

The Calder Case: Setting A Precedent for Indigenous Canadian Constitutional Relations

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Indigenous-State Relations around land claims in Canada have been an area of significant debate throughout the past fifty years. Often, the land claims process that the Indigenous nations had to work through was one that was not conducive to a proper settlement. In the case of the Nisga'a and their land claims case during the 1970s, the Nation challenged the system that had held them from asserting their sovereignty, providing a way for the Nisga'a and other Indigenous nations to not only sign treaties, but assert their own rights as well. This landmark case ultimately saw the Nisga'a utilize their oral histories to prove their occupancy on the lands, helping invalidate the state's claim that the lands had been empty prior to the arrival of settlers in the 19th century.

The 1973 court case of *Calder et al. v. Attorney General of British Columbia* was a landmark case for Indigenous peoples in Canada, as it challenged the Canadian Constitution and the structure that defined how First Nations land claims were administered. In this case, the Nisga'a addressed positions related to the use of the land and the lack of a treaty, in order to reassert their determination for sovereignty over their territories. The Nisga'a faced many hurdles as part of this claim, with the limitations of the Canadian Constitution, as well as language and precedents of the legal system providing a challenging battle. From the results of the Calder Case, the Nisga'a were able to assert their rights to their land, and ultimately pave the way for a treaty between the Nisga'a Nation and Canada in the 1990s. While the Nisga'a suffered an initial defeat in 1973 by way of a technicality in this case, the ripples that resulted from the Calder trial would have an effect on Canadian-First Nations relations for years to come.

The Calder Case was based on a historical issue of the status of Nisga'a Land. In the eyes of the British Columbian Government, the lands that the Nisga'a had resided upon had been automatically ceded to the settlers upon their arrival in the Nisga'a Territories.¹ For the Nisga'a, this issue of residence was the core of their case, to prove that

¹ J.R Miller, *Compact, Contract, Covenant: Aboriginal Treaty Making in Canada*, (Toronto: University of Toronto Press, 2009), 251.

their title to the land was one that had not been extinguished and their claim to the land still stood due to the lack of any formal agreements.² Many years of debate and discussion between various levels of Government and the Nisga'a Nation often led to stalemate and deadlock, with no acceptable settlement presenting itself. In 1969, Chief Frank Calder³ of the Nisga'a Nation launched a court action to confirm that the Nisga'a still were in control of their land. The heart of the argument presented by Calder was that the Nisga'a Nation still had a standing, unextinguished aboriginal right to the lands that had been seized by the Canadian Government.⁴ Calder's belief was that since the rights had not been extinguished under treaty, the lands were still Nisga'a territory and therefore a treaty was required if the Crown was to gain control of the territory. The main thrust of the Nisga'a argument was their claim of legal ownership to the land that stemmed from time immemorial. This idea suggests that from this prior occupancy, the Nisga'a were still in control of their lands especially due to the fact that a treaty had never been signed.⁵ With this argument relying heavily on their oral histories to prove their claim, the Nisga'a were moving boldly into an uncertain part of the land claims process. Despite having the initial claim denied, the Calder decision ultimately helped the Nisga'a Nation bring the two levels of Government together in order to negotiate a treaty between the Nisga'a and the rest of Canada.

While the majority of the Calder Case would be considered a victory for the Nisga'a, the fact that this lawsuit was rejected demonstrated one of the major issues that faced First Nations looking for a legal settlement in Canada. When the final ruling on the case was delivered, three judges had decided in favour of the Nisga'a, with three pronouncing against, while one other judge had ruled against the

² The Nisga'a Territories referenced in the paper refer to the areas north of Terrace, B.C., known as the Nass Valley. This territory follows the Nass river, from the Pacific Coast to the Kispiox River east of Terrace.

³ Chief Frank Calder was a Nisga'a Chief, but was also, at the time of the *Calder Case* the MLA in the British Columbia Legislature for the Bulkey-Stikine Riding, where the Nass Homelands were located. He was the person who took the lead for the Nisga'a in the case.

⁴ Michael Asch, "From Calder to Van der Peet: Aboriginal Rights and Canadian Law, 1973-96," in *Indigenous Peoples Rights in Australia, Canada and New Zealand*, ed. Paul Haveman (Auckland: Oxford University Press, 1999), 430.

⁵ Miller, *Contract, Compact, Contract, Covenant*, 255.

Nisga'a due to a technicality in the process.⁶ The judges who had ruled against the Nisga'a were of the belief that any Nisga'a rights to the land had been extinguished upon colonization and Confederation.⁷ This did not align with Nisga'a beliefs, which were still strongly rooted to the idea that the land had never left their ownership. The courts made this assumption as a result of ambiguity in the British North America Act (BNA Act.) The Act did not allow for any protections for First Nations and their sovereignty; to provide for such protection the Canadian Government would have required the consent of the affected peoples in order to proceed with their actions.⁸ With the courts considering the precedents from the BNA Act, the Nisga'a claim in the 1973 case was rejected. The act suggested that if a First Nation was to have its sovereignty protected, it would more than likely need a treaty with the Federal Government. This did not account for how the Federal Government applied its power post Confederation, as the Government of the settlers became responsible for First Nations and their territories, further stripping influence and control from them. As the powers of the BNA Act were applied after Confederation, the legitimacy of the First Nations governance structure was diminished, leaving the question of aboriginal sovereignty to be completely moot.⁹ With the Constitution of the time, there seemed to be no way for any sort of First Nations control of sovereignty, as every aspect of their existence had become dominated by the Federal Government after it had taken their lands without any sort of agreement. With the courts ultimately ruling against the Nisga'a, this should have been a resounding defeat for the Nation. From this legal setback however, a significant change to the narrative around the lands claims process would be set in motion.

While the Calder decision did reset the precedent of the land claims process, one of the unique challenges was that it came before the arrival of the 1982 Constitution Act. As part of the legislation that made up the act, the Canadian Government made it clear that it intended on affirming and recognizing Aboriginal and Treaty rights.¹⁰ For the Calder decision, this affirmation came nine years too late to be

⁶ Miller, *Contract, Compact, Contract, Covenant*, 255.

⁷ Ibid.

⁸ Patrick Macklem, *Indigenous Differences and the Constitution of Canada*, (Toronto: University of Toronto Press, 2001), 115.

⁹ Macklem, *Indigenous Differences and the Constitution of Canada*, 115.

¹⁰ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, (Toronto: University of Toronto Press, 2012), 262.

codified into the Canadian Constitution, with the introduction of the Constitution being the first time the Federal Government made such an assertion.¹¹ The Supreme Court, in its 1973 ruling agreed that the Nisga'a had that inherent right to their land- since there had been no treaty. This ran counter to previous interpretations of the Constitution, which did not confirm that the Indigenous peoples of Canada had title to those lands. In some cases, First Nations in Canada saw their lands fall under the control of the crown despite the lack of a treaty, but would have some use of the land granted to them via an easement provided by the crown.¹² For many First Nations in Canada, this provided an easier approach to negotiate a potential land claim. While this was true in many cases in the eastern part of the Country, in British Columbia, Governor James Douglas's method of working with the First Nations saw a slightly different process in place. With Douglas's approach, First Nations in B.C. were afforded the same rights, including the pre-emption of those tracts that were vacant Crown land.¹³ In a roundabout way, the B.C. Government did recognize for a brief moment that the Nisga'a could utilize and claim their lands for homesteads and settlement, but did not acknowledge that the Nisga'a were in control of their lands. In the eyes of the Crown, those members of the Nisga'a Nation had ceased to be an independent member of that nation, and instead were considered to be just another group of colonial citizens who were setting up a homestead or a village. With the decision from the Calder Case, the idea of tenancy could be abolished, with the ownership of the lands being confirmed in the hands of the Nisga'a. From the point of view of the court, that ownership of lands was bundled in with common law rights due to that possession of the land since time immemorial.¹⁴ With these two developments, it appears that accommodation for First Nations and their rights did exist in the framework, but would conflict with the Federal Government's goal of assimilation that had been present from the very beginning of contact with the Nisga'a.

The directions the state took in order to reach a land and title conclusion were also challenged as a result of Calder. The Nisga'a

¹¹ Tom Molly and Donald B. Ward, *The World is Our Witness: The Historic Journey of the Nisga'a into Canada*, (Calgary: Fifth House Press 2000), 118.

¹² Tom Flanagan, *First Nations, Second Thoughts?* (Montreal: McGill: Queens University Press, 2000), 123.

¹³ *Ibid.*, 124.

¹⁴ Macklem, *Indigenous Differences and the Constitution of Canada*, 268.

relied heavily upon oral traditions and histories to prove their accounts of land ownership throughout their case, a connection that the settlers who had arrived in the 19th century would not have experienced in their short time on Nisga'a land.¹⁵ While aboriginal right is something that has emerged as a result of the courts' translation, this particular piece of testimony was something that challenged the assumptions that the state had set forward. The Nisga'a claim focused on oral traditions which had been passed down from generation to generation, making for a record which the courts had trouble translating into the settler system.¹⁶ Looking at how this intersects with the aboriginal rights assertion is interesting, as the case suggests that the Nisga'a had a right to claim traditional use of the land, but less of a claim of ownership to the land. By examining this theme, a further case could be made that the Canadian Government had failed in its obligation when considering the status of Indigenous peoples. In the 1990s, a lawyer named Bruce Clark claimed that the Canadian Government had systematically ignored its own rules, which were based in the Royal Proclamation, when dealing with First Nation's lands, a situation that he stated led to an occupation of Canada's First Nation's lands.¹⁷ The lack of sanction for this occupation is something that kept appearing, with the language constantly focused on the fact that the Nisga'a had a right to the land, and not just a claim to it due to that ignorance of oral tradition.

With the Calder Case, evidence supporting the Nisga'a claim brought to attention the approach towards land use before colonization. For the Nisga'a, there was no real aspect of owning land in the sense of holding title. Instead, the Nisga'a team argued that since parts of the valley were designated for village sites and food gathering, it demonstrated that there was a firm plan of use for the area.¹⁸ This argument would naturally challenge how the court saw title being held, with the accounts of the traditional use of the land by the Nisga'a being used to prove that this was indeed their territory. For the court, this proved problematic as there had been limited precedent delivered for a

¹⁵ Lorraine Weir, "'Time Immemorial' and Indigenous Rights: A Genealogy and Three Case Studies (Calder, Van Der Peet, Tsilhqot'in) from British Columbia," in *Journal of Historical Sociology* 26, No.3 (September 2013), 394.

¹⁶ Ibid.

¹⁷ Greg Poelzer and Kenneth Coates, *From Treaty Peoples to Treaty Nation: A Road Map For All Canadians*, (Vancouver: UBC Press, 2015), 86.

¹⁸ Molloy and Ward, *The World Is Our Witness*, 113.

land claim set in the rights to the use of the land. This acknowledgement did not come until much later, after the Calder Case had been settled, conveyed as part of the Van der Peet case of 1990. Here, the Crown had an opportunity to analyze the 1982 addendum to the Constitution, where upholding Aboriginal rights was codified. In this case, the Supreme Court determined that the protection of Aboriginal rights involved protecting aboriginality, including activities that occurred on their lands.¹⁹ For the Calder Case, this was the piece that had been missing; the definition of aboriginality had not been determined at this point, and the protections of the Canadian Constitution would not be brought into effect until 1982. This idea of Aboriginal Rights continued to haunt the Canadian Government's constitutional dealings, as well as the pursuit of a treaty by the Nisga'a until well after the Calder Case had been settled and the Constitution repatriated. In the *Sparrow Case* of the 1990s, it became clear that past British Columbian Governments had often made policy that affected the Nisga'a, even though Aboriginal rights had been infringed upon without a valid public policy reason, a determination that was transmitted through this particular case.²⁰ This idea of infringement was something that had been brought to the foreground after 1982. In the context of the Calder Case, the Nisga'a argument stated that their rights to use the land for their own practice were being infringed upon due to the state's inability to create a treaty. From that argument, the concept of land use was something that was now considered a First Nation right.

The 1982 Constitution and its reaffirmation of Aboriginal rights is something that would have pushed through the Nisga'a's case with much more ease. This declaration only came into being after the Calder Case had been settled in 1973, but it did have a tangible effect on other cases moving forward. As part of this act, rights were affirmed by identifying the Aboriginal peoples as communities with political and social infrastructure.²¹ This term would have been all encompassing, especially considering the fact that the Indigenous

¹⁹ Dimitrios Panagos, "The Plurality of Meanings Shouldered by the Term 'Aboriginality': a look at the Delgamuukw Case," in *Canadian Journal of Political Science* 40, no. 3, (Sept 2007): 592.

²⁰ Miller, *Compact, Contract, Covenant*, 273.

²¹ Paul L.A.H. Chartrand, "The 'Race' for Recognition Towards a Policy of Recognition of Aboriginal Peoples in Canada," in *Aboriginal Title and Indigenous Peoples* (Vancouver: UBC Press 2010), 135.

nations all had their own social infrastructure, as well as governance systems in place pre-contact. During the Calder Case, the structures used by the Nisga'a's related to their own governance were brought into question quite frequently. The Calder Case is an early example where the courts challenged the idea of primitive societies and overly primitive structures, ultimately embracing them as part of the perception of the right to the land.²² For First Nations across Canada, this situation was one that would be beneficial to their causes, as the courts accepted the fact that their governance structures existed before colonization. This new approach was ultimately made into Government policy at the conclusion of the Calder Case later in October 1973. Following the judicial ruling, Indian Affairs minister Jean Chrétien announced that the Canadian Government was willing to negotiate a settlement based in traditional use as a result of the precedent set by the case.²³ The arguments made by the Nisga'a were ultimately seen as strong enough, leading to the acceptance of the use of their oral histories, despite the previous affirmation that those oral traditions of First Nations were inferior to the history recorded by the settlers. The change in opinion related to oral histories gave other First Nations groups much more room to assert their rights to territory they claimed.

The Calder Case forced a major adjustment to the lands and rights claim process that Indigenous peoples in Canada had to work through. While the initial case did not succeed, it did provide the foundation for a long-term victory for the Nisga'a. The case challenged the notions laid out by the British North America Act, and confronted the Crown's right to the land that the Nisga'a held. The Nisga'a also managed to disprove the idea of *terra nullius*²⁴ and prove an indigenous existence via oral tradition, something that had been unheard of when it came to land claims in the past. It also demonstrated that the First Nations of Canada had something much more than a claim to the land, but a right to the land instead, owing to that longstanding historical connection. This protection of Aboriginal rights would ultimately be enshrined as part of the 1982 Constitution. While the Calder Case did not get the Nisga'a a settlement and treaty at the time of the court ruling, the case did help to pave the way for an eventual Nisga'a treaty, and also provided a blueprint for many other

²² Weir, "Time Immemorial" and Indigenous Rights," 390.

²³ Molloy and Ward, *The World Is Our Witness*, 118.

²⁴ This was the concept used by initial settlers that the lands of the Indigenous Peoples of North America were vacant upon the arrival of Europeans.

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First Nations to challenge their own situations within the state in order to provide for a future where they could have greater opportunity to assert their sovereignty.

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