The federal government was resurrecting an argument it had lost sixty-three years earlier.

Frank Calder began the Nishga case when little was happening in Canada on Indian questions. The final judgment, four years later, came at a time when a substantial momentum had been achieved. He has described the land claim as a "torch" thrown to him by his elders. "The mind of an Indian," he has said, "will never rest until this case is

[31] *Attorney-General of Canada v. Attorney-General of Ontario* (1910) A.C. 637.

settled."[32] By August of 1973, Frank Calder had been dismissed from his cabinet post, hurt by a minor scandal, but a settlement of the land claim which had been his "life's battle" seemed closer than at any time since Europeans first entered the Nass Valley.

[32] Slinger, "The Cabinet Minister who Says B.C. belongs to us Indians," *Toronto Star*, December 13, 1972.