Supreme Court of Canada
Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313
Date: 1973-01-31

Frank Calder *et al.,* suing on their own behalf and on behalf of All Other Members of the Nishga Tribal Council, and James Gosnell *et al.,* suing on their own behalf and on behalf of All Other Members of the Gitlakdamix Indian Band, and Maurice Nyce *et al.,* suing on their own behalf and on behalf of All Other Members of the Canyon City Indian Band, and W.D. McKay *et al.,* suing on their own behalf and on behalf of All Other Members of the Greenville Indian Band, and Anthony Robinson *et al.,* suing on their own behalf and on behalf of All Other Members of the Kincolith Indian Band *Appellants;*

and

Attorney-General of British Columbia *Respondent.*

1971: November 29, 30; 1971: December 1, 2, 3; 1973: January 31.

Present: Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Indians—Aboriginal title to lands—Territory occupied by Nishga Tribe—Extinguishment of title.

Crown—Sovereign immunity—Claim of title against Crown in right of Province—Absence of fiat of Lieutenant-Governor—Court without jurisdiction to make declaration requested—Crown Procedure Act, R.S.B.C. 1960, c. 89.

The appellants, suing on their own behalf and on behalf of all other members of the Nishga Tribal Council and four Indian bands, brought an action against the Attorney-General of British Columbia for a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory… has never been lawfully extinguished". It was agreed that this territory consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia. The action was dismissed at trial and the Court of Appeal rejected the appeal. With leave, the appellants then appealed to this Court.

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Held (Hall, Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Ritchie JJ.: The Royal Proclamation of October 7, 1763, which the appellants claimed applied to the Nishga territory and entitled them to its protection, had no bearing upon the problem of Indian title in British Columbia. The history of the discovery and settlement of British Columbia demonstrated that the Nass Valley, and, indeed, the whole of the Province could not possibly be within the terms of the Proclamation. The area in question did not come under British sovereignty until the Treaty of Oregon in 1846. The Nishga bands, therefore, were not any of the several nations or tribes of Indians who *lived* under British protection in 1763 and they were outside the scope of the Proclamation.

When the Colony of British Columbia was established in 1858, the Nishga territory became part of it. The fee was in the Crown in right of the Colony until July 20, 1871, when the Colony entered

Confederation, and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion under the Terms of Union.

A series of proclamations by Governor Douglas between 1858 and 1863, followed by four ordinances enacted between 1865 and 1870, revealed a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title".

Under art. 13 of the Terms of Union, the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, were assumed by the Dominion Government. The recommendations of a Royal Commission in 1913 resulted in the establishment of new or confirmation of old Indian reserves in the Nass area. Although it was said that this was done over Indian objections, nevertheless the federal authority did act under its powers under s. 91(24) of the *B.N.A. Act.* It agreed, on behalf of the Indians, with the policy of establishing these reserves.

Also, the Government of the original Crown Colony and, since 1871, the Government of British

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Columbia had made alienations in the Nass Valley that were inconsistent with the existence of aboriginal title. Further, the establishment of the railway belt under the Terms of Union was inconsistent with the recognition and continued existence of Indian title.

In view of the conclusion reached as to the disposition of the appeal, it was not necessary to determine the point raised by the respondent that the Court did not have jurisdiction to make the declaratory order requested because the granting of a fiat under the *Crown Procedure Act,* R.S.B.C. 1960, c. 89, was a necessary prerequisite to bringing the action and it had not been obtained. However, agreement was expressed with the reasons of Pigeon J. dealing with this point.

St. Catharines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46; *Johnson v. McIntosh* (1823), 21 U.S. 240; *Worcester v. State of Georgia* (1832), 31 U.S. 530; *United States v. Santa Fe Pacific R. Co.* (1941), 314 U.S. 339; *United States v. Alcea Band of Tillamooks* (1946), 329 U.S. 40; (1951), 341 U.S. 48; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, referred to.

Per Pigeon J.: Although sovereign immunity from suit without a fiat has been removed by legislation at the federal level and in most of the Provinces, this has not yet been done in British Columbia. Accordingly, the preliminary objection that the declaration prayed for, being a claim of title against the Crown in the right of the Province of British Columbia, the Court has no jurisdiction to make it in the absence of a fiat of the Lieutenant-Governor of that Province, should be upheld.

Lovibond v. Governor General of Canada, [1930] A.C. 717; *Attorney-General for Ontario v. McLean Gold Mines,* [1927] A.C. 185, applied.

Per Hall, Spence and Laskin JJ., *dissenting:* The proposition accepted by the Courts below that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer was wholly wrong. There is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aboriginees precisely analogous to the Nishga situation.

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Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question was the guarantee of Indian rights contained in the Royal Proclamation of 1763. The wording of the Proclamation indicated that it was intended to include the lands west of the Rocky Mountains.

Once aboriginal title is established, it is presumed to continue until the contrary is proven. When the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did the Parliament of Canada.

Further, on the question of extinguishment, the respondent relied on what was done by way of Acts, Ordinances and Proclamations by Governors Douglas and Seymour and the Council of British Columbia. However, as submitted by the appellants, if either Douglas or Seymour or the Council of the Colony of British Columbia did purport to extinguish the Nishga title any such attempt was beyond the powers of either the Governors or the Council and what, if anything, was attempted in this respect was *ultra vires.*

As to the pre-emption provision in the consolidating Ordinance of July 1, 1870, on which the Courts below chiefly relied in making the finding that the Indian title in British Columbia had been extinguished, it was obvious that this enactment did not apply to the Nishga lands on the Nass River. The Northwest boundary of the Colony in that area was still in dispute at the time.

On the question of jurisdiction, actions against the Crown in British Columbia are governed by the *Crown Procedure Act* and this Act provides for the petition of right procedure, which requires that a fiat be obtained as evidence of the consent of the Crown to the action. However, the petition of right procedure does not apply to proceedings seeking declaratory or equitable relief. Furthermore, the validity of what was done by Governors Douglas and Seymour and by the Council of the Colony of British Columbia was a vital question to be decided in this appeal and the Province could not be permitted to deny access

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by the Nishgas to the Courts for the determination of that question.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Gould J. Appeal dismissed, Hall, Spence and Laskin JJ. dissenting.

T.R. Berger, D.J. Rosenbloom and J.M. Baigent, for the appellants.

D. McK. Brown, Q.C., and A.W. Hobbs, Q.C., for the respondent.

The judgment of Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.—The appellants sue, as representatives of the Nishga Indian Tribe, for a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs… has never been lawfully

[1] (1970), 74 W.W.R. 481, 13 D.L.R. (3d) 64.

extinguished". The action was dismissed at trial. The Court of Appeal rejected the appeal. The appellants appeal from both decisions.

The appellants are members of the Nishga Nation, which is made up of four bands: Gitlakdami, Canyon City, Greenville and Kincolith. They are officers of the Nishga Tribal Council and councillors of each of the four Indian bands. They are descendants of the Indians who have inhabited since time immemorial the territory in question, where they have hunted, fished and roamed. It was agreed for purposes of this litigation that this territory consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia. No other interest has intervened in this litigation to question the accuracy of this agreed statement of facts.

The Crown in right of the province has made certain grants in this territory, some in fee simple; in other cases rights of pre-emption, mineral and mining rights, petroleum permits,

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forestry rights and titles, and tree farm licences. However, the vast bulk of the area remains still unalienated.

No treaty or contract with the Crown or the Hudson's Bay Company has ever been entered into with respect to the area by anyone on behalf of the Nishga Nation. Within the area there are a number of reserves but they comprise only a small part of the total land. The Nishga Nation did not agree to or accept the creation of these reserves. The Nishgas claim that their title arises out of aboriginal occupation; that recognition of such a title is a concept well embedded in English law; that it is not dependent on treaty, executive order or legislative enactment. In the alternative they say that if executive or legislative recognition ever was needed, it is to be found in the Royal Proclamation of 1763, in Imperial Statutes acknowledging that what is now British Columbia was "Indian Territory", and in Royal instructions to the Governor of British Columbia. Finally, they say that their title has never been extinguished.

All these claims, at one point or another, were rejected in the judgments under appeal.

In the agreed statement of facts, the mode of life of the Indians is set out in rather bald terms. This description is amplified in the material filed at the hearing. I refer to *The Indian History of British Columbia,* chapter 8, by Wilson Duff, published in 1964:

> It is not correct to say that the Indians did not "own" the land but only roamed over the face of it and "used" it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they

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> didn't subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping, and foodgathering. Even if they didn't sink mine shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the owned and recognized territory of one or other of the Indian tribes.

The Nishga answer to government assertions of absolute ownership of the land within their boundaries was made as early as 1888 before the first Royal Commission to visit the Nass Valley. Their spokesman said:

> David Mackay—What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white people who live in towns and have their stores and other business, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land.

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Any Canadian inquiry into the nature of the Indian title must begin with *St. Catharines Milling and Lumber Co. v. The Queen*[2]. This case went through the Ontario Courts, the Supreme Court of Canada and ended in the Privy Council. The Crown in right of the Province sought to restrain the Milling Company from cutting timber on certain lands in the District of Algoma. The company pleaded that it held a licence from the Dominion Government which authorized the cutting. In 1873, by a treaty known as the North-West Angle Treaty No. 3, the Dominion had extinguished the Indian title.

[2] (1885), 10 O.R. 196, affirmed (1886), 13 O.A.R. 148, affirmed (1887), 13 S.C.R. 577, affirmed (1888), 14 App. Cas. 46.

The decision throughout was that the extinction of the Indian title enured to the benefit of the Province and that it was not possible for the Dominion to preserve that title so as to oust the vested right of the Province to the land as part of the public domain of Ontario. It was held that the Crown had at all times a present proprietary estate, which title, after confederation, was in the Province, by virtue of s. 109 of the *B.N.A. Act.* The Indian title was a mere burden upon that title which, following the cession of the lands under the treaty, was extinguished.

The reasons for judgment delivered in the Canadian Courts in the *St. Catharines* case were strongly influenced by two early judgments delivered in the Supreme Court of the United States by Chief Justice Marshall—*Johnson v. McIntosh*[3]*,* and *Worcester v. State of Georgia*[4]*.* In *Johnson v. McIntosh* the actual decision was that a title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773 and 1775, could not be recognized in the Courts of the United States. In *Worcester v. Georgia,* the plaintiff, who was a missionary, was charged with residing among the Cherokees without a licence from the State of Georgia. His defence

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was that his residence was in conformity with treaties between the United States and the Cherokee nation and that the law under which he was charged was repugnant to the constitution, treaties and laws of the United States. The Supreme Court made a declaration to this effect. Both cases raised the question of aboriginal title to land. The following passages from 8 Wheaton, pp. 587-8, give a clear summary of the views of the Chief Justice:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.
>
> The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy; and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

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[3] (1823), 8 Wheaton 543, 21 U.S. 240.
[4] (1832), 6 Peters 515, 31 U.S. 530.

The description of the nature of Indian title in the Canadian Courts in the *St. Catharines* case is repeated in the reasons delivered in the Privy Council. I quote from 14 App. Cas. at pp. 54-5:

> The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the

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> British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present", they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

There can be no doubt that the Privy Council found that the Proclamation of 1763 was the origin of the Indian title—"Their possession, such as it was, can only be ascribed to the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown."

I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title. The territory under consideration in the *St.*

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Catharines appeal was clearly within the geographical limits set out in the Proclamation. It is part of the appellants' case that the Proclamation does apply to the Nishga territory and that they are entitled to its protection. They also say that if it does not apply to the Nishga territory, their Indian title is still entitled to recognition by the Courts. These are two distinct questions.

I say at once that I am in complete agreement with judgments of the British Columbia Courts in this case that the Proclamation has no bearing upon the problem of Indian title in British Columbia. I base my opinion upon the very terms of the Proclamation and its definition of its geographical limits and upon the history of the discovery, settlement and establishment of what is now British Columbia.

Following the Treaty of Paris, General Murray was appointed the first Governor of Quebec. The Royal Proclamation, dated October 7, 1763, first recites that the Crown has created four distinct and separate governments, styled respectively Quebec, East Florida, West Florida and Grenada, specific boundaries having been assigned to each of them. The concluding recital reads as follows:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

The Proclamation then goes on to deal with a prohibition of the granting of warrants of survey or patents for lands; the reservation of lands for the use of Indians; the prohibition of purchase or settlement or taking possession of reserved lands without special leave and licence; directions to all who have either wilfully or inadvertently settled on reserved lands to remove them-

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selves; and the prohibition of private purchase from Indians of lands reserved to them within those Colonies where settlement was permitted, all purchases being directed to be made on behalf of the Crown, in public assembly of the Indians, by the Governor or Commander in Chief of the Colony in which the lands lie. Rather than attempt to paraphrase, I set out the precise text of the opening paragraphs of the Proclamation dealing with these matters. The full Proclamation with all its recitals is to be found in the Revised Statutes of Canada 1970, Appendices, pp. 123-129.

> We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the

> Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.
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> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our

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> especial leave and Licence for that Purpose first obtained.
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> And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

It is clear, as the British Columbia Courts have held, and whose reasons I adopt, that the Nishga bands represented by the appellants were not any of the several nations or tribes of Indians who lived under British protection and were outside the scope of the Proclamation.

The British Columbia Courts have dealt with the history of the discovery and settlement of their province. This history demonstrates that the Nass Valley, and, indeed, the whole of the province could not possibly be within the terms of the Proclamation.

As to the establishment of British sovereignty in British Columbia in 1818 by a Convention of Commerce between His Majesty and the United States of America, the British Crown and the United States settled the boundary to the height of land in the Rockies, referred to in the Convention as the "Stoney Mountains". The boundary was the 49th parallel of latitude. The Convention provided for the joint occupancy of the lands to the west of that point for a term of ten years. This Convention was extended indefinitely by a further Convention in 1827.

The area in question in this action never did come under British sovereignty until the Treaty of Oregon in 1846. This treaty extended the boundary along the 49th parallel from the point of termination, as previously laid down, to the channel separating the Continent from Vancouver Island, and thus through the Gulf Islands to Fuca's Straits. The Oregon Treaty was, in effect, a treaty of cession whereby American claims were ceded to Great Britain. There was

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no mention of Indian rights in any of these Conventions or the treaty.

As to establishment of the northern boundary of what became British Columbia, the Courts below relied on the evidence of Dr. Willard Ireland, Provincial Archivist, who had published a work on the evolution of the boundaries of the province. He begins with the Imperial ukase of the Czar, dated September 16, 1821, asserting exclusive rights of trade on the Pacific Coast as far south as the 51st parallel. There was opposition to this pretension immediately both from Great Britain and the United States. The United States proposed a tripartite treaty under the terms of which no settlements should be made by Russia south of 55 degrees, by the United States north of 51 degrees or by Great Britain north of 55 degrees or south of 51 degrees. The United States was prepared, if necessary, to accept the 49th parallel as the northern limit for its settlements. This proposal was rejected by the British Government, which preferred to negotiate separately with Russia and the United States. The discussions with Russia culminated in the Convention of February 28, 1825, which laid down a line of demarcation.

It was the opinion of Dr. Ireland that although the exact interpretation of these terms became a matter of serious dispute after Russian America was purchased by the United States, this Convention, broadly speaking, established the boundary as it exists today between Canada and Alaska. In other words, it determined the northern limit of British territory on the Pacific coast.

The Colony of Vancouver Island was established by the British Crown in 1849. James Douglas was appointed Governor in 1851. The Colony of British Columbia, being the mainland of what is now the Province, was established by the British Crown in 1858 and the same James Douglas was the first Governor of the Colony with full executive powers. Douglas remained

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Governor of both Colonies until 1864. On November 17, 1866, the two Colonies were united as one Colony under the British Crown and under the name of British Columbia. This Colony entered Confederation on July 20, 1871, and became the Province of British Columbia and part of the Dominion of Canada.

When the Colony of British Columbia was established in 1858, there can be no doubt that the Nishga territory became part of it. The fee was in the Crown in right of the Colony until July 20, 1871, when the Colony entered Confederation, and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion under the Terms of Union.

The political and social conditions prevailing in these two colonies are described in some detail in the reasons of Tysoe J.A.[5];

> Prior to the establishment of the territories of Vancouver Island and the mainland of British Columbia as British colonies they had been governed by the Hudson's Bay Company, of which company James Douglas was for some time the chief factor. It had been his responsibility to see to the orderly settlement of the lands and to control the native Indians, some tribes of which were of a warlike and aggressive nature. Douglas had to keep law and order. The responsibility continued to rest upon his shoulders after the establishment of the colonies and until executive councils were appointed, as in due course they were. Douglas had his difficulties with the Indians on Vancouver Island. In 1852 the white settlers with their children numbered only about one thousand and they were surrounded by an Indian population of nearly thirty thousand. On the mainland he had like troubles but in aggravated form. The territory was much larger and the discovery of gold exacerbated the situation. Vancouver Island had been the scene of an influx of foreigners and it was fear of this that led to the setting up of the Colony of Vancouver Island. On the mainland conditions in this regard were worse. Gold was first discovered on the Fraser River and this resulted in a great number of Ameri-

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> cans from the California gold fields entering the territory. They were men who had "a hankering in their minds after annexation to the United States" and they did not have the same respect for the native Indians as did the British colonists. The first white child was born at Fort Langley on the mainland on November 1, 1857. The precious metal was the lure that brought the Kanakas from Hawaii in 1858, and it is said that in that year there were ten thousand men engaged in gold mining in the Colony of British Columbia. In the years 1859 and 1860 the mining population was being added to by small parties of men who had travelled overland from Eastern Canada. That was the commencement of a slow but steady stream of immigrants from beyond the Rocky Mountains. See Margaret Ormsby, "British Columbia" p. 145, and Cicely Lyons, "Salmon, our Heritage", pp. 80, 81, 82, 85. In the late fifties and early sixties roads were being built into the mining areas. Frequent clashes with the Indians occurred. As immigration increased Douglas became concerned about the danger of Indian warfare spreading into the interior from Washington territory and alarmed about the great hazard of disrespect for Imperial rights and law and order. The search for gold spread further and further north and east. White settlers were spreading out and some were encroaching upon the village lands and other occupied lands of the Indians. The need for protection to the Indians and protection to the settlers against the Indians increased immeasurably. Such protection and an orderly system of settlement became of paramount consideration. Douglas had these matters very much in mind in the year 1858 and in succeeding years.

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". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".

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[5] 13 D.L.R. (3d) at pp. 80-1.

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It was the opinion of the British Columbia Courts that this right, if it ever existed, had been lawfully extinguished, that with two societies in competition for land—the white settlers demanding orderly settlement and the Indians demanding to be let alone—the proper authorities deliberately chose to set apart reserves for Indians in various parts of the territory and open up the rest for settlements. They held that this had been done when British Columbia entered Confederation in 1871 and that the Terms of Union recognized this fact.

As to Vancouver Island, we have before us a collection of dispatches between the Colonial Office and Governor Douglas in connection with the Indian problem that was confronting him. The first, dated July 31, 1858, contains an admonition that it should be an invariable condition in all bargains or treaties with the natives for the cession of lands possessed by them that subsistence should be supplied in some other shape. It is in the following terms.

> July 31, 1858
>
> I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. *This question is of so local a character that it must be solved by your knowledge and experience,* and I commit it to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest. Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of civilization among the natives.

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These dispatches are detailed and informative on both sides. They set out the difficulties and problems as they arose and suggestions for their solution. I quote from the last dispatch of the Governor, which conveniently summarizes his efforts:

> Victoria, 25th March, 1861.
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> My Lord Duke,—I have the honour of transmitting a petition from the House of Assembly of Vancouver Island to your Grace, praying for the aid of Her Majesty's Government in extinguishing the Indian title to the public lands in this Colony; and setting forth, with much force and truth, the evils that may arise from the neglect of that very necessary precaution.
>
> 2. As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would

> not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.
>
> 3. Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Company's Charter, and the want of funds, it has not been in my power to continue it. Your Grace must, indeed, be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.

He then went on to point out the need for further purchases, totalling in all £3,000, and asked for a loan of this amount from the Imperial Government. The reply was that the problem was essentially local in character and the money would have to be raised in the Colony. The full reply is as follows:

> Downing Street, 19th October, 1861
>
> Sir.—I have had under my consideration your despatch No. 24, of the 25th of March last, transmitting an Address from the House of Assembly of Vancouver Island, in which they pray for the assistance of Her Majesty's Government in extinguishing

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> the Indian title to the public lands in the Colony, and set forth the evils that may result from a neglect of this precaution.
>
> I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island; but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds or British credit pledged for the purpose. I would earnestly recommend therefore to the House of Assembly, that they should enable you to procure the requisite means, but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money requisite for an object which, whilst it is essential to the interests of the people of Vancouver Island, is at the same time purely Colonial in its character, and trifling in the charge that it would entail.

The reasons for judgment next deal with a series of proclamations by James Douglas as Governor of the Colony of British Columbia. The first is dated December 2, 1858, and it is stated to be a proclamation having the force of law to enable the Governor of British Columbia to have Crown lands sold within the said Colony. It authorized the Governor to grant any land belonging to the Crown in the Colony.

The second proclamation is dated February 14, 1859. It declared that all lands in British Columbia and all mines and minerals thereunder belonged to the Crown in fee. It provided for the sale of these lands after surveys had been made and the lands were ready for sale, and that due notice should be given of such sales.

The third proclamation is dated January 4, 1860. It provided for British subjects and aliens who take the oath of allegiance acquiring unoccupied and unreserved and unsurveyed Crown land, and for the subsequent recognition of the claim after the completion of the survey.

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The fourth proclamation is dated January 20, 1860. It provided for the sale of certain lands by private contract and authorized the Commissioner of Land and all Magistrates and Gold Commissioners to make these sales at certain prices.

The fifth proclamation of January 19, 1861, dealt with further details of land sales.

The sixth proclamation, dated January 19, 1861, reduced the price of land.

The seventh proclamation, dated May 28, 1861, dealt with conditions of pre-emption and limited the right to 160 acres per person.

The eighth proclamation, dated August 27, 1861, was a consolidation of the laws affecting the settlement of unsurveyed Crown lands in British Columbia.

The ninth proclamation, dated May 27, 1863, dealt with the establishment of mining districts.

Then follow four ordinances enacted by the Governor by and with the consent of the Legislative Council of British Columbia. The first is dated April 11, 1865. It repeats what the proclamation had previously said, namely, that all lands in British Columbia and all mines and minerals therein, not otherwise lawfully appropriated, belong to the Crown in fee. It goes on to provide for the public sale of lands and the price; that unless otherwise specially announced at the time of the sale, the conveyance of the lands shall include all trees and all mines and minerals within and under the same (except mines of gold and silver). It also deals with rights of pre-emption of unoccupied, unsurveyed and unreserved Crown lands “not being the site of an existent or proposed town, or auriferous land or an Indian reserve or settlement under certain conditions.”

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The next ordinance, dated March 31, 1866, restricts those who may acquire lands by preemption under the ordinance of April 11, 1865. British subjects or aliens who take the Oath of Allegiance have this right but it does not extend without special permission of the Governor to companies or “to any of the Aborigines of this Colony or the Territories neighbouring thereto.”

The third ordinance is dated March 10, 1869. It deals with the payment of purchase money for pre-emption claims.

The last ordinance is dated June 1, 1870, and is one to amend and consolidate the laws affecting Crown lands in British Columbia.

The result of these proclamations and ordinances was stated by Gould J. at the trial in the following terms. I accept his statement, as did the Court of Appeal:

> The various pieces of legislation referred to above are connected, and in many instances contain references *inter se,* especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

The same opinion is expressed in a letter dated January 29, 1870, from Governor Musgrave to the Colonial Office, which had received certain representations from the Aborigines Protection Society relative to the conditions of the Indians on Vancouver Island. He had a memorandum prepared by the Commissioner of

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Lands and Works and Surveyor General, Mr. Trutch. When the Colony entered Confederation on July 20, 1871, Mr. Trutch was appointed its first Lieutenant-Governor. He had served as the Colony's chief negotiator, both in Ottawa and London, of the terms of entry into Confederation, and he had resided in the Colony since it was established in 1858. He said in part:

> The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has, in all cases where it has been desirable for the interests of the Indians, set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each tribe; and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.
>
> But the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes.

The terms used in this letter bring to mind what was said on the subject of extinguishment of Indian title in *United States v. Santa Fe Pacific R. Co.*[6]*:*

> Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U.S. at 229.
>
> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. *Buttz v. Northern Pacific*

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> *Railroad.* As stated by Chief Justice Marshall in *Johnson v. M'Intosh,* "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 U.S. 517, 525.

To the same effect are the reasons delivered in the Privy Council in *Re Southern Rhodesia*[7].

The Terms of Union under which British Columbia entered into Confederation with the Dominion of Canada are also of great significance in this problem. These terms were approved by Imperial Order in Council dated May 16, 1871, which has, under s. 146 of the *B.N.A. Act,* the force of an Imperial statute. Article 13 reads:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

On the question of reserves, it is convenient to mention at this point, though it is out of chronological order, the McKenna-McBride Commission, its Report and the Dominion legislation which followed on its recommendations.

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[6] (1941), 314 U.S. 339 at 347.
[7] [1919] A.C. 211.

The Commission was established in 1913 to settle all differences between the Dominion and the Province of British Columbia respecting Indian lands and Indian affairs generally in the Province. Seven years later, the recommendations of this Commission were followed by Dominion legislation, 1920 (Can. 2nd Sess.), c. 51. This legislation is entitled "An Act to provide for the Settlement of Differences between the Governments of the Dominion of Canada and the Province of British Columbia respecting Indian Lands and certain other Indian Affairs in the said Province." It recites the establishment of the Commission, the receipt of its report and recommendations as to lands reserved and to be reserved for Indians in the Province of British Columbia, and otherwise for the settling of all differences between the said Governments respecting Indian lands and Indian affairs generally in the Province.

Section 2 of the Act reads:

> 2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfil every act, deed, matter or thing necessary for the carrying out of the said Agreement between the Governments of the Dominion of Canada and the Province of British Columbia according to its true intent, and for giving effect to the report of the said Royal Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.

The recommendations of the Commission resulted in the establishment of new or confirmation of old Indian reserves in the Nass area. They are over thirty in number. Frank Calder, one of the appellants, says that this was done over Indian objections. Nevertheless, the federal authority did act under its powers under s. 91(24) of the *B.N.A. Act.* It agreed, on behalf of the Indians, with the policy of establishing these reserves.

In the Indian Department there exists a Nass River Agency that administers the area in ques-

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tion. The reserves generally correspond with the fishing places that the Indians had traditionally used. The Government of the original Crown Colony and, since 1871, the Government of British Columbia have made alienations in the Nass Valley that are inconsistent with the existence of an aboriginal title. These have already been referred to and show alienations in fee-simple and by way of petroleum and natural gas leases, mineral claims and tree farm licences.

Further, the establishment of the railway belt under the Terms of Union is inconsistent with the recognition and continued existence of Indian title. Article 11 reads:

> 11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and, further, to secure the completion of such railway within ten years from the date of the Union.
>
> And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia (not to exceed, however, twenty (20) miles on each side of the said line), as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest Territory and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any

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> other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

There was no reservation of Indian rights in respect of the railway belt to be conveyed to the Dominion Government.

From what I have already said, it is apparent that before 1871 there were no treaties between the Indian tribes and the Colony relating to lands on the mainland. From the material filed, it appears that on Vancouver Island there were, in all, fourteen purchases of Indian lands in the area surrounding Fort Victoria. These are the ones referred to in the correspondence between James Douglas and the Colonial Office. In 1899, Treaty No. 8 was negotiated and certain tribes of northeastern British Columbia were grouped with the Cree, Beaver, Chipewyan, Alberta and Northwest Territories' tribes, and included in the treaty. The area covered by this treaty is vast—both in the Northwest Territories and northeastern British Columbia. There can be no doubt that by this treaty the Indians surrendered their rights in both areas.

The appellants submit that this treaty constituted a recognition of their rights by the Dominion in 1899. Whether this involved a recognition of similar rights over the rest of the Province of British Columbia is another matter. The territorial limitations of the treaty and the fact that the Indians of northeastern British Columbia were included with those in the Northwest Territories may have some significance.

But the answer of the Province is still the same—that original Indian title had been extinguished in the Colony of British Columbia prior to Confederation and that there were no Indian

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claims to transfer to the Dominion beyond those mentioned in Article 13 of the Terms of Union.

In the United States an issue closely comparable with the one now before us was dealt with in three fairly recent cases in the Supreme Court. These case are: *United States v. Alcea Band of Tillamooks et al.*[8]; *United States v. Alcea Band of Tillamooks et al.*[9]*; Tee-Hit-Ton Indians v. United States*[10]*.*

In these cases the Indians were claiming compensation for the taking of their lands outside their reserves and not covered by any treaty. The facts in the first *Tillamooks* case were these: After creating a Government for the Territory of Oregon by Act of 1848, Congress in 1850 authorized the negotiation of treaties with Indian tribes in the area. The official designated by the legislation concluded a treaty providing for the cession of Indian lands in return for certain money payments, and the creation of a reservation which by the very terms of its creation might be subject to future diminution. This treaty was only to be operative upon ratification. It was not submitted to the Senate until 1857 and it was never ratified. The reservation itself in subsequent years was reduced in size either by executive order or Act of Congress in order to open up more land for public settlement. Eventually, in 1894 Congress approved of the reservation as it then existed, *i.e.,* at its reduced size, and from then on did not take reservation lands without compensation.

The Tillamooks tribe brought action against the United States under an Act of 1935, which gave the Court of Claims jurisdiction to hear and adjudicate cases involving any and all legal and equitable claims arising under or growing out of the original Indian title, claims or rights in

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the lands described in the unratified treaties. The judgment of the majority was that on proof of their original Indian title to the designated lands, and that their interest in these lands was taken without their consent and without compensation, the Tillamooks were entitled to recover compensation without showing that the original Indian title was ever formally recognized by the United States.

This was the first time that such a claim had been accepted and paid for in the United States. There had been previous cases where lands which had been reserved for Indians pursuant to treaty had

[8] (1946), 329 U.S. 40.
[9] (1951), 341 U.S. 48.
[10] (1955), 348 U.S. 272.

been taken by the United States without the consent of the Indians. Such cases were *Shoshone Tribe of Indians v. United States*[11], and *United States v. Klamath and Moadoc Tribes of Indians*[12].

In *Shoshone* the Indians, by a treaty made in 1868, had a reservation set apart for their exclusive use. Ten years later the Commissioner of Indian Affairs settled another band of Indians on the reservation and from then on treated the two tribes as equal beneficiaries of the reservation. Acts of Congress subsequently adopted the policy initiated by the Commissioner. The Shoshones protested for a long time against this invasion of their rights, and eventually, in 1927, secured from Congress a jurisdictional Act which permitted them to claim compensation for the taking of an undivided one-half interest in their tribal lands.

In view of the subsequent developments in the *Tillamooks* and *Tee-Hit-Ton* cases, the basis of the award for compensation is of great interest. The Shoshones were awarded not only the value of their property rights at the time of taking, but also such additional amount as might be necessary to award just compensation, "the increment to be measured either by interest on the value or by such other standard as might be

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suitable in the light of all the circumstances".

In the *Klamath* case, a similar award was made for the taking of part of their reserve.

The significance of the *Tillamooks* case is that the Court held that the principle of awarding compensation for the taking of Indian Reserves applied equally to claims arising out of original Indian title. The *ratio* of the majority appears in the following paragraph from the reasons of Vinson C.J.:

> Nor do other cases in this Court lend substance to the dichotomy of "recognized" and "unrecognized" Indian title which petitioner urges. Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which "is not open to inquiry in the courts." *United States v. Sante Fe Pacific R. Co., supra* at 347. Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title. Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call "recognized" title; yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of "recognized" title. We think the same rule applicable to a taking of original Indian title. "Whether this tract… was properly called a reservation… or unceded Indian country,… is a matter of little moment… the Indians' right of occupancy has always been held to

[11] (1937), 299 U.S. 476.
[12] (1938), 304 U.S. 119.

> be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota v. Hitchcock,* 185 U.S. 373, 388-89 (1902).

Mr. Justice Black agreed with the majority in the result but was of the opinion that the legislation of 1935, which permitted the bringing of the action, also created the obligation on the

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part of the Government to pay the Tillamooks for all lands for which their ancestors held an "original Indian title". Three judges dissented. They would have dismissed the claim for the reasons summarized in the following paragraph:

> As we are of the opinion that the jurisdictional act permitted judgment only for claims arising under or growing out of the original Indian title and are further of the opinion that there were no legal or equitable claims that grew out of the taking of this Indian title, we would reverse the judgment of the Court of Claims and direct that the bill of the respondents should be dismissed. Cf. *Shoshone Indians v. United States,* 324 U.S. 335.

The original *Tillamooks* case cannot be dealt with without its sequel, *United States v. Alcea Band of Tillamooks et al.*[13] In the interval the Court of Claims had heard evidence on the amount of recovery and had given judgment for the value of the lands as of 1855, plus interest from that date. On appeal to the Supreme Court, the award of interest was unanimously set aside. The ground for this decision was that the special jurisdictional Act of 1935 did not expressly provide for the payment of interest, the only exception to this rule being when the taking entitles the claimant to just compensation under the Fifth Amendment:

> Looking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment. And, since the applicable jurisdictional Act, 49 Stat. 801 (1935), contains no provision authorizing an award of interest, such award must be reversed.

This, to me, amounts to an affirmance of the opinion of Mr. Justice Black, above noted, that the jurisdictional Act of 1935 created the obligation to pay. In the first *Tillamooks* case, the majority had clearly said that there was no difference between compensation for the taking of reserves (*Shoshone* and *Klamath*) and for

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claims under original Indian title, and that both claims came under the Fifth Amendment. The second *Tillamooks* case receded from this position and held that the claim had to be dealt with under the legislation of 1935 and not under the Fifth Amendment.

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[13] (1951), 341 U.S. 48.

The next case is *Tee-Hit-Ton Indians v. United States*[14]. The United States had taken certain timber from Alaskan lands which the Indians said belonged to them. They asked for compensation. In this case compensation claimed did not arise from any statutory direction to pay. The petition was founded on the Fifth Amendment and the aboriginal claim against the lands upon which the timber stood. The suit was one which could be brought as a matter of procedure under a jurisdictional Act of 1946 permitting suits for Indian claims accruing after that date. The Court held that the recovery in the *Tillamooks* case (329 U.S. 40) and (341 U.S. 48) was based upon a statutory direction to pay for the aboriginal title in the special jurisdictional Act for the purpose of equalizing the Tillamooks with the neighbouring tribes and not that there had been a compensable taking under the Fifth Amendment.

Again, I say this was, in effect, an adoption of the opinion of Mr. Justice Black in the *Tillamooks* case that the basis of recovery was statutory.

The relevant portion of the Fifth Amendment provides as follows:

> nor shall private property be taken for public use, without just compensation.

The finding of the Court in the second *Tillamooks* case was therefore that aboriginal title did not constitute private property compensable under the Amendment.

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This position is spelled out in the *Tee-Hit-Ton* case. In the opinion of the Court, at p. 279, in discussing the nature of aboriginal Indian title, it is said:

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

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.

We were not referred to any cases subsequent to *Tee-Hit-Ton* on the problem of compensation for claims arising out of original Indian title. The last word on the subject from the Supreme Court of the United States is, therefore, that there is no right to compensation for such claims in the absence of a statutory direction to pay. An *Indian Claims Commission Act* was, in fact, passed by Congress in 1946.

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[14] (1955), 348 U.S. 272.

I note the concluding paragraph in the reasons for judgment in *Tee-Hit-Ton.* In my opinion, it has equal application to the appeal now before us:

> In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.

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For the foregoing reasons I have reached the conclusion that this action fails and that the appeal should be dismissed.

There is the further point raised by the respondent that the Court did not have jurisdiction to make the declaratory order requested because the granting of a fiat under the *Crown Procedure Act,* R.S.B.C. 1960, c. 89, was a necessary prerequisite to bringing the action and it had not been obtained. While it is not necessary, in view of my conclusion as to the disposition of this appeal, to determine this point, I am in agreement with the reasons of my brother Pigeon dealing with it.

I would dismiss the appeal and would make no order as to costs.

The judgment of Hall, Spence and Laskin JJ. was delivered by

HALL J. (*dissenting*)—This appeal raises issues of vital importance to the Indians of northern British Columbia and, in particular, to those of the Nishga tribe. The Nishga tribe has persevered for almost a century in asserting an interest in the lands which their ancestors occupied since time immemorial. The Nishgas were never conquered nor did they at any time enter into a treaty or deed of surrender as many other Indian tribes did throughout Canada and in southern British Columbia. The Crown has never granted the lands in issue in this action other than a few small parcels later referred to prior to the commencement of the action.

The claim as set out in the statement of claim reads as follows:

WHEREFORE the Plaintiffs claim a declaration that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished.

The Attorney General of Canada, although given notice under the *Constitutional Questions*

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Determination Act, R.S.B.C. 1960, c. 72, elected not to intervene in the action (ex. 3).

It was stated and agreed to by counsel at the hearing in this Court that Parliament had not taken any steps or procedures to extinguish the Indian right of title after British Columbia entered Confederation. The appeal was argued on this basis and on the representation of counsel that no constitutional question was involved.

Consideration of the issues involves the study of many historical documents and enactments received in evidence, particularly exs. 8 to 18 inclusive and exs. 25 and 35. The Court may take judicial notice of the facts of history whether past or contemporaneous: *Monarch Steamship Co. Ltd. v. A/B Karlshamms Oljefabriker*[15]*,* at p. 234, and the Court is entitled to rely on its own historical knowledge and researches: *Read v. Lincoln*[16]*,* Lord Halsbury at pp. 652-4.

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*[17]*,* 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 that 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

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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:

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[15] [1949] A.C. 196.
[16] [1892] A.C. 644.
[17] (1823), 8 Wheaton 543, 21 U.S. 240.

> …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.

The case was tried in part upon written admissions, including the following:

> 1. The Defendant admits that the Plaintiff Frank Calder is the President of the Nishga Tribal Council and that the Plaintiffs James Gosnell, Nelson Azak, William McKay, Anthony Robinson, Robert Stevens, Hubert Doolan and Henry McKay are the officers of the Nishga Tribal Council.
>
> 6. The Defendant admits that the bands referred to in paragraphs 2, 3, 4 and 5 of the Statement of Claim are the descendants of Indians who have inhabited since time immemorial the area delineated in the map annexed hereto and signed by counsel for the Plaintiffs and the Defendant.
>
> 7. The Defendant admits that the ancestors of persons referred to in paragraphs 2, 3, 4 and 5 of the Statement of Claim in this action had obtained a living since time immemorial from the lands and waters delineated in the map annexed hereto.

Paragraphs 6 and 7 constitute the basis of the claim founded on possession from time

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immemorial. Further admissions were made at the trial as follows:

> MR. BERGER: The Defendant has admitted that the plaintiffs are the officers of the Nishga Tribal Council and members of the Band Councils of each of the bands. The Defendant has also admitted that these bands are the descendants of Indians who have inhabited since time immemorial the area delineated in the map annexed hereto, prepared by Professor Wilson Duff of U.B.C., which has been signed by Counsel for the Plaintiff and Counsel for the Defendant. The Defendant also admits that the ancestors of the persons who are members of the band in the Naas River today had obtained a living since time immemorial from the lands and waters delineated in the map.
>
> The admissions of fact have been signed by my friend, Mr. Brown.
>
> THE COURT: That will be exhibit 1.

The map referred to by Mr. Berger was received in evidence as ex. 2 and the lands in question in this action are those delineated in ex. 2. This is the map referred to in para. 6 of the admissions previously quoted.

All the area outlined in ex. 2 is now internationally recognized as being in Canada, but Canadian sovereignty over part (the greater part of Pearce Island) was not confirmed until the United States-Canadian boundary was fixed by the Alaskan Boundary Commission in 1903. This historical fact

cannot be overlooked in considering whether, as the respondent alleges, the Indian right or title, if any, was extinguished between 1858 and when British Columbia entered Confederation in 1871.

The boundary line separating the Territory of Alaska from the Province of British Columbia was in doubt at the time of Confederation. This is borne out by a petition from the Legislative Assembly of British Columbia dated March 12, 1872, which reads in part as follows:

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> …inasmuch as the boundary line between the adjoining Territory of Alaska and the said Province of British Columbia has never been properly defined, and insomuch as it will materially assist in maintaining peace, order, and good government within the said Province, to have the boundary line properly laid down—to take such steps as may call the attention of the Dominion Government to the necessity of some action being taken at an early date, to have the boundary line properly defined.

This was followed by attempts to have the boundary line surveyed and there followed extensive communications between the Governments of the United States and of England but no definite action was taken to settle the boundary until a treaty was signed in Washington on January 24, 1903, setting up the Alaska Boundary Commission charged with fixing the boundary.

The appellant Calder described the area as follows:

> Q. Can you tell his lordship whether the Nishgas today make use of the lands and waters outlined in the map, exhibit 2?
>
> A. Put it this way, in answer to your question, from time immemorial the Nishgas have used the Naas River and all its tributaries within the boundaries so submitted, the lands in Observatory Inlet, the lands in Portland Canal, and part of Portland Inlet. We still hunt within those lands and fish in the waters, streams and rivers, we still do, as in time past, have our campsites in these areas and we go there periodically, seasonally, according to the game and the fishing season, and we still maintain these sites and as far as we know, they have been there as far back as we can remember.
>
> We still roam these territories, we still pitch our homes there whenever it is required according to our livelihood and we use the land as in times past, we bury our dead within the territory so defined and we still exercise the privilege of free men within the territory so defined.
>
> Q. Mr. Calder, do you know whether the Indian tribes that live in the area adjacent to the territory outlined in the map, exhibit 2, acknowledged the rights of the Nishga people within the territory?
>
> A. Yes, we have a very friendly relationship within the neighbouring tribes to the extent the Nish-

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> gas have even allowed historical rights within the area, like the famous candle fish.

Q. On the map there is a line circling part of the Naas River—

A. Just above Naas Bay. You are referring to this?

Q. No, I am referring to the circle, the dotted line that encircles the Naas River just above Naas Bay.

A. Yes.

THE COURT: That is where it encircles the Naas River?

THE WITNESS: Just above Naas Bay, above and opposite and below. Northeast, I should say, my lord.

MR. BERGER:

Q. Does that circle indicate the Ooligchan grounds?

A. Yes.

Q. Are the rights of any other tribes besides the Nishga people recognized there?

A. The Port Simpson people, the Tsimshian tribes have their own locations in which they have their supply of Ooligchans.

The area described by Calder covers all the lands outlined in ex. 2 other than a small parcel granted by the Government of British Columbia for the townsite of Stewart as well as tree farm license No. 1 and possibly some mineral leases and timber dispositions of indefinite duration. These parcels total but a fraction of the area in ex. 2. The appellants now make no claim in respect of these parcels but it will be noted that in paras. 19, 20 and 21 of the statement of claim the appellants allege as follows:

19. No part of the said territory was ever ceded to or purchased by Great Britain or the United Kingdom, and no part of the said territory was ever ceded to or purchased by the Colony of British Columbia.

20. No part of the said territory has been ceded to or purchased by the Crown in right of the Province of British Columbia and no part thereof has been purchased from the said Nishga tribe or the Plaintiffs or

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any of them by the Crown or by any person acting on behalf of the Crown, at a public meeting or assembly or otherwise, or by any person whomsoever.

21. The Plaintiffs say that the Land Act and other statutes of the Province of British Columbia do not apply to the lands comprising the tribal territory of the Nishga tribe so as to confer any title or interest in the said lands unencumbered by the aboriginal title of the Nishga tribe, and that if the Land Act and other statutes of the Province of British Columbia have purported to purport to confer any title or interest unencumbered by the aboriginal title of the Nishga tribe, in any of the

> land comprising the tribal territory of the Nishga nation, the same are ultra vires the Province of British Columbia.

Paragraph 21 alleges that any disposition by the Province of British Columbia purporting to have been made under the *Land Act* or other statutes of the Province are *ultra vires* the Province and also by paras. 1 and 2 of the reply the appellants plead that all the proclamations and enactments set out and referred to in paras. 12 and 13 of the statement of defence were *ultra vires* the Colony of British Columbia and of the Province of British Columbia.

The nature of the title of the interest being asserted on behalf of the Nishgas was stated in evidence by Calder in cross-examination as follows:

> From time immemorial the Naas River Nishga Indians possessed, occupied and used the Naas Valley, Observatory Inlet, and Portland Inlet and Canal, and within this territory the Nishgas hunted in its woods, fished in its waters, streams and rivers. Roamed, hunted and pitched their tents in the valleys, shores and hillsides. Buried their dead in their homeland territory. Exercised all the privileges of free men in the tribal territory. The Nishgas have never ceded or extinguished their aboriginal title within this territory.

which is actually a quotation from ex. 7.

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When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants described it as "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada." The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation. The issue here is whether any right or title the Indians possess as occupants of the land from time immemorial has been extinguished. They ask for a declaration that there has been no extinguishment. The precise nature and value of that right or title would, of course, be most relevant in any litigation that might follow extinguishment in the future because in such an event, according to common law, the expropriation of private rights by the government under the prerogative necessitates the payment of compensation: *Newcastle Breweries Ltd. v. The King*[18]*.* Only express words to that effect in an enactment would authorize a taking without compensation. This proposition has been extended to Canada in *Montreal v. Montreal Harbour Commission*[19]*.* The principle is so much part of the common law that it even exists in time of war as was made clear in *Attorney General v. DeKeyser's Royal Hotel*[20]*,* and *Burmah*

[18] [1920] 1 K.B.854.
[19] [1926] A.C. 299.
[20] [1920] A.C. 508.

Oil Co. v. Lord Advocate[21]. This is not a claim to title in *fee* but is in the nature of an equitable title or interest, (see *Cherokee Nation v. State of Georgia*[22]) a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.

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The essence of the action is that such rights as the Nishgas possessed in 1858 continue to this date. Accordingly, the declaratory judgment asked for implies that the *status quo* continues and this means that if the right is to be extinguished it must be done by specific legislation in accordance with the law.

The right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person or authority. Since it is admitted that the Nishgas have been in possession since time immemorial, that fact negatives that anyone ever had or claimed prior possession.

The Nishgas do not claim to be able to sell or alienate their right to possession except to the Crown. They claim the right to remain in possession themselves and to enjoy the fruits of that possession. They do not deny the right of the Crown to dispossess them but say the Crown has not done so. There is no claim for compensation in this action. The action is for a declaration without a claim for consequential relief as contemplated by British Columbia Marginal Rule 285 quoted later. However, it must be recognized that if the Nishgas succeed in establishing a right to possession, the question of compensation would remain for future determination as and when proceedings to dispossess them should be taken. British Columbia's position has been that there never was any right or title to extinguish, and alternatively, that if any such right or title did exist it was extinguished in the period between 1858 and Confederation in 1871. The respondent admits that nothing has been done since Confederation to extinguish the right or title.

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The appellants do challenge the authority of British Columbia to make grants in derogation of their rights, but because the grants made so far in respect of Nishga lands are so relatively insignificant the appellants have elected to ignore them while maintaining that they were *ultra vires.*

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[21] [1965] A.C. 75.
[22] (1831), 5 Peters 1, 30 U.S. 1.

Unlike the method used to make out title in other contexts, proof of the Indian title or interest is to be made out as a matter of fact. In *Amodu Tijani v. Secretary, Southern Nigeria*[23], Lord Haldane said at pp. 402 to 404:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. *There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.* As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. *A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached.* But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. (*St. Catherine's Milling and Lumber Company v. The Queen* (1889), 14 App. Cas. 46.) But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate

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> imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

(Emphasis added.)

The appellant Calder who is a member of the Legislature of British Columbia testified as follows:

> Q. Are you on the band list?
>
> A. I am.
>
> Q. Would you tell his lordship where you were born?

[23] [1921] 2 A.C. 399.

A. I was born in Naas Bay, near the mouth of the Naas River.

Q. Where were you raised?

A. I was raised at Naas Bay and mostly at Greenville.

Q. Were your parents members of the Greenville Indian Band?

A. Yes they are.

Q. Going back beyond your own parents, are you able to say whether your forefathers lived on the Naas River?

A. Yes, they did.

Q. Now, Mr. Calder, are you a member of the Nishga Tribe?

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A. Yes, I am.

Q. What Indians compose the Nishga Tribe?

A. The Nishga Indians that live in the four inlets of the Naas River.

Q. What are the names of the four Indians?

A. Kincolith.

Q. Kincolith?

A. That's correct, Greenville, Canyon City and Aiyansh.

Q. Can you tell his lordship, Mr. Calder, whether all of the Indians who live in the four communities on the Naas River are members of the Nishga Tribe?

A. Yes, they are members of the Nishga Tribe.

Q. Do you include not only the men and women but the children as well?

A. Yes.

Q. What language do the members of the Nishga Tribe speak?

A. They speak Nishga, known as Nishga today.

Q. Is that language related to any other languages that are spoken on the North Pacific Coast?

A. It is not the exact—our neighbouring two tribes, we more or less understand each other, but Nishga itself is in the Naas River, and there is no other neighbouring tribe that has that language.

Q. What are the names of the two neighbouring tribes who have a limited understanding of your language?

A. Gitskan and Tsimshian.

Q. Do you regard yourself as a member of the Nishga Tribe?

A. Yes, I do.

Q. Do you know if the Indian people who are members of the four Indian bands on the Naas River regard themselves as members of the Nishga Tribe?

A. Yes, they do.

Q. Apart from their language, do they share anything else in common?

A. Besides the language they share our whole way of life.

…

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Q. Now, Mr. Calder, I am showing you exhibit 2, which is a map Mr. Brown and I have agreed upon. Does the territory outlined in the map constitute the ancient territory of the Nishga people?

A. Yes, it does.

Q. Have the Nishga people, Mr. Calder, ever surrendered their aboriginal title to the land in exhibit 2?

A. They have not.

THE COURT: Isn't that what I have to decide?

MR. BERGER: I don't think the—

MR. BROWN: My friend can ask him what he knows. I think your lordship has summed it up correctly.

THE COURT: That earlier question you phrased, would you repeat it please?

MR. BERGER: The ancient territory of the Nishga people.

THE COURT: Your next question was objected to.

MR. BROWN: I don't object to it, if my friend is using his question in the sense of have there been documents or treaties under which they have surrendered some right. That is a legitimate fact, I think; I withdraw my objection to that extent.

MR. BERGER:

Q. You have told the court you were born and raised in the Naas Valley and you were a member of the Nishga Tribe. Are you in fact the President of the Nishga Tribal Council?

A. I am the elected President.

Q. Have you been President of the Nishga Tribal Council since 1955?

A. Yes, since its formation. I have been elected annually as President of the Council, yes.

Q. Are you acquainted with the territory outlined in the map, exhibit 2?

A. Yes.

Q. Have the Nishga people ever signed any document or treaty surrendering their aboriginal title to the territory outlined in the map, exhibit 2?

A. The Nishgas have not signed any treaty or any document that would indicate extinguishment of the title.

Gosnell, Chief Councillor of the Gitlakdamix band, said:

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Q. Mr. Gosnell, have the Nishga people ever signed any treaty or document giving up their Indian title to the lands and the waters comprised in the area delineated on the map Exhibit 2 which I am showing you?

A. No.

MR. BROWN: I think I can save my friend some trouble, I think the Attorney-General is prepared to say while denying there is such a thing as an Indian title in the area, that the inhabitants never did give up or purport to give up that right.

The witnesses McKay, Nyce and Robinson confirmed the evidence of Calder and Gosnell.

W.E. Ireland, Archivist for British Columbia, produced the private papers of Governor Douglas as well as despatches between the Secretary of State for the Colonies and Governor Douglas and many other historic documents, including the Nishga petition to the Privy Council in 1913. There were received in evidence extracts from testimony given at hearings of two Royal Commissions, the first being in 1888 when David MacKay, speaking for the Nishgas, said in part:

David Mackay—what we don't like about the Government is their saying this: "We will give you this much land". How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always

> been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white

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> people who live in towns and have their stores and other business, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land.

At the second Royal Commission hearing in 1915 (the McKenna-McBride Commission), Gideon Minesque for the Nishgas said:

> We haven't got any ill feelings in our hearts but we are just waiting for this thing to be settled and we have been waiting for the last five years—we have been living here from time immemorial—it has been handed down in legends from the old people and that is what hurts us very much because the white people have come along and taken this land away from us. I myself am an old man and as long as I have lived, my people have been telling me stories about the flood and they did not tell me that I was only to live here on this land for a short time. We have heard that some white men, it must have been in Ottawa; this white man said that they must be dreaming when they say they own the land upon which they live. It is not a dream—we are certain that this land belongs to us. Right up to this day the government never made any treaty, not even to our grandfathers or our great-grandfathers.

Wilson Duff, associate professor of anthropology at the University of British Columbia, testified as to the nature of the Nishga civilization and culture in great detail. The trial judge said of this witness and of Dr. Ireland: "Drs. Ireland and Duff are scholars of renown, and authors in the field of Indian history, and records", and on the question of credibility, he said:

> I find that all witnesses gave their respective testimony as to facts, opinions, and historical and other documents, with total integrity. Thus there is no issue of credibility as to the witnesses in this case, and an appellate court, with transcript and exhibits in hand,

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> would be under no comparative disadvantage in evaluating the evidence from not having heard the witnesses in personam.

Dr. Duff is the author of vol. I of *The Indian History of British Columbia* published by the Government of British Columbia and admitted in evidence as ex. 25. Dr. Duff testified as follows, quoting from ex. 25 and related quotations applicable to the Nishgas:

> Q. Did you, Professor Duff, in fact prepare for counsel the map that has been marked Exhibit 2 in this case?

A. Yes, I did.

Q. Are you familiar with the anthropological history of the Indian people who inhabited the area delineated in the map and the surrounding areas?

A. Yes, I am.

Q. Who has, since time immemorial, inhabited the area delineated on the map?

A. The Nishga Indians.

Q. Can you tell the Court what position the Indians in the areas adjacent to that delineated on the map took regarding the occupancy of the Nishga Tribe of that area?

A. All of the surrounding tribes knew the Nishga as the homogeneous group of Indians occupying the area delineated on the map. They knew of them collectively under the term Nishga. They knew that they spoke their own dialect, that they occupied and were owners of that territory and they respected these tribal boundaries of the territory.

Q. By the tribal boundaries do you mean the boundaries delineated on the map?

A. Yes.

…

Q. Now, are you able to tell the Court whether the Nishga Tribe made use of the land and the waters delineated on the map beyond the limits of the reserve that appear on this map in the McKenna-McBride report?

A. Yes.

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Q. Is there any significance to the location of the reserves on the Portland Canal and Observatory Inlet and the Nass River?

A. Yes, I think that I can say that in many cases these small reserves were located, for example, on the Portland Canal at the mouth of the tributary stream, at the mouth of a valley. The reserve is a small piece of land at the mouth of the stream which, to a degree, protects the Indian fishing rights to the stream.

Q. Now, prior to the establishment of these reserves what use would the Indian people have made of the areas which flow into the mouths of the streams and rivers?

A. The general pattern in these cases would be that the ownership of the mouth of the stream and the seasonal villages, or habitations that were built there, signify the ownership and use of the entire valley. It would be used as a fishing site itself and a fishing site on the river, but in addition to that the people who made use of this area would have the right to go up the valley for berry picking up on the slopes, for hunting and trapping in the valley and up to forest slopes, usually for the hunting of mountain goats. In other words they made use, more or less intensive use of the entire valley rather than just the point at the mouth of the stream.

Q. So that in the case of each of those Indian Reserves situated at the mouth of a stream use would have been made by the Indians—

MR. BROWN: Oh, would my friend not lead quite so much.

MR. BERGER: No, I won't. I won't pursue that matter, anyway.

Q. Now, in your book which has been marked as an exhibit you say on page 8:

> "At the time of contact the Indians of this area were among the world's most distinctive peoples. Fully one-third of the native population of Canada lived here. They were concentrated most heavily along the coastline and the main western rivers, and in these areas they developed their cultures to higher peaks, in many respects, than in any other part of the continent north of Mexico. Here, too, was the greatest linguistic diversity in the country, with two dozen languages spoken, belonging

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> to seven of the eleven language families represented in Canada. The coastal tribes were, in some ways, different from all other American Indians. Their languages, true enough, were members of American families, and physically they were American Indians, though with decided traits of similarity to the peoples of Northeastern Asia. Their cultures, however, had a pronounced Asiatic tinge, evidence of basic kinship and long continued contact with the peoples around the North Pacific rim. Most of all, their cultures were distinguished by a local richness and originality, the product of vigorous and inventive people in a rich environment."

Would that paragraph apply to the people who inhabited the area delineated on the map, Exhibit 2?

A. Yes.

Q. The next paragraph reads:

> "It is not correct to say that the Indians did not own the land but only roamed over the face of it and used it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they didn't subject the forest to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food gathering. Even if they didn't sink mine shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the province was formerly within the owned and recognized territory of one or other of the Indian Tribes."

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Does that paragraph apply to the people who inhabited the area delineated on the map, Exhibit 2?

A. Yes, it does.

Q. Does it apply to the Nishga Tribe?

A. Yes, it does.

Q. Now, you have said that the paragraph that I have just read to you applies to the Nishga Tribe. Can you tell his lordship the extent of the use to which the Nishgas have put the lands and waters in the area delineated on Exhibit 2 and how intensive that use was?

A. This could be quite a long statement.

Q. Well, I think we can live with it.

A. And much of it has already been said. However, the territories in general were recognized by the people themselves and by other tribes as the territory of the Nishga Tribe. Certain of these territories were used in common for certain purposes, for example, obtaining of logs and timber for houses, and canoes, totem poles, and the other parts of the culture that were made of wood, like the dishes and the boxes and masks, and a great variety of other things, and the obtainment of bark, which was made into forms of cloth and mats and ceremonial gear. These would tend to be used in common.

Other areas weren't tribal territories, would be allotted or owned by family groups of the tribe and these would be used, different parts, with different degrees of intensity. For example, the beaches where the shell fish were gathered would be intensively used. The salmon streams would be most intensively used, sometimes at different times of the year, because different kinds of salmon can run at different times of the year.

The lower parts of the valley where hunting and trapping were done would be intensively used, not just for food and the hides and skins and bone and horn material that was used by the Indian culture, but for furs of different kinds of large and small animals which were either used by the Indians or traded by them.

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These people were great traders and they exploited their territories to a great degree for materials to trade to other Indians and later to the white man.

The farther slopes up the valleys, many of them would be good mountain goat hunting areas. This was an important animal for hunting. Other slopes would be good places for trapping of marmots, the marmot being equally important, and there are a great number of lesser resources, things like minerals of certain kinds for tools and lichen and mosses of certain kinds that were made into dyes. It becomes a very long list.

Q. Go ahead.

A. Now, in addition to this, the waterways were used for the hunting of sea animals as well as fishing of different kinds. They were used also as highways, routes of travel for trade amongst themselves and for their annual migration from winter to summer villages, and a great variety of minor resources from water, like shell fish of different kinds, fish eggs, herring eggs—there is a great list of such minor resources in addition.

Q. To what extent would the use and exploitation of the resources of the Nishga territory have extended in terms of that territory? Would it have extended only through a limited part of the territory or through the whole territory?

A. To a greater or lesser degree of intensity it would extend through a whole territory except for the most barren and inaccessible parts, which were not used or wanted by anyone. But the ownership of an entire drainage basin marked out by the mountain peaks would be recognized as resting within one or other groups of Nishga Indians and these boundaries, this ownership would be respected by others.

Q. Now, can you make any comparison between the area that is represented by the Indian Reserves in the map, in the third volume of the McKenna-McBride Report; can you make any comparison between that area represented by those reserves and the area of the whole Nishga territory that was used and exploited by the Nishgas before their confinement to reserves?

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A. Well, I think the comparison is simply here, and these are several tiny plots of land, whereas on the map the entire tract was used for some purpose or other with some greater or lesser degree of intensity.

Q. Well, by the map do you mean the map, Exhibit 2? A. That's right, yes.

On cross-examination he said:

A. May I tell you the nature of my information on which I am working because I think this needs to be said?

THE COURT: Yes.

A. All right. I am, of course, familiar with the great bulk of the published material on the Indians of this area, some of which will be entered into evidence. I have myself discussed these matters with many Indians, both Nishga and their neighbours, but my main source of information is the great, abundant body of unpublished anthropological and historical material which was assembled in the National Museum of Canada by the anthropologist Marius Barbeau, who worked in this area between 1914 and the late '40's, and continued to assemble it until just a couple of years ago. He died this past year. Also, a Tsimshian gentleman who actually thought of himself as a Nishga chief, William Beynon who lived the greater part of his life at Port Simpson, who was an interpreter and assistant of Barbeau and other anthropologists and who, himself, until his death in 1967, recorded hundreds and hundreds of pages of anthropological information and family traditions and narratives having to do with the Nishga and the Gitksan people. I have had access to this great body of unpublished material. I spent a year at the National Museum working with it ten years ago and this has provided me with the detailed information upon which I can make these statements. Unfortunately I haven't worked it up into a publishable form as yet and it is such a vast body of material that I don't have it all at the tip of my tongue.

…

Q. Yes. Now, the fact is that the members of these bands did reside from time to time in communi-

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ties and those communities would appear to have been within some of the present reserves?

A. Yes, that's right.

Q. Well, now, I was asking you as to what documentary or other evidence there was that justifies you in using the word "ownership". I suggest that that was a concept that was foreign to the Indians of the Nass Agency?

A. I am an anthropologist, sir, and the kind of evidence with which I work is largely not documentary evidence. It is verbal evidence given by people who didn't produce documents and it is turned into documentary form in anthropological and historical reports and in the reports of various Commissions.

Q. All right. Well, that is what I want now.

A. Yes, okay.

Q. I want you to state, so I can go and look them up, the documents you rely upon to support your statement, your use of the word "ownership", as "belonging" in the Indian concept.

A. Anthropological reports which I understand Mr. Berger is going to enter into the record, one of them by Philip Drucker, is a general book on the Indians of the Northwest Coast and it would use the term. Another is a book by Viola Garfield as to the Tsimshian Indians in general and in this sense it includes the Nishga which would use a concept of ownership.

Q. Now, are you suggesting that this is anything other than a tribal concept?

A. It includes the tribal concept and it is more besides, yes.

Q. Well, perhaps if my learned friend would give me the book you can indicate just what you mean. What was the book you referred to, Drucker?

A. Drucker or Docker.

MR. BERGER: Yes, I have it, my lord.

THE COURT: It is enmeshed in the toils of your papers, is that right?

MR. BERGER: That's right. I think those are two of them.

MR. BROWN:

Q. Would you indicate what you had in mind?

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A. May I read it? Do you want me to read a section?

Q. Yes. Just direct our attention, will you, to the particular points?

A. This is Viola Garfield's book, "The Tsimshian, Their Arts and Music." On page 14—

THE COURT: Now, tell me something about the author first.

A. Yes. The authoress is an anthropologist who studied at the University of Washington in Seattle and who is still a professor of Anthropology there and who did her field work and much of her writing on the Tsimshian Indians. These would be primarily the Tsimshian, in the narrower sense of people who live at Port Simpson, now Metlakatla, but the concepts would apply to the Nishga as well.

On page 14 she writes:

> "It was characteristic of the Tsimshian, as of other Northwest Coast Tribes, that exclusive rights to exploit the resource districts were claimed by kin. Lineages of the Tsimshian were the owners of rights to hunt, fish, pick berries or gather raw materials from geographically defined territory. Lineage properties were listed at an installation potlatch of a new head, hence were in his name. Lineage heads could and did designate certain areas as actually his and pass them on as private property to successors. This is the concept of ownership that—"
>
> …

Q. Well, the basis of any statement about ownership would lie in the fact that the Nishgas had exclusive possession of the area, it was unchallenged, isn't that true?

A. For the area marked on the map?

Q. Yes.

A. Yes.

Q. So that anyone has to be careful about what word you apply because of the legal implications and to speak of ownership simply because someone has an unchallenged possession is to confuse two things, would you not agree?

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A. The point I was trying to make in the second paragraph that Mr. Berger read out was that although their concepts of ownership were not the same as our legal concept of ownership, they nevertheless existed and were recognized and that is the point I was trying to make.

Q. Well, anyway, you are unable to find any documentary evidence in support other than conclusions drawn by anthropologists?

A. And also verbatim statements by Indians at the various Commissions, and I think Mr. Berger is going to enter some of this.

MR. BERGER: They have been entered.

MR. BROWN: Yes.

Q. Well, in other words the Indians would speak of the fact that when they attended before a Commission, that they owned the land?

A. Yes.

Q. They would speak in those terms as "We" as a group.

A. Yes.

Q. "Own the land".

A. I think they would go beyond that and say, "And the chief owned that certain territory up Portland Inlet where we used to get this and that," and the whole list of things that I referred to before.

Q. Would one family defend its right like that against other families?

A. It could, yes.

Q. Well, is there evidence of that?

A. There are narratives to that effect, yes.

Q. In the Nishga Valley, in the territory you have marked off there?

A. Yes.

Q. Where? Can you point to that?

A. They are in the unpublished material that I have been referring to.

Possession is of itself at common law proof of ownership: Cheshire, *Modern Law of Real Property,* 10th ed., p. 659, and Megarry and Wade, *The Law of Real Property,* 3rd ed., p. 999. Unchallenged possession is admitted here.

Dr. Duff also went into the details of the Nishga system of succession to property based on a matrilineal line, showing that the Nishgas

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had a well developed and sophisticated concept of property. Regarding the general state of development and sophistication of the culture of the Nishgas, he testified, quoting from his book as follows:

Q. I will go on to something else for the time being, then. Now, at page 17 of your book you say in the last paragraph:

> "There were some incipient or tentative groupings of tribes into larger units. In some cases clusters of closely related tribes bore collective names; for example, Cowichan."

And you mentioned some others,

> "In other cases such a cluster was acknowleged to be closely interrelated but had no joint names; for example, the Haida of Cumshewa, Skedans and Tanoo. A number of descriptive names for regional groups have appeared in print so often that they have become established by usage; for example, Upper Thompson, Lower Kootenay, Northern Kwakiutl, and Coast Tsimshian. Though not native names, these have been included in the table. These larger groupings had no internal organization, with two interesting exceptions. After the establishment of Fort Rupert the Southern Kwakiutl Tribes arranged themselves in a definite order of rank in order to control their ceremonial relations and potlaching organizations, and after the establishment of Port Simpson the nine Lower Skeena Tsimshian Tribes did much the same thing."

Now, is that what we are talking about, the organization of these groups for potlaching purposes?

A. Which groups?

Q. Well, what you are talking about there was this organization of family groups basically related to the potlaching arrangements.

A. The potlaching was the mechanism by which the family groups maintained their relative ranking, yes.

Q. Yes.

A. Within the tribes.

Q. Now, you say, going back to page 16:

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> "On the Northern Coast, where kinship ties were most rigidly defined, matrilineal households or lineages were the basic units that united in each locality to form tribal groups, which usually assembled for part of the year in a common village."

Now, was that a characteristic in the Nishga groups, and if so, where did they assemble in a common village?

A. There was no single common village in which all of the Nishga groups assembled at any one time.

Q. No, I didn't understand that from the councillors. Now, you say:

> "Among the Tsimshian these tribes hardened into firmly knit political units (this was somewhat less the case among the Gitksan, Niska—."

Now, those two peoples we are talking about, the people within the area you have delineated, are they not?

A. The Gitksan are just outside of the area and the Nishga are inside the area.

Q. Yes. So Niska means Nishga there?

A. That is correct, yes.

Q. And is that a correct statement, that this was somewhat less the case among the Nishga?

A. Yes, that is correct.

and reverting to the question of ownership, he said, quoting with approval from Drucker, a well known American anthropologist:

Q. Yes, please.

A. This is the chapter on social and political organization of the peoples of the North Pacific Coast. The section that is relevant here concerns the localized groups of kin. The localized groups of kin define who lived together, worked together and who jointly considered themselves exclusive owners of the tracts from which food and other prime materials were obtained.

Q. Jointly considered themselves, is that the word?

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A. Jointly considered themselves, yes.

The whole group owned not only lands and their produce but all other forms of wealth, material treasures and intangible rights usually referred to as privileges, names for persons, houses, canoes, houseboats and even for dogs and slaves. I emphasize the phrases that I wanted to emphasize there.

Q. So that there was a form, again, of a communal approach?

A. In that sense.

Q. Yes.

A. It belonged to the group, yes.

Q. Thank you.

A. And on page 49, the last eight or so lines, this is dealing with wealth in these cultures and I quote:

> "Distinctive of North Pacific Coast culture is the inclusion of natural resources and items of wealth; the foodstuffs, the materials for dress, shelter and transport and the places from which these things were obtained. Each group regarded the areas utilized as the exclusive

property of the group. Group members used habitation sites, fishing grounds, clam beaches, hunting and burying grounds, that is in the sense of getting buried, forest areas where timber and bark were obtained through right. Outsiders entered by invitation or in trespass.

"Bounds were defined by natural landmarks with a precision remarkable for people with no surveying equipment."

THE COURT: Read me the last sentence again, please.

"Bounds were defined by natural landmarks with a precision remarkable for people with no surveying equipment."

Now, these are the only two specific specimens in this book.

MR. BROWN:

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Q. Thank you. Now, what is he discussing there? Is he discussing a particular group?

A. He is discussing the Northwest Coast groups in general, of which the Nishga are one.

An interesting and apt line of questions by Gould J. in which he endeavoured to relate Duff's evidence as to Nishga concepts of ownership of real property to the conventional common law elements of ownership must be quoted here as they disclose that the trial judge's consideration of the real issue was inhibited by a preoccupation with the traditional *indicia* of ownership. In so doing, he failed to appreciate what Lord Haldane said in *Amodu Tijani, supra:*

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

The trial judge's questions and Duff's answers were as follows:

THE COURT:

Q. I want to discuss with you the short descriptive concept of your modern ownership of land in British Columbia, and I am going to suggest to you three characteristics (1) specific delineation of the land, we understand is the lot.

A. Yes.

Q. Specifically delineated down to the lot, and the concept of the survey; (2) exclusive possession against the whole world, including your own family. Your own family, you know that, you want to keep them off or kick them off and one can do so; (3) to keep the fruits of the barter

or to leave it or to have your heirs inherit it, which is the concept of wills. Now, those three characteristics—are you with me?

A. Yes.

Q. Specific delineation, exclusive possession, the right of alienation, have you found in your anthropological studies any evidence of that

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concept being in the consciousness of the Nishgas and having them executing such a concept?

A. My lord, there are three concepts.

Q. Yes, or a combination of them.

A. Could we deal with them one at a time?

Q. Yes, you can do it any way you like. You deal with it.

A. Specific delineation, I think, was phrased by Dr.—

Q. Touched upon by landmarks.

A. Physical landmarks, physical characteristics. The exclusive occupation did not reside in an individual. It rested in a group of people who were a sub-group of the tribe.

Q. The third one was alienation.

A. The owners in this sense had certain rights of alienation. They could give up the tract of land, lose it in warfare, but in practice it would not go to anybody outside of the tribe, that is, a tract of Nishga land might change hands but it wouldn't go to other than a Nishga family.

Q. So am I correct in assuming that there are similarities in the Nishga civilization in the first two characteristics, but not the third? All that alienation means, of course, is that you can sell it to anybody you like?

A. Yes.

Q. Generally speaking, I mean, that is, what it does. Two of the three the Nishga Tribe—I don't want to put words in your mouth, now, I want you to tell me. I don't want to tell you anything.

A. Delineation but not by modern surveying methods.

Q. Of course, I understand, yes.

A. Exclusive ownership resting not in an individual.

Q. Possession or occupancy, not ownership?

A. Oh, I see. Possession or occupancy resting in a specific group rather than an individual. The right of alienation, which in practice would leave the land within the same tribe. It was limited.

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Q. Could the group having exclusive occupancy select within the tribe, if they chose, another group to whom they wanted to either, to use the modern word, convey it, or would that go by general communal habit, custom or even law?

A. The group could do the thing you suggest. For example, in some cases the chief of a group might convey a property to his son, which would not be the normal way; it would be to his nephew in the normal way.

Q. Yes.

A. And that would, on rare occasions, be accepted.

Q. Always subject to the acceptance of what, the tribe?

A. The tribe, yes.

RE-EXAMINED BY MR. BERGER:

Q. His lordship put to you three characteristics of modern day real property concepts. Having regard to the territory of the Nishga Tribe outlined on the map, Exhibit 2, can you say whether or not there would have been specific delineation of that area in the sense in which it was put to you by his lordship?

A. Of the boundaries of that area?

Q. Yes.

A. Yes.

Q. What would the means of delineation have been?

A. As Dr. Drucker has described them here, landmarks.

Q. By landmarks. Do you mean the mountain tops?

A. Yes, geographical locations.

Q. Now, his lordship put to you the notion of exclusive possession. As regards the territory delineated on the map, Exhibit 2, the Nishga territory, what would have been the application of that concept if it had any in the time before the coming of the white man?

A. It would be recognized by all as Nishga territory. They would exercise exclusive possession of it.

MR. BERGER: I have no further questions.

THE COURT: I have some more now.

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Q. I will give two more characteristics of ownership, the right to destroy it at your own whim, if you like, and the other, that the exclusive possession should be of indeterminable time, that is, cannot be terminated by a person's life, that is, can be passed on to one's heirs. That makes five. Now, you have dealt with three. Now, the right to destroy at whim, set fire to your own house; these matters you have been dealing with, would a group within the Nishga have the right, if the buildings at the mouth of a certain river had been in their exclusive use some time and they will say, "Let's set fire to it," would the tribe prohibit that?

A. I would think that they would have that right.

Q. You would think they would have that right?

A. Yes.

Q. Now, what about the duration of the right, not to destroy, but the right of exclusive ownership, would it go to their heirs?

A. Yes.

Q. Or go back to the tribe for distribution?

A. In theory it belongs within that kinship group through time, with no duration in theory. It always remains with that same kinship group.

Q. That is the matrilineal line?

A. Yes.

THE COURT: Thank you.

In enumerating the *indicia* of ownership, the trial judge overlooked 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.

What emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law having, in the words of Dr. Duff, "developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico". A remarkable con-

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firmation of this statement comes from Captain Cook who, in 1778, at Cape Newenham claimed the land for Great Britain. He reported having gone ashore and entered one of the native houses which he said was 150 feet in length, 24 to 30 feet wide and 7 to 8 feet high and that "there were no native buildings to compare with these north of Mexico". The report continues that Cook's officers were full of admiration for the skill and patience required to erect these buildings which called for a considerable knowledge of engineering.

While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here.

Strong J. (later C.J.C.) in *St. Catharine's Milling and Lumber Company v. The Queen*[24], said at p. 608:

> In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. *It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.* This short statement will, I think, on comparison with the authorities to which I will presently refer, be found to be an accurate description of the principles upon which the crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnston was appointed by the Imperial Government superintendent of Indian

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> affairs in North America, being as such responsible directly to the crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867, when the confederation act constituting the Dominion of Canada was passed. So faithfully was this system carried out, that I venture to say that there is no settled part of the territory of the Province of Ontario, except perhaps some isolated spots upon which the French Government had, previous to the conquest, erected forts, such as Fort Frontenac and Fort Toronto, which is not included in and covered by a surrender contained in some Indian treaty still to be found in the Dominion Archives. These rules of policy being shown to have been well established and acted upon, and the title of the Indians to their unsurrendered lands to have been recognized by the crown to the extent already mentioned, it may seem of little importance to enquire into the reasons on which it was based.

(Emphasis added)

and at p. 610:

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[24] (1886), 13 S.C.R. 577.

> The American authorities, to which reference has already been made, consist (amongst others) of passages in the commentaries of Chancellor Kent, (Kent's Commentaries 12 ed. by Holmes, vol. 3 p. 379 *et seq.* and in editor's notes.) in which the whole doctrine of Indian titles is fully and elaborately considered, and of several decisions of the Supreme Court of the United States, from which three, *Johnston v. McIntosh,* 8 Wheaton 543, *Worcester v. State of Georgia,* 6 Peters 515, and *Mitchell v. United States,* 9 Peters 711, may be selected as leading cases. *The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America.* Chancellor Kent, referring to the decision of the Supreme Court of the United States, in *Cherokee*

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Nation v. State of Georgia, 5 Peters 1, says:—

> "The court there held that the Indians were domestic, dependent nations, and their relations to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied until that right should be extinguished by a voluntary cession to our government, 3 Kent Comms. 383."

(Emphasis added.)

…

> It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the *dominium utile* is recognized as belonging to or reserved for the Indians, though the *dominium directum* is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States courts to have been originally enforced by the crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favorable to the Indians whose lands were situated within the dominion of the British crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? *Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown.* I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th sub-section of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly

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> legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments.

(Emphasis added.)

…

> To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil;…

Strong J., with whom Gwynne J. agreed, was dissenting in the case but the dissent was on the question of whether the Dominion or Provincial government acquired title when the Indian title was extinguished as it had been in that case by treaty. The majority held that the Crown in the right of the Province became the owner and Strong and Gwynne JJ. held that the Dominion became the owner. However, on the point of Indian title there was no disagreement between the majority and minority views. Ritchie C.J. for the majority agreed substantially with Strong J. in this respect, saying at pp. 559-60:

> I am of opinion, that all ungranted lands in the province of Ontario belong to the crown as part of the public domain, *subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished,* and when such right of occupancy has been lawfully extinguished absolutely to the crown, and as a consequence to the province of Ontario. I think the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute

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> exclusive right to extinguish the Indian title either by conquest or by purchase…

(Emphasis added.)

The *St. Catharine's Milling* case was affirmed in the Privy Council[25]. The judgment was given by Lord Watson who, in referring to Indian aboriginal interests, said at p. 54:

> It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians

[25] (1888), 14 App. Cas. 46.

> was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. *There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.* (Emphasis added.)

The case most frequently quoted with approval dealing with the nature of aboriginal rights is *Johnson v. McIntosh*[26]. It is the *locus classicus* of the principles governing aboriginal title. Gould J. in his reasons said of this case at p. 514:

> The most cogent one of these is the argument based upon a classic and definitive judgment of Chief Justice Marshall of the United States, in 1823, in the case of *Johnson v. McIntosh,* (1823) 8 Wheaton, p 541, wherein that renowned jurist gave an historical account of the British Crown's attitude towards the rights of aboriginals over land originally occupied by

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> them, and an enunciation of the law of the United States on the same subject.

and on p. 518 he said:

> For more than 150 years this strong judgment has at various times been cited with approval by such authorities as the House of Lords (*Tamaki v. Baker* [1901] A.C. 561 at 580); the Supreme Court of Canada (*St. Catherine's Milling v. The Queen* (1886) 13 S.C.R. 577, Strong, J. at 610); Court of Appeal for Ontario, (in the same case, (1886)—13 O.A.R. 148, Burton, J.A., at 159-160); Ontario High Court, Chancery Division (in the same case, 10 O.R. 196, Boyd, J., at 209); Court of Appeal for British Columbia (*White and Bob,* supra p. 230); Supreme Court of New Brunswick (*Warman v. Francis* (1958)—20 D.L.R. (2d) 627, Anglin, J., at 630).

Chief Justice Marshall said in *Johnson v. McIntosh:*

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government

[26] (1823), 8 Wheaton 543, 21 U.S. 240.

by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no

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Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. *They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion;* but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

(Emphasis added.)

It is pertinent to quote here what Norris J.A. said of *Johnson v. McIntosh* in *R. v. White and Bob*[27]*,* at pp. 212-13:

…The judgment in *Johnson v. McIntosh, supra,* was delivered at an early stage of exploration of this continent and when controversy as to those rights was first becoming of importance. Further, on the consideration of the subject matter of this appeal, it is to be remembered that it was delivered only five years after the Convention of 1818 between Great Britain and the United States (erroneously referred to by counsel as the *Jay Treaty*) providing that the northwest coast of America should be free and open for the term of ten years to the vessels, citizens, and subjects of both powers in order to avoid disputes

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between the powers. The rights of Indians were naturally an incident of the implementation of a common policy which was perforce effective as applying to what is now Vancouver Island and the territory of Washington and Oregon, all of which were then Hudson's Bay territories. For

[27] (1965), 52 W.W.R. 193.

these reasons and because the judgment in *Johnson v. McIntosh* was written at a time of active exploration and exploitation of the West by the Americans, it is of particular importance.

The dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. McIntosh* is that on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.

Chief Justice Marshall had occasion in 1832 once more to adjudicate upon the question of aboriginal rights in *Worcester v. State of Georgia*[28]. He said at pp. 542-4:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws.* It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.
>
> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science,

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> conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.
>
> Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?
>
> But power, war, conquest, give rights, which after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.
>
> The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for anyone of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge,

[28] (1832), 6 Peters 515, 31 U.S. 530, 8 L. ed. 483.

> and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession".
>
> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements upon it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, *but could not affect the rights of those already in possession, either as*

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> *aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.*

(Emphasis added.)

See also Chancellor Kent in his *Commentaries on American Law,* (1889), vol. 3, p. 411.

The view that the Indians had a legal as well as a just claim to the territory they occupied was confirmed as recently as 1946 by the Supreme Court of the United States in the case of *United States v. Alcea Band of Tillamooks*[29] In that case it was held that the Indian claims legislation of 1935 did not confer any substantive rights on the Indians, that is, it did not convert a moral claim for taking their land without their consent and without compensation into a legal claim, because they already had a valid legal claim, and there was no necessity to create one. The statute simply removed the necessity that previously existed for the Indians to obtain the consent of the Government of the United States to sue for an alleged wrongful taking. The judgment is based squarely on the recognition by the Court of "original Indian title" founded on their previous possession of the land. It was held that "the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title". Vinson C.J. said at p. 45:

> The language of the 1935 Act is specific, and its consequences are clear. By this Act Congress neither admitted or denied liability. The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one.

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> It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favour of Indian tribes,

[29] (1946), 329 U.S. 40.

> because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.
>
> As against any but the sovereign, original Indian title was accorded the protection of complete ownership but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. However, it is now for the first time asked whether the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title.
>
> …
>
> A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title. The early acquisition of Indian lands, in the main, progressed by a process of negotiation and treaty, the first treaties reveal the striking deference paid to Indian claims, as the analysis in *Worcester v. Georgia, supra,* clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation. *The great drive to open western lands in the 19th century, however, productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title. In 1896, this Court noted that "nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government". Marks v. United States,* 161, U.S. 297, 302 (1896). *Something more than sovereign grace prompted the obvious regard given to original Indian title.*

(Emphasis added.)

The same considerations applied in Canada. Treaties were made with the Indians of the

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Canadian West covering enormous tracts of land. See Kerr's *Historical Atlas of Canada* (1961), p. 57 (map no. 81). These treaties were a recognition of Indian title.

In *Re Southern Rhodesia*[30], Lord Sumner said at p. 233:

> In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.
>
> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a

[30] [1919] A.C. 211.

landed proprietor "richer than all his tribe." *On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.*

(Emphasis added.)

Chief Justice Marshall in his judgment in *Johnson v. McIntosh* referred to the English case of *Campbell v. Hall*[31]. This case was an important and decisive one which has been regarded as authoritative throughout the Commonwealth and the United States. It involved the rights and status of residents of the Island of Grenada which had recently been taken by British arms in open war with France. The judgment was given by Chief Justice Mansfield. In his

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reasons he said at p. 1047:

> A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:
>
> A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.
>
> The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.
>
> The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.
>
> The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.
>
> The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in *Calvin's case,* shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Crusades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

[31] (1774), 1 Cowp. 204, 98 E.R. 1045.

> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a

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> conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects, and so in many other instances which might be put.

A fortiori the same principles, particularly Nos. 5 and 6, must apply to lands which become subject to British sovereignty by discovery or by declaration.

It is of importance that in all those areas where Indian lands were being taken by the Crown treaties were negotiated and entered into between the Crown and the Indian tribe on land then in occupation. The effect of these treaties was discussed by Davey J.A. (as he then was) for the majority in *White and Bob* as follows at p.197:

> It was the long-standing policy of the Imperial government and of the Hudson's Bay Company that the Crown or the Company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, *were made with various bands and tribes of Indians for the purchase of their lands.* These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the Crown and the Hudson's Bay Company in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard Ex. 8 as a mere, agreement for the sale of land made between a private vendor and a private purchaser. In view of the notoriety of these facts, I entertain no doubt that Parliament intended the word "treaty" in sec. 87 to include all such agreements, and to except their provisions from the operative part of the section.

(Emphasis added.)

The Crown appealed *White and Bob* to this Court. Cartwright J. (as he then was) delivered

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the oral judgment of the Court dismissing the appeal as follows[32]:

> Mr. Berger, Mr. Sanders and Mr. Christie. We do not find it necessary to hear you. We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a "treaty" within the meaning of that term as used in s. 87 of the *Indian Act* [R.S.C. 1952, c. 149]. We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* [R.S.B.C. 1960, c. 160] was excluded by reason of the existence of that treaty.

[32] 52 D.L.R. (2d)481.

In *Attorney General for Quebec v. Attorney General for Canada*[33], Duff J. (as he then was) speaking for the Privy Council said at p. 408 that the Indian right was a "usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."

The aboriginal Indian title does not depend on treaty, executive order or legislative enactment. Sutherland J., delivering the opinion of the Supreme Court of the United States in *Cramer v. United States*[34], dealt with the subject as follows:

> The fact that such right of occupancy finds no recognition in any state or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. *Broder v. Natoma Water & Min. Co.* 101 U.S. 274, 276, 25 L. ed. 790, 791, furnishes an analogy. There this court, holding that the Act of July 26, 1866, 14 Stat. at L. 251, chap. 262 #9, Comp. Stat. #4647, 9 Fed. Stat. Anno. 2d ed. p. 1349, acknowledging and confirming rights of way for the construction of ditches and canals, was in effect declaratory of a pre-existing right, said: "It is the established doctrine of this court that rights of… persons who had constructed canals and ditches… are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the Act of 1866. We are of opinion that the section of the Act which we have quoted was rather a voluntary *recognition of a pre-EXISTING RIGHT OF POSSESSION,* constituting a

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> valid claim to its continued use, than the establishment of a new one."

The Court of Appeal in its judgment cited and purported to rely on *United States v. Santa Fe Pacific Ry. Co.*[35]. This case must be considered to be the leading modern judgment on the question of aboriginal rights. In my view the Court of Appeal misapplied the *Santa Fe* decision. This becomes clear when the judgment of Douglas J. in *Santa Fe* is read. He said:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which unless extinguished survived the railroad grant of 1866. *Buttz v. Northern Pacific Railroad* [119 U.S. 55].
>
> …
>
> Whatever may have been the rights of the Walapais under Spanish law, the *Cramer* case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the *Cramer* case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from "the original nomadic tribal occupancy." [261 U.S. p. 227]. Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson*

[33] [1921] 1 A.C.401.
[34] (1923), 261 U.S. 219.
[35] (1941), 314 U.S. 339.

> *v. McIntosh,* 8 Wheat. 543, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations including Spain, that like other rules governing titles to property (*United States v. Title Ins. & T. Co.* 265 U.S. 472, 486-487) they should now be considered no longer open.

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> …
>
> *Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action.* As stated in the *Cramer* case, "The fact that such right of occupancy finds no recognition in any state or other formal governmental action is not conclusive." 261 U.S. at 229.

It is apparent also that the Court of Appeal misapprehended the issues involved in *United States v. Alcea Band of Tillamooks*[36]*.* This is clear from the judgment of Davis J. in *Lipan Apache Tribe v. United States*[37]*.* In that case it was argued unsuccessfully that affirmative recognition by Texas prior to entering the Union was essential to any legal assertion of Indian title. The Court said:

> On this motion to dismiss we must accept the factual allegation that the claimant tribes had used and occupied designated lands in Texas to the exclusion of other peoples for many years. Such continuous and exclusive use of property is sufficient, unless duly extinguished, to establish Indian or aboriginal title. See, *e.g., Sac and Fox Tribe v. United States* 179 Ct. Cl. 8, 21-22 (1967) and cases cited. We know that, prior to the creation of the Republic of Texas in 1836, the previous sovereigns, Spain and Mexico (and France to some extent), did not cut off the aboriginal rights of the Indians within their territories on the North American continent. The Supreme Court has clearly indicated that lands formerly under Spanish, Mexican or French sovereignty are not to be treated differently, for purposes of determining Indian title, from other property within this nation. *United States v. Santa Fe Pac. R.R.,* 314 U.S. 339, 345-46 (1941). In each instance, Indian possession, when proved, must be accorded proper respect. *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 571, 574, 592 (1823); *Mohave Tribe v. United States,* 7 Ind. Cl. Comm. 219, 260-61 (1959), *Washoe*

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> *Tribe v. United States, 7* Ind. Cl. Comm. 266, 288 (1959).
>
> The Claims Commission has found, however, that, even if the claimants had once possessed aboriginal title to the lands, that right of occupancy was lost after 1836 when Texas became an independent country. The Commission appeared to believe that the survival of aboriginal title depends upon affirmative recognition by the sovereign and that the Republic "did not accord the Indian(s) the right of occupancy…"; without such a right to lands in Texas, at the time of annexation, the tribes failed to prove a necessary element of their cause of action and were barred from recovery.
>
> *To the extent that the Commission and the appellee believe that affirmative governmental recognition or approval is a prerequisite to the existence of original title, we think they err. Indian*

[36] (1946), 329 U.S. 40.
[37] (1967), 180 Ct. Cl. 487.

> *title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival.* Once established in fact, it endures until extinguished or abandoned. *United States v. Santa Fe Pac. R.R.,* supra, 314 U.S. at 345, 347. It is "entitled to the respect of all courts until it should be legitimately extinguished…". *Johnson v. McIntosh,* supra, 21 U.S. (8 Wheat.) at 592. See *Clark v. Smith,* 38 U.S. (13 Pet.) 195, 201 (1839); *Worcester v. State of Georgia,* 31 U.S. (6 Pet.) 405, 420, 439 (1832); *Mohave Tribe v. United States,* supra, 7 Ind. Cl. Comm. at 262.
>
> The correct inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights. Extinguishment can take several forms; it can be effected "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise…". *United States v. Santa Fe Pac. R.R., supra,* 314 U.S. at 347. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. *In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues. Id.* at 353.

(Emphasis added.)

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Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed. Treaty No. 8 made in 1899 was entered into on behalf of Queen Victoria and the representatives of Indians in a section of British Columbia and the Northwest Territories. The treaty was ratified by the Queen's Privy Council in Canada. Certain statements in the treaty are entirely inconsistent with any argument or suggestion that such rights as the Indians may have had were extinguished prior to Confederation in 1871. The treaty reads in part:

> And whereas the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan, and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the Said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, *all their rights, titles and privileges whatsoever, to the lands included within the following limits,* that is to say…
>
> *And also the said Indian rights, title and privileges whatsoever to all other lands wherever situated in the North-West Territories, British Columbia, or in any other portion of the Dominion of Canada.*
>
> To have and to hold the same to Her Majesty the Queen and her successors forever.

(Emphasis added.)

If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?

Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question is the guarantee of Indian rights contained in the Proclamation of 1763. This Proclamation was an Executive Order having the force and effect of an Act of Parlia-

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ment and was described by Gwynne J. in *St. Catharine's Milling* case at p. 652 as the "Indian Bill of Rights": see also *Campbell v. Hall.* Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the *Colonial Laws Validity Act* applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely, the *Quebec Act* of 1774.

In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America. The Proclamation must be regarded as a fundamental document upon which any just determination of original rights rests. Its effect was discussed by Idington J. in this Court in *Province of Ontario v. Dominion of Canada*[38]*,* at pp. 103-4 as follows:

> A line of *policy* begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.
>
> *That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.*
>
> In these surrendering treaties there generally were reserves provided for Indians making such surrenders

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> to enter into or be confined to for purposes of residence.

[38] (1909), 42 S.C.R. 1.

> The history of this mode of dealing is very fully outlined in the judgment of the learned Chancellor Boyd in the case of *The Queen v. St. Catharines Milling Co.* 10 O.R. 196, affirmed 13 O.A.R. 148.

(Italics added.)

The question of the Proclamation's applicability to the Nishgas is, accordingly, relevant in this appeal. The point has been before provincial Courts in Canada on a number of occasions but never specifically dealt with by this Court.

It is necessary, therefore, to face the issue as one of first impression and to decide it with due regard to the historical record and the principles of the common law.

The judges of the Court of Appeal of British Columbia have disagreed on this important question. Norris J.A. in *White and Bob* dealt exhaustively with the subject at pp. 218 to 232 of his reasons, saying in part at p. 218:

> The royal proclamation of 1763 was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island.
>
> For the British, the proclamation of 1763 dealt with a new situation arising from the war with the French in North America, in which Indians to a greater or less degree took an active part on both sides, and, incidentally, from the Treaty of Paris of 1763 which concluded the war. The problem which then faced the British was the management of a continent by a power, the interests of which had theretofore been confined to the sea coast. As exploration advanced, the natives of the interior and the western reaches must be pacified, trade promoted, sovereignty exercised and justice administered even if only in a general way, until such time as British settlement could be established. It was a situation which was to face the Imperial power in varying degree and in various parts of the continent until almost the close of the 19th century. In the circumstances, it was vital that aboriginal rights be declared and the policy pertaining

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> thereto defined. This was the purpose and the substance of the royal proclamation of 1763. The principles there laid down continued to be the charter of Indian rights through the succeeding years to the present time—recognized in the various treaties with the United States in which Indian rights were involved and in the successive land treaties made between the Crown and the Hudson's Bay Company with the Indians.

concluding correctly that the Proclamation was declaratory of the aboriginal rights and applied to Vancouver Island. It follows that if it applied to Vancouver Island it also applied to the Indians of the mainland. Sheppard J.A., with whom Lord J.A. agreed, held that the Proclamation did not apply to Vancouver Island. This Court upheld the majority judgment but did not deal with the question of whether or not the Proclamation extended to include territory in British Columbia.

In the judgment under appeal, Gould J. accepted the views of Sheppard and Lord JJ.A. in preference to that of Norris J.A. In my view the opinion of Sheppard J.A. in *White and Bob* was based on incomplete research as to the state of knowledge of the existence of the land mass between the Rocky Mountains and the Pacific Ocean in 1763.

In *R. v. Sikyea*[39]*,* at p. 66, Johnson J.A. said:

> The right of Indians to hunt and fish for food on unoccupied crown lands has always been recognized in Canada—in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands. McGillivray, J.A. in *Rex v. Wesley,* [1932] 2 WWR 337, 26 Alta LR 433, 58 CCC 269, discussed quite fully the origin, history and nature of the right of the Indians both in the lands and under the treaties by which these were surrendered and it is unnecessary to repeat what he has said. It is sufficient to say that these rights had their origin in the royal proclamation that followed the *Treaty of Paris*

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> in 1763. By that proclamation it was declared that the Indians
>
> > "…should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds."
>
> The Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the proclamation, and it is doubtful, to say the least, if the Indians of at least the western part of the Northwest Territories could claim any rights under the proclamation, for these lands at the time were *terra incognita* and lay to the north and not "to the westward of the sources of the river which fall into the sea from the west or northwest," (from the 1763 proclamation describing the area to which the proclamation applied). That fact is not important because the government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender.

This Court expressed its agreement with the views of Johnson J.A. in *Sikyea v. The Queen*[40]*,* at p. 646, where, speaking for the Court, I said:

> On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal, [*supra*]. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

The wording of the Proclamation itself seems quite clear that it was intended to include the lands west of the Rocky Mountains. The relevant paragraph reads:

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[39] (1964), 46 W.W.R.65.
[40] [1964] S.C.R.642.

> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also

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> all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;

The only territories not included were: (1) Those within the limits of the three new governments; and (2) Within the limits of the territory granted to the Hudson's Bay Company. The concluding sentence of the paragraph just quoted, "as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;" shows clearly that the framers of the paragraph were well aware that there was territory to the west of the sources of the rivers which ran from the west and northwest.

Sheppard J.A. in *White and Bob* founded his opinion that the Proclamation did not extend to the lands west of the Rockies in part upon the statement that in 1763 the areas of British Columbia west of the Rockies were *terra incognita.* Such a view is not at all flattering to the explorers and rulers of England in 1763. The knowledgeable people in England were not unaware that the Russians were by 1742 carrying on a fur-trading business with the natives of what we now know as the Alaskan Panhandle. In 1721 a Dane, Captain Bering, under orders from the Emperor of Russia, had sailed from Kamtschatka to determine if Asia and America were joined or separate. He did determine that the two continents were separate, and in so doing gave his name to Bering Strait. Arctic explorers from Europe and England had been trying to find the fabled Northwest Passage for a considerable time prior to 1763; amongst them Frobisher in 1576-8 and Hudson prior to his disappearance in 1610. The Hudson's Bay Company had been operating in the area west of Hudson Bay and to the Rockies for almost a century prior to 1763, and although it was 30 years more before Alexander Mackenzie crossed the Rockies to the Pacific, the thought of so doing had intrigued explorers for many years. Anthony Hendry for Hudson's Bay Company travelled to the Rockies by way of the Red Deer River in 1754 and into the mountains in

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1759. The west coast of the continent was not unknown nor was the fact that it extended very far to the north. Drake in 1579, in an attempt to find a passage from west to east, had sailed northward to a point where the bitter cold caused him to return southward. According to *Haklutys' Voyages,* Drake sailed "in a climate zone where his rigging froze, where the trees on the coast were lifeless and where the natives lived in houses covered with earth. Behind the shore rose ridges of snow-capped peaks." It

would seem that he reached substantially the same latitude that Cook did two centuries later. Coronado's lieutenant, as early as 1550, stood on the east rim of the Grand Canyon but found it impossible to cross. LaVerendrye's sons sighted the Rockies near Lethbridge in 1743. After LaVerendrye's death in 1749 his sons sought permission to continue their father's explorations into and beyond the mountains but were denied authorization. However, one Legardeur de Saint-Pierre undertook to reach and cross the mountains. In 1750 he sent an associate, one de Niverville, who, following the South Saskatchewan River and the Bow River, reached a point near the present site of Calgary where he built a stockade in 1751 within the territory of the Blackfoot nation. De Niverville learned from his Indian hosts that trading was done by other Indians to the west with white men on the far side of the mountains. These white men were probably Spaniards for it is known that the Spanish were exploring the west coast of America north from California. The names of several localities in British Columbia attest to that fact. Further confirmation of Spanish trading on the west coast was found by Cook when he put into Nootka Sound in 1778. He reports meeting with a native who had come into Nootka with a group of Indians from a distant area. This native was wearing around his neck as an ornament two silver table spoons which were assumed to have come from Spaniards. These spoons were taken by Cook and, after his death, were presented to the artist, Sir Joseph Banks, who had painted a portrait of Cook in 1776. Accordingly it cannot be challenged that while the west coast lands were

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mostly unexplored as of 1763 they were certainly known to exist and that fact is borne out by the wording of the paragraph in the Proclamation previously quoted.

This important question remains: were the rights either at common law or under the Proclamation extinguished? Tysoe J.A. said in this regard at p. 582 of his reasons:

> It is true, as the appellants have submitted, that nowhere can one find express words extinguishing *Indian title*…

(Emphasis added.)

The parties here agree that if extinguishment was accomplished, it must have occurred between 1858 and when British Columbia joined Confederation in 1871. The respondent relies on what was done by Governor Douglas and by his successor, Frederick Seymour, who became Governor in 1864.

Once aboriginal title is established, it is presumed to continue until the contrary is proven. This was stated to be the law by Viscount Haldane in *Amodu Tijani* at pp. 409-10 as follows:

> Their Lordships think that the learned Chief Justice in the judgment thus summarized, which virtually excludes *the legal reality of the community usufruct,* has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a *communal usufructuary occupation,* which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in

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> the treaty of cession are not in themselves to be construed as extinguishing subject rights. *The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances.* There is, in Their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the full Court.

(Emphasis added.)

The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty (and that is subject to what I said about sovereignty over part of the lands not being determined until 1903) they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament at Ottawa. The following quotation from Lord Denning's judgment in *Oyekan v. Adele*[41] at p. 788 states the position clearly. He said:

> In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordships' Board that
>
> > "Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such right as he had under the rule of his predecessors avail him nothing."
>
> See *Vajesingji Joravarsingji v. Secretary of State for India* ((1924), L.R. 51 Ind. App. 357 to p. 360 per

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[41] [1957] 2 All E.R. 785.

> Lord Dunedin), *Hoani Te Heuheu Tikino v. Aotea District Maori Land Board* ([1941] 2 All ER 93 at p. 98). *In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.* Whilst, therefore, the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law: See *Amodu Tijani v. Southern Nigeria* (Secretary) ([1921] 2 A.C. 399); *Sakariyawo Oshodi v. Moriamo Dakolo* ([1930] A.C. 667).

(Emphasis added.)

Reference should also be made to *The Queen v. Symonds*[42], approved in *Tamaki v. Baker*[43], at p. 579. In *Symonds,* Chapman J. said at p. 390:

> The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians. In the case of the *Cherokee Nation v. State of Georgia,* (1831) 5 Peters 1, the Supreme Court threw its protective decision over the plaintiff-nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgment, the principles of the common law as applied and adopted from the earliest times by the colonial laws: *Kent's Comm. Vol. ii, lecture 51.* Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it

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> cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.

and to the statement of Davis J. in *Lipan Apache* previously quoted that:

> …In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the (claimants') rights" in their property, Indian title continues…

[42] (1847), N.Z.P.C.C.387.
[43] [1901] A.C. 561.

It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.

The Court of Appeal also erred in holding that there "is no Indian title capable of judicial interpretation unless it has previously been recognized either by the Legislature or the Executive Branch of Government". Relying on *Cook v. Sprigg*[44]*,* and other cases, the Court of Appeal erroneously applied what is called the Act of State Doctrine. This doctrine denies a remedy to the citizens of an acquired territory for invasion of their rights which may occur during the change of sovereignty. English Courts have held that a municipal Court has no jurisdiction to review the manner in which the Sovereign acquires new territory. The Act of State is the activity of the Sovereign by which he acquires the property. Professor D.K. O'Connell in his work *International Law,* 2nd ed., 1970, at p. 378 says:

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> This doctrine, which has been affirmed in several cases arising out of the acquisition of territory in Africa and India, has been misinterpreted to the effect that the substantive rights themselves have not survived the change. In fact English courts have gone out of their way to repudiate the construction, and it is clear that the Act of State doctrine is no more than a procedural bar to municipal law action, and as such is irrelevant to the question whether in international law change of sovereignty affected acquired rights.

The Act of State doctrine has no application in the present appeal for the following reasons: (a) It has never been invoked in claims dependent on aboriginal title. An examination of its rationale indicates that it would be quite inappropriate for the Courts to extend the doctrine to such cases; (b) It is based on the premise that an Act of State is an exercise of the Sovereign power which a municipal Court has no power to review: see *Salaman v. Secretary of State in Council of India*[45]*,* at pp. 639-640; *Cook v. Sprigg, supra,* at p. 578.

When the Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land, then a municipal Court is without jurisdiction to the extent that any claimant asserts a proprietary right inconsistent with acquisition of property by the Sovereign—*i.e.* acquisition by Act of State. The *ratio* for the cases relied upon by the Court of Appeal was that a municipal Court could not review the Act of State if in so doing the Court would be enforcing a treaty between two Sovereign States: see *Cook v. Sprigg, supra* at p. 578, *Vayjestingji Joravaisingji v. Secretary of State for India, supra,* at p. 360, *Salaman, supra,* at p. 639. In all the cases referred to by the Court of Appeal the *origin* of the claim being asserted was a grant to the claimant from the previous Sovereign. In each case the

[44] [1899] A.C. 572.
[45] [1906] 1 K.B.613.

claimants were asking the Courts to give judicial recognition to that claim. In the present case the appellants are

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not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown. The appellants are not challenging an Act of State—they are asking this Court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people—a title which has its origin in antiquity—not in a grant from a previous Sovereign. In applying the Act of State doctrine, the Court of Appeal completely ignored the rationale of the doctrine which is no more than a recognition of the Sovereign prerogative to acquire territory in a way that cannot be later challenged in a municipal Court.

Once it is apparent that the Act of State doctrine has no application, the whole argument of the respondent that there must be some form of "recognition" of aboriginal rights falls to the ground.

On the question of extinguishment, the respondent relies on what was done by Governors Douglas and Seymour and the Council of British Columbia. The appellants, as I have previously mentioned, say that if either Douglas or Seymour or the Council of the Colony of British Columbia did purport to extinguish the Nishga title that any such attempt was beyond the powers of either the Governors or of the Council and that what, if anything, was attempted in this respect was *ultra vires.*

Douglas' powers were clearly set out in his Commission. A Governor had no powers to legislate other than those given in the Commission: 5 Halsbury, 3rd. ed., p. 558, para. 1209: *Commercial Cable v. Newfoundland*[46]*,* at p. 616; *Musgrave v. Pulido*[47]*.* Sir Arthur Berridale Keith in his *Responsible Government in the Dominions* said at p. 83:

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> the Governor of a colony in ordinary cases cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and *limited* to the powers thereby *expressly or impliedly entrusted to him.*

and at pp. 83-84:

> There can be no doubt of the doctrine of the Privy Council; a Governor has no special privilege like that of the Crown; he must show in any court that he has authority by law to do an act, and

[46] [1916] 2 A.C 610
[47] (1879), 5 App. Cas. 102.

> what is more important for our purpose, he must show not merely that the Crown might do the act, but that he personally had authority to do the act…
>
> There is therefore no alternative but to hold that, apart from statutory powers, the Governor has a delegation of so much of the executive power as enables him effectively to conduct the executive government of the territory.

The Letters Patent under which Douglas acted authorized him in part:

> …and whereas We have, in pursuance of the said Act, by Our Order made by Us in Our Privy Council, bearing date this 2d instant, ordered, authorized, empowered, and commanded Our Governor of Our said Colony to make provision for the administration of justice in Our said Colony, and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Our subjects and others residing therein, wherein the said Governor *is to conform to and exercise the directions, powers, and authorities given and granted to him by Our Commission, subject to all such rules and regulations as shall be prescribed in and by Our Instructions under Our Signet and Sign Manual accompanying Our said Commission, or by any future instructions, as aforesaid;*…

(emphasis added)

and also the following:

> IV. And We do by these presents further give and grant unto you, the said James Douglas, full power and authority, by Proclamation or Proclamations to be by you from time to time for that purpose issued

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> under the Public Seal of Our said Colony, to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Our subjects and others residing in Our said Colony and its Dependencies: *Provided that such laws, institutions, and ordinances are not to be repugnant, but, as near as may be, agreeable to the Laws and Statutes of Our United Kingdom of Great Britain and Ireland:* Provided also, that all such laws, institutions, and ordinances, of what nature or duration soever, be transmitted under the Public Seal of Our said Colony for Our approbation or disallowance, as in Our said Order provided: And We do by these presents require and enjoin you that in making all such laws, institutions, and ordinances you do strictly conform to and observe the rules, regulations, and restrictions which are or shall be in that respect prescribed to you by Our Instructions under Our Royal Sign Manual and Signet accompanying this Our Commission, or by any future Instructions, as aforesaid.

(Emphasis added.)

Attached to Douglas' Commission and forming an integral part thereof were "Instructions" by which he was to govern the Colony. Regarding those Instructions, the Letters Patent said:

> VII. You are, as much as possible, to observe, in the passing of all laws, that each different matter be provided for by a different law, without intermixing in one and the same law such

> things as have no proper relation to each other; and you are more especially to take care that no clause or clauses be inserted in or annexed to any law which shall be foreign to what the title of such law imports, and that no perpetual clause be part of any temporary law, *and that no law whatever be suspended, altered, continued, revived, or repealed by general words, but that the title and date of such law so suspended, altered, continued, revived, or repealed be particularly mentioned and expressed in the enacting part.*

(Emphasis added.)

Further Instructions were sent from time to time by the Colonial Secretary in London, including one dated July 31, 1858, which read:

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> 3. *I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them.* At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. This question is of so local a character that it must be solved by your knowledge and experience, and I commit it to you, *in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest.* Let me not omit to observe, that it should be an invariable *condition, in all bargains or treaties with the Natives for the cession of lands* possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of Civilization among the Natives.

(emphasis added)

to which Douglas replied:

> 16. *I shall not fail to give the fullest scope to your humane consideration for the improvement of the native Indian tribes, and shall take care that all their civil and agrarian rights be protected.* I have in fact already taken measures, as far as possible, to prevent collisions between those tribes and the whites, *and have impressed upon the miners the great fact that the law will protect the Indian equally with the white man, and regard him in all respects as a fellow subject.* That principle being admitted will go far towards the well-being of the Indian tribes, and securing the peace of the country.

(Emphasis added.)

Another despatch from the then Colonial Secretary, Sir E.B. Lytton, reads:

> 2. To *open land for settlement gradually; not to sell beyond the limits of what is either surveyed or ready for immediate survey, and to prevent, as far as in you lies squatting on unsold land.* Mineral lands will require a special care and forethought and I request your views thereon.

(Emphasis added.)

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There is nothing in the record indicating that the Nishga lands have even yet been surveyed or made ready for immediate survey excepting, perhaps, the land given for the townsite of Stewart. The boundary line with Alaska was not surveyed until after the boundary settlement. Consequently I cannot see how anything can be derived from the fact that surveys were made on Vancouver Island or on the lower mainland that would lead to the conclusion that the rights of the Nishgas in the northwest corner of the Colony were being dealt with by implication or at all.

Specific declarations by Douglas and by the Council of the Colony of British Columbia relied on by the respondent include:

(a) Proclamation dated February 14, 1859, which contained the following paragraph:

1. All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.

(b) Ordinance dated April 11, 1865, in which is found:

3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

(c) Ordinance of March 31, 1866, which provided:

“The aborigines of this colony or the territories neighbouring thereto” could not pre-empt or hold land in fee simple without obtaining special permission of the Governor in writing.

The appellants do not dispute the Province’s claim that it holds title to the lands in fee. They acknowledge that the fee is in the Crown. The enactments just referred to merely state what was the actual situation under the common law and add nothing new or additional to the Crown’s paramount title and they are of no

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assistance in this regard to the respondent. In relying so heavily on these enactments, the respondent is fighting an issue that does not arise in the case and is resisting a claim never made in the action. As to the ordinance of March 31, 1866, the limitation on the right of an aborigine to hold land in fee simple has no bearing whatsoever on the right of the aborigine to remain in possession of the land which has been in the possession of his people since time immemorial. Governor Douglas knew that he had no right to take Indian lands without some form of compensation. He understood his Instructions in that

regard. This is clear from paragraphs of his letter to the Colonial Secretary dated March 25, 1861. He said in part:

> 2. As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.
>
> 3. Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case, prior to the settlement of any district; but since that time in consequence of the termination of the Hudson's Bay Company's Charter, and the want of funds, it has not been in my power to continue it. Your Grace must, indeed, be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.
>
> 4. All the settled districts of the Colony, with the exception of Cowichan, Chemainus, and Barclay Sound, have been already bought from the Indians, at a cost in no case exceeding 2 pounds 10s. sterling for each family. As the land has, since then, increased in value, the expense would be relatively somewhat greater now, but I think that their claims might be satisfied with a payment of 3 pounds to each family; so that taking the native population of those districts

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> at 1,000 families, the sum of 3,000 pounds would meet the whole charge.

The Colonial Secretary replied on October 19, 1861, as follows:

> SIR—I have had under my consideration your despatch No. 24, of the 25th of March last, transmitting an Address from the House of Assembly of Vancouver Island, in which they pray for the assistance of Her Majesty's Government in extinguishing the Indian title to the public lands in the Colony, and set forth the evils that may result from a neglect of this precaution.
>
> I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island; but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds or British credit pledged for the purpose. I would earnestly recommend therefore to the House of Assembly, that they should enable you to procure the requisite means, but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money requisite for an object which, whilst it is essential to the interests of the people of Vancouver Island, is at the same time purely Colonial in its character, and trifling in the charge that it would entail.

This reply, while refusing funds to acquire the native rights in land, did not authorize Douglas to take or extinguish those rights without compensation. If the lands were to be taken they had to be paid for by the Colony and not by the British taxpayer. If the Colony had intended extinguishing the Indian title to public lands as referred to in the foregoing letter, it could easily have said, "Indian title to public lands

in the Colony is hereby extinguished". No such enactment or one with language to like effect was ever passed.

A number of other Acts, Ordinances and Proclamations were passed or issued between February 14, 1859, and June 1, 1870. All of these were repealed and consolidated by an Ordinance passed July 1, 1870. That Consolidation contained in part the following:

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> PRE-EMPTION
>
> 3. From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. Provided that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect.

This is the provision chiefly relied on by Gould J. and by the Court of Appeal in making the finding that the Indian title in British Columbia had been extinguished. It is obvious that this enactment did not apply to the Nishga lands on the Nass River. The northwest boundary of the Colony in that area was still in dispute. In any event, this provision is expansive and permissive in so far as it enables aborigines to get title in fee with the Governor's written permission.

If in any of the Proclamations or actions of Douglas, Seymour or of the Council of the Colony of British Columbia there are elements which the respondent says extinguish by implication the Indian title, then it is obvious from the Commission of the Governor and from the Instructions under which the Governor was required to observe and neither the Commission nor the Instructions contain any power or authorization to extinguish the Indian title, then it follows logically that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so and, therefore, *ultra vires.*

A further observation in respect of the Letter of Instructions of July 31, 1858, must be made

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of the phrase, "Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the Natives for the *cession* of land possessed by them…". Having in mind the use of the word "cession" in this context, how can it logically be said that the Imperial Government was not at the

time recognizing that the natives had something to cede? What they had to cede was their aboriginal right and title to possession of the lands, subject to the Crown's paramount title.

Having reviewed the evidence and cases in considerable detail and having decided that if the Nishgas ever had any right or title that it had been extinguished, Tysoe J.A. was inexorably driven to the conclusion which he stated as follows:

> As a result of these pieces of legislation the Indians of the Colony of British Columbia *became in law trespassers* on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves for the use of Indians.

(Emphasis added.)

Any reasoning that would lead to such a conclusion must necessarily be fallacious. The idea is self-destructive. If trespassers, the Indians are liable to prosecution as such, a proposition which reason itself repudiates.

Following the hearing, the Court's attention was drawn to a recent Australian decision in which judgment was handed down on April 27, 1971, but the report of the judgment was not available until after the appeal was argued. The case is *Milirrpum et al. v. Nabalco Pty. Ltd.*[48] It is a judgment at trial by Blackburn J. and involved a consideration of the rights of aborigines and whether the common law recognized a doctrine of "communal native title". The direct issue was the interpretation to be given to the phrase "interest in land" contained in s. 5(1) of the *Lands Acquisition Act,* 1955-1966 relating

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to the acquisition of land on just terms. The issue was to this degree different from the issue here. It dealt with the validity of a grant made under the *Lands Acquisition Act.*

Blackburn J., after an extensive review of the facts and historical records involving some 50 pages, held as follows:

> This question of fact has been for me by far the most difficult of all the difficult questions of fact in the case. I can, in the last resort, do no more than express that degree of conviction which all the evidence has left upon my mind, and it is this: that I am not persuaded that the plaintiffs' contention is more probably correct than incorrect. In other words, I am not satisfied, on the balance of probabilities, that the plaintiffs' predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim.

[48] (1971), 17 F.L.R. 141.

That finding necessarily disposed of the claim being made. However, the learned justice proceeded with a very comprehensive review of much of the case law regarding the rights of aborigines and the questions of the recognition and extinguishment of aboriginal title. It is obvious that all of the observations contained in his judgment following the finding of fact above set out were *obiter dicta.* In his review he dealt with the trial and appeal judgments in this case and said:

> I consider, with respect, that *Calder's* case, though it is not binding on this Court, is weighty authority for these propositions:
>
> 1. In a settled colony there is no principle of communal native title except such as can be shown by prerogative or legislative act, or a course of dealing.
>
> 2. In a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown, together with the establishment of native reserves, operates as an extinguishment of aboriginal title, if that ever existed.

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It will be seen that he fell into the same errors as did Gould J. and the Court of Appeal. The essence of his concurrence with the Court of Appeal judgment lies in his acceptance of the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer, That proposition is wholly wrong as the mass of authorities previously cited, including *Johnson v. McIntosh* and *Campbell v. Hall,* establishes.

One last issue remains to be dealt with. The respondent by way of preliminary objections argued that the Court had no jurisdiction to grant the declaration asked for because it impugns the Crown's title to the land by seeking to have it declared that there is a cloud on the title, namely aboriginal or Indian title, and secondly, that the Court has no jurisdiction to make the declaration as it would affect the rights of persons who have had no opportunity to be heard, and thirdly, that the Court has no jurisdiction to grant a declaration if the declaration cannot have any practical result. Neither Gould J. nor the Court of Appeal found it necessary to deal with these objections because they dismissed the action on other grounds. As I take the view that the action succeeds, I now deal with the objections.

Dealing with them in reverse order, it seems clear to me that if the declaration can be made it will have a most practical result, namely the right of the Nishgas to compensation if and when extinguishment should be attempted or takes place. As to the second objection, the appellants' position is that the Nishgas are not asking to disturb the rights of any persons or corporations which had been given grants or rights even though such grants were *ultra vires.* They are prepared to accept things as they are.

That leaves the first objection, and there are, in my view, two valid answers to it. It is a fact that British Columbia does not have a Crown

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Proceedings Act, which virtually all the other Provinces have, which confers on the citizen the right to commence an action and to have his rights vis-à-vis the Crown determined. Actions against the Crown in British Columbia are governed by the *Crown Procedure Act* and this Act provides for the historic petition of right procedure. Accordingly, it is argued by the respondent that actions against the Crown must have the consent of the Crown evidenced by a fiat in respect of the petition of right, but it was argued by the appellants that a writ claiming declaratory relief only does not fall within the provisions of the *Crown Procedure Act.*

Historically there were two main avenues of pursuing a remedy against the Crown. There was the petition of right procedure, the beginning of which is aptly described by Holdsworth [*History of English Law,* 3rd ed., vol. 9, p. 8]:

> …it was recognized in Henry Ill's reign that the King could not be sued in his central courts of law because, like any other lord, he could not be sued in his own courts. But it was admitted that the king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects. The procedure to be followed in such cases was, like many other rules of English law, fixed in outline in Edward I's reign. It became an established rule that the subject, though he could not sue the king, could bring his petition of right, which, if acceded to by the king, would enable the courts to give redress.

This situation obtained more or less until the *Crown Proceedings Act* of England was enacted in 1947. Thereafter, a subject could invoke the jurisdiction of the courts *as of right* to have his position determined vis-à-vis the government.

However, a vital exception must be noted to the foregoing. The petition of right procedure was the continuing rule of the day in the common law courts but not so elsewhere, *e.g.,* Exchequer.

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Supplementing the petition of right procedure in an invaluable way was the jurisdiction of the Court of Exchequer to grant equitable relief against the Crown in its Bill procedure. This procedure was not subject to the pitfalls of "writs" which was the form of procedure followed in the common law courts.

The jurisdiction of the Court of Exchequer to grant equitable relief against the Crown was asserted in *Pawlett v. Attorney-General* in 1668. Holdsworth outlines the salient features of the case [p. 30]:

> …it was in the case of *Pawlett v. the Attorney-General* in 1668, that it was first clearly recognized that the subject was entitled to this [*equitable*] relief against the crown. In that case the plaintiff had mortgaged property to a mortgagee. The legal estate had descended to the mortgagee's heir, who had been attainted of treason. The King had therefore seized his property; and the plaintiff brought his bill in the Exchequer against the attorney-general for redemption. It was argued that the plaintiff could not proceed in this way, but must petition the King to allow him as a matter of grace and favour, [*petition of right*] to redeem. But the court held that the plaintiff was entitled to succeed.

In *Pawlett* the equitable title was vested in the plaintiff, the legal title in the Crown. None the less these facts did not inhibit the Court of Exchequer, Hale C.B. and Atkyns B. from giving relief in the absence of a petition of right and fiat. Holdsworth proceeds further to say that [p. 31]:

> …the rule that equitable relief could be given without a petition of right, on a bill filed against the attorney-general, was stated perfectly generally in 1835.

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For the latter proposition *Deare v. Attorney-General*[49]*,* is cited as authority:

> It is now settled law, therefore, that any court administering an equitable jurisdiction can give relief in this way.

There are, it is submitted, other than mere historical reasons for suggesting that the petition of right procedure should not, and does not, apply to proceedings seeking declaratory or equitable relief. Firstly, the petition of right procedure is conceptually one to assert proprietary rights evolved in an age of status and feudalism. A declaration is a far broader remedy and when considered analytically merely states the law, without determining, shifting or varying property interests. Furthermore, one must, given an historical awareness, be reluctant to apply a common law rule to fetter the operation of an equitable jurisdiction which co-existed for so many centuries. Kellock J., in *Miller v. The King*[50]*,* said at p. 176:

> With respect to a contention that there was no jurisdiction in the ordinary courts as to claims against the Crown where a petition of right would not lie, their Lordships in *Esquimalt and Nanaimo Rly. v. Wilson,* [1920] A.C. 358, said at page 365:
>
> > "But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned…"
>
> At page 367 their Lordships referred to what was said by Lord Lyndhurst in *Deare v. Attorney-General,* (1835) 1 Y. & C. 197, 208, namely:

[49] (1835), 1 Y. & C. Ex. 197 at p. 208.
[50] [1950] S.C.R. 168.

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> "I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General or of making him a party to a bill, where the interest of the Crown is concerned."

Moreover, it cannot be said that when the petition of right jurisprudence was being formulated that it was contemplated that it should apply to declaratory remedies. The declaratory remedy in the absence of concomitant consequential relief emerged only in the 19th century. The application of the ancient common law rule then would have to be one of deliberate judicial policy to constrain the remedies of the subject against the Crown, a policy of dubious validity today. It is much too late for the Courts to place obstructions in the path of citizens seeking redress against Government by resort to ancient judicial procedures.

A further aspect of the historical analysis deserves consideration. An action for a declaratory judgment will lie in the absence of a cause of action in the traditional sense: *Guaranty Trust Co. of New York v. Hannay & Co.*[51] at pp. 557-562. The rule dealt with in *Hannay* is identical, with one minor exception, to British Columbia 0.25, R.5, M.R. 285, which reads:

> No action or proceedings shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

In the English rule the word "proceeding" is used whereas the British Columbia rule says "proceedings".

Pickford L.J. said, respecting the rule under discussion, in *Hannay* at p. 562:

> The next contention is that, even if there is no necessity for a cause of action, the declaration can

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> only be made at the instance of the person claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. No such limitation, so far as I know, has been suggested in the analogous procedure under Order LIV.A of declaring rights arising out of documents. But I think this point again is covered by authority in the cases of *Dyson v. Attorney-General,* [1912] 1 Ch. 158, and *Burghes v. Attorney-General,* [1912] 1 Ch. 173. The plaintiffs in those cases were not claiming to exercise any right; they claimed a declaration that a document which might be used to make a demand upon them was invalid and got it.

[51] [1915] 2 K.B.536.

> I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration…

Ex hypothesi this class of case would be *without* the petition of right procedure which is postulated on traditional and ancient rights and "causes of action". In other words, a proceeding seeking declaratory relief is not the kind of "action" within the rule requiring a petition of right to assert a declaratory remedy against the Crown.

There is a further and, I think, complete answer to the first preliminary objection. In this action the appellants assert that certain Acts and Orders and Proclamations of Governors Douglas and Seymour and of the Council of the Colony of British Columbia were *ultra vires.* That issue was spelled out clearly in the statement of claim and in the reply. It has been held by this Court in *British Columbia Power Corporation, Limited v. British Columbia Electric Co. Ltd. et al*.[52] that the absence of a fiat under the *Crown Procedure Act* of British Columbia was not fatal to the right to bring the action. Kerwin C.J. said:

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> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid.

The validity of what was done by Governors Douglas and Seymour and by the Council of the Colony of British Columbia is a vital question to be decided in this appeal and the Province cannot be permitted to deny access by the Nishgas to the Courts for the determination of that question.

I would, therefore, allow the appeal with costs throughout and declare that the appellants' right to possession of the lands delineated in ex. 2 with the exceptions before mentioned and their right to enjoy the fruits of the soil, of the forest, and of the rivers and streams within the boundaries of said lands have not been extinguished by the Province of British Columbia or by its predecessor, the Colony of British Columbia, or by the Governors of that Colony.

PIGEON J.—This is an appeal by special leave of this Court from a judgment of the Court of Appeal of British Columbia affirming the judgment of Gould J. in the Supreme Court of British Columbia

[52] [1962] S.C.R. 642.

dismissing an action in that Court claiming "a declaration that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished".

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In his reasons for judgment, Gould J. after reviewing the facts and referring to the *St. Catherine's* case, said:

> In the instant case sovereignty over the delineated lands came by exploration of *terra incognita* (see *Johnson v. McIntosh* (supra)), no acknowledgment at any time of any aboriginal rights, and specific dealings with the territory so inconsistent with any Indian claim as to constitute the dealings themselves a denial of any Indian or aboriginal title. As the Crown had the absolute right to extinguish, if there was anything to extinguish, the denial amounts to the same thing, sans the admission that an Indian or aboriginal title had ever existed. There is nothing to suggest that any ancient rights, if such had ever existed prior to 1871 and had been extinguished, were revived by British Columbia's entry into Confederation and becoming subject to the "British North America Act, 1867".
>
> It is convenient here to deal with the third preliminary objection of defendant referred to earlier, that this matter required the granting of a fiat as a prerequisite to adjudication. In the light of opinions already expressed it is not necessary to decide on this question so interestingly argued by both counsel. It is not the usual judicial course to decide on the merits and then deal with the preliminary objections, but I think the comity of our courts as an institution would have suffered had these plaintiffs been told judicially that their clearly enunciated claim would get no adjudication because it had been brought in the wrong form.

In the Court of Appeal, the finding adverse to the plaintiffs on the merits was upheld without any reference to the preliminary objections, save in the reasons of Maclean J.A. at the end of which he said:

> In view of the decision I have arrived at, I do not consider it necessary to deal with the three formidable preliminary objections raised by the respondent as follows:
>
> 1. The Court does not have jurisdiction to grant the declaration sought because it impugns the Crown's title to the land by seeking to have it

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> declared that there is a cloud on the title, i.e. Indian title.
>
> 2. The Court has no jurisdiction to make the declaration because it will affect the rights of others who have had no opportunity to be heard. Audi Alteram Partem.
>
> 3. The Court ought not to grant a declaration if it can have no practical consequences.

If the objection that the granting of a fiat is a prerequisite to adjudication merely meant that the proceedings were instituted "in the wrong form", it certainly should not be considered for a moment, especially in this Court and at its stage. However, I feel bound by high authority to hold that the granting of a fiat, when required, is a condition of jurisdiction. Furthermore, the decision of the executive to withhold the granting of a fiat is one from which there is no appeal: *Lovibond v. Governor General of Canada*[53].

In *Attorney-General for Ontario v. McLean Gold Mines*[54], an action was brought against the Attorney-General, the Minister of Mines and the registered owners of some mining claims under a new grant made after forfeiture of previous grants, claiming *inter alia* a declaration that the plaintiffs were the true owners of those mining claims. The Court of Appeal, reversing the trial judge, granted a declaration that the proceedings for forfeiture of the claims were null and void. This judgment was reversed in the Privy Council for the sole reason that the declaration had been made in violation of the Crown's prerogative "to decline to be impleaded in the Courts for the recovery of property otherwise than by a petition for the hearing and disposition of which it has accorded its fiat". Anglin C.J. who delivered the judgment in the Privy Council, said:

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> It is obvious that it is vital to the success of plaintiffs that they should obtain the particular declaration and order last set forth. Had the judgment merely set aside the Crown grants to Fuller and his transfers to the defendant company and vacated the registration of these several instruments, the result would have been to leave the title to the mining claims vested in the Crown. Indeed, it is essential to the plaintiffs' status to seek relief against the defendant company that they should reestablish their interest in the lands by avoiding the forfeiture of that interest under the provisions of the Mining Tax Act. Until that has been done the plaintiffs cannot be regarded as having any interest which would enable them to impeach the title of the defendant company.
>
> However the plaintiffs' claim may be viewed, it seeks in substance and reality to avoid the title acquired by and vested in the Crown as the result of the impugned forfeiture. The real matter in issue is the Crown's title…
>
> The plaintiffs' claim is for the recovery of property "which has been granted or disposed of by or on behalf of His Majesty," and it rests on the assertion that His Majesty could not effectively grant or dispose of that property because he lacked title thereto, owing to the invalidity of the forfeiture proceedings on which that title depended.
>
> Such a case differs widely from that with which this Board was called upon to deal in *Esquimalt and Nanaimo Ry. Co. v. Wilson* ([1920] A.C. 358, 363), relied upon by the respondents. There, as Lord Buck-master observed, "the title of the Crown to the land (was) not in controversy."…

[53] [1930] A.C. 717.
[54] [1927] A.C. 185.

> …In the case now before their Lordships the plaintiffs, in order to recover the lands they seek, must first set aside the forfeiture proceedings which, if valid, extinguished their ownership of them and vested the title to those lands in the Crown.
>
> This feature of the present litigation serves to distinguish it from *Dyson v. Attorney-General* ([1911] 1 K.B. 410, 414, 421, 422), and also from two cases in the Ontario Courts cited for the respondents: *Farah v. Glen Lake Mining Co.* (17 Ont. L.R. 1) and *Zock v. Clayton* (28 Ont. L.R. 447).

Concerning the contention that the making of the declaration prayed for could be considered as an exercise of equitable jurisdiction, I must

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say that I fail to see how it could be so and how this could be reconciled with the decision above referred to. The substance of the claim is that the Crown's title to the subject land is being questioned, its assertion of an absolute title in fee being challenged on the basis of an adverse title which is said to be a burden on the fee.

It has been pointed out that in their statement of claim the plaintiffs alleged that some pre-confederation B.C. legislation by proclamations and statutes was *ultra vires* and reference was made to authorities holding that there is jurisdiction to issue, without a fiat obtained on a petition of right, declaratory judgments respecting the invalidity of legislation. The answer to this contention is that plaintiffs do not pray for any such declaration. Assuming the Court had jurisdiction to make it, this would not give it jurisdiction to make another quite different declaration. Furthermore, in view of s. 129, *B.N.A. Act,* I doubt very much that the constitutional validity of pre-confederation legislation affecting Indians or Indian lands can be made in proceedings instituted against the provincial attorney-general.

Concerning the decision of this Court in *B.C. Power Corporation Ltd. v. British Columbia Electric Co. Ltd.*[55]*,* I would point out that the *ratio decidendi* is that the constitutional division of authority under the *B.N.A. Act* was the basis of the alleged invalidity of the impugned legislation. No such question arises in this case. No post-confederation legislation is in question.

For all those reasons, I have to uphold the preliminary objection that the declaration

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prayed for, being a claim of title against the Crown in the right of the Province of British Columbia, the Court has no jurisdiction to make it in the absence of a fiat of the Lieutenant-Governor of that Province. I am deeply conscious of the hardship involved in holding that the access to the Court for

[55] [1962] S.C.R. 642.

the determination of the plaintiffs' claim is barred by sovereign immunity from suit without a fiat. However, I would point out that in the United States, claims in respect of the taking of lands outside of reserves and not covered by any treaty were not held justiciable until legislative provisions had removed the obstacle created by the doctrine of immunity. In Canada, immunity from suit has been removed by legislation at the federal level and in most provinces. However, this has not yet been done in British Columbia.

I would therefore dismiss the appeal and make no order as to costs.

Appeal dismissed, HALL, SPENCE and LASKIN JJ. dissenting.

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