

THE INDIAN TITLE QUESTION IN CANADA: AN APPRAISAL IN THE LIGHT OF CALDER*

K. LYSYK**

Regina

Introduction

In many parts of Canada, of the United States, and of the Commonwealth,¹ a native interest in the land has been said to exist, and to remain in existence until cession or surrender by treaty or some other means of extinguishment of the native interest has been effected. The native interest is variously described as "Indian title", "aboriginal title", "original title", "native title", "right of occupancy", "right of possession", and so on. These terms have been used more or less interchangeably. In this article the terminology of "Indian title" is favoured, following in that respect the most common form of reference in Canadian enactments and official usage.

Following a period of dormancy, the Indian title question has re-emerged as a live legal and political issue in Canada. Early this year the Supreme Court of Canada delivered judgment in *Calder v. Attorney-General of British Columbia*, which involved a title claim by the Nishgas to an area in northwestern British Columbia. This represented the first occasion upon which Indian title was squarely before the Supreme Court for consideration.² At the time

* *Calder v. Attorney-General of British Columbia*. Judgment of the Supreme Court of Canada pronounced January 31st, 1973, and as yet unreported. On appeal from: (1970), 13 D.L.R. (3d) 64, 74 W.W.R. (n.s.) 481 (B.C.C.A.), aff'g 8 D.L.R. (3d) 59, 71 W.W.R. 81 (B.C.S.C., per Gould J.).

** K. Lysyk, Deputy Attorney General, Saskatchewan. The views contained in this article are entirely personal and not attributable in any way to the government of Saskatchewan.

¹ While this article is concerned with the Canadian situation, with occasional reference to other Commonwealth jurisdictions and the United States, the question of present day land claims by indigenous peoples is not confined to countries sharing a common-law heritage. It may be noted, for example, that legal proceedings to vindicate land claims by the Lapps of northern Norway and Sweden have recently been put before the courts of these countries.

² The court had an opportunity to pronounce on Indian title in an earlier appeal from British Columbia, but disposed of the case in favour of the respondent Indians on other grounds: *Regina v. White and Bob* (1966), 52 D.L.R. (2d) 481, aff'g (1965), 50 D.L.R. 613 (B.C.C.A.). Indian title

of writing, Indian title questions are before the courts in Quebec and the Northwest Territories, the former proceedings being concerned with Indian land claims in the area of the proposed James Bay power project and the latter with an attempt to secure registration of an Indian title claim through lodgment of a caveat under the Territories' land titles legislation.

The extensive press coverage which has accompanied this legal activity in Canada together with reportage of developments in other jurisdictions, most notably the recent Alaska native land claim settlement, has gone far toward rescuing the concept of Indian title from the obscurity to which it appeared to have been consigned by lawyers and laymen alike in recent years. Indeed, so completely had it faded into history over the last half century that discussion of the subject at this time must contend with a credibility gap, an initial scepticism as to whether the concept of Indian title is one which has any basis at all in our jurisprudence. That this should be so is perhaps not surprising. Constitutional and legal history courses in Canadian law schools, always heavily preoccupied with English legal history, have tended to overlook the processes by which the Europeans treated with the indigenous people of Canada, and the proprietary rights the latter asserted to the lands they occupied. While the subject of Indian title attracted discussion in Canadian constitutional law treatises early in this century,³ references in the standard textbooks and casebooks of today are hard to find.⁴

In the discussion which follows, the main lines of development in Canada will be sketched in with illustrative references to source material reflecting governmental policy and practice, and with emphasis on materials considered to be more central to an assessment of the legal position. No attempt is made at an exhaustive cataloguing of the documentation. The volume of material is substantial, for the Indian title question is older than the Canadian federation itself and has engaged the attention of colonial, provincial, federal and Imperial governments.

As a prelude to more detailed consideration of the reasons for judgment in *Calder*, it can be noted at this stage that the actual

received indirect consideration in an earlier line of cases testing the competing claims of federal and provincial governments to lands surrendered by Indian treaty, the most notable of which was the *St. Catherine's Milling* case (1887), 13 S.C.R. 577, aff'd (1889), 14 A.C. 46.

³ See Lefroy, *Canada's Federal System* (1913), pp. 710-719; Clement, *The Law of the Canadian Constitution* (3rd ed., 1916), pp. 633-638. The authors anticipated that the British Columbia Indian title question, recently ventilated in the *Calder* case, would be settled by reference to the Privy Council or by negotiation.

⁴ For treatment of the subject in more specialized works, see LaForest, *Natural Resources and Public Property under the Canadian Constitution* (1969), ch. 7, and Indian-Eskimo Association of Canada, *Native Rights in Canada* (2nd ed., 1972).

ratio of the case is very narrow. The plaintiffs (appellants), suing as representatives of the Nishga Indian Tribe sought a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territories hereinbefore described, has never been lawfully extinguished". The court divided three to three on the merits with the seventh member of the court, Pigeon J., holding that the action must fail on a procedural defect going to jurisdiction, and without addressing himself to the merits. Judson J., delivered the reasons of those members of the court⁵ who reached the conclusion that the action must fail on the merits. He concurred with Pigeon J., on the procedural ground which supplies the *ratio* of the case, namely, that inasmuch as the Crown's immunity from suit has not yet been removed by legislation in British Columbia, the granting of a fiat under that province's Crown Procedure Act⁶ was a necessary prerequisite to bringing the action and a fiat had not been obtained. Hall J., delivered the reasons for the three members of the court⁷ who were prepared to grant the declaration claimed, finding in favour of the Nishgas both on the merits and on the jurisdictional issues respecting sovereign immunity.

As a framework for discussion of the concept of Indian title, and assessing the impact of the *Calder* decision, four more or less distinct issues or groups of issues may be identified: first, the existence of Indian title; second, the nature of Indian title; third, the extinguishment of Indian title; and fourth, responsibility for settlement of claims based on Indian title. These facets of the question will be examined in turn, followed by a brief concluding summary.

I. *The Existence of Indian Title.*

Consideration is given to the nature and characteristics of Indian title in the next section of this article. For present purposes, an adequate working definition is that supplied by Judson J., in *Calder* where he stated:

Although I think 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.

This description identifies the claim of an organized native community—whether it be called a tribe, a nation, a band, or what-

⁵ The others being Martland and Ritchie JJ.

⁶ R.S.B.C., 1960, c. 89.

⁷ The others being Spence and Laskin JJ.

ever—which occupied a defined territory at the time of the coming of the Europeans, and which had occupied that territory into the indefinite past or, as it is sometimes phrased, since time immemorial. We are looking, in brief, at the connection between an Indian society and the geographic area it inhabited. It is known that the connection was real enough to the Indians themselves and that the territories of one tribe, generally speaking, would be jealously guarded against encroachment by any other. The initial line of inquiry will be whether Canadian law has recognized a proprietary interest as inhering in the group of Indians occupying a particular area of land.

The usual point of commencement for a discussion of Indian title is the Royal Proclamation of 1763.⁸ The Proclamation, which has been described as the Imperial Constitution of Canada during the period 1763 to 1774 and which has the force of law,⁹ reserved certain lands to the Indians and provided that Indian lands could not be purchased or otherwise alienated except by way of surrender to the Crown, and then only according to the procedures prescribed in the Proclamation. Exempted from the terms of the Proclamation were the lands that had been granted to the Hudson's Bay Company and, as will appear, this exception becomes most significant in the light of subsequent legislative and executive action. The Proclamation demanded attention in the *Calder* case in that the principal argument that has been advanced against the existence of Indian title to British Columbia lands depends upon the twin propositions first, that Indian title finds its origin in the Royal Proclamation and, second, that the Proclamation had no application to the territory now comprising the Province of British Columbia. The latter proposition, in turn, rests on the conclusion that in 1763 the lands within the present boundaries of British Columbia were *terra incognita* and that the Proclamation must be deemed to be inapplicable to territories unknown to the Crown at the date of issuance of the Proclamation. From the quotation set out in the paragraph next above, it will be noted that Judson J., concluded that Indian title in British Columbia could not be based on the Proclamation. In his opinion the Proclamation did not apply to the land of the Nishgas, but this was not conclusive on the question of existence of Indian title. Referring to a dictum dropped by Lord Watson in the *St.*

⁸ R.S.C., 1970, Appendices Vol., p. 123.

⁹ *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *The King v. Lady McMaster*, [1926] Ex. C.R. 68, at p. 72, per MacLean J.: "The proclamation of 1763, as has been held, has the force of a statute, and so far herein as the rights of the Indians are concerned, it has never been repealed." In *Calder*, Hall J. stated: "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."

Catherine's Milling case¹⁰ which some have interpreted as making the existence of Indian title dependent upon applicability of the Proclamation to the geographic area in question, Judson J., stated:

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. Catherine's* 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.*^{10a}

It was not necessary for Hall J., to address himself to this issue, inasmuch as he reached the conclusion that the Proclamation did in fact apply to British Columbia, but it is noteworthy that he referred to the Proclamation as "paralleling and supporting" the Nishga claim.

On the question of whether the Royal Proclamation created, or merely recognized and confirmed, Indian title, the earlier cases were inconclusive and provided support for both possible views. For the most part the judicial utterances took the form of casual dicta which, like Lord Watson's remark in the *St. Catherine's* case, were made in cases where full consideration of the problem was unnecessary.¹¹ One of the significant aspects of *Calder* therefore is that even those members of the Supreme Court who went on to find against the Nishga claim did so on other grounds and expressly refrained from concluding that non-applicability of the Proclamation to the area in question was determinative on the question of existence of Indian title.

Although the reasons of Judson J., offer little elaboration,

¹⁰ *Supra*, footnote 2, at p. 54 (A.C.): "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."

^{10a} Italics supplied.

¹¹ In two leading cases a reference to the Proclamation as the source of Indian hunting rights was coupled with a conclusion that no obstacle was presented to recognition of such rights respecting lands formerly held by the Hudson's Bay Company (and consequently not "reserved" by the Proclamation) inasmuch as Canada had subsequently treated the Indians in possession of such lands as having a title to be surrendered by treaty: *R. v. Wesley*, [1932] 2 W.W.R. 337, at pp. 348-350 (per McGillivray J.A.); *R. v. Sikyea* (1964), 46 W.W.R. 65, at pp. 66-67 (per Johnson J.A.) adopted on appeal: [1964] S.C.R. 642, at p. 646. The view that the Proclamation was confirmatory of, as opposed to creative of, the Indian title finds support in the language of Sissons J. in *R. v. Kogogolak* (1959), 28 W.W.R. 376, at p. 377, and in *R. v. Koonungnak* (1963), 45 W.W.R. 288, at p. 302, and agreed with by Norris J.A. in *Regina v. White*, *supra*, footnote 2, 50 D.L.R. (2d) 613, at p. 647. Other pronouncements in the British Columbia courts in *White* and in *Calder* tended on the other hand toward the conclusion that the Indian claim of right must stand or fall with the Proclamation.

compelling arguments may be advanced in support of his position that the question of geographic applicability of the Proclamation can be divorced from the question of existence of Indian title. Certainly native title has been recognized as existent in other jurisdictions independently of the Royal Proclamation or equivalent.¹² And in Canada, when one turns from judicial determinations to a consideration of legislative and executive action by the federal government, it becomes clear that little attention has been paid to nice questions concerning the applicability or non-applicability of the Proclamation. As has been pointed out, the Proclamation by its terms did not apply to Hudson's Bay Company lands. But these same Company lands, conveyed to Canada shortly after Confederation to become the "Dominion lands", were the subject of clear government policy, reflected in statute and in executive action, directed toward obtaining surrenders of Indian title prior to opening of the lands for settlement.

A brief outline of this pattern of dealing with Indian title on the public lands vested in the Crown in right of Canada will serve to underline the fact that non-applicability of the Proclamation to most of the territory in question does not appear to have been regarded as material. At the same time it demonstrates that, with respect to the federal Crown lands at least, the law did indeed take cognizance of the existence of Indian title. The area under discussion constitutes a vast section of Canada, taking in much of what is now northern Quebec and northern Ontario, the Prairie Provinces, and the Territories north of the sixtieth parallel.

The territories known as Rupert's Land were granted to the Hudson's Bay Company by its incorporating charter of 1670 and reconveyed by the Company to the Crown (in right of Canada) in 1870. During that period the Company had had little occasion to concern itself with extinguishment of Indian title. The only object in obtaining surrenders from the Indians would be to prepare the way for settlers, and the Company tended to be something less than enthusiastic in encouragement of settlement. Its concern was furtherance of the fur trade, and land use for the Company consisted essentially in the establishment of trading posts. Unless and

¹² For reference to the history of land purchases from the Indians in the American colonies prior to 1763, see argument of counsel before the Supreme Court of Canada in the *St. Catherine's Milling* case, *supra*, footnote 2, at pp. 583-585, (S.C.R.). The United States courts have not relied on the Proclamation as the determinant of the existence of Indian title. Nor has the Privy Council rested its decisions on appeal from Africa concerning native title on the existence of some equivalent to the Proclamation: see *Amodu Tijani v. The Secretary, Southern Nigeria*, [1921] 2 A.C. 399; *In re Southern Rhodesia*, [1919] A.C. 213. And see generally the comprehensive review undertaken by Blackburn J., in the recent aboriginal land case in Australia: *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 14.

until settlement was contemplated, negotiations for cession of Indian title were uncalled for.

In 1811 the Earl of Selkirk purchased an area carved out of Rupert's Land upon which the Red River settlement was founded (now a part of Manitoba). It is noteworthy that Lord Selkirk entered into negotiations with the Indians for extinction of their title, resulting in the Selkirk Treaty of July 18th, 1817.¹³

In negotiating the transfer of Rupert's Land to Canada in 1870, the Company was careful to require a term absolving itself from any future liability for, or responsibility in respect of, unsurrendered Indian title. The Imperial Order in Council of June 23rd, 1870, which provided for the admission of Rupert's Land and the north-western Territory into Canada as of July 15th, 1870, incorporated the terms upon which Rupert's Land was yielded up by the Hudson's Bay Company, one of which was the following:¹⁴

14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government, and the Company shall be relieved of all responsibility in respect of them.

An address from both Houses of the Canadian Parliament, which appears as Schedule "A" to the Order in Council, contained the following undertaking:¹⁵

And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for land required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

In anticipation of the acquisition of the new territories which it was to receive later that year, the Parliament of Canada enacted the Manitoba Act, 1870,¹⁶ which enactment was subsequently confirmed by the British North America Act, 1871.¹⁷ The last few sections of the Manitoba Act relate to land titles and are instructive on early federal policy toward Indian title. By section 30 of the Act all ungranted or waste lands in the province are, from the date of transfer of Rupert's Land, vested in the Crown, to be administered by the Government of Canada for Dominion purposes, subject to any conditions contained in the agreement for surrender of Rupert's

¹³ For the terms of the treaty see Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories* (1880), pp. 299-300. The Company bought back the whole tract from the heirs of Lord Selkirk in 1836.

¹⁴ R.S.C., 1970, Appendices Vol., pp. 257, 262-263.

¹⁵ *Ibid.*, p. 264. See also Resolutions, Schedule B, at p. 265, *et seq.*, and the Company's Deed of Surrender, Schedule C, para. 14, at p. 274.

¹⁶ *Ibid.*, p. 247.

¹⁷ *Ibid.*, p. 289.

Land by the Hudson's Bay Company. Section 31 provides for the setting aside of certain lands for the children of "half-breeds", and commences as follows:

31. And whereas, it is expedient, *towards the extinguishment of the Indian title to the lands in the Province*, to appropriate a portion of such ungranted lands . . . for the benefit of the families of the half-breed residents, it is hereby enacted. . . .

Section 32 reads, in part, as follows:

32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:

. . .

3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land *in that part of the Province in which the Indian Title has been extinguished*, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada, *in those parts of the Province in which the Indian Title has not been extinguished*, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.

Turning to the general land enactments, the salient point is that from the outset legislation relating to the alienation of Dominion lands specifically excluded from the operation of such legislation any lands to which Indian title had not yet been extinguished. The first general enactment dealing with the administration and management of lands in Manitoba and the Northwest Territories was the Dominion Lands Act,¹⁸ and by section 42 Indian lands were exempted from its operation:

42. None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory *the Indian title to which shall not at the time have been extinguished*.

A section so exempting unsurrendered Indian lands was continued in the Act until 1908 and, until the Act was repealed in 1950, it contained some provision dealing expressly with the subject of extinguishment of Indian title.¹⁹

¹⁸ S.C., 1872, c. 23.

¹⁹ The 1872 Act was succeeded by the Dominion Lands Act, 1883, S.C., 1883, c. 17, applying to the "public lands included in Manitoba and the several Territories of the Dominion" (s. 1), and s. 3 of which provided:

"3. None of the provisions of this Act shall be held to apply to territory the Indian title to which shall not, at the time, have been extinguished."

The same provision appears as section 4 of the Dominion Lands Act in the 1886 consolidation, and again as section 4 of the Act in the 1906 consolidation. In 1874 legislation was passed bringing the three and one-half

Still in the realm of legislative action respecting Indian title, reference may be made to the enactments which effected the northward extension of the boundaries of Ontario and Quebec to Hudson's Bay in 1912.²⁰ These statutes contain identical provisions

million acre Peace River Block of British Columbia under the Act by defining the Block as Dominion lands within the meaning of the Dominion Lands Act: S.C., 1884, c. 6, s. 12; R.S.C., 1886, c. 56, s. 2. The Peace River Block, together with the Railway Belt, was reconveyed to British Columbia under the Memorandum of Agreement of February 20th, 1930, confirmed by the British North America Act, 1930: see R.S.C., 1970, Appendices Vol., pp. 265, 392-399. In 1908 the Dominion Lands Act was repealed and replaced by a consolidated and amended version thereof: The Dominion Lands Act, S.C., 1908, c. 20. By section 3 the Act was made applicable to the three Prairie Provinces, the Northwest Territories (but excluding the Yukon), and to the Peace River Block of British Columbia. The new Act did not contain a section exempting unsundered Indian lands from its application, the only provisions respecting Indian title being contained in a section dealing with the powers of the Governor in Council. Legislation in 1883 had enacted certain provisions empowering the Governor in Council to withdraw from the operation of the Act such lands as were reserved for Indians and to make grants in satisfaction of claims existing in connection with the Indian title preferred by certain half-breeds (S.C., 1883, c. 17, s. 81; R.S.C., 1886, c. 54, s. 90; R.S.C., 1906, c. 55, s. 6). The corresponding section in the 1908 Act was section 76 which read as follows:

"76. The Governor in Council may—

- (a) withdraw from the operation of this Act, subject to existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians;
- (b) grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title;
- (c) upon the extinguishment of Indian title in any territory or tract of land, make to persons satisfactorily establishing undisturbed occupation of any lands within the said territory or tract at the date of such extinguishment . . . free grants of the said lands. . . ."

Section 76 contained the only provisions relating to Indian title in the 1908 statute. These provisions were carried through the 1927 statute consolidation—R.S.C., 1927, c. 113, s. 74 (repeating the above quoted portion of section 76 from the 1908 Act, with a change in paragraph (b) to substitute cash payments for land grants)—and remained in the Act until its repeal in 1950.

In 1950 the Dominion Lands Act was repealed and replaced by the Territorial Lands Act, S.C., 1950, c. 22 (now R.S.C., 1970, c. T-6). "Territorial lands" are defined as meaning "lands in the Northwest Territories or in the Yukon Territory that are vested in the Crown or of which the Government of Canada has power to dispose" (s. 2). The only reference to Indians or Indian lands appears in (now) s. 18 dealing with the powers of the Governor in Council, as follows:

"18. The Governor in Council may,

- (d) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians."

²⁰ Quebec Boundaries Extension Act, 1912, S.C., 1912, c. 45, s. 2 (c),

respecting the obligation on the part of those two provinces to negotiate treaties of surrender with the Indians in the newly acquired territories. (It may be observed, once again, that this territory embraced lands formerly held by the Hudson's Bay Company and which, consequently, had not been "reserved" by the Royal Proclamation of 1763.) In each of the two federal enactments, the boundaries extension is stated to be made "upon the following terms and conditions and subject to the following provisions" (in part):

That the province of Quebec [Ontario] will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;

That no such surrender shall be made or obtained except with the approval of the Governor in Council;

That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.

Subsequently treaties of surrender of Indian title were concluded with the Indians in northern Ontario. To date no such treaties have been negotiated with the Indians of Quebec.²¹

Federal legislation from the outset, therefore, contemplated extinguishment of Indian title through the negotiation of treaties with the Indians prior to the opening of a particular area for settlement. The treaty-making policy of the federal government is well known and may be treated summarily. It constituted a continuance of the policy that had been followed prior to Confederation in what is now southern Ontario.²² It has been noted that in the joint address requesting the admission of Rupert's Land and the Northwest Territory to Canada, the Parliament of Canada had delivered an undertaking to settle Indian claims for compensation for land in conformity with the principles which had "uniformly governed the British Crown in its dealings with the aborigines". The federal

(d) and (e); Ontario Boundaries Extension Act, 1912, S.C., 1912, c. 40, s. 2(a), (b) and (c). In each case complementary provincial legislation was enacted: An Act respecting the extension of the Province of Quebec by the annexation of Ungava, S.Q., 1912, c. 7; An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province, S.O., 1912, c. 3.

²¹ As to Indian title in Quebec, see Rapport de la Commission d'Etude sur l'Intégrité du Territoire du Québec: Le Domaine Indien, Vol. 4.1 (Québec, 1971), esp. at pp. 255-294.

²² The most recent of the pre-Confederation treaties were made on behalf of the Province of Canada and included the Robinson-Huron and Robinson-Superior Treaties of 1850 and the Manitoulin Island Treaty of 1862.

government embarked on its treaty-making policy in the year following the admission of these territories to Canada. The lands caught by the numbered treaties—from Treaty No. 1 concluded on August 3rd, 1871, to Treaty No. 11 of June 27th, 1921—included all the lands now forming the three Prairie provinces, as well as areas situated in north-western Ontario (an area that had been the subject of a boundary dispute between Manitoba and Ontario, and most of which was subsequently determined to be in Ontario), northeastern British Columbia (the Peace River country, east of the Rockies), and western Northwest Territories.²³

It is the case that there have been gaps in the federal government's treaty-making policy. For reasons which are obscure, to date no treaty has been entered into with the Indians of the Yukon Territory. Nor has the eastern part of the Northwest Territories (most but not all of which is Eskimo country) been covered by treaty. It is apparent, however, that the latter instances are properly characterized as exceptions to a general rule.²⁴ Generally speaking, the federal government has pursued a policy of either concluding Indian treaties, or of making provision for the concluding of such treaties, in respect of lands which are, or have been, vested in the Crown in right of Canada.

The essence of the treaties is unmistakable from their terms. In each case the Crown made certain promises in return for the Indians' surrender of the lands defined in the treaty. The standard phraseology employed was that the named tribes of Indians did "hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included within the following limits, that is to say: . . .", and this was followed by a description in precise terms of the land in question. The treaties in other words purported to be a purchase of whatever proprietary rights the Indians had in the land. In his reasons in the *Calder* case, Hall J., put it this way:

Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other

²³ See Kerr's, *Historical Atlas of Canada* (1960), p. 57. The treaty-making had been completed prior to the British North America Act, 1930, and Agreements scheduled thereto (R.S.C., 1970, Appendices Vol., p. 365 *et seq.*) by the terms of which Canada transferred the public lands of the three Prairie provinces, and reconveyed the Peace River Block in British Columbia, to the respective provinces. When the boundaries of the provinces of Ontario and Quebec were extended northward in 1912, the federal government obtained undertakings from these provinces regarding future extinguishment of Indian title: see *supra*, footnote 20, and accompanying text.

²⁴ The Railway Belt, conveyed by British Columbia to Canada pursuant to British Columbia's Terms of Union and reconveyed to the province in 1930, would not seem to be a true exception since the artificial boundaries of the Belt would have been inappropriate for treaty-making.

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.

In summary, it is abundantly clear that with respect to lands vested in the Crown in right of Canada, the *existence* of an Indian title has frequently been recognized. The federal policy has been manifested in legislative enactments recognizing, in terms, an "Indian title", as well as in the executive acts of concluding treaties with the Indians for the purpose of extinguishment of such title. Moreover definite consequences flowed from the extinguishment or non-extinguishment of Indian title. Most importantly, until 1908 the Dominion Lands Acts were made inapplicable to lands in respect of which Indian title remained unextinguished. By that year the federal government's treaty-making was nearing completion.²⁵ Finally, it is to be noted once again that no distinction was drawn between lands which could be said to have been reserved by the Royal Proclamation of 1763 and those (such as the former Rupert's Land territory) which had not been so reserved. The legislative and administrative history, that is to say, supports the approach taken by Judson J., in *Calder* insofar as he treated the question of applicability of the Proclamation as entirely distinct from, and not determinative of, the question of the existence of Indian title to a particular area.

Turning now to the particular situation of the Nishga territory, another aspect of the *Calder* decision which is of cardinal importance lies in the fact that nowhere in the reasons for judgment is the conclusion reached that Indian title has never existed in British Columbia. Hall J., as noted earlier, would have upheld the Nishgas claim that Indian title not only did exist but that it remains unextinguished at the present time. Judson J., did not take issue with the proposition that Indian title had existed in British Columbia. Indeed, having concluded that the Royal Proclamation had no bearing upon the question of Indian title in British Columbia, he proceeds on the basis that there was a claim of title that called for extinguishment. He held that the declaration sought by the plaintiffs could not be granted because extinguishment of Indian title had been effected prior to British Columbia's entry into Confederation in 1871.

The main features of colonial policy in the territory that was to become the Province of British Columbia in 1871 are traced in the judgments in *Calder* and need not be reviewed in detail here. An examination of the colonial period involves the consideration of enactments and policies of three colonies: (1) the separate Colony

²⁵ The first ten of the eleven numbered treaties had been negotiated, catching Dominion lands south of the 60th parallel. Treaty No. 11, applying to lands in the Northwest Territories was not entered into until 1921.

of Vancouver Island, established in 1849;²⁶ (2) the separate (mainland) Colony of British Columbia established in 1858; and (3) the united Colony of British Columbia brought into existence by merger of the two formerly separate Colonies in 1866.

The general line of development of colonial policy respecting Indian title, in a nutshell, was this. During the 1850's the existence of an Indian title which required extinguishment prior to settlement obtained acknowledgment in the Colony of Vancouver Island in the form of deeds of surrender of lands, for stipulated cash payments, taken from Indians on southern Vancouver Island.²⁷ Toward the end of that decade the policy of purchase of Indian lands prior to settlement was given up. The Hudson's Bay Company was no longer a source of funds, the colonies were financially pressed and the Imperial government refused to finance the purchase of Indian lands.²⁸ Commencing in the late 1850's, the land enactments of the

²⁶ Vancouver Island was granted to the Hudson's Bay Company on January 13th, 1849, and proprietary rights remained vested in the Company until reconveyance was eventually effected by deed of April 3rd, 1867. The commission and instructions of the first governor, Blanshard, were issued on July 16th, 1849, and the commission read at Victoria on March 11th, 1850. The dominant figure in the shaping of colonial policy during most of the years of existence of the two separate colonies was James Douglas. Douglas was the Hudson's Bay Company's chief representative on Vancouver Island at the time that the Island Colony came into existence. In 1851 he succeeded Blanshard to become the second governor of the colony. He continued to act as chief representative of the Company, as well as of the Crown, until 1858 when he was obliged to sever his connections with the Company as a condition of appointment as the first governor of the colony of British Columbia. He continued as governor of the two separate Colonies for some years, his commission for Vancouver Island terminating in 1863 and for British Columbia in 1864.

²⁷ Fourteen such purchases were made in the years 1850 to 1854, by Douglas as the chief representative of the Hudson's Bay Company.

²⁸ The position taken by the colonial government on the Island, and the difficulties it faced in continuing the policy instituted by the Company, are clearly evidenced by three communications in 1861: (1) a Petition dated February 6th, 1861, from the House of Assembly of Vancouver Island, addressed to the Secretary of State for the Colonies; (2) Douglas' despatch of March 25th, 1861, transmitting the Petition to the Secretary; and (3) the Secretary's reply of October 19th, 1861. The two latter are set out in *Calder*, both in the reasons of Judson J. and of Hall J. The Petition disclosed that some sales of unsundered Indian lands had been made to colonists and that possession of such lands could not be taken until the Indian title question was resolved. As to the Assembly's views on the existence of an Indian title to unsundered lands and the necessity of extinguishing such title, both of which are referred to in terms, the Petition admits of no ambiguity. Douglas' despatch stated (a) that his practice up to the year 1859 was "to purchase the native rights in the land, in every case, prior to the settlement of any district" (b) that since 1859 because of termination of the Hudson Bay Company's charter and lack of funds he had not been able to continue this policy and (c) that as of the date of this despatch in 1861 there were already three settled districts of the Colony which had not been bought from the Indians. That Douglas proposed to resume a policy of purchasing Indian title, if the funds could be found, is abundantly clear. The response of the Secretary of State for the

colonial period, whether of the Island Colony, of the mainland Colony, or of the united Colony, are quite consistent in their treatment of the question of Indian title to the unsurrendered land. It is ignored. When qualifications are made in the general statutory provisions respecting land holdings, the qualification is in respect only of Indian reserves or settlements or gardens, and the inference the limited qualification demands is that no wider exemption in favour of the unsurrendered lands was intended. In this respect the colonial enactments stand in the same position as those passed by the province after 1871.

An account of the troubled history of Canada—British Columbia relations on the Indian land question following admission to the federation in 1871 cannot be attempted here.²⁹ Of considerable interest, however, particularly in view of the conclusion reached by Judson J., in *Calder* that Indian title had been extinguished in British Columbia during the colonial period, is the position taken by the federal government in the first years after British Columbia's admission to Canada. It will be recalled that the federal government embarked on its treaty-making policy in 1871, the same year in which British Columbia entered Confederation, and that in the following year the first Dominion Lands Act was enacted, which statute expressly stipulated that its provisions respecting settlement of agricultural lands, or disposition of timber or mineral lands, were inapplicable to territory "the Indian title to which shall not at the time have been extinguished". Two years after the last mentioned federal statute was enacted, the Province of British Columbia passed the first statute relating to its public lands since entry into Confederation, being the Crown Lands Act of 1874.³⁰ In contrast to its federal counterpart, the British Columbia statute did not

Colonies acknowledged "the great importance of purchasing without loss of time the native title to the soil of Vancouver Island". However, any suggestion that extinction of Indian title was the responsibility of the Imperial government was repudiated, and that government declined either to provide, or to lend, the necessary funds. If financial necessity in fact precluded the continuation of a systematic policy of extinguishment of Indian title through purchase, it is perhaps not surprising that the land enactments which followed were not cast in terms which anticipated such extinguishment as a condition precedent to land sales and settlement.

²⁹ Detailed treatment is available from such sources as: Special Joint Committee of the Senate and House of Commons appointed to enquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their Petition Submitted to Parliament in June, 1926; Report and Evidence (Ottawa, 1927), and printed as an Appendix to Journals of the Senate of Canada, 1926-27; McInnes, T. R. E., Report on the Indian Title in Canada, with special reference to British Columbia (1909), House of Commons. Sessional Paper No. 47 (Ottawa, 1914); La Violette, F. E., *The Struggle for Survival* (1961), ch. 4; Cail, R. E., *Disposal of Crown Lands in British Columbia, 1871-1913*, unpublished M.A. Thesis, University of British Columbia, Vol. 2, ch. 4 (1956).

³⁰ S.B.C., 1874, No. 2.

exempt from its operation unsundered Indian lands. With respect to the recording of unsurveyed Crown lands or the pre-emption of surveyed Crown lands, the sole relevant exclusion was that such lands should not be in "an Indian settlement", and it was further provided that the right of recording or of pre-emption, as the case might be should not extend to "any of the aborigines of this Continent" except by virtue of a written order of the Lieutenant Governor in Council.

Upon the recommendation of the then Minister of Justice (Fournier), the provincial statute was disallowed.³¹ The disallowance is of special interest as representing the first occasion upon which the federal government was called upon to take a position respecting the British Columbia land question. Two passages from the Minister's report³² are particularly noteworthy. Having noted the failure to obtain surrenders or cessions from the Indians of the province, it is stated that:

... the undersigned feels that he cannot do otherwise than advise that the Act in question is objectionable, as tending to deal with lands which are assumed to be the absolute property of the province, an assumption which completely ignores, as applicable to the Indians of British Columbia, the honor and good faith with which the Crown has, in all other cases, since its sovereignty of the territories in North America dealt with their various Indian tribes.

Again, referring to section 109 of the British North America Act, 1867, the report anticipates the conclusion later to be reached by the Privy Council in the *St. Catherine's Milling* case:³³

The undersigned would also refer to the British North America Act, 1867, section 109, applicable to British Columbia, which enacts in effect that all lands belonging to the province shall belong to the province, "subject to any trust existing in respect thereof and to any interest, other than that of the province in the same".

That which has been ordinarily spoken of as the "Indian title" must, of necessity, consist of some species of interest in the lands of British Columbia.

If it be conceded that they have not a freehold in the soil, but that they have an usufruct, a right of occupation or possession of the same for their own use, then it would seem that these lands of British Columbia are subject, if not to a "trust existing in respect thereof", at least "to an interest other than that of the province alone".

³¹ By Order in Council of March 16th, 1875.

³² The Minister's report, dated January 19th, 1875, and approved by the Governor General in Council on January 23rd, 1875, appears in W. E. Hodgins, *Dominion and Provincial Legislation 1867-1895* (Department of Justice, 1896), at p. 1024.

³³ *Supra*, footnote 2. Referring to the lands there in question, prior to their surrender, Lord Watson stated, at p. 58 (A.C.): "The ceded territory was, at the time of the Union, land vested in the Crown, subject to an interest other than that of the province in the same within the meaning of Section 109: . . ."

The undersigned, therefore, feels it incumbent on him to recommend that the Act should be disallowed . . .

In 1875 British Columbia enacted a second statute, the Land Act, 1875,³⁴ the relevant provisions of which were substantially the same as its disallowed predecessor, with the exception that section 60 of the new Act expressly empowered the Lieutenant-Governor to reserve lands for the purpose of conveying the same to the Dominion for the use and benefit of the Indians. The new Act was allowed to stand, albeit somewhat reluctantly. The report of the new Minister of Justice (Blake) read, in part, as follows:³⁵

The Lieutenant-Governor's communication upon this Act states that the objections taken by council to it are considered to be removed by the agreement for a settlement of the Indian land question by commissioners.

Although the undersigned cannot concur in the view that the objections taken are entirely removed by the action referred to; and, though he is of opinion that, according to the determination of council upon the previous Crown Lands Act, there remains serious question as to whether the Act now under consideration is within the competence of the provincial legislature, yet since according to the information of the undersigned, the statute under consideration has been acted upon, and is being acted upon largely in British Columbia, and great inconvenience and confusion might result from its disallowance; and considering that the condition of the question at issue between the two governments is very much improved since the date of his report, the undersigned is of opinion that it would be the better course to leave the Act to its operation.

It is to be observed that this procedure neither expresses nor impliedly waives any right of the government of Canada to insist that any of the provisions of the Act are beyond the competence of the Local Legislature, and are consequently inoperative.

The undersigned recommends that the Act be left to its operation.

By this time the two governments had agreed to the setting up of a joint commission for the purpose of allotting Indian reserves and, as the first paragraph of the above passage implies, this no doubt contributed to the federal government's decision to allow the British Columbia legislation to stand.

The thirteenth article of the Terms of Union under which British Columbia was admitted to Canada provided that disagreements as to the amount of land to be set aside for the Indians be referred for the decision of the Secretary of State for the Colonies,³⁶ and his intervention had in fact been sought prior to the disallowance of 1875. In a communication of December 4th, 1874,

³⁴ S.B.C., 1875, No. 5.

³⁵ The report, dated April 28th, 1876, and approved by the Governor General in Council on May 6th, 1876, appears in Hodgins, *op. cit.*, footnote 32, at p. 1038.

³⁶ R.S.C., 1970, Appendices. Vol., p. 279, 285.

from the Governor General of Canada (Lord Dufferin) to the Secretary of State for the Colonies, the Indian title question was referred to in the following terms:

In Canada the accepted theory has been that while the sovereignty and jurisdiction over any unsettled territory is vested in the Crown certain territorial rights or at all events rights of occupation, hunting and pasture, are inherent in the aboriginal inhabitants.

As a consequence the Government of Canada has never permitted any lands to be occupied or appropriated, whether by Corporate bodies or by individuals, until after the Indian title has been extinguished, and the Districts formally surrendered by the Tribes or bands which claimed them for a corresponding equitable consideration.

In British Columbia this principle seems never to have been acknowledged. No territorial rights are recognized as pre-existing in any of the Queen's Indian subjects in that locality. Except with a few special cases dealt with by the Hudson Bay Company, before the foundation of the Colony, the Indian title has never been extinguished over any of the territories now claimed as Crown property by the Local Government, and lands have been pre-empted and appropriated without any reference to the consent or wishes of their original occupants.

Lord Dufferin's name is further associated with the Indian title question in connection with the strong speech he delivered at Government House, Victoria, on September 20th, 1876, an extract from which follows:³⁷

From my first arrival in Canada I have been very much occupied with the condition of the Indian population in this province. You must remember that the Indian population are not represented in Parliament, and, consequently, that the Governor General is bound to watch over their welfare with special solicitude. Now we must all admit that the condition of the Indian question in British Columbia is not satisfactory. Most unfortunately, as I think, there has been an initial error ever since Sir James Douglas quitted office, in the Government of British Columbia neglecting to recognize what is known as the Indian title. In Canada this has always been done; no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and the communities that hunted or wandered over them. Before we touch an acre we make a treaty with the chiefs representing the bands we are dealing with, and having agreed upon and paid the stipulated price, oftentimes arrived at after a great deal of haggling and difficulty, we enter into possession, but not until then do we consider that we are entitled to deal with a single acre. The result has been that in Canada our Indians are contented, well affected to the white man, and amenable to the laws and Government. At this very moment the Lieutenant-Governor of Manitoba has gone on a distant expedition in order to make a treaty with the tribes to the northward of the Saskatchewan. Last year he made two treaties with the Crees and Chippeways, next year it has been arranged that he should make a treaty with the Blackfeet, and when this is done the British Crown will have acquired a title to every acre that lies between Lake Superior and the top of the

³⁷ H. Walton, ed., *Speeches and Addresses of Lord Dufferin* (1882), p. 209.

Rocky Mountains. But in British Columbia—except in a few places where, under the jurisdiction of the Hudson's Bay Company or under the auspices of Sir James Douglas, a similar practice has been adopted—the Provincial Government has always assumed that the fee simple in, as well as the sovereignty over the land, resided in the Queen. Acting upon this principle they have granted extensive grazing leases, and otherwise so dealt with various sections of the country as greatly to restrict or interfere with the prescriptive rights of the Queen's Indian subjects. As a consequence, there has come to exist an unsatisfactory feeling amongst the Indian population. Intimations of this reached me at Ottawa two or three years ago, and since I have come into the province my misgivings on the subject have been confirmed. Now, I consider that our Indian Fellow-subjects are entitled to exactly the same civil rights under the law as are possessed by the white population, and that if an Indian can prove a prescriptive right of way to a fishing station, or a right of any other kind, that that should no more be ignored than if it were the case of a white man. I am well aware that among the coast Indians the land question does not present the same characteristics as in other parts of Canada, or as it does in the grass countries of the interior of this province; but I have also been able to understand that in these latter districts it may be even more necessary to deal justly and liberally with the Indian in regard to his land rights than on the prairies of the North-West.

The failure of British Columbia to resolve the Indian title question was to remain a point of contention between the governments of that province and of Canada well past the turn of the century, and would receive attention by various commissions and parliamentary committees. While it eventually receded as a point of conflict between the two governments, and an accommodation of sorts was reached,³⁸ the immediate point is simply that the question of extinguishment of Indian title remained very much a live issue following British Columbia's metamorphosis from colony to province.

II. *The Nature of Indian Title.*

It is well to remember, at the outset, that the subject of Indian title raises questions of property rights, not exercise of governmental power. Sovereignty, in the sense of the right to govern and tax, may have been asserted as against European powers by virtue of discovery, or by conquest, or (in the case of the United States) by purchase from the country asserting a prior claim. While acquisition of territory in this sense may carry with it a claim of underlying title to the soil, it leaves untouched the question of a coexistent aboriginal claim to the soil. As Viscount Haldane observed in *Amodu Tijani v. The Secretary, Southern Nigeria*.³⁹

A mere change in sovereignty is not to be presumed as meant to dis-

³⁸ See, Indian Affairs Settlement Act, S.B.C., 1919, c. 32, and the British Columbia Indian Lands Settlement Act, S.C., 1920, c. 51.

³⁹ [1921] 2 A.C. 399, at p. 407.

turb rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly.

In the United States, while sovereignty was acquired from Britain, Spain, France, Mexico and Russia, lands within the whole of the country were, with few exceptions, purchased from the Indians.⁴⁰ By way of illustrating the distinction between transfer of governmental power and sale of land, an eminent American jurist has pointed out that after paying Napoleon \$15,000,000.00 for the cession of political authority over the Louisiana Territory, the United States proceeded to pay the Indian tribes of the ceded territory more than twenty times that sum for such lands in their possession as they were willing to sell.⁴¹ A more recent example is provided by the Alaska native land claim settlement. Having originally purchased Alaska from Russia for seven million dollars in 1867, the United States government has now agreed to pay the Alaskan natives nine hundred and sixty-two million dollars in cash over a period of time, as well as agreeing to a very substantial land allotment, in settlement of the native land claims. And similarly in Canada, we have seen that immediately following Confederation Canada acquired vast territories to the north and west from the Hudson's Bay Company, and then proceeded with the task of negotiating surrenders of property rights with the Indian inhabitants of those territories.

One aspect of sovereignty, to be sure, involves an underlying title in the Crown but, as explained by the Privy Council commencing with the *St. Catherine's Milling* case,⁴² it is in no way inconsistent with such underlying title that there can be superimposed on it an Indian title. The two claims of title stand together with respect to unsurrendered lands. By constitutional doctrine the ultimate fee is in the Crown, and it has never been held to be vested in the Indians. In the *St. Catherine's Milling* case Lord Watson stated:⁴³

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.

In a later passage, still referring to the nature of the Indian interest prior to its surrender by treaty of 1873, he noted that since the Indians had not been owners in fee simple it could not be argued that the land in question had not been vested in the Crown in 1867.

⁴⁰ See F. Cohen, *Original Indian Title* (1947-48), 32 Minn. L. Rev. 28.

⁴¹ *Ibid.*, at pp. 35-36.

⁴² *Supra*, footnote 2.

⁴³ *Ibid.*, at p. 55 (A.C.).

He stated:⁴⁴

But [fee simple ownership] was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was, at the time of the Union, land vested in the Crown, subject to "an interest other than that of the province in the same", within the meaning of section 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

In brief, the Crown's underlying, or ultimate, title is one which is perfected to become full ownership (*plenum dominium*) by the surrender of Indian title. Until such surrender the Indian title forms a "burden" on that of the Crown and is "an interest other than that of the province" to which the title of the Crown (in right of the province) is subject within the meaning of section 109 of the British North America Act.

The contemporaneous existence of the Crown's ultimate title and the native title has been recognized elsewhere. In the Privy Council's decision in *Tamaki v. Baker*,⁴⁵ on appeal from New Zealand, and where a native title was asserted, Lord Davey stated:⁴⁶

Their Lordships are somewhat embarrassed by the form in which the third question is stated. If it refers to the prerogative title of the Crown, the answer seems to be that that title is not attacked, the native title of possession and occupancy not being inconsistent with the seisin in fee of the Crown. Indeed, by asserting his native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession.

Again in the case of *In re "The Landon and Whitaker Claims Act, 1871"*,⁴⁷ Chief Justice Arney, giving the reason of the New Zealand Court of Appeal, stated:⁴⁸

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary

⁴⁴ *Ibid.*, at p. 58 (A.C.). It is noteworthy that Lord Watson's terminology, and the reference to section 109, suggests that the Indian title is an interest enforceable in law, as opposed to a merely moral obligation. That impression is fortified by a passage in the first Indian Annuities case, *Attorney General for Canada v. Attorney General for Ontario*, [1897] A.C. 199, where Lord Watson again gave the reasons of the Privy Council, and where, with reference to section 109, it is stated, at pp. 210-211:

"On the other hand, 'an interest other than that of the province in the same' appears to (their Lordships) to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province."

In the latter case, it was held that after the beneficial interest had passed to the province by a surrender, the Indians' right to payment of treaty annuities was not such "an interest other than that of the province" in the lands surrendered.

⁴⁵ [1901] A.C. 561.

⁴⁶ *Ibid.*, at p. 574.

⁴⁷ (1872), 2 C.A. 41.

⁴⁸ *Ibid.*, at pp. 49-50.

right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee simple of the whole territory of New Zealand is vested and resides in the Crown, until it be parted with by grant from the Crown.

The same position has consistently been taken in the United States ever since the early leading decision of the Supreme Court in *Johnson v. McIntosh*⁴⁹ where Chief Justice Marshall referred to the Crown's absolute ultimate title, to which the United States succeeded, subject only to the Indian right of occupancy, and concluded that the said right of occupancy was no more incompatible with a seisin in fee than is a lease.⁵⁰ He stated:⁵¹

It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.

On the authorities, therefore, it would seem clear that there is no inconsistency in locating the underlying title, or fee, in the Crown while recognizing the contemporaneous existence of Indian title. Hence legislative declarations to the effect that lands belong in fee to the Crown need not *per se* constitute a denial of the existence of Indian title, but can be regarded as merely declaring recognized constitutional doctrine. The point assumed importance in *Calder* in the light of certain colonial proclamations and ordinances stating that lands, mines and minerals belonged to the Crown in fee. The analysis of Hall J., is in accord with the authorities discussed above. He stated:

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 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.

Judson J., however, appears to have taken a different interpretation out of those enactments. He stated:

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 ex-

⁴⁹ (1823), 8 Wheaton 543.

⁵⁰ *Ibid.*, at p. 592.

⁵¹ *Ibid.*, at p. 603.

tend 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 reference to exercise of sovereignty, it has been suggested, is of doubtful assistance in this context, and the assertion that the fee in the public lands lay with the Crown, for the reasons outlined, can be cogently argued not to be determinative on the question of continued existence of Indian title.

As to the content or characteristics of Indian title, the familiar point of commencement is Lord Watson's description of the nature of Indian tenure in the *St. Catherine's Milling* case as "a personal and usufructuary right, dependent upon the good will of the Sovereign".⁵² The "personal" nature of the Indian title, was explained by Duff J., in *Attorney-General for Quebec v. Attorney-General for Canada* (the *Star Chrome* case),⁵³ where reference is made to the Indian right as "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown".⁵⁴

This restriction on alienation is well known and may be summarily dealt with. As noted in the *St. Catherine's Milling* case, in Canada the policy of requiring surrender to the Crown, as opposed to permitting sale to a subject, dates from the Royal Proclamation of 1763 and has been followed consistently ever since. Similarly, in the United States the exclusive right of purchasing (or "pre-empting") Indian title has been held to rest with the government.⁵⁵

The restriction on alienation was and is undoubtedly a characteristic feature of Indian title. It does not, of course, in any sense deny the existence of such title. Such restrictions on alienation are familiar to recognized interests in land at common law, for example, in leases⁵⁶ or in estates in fee tail. As one writer has observed, at English common law there were times when most of the land in England could not be sold to anyone.⁵⁷

⁵² *Supra*, footnote 2, at p. 55 (A.C.).

⁵³ [1921] 1 A.C. 408.

⁵⁴ *Ibid.*, at p. 408.

⁵⁵ *Johnson v. McIntosh*, *supra*, footnote 49, at pp. 587-603. In any case, a purported transfer of Indian title to a private person could do no more than clear the Indian title from the ultimate fee; the fee, being located in the government, could only be granted by the government.

⁵⁶ Cf. Chief Justice Marshall's analogy between the Indian right and a leasehold: *supra*, footnote 50, and accompanying text.

⁵⁷ F. Cohen, *The Legal Conscience* (1960), p. 218.

A feature of Indian title which is more difficult to reconcile with common law concepts is its communal character. This, together with the usufructuary nature of the right, invites caution in pressing analogies to common law estates and interests in land. In *Amodu Tijani v. The Secretary, Southern Nigeria*,⁵⁸ Viscount Haldane stated:⁵⁹

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 . . .

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 the community. Such a community may have the possessory title to the common enjoyment of a usufruct . . .

Lord Haldane went on to emphasize the need for studying the history of the particular native community and its usages, and observed that abstract principles fashioned *a priori* were as often as not misleading. It was held that while the British Crown had obtained the radical title by cession from former potentates, that title was qualified by the "usufructuary rights of communities". He stated:⁶⁰

Their Lordships think that the learned Chief Justice in the judgment thus summarised, 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 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.

It remains to be added that the fact that Indian title is of a communal nature in no way diminishes the exclusive character of the possessory right. In terms of British Columbia, it is well known that the claim of one Indian "community" or tribe to well-defined areas of land were asserted against all other Indians. The

⁵⁸ *Supra*, footnote 12.

⁵⁹ *Ibid.*, at pp. 402-403.

⁶⁰ *Ibid.*, at pp. 409-410.

title claim was exclusive in the sense of excluding all persons not members of the group asserting the claim.

As to the actual content of the Indian title, the cases permit only general guidelines to be drawn, and it is perhaps well to remember the observations of Lord Haldane in the *Amodu Tijani* case, quoted above, concerning the danger of relying on abstract principles or in dissociating the inquiry from an examination of the history of the particular native community in question.

Little assistance is to be obtained from such observations as that repeated in many United States decisions to the effect that the Indian title is "as sacred as the fee simple of the whites".⁶¹ Such statements pertain to the policy of recognizing and vindicating the Indian title, not to its content.

In the *St. Catherine's Milling* case, as in *Amodu Tijani* and other decisions, the Privy Council resorted to the Roman law concept of usufruct to characterize the native title, a concept that logically suggested itself to describe the right to take the fruits of the soil as distinct from ultimate title (*dominium*). When the usufructuary interest was surrendered, the title of the person in whom the *dominium* was vested would be perfected (*plenum dominium*).

While in the *St. Catherine's Milling* case Lord Watson declined to enter upon a discussion of the precise nature of the Indian title, his reasons in that case, and those delivered subsequently in the first *Indian Annuities* case,⁶² indicate that he considered the Indian title to constitute a beneficial interest in the lands. In the *St. Catherine's Milling* case, he stated:⁶³

The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue *whenever the estate of the Crown is disencumbered of the Indian title.*

The clear implication is that the beneficial interest in the lands was not available to the province *until* the Indian title was extinguished. The same assumption is apparent in several passages in the reasons delivered in the first *Indian Annuities* case.

Referring to the Robinson Treaties of 1850, Lord Watson stated:

The effect of these treaties was, that whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province, which also became

⁶¹ See, e.g., *Mitchel v. The United States* (1835), 9 Pet. 711, at p. 746; *The Cherokee Nation v. The State of Georgia* (1831), 5 Pet. 1, at p. 48.

⁶² [1897] A.C. 199.

⁶³ *Supra*, footnote 2, at p. 59 (A.C.). Italics supplied.

liable to fulfill the promises and agreements made on its behalf, by making due payment to the Indians of the stipulated annuities whether original or increased.⁶⁴

...

The beneficial interest in the territories ceded by the Indians under the treaties of 1850 became vested, by virtue of section 109, in the Province of Ontario.⁶⁵

...

In other words, the main and only question between the parties is, whether liability for the increased amount of the Indian annuities stipulated by the treaties of 1850 is so connected with or attached to the surrendered territory and its proceeds, in the sense of the concluding enactments of section 109, *as to follow the beneficial interest*, and form a charge upon it in the hands of the province.⁶⁶

Again, in *Ontario Mining Co. Ltd. v. Seybold*,⁶⁷ Lord Davey delivered the reasons of the Privy Council and stated:⁶⁸

The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty. It was decided by this Board in the *St. Catherine's Milling Company's* case that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of section 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved by the Indians in the treaty.

The above passages make it clear that the Privy Council saw the Indian title as a beneficial interest in the lands, passing to the province only by virtue of the Indian treaties.

As to the extent of the beneficial interest, it would seem that such interest inhering in the native title need not preclude beneficial rights also being associated with the Crown's title. In the *Amodu Tijani* case Lord Haldane stated:⁶⁹

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 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

⁶⁴ *Supra*, footnote 62, at p. 205. Italics supplied.

⁶⁵ *Ibid.*, at p. 206.

⁶⁶ *Ibid.*, at p. 209. Italics supplied.

⁶⁷ [1903] A.C. 73.

⁶⁸ *Ibid.*, at p. 79. Italics supplied.

⁶⁹ *Supra*, footnote 12, at p. 402.

with the Indian title to reserve lands in Canada. . . . But the Indian title in Canada affords by no means the only illustration of the necessity of getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle.

The native right may, however, be broad in scope. It will be recalled that in another passage which has been quoted above,⁷⁰ Lord Haldane spoke of the native title based on communal usufructuary occupation as capable of being "so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference".

III. *The Extinguishment of Indian Title.*

As a preliminary matter, it may be noted that the position taken in common law countries has consistently been that the *power* of a sovereign government to extinguish Indian title, by such means as it sees fit, cannot be questioned in the courts. That this is equally true in Canada has not been doubted and that proposition is, in fact, expressly adopted by Judson J., in *Calder*. With regard to extinguishment of Indian title since Confederation, there is a question as to the constitutional competence of a province to effect such extinguishment, and this aspect of the matter is touched upon in the next section of this article. For the moment it will suffice to observe that the question is not whether government can extinguish Indian title but whether, and (if so) when, it has done so. The problem of locating extinguishment of Indian title in time obviously cannot be resolved without considering the prior question of the manner or mode of extinguishment. Several possible modes of extinguishment of Indian title have received consideration in Commonwealth and in United States decisions, the three most important of which are: (1) purchase (treaty); (2) conquest; and (3) legislation.⁷¹

The first and most obvious method of extinguishment is the negotiation of treaties for the surrender of the Indian title. It is, of course, in the non-treaty areas of Canada, such as the territory which was the subject of litigation in *Calder*, that the Indian title question is foremost.

⁷⁰ See text accompanying footnote 60.

⁷¹ No discussion is attempted here of other possible modes of extinguishment canvassed in decisions in other common law jurisdictions. See, *e.g.*, the *Hualpai* case (1941), 314 U.S. 339, as to implied surrender of title by the Indians, or what might be termed extinguishment by acquiescence, and also for the proposition that Indian title may survive a grant of the fee by the federal government. As to the latter issue, the Privy Council in *Tamaki v. Baker*, *supra*, footnote 45, expressly left open the question of whether native title could be extinguished by the exercise of the prerogative (at p. 580).

As to the second mode of extinguishment, the conquest that is material is, of course, conquest of the Indians. The conquest of one European country by another that had previously exercised sovereignty over Indian territory would not of itself resolve the Indian land title question any more than purchase of sovereignty by one European power from another. There is no history of Indian wars in this country corresponding to what transpired in the United States and it is therefore of passing interest that the Special Joint Committee of Parliament set up to consider the British Columbia land question in 1927 reached the conclusion that the Indians of British Columbia were the subjects of military conquest!⁷² The question is one of history, rather than of law, but that view of the Committee would seem to be extremely difficult to sustain. The territory now forming British Columbia embraced the domain of several distinct Indian nations. Minor skirmishes with particular groups of Indians would hardly seem to warrant the conclusion that the entire Indian race west of the Rockies had been conquered. And in the earlier colonial period, at least, the vastly outnumbered settlers in what is now British Columbia were wise to avoid a major test of strength. In the *Calder* case, in any event, the question of conquest was not seriously canvassed.

Third, with respect to legislative extinguishment, the clearest form of such extinguishment would obviously be an enactment which, in terms, declared the Indian interest in lands within the jurisdiction to have terminated. Such legislation would, of course, concede the prior existence of the title which it declared to be extinguished. With reference, again, to the history of British Columbia, it is perhaps not surprising that no such enactment can be found, either from the colonial period or in the provincial statutes of British Columbia since 1871. What is characteristic of the British Columbia situation, we have seen, is that its legislation simply ignored Indian title, and the inquiry therefore becomes one as to an implied taking through legislation which is inconsistent with the continued existence of an Indian title.

It has been suggested that legislative declarations in the Colony of British Columbia to the effect that all lands belonged to the Crown in fee can be viewed as no more than assertions of accepted constitutional doctrine concerning the location of the ultimate fee. In that regard such declarations may be compared to the Privy Council's conclusion that lands "belonged" to the Province of Canada within the meaning of section 109 of the British North America Act prior to surrender of Indian title, and while subject to the latter interest. The *Calder* decision, unfortunately, leaves entirely unresolved the question of whether or not such legislative

⁷² The report of the Committee is referred to *supra*, footnote 29.

declaration concerning the location of the fee, coupled with provisions contemplating the disposition of lands without regard for Indian title claims, must be regarded as effecting extinguishment of Indian title by implication. Judson J., held that the colonial enactments had the effect of extinguishing Indian title prior to 1871. Hall J., came to the opposite conclusion, and his further finding that Indian title to the area in question remains unextinguished to the present day is consistent with that analysis for there is no essential difference between the enactments before and after 1871 in this respect. Holding that the plaintiffs' claim to Indian title was "a legal right", Hall J., concluded that legislative extinguishment could be effected only by *specific* legislation. His reasoning, in that connection, invites comparison with the position taken by United States' courts that extinguishment is not to be lightly implied.⁷³

In brief, this last issue upon which the Supreme Court was evenly divided—namely, whether or not the terms of general land enactments have the effect of impliedly extinguishing Indian title—is obviously of critical importance in determining the time as of which extinguishment may be viewed as having taken place in various parts of Canada.

IV. *The Settlement of Claims Based on Indian Title.*

Given the existence of Indian title to a particular territory, the question remains as to whether the government is legally obligated to compensate upon the extinguishment of such title. Prior to *Calder*, the question of whether a suit against the Crown for compensation could succeed was untouched by authority in Canada, and the plaintiffs in *Calder*, it will be recalled, were not seeking compensation for extinguishment but a declaration that extinguishment had not occurred. However, both Judson J., and Hall J., discussed the applicability of United States authorities concerned with a distinction drawn between "recognized" and "unrecognized" Indian title, and the relevance of that distinction to a claim for compensation based on extinguishment of Indian title. In its controversial decision in *Tee-Hit-Ton-Indians v. United States*,⁷⁴ a majority of the United States Supreme Court reached the conclusion that a prerequisite to a successful claim for compensation was some form of congressional recognition or statutory direction to pay compensation. The majority opinion would appear to be in direct conflict with the earlier decision of the court in *United States v. Tillamooks*.⁷⁵ In *Calder*, Judson J., adopted the reasoning

⁷³ See, for example, the *Hualpai* case, *ibid.*, at p. 354.

⁷⁴ (1955), 348 U.S. 272.

⁷⁵ (1946), 329 U.S. 40. Mr. Justice Reed, who dissented in this case, wrote the majority opinion in *Tee-Hit-Ton*. For a full discussion, see Mick-

in *Tee-Hit-Ton* while Hall J., preferred that in *Tillamooks*. A resolution of the impasse must, again, await further consideration by the Supreme Court of Canada.

A further question in Canada goes to the respective federal and provincial government responsibilities in settlement of claims based on Indian title. One commences with the constitutional authority and responsibility relating to "Indians and Lands reserved for the Indians" located at the federal level by section 91, head 24 of the British North America Act. In *Calder* it was unnecessary for the court to canvass the interesting question of provincial competence to extinguish Indian title⁷⁶ because the case was argued, by agreement of counsel, on the basis that extinguishment had not occurred between the time of British Columbia's entry into Confederation and the date of the action.

Beyond the implications of section 91(24), it is necessary to consider the question of the obligations imposed on the government which has (or had at the material time) ownership of the public lands. In what was formerly Rupert's Land, the public lands were vested in the Crown in right of Canada. In the case of the Prairie provinces, for example, the Crown lands were transferred to the provinces only in 1930 and, of course, in the Yukon and the Northwest Territories, the public lands remain vested in the Crown in right of Canada.

In the case of British Columbia, on the other hand, the public lands were never vested in the Crown in right of Canada, with the minor exceptions of the Railway Belt and the Peace River Block, and the situation is analogous to that of the original confederating colonies in 1867. The central issue in a situation such as that of

enberg, *Aboriginal Rights in Canada and the United States* (1971), 9 Os-
goode Hall L.J. 119. As to what sort of "recognition" of Indian title will
be sufficient to base a legal right to compensation, Mr. Justice Reed, deliv-
ering the opinion of the court, stated:

"There is no particular form for congressional recognition of Indian right
of permanent occupancy. It may be established in a variety of ways but
there must be the definite intention by congressional action or authority
to accord legal rights, not merely permissive occupation."

It is not essential that the act authorizing suit *expressly* require compen-
sation for taking of Indian title. In post-*Tee-Hit-Ton* decisions allowing
recovery for such a taking, reference has been made to the legislative history
as a means of ascertaining congressional intent. On this basis, and subse-
quent to the *Tee-Hit-Ton* decision of 1955, the courts have permitted re-
covery for a taking of Indian title both under the Indian Claims Com-
mission Act: *Otoe & Missouri Tribe of Indians v. United States* (1955),
131 F. Supp. 265; cert. den. 350 U.S. 848, and under the terms of a special
jurisdictional act: *Tlingit & Haida Indians of Alaska v. United States*
(1959), 177 F. Supp. 452 (Ct Cl., on the issue of liability) and (1968),
389 F. 2d. 778 (Ct Cl., on valuation).

⁷⁶ Cf., the doubts expressed by the federal Justice Department concern-
ing the constitutional validity of the province's first land enactments, and
reasons given for the disallowance of the first such enactment: *supra*, foot-
notes 31 to 35, and accompanying text.

British Columbia therefore relates to the respective obligations of the province as owner of the public lands to discharge the burden on the title that Indian title constitutes, and the obligations of the federal government which carries constitutional responsibility for Indians and lands reserved for the Indians.

The issue of whether extinguishment of Indian title took place before or after entry of the colony into Confederation may have an important bearing on the question of federal versus provincial responsibility. In this connection it is of interest to note that Bills introduced in the House of Commons in 1963 and 1965⁷⁷ to establish an Indian Claims Commission would have permitted the proposed Commission to entertain a claim based on Indian title which, as a pre-Confederation Claim, was against the Crown in right of the United Kingdom. The commission would not have had jurisdiction to entertain claims based on an act or omission of a provincial government. The significant point is that these government sponsored Bills appear to disclose a readiness, at that time, to acknowledge federal responsibility respecting a taking of Indian lands without compensation therefor, during the colonial period.

The time of extinguishment may be material, as well, in connection with the terms upon which the colony entered Confederation. Thus, in the case of British Columbia, if in fact extinguishment of Indian title occurred and the obligation to compensate arose prior to 1871, a question may be raised as to the possible liability of the federal government under the first article of the Terms of Union which provides that "Canada shall be liable for the debts *and liabilities* of British Columbia existing at the time of the union".⁷⁸

The *Calder* decision leaves unresolved, as a matter of authority, the question of whether or not extinguishment of Indian title was effected in British Columbia prior to entry into Confederation, the court having divided evenly on that issue.

Summary

Indian title has been the subject of legislative, executive and judicial attention in Canada. The *Calder* decision provides support for the proposition that applicability of the Royal Proclamation is not determinative on the question of existence of Indian title. The reasons for judgment do not shed new light on the nature of

⁷⁷ Bill C-130, entitled "An Act to Provide for the Disposition of Indian Claims" received first reading on December 14th, 1963. A slightly amended version of the Bill was introduced as Bill C-123 on June 21st, 1965, and had received second reading prior to dissolution. For a discussion of the Bills by the writer, and a comparison with United States legislation, see *Native Rights in Canada*, *op. cit.*, footnote 4, pp. 256-258.

⁷⁸ R.S.C., 1970, Appendices. Vol., p. 282.

Indian title. On the critical issue of what may constitute extinguishment of such title in non-treaty areas of Canada, the court divided evenly on the effect of general land enactments declaring the fee to be vested in the Crown and providing for the alienation of Crown lands without reference to Indian title. The decision is equally inconclusive on the matter of when such extinguishment is to be regarded as effected, and this in turn has implications for the respective responsibilities of federal and provincial governments. Further, the court was split on the necessity for some form of "recognition" of Indian title as a prerequisite to a successful claim for compensation. Failing a negotiated settlement or legislative determination of some kind, authoritative answers to a number of fundamental questions relating to Indian title must await future consideration by the court.
