

Aboriginal Land Title: The Nisga'a's Fight for Sovereignty

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As Canada continues to progress into the twenty-first century, arguably the biggest issue facing the future of the country is its relationship with aboriginal peoples. While aboriginal rights is one of the oldest issues of human rights in the country, it has only been in the last few decades that it has entered the consciousness of the courts and legislatures. To illustrate this point, the Nisga'a's battle for sovereignty dates back over a century. This includes attempts for government consultation, royal visits to London, damaging legal restrictions imposed by the infamous Indian Act and lastly, a Supreme Court decision. The Nisga'a's fight for sovereignty is best characterized by their perseverance, strength and unrelenting fight for justice. This paper will show how the historical affairs between the courts and the Aboriginal peoples of British Columbia, specifically the Nisga'a, can serve as a case study to highlight the greater issues of Canadian Government-Aboriginal relations.

The issue of aboriginal rights is one of the oldest questions of human rights in Canada. At the same time, however, it is also very recent; for only in the last few decades has the idea of Aboriginal land title entered the consciousness of the courts and legislature.¹ The subject of Aboriginal rights begins with the colonial occupation of a continent already inhabited by other peoples with their own cultures, languages, institutions and ways of life.² Today, Aboriginal peoples are advancing their claims for lands they once occupied, while also calling for self-determination and self-government. In the 1970s, the emergence of an influential Aboriginal political force caused the Canadian

¹ Irwin Clarke, "The Nisga'a Indians and Aboriginal Rights," *Fragile Freedoms* (1981): 219.

² Clarke, "The Nisga'a Indians and Aboriginal Rights," 219.

courts and legislatures to address Aboriginal sovereignty.³ In British Columbia, Aboriginal protest regarding land title has been challenged. Specifically, one British Columbian nation has been at the forefront of this controversy: the Nisga'a. The Nisga'a's battle dates back to the colonization of North America, and goes forward to the legal disputes of the Canadian Courts and legislatures. This paper will show how the historical affairs between the courts and the Aboriginal peoples of British Columbia, specifically the Nisga'a, can serve as a case study to highlight the greater issues of Canadian Government-Aboriginal relations.⁴

When Europeans arrived in North America, they began to colonize it. They primarily asserted their sovereignty over the First Nations and the New World by virtue of the principle of discovery. Europeans justified the dispossession of Aboriginal peoples with arguments of moral superiority and religion.⁵ Furthermore, the idea of civilizing the 'savages' and making the land productive became the rationale for expanding colonial power.⁶ However, many Europeans recognized that Aboriginal peoples were the land's original occupants, and retained a legal interest in it. For instance, early expansion into Canada marked few agreements between colonizers and Aboriginals, however, the Royal Proclamation of 1763 became the British Crown's first legal recognition of Aboriginal rights. It established the important precedent that Aboriginal peoples had certain rights to their lands and reserved these rights until they were purchased or ceded from them. Moreover, the Royal Proclamation of 1763's inclusion under S. 25 (a) of the Canadian Charter of Rights and

³ Clarke, "The Nisga'a Indians and Aboriginal Rights," 219.

⁴ Clarke, "The Nisga'a Indians and Aboriginal Rights," 220.

⁵ Clarke, "The Nisga'a Indians and Aboriginal Rights," 220.

⁶ Cole Harris, "The Native Land Policies of Governor James Douglas," *BC Studies* (2012): 2.

Freedoms entrenched its legitimacy within the Canadian legal system.⁷

In British Columbia, like other colonies, it was in the best interest of settlers to develop the land.⁸ Thus, in 1849, Vancouver Island was established as a Crown colony, and James Douglas was named its first governor. Douglas was a strong advocate for the development of the British colonial enterprise. However, Douglas believed that Aboriginal peoples were just as competent as any other, and that their assimilation into British society was also possible.⁹ Douglas had a great deal of experiences with Aboriginal affairs, had been a fur trader and was even married to a *Métis* woman. Douglas' policy regarding Aboriginal land was that only after Aboriginal title had been extinguished by a treaty could colonial settlement proceed. For example, on Vancouver Island, Douglas entered into fourteen treaties which called for the cession of Aboriginal land and provision of reserves. Within these treaties, Aboriginals were able to retain the right to hunt and fish over the land until it was taken up for settlement.¹⁰

In 1867, the unification of Vancouver Island and British Columbia marked the beginning of settlers ignoring their responsibility to negotiate with Aboriginals. The newly unified British Columbia began to deny Aboriginal title when the legislature realized that the funds to finance Aboriginal claims would have to be provided locally.¹¹ Joseph Trutch, Chief Commissioner of lands and works of the newly united colony of British Columbia, claimed:

⁷ Anthony J. Hall, "The Royal Proclamation of 1763," *Canadian Encyclopedia*, February 7, 2006.

⁸ Harris, "The Native Land Policies of Governor James Douglas," 2.

⁹ Harris, "The Native Land Policies of Governor James Douglas," 3.

¹⁰ Clarke, "The Nisga'a Indians and Aboriginal Rights," 222.

¹¹ Clarke, "The Nisga'a Indians and Aboriginal Rights," 223.

The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them; and I cannot see why they should ... retain these lands...for the general interests of the colony.¹²

While British Columbia and Trutch no longer recognized Aboriginal title, the authorities agreed that Aboriginals deserved enough land to be sufficient for the probable requirements of cultivation. British Columbia soon adopted a reserve system.¹³

In 1871, British Columbia entered Canadian Confederation over the promise of a Pacific railway. However, delays with implementing the infrastructure created an acrimonious relationship between British Columbia and Ottawa. Moreover, new disputes over Aboriginal title and reserves added to the tension. Under the British North America Act, “Indians and Lands Reserved for the Indians” came under federal jurisdiction.¹⁴ However, under s. 92 (13) of the BNA Act, property and civil rights fell within the jurisdiction of the provincial governments—creating a constitutional dilemma over division of powers.¹⁵

While the BNA Act’s list of enumerations was left to be interpreted by the courts, there was no element of the Constitution that was more threatening to provincial autonomy than the federal powers of reservation and disallowance. Under disallowance, the Federal Government could render null and void any provincial law a year within its passage.¹⁶ Consequently, British Columbia acted promptly through the adoption of the

¹² Harris, “The Native Land Policies of Governor James Douglas,” 11.

¹³ Harris, “The Native Land Policies of Governor James Douglas,” 11.

¹⁴ “The British North America Act,” *Solon*.

¹⁵ “The British North America Act,” *Solon*.

¹⁶ Peter H. Russell, “Constitutional Odyssey: Can Canadians Become a Sovereign People?” (Toronto: University of Toronto Press, 2004), 38.

1874 Land Act. The act was meant to address the disposition of Crown lands. However, it made no provision for supplying Aboriginal reserves. Through the use of the Federal powers of reservation and disallowance, the 1874 Land Act was disallowed. This was followed by a letter written from Prime Minister Alexander Mackenzie's Minister of Justice, Telesphore Fournier, stating: "There is not a shadow of doubt, that from the [Royal Proclamation of 1763], England [and its dominions] have always felt it imperative to meet the Indians in council."¹⁷

Under Prime Minister Alexander Mackenzie, the Federal Government had attempted to obtain a settlement of its claims for the Aboriginals of British Columbia, but failed because there was no constitutional obligation requiring the province to make such a deal. Nevertheless, Aboriginal peoples across British Columbia continued to fight the ethnocentric policies of the British Columbia Legislature. In 1887, the Provincial Government appointed a Royal Commission to "[e]nquire into the Conditions of the Indians of the Northwest Coast."¹⁸ It was during the commission's arrival in the Nass Valley when it first interacted with one of Canada's most resilient Aboriginal groups: the Nisga'a. Addressing the commission, Nisga'a Chief David Mackay summed up the Aboriginal perspective perfectly: "The Government is saying it will give you this much land, [yet] how can they give us land when it is our own? We cannot understand it."¹⁹

The turn of the century marked new opportunities for Aboriginal peoples and their quest for sovereignty. However, it began with more disappointment. In 1906 and in 1909, delegations of Aboriginal Chiefs from British Columbia went to

¹⁷ Clarke, "The Nisga'a Indians and Aboriginal Rights," 226.

¹⁸ Clarke, "The Nisga'a Indians and Aboriginal Rights," 230.

¹⁹ Clarke, "The Nisga'a Indians and Aboriginal Rights," 230.

London to present their demands to the King himself.²⁰ However, even the Imperial government was powerless to change the mind of the provincial government in British Columbia. In 1909, the Premier of British Columbia, Richard McBride, stated, “Of course it would be madness to think of conceding to the Indians’ demands. It is too late to discuss the equity of dispossessing the Red man [*sic*] in America.”²¹ In 1913, the Nisga’a formed the Nisga’a Land Committee. They soon formed a coalition of tribes called the Allied Tribes of British Columbia.²² However, the Federal Government was determined to end the question of Aboriginal sovereignty, and in 1927, they created an amendment to the infamous 1876 Indian Act prohibiting the raising of funds to pursue land claims without leave from the Department of Indian Affairs.²³ In the second quarter of the twentieth century, claims to Aboriginal treaty rights all but disappeared from Canadian Courts. Aboriginal claims became largely unknown to the judiciary. In 1951, the amendment was repealed, and Aboriginal peoples were able to reassert themselves into the courtroom.²⁴

Prior to 1951, no cases arose concerning Aboriginal title in British Columbia or other non-treaty areas in Canada. However, outside of Canada, cases involving Aboriginal title in a number of African colonies arose. Early Judicial Committee of the Privy Council (JCPC) decisions stated that Aboriginal tribes were too primitive to have their title continue under the British regime. However, in a monumental case from Nigeria, the JCPC rejected these requirements of individual ownership and indicated that

²⁰ Clarke, “The Nisga’a Indians and Aboriginal Rights,” 229.

²¹ Clarke, “The Nisga’a Indians and Aboriginal Rights,” 231.

²² “Nisga’a Land Committee,” *Nisga’a Lisims Government*.

²³ Douglas C. Harris, “A Court Between: Aboriginal and Treaty Rights in the BC Court of Appeal,” *Pacific Affairs* (2009): 2.

²⁴ Harris, “A Court Between,” 2.

pre-existing communal or tribal title should be presumed to continue under the British. This ruling was made by Viscount Haldane.²⁵ Haldane's ruling came at a time when the land claims efforts of the Allied Tribes of BC were most intense. Haldane's ruling likely influenced the Canadian Parliament's decision to outlaw claims-related activity, making it legally impossible for Aboriginals in British Columbia to take the necessary steps to get their claims to the JCPC.²⁶

Upon signing the Declaration of Human Rights in 1948, Canada was forced to re-examine its treatment of minority groups and expand their civil liberties. In 1960, under Prime Minister John Diefenbaker, the Federal Government gave non-enfranchised Aboriginals the right to vote in federal elections.²⁷ Moreover, in 1967, the growing civil rights movement created the opportunity for the Nisga'a to bring a suit before the Supreme Court of British Columbia. Their claim was a simple one: Aboriginal title had never been extinguished in British Columbia.²⁸ In April of 1969, President of the Nisga'a Tribal Council, Frank Calder, had his claim opened in the Supreme Court of British Columbia before Mr. Justice J.G. Gould, in what legal historians have called the "Calder Case."²⁹

Counsel for the province of British Columbia argued that Aboriginal title was a concept unknown to the law and that, even if such title had existed, it had been extinguished by the old colony of British Columbia. Justice Gould agreed that sovereignty over British Columbia flowed from the Imperial Crown of England, and if the Nisga'a had ever possessed a right

²⁵ Paul Tennant, "Aboriginal Title in the Courts," *Aboriginal Peoples and Politics* (1990): 214.

²⁶ Tennant, "Aboriginal Title in the Courts," 215.

²⁷ "1951-1981: Aboriginal Rights Movement," *Canada in the Making*.

²⁸ Neyooxet Greymorning, "Calder V. Attorney General of BC," *The Canadian Journal of Native Studies* (2006): 5.

²⁹ Greymorning, "Calder Case," 5.

to the land, it was extinguished by the Imperial government.³⁰ The judges dismissed the protection under the Royal Proclamation of 1763 stating that the land was “*terra incognita*” and not recognized under British law. Nevertheless, the Nisga’a did not give up. In November of 1971, they brought their case before the British Columbia Court of Appeal. While the Court of Appeal also dismissed the case on the account that the Nisga’a people were not officially recognized by the Crown, the Nisga’a continued to press the issue until it was brought before the Supreme Court of Canada in January of 1973.³¹

Strategically, the Nisga’a limited their claim to Aboriginal title, avoiding the contentious issue of “self-government.” Seven judges sat, marking the first significant case on Aboriginal land title and its use.³² The Supreme Court judges organized the question of Aboriginal title into three issues: (1) whether Aboriginal title existed in the first place; (2) whether, in the case of the Nisga’a, the title had been lawfully extinguished; (3) a procedural issue as to whether or not the Court had jurisdiction to grant such a declaration despite the fact that the Nisga’a had not secured permission to sue the Crown.³³ Six of the seven judges affirmed that Aboriginal title exists as a right within the common law, regardless of government recognition or acknowledgment by a treaty. However, three of those justices found that Aboriginal title had existed, but was extinguished. On the other hand, the other three justices found that there was no proof of extinguishment. On this calculation, the court was tied. Mr. Justice Louis-Philippe Pigeon, the seventh judge, expressed no

³⁰ Clarke, “The Nisga’a Indians and Aboriginal Rights,” 237.

³¹ Greymorning, “Calder Case,” 6.

³² Lorraine Weir, “Time Immemorial and Indigenous Rights: A Genealogy and Three Case Studies from BC,” *Journal of Historical Sociology* (2013): 389.

³³ Weir, “Three Case Studies from BC,” 389.

opinion on the main issue. Pigeon declined to believe that the Nisga'a peoples had their own ideas of land ownership and Chief Justice Davey summed up Pigeon's opinion on the matter: "They were undoubtedly at the time of settlement a very primitive people with few of the of the institutions of civilized society, and none at all of our notions of private property."³⁴

While the Nisga'a lost their battle in the Supreme Court by a count of 4-3, their battle brought the notion of Aboriginal title into the mainstream of Canadian Politics. On 8 August 1973, Jean Chretien announced that the Federal Government intended to settle Native land claims in parts of Canada where no treaties had yet been made.³⁵ It was fitting that under the Trudeau government in 1982, Jean Chretien, now Minister of Justice, was an integral drafter of S. 35(1), and the inclusion of the Royal Proclamation of 1763 in S. 25 (a) of the Canadian Charter of Rights and Freedoms. Section 35 (1) states that "existing aboriginal and treaty rights... are hereby recognized and affirmed," and section 35 (2) defines Aboriginal peoples of Canada as including Indians, Inuits and Métis."³⁶ However, there still remains considerable ambiguity within the Charter, because it does not spell out what these "existing rights" actually are: in the absence of agreements and treaties that would answer this, it has been left to the courts to decide."³⁷

Even after the adoption of the Charter, British Columbia's opinion on Aboriginal rights remained unchanged. In 1991, Mike Harcourt's NDP government was elected and agreed to open negotiations with the Nisga'a people and other First Nations

³⁴ Clarke, "The Nisga'a Indians and Aboriginal Rights," 242.

³⁵ Clarke, "The Nisga'a Indians and Aboriginal Rights," 248.

³⁶ Claude Denis, "The Nisga'a Treaty: What Future for the Inherent Right to Aboriginal Self-Government?" *Review of Constitutional Studies* (2002): 41.

³⁷ Denis, "The Nisga'a Treaty," 42.

groups throughout the province.³⁸ In the fall of 1995, the federal and BC governments finally proposed a settlement to the Nisga'a people. After a few years of negotiating and fine-tuning the proposal, a final agreement was signed on 4 August 1998. The Nisga'a settlement provided two thousand square kilometers of land, and self-governing institutions. Importantly, it capped more than a century of struggle for justice, and a new era of tolerance and respect for Canadians.³⁹ It was summed up perfectly on 2 December 1998 in the BC Legislature when Chief Joseph Gosnell declared " [t]oday marks a turning point in the history of British Columbia. Today, Aboriginal and non-Aboriginal people are coming together to decide the future of this province."⁴⁰

While the Nisga'a agreement was more than a century in the making, it was not without its critics. Many argued that the Federal Government was pursuing its own agenda of containing the scope of indigenous demands. The Nisga'a were only able to obtain a very small part of the land they had claimed, amounting to roughly 8 percent. Moreover, the Nisga'a were forced to make large concessions to the Provincial Government, including the amount of land obtained and limits to logging and fishing rights.⁴¹ On some issues, the Federal Government stepped in to compensate the Nisga'a. However, the Federal Government's fiduciary responsibility to compensate First Nations could be considered minimal at best. Lastly, the Nisga'a's agreement was met with great hostility from the opposition party: the BC Liberals.

While the Nisga'a agreement was not perfect, it did change the attitude of the Provincial Government regarding Aboriginal

³⁸ Denis, "The Nisga'a Treaty," 51.

³⁹ Joseph Gosnell, "Nisga'a Treaty is a Triumph for all Canadians," *Canadian Speeches* (1999): 2.

⁴⁰ Gosnell, "Nisga'a Treaty is a Triumph for all Canadians," 2.

⁴¹ Denis, "The Nisga'a Treaty," 10.

peoples. Interestingly, former BC Liberal Premier, Gordon Campbell, an active opponent of the Nisga'a agreement, suddenly changed his mind. In 2006, he stated to the Federal Government that:

Canada's first nations, Metis and Inuit people should not be further marginalized by dint of this effort to unite Canada, which leaves them noticeably out of the picture. It is high time we formally acknowledge Canada's third solitude -- the aboriginal peoples of Canada.⁴²

Moreover, on 26 June 2014, the Supreme Court of Canada made a landmark ruling in what legal observers are calling the most important Supreme Court ruling on Aboriginal rights in Canadian history.⁴³ For the first time, the Court recognized the existence of Aboriginal title on a particular site in British Columbia's interior. The courts determined that Aboriginal peoples still own their ancestral land, unless it was signed away in a treaty with the government.⁴⁴

There are nearly fifty million Native people in North and South America and almost everywhere they are dispossessed, poor and powerless. They have never given up, and they have continuously refused to be assimilated. Canada, and specifically British Columbia, has been given the opportunity to address these problems by providing a fair settlement of Native claims and creating a strong partnership moving forward. In conclusion, while the Nisga'a agreement was over a century in the making,

⁴² "Recognize Aboriginals as Nation in Canada, Campbell Says," *Vancouver Sun*, 27 November 2006.

⁴³ Sean Fine, "Supreme Court Expands Land-title Rights in Unanimous Ruling," *Globe and Mail*, 26 June 2014.

⁴⁴ "Supreme Court Expands Land-title Rights in Unanimous Ruling," *Globe and Mail*.

its conclusion marked a positive turning point for the future of Aboriginal and non-Aboriginal relations in Canada.

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