NATIVE LAND CLAIMS IN BRITISH COLUMBIA

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Over the past decade, native land claims have become a major focus of public attention in Canada, and especially in British Columbia.

The matter is inexorably bound to the political and social destiny of Canadian aboriginal peoples. Canadian native leaders, with no apparent exceptions, link the social and individual health of their people to the removal of federal government control over their affairs. But few native leaders propose the removal of the federal presence without the creation of a new regime that would make native communities and tribal groups viable social and economic units.

Often excluded through social, economic and geographic barriers from participating in mainstream Canadian life, native groups demand that independence from government tutelage be accompanied by an economic base. Hence a requirement for a share in the control— and derived revenues— of the land. In some instances native groups enter the land claim arena for historical and cultural reasons. They claim to have never given up the land, and express no desire to trade their land tenure and cultural systems for those of industrial society. To mainstream Canada, the impact on land tenure in areas under native claim is the same.

The topic of land claims is as broad and diverse as Canada and the peoples who compose it. This paper will concentrate on a few general aspects of land claims in order to allow the reader to better appreciate specific claims as they arise.

The paper opens with a brief review of the legal considerations. This is not to say the matter is primarily a legal one, but it reflects the historic course of events. It was only under threat of losing in the courts that the federal government began to deal with the land claims as a legitimate political issue. The paper correspondingly moves from the legal to the political, summarising the reasoning of the governments of Canada and British Columbia. It includes a list of land claims in British Columbia and a discussion of the relationship of land claims and resource development.

The Legal Concept of Native Title

In Canada, native leaders have continually, if sometimes weakly, pursued their rights and titles since before confederation. From time to time the courts have discussed native title and early in Canadian history the Crown ackowledged the existence of specific rights through the Royal Proclamation of 1763 and through treaties, the last of which was signed in 1923.

The case law, however, is anything but consistent in regard to native claims. In fact, there appears to be two opposed lines of argument in our law concerning native rights and title.

The first line of argument is as follows:

- Discovery gave title to the government of the discoverer;
- The government of the discoverer had the exclusive right to extinguish native title of occupancy by purchase or conquest;
- Until the government extinguished native title, the natives maintained a legal and just possession, diminished only insofar as their power to dispose of the soil passed to the government of the discoverer;
- The native title was a usufructary right;
- The native title, while one of only use and enjoyment, was as exclusive and sacred as the fee-simple possession of the whites.

The second line of argument is less generous to native claims. It has developed mainly in the English Appeal Courts concerning colonial cases and is as follows:

- A change in sovereignty ought not to affect private property, but if it did, the court system of the nation is not able to remedy such an injustice. This is because a change of sovereignty is a matter between sovereigns, not a matter within the nation;
- In order for a native claim to be actionable by a national court, it must be shown that the object of that claim was ensured by prerogative or legislative act of the new sovereign. That a right existed before the change in sovereignty,

gains the native nothing.

These two arguments twine through the case law concerning native claims, often appearing as majority and minority decisions concerning the same matter. While the first argument holds the most comfort for the native claimants, both arguments indicate avenues through which native interests can be pursued.

The first argument would encourage natives in territories with no record of treaties, purchase or conquest to assert their title. This was attempted in the case of Calder et al v. Attorney General of British Columbia (1973) in which the Nishga Indians sought a declaration that their aboriginal title had never been lawfully extinguished.

The second argument encourages natives to seek legislative recognition of their rights as they now have done in regards to the Canada Act. Furthermore, the second line of argument points natives to international courts and the United Nations, which they have now approached on several occasions.

As natives and their advocates have become more sophisticated and resourceful, political leaders in the legislative branch of the federal government have come to realise that even the apparently unsympathetic second line of argument will not buy peace or security from native claims. No federal party dares leave the resolution of these matters to federal or international courts, for the judicially correct solution might be politically disastrous to the party in power.

The Response of Government

THE IMPORTANCE OF THE CALDER CASE

The Calder case precipitated an abrupt change in federal government policy concerning native land claims. The plaintiffs based their 'argument' on the Royal Proclamation of 1763, in which George III forbade settlement and purchase of lands not included in the existing colonies and the territories granted to the Hudson Bay Company, and of all lands west of the Atlantic watershed, unless they were first ceded to, or purchased by, the Crown. The court held that the Royal Proclamation of 1763 did not apply to Nishga territory, because it was terra incognita at that time. The Nishga lost their case through two appeals ending with the Supreme Court of Canada. But they did so by a narrow margin: three justices concurring, three dissenting and one dismissing the appeal on a technicality. The dissenting justices Hall, Spence, and Laskin argued strongly that earlier judgements were impaired by ill-founded assessments of Indian society. They adopted the first line of argument described above, and turned responsibility around so that the province, and not the Nishgas, should bear the burden of establishing a right to possession.

As late as 1969, Prime Minister Trudeau had categorically refused to consider questions of aboriginal rights and claims. Immediately following the Calder decision in 1973, however, the federal government committed itself to negotiating the settlement of aboriginal claims and established the Office of Native Claims the following summer.

What had happened was that the federal government, upon examining the Calder case, came to realise how possible it was that the courts could render a decision regarding native claims which would be economically and politically devastating and therefore unacceptable to white Canadians. Justice Hall's dissenting argument in favour of the existence of Nishga title, regardless of legislative act, was made with such force and eloquence that it became the memorable aspect of the case. Native leaders, realising that the court had afforded them only a moral victory and might not do so again, accepted the federal government's offer to negotiate claims. Both sides realised the wages of losing in court were high, and a political compromise made more sense.

Furthermore, the government became aware of growing unanimity of discussion among those informed about the lives of natives in Canada. The position of native people at the bottom end of social, political and economic power structures— in spite of the costly intervention of the State in the details of their lives — was an affront to everyone. While there was— and still is— great debate in both native and white society as to what should be done, there was little difference of opinion that the present situation was inconsistent with Canadian values of human and democratic rights.

This sense of moral sympathy with the native cause was expressed in all three hearings of the Calder case. Justice Gould of the Supreme Court of B.C., who found against the Nishgas, bore evidence of this in concluding his judgement with these words:

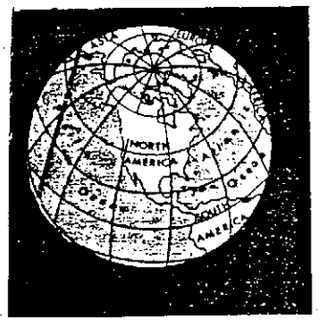
'One would have to be self-blinded to events and attitudes of the day to ignore the fact that the litigation is of great concern, and this judgement a deep distress, to the Indian peoples of British Columbia. I take the judicial liberty of recording my opinion that

should the Nishgas wish to appeal this judgement, the cost of preparing the appeal books because of the historical documents germane to the issue, would amount to a sum probably beyond their financial resources. The same sum, in the context of the provincial treasury, would be insignificant.'

Position of British Columbia

The provinces have not been anxious to take part in discussions of land claims. British Columbia consistently avoids discussion of native claims and takes the following position:
- 'Native title' is not a concept that existed in common law when the English Crown exercised claims of sovereignty over those lands which became British Columbia;
- If such a concept did exist, it was dependent upon executive or legislative order;
- The Royal Proclamation of 1763 could not apply to B.C. because B.C. was terra incognita at the time of the Proclamation.

This position was approved by the trial judge in the Calder case and supported in the Supreme Court of Canada by Justices Martland, Judson and Ritchie. It is, indeed, the interpretation that the federal government believes has the most firm legal basis. But as stated above, the federal government has taken note that three other judges of the Supreme Court took the opposite view. In fact, it has been a source of wonder to senior officials of the federal Department of Justice that the Calder case did not cause the Province of British Columbia to become at least as perturbed as the federal government about the possibility of a subsequent court being composed of a majority of judges who would support aboriginal rights.



The federal government's concerns about British Columbia's continued reticence to review its position on land claims can be summarised as follows:
- The provisions of the Constitution Act of 1867 which limit the effect of provincial land laws on 'land reserved for Indians' may apply to all lands on which native title has not been extinguished, as Justice Judson, in Calder, found to be the case in pre-Confederation British Columbia, and as the trial judge in Hamlet of Baker Lake found to be the case in Ruperts land;
- If the courts follow Justice Judson's definitions of Indian lands, the major part of British Columbia (and much of Quebec and Labrador) maybe so defined;
- If Indian title is found to survive in areas of the province, and if federal exclusivity over Indian lands were to be given in accord with the Constitution Act of 1867, serious holes could be opened in the provincial land regime.

Aboriginal Rights Section

The Constitution Act of 1982 strengthened the argument for native land claims. Historically, provinces could pass legislation which was detrimental to native rights, as long as the legislation pertained to valid provincial objects and affected natives as citizens of the province rather than natives, per se. Now, Section 52(1) of the Constituion Act of 1982 provides:

'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect'.

and in regard to natives rights Section 35(1) declares:

'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed'.

The constitutionality test, therefore, is no longer whether provincial laws are in relation to provincial objects, but rather if they are consistent with existing aboriginal and treaty rights. The Department of Justice has concluded that this section will give native groups a considerable advantage in the courts, as judges will be quite willing to issue interim injunctive relief while the effect of a law on existing aboriginal rights is determined.

The Department of Justice, in fact, looks ahead to some very serious problems for the province:
- Future provincial enactments regarding natural resources could be overturned because they are inconsistent with Section 35(1) of the Constitution Act of 1982;
- Federal laws, such as the Fisheries Act, could be held ineffective to limit aboriginal fishing rights;

- The native leadership of B.C. has made clear that it will press for sweeping interpretations of Section 35(1);
- Until the courts have resolved the interpretive issues of the constitution, the natives will likely enjoy easy access to interim injunctive relief until their cases are disposed of;
- This interim relief will in some cases stop major projects;
- When the courts finally decide on aboriginal and treaty rights, the interim injunctive relief could well become permanent.

Federal Policy

There is no question that the federal government has determined the only safe avenue away from the risks associated with court decision is through formalised land claim negotiations.

Following the Calder decision of 1973, the federal government in 1974 prepared a policy concerning land claims and established the Office of Native Claims within the Ministry of Indian Affairs and Northern Development to represent the Minister and federal government, for the purposes of settling claims through the negotiation of agreements. Although the office and its procedures were unilaterally established by the federal government, native leaders have generally accepted the federal approach.

The federal land claims policy divides native claims into two categories: specific and comprehensive.

Specific claims are those claims based on unfulfilled lawful obligations such as a failure to keep a treaty, a breach of the Indian Act, a breach of trust, the illegal disposition of Indian lands, failure to compensate for lands taken by the federal government, or fraud by federal government agents.

Hundreds of such claims have been presented to Indian Affairs, and the Province of British Columbia has participated in negotiations to settle them. It is under this policy that the claim of the Penticton Band was settled resulting in the return to the Band of 4,855.2 hectares of provincial Crown land as well as $14.2 million from federal and provincial governments. The recent return of large portions of Ambleside Park to the Squamish Band also took place under this policy. The motivation for these settlements is not goodwill on the part of the province and Canada: it is prompted by the very real likelihood that a court would have found in favour of the native claimants.

Comprehensive claims are those based on the concept of native title. Because the Province of British Columbia does not accept the existence of native title, it has not participated in the negotiation of comprehensive claims. The federal government has accepted claims from twenty-four (24) native groups, fourteen (14) of which are located in British Columbia. A further thirteen (13) claims are under review or anticipated in the province. If all claims are accepted, very little of the province's surface will remain unclouded.

When the federal government accepts a comprehensive claim, it admits that a review by the Office of Native Claims and the Department of Justice has indicated there is sufficient substance in the claim to merit the cost and time involved in negotiating a settlement. Claims negotiations have been successfully concluded only twice: the James Bay and Northern Quebec Agreement of 1975 and the supplementary Northeastern Quebec Agreement of 1978. The federal government and natives have hovered near agreement in the Yukon and Western Arctic for a decade. The Western Arctic claim, in fact, appears to be awaiting only the formalities of signing.

In 1979 a test for native title was established for the first time in the case of *The Hamlet of Baker Lake et al v the Minister of Indian Affair and Northern Development et al*. The court held that 'the elements which the Plaintiffs must prove in order to establish an aboriginal title cognizable at common law ...' are:
- That they and their ancestors were members of an organised society;
- That the organised society occupied the specific territory over which they assert the aboriginal title;
- That the occupation was to the exclusion of other organised societies;
- That the occupation was an established fact at the time sovereignty was asserted by England.

In British Columbia, claims negotiations have commenced with the Nishgas, but have made little progress because of the refusal of the province to actively participate. The leaders of all claimant tribal councils are also reluctant to proceed too quickly with the terms of settlement because each council wants to build its settlements on that of the others: no one wants to be the first. In addition, natives are dissuaded from making hasty settlements by the ongoing constitutional talks concerning native rights, which offer them the promise of an improved bargaining position in a few years.