# THE NISHGA LAND CLAIM

1873-1973

by

Edwin Peter May

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Name: Edwin Peter May

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Examining Committee:

Chairperson: C. L. Hamilton

Robin Fisher
Senior Supervisor

H.B.M. Johnston

Douglas L. Cole

L.F.S. Upton
External Examiner
Professor
Department of History
University of British Columbia

Date Approved: October 29, 1979

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Author:

(signature)

Edwin P. May

(name)

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(date)

## ABSTRACT

### THE NISHGA LAND CLAIM: 1873 - 1973

On January 31, 1973 the Supreme Court of Canada handed down a split decision in Calder v. Attorney-General of British Columbia, which involved a title claim by the Nishga tribe of British Columbia to an area of approximately 4,600 square miles in the Nass River Valley. Three judges, Judson, Martland and Ritchie held that the appellants had no aboriginal rights; three judges, Hall, Spence and Laskin, held that the Nishga had aboriginal rights. The seventh member of the Court, Mr. Justice Pigeon, held that the action must fail on procedural grounds. To Frank Calder and the Nishga Tribal Council, the decision of the Court was a victory in their long dispute to obtain legal credibility for their claims. Any negotiations to follow would now have to be carried on in the political arenas of British Columbia and Ottawa.

This thesis deals with the lengthy dispute that began before British Columbia joined Canada in 1871 and that shows no real signs of settlement after more than a century. The broad topic will be divided into five sections, the first one dealing with the Nishga passion for ancestral lands and the tribe's conviction that they possess aboriginal rights over the dispute area, rights which were never extinguished by

treaty, purchase or conquest. To provide some understanding of the persistence with which the small Nishga nation has pursued its claim to the Nass River Valley, this section will rely on anthropological testimony relating to the social structure which has provided the Nishga with the cohesion and drive displayed over more than a century of striving.

The second section will deal with attitudes of successive British Columbia governments to the Nishga claim and will trace the policies that were begun by Sir James Douglas, were revised by Sir Joseph Trutch and were generally followed by those who succeeded the controversial Commissioner of Lands and Works. Two arguments frequently used by Provincial jurisdictions in refuting the Nishga claim will be examined in their historical context: that there had been no extinguishment of aboriginal title because there never had been such title to extinguish; that had such title ever existed, it had been extinguished by various acts of government. The policies of Provincial governments in dealing with the Nishga claim will then be examined in light of their political foundation.

Because it is central to any understanding of a conflict dealing with aboriginal title, the concept of what constitutes such title will be examined both in its historical and its legal terms, in the third section. Various concepts of

Indian Land, commencing with the Royal Proclamation of 1763 and concluding with the Supreme Court of Canada's 1973 ruling, will be outlined.

As these concepts have been variously interpreted by disputants on both sides, the fourth section will deal with the legal and political manoeuvers that followed the 1906 decision of Cowichan Indians to send a deputation to the king, a decision that ended two decades of relative inactivity by claimants to native land title in British Columbia, and provided an incentive for a resurgence of such activity. This historical overview of the lengthy dispute will emphasize the Nishga tribe's efforts to bring a Petition to the London Privy Council in 1913, the events that followed the failure of such a move, and the long series of actions which culminated in the 1927 Joint Parliamentary Committee decision which brought to an end that phase of the Nishga struggle to obtain recognition to the tribe's claim. Some emphasis will be given to the gains made by British Columbia Indians in the 1930's and 1940's, a period sometimes thought of as one of inactivity by claimants to aboriginal title.

The concluding section will commence with the renewal of the Nishga effort to place the tribe's land claim before a Canadian jurisdiction, activity which followed the 1951 revision of the Indian Act. Then will follow a brief examination of the court actions undertaken by the Nishga

Tribal Council. These legal moves, culminating in the 1973 Supreme Court of Canada decision, seemed a defeat for the Nishga. Yet, some observers, and the Nishga Tribal Council in particular, feel the 1973 decision simply removes the dispute from the courts and places it in the political arena. Because negotiations since 1973 have been carried out behind "closed doors", some ideas as to the ultimate resolution of the land claim dispute will have to be deduced from events that are only peripheral to the Nishga claim. Evidence presently available points to an eventual settlement that will be different from the one hitherto pressed for by the Nishga, namely, recognition of their aboriginal title to their ancestral lands.

Since any study of Native Land Claims in Canada must take into account the fact that the country's Indian population cannot be treated as a homogenous group, with common aims and aspirations, any settlement dealing with land claims of the native people will of necessity involve complex issues. Such a settlement must take into consideration the social, economic, political and historical factors of a particular area. The Nishga claim is, therefore, unique: there are no real villains other than the set of circumstances arising from the clash of alien cultures. Nonetheless, some decision must be reached as to the validity of the Nishga claim. It is the purpose of this thesis to support the view that the Nishga claim to

aboriginal title of the lands occupied by them "since time immemorial" is indeed supported by historical and anthropological evidence. Further, even if such claim, judged within the framework of a legal system not of the Indians' devising, should fail, there are strong and irresistible moral grounds for supporting the validity of the Nishga claim.

Various staff members of the Public Archives of Canada, and of the National Indian Brotherhood Centre, Ottawa, Frank Calder, Douglas Sanders, and Robin Fisher gave help and advice to make this thesis possible.

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# PREFACE

Samuel Johnson once observed that "Knowledge is of two kinds: we know a subject ourselves, or we know where we can find information about it." Dr. Johnson's wisdom became apparent soon after I set out to research the history of British Columbia's most celebrated native land claim, that of the Nishga.

Visits to the Provincial Archives and the Attorney-General's office, Victoria, yielded little more than some newspaper clippings, while the librarian at the University of British Columbia's Special Collections suggested what by now had become obvious: I would have to work my way through Record Group 10 (Western Canada), Public Archives of Canada, Ottawa.

The summer of 1975 was not a propitious time for research into the history of the Nishga land claim, the latest round of negotiations involving the Tribe, the Government of British Columbia, and the Federal Government, having begun. Researchers working for each of the three parties vied for material. Their search, like mine, was hindered by the "unavailability" of correspondence related to the Nishga land claim in the post-1951 period.

Staff at the Archives were in the midst of the massive task of placing all holdings on microfilm. Despite their work load, various staff members did what they could to assist me in finding my way through what, at the time, was a rather disorganized Record Group 10. Later researchers dealing with the Nishga land claim will, I hope, have more success than I had in tracing those file numbers which eluded me.

As the history of the Nishga struggle for recognition of their aboriginal title to ancestral lands unfolded, my admiration for the tenacity of the tribe grew. After facing a hundred years of obduracy on the part of both provincial and federal authorities, the Nishga remain determined to pursue their struggle. When a settlement is reached, and Nishga leaders feel free to release material now denied to researchers, the struggle for aboriginal land rights will be seen as a struggle for justice.

Chapter One

## THE PASSION FOR ANCESTRAL LAND

Testifying before the 1888 Commission of Enquiry into the State and Condition of the Indians of the North-West Coast of British Columbia, Chief Cledach of Greenville in the Nass Valley declared:

> I want to let you know how much land I want. I want from Al-que-soas, below Stoney Point, up to Al-e-quoth, above Greenville, the same as Mountain asked for, on the left side of the Nass as you go up. Also the mountains at the back, where we get our living; and I want the Queen to pay me for the rest of the land. I have been looking after the river all these years, and, although poor, have been trying to keep peace when there has been a prospect of trouble. [1]

In a few words, the chief had illustrated the major features of his tribe's concept of land ownership: that the claim is a definite one with clearly-defined boundaries created by natural features such as mountains; that the claim includes not only those small areas occupied physically by his people, but also the important hinterland that provides berries, game, timber and grazing space; that the bountiful river is the heart of the area in dispute; that the Nishga are willing to accept the presence of others with legitimate rights to parts of the Valley.

Six months later, in August 1888, other voices reminded the Provincial authorities that the Nishga were concerned over the fate of their valley. Speaking to Reserve Commissioner Ashdown Green, Fred Allan of Kincolith saw ominous

developments following the activities of American surveyors in the Portland Canal area and wanted an official declaration of the amount of land his people owned. George Kinsada, also of Kincolith, remarked on the hostility of the people of Greenville towards agents, law enforcement officers, surveyors and visitors. Kinsada threatened that "if you try to get land reserved for yourselves without letting us know, it will make trouble amongst us." Joe Calder was even blunter: "We want to be paid for the land outside the reserve, and we want a treaty. We want a title. If you cannot do this now, we don't wish you to do anything. We don't want you to measure our land."[2]

For more than a century the Nishga have steadfastly maintained that the fundamental issue is the non-extinguishment of their title to the Nass River Valley. Opposed to this view is that of British Columbia governments of the past century who have been equally consistent in their stand that either the Nishga tribe's aboriginal rights were never extinguished simply because they did not exist or that if such rights had existed these had been extinguished by various acts of government. While the rhetoric over the years might have been softened, the settler view of aboriginal title in response to growing unrest in British Columbia's north-west corner has not substantially changed since J.S. Helmcken wrote in 1886:

> The question of Indian Title and the question of the duty of the government to civilize the aborigines of the country, are two separate and distinct questions, and must be kept apart.
>
> Whether the government has done its whole duty or whether it has done as much as it could with its limited means, is a matter altogether distinct from Indian Title. It is a grievous blunder to make the moral, expensive and difficult duty of the government to be only as large and commensurate with the value of a worthless Indian Title, to (to them) worthless land, and yet this fancied title is made a vital point by the misleaders! It is a vital error instead.... The sooner they are taught the valueless nature of their roving title, and, indeed, that they have no title whatever, the better for them and their moral cause. [3]

To a refusal to apply the tenets of real property ownership to Indians was added the view that Indians constituted a barrier to colonization and development. This certainly was the opinion of Sir Joseph Trutch who as Chief Commissioner of Lands and Works in British Columbia reshaped Indian policy after the retirement of Governor James Douglas in 1864. Trutch stated:

> The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them, and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or to be allowed to make a market of them either to the Government or to Individuals. [4]

This lack of understanding of the Indian concept of land ownership was widespread, Trutch having the support of many colonists. For mid-Victorians, with their view of land ownership defined in terms of picket fences and solid home-

steads, British Columbia's Indian population appeared as nothing more than scattered bands of vagrants to whom the idea of land ownership was a foreign notion implanted by mischievous and meddling missionaries.[5] Few settlers understood the spiritual connections between Indians and the land they claimed as their own and which was often the basis of their social, political and religious life as well as a source of sustenance. The Indians' life-style in no way detracted from the respect they had for their land. Unlike Europeans, the Indians had never regarded continuous occupation as a criterion of ownership. Nor had they practised individual land tenure, and group ownership had merely strengthened their belief in the inalienable nature of their land.[6] Thus cultural differences, the ever-spreading settlers, and the persistent stereotyping of Indians as lawless savages contributed to the impasse over land claims and aboriginal rights. As late as 1910, Premier Richard McBride could snap at a delegation which included the Rev. Peter Kelly and Andrew Paull, "You have no claim."[7] McBride's view was quite in keeping with the tradition established by Chief Commissioner of Lands and Works Trutch.

Since the Nishga tribe had demonstrably not signed any treaty to extinguish their land claims and aboriginal rights, successive Provincial Governments had relied on two arguments to justify the incursions they had permitted in the Nass Valley: that the Nishga, in common with other tribes in

British Columbia, had never owned the land under dispute and had, in fact, moved out of the Valley during the years immediately preceding the coming of the first white settlers in the area; that even if aboriginal title to the Nass Valley had indeed existed, such title had automatically been ceded to "the Queen" when the Colony of British Columbia had been established. Therefore, consideration of the Nishga tribe's concept of land ownership and system of land tenure is appropriate at this point, not only to establish some kind of balance between the conflicting claims but also to understand the Nishga tribe's dogged pursuit of the issue. Anthropological studies of the Tsimshian social and political system can provide insights into the Nishga determination to retain title to the Nass River Valley, since the Nishga form one of the three Tsimshian linguistic groups.

Tsimshian society was made up of a complex series of kinship divisions. There were also the phratries, these being exogamous groups. Like the Coast Tsimshian, the Nishga recognized four phratries: Eagles, Wolves, Ravens and Blackfish or Killerwhales. One function of these phratries was the regulation of spouse selection, marriages between members of the same phratry being forbidden. This meant that at least two of the four phratries were represented in every household. Together with an elastic system of adoption of migrants, the ban on marriage between members of the same

phratry led to loose federations of clans becoming extremely complex, especially to European eyes.[8] Since segments of these phratries were often widely scattered and had little or no contact with their fellows, the actual political unit that functioned as a group was called the house group or lineage, members of which were related by blood through their mothers. This matrilineal organization meant that descent and inheritance was reckoned in the maternal line. Although male members held most of the important property, it passed not from father to son, but from uncle to nephew on the female side.

In his 31st Annual Report to the Bureau of American Ethnology, Franz Boas notes that property transmitted in this way consists of crests, lullabies or mourning songs, clan-songs, names, hunting grounds, bathing places, sea-lion rocks, houses, canoes, and slaves.[9] All these property rights were supervised and administered by the male head of the lineage. Cousin marriages, with their obvious social and economic benefits to the household group, were encouraged. Those families or individuals who could lay hereditary claim to hunting, fishing and berry-gathering areas could regard these as their exclusive possessions. This monopoly did not preclude the sharing with other families of food-gathering areas. However, ceremonial property such as songs and dances remained the sole possession of the hereditary owners. That

the Tsimshian clearly understood the nature of property rights and respected these is apparent from an observation made in 1910 by G.T. Emmons after he had spent some weeks amongst the Kitselas who had made their home in a narrow canyon in the area. So clear were the prevailing concepts of property ownership that the Kitselas were not permitted to descend below the first fishing village of the Kitsumkalum even for trading purposes, because they were determined to guard their own share of the river valley from Kitselas and other neighbours.[10]

Household group heads were forbidden to alienate any property without the consent of the household members. A man who had inherited the right of leadership of the group had not inherited its property. This system of inheritance was another clearly-defined feature of Tsimshian society and explains, at least in part, why the idea of treaties of land alienation was not common amongst the Tsimshian. A younger brother usually inherited the headship. If there was no younger brother, the right of headship passed to the eldest sister's eldest son. Next in order of succession was a man's next younger parallel cousin, a male who had the same maternal grandmother as the holder. If there was no male heir, a man's sister could succeed him but would be expected to pass on the right of headship to the nearest eligible male when such a person became available. Lineage heads were

known to adopt a man as a younger brother when there was no male heir, such adoption being possible only with the consent of the household members. The normal pattern of inheritance could be deviated from by male aspirants to leadership who could hold a feast upon the leader's death and distribute more wealth than the heir apparent could muster. This step was possible only with the consent of the household members. There could be another deviation from the traditional pattern of succession if the household members felt the heir to be unworthy of the right to lead, and gave the honour to the next in line.[11]

Each village seemed to develop characteristics of its own, these being most apparent when large potlatches were given involving several villages. The gifts provided coincided with those products most easily found on the village site. One village could give dried mountain-goat fat, another cedar-bark mats,while a third could supply cranberries. This was not the only form of specialization for the wide variety of natural resources found in the territory of the Tsimshian people determined that the coastal villagers specialized in fishing for salmon, halibut and cod, and in hunting sea-mammals. The Nass River people concentrated on salmon and eulachon, while the interior groups caught salmon, hunted caribou and deer, and trapped fur-bearing animals. Such diversity of products influenced not only

inter-village trading but also the trade carried on by the Tsimshian with other language groups. Viola Garfield points out that rights to territories, properly validated in potlatches and established by use and occupancy, were inalienable. In common with other North-West Coast tribes, the Tsimshian insisted that exclusive rights to exploit resource districts were claimed only by kin, even if boundaries were not clearly defined. Although in rugged, heavily-wooded territory, such definition was not possible, such rights were still firmly recognized.[12]

For Europeans settling in the area, the native concept of property rights seemed vague. In part this was the result of the settlers' inability to allow for the Tsimshian pattern of seasonal movement, essential to the organization for food production, which in turn was controlled by the seasonal runs of salmon, herring and eulachon. The winter season, from October to March, found each household group occupying a cedar plank house in one of the winter villages. Because of the Tsimshian reliance on canoes for transportation, these villages were always alongside salt water beaches, on the banks of streams or, as with the Nishga, along the Nass River. Each family in the household had its section of the platform which ran around the inside walls of the house. The space at the back of the house was reserved for the house head, his family and possessions, while slaves lived in the

coldest section of the house closest to the door.[13]

Most of the ceremonial life of the Tsimshian centred on the winter season: feasting, initiation rites, elevation of people to leading positions. For these occasions the energies of the tribe had been devoted in spring and summer when food had to be stored in great quantities. The women also had household tasks to perform between events, while the men worked on new houses, canoes, and did some hunting and fishing. There was no haphazard activity. Every chore was planned.

In early March the great migration to the lower Nass River area began, each village leader deciding when his group should move. This activity left the settlements deserted but here we must note an important feature of Tsimshian property rights: each village group owned more than one piece of property. There was the village camping site en route to the eulachon fishing grounds. At each site the various households had their traditional section of the beach. There was also the section of river bank on the Nass apportioned to each household, where smaller cedar houses came into use. The eulachon run usually lasted between six and eight weeks after which the people prepared for another move, this one to their salmon-fishing sites along the lower Skeena River. As autumn came, each household group found its own fishing and hunting sites in the area between the Skeena

and Nass, the women working household berry patches. By the end of September, the households had returned to their winter villages.

While the Tsimshian patterns of property ownership did not conform to the system used by Europeans, these aboriginal ideas of land use and ownership were the result of adaptation to the environment and served the people well. Viola Garfield points out that "by the time Europeans arrived, there were no unclaimed land or sea-food resources of a kind important in the Indians' economy. Not only were lands and beaches listed by the Indians as lineage property, but also offshore cod and halibut banks, and seal and sea-lion rocks." Each household claimed stands of cedar, patches of edible roots, river gorges, valleys and mountain sides as hunting areas, and even sea-bird rookeries.[14]

These property rights, even though established by sporadic occupation and use, were recognized after the ceremonial obligations had been met and were respected by neighbouring tribal groups, households within the tribe, and individuals. Trespassing could be met with ridicule and physical resistance. On occasions when property rights were breached, offenders faced the opposition of the whole tribe. The ownership of food-gathering places carried with it an element vital in Tsimshian society-prestige. Productive areas provided the means whereby an individual or a household

group could seek to gain prestige through competitive means. The potlatch, feasts, and other ceremonial gatherings were not complete without bounty from these food-gathering areas. Property ownership was the basis for the society's well-being, hence land rights were not lightly abandoned: these could be forfeited as settlement for some debt and such forfeiture would have to be accompanied by a public announcement. But simply to assume that because a household no longer occupied the land it had also given up its rights to it was incorrect. Only when a household had clearly indicated that it had "thrown away" the land, could another household claim ownership.[15]

It was often argued by Europeans that the penetration of Indian land was justified because many Indians had abandoned their traditional areas in favour of squatting on the perimeters of white settlements. The most striking example of such a trend during the period when Trutch was reshaping policies related to Indian lands could be found in and around Victoria. For various reasons the town had attracted large numbers of Indians from as far afield as the Queen Charlotte Islands. While the people of the Skeena and the Nass River Valleys were still relatively remote and had not yet felt the impact of colonization in their ancestral lands, some of the Tsimshian had joined the flow of Indians to Victoria and had been exposed to a different culture.

Further cultural contact, of a kind so important that it could have disrupted, even destroyed, the traditional way of life among the Tsimshian came in the wake of two developments: the relocation of a Hudson's Bay Company trading post at Fort Simpson in 1831, just seventeen miles north of Metlakatla Channel and the arrival, in 1857, of William Duncan of the C.M.S. While both these cultural contacts were to bring some benefits to the Tsimshian, there would also be the inevitable list of destructive forces - diseases, alcohol, demoralization, imposition of outside laws and suppression of native customs, new codes advocated by missionaries.[16] Fort Simpson attracted large numbers of Tsimshian as did Duncan's "model village" of Metlakatla. Some consideration of the degree of disruption in Tsimshian land tenure patterns is necessary in order to assess the validity of claims that many areas along the Skeena and the Nass had in fact been abandoned for twenty to thirty years by their former occupants before white settlers and entrepreneurs moved in. That Fort Simpson and Metlakatla both disrupted the traditional way of life amongst the Indians in the Skeena-Nass region seems clear. However, were these disruptions of such a nature that they completely destroyed the old system of aboriginal ownership and left the vacated lands open to white settlement?

Addressing Commissioners Cornwall and Planta at Nass

Harbour on October 19, 1887, a Nishga declared:

> Our forefathers for generations and generations past had their land here all around us .... It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. [17]

While a review of both cultural contacts already referred to would provide evidence that these had brought about changes in Indian values and attitudes, neither Fort Simpson nor William Duncan could permanently change Indian concepts of land ownership. Instead, the attraction that Fort Simpson had for those Indians who sought to trade there served to reinforce the importance that fishing grounds, berry patches, hunting areas and cedar stands had for their original owners. These properties now had double significance for they not only continued to provide sustenance but also goods for trading. As the Indians acquired a taste for the white man's goods and used these in feasts and potlatches, hereditary lands assumed even more importance than they had done in earlier times. Such areas were now jealously guarded. Those Indians who made their permanent homes in the area adjoining the Fort (by 1857, 2,300 of them) no longer wintered in the old areas, having dismantled and removed their plank houses and rebuilt them close to the Hudson's Bay Company outpost.[18] This move did not mean that the people had

abandoned title to their old homesites and camping grounds. Because the Hudson's Bay Company men required vegetables, especially potatoes, as the area around the Fort had virtually no land suitable for cultivation, Indians were encouraged to use whatever of their food-gathering sites where cultivation of produce was possible. The Fort had brought about adaptations in traditional modes but had not changed the patterns of land ownership.

Since the Hudson's Bay men were in the area to trade, they made no conscious effort to change the way of life of the Tsimshian who now were their trading partners. A far greater change was possible when William Duncan set about his self-imposed task of remaking Indian society after the fashion of the Victorian middle class. He was astute enough to learn the Tsimshian language when he ventured into the area and after only a few months at Fort Simpson was able to give an address in the local dialect. Deciding that conditions prevailing at Fort Simpson were not conducive to the process of Christianizing native people, he led a party of fifty to another site and in 1862 began the building of a new village named Metlakatla. For thirty years his strong will and driving energy enabled him to control his village to an astonishing degree. He challenged native tribal leaders, defied the Hudson's Bay Company, and single-mindedly followed his plan of turning Metlakatla into an

English-style Christian village. His first effort was directed at breaking up the old household grouping which he felt was conducive to incest. The need for housing forced Duncan to compromise his plan for single family dwellings: traditional houses were walled off into separate compartments for each family. He tried to abolish the old ceremonies, feasts and dances, and made rules designed to outlaw these practices. His followers valued competition, so much a part of their traditional culture, and Duncan had to accept this by adapting some of the routines at Metlakatla to accommodate the competitive spirit of his followers. Thus he allowed potlatches and feasts under the guise of Christmas and Thanksgiving celebrations. (When Duncan adapted some of the Church rituals to fit in with Indian traditions, he clashed with his superiors. This clash eventually led to Duncan's departure and his creation of a new Metlakatla on American soil.) He also decided that the annual migratory pattern of the Tsimshian militated against their learning habits of industry and other Christian virtues so valued by the society which had shaped the missionary's own thinking. His plan was to establish industries at Metlakatla to provide the people with a year-round means of earning their livelihood and thus leading a stable community life. Here again, cultural change was only superficial, for Duncan was not able to provide enough wealth to sustain the many households now

living at Metlakatla. He had started with traditional pursuits which provided smoked and salt salmon and furs for trading. Schooling and vocational training prepared his followers for the next stage in the programme: the operation of a saw mill, a brick kiln, soap factory, and carpentry shop. These were communally owned and operated but not until 1883 when Duncan set up a salmon cannery did the people of Metlakatla earn enough to sustain them throughout the year. In any case, by then the rift between Duncan and his bishop had already developed and soon after the establishment of the successful cannery, Duncan led 825 of his 950 followers to Annette Island and a new Metlakatla.[19]

The efforts to disrupt the old migratory pattern and with it the old system of land tenure had not succeeded. The need for food had meant that the people of Metlakatla still had to use their berry patches, fishing sites and fur-gathering areas. Duncan's new housing arrangements (the old-style communal houses were eventually replaced, thanks to the saw mill's production, with duplex arrangements) did not destroy traditional households, since people still traced their lineage through their mothers' and thus were able to identify traditional household properties. Other missionaries, such as the Methodists who worked along the middle and upper reaches of the Nass River, were no more

successful than Duncan in bringing about permanent changes in traditional modes of living amongst their Indian followers. New customs were cleverly adapted by people who would not readily surrender ancient practices. The few Tsimshian women who were taken in at Fort Simpson as wives, and who bore children of white men, did not upset the household patterns, for children of such unions went to live in their mother's brother's house and kept their lineage connections. When diseases, such as smallpox, decimated many households, the Tsimshian extended their practice of adoption to captives and other suitable outsiders, thus maintaining the households. This enabled them to continue their traditional economy, based as it was on their system of land ownership. Even though the Hudson's Bay Company controlled much of the economy of those Indians who had settled around Fort Simpson, the Tsimshian were never completely dependent on the white-dominated economy, wages being supplementary to what was still harvested from hereditary holdings. Despite cultural contact with representatives of mid-Victorian Britain, the Indian people in North-West British Columbia still regarded land as their central possession, one which had by the time British Columbia joined Confederation in 1871 not been seriously threatened by the spreading waves of settlers.

But it would not be an exaggeration to say that by this

time Indians in some parts of the Province were in a state of extreme agitation. Their troubles with gold miners, and with the settlers who had followed in the wake of the gold rush, had crystallized into a succession of petitions and deputations directed at local officials. Although the Tsimshian Indians had hitherto not figured prominently in the protests over land, their remoteness was no longer a guarantee that they would escape the traumas of alcoholism, prostitution, racial prejudice and economic blight brought on by settlement and land speculation. During the colonial period, some miners had come into Tsimshian territory after the discovery of the Cariboo gold deposits and there had been at least one ugly incident when some miners had traspassed on Indian land, had been ambushed and killed. The killers were tried and hanged and, soon after, the last of the miners had left the area. A handful of white settlers had begun farming operations in the Skeena Valley shortly after British Columbia's entry into Confederation but had not posed much of a threat to Indian land claims, since limited markets and poor soil curtailed the kind of expansion that had taken place in the Lower Fraser Valley. Duncan's success with his salmon cannery at Metlakatla had led to other such ventures along the lower Nass and Skeena Rivers. Some of these canneries were built on sites traditionally used by the Indians as summer fishing villages, but the

employment provided by the canneries soothed away objections.

Real trouble erupted in the area over the question of reserves. Since it was the policy of the Dominion Government to encourage the assimilation of Indians into the Canadian mainstream, a policy devised in co-operation with the Provincial Government, which controlled Crown Lands, was applied. Reserves were set aside and Indians were encouraged to own individual plots, in approved European style. Henceforth, the emphasis was to be on agriculture and patrilineal inheritance, Indians were to learn the rudiments of democracy through their election of band councils, traditional ceremonies were banned, and schools established. In 1886 the area around Fort Simpson became a reserve as did the village of Metlakatla. These reserves were divided into lots, control of each lot being given to the head of the household. Property could be willed to relatives, subject to the approval of the Indian agent. These clashes with traditional patterns of inheritance brought protests. Indian culture was not simply going to disappear and various devices were employed to circumvent the new regulations.[20]

Because some of the land used for reserves along the Skeena and Nass Rivers was not suitable for agriculture, agents were instructed to designate resource areas for those

Indians who could not make a living off their lots. But the government refused to designate large tracts of land which the Indians claimed as hunting grounds. Tsimshian claims to eulachon fishing grounds on the Nass were recognized but these sites were limited to the river's bank. The land behind was reserved for some Nishga who had joined the Anglican mission at Kincolith. The Nishga were assured access to the river, but the Tsimshian were ordered not to trespass on Nishga property. Seemingly high-handed action by government agents, complaints about methods employed in the designation of reserves, demands for larger parcels of land, and a refusal to accept the rights of newcomers to claim control over hereditary land brought forth a spate of protests. In 1887, a provincial commission to "Enquire into the Conditions of the Indians of the North-West Coast" was appointed. By this time a large delegation from Fort Simpson had also been formed to interview the government in Victoria. More voices had been added to the growing flood of protests.

In general, the Commissioners, Clement F. Cornwall and Joseph P. Planta, were well received by the Indians settled in or near mission areas, such as at Metlakatla and Kincolith, but were met with a surprising degree of firmness once hearings amongst the Nishga began. Except for the Nishga who were

settled at Kincolith, the people of this group were determined to assert a number of rights: (1) the recognition of Indian ownership; (2) establishment of larger reserves; (3) the setting aside of extensive hunting areas of which the Indians would have exclusive use. There was also a great deal of strife over the "valuable" eulachon fishery, the commissioners concluding that much of the trouble emanated from sectarian differences fostered by missionaries, especially those of the Methodist Church of Canada.[21] While missionary influence was inevitable, both in the substance of the protests and in the wording of petitions, at the root of much of the trouble over the eulachon fisheries lay the division of land by Reserve Commissioner, Peter O'Reilly. From a white man's point of view, the land arrangements along the Nass were tidy, but the Indians soon found that these reserves did not accommodate the traditional manner in which the people had exploited their resources.[22] The commissioners also concluded that the isolation of the area could in part be offset by the appointment of a "capable Indian agent" and by prompt recognition of reasonable demands.[23]

The spirited hearings held amongst the Nishga showed the Commission that the people were adamant about the fact that aboriginal title had never been extinguished. Whites who had settled in the area, against the wishes of the Indians,

were regarded as trespassers - a Mr. Grey and a Mrs. Snow being particularly resented. Interference by agents was a sore point and one of the main reasons for mounting agitation. A C.M.S. missionary, James B. McCullagh, in a letter to the Commission, pointed out some of the resentment generated by the clash of cultures taking place: older people were alarmed at the pace of change in the younger generation; land tenure patterns broke down as a result of official interference; the squabble over eulachon fishing rights continued; tribal marriages and family life were disrupted.[24]

While these hearings resulted in no attempt by the provincial authorities to remedy the most pressing problems, the report of Commissioners Cornwall and Planta brought to the notice of the government of British Columbia and the intensity of the Nishga people's feeling for their land and their determination to assert their right to that land. The first skirmishes, in what was to prove to be the most persistent and best-publicized native land claims case in this province, had taken place. This struggle for aboriginal title is remarkable when we consider the smallness of the tribe, its limited resources and its remoteness from the political centres of Canada. Appendix I lists the tribes, their populations and their land holdings, that make up the Nishga group as per the 1894 census.[25] Numbering only 777

in 1894 and with only 44½ acres under cultivation, the Nishgas looked insignificant enough for governments to ignore. No wonder the authorities in Victoria had shelved the Cornwall and Planta report. But official indifference was not the only problem.

A special despatch on the Nass River Indians, March 31, 1914, by Indian Agent C.C. Perry, provides useful information which illustrates not only the biases of the period towards Indians in general, but also the manner in which the Nishgas had adapted themselves to the dominant culture in the Province. Perry reported that the population was about 800, living in villages of from 64 to 250 souls. These villages, with one exception, were names of bands: Gitlakdamiks, Aiyanash, Lak-kalzap, Kincolith and Gwinoha, this latter, according to Perry meaning "O, How Lovely!" and occupied by the Gitwanshiltqu band. The reserves were situated mainly on the Nass River proper, while the small camping grounds and hunting lodges of the people were scattered along Hastings Arm, Alice Arm, Observatory Inlet, Portland Canal and Quinamaas Inlet. These reserves had a total area of about 12,610 acres. Agent Perry observed the "large numbers of dogs kept," and noted that the people wore modern dress which was as clean as could be expected under "limited conditions of civilization." Many had died from alcoholic poisoning and tuberculosis during the preceding

years. Some medical care was available at the time of Perry's report since a Dr. D.J. McDonald was stationed at Kincolith. Perry further reported that he had tried to get the Indians to tear down some old camp houses and replace these with more sanitary ones at the Fishery Bay eulachon camp. But the Indians had suspected a government plan to claim their land and had steadfastly refused the scheme despite promises that the government would donate building materials.

Perry also noted that the introduction of sawmill machinery had allowed for the construction of many buildings of modern design, but these structures were seldom finished and their surroundings appeared neglected because of debris, hungry dogs, and many chickens. This situation, according to Perry, was the result of the Indians' nomadic habits. The Nishga were engaged in various occupations, working as fishermen, hunters, trappers, boat-builders, carpenters, marine engineers, haulers, net makers, basket and souvenir makers. According to Perry, the people usually were industrious, able to adapt to almost any kind of manual employment, but with a tendency to move from one job to another. They had little stock and kept cows only for their meat. Agriculture was not important to the Nishga and Perry reported seeing few farm implements.

Under the heading, "Characteristics and Progress", Perry made some observations which bear quoting in full:

> There are many good, conscientious and industrious Indians on the Nass River. There would be many more were it not for the fact that a number of privileged agitators have found their way into their reserve and homes. These latter teach them to disregard the laws of Canada which govern the Indians; to ignore officials of the Government who are given charge of their affairs, and their plans for the Indians' welfare; and lead them to believe that British justice has been weighed in the balance and found wanting in that the Nass Indians, in common with other provincial tribes, have been ignominously dispossessed of their tribal and hereditary right to ownership of the lands of the Province of British Columbia.
>
> As a consequence, it has happened that white men - settlers and others - have been boycotted and intimidated by the Indians; indifference to moral issues has been displayed by the Indians in the form of occasional lapses into tendencies of heathenism and drinking. 26

Perry's patronising comments can be appreciated when one remembers that he was an agent of a government determined to integrate the Indians with the dominant white culture. Many things, from the state of the buildings to work habits, were equated with Victorian concepts of virtue and morality still in vogue in 1914. That there was agitation could not be overlooked but, as Perry saw things, this agitation was the work of outsiders, mainly meddling parsons. This was the stock white reaction: if Indians are well-organized, assume a white conspirator in the background, a

stereotyped perception of that time bound up in the official attitude towards the Rev. Arthur O'Meara by those who ignored the fact that no outsider could function unless the Indians were willing to act and were seeking a course of action.[27]

This settler view also ignored the passionate affiliation felt by the Nishga for their ancestral land, a feeling not devoid of mystic and religious tones:

> The respect our people have for the land is so deep that we feel a oneness with it. The land speaks to us and we listen. A man goes on his land and sees a dog defecating there and he will know that it is a message that perhaps his wife has been unfaithful to him.[28]

But the devotion to their land shown by the Nishga people goes beyond mystic factors. There were also practical reasons for the attachment and most of these centred around the bountiful river Nass which meant "the stomach, or food depot." The Nishga built their villages on the river's banks, houses of hewn timber being built in single rows that followed the contours of the shore. From the river, the Nishga harvested vast quantities of eulachon and salmon. From the valley, they gathered berries, edible roots and game animals. The isolated valley supplied almost all the needs of its inhabitants and they, in turn, responded with a gratitude that bordered on religious zeal for their valley.

Just as they had fought off rival Indian groups, like the Tahltan, who disputed parts of the drainage basin of

the Nass River, they also resented the presence of surveyors who were sent to mark out reserves, a step which the Nishga refused to recognize, claiming that the whole country belonged to them.[29] A Petition drawn up by the people of Gwincha Village and sent to the Dominion Government in June 1911, pleaded with Sir Wilfrid Laurier to intercede with the Provincial Government on behalf of the Nishga people so that some protection against land speculators and settlers could be extended to the original inhabitants. The petitioners claimed that the Provincial Government had ignored all Nishga protests and had sent in surveyors with the aim of selling sections of the Valley to white people.[30] A few months earlier, Arthur E. O'Meara had warned Laurier that Nishga fears of encroachment were real and O'Meara claimed that during a visit to the Lands Office in Victoria, April 1911, he had been amazed at the "scores of applications for purchase" of land in the Nass Valley. O'Meara also told Laurier that, to assert their claim to the territory, the Nishga had drawn up a strong statement: "Standing well within our constitutional rights we prohibit you from entering this territory...." copies of which they served upon those going in and settling there.[31] The people were determined to remain in control of their bountiful food depot and to remain purveyors of the highly-prized eulachon oil, a position that they had held for so

long. The attitudes of Victoria's political leaders, that Indians had no use for the land they claimed to own, were reinforced by developments in the Province during the first decade of the Twentieth Century. The era of unbridled expansion had come. A small, stubborn tribe could not be allowed to hold up progress in a valley that the provincial authorities saw as important for settlement, forestry, and railway development. Two divergent cultures and economies were set for a clash.

Chapter Two

## THE PROVINCIAL GOVERNMENT AND THE NISHGA CLAIM

Reference has already been made to another argument used by those who disputed the Nishga claim to title of the Nass River Valley, namely, that even if aboriginal title had existed, such title had automatically been transferred to the British Crown when the mainland had become the new colony of British Columbia on November 19, 1858. Months before, the Secretary of State for the Colonies, Sir E. Bulwer Lytton, had expressed concern for Indian claims. In a letter to James Douglas, he had written:

> I have to enjoin upon you to consider the best and most humane means of dealing with the native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them... Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with natives for the cessions of lands possessed by them, that subsistence should be supplied to them in some other shape....."[1]

This counselling was not to be the only example of Britain's insistence that some consideration for the well-being of the native people be shown in connection with any action to extinguish aboriginal land rights in the new colony. Since the theory of native rights and Britain's treatment of such in her colonial policy will receive detailed treatment in another section, only a review of some principles governing the "cession of lands" will be dealt with now in order to

establish the nature of the dispute over the Nass River Valley.

For the Indians of British Columbia, the choice of Sir James Douglas to represent the Crown in dealings connected with the "cession of lands" was a fortunate one. Despite some misgivings the Indians had about Douglas, he was the most experienced man for the job, and a sympathetic advocate of the view "that the Indians should not be swept aside as the settlers scrambled to possess the land."[2] In 1858, Douglas was the only official to have completed some kind of treaty-making over land. As an employee of the Hudson's Bay Company, he had bought sites around Victoria from the Songhees and had dealt similarly with Indians in Nanaimo and Fort Rupert. In doing so, he had adhered closely to the principles which had governed the British in their dealings with native peoples in Canada and parts of the Empire:

> The working assumptions on which the Songhees treaties were based included these: that the 'families or tribes' were the corporate groups that 'owned' the lands, that each of them owned a single tract whose boundaries could be defined, that ownership was exclusive, and that all of the land in question was owned by one or other of the named groups. [3]

A possible influence on Douglas was the fact that during the first two years of his tenure as governor of the mainland, he had not been pressed to make treaties, since the influx of settlers had not yet reached the proportions it

did in the following decade. He had, however, noted that some settlers were bargaining directly with the Indians. Accordingly, he had posted a notice in the Victoria Gazette, stating "that the land in question was the property of the Crown, and for that reason the Indians themselves were incapable of conveying a legal title to the same, and that any person holding such land would be summarily ejected."[4]

The 1860's saw an increase in the pace of settlement. This brought new pressures for land. The British position since the Royal Proclamation of 1763 forbidding settlement on Indian lands except through purchase or cession of such lands, had been that the Indians were allies and should be protected from those who would abuse aboriginal land rights. Although British Columbia had not yet fallen within the Empire when the Royal Proclamation of George III had been made, James Douglas adhered to its spirit and intent, and added two facets of his own. His policy stated that title of the reserved lands of the Indians remained with the Crown and was inalienable. This circumvented attempts by white settlers and speculators who sought to purchase Indian lands, and prevented individual Indians from "selling" tribal lands. Douglas also stated that proceeds from the sale of reserved lands were to be used exclusively for Indian purposes.[5] Since the Secretary of State for the Colonies had given Douglas virtual carte blanche for handling the Indians and

the land question, the policies outlined above can be regarded as Imperial policy. Both in and out of the Legislature, pressures for the purchase of Indian lands had mounted. The Assembly, finding it financially impossible for the Colony to handle such purchases, made many requests to the Imperial Government to provide funds for the extinguishment of aboriginal title. However, the British parliament's mood was one of strict economy, expenditures in colonial ventures being viewed with extreme skepticism, and Lord Newcastle's reply to a request for funds in 1861 was predictably negative.[6]

During the remaining years of his term as governor, Douglas followed Imperial policy in his treatment of Indians. He continued the marking out of reserves, following a generous policy which had as its basis the granting of ten acres per family, with the stipulation that the wishes of the Indians should really determine the size of their land holdings.[7] When Douglas retired in 1864, he could claim that his reserve policy had been most acceptable to the Indians.[8] Ironically, the man whom Douglas had recommended for the position of Chief Commissioner of Lands and Works, Joseph Trutch, was going to be the foremost instigator of changes in policies. Trutch, with his progress-or-bust attitude, regarded Indians as impediments to development. Not only was he going to prove ruthless

in his dealings related to reserve lands, but adept at the political manoeuvres carried on between the Colony of British Columbia and the Government of Canada over the issue of confederation.

His attitude towards Indians and their land, meeting with wide approval amongst the colonists Trutch set about the task of revising reserve boundaries to accommodate the ever-increasing demands for land. With the prospect of increased settlement, many of the reserves were now seen as wastelands occupying choice areas that would be more profitable if utilized by settlers.[9] Challenging the judgement of Douglas and his surveyors in setting out reserves, Trutch was able to move the Colonial Secretary to authorize Walter Moberly to "make enquiries... and to reduce these reserves if he is of the opinion that it can be effected without dissatisfaction of the Indians." Because the successors to Douglas chose to ignore Indian attitudes to land, Trutch could shape policies. First to be redefined were reserve lands of the Kamloops and Shuswap Indians, the land thus "freed" being thrown open for pre-emption by settlers. With this precedent established, Trutch turned his attention to other areas. He had mislead the Imperial Government into thinking that Douglas had specifically limited Indians to ten acres per family and that the excess land held by some of the groups could be

reduced.[10] Indians could pre-empt land only with permission from the Lieutenant-Governor. Trutch had created a land policy which did not recognize aboriginal title, and allocated comparatively small amounts of land to the Indians so that many of them were reduced to mere subsistence.[11]

For the Indians, the political changes which were pending appeared to offer some hope: British Columbia was now in the process of negotiating union with Canada. Some Indians were aware of the comparatively generous land settlements that had been made with tribes in other parts of Canada and were hoping for similar treatment from the new government that would control their lives. They had not counted on Trutch. As early in the discussion on union with Canada as September 1868, the Yale Convention had passed an ominous resolution which included amongst other clauses the one that "it is incumbent therefore on the government to establish such regulations as would utilize the Indian reserves and appropriate the proceeds to the benefits of the Indians."[12] Even more ominous was the lack of any reference whatever to Indians in the original resolution on union with Canada passed by the British Columbia Legislature. Indeed, one commentator feels that Governor Musgrave purposely omitted any reference to Indian policy in bringing the question of Confederation before the

Legislature. When a resolution was eventually brought forward to provide for the protection of Indians under the new government, the motion was defeated by a margin of twenty to one and discussion on the subject of Indian rights was halted.

On May 16, 1871, an Imperial Order in Council stated the Terms of Union, Clause 13 defining Indian policy:

> .... the charge of the Indians and the trusteeship and management of the land reserved for their use and benefit shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after Union.[13]

This strange clause emphasizes the ignorance of the Dominion Government about conditions in British Columbia; the influence of Trutch in the shaping of Indian policy, an influence he was to broaden in his new capacity as British Columbia's first Lieutenant-Governor; and, the complete lack of understanding on the part of both levels of government as to the real nature of British Columbia's Indian land holdings, with their variety of sites and uses. The clause also pointed to coming problems caused when a remote administration would have to protect the Indians from a conniving Provincial Government. Under the Terms of Union, Indian Affairs were now controlled by the Dominion Government. As such control would have to be applied with the co-operation and advice of the provincial authorities, it is quite apparent that Trutch and his followers were in a

favourable position to influence Ottawa and its agents.[14]

In a letter to Sir John A. Macdonald, Trutch declared:

> ....The Canadian system as I understand it will hardly work here. We have never bought out any Indian claims to lands nor do they expect we should, but we reserve for their use and benefit from time to time tracts of sufficient extent to fulfill all their reasonable requirements for cultivating or grazing.[15]

For British Columbia's Indians, Confederation had not brought relief from their troubles: they were now to enter the real struggle for their rights, a struggle made more difficult because the two governments could not agree on Indian policy. The provincial policy had been delineated and, with minor modifications, was to remain as Trutch had moulded it. British Columbia was ready for large-scale settlement and nothing was to stand in the way of "progress"; Indian title, if there ever was such a thing, had been extinguished when the Colony had been created in 1858, the Crown assuming title to all lands. With the formation of the Province of British Columbia in 1871, the Crown's rights were ceded to the Provincial Government. As an act of largesse, the Province could set aside areas of land for the exclusive use of Indians, these reserves having to be reduced as the demands of settlers grew for some of the Indian land. Pleas by the Indians were to be ignored.

By coincidence, the Dominion Government began its treaty-making policy in the Prairie West in the same year

that British Columbia joined Confederation. A year later, in 1872, the First Dominion Lands Act was passed, Section 42 of which states:

> 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. 16

The Dominion Government's concern for Indians and their lands was in contrast to the manner in which the British Columbia Government proceeded with its whittling away of reserves, and this in the face of mounting Indian protests. In 1874 the Province passed its first act relating to public lands within its confines, since entry into Confederation. The statute did not exempt from its operation Indian lands not surrendered. The only Crown lands exempt from recording or pre-emption, were those in an Indian settlement and Indians were specifically denied the right of pre-emption unless favoured with a written order of the Lieutenant Governor in Council. The then Minister of Justice, Fournier, disallowed the statute on grounds 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.

The report points out that:

> ... there is not in this Act any reservation of lands in favor of the Indians or Indian tribes of British Columbia; nor are the latter thereby accorded any rights or privileges in respect to lands, or reserves, or settlements.

Significantly, in light of the growing dispute over aboriginal title, the report states:

> 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 is 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.' [17]

In disallowing the 1874 provincial Crown Lands Act the Dominion Government had taken its first position on an issue that was to become the most contentious between Canada and the boisterous new partner. The appointment of two Dominion officials to administer Indian Affairs in the province, Dr. Israel Wood Powell in 1872, and James Lenihan in 1874, did nothing to improve matters. The personal inadequacies of these officials and the obstructionist tactics of the Provincial Government, reduced Indian

administration in British Columbia to a state of chaos.[18] The provincial authorities had also devised a new tactic in their dealings with Indians: blame Ottawa when anything went wrong. The Dominion Government had planned to run Indian Affairs in the province under a three-man board comprised of Powell, Lenihan and Lieutenant-Governor Trutch. But the Board, created in 1874, did nothing to end the confusion over Indian affairs and, in particular, the question of acreage to be allocated to Indian families, because "Trutch was not interested in serving on it unless he directed its actions."[19]

Influenced by a suggestion of William Duncan's that a commission should investigate the impasse over Indian lands, the two governments appointed the Indian Reserve Commission in 1876. One commissioner, A.C. Anderson, represented Canada; the second, Archibald McKinley, represented British Columbia; the third, Gilbert Sproat, served as joint commissioner. The Commission was not going to concern itself with the extinguishment of aboriginal title because this would worsen relations with Victoria. The Commission would allocate acreage to Indians on the basis of individual circumstances. Some idea of the Provincial Government's attitude can be gained by noting the procrastination surrounding the appointment of the third commissioner. Another pointer was the agreement, insisted

on by the provincial authorities, that British Columbia secure a reversionary interest in all reserve lands cut off because of a decrease in Indian population, the Province paying for any improvements made on the land. This clause was a major constitutional gain for British Columbia but was to create enormous problems for the Dominion Government when it sought to dispose of reserve lands so that proceeds of such sales could accrue to the Indians.[20]

Meanwhile, the British Columbia Government had amended the 1874 Act, a few minimal changes resulting from consultations with the Dominion Government. These dealt with the selection and allotment of reserves. The fundamental issue of aboriginal title was skirted.[21] However, the new Minister of Justice, Edward Blake, allowed the revised Act in 1876. His report stated:

> 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 the 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. [22]

While the reluctance of the Minister of Justice to allow the revised Act is evident, he was swayed by the promise to set up a joint commission "for settlement of the Indian land question."

The Commission was dominated by the energetic and voluble Sproat, who was assailed by Indian leaders irked over threats to their lands and ignored by the provincial authorities. The growing controversy over the amount of land to be set aside for Indians moved the Governor-General of Canada, Lord Dufferin, to seek the intervention of the Secretary of State for the Colonies. Acting in terms of the thirteenth article of the agreement under which British Columbia entered Confederation, Dufferin reminded the Secretary of State for the Colonies that the Dominion Government had insisted on extinguishment of Indian title before permitting any lands to be occupied or appropriated. Dufferin went on:

> 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's 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. [23]

Two years later, on September 20, 1876, Lord Dufferin delivered his now famous speech at Government House, Victoria, chiding the provincial authorities for their failure to conform to what was by now accepted practice with the Dominion Government in its dealings with Indians and their title:

> ... 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." [24]

As news of the numbered treaties being negotiated between the Dominion Government and Indians in other parts of Canada reached local native leaders, the pressure on the Provincial Government grew. The Reserve Commissioners warned Ottawa of the possiblity of war, but in Victoria the government of George Walkem refused to alleviate the bitterness of the Indians. It was always the voice of the settler lobby that prevailed in disputes over land and the Commission could make little headway in implementing the terms of the 1876 agreement between Ottawa and Victoria. It is true that the Commissioners had prevented possible violence in the Kamloops area in 1877, but they had been unable to change the Indian land policies of the British Columbia Government.[25] In 1880, Sproat resigned and with his departure, the Commission became

nothing more than a charade.

With the Walkem government back in office, after a short stint by Andrew Elliott as Premier (February 1876 - June 1878), the determination to undo Sproat's treatment of some Indian bands in granting them tracts of land, grew. The Dominion Government agreed with Victoria's demand that future decisions of the Reserve Commissioner should be confirmed only after these had been approved by both the Indian Superintendent and the Chief Commissioner of Lands and Works. The appointment of O'Reilly as Reserve Commissioner signalled new Indian protests, ranging from Nicola Lake to the Kootenays, and the new Commissioner justified all the misgivings about him. As the wave of Indian protest could no longer go unheeded, a Dominion-Provincial Commission to the North-West Coast Indians was formed to hear Indian grievances. The Cornwall-Planta Commission, to which reference has already been made, met with more than just complaints over the loss of lands and fishing sites. When the Commissioners met with the Tsimshian and the Nishga, they were faced with the question of title to Indian land, a concept that the Commissioners would not entertain.[26]

They had listened to dramatic appeals, had experienced at first hand the unique nature of land ownership as practised by the Indians of the North-West Coast of British Columbia,

but were not faced with a single, unified voice speaking on behalf of the complainants. Because of this, the Commissioners could find an excuse for not responding to the Indians.[27] For their part, the Indians had become convinced of the need to unite their efforts in their quest for recognition of land rights. The need to appeal to an authority outside Canada also entered discussions by Indian leaders.[28]

That the disillusionment of the people of the North-West Coast was based on the realization that settlement of the frontier meant the end to a traditional way of life can be illustrated by some developments that followed the visit of the Cornwall-Planta Commission. In the same year (1887) a delegation of Nishga chiefs had gone to Victoria to seek assurances about their land and had been promised a land commission. Instead, the Nishga were dismayed to see even more surveyors come into the Nass River Valley.[29] The Indians could only counter with protests and what officials regarded as truculent behaviour. Typical were reports sent by the Indian Agent at Metlakatla, circa 1911-12. He complained that although a Church of England teacher at the village of Gitladamiks "did his best to teach the children...he was regarded as the thin edge of a wedge to pave the way of the white man who was following the missionary to occupy their lands."[30] Two months later, the same unidentified agent

complained that the Lak-Kalzan Band spent "much of their time in fomenting the land title question with their Gitlakdamiks and Aiyansh brethren, and many matters of interest in their home village had been overlooked."[31] Even his proximity to the problem did not help the agent to understand the deep concern that his "charges" had for their land. Writing on January 12, 1912, the agent reported on the village of Gitlakdamiks at the head of the navigable portion of the Nass River:

> ... These Indians have had a suspicion that their land grievances are not being heeded by the Government, and have resumed the former attitude of indifference in respect to the proffers of the Department to give them more advanced educational facilities. At a recent meeting of the chiefs of Gitlakdamiks held at Aiyansh, Nass River, whilst investigating a reported uprising in the valley against the white settlers, they, in the presence of the Chief of Provincial Police, told me that they did not want any favours from the Government until the land question was settled, and asked me to hold off the matter (of a school) for the time being.[32]

Another cause of concern amongst the Indian people of British Columbia stemmed from the insistence of the Provincial Government that the Dominion should rule on "whether upon an Indian reserve in British Columbia, outside the railway belt, your Department can, after obtaining a surrender or consent from the Indians, lease land for purposes of mining (1) the base metals, or (2) gold and silver..." The Deputy-Superintendent of Indian Affairs passed on the provincial

request to E.L. Newcombe, legal counsel to the Department, who ruled:

> First, as to the base metals - I am of opinion, provided there has been no reversion of the land in question to the Province under the terms of that agreement and the action taken thereunder, that the Crown in Canada, upon obtaining a surrender from the Indians, can grant a lease of the surrendered land for the mining of the base metals therein, and, subject to the same proviso, I think that the Crown in Canada or the Supt.-General may with the consent of the Indians grant a licence to mine such metals. In view, however, of the attitude of the government of the Province, these questions cannot be said to be entirely free from doubt until they have been decided one way or the other by the courts. [33]

This ruling seems to indicate a retreat on the part of the Dominion from its earlier constitutional obligation to have responsibility for Indian lands. Perhaps the constant bludgeoning from the provincial authorities had paid off.

But mining interests were not the only threat to Indian lands: the growing demands from settlers for more agricultural land moved Robert G. Taylor, Minister of Agriculture in British Columbia, to present to the Department of Indian Affairs a resolution adopted by the Central Farmers Institute:

> That the Dominion Government be asked to purchase all Indian reserves, or any portion thereof, not necessary for the support of Indians occupying same, and throw them open for settlement. [34]

Lest this action seem the indiscretion of an over-zealous politician, it should be noted that just two years later,

in 1907, the Department of Indian Affairs sent out a memo containing a view expressed by the Attorney-General of British Columbia that:

> ... the title of the Indians in the reserves is simply a right of use and occupation, and that the Dominion Government holds no proprietary rights on the reserve and that when any Indian band or nation abandons its right or title to a reserve, the entire beneficial interest in such reserve or portion of a reserve immediately becomes vested in the Province freed from incumbrances of any kind. [35]

This eagerness to acquire Indian lands is all the more remarkable when the evidence available suggests that an important cause for the lack of agricultural land was an artificial shortage created by the holdings of speculators.[36] Yet another provincial official, this time the Deputy Minister of Agriculture, was to bemoan the "waste" of land held by Indians. After referring to the "hostility" of Nass River Indians towards would-be settlers, who were sometimes turned back "at the point of a rifle," the writer called the Nass River Valley "one of the most extensive and fertile valleys in the Province, with good climatic conditions, and eminently suited for most phases of agriculture, and many home seekers would settle therin if it were not for the hostile attitude of the Indians." Claiming that these Indians were not averse to white settlers, providing these bought land from the Indians themselves, the writer called the whole idea "absurd" and suggested another

scheme "in the interests of agricultural development: on the completion of the Grand Trunk Pacific, this valley will be the source of supply for Prince Rupert and other Coast cities. The quality of the land is excellent, and it is comparatively inexpensive to clear."[37] Coming as this did from an official serving in the government of Premier Richard McBride, it provides a fair reflection of the attitude that prevailed, and would for the following forty years, prevail in Victoria, over the question of Indian lands. Changes in the economic climate had placed the Provincial Government under increasing pressure to supply agricultural land for the settlers and Victoria's impatience at Indian demands for recognition of aboriginal title became the dominant feature in the struggle between the two groups.

## Chapter Three

## THE NISHGA CLAIM AND THE CONCEPT OF ABORIGINAL TITLE

The question of aboriginal title first received official attention with the coming of British supremacy in New France. Two vital documents indicate the policy that Britain would adopt in this matter. The first of these documents was the Articles of Capitulation drawn up in 1760, of which Article XL states:

> The Savages or Indian allies of his most Christian Majesty, shall be maintained in the lands they inhabit; if they chose to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries. [1]

The French had not recognized aboriginal title: the British accepted that the aboriginal people had an inherent and definite right to the soil they have occupied from time immemorial.[2] The British clearly wanted to confirm the right of the Indians to possess ancestral lands. The second of these two important documents, the Royal Proclamation of 1763, deals with Indian lands lying to the west of Quebec, these being "all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company."[3]

The Royal Proclamation is the first written constitutional document for British North America and has been

called the Imperial Constitution of Canada during the period 1763 and 1774. It represented a grand scheme on the part of the British to calm the frontier and stabilize relations between the English and the Indian tribes along the Ohio and Mississippi river valleys where settlement threatened the hunting lands of the Indians:

> And whereas it is just and reasonable, and essential to our interests, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominions and Territories as, not having been ceded to or purchased by us, are reserved to them, or any of them, as their Hunting grounds. - We do therefore, with the advice of our Privy Council, declare it to be our Royal will and pleasure, that no Governor or Commander in Chief in any of our Colonies in Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor, or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them. [4]

In addition to creating an "Indian Country" outside the borders of the colonies, the Proclamation established a procedure to be followed for the purchase of Indian lands lying within the colonies or within the territory of the

Hudson's Bay Company.[5] The Proclamation clearly limited the purchase of Indian land to the Crown, thus establishing a monopoly and creating a definite procedure for the Crown to follow when entering into land treaties with Indian tribes. These two sections of the 1763 Proclamation remain as part of Canadian law. They are well-tried, for the government in opening parts of Southern Ontario to settlement, followed the procedures set down in the Proclamation. Possibly as many as three hundred treaties and surrenders connected with Indian land were involved in this phase of expansion for the sake of settlement.[6]

The Proclamation received extensive attention in the Nishga Case since the main argument of the Attorney-General of British Columbia in refuting the existence of Indian title to lands in the Province rested on the propositions that:

(a) the Indian title finds its origin in the Royal Proclamation and (b) that the Proclamation does not apply to what is now British Columbia, since the area was still terra incognita in 1763.[7] The argument seems dubious since the Royal Proclamation does not state that it is creating any Indian rights but commences with the statement that it is "just and reasonable" that the Indians "not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved

to them, or any of them, as their hunting-grounds." This wording is obviously a recognition that a native group, having occupied a defined territory "since time immemorial" has a claim to that territory.[8]

But the idea that Indian rights existed only because of the Royal Proclamation of 1763 has persisted in government and legal circles. The difficulty here, in a very precedent-oriented legal system, is that the only Canadian case that really saw the court facing the issue of Indian claims, was the St. Catherine's Milling Case. But in this instance the Indian land in dispute fell within the compass of the geographic area delineated by the Proclamation. For this reason, the Privy Council was not required to deal with two important issues raised by the 1763 Proclamation, namely, what constituted the western boundary of "Indian Country", and did the Royal Proclamation constitute the sole source of Indian rights?[9] As for the nature of Indian rights, the St. Catherine's Milling Case produced nothing more than a casual remark by Lord Watson:

> 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.[10]

Interestingly, the courts never resolved the issue of Indian land claims: Quebec did not go into court until James Bay, and British Columbia until the White and Bob case over native

hunting rights.

If the argument that aboriginal rights stem exclusively from the Royal Proclamation is accepted, another question arises. Would native people who live outside the area supposedly delineated by the Proclamation have no rights at all in respect to their land? Such a proposition would not stand up in light of the history of British Colonial Policy toward the Indians. As an illustration, the territories granted to the Hudson's Bay Company by Royal Charter of 1670 and transferred by the Company to Canada in 1870, had been specifically excluded from the geographical area covered in the Royal Proclamation. Yet, in negotiations over the reconveyance of Prince Rupert's Land, the Hudson's Bay Company insisted on the inclusion of a clause that "any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government... and the Company shall be relieved of all responsibility in respect of them."[11] Such a clause would have been unnecessary had there been no recognition of the possibility that Indian land rights did exist. The Hudson's Bay Company, when selling an area to Lord Selkirk for his Red River Settlement (1811), did not regard negotiations as final until Selkirk had signed the Treaty of July 18, 1817 with the Indians for extinguishment of their title.[12]

That Dominion legislation from the outset was designed to extinguish native title with the negotiation of treaties, indicates that the Government of Canada intended to continue the policy of the Imperial Government. In 1870, the Manitoba Act preceded the acquisition of new areas. Section 30 of the Act vested all ungranted or waste lands, in the province of Manitoba, in the Crown, to be administered by the Government of Canada for Dominion purposes. Sections 31 and 32 deal with the disposition of certain lands for the use of "half-breeds" and settlers, respectively, all such action to be subject to extinguishment of the Indian title.[13] This point was further stressed by Mr. Justice Johnson in Regina v. Sikyea. The Justice pointed out that although Indians inhabiting Hudson's Bay Company lands were not included in the Royal Proclamation of 1763, "that fact is not important because the Government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson's Bay Company, as having an interest in the lands that required a treaty to effect its surrender."[14] Significantly, the Dominion Lands Act which superceded the Manitoba Act, exempted Indian lands from its operation and continued to apply Clause 42 until 1908 when virtually all the numbered treaties had, in any event, been completed.

The question, then, is that if the provisions of the

Royal Proclamation were applied to Manitoba, would these not also apply to British Columbia? Delivering the reasons for the three members of the Supreme Court of Canada who were prepared to grant the declaration claimed by the Nishga, Mr. Justice Hall stated:

> Parallelling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question is the guarantee of Indian rights contained in the Proclamation of 1763. This Proclamation was an Executive Order having the force and effect of an Act of Parliament... 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. 15

Significantly, Mr. Justice Hall did not claim that the Nishga title derived exclusively from the Royal Proclamation. He referred to the Proclamation as "paralleling and supporting" the Nishga claim.

Speaking on behalf of the three judges who would deny the Nishga their claim, Mr. Justice Judson stated that the Proclamation did not apply to the Nass River Valley, although this did not mean an absolute rejection of the existence of Indian title:

> 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. 16

Since those judges who found in favour of the Nishgas had concluded that the Royal Proclamation did apply to British Columbia, it is significant to note that the three judges who ruled against the Nishga claim did so on grounds other than the non-applicability of the Proclamation.[17] Instead, they held that there had in fact been an Indian title to the land but that such title had been extinguished before British Columbia's entry into Confederation.

As to the nature of the Indian title, the St. Catherine's Milling Case provides the first attempt by a Canadian court to deal with this issue and found that such title consisted of a "personal and usufructuary right, dependent upon the good will of the Sovereign."[18] This suggests that Indian title is based on use of the gathering of fruits from the land by the Indians. (The Royal Proclamation refers to lands used for hunting.) Further to this, Mr. Justice Strong, dealing with the meaning of a "usufructuary right" in St. Catherine's Milling, stated:

> It may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was... considered as vested.[19]

Combining the comment of Mr. Justice Strong about the "absolute use and enjoyment of their lands" with long-standing concepts in both Canada and the United States, we can reach the conclusion that "usufructuary right" is the right of Indians to hunt, farm, and exploit the natural resources on the lands which they possess.[20] While it is true that the semi-nomadic nature of many North-West coast Indian tribes, and the fact that their ownership, as recognized by other tribes, extended to fishing grounds, made it difficult for European-oriented concepts on land ownership to be applied, the Nishga have "since time immemorial" lived a settled existence in the Nass River Valley. The tribe's concept of land ownership, already outlined in a preceding chapter, was dramatically explained by Frank Calder when testifying before the Supreme Court of Canada:

> Put it this way, in answer to your question, from time immemorial the Nishgas have used the Nass River and all its tributaries within the boundaries so submitted, the lands in Observatory Inlet, the lands in Portland Canal, and part of Portland Inlet. We still hunt within those lands and fish in the waters, streams and rivers, we still do, as in time past, have our campsites in these areas and we go there periodically, seasonally, according to the game and fishing season, and we still maintain these sites and as far as we know, they have been there as far back as we can remember.
>
> We still roam these territories, we still pitch our homes there whenever it is required according to our livelihood and we use the land as in times past, we bury our dead within the territory so defined and we still exercise the privilege of free men within the territory so defined.[21]

Mr. Calder had given similar evidence before Chief Justice Davey in the British Columbia Court of Appeal, May 7, 1970. So had Professor Wilson Duff, a noted authority on the culture of the Indian tribes of the North-West coast. But Chief Justice Davey stated:

> I am not overlooking Mr. Duff's evidence that the boundaries of the Nishga territory were well known to the tribes and to their neighbours, and respected by all. These were territorial, not proprietary boundaries, and had no connection with notions of ownership of particular parcels of land. [22]

Chief Justice Davey also asserted that:

> The primitive tribes at the time of British discovery and conquest had no conception of proprietary, as opposed to territorial boundaries. The boundaries claimed by the Nishga tribe were not connected with notions of ownership of particular parcels of land. There was no evidence to justify the conclusion that the aboriginal rights claimed by the appellants are of a kind that it ought to be assumed that the Crown recognized them when it acquired the mainland of British Columbia by occupation. [23]

This statement by the learned Justice is remarkable, both from an anthropological and a historical point, and contrasts with the celebrated pronouncement on Indian title by Chief Justice Marshall of the United States Supreme Court in Johnson v. McIntosh. Pointing out that the European nations who operated on the North American continent applied the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments," and that such title

meant the establishing of special relations between the discoverer and the natives, Marshall stated:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it. [24]

Since the judgement of Marshall has been regarded as the most definitive interpretation of Indian rights in United States legal circles, it is well to note that his judgement underscores two precepts: (a) that the discoverers, or conquerors, of newly-found lands recognized the aborigines to be the rightful occupants of the soil with a just and legal claim to continue the use of the land; and (b) that a recognition of the rights of the aboriginal occupants did not give them sovereignty over their lands, the ultimate control, plenum dominium, residing with the discoverer, or conqueror. Since Marshall's dictum was based on British colonial laws, rather than on those peculiar to his own country, Johnson v. McIntosh has been cited as a precedent in every Canadian court which has had to consider aboriginal rights. The principle that has guided the

Dominion Government in its dealings with Indians and the extinguishment of title has followed a consistent pattern: the Government has either extinguished title through treaties, or has made provision for the implementation of such treaties. These dealings have involved the following elements: (a) the Crown has conceded something in return for the surrender of Indian lands in terms of the treaty; (b) the document drawn up as a result of such dealings has invariably stated that the Indians involved did "hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included within the following limits; (c) any lands included in the treaty were described in precise terms. These elements gave the treaties the validity of purchases of what rights of ownership the Indians had in the land. [25]

While these terms are admittedly directly connected with the numbered treaties which included the lands now known as the three Prairie Provinces, and some parts of north-western Ontario, it is well to note that the Dominion Government also concluded treaties over lands in the North-west Territories and the Peace River country of British Columbia, these actions involving the extension of two of the numbered treaties. In concluding the Peace River Treaty, the Dominion Government acted without any participation on the part of the government of British Columbia. This treaty also raises a question about the existence of aboriginal rights in what

is now British Columbia, an area claimed by those who would deny the Nishga claim as lying outside the scope of the Royal Proclamation of 1763. If there were no aboriginal rights, why would the Dominion Government have seen any need to enter into a treaty for the extinguishment of native title in the Peace River country? And, if such title then did not emanate from the Royal Proclamation, did it not exist "from time immemorial"? Did the treaty not constitute a purchase and, did such purchase not form an acknowledgement that the land was owned by its occupants? Mr. Justice Hall saw the matter in this light:

> Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.[26]

The Provincial Government had chosen to ignore aboriginal title, its rationale after 1864 being that British Columbia was ready for settlement and nothing, not even Indians, should stand in the way of progress. If Indian land was required for agriculture, this land should be placed under white control. This policy was developed and promoted by Joseph Trutch with the support of settlers who were moving into British Columbia, and then enshrined in the 1876 agreement between the Dominion and the Provincial Governments:

> That each reserve shall be held in trust for the use and benefit of the nation to which it has been allotted; and in the event of any material increase or decrease hereafter of the members of a nation occupying a reserve, such reserve shall be enlarged or diminished as the case may be, so that it shall bear a fair proportion to the members of the nation occupying it. The extra lands required for any reserve shall be allotted from Crown lands, and any lands taken off a reserve shall revert to the Province. [27]

This reversionary clause was to be at the root of much of the furore over Indian lands in the period immediately following British Columbia's entry into Confederation. While the Dominion Government strongly favoured the recognition and proper extinguishment of native rights, the Province sometimes refused even to discuss the issue. In part, this unhappy dialogue was the result of the ignorance shown by those who represented Ottawa in negotiations with British Columbia. Clause 13 of the Terms of Union echoed a memorandum issued by Joseph Trutch in 1870 and states that in the management of the lands reserved for the use of Indians "a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued" after union and that "tracts of land of such extent as it had hitherto been the practice of the British Columbia Government to appropriate" shall be held in trust for the Indians.[28] How sincere the Provincial Government would prove to be in applying these "liberal" policies can be gauged from certain features of the Land Act in 1874, disallowed by the Dominion Government but later

accepted after minor revisions. The Act was disallowed because it had made no provision for any Indian reservation; it had failed to grant Indians any rights to own land; there had been no recognition of "an interest other than that of the Province alone."[29] The tone had been firmly set for the acrimonious and frustrating relationship between Ottawa and Victoria over the question of Indian lands, and the Indians would be the losers. It was in this context that the second phase of the Nishga struggle to gain recognition of their aboriginal title to ancestral lands was to develop.

Chapter Four

## THE NISHGA LAND CLAIM, 1906 - 1950

With the completion of the trans-continental railway in 1886, pressures for land increased. Numbers of settlers, miners, speculators and other would-be land owners flocked into British Columbia. Indian land increasingly became the target for the newcomers and in this they were abetted by the policy of the British Columbia government with its reversionary rights. The Reserve Commission under O'Reilly had continued to grant agricultural land, where available, to tribes who asked for it. In 1897, a report published by the Department of Indian Affairs showed that the total acreage held by Indians had increased from 28,437 in 1871 to 718,568. Of this amount, 10,727 acres had been placed under cultivation, evidence that the Indians were gradually moving away from their traditional "hunting and gathering" to the white man's agriculture.[1] This change, however, was not without its price as Indians were subjected to the voices of "civilisation".

Despite the apparent gains in acreage that the Indians had made during a quarter century of struggle, the agitation over land continued. Whereas, before 1874, Indians had been primarily concerned with acreage, they now had a new conception of their aboriginal rights. This change in focus resulted from implications which followed the Dominion

Government's admission, through order-in-council of November 5, 1875, of the Province's reversionary right. That the Indians lacked surety with respect to their land title became clear when the railways joined the scramble for land. The Canadian Pacific Railway paid no compensation to Indians whose land had been used by the Company. In 1904 representations were made on behalf of the Grand Trunk Pacific Railway Company for the sale of 10,000 acres of reserved Crown land on Tuck Inlet, on the side opposite the Tsimshian Reserve. The Provincial Government accepted the Company's offer of one dollar an acre. The following year the Company again negotiated with R.F. Green, Chief Commissioner of Lands and Works, this time for part of the Tsimshian Indian Reserve. This arrangement would have to be made under terms of the provincial reversionary right and would involve the Dominion Government. Since the Laurier Government was eager to assist the Grand Trunk Pacific in the construction of a terminus and wharf, it requested the Province to waive its reversionary interest in the Indian reserve. McBride refused on grounds that the 1876 agreement with the Dominion stated that "any land taken off a Reserve shall revert to the Province".

While the Department of Indian Affairs sought legal opinion on the matter, the British Columbia Government invoked certain amendments to the Land Act which allowed

the government to alienate portions of its reversionary interest in Indian reserves. These amendments later became Section 80 of the Consolidated Land Act of 1908 and added to the chaos that now existed.[2] The Agreement of 1876 had created a joint trusteeship which meant that the Dominion could not sell excess Indian lands without the concurrence of the British Columbia Government. With the influx of settlers and the clamour for agricultural land that ensued, as well as the Dominion Government's desire to reduce administrative costs of Indian Affairs in British Columbia, the Department of Indian Affairs had been willing to relax its policy in connection with the sale of excess Indian land.[3]

Because the difficulty in administering Indian lands was largely the result of the dual ownership practised by the Dominion and the Province, Indian leaders had already concluded that any appeal to either jurisdiction would be futile.[4] The only recourse was an appeal to higher authority, thus sustaining pressure for the recognition of native rights and adequate compensation for alienated lands. In 1906 several chiefs of the Squamish Tribe drew up a petition stating that the title to their land had never been extinguished; white men had settled on their land against tribal wishes; all appeals to the Dominion Government had been fruitless; the Indians had no vote and were not consulted

by their agents in matters concerning the tribe.[5] A deputation of three chiefs took the petition to London and obtained an audience with Edward VII. They were told that their claims should be presented to the Government of Canada and if they received no satisfaction, their complaints would be reconsidered.[6] Shankel says of this action:

> It was an ill-considered move, to be sure, with no hope whatsoever of any immediate result. Considering their lack of knowledge of Government administration they cannot be censured. However, the very fact that they should undertake such a trip and at such expense is striking evidence in itself how deep were their feelings in the matter.[7]

While it is hard to second-guess actions of that period, it is clear that the delegation of 1906 initiated a new era in the long struggle for Native rights. No longer were protests to be confined to unsophisticated outbursts before wary commissions, unsympathetic agents, and conniving politicians. The Indians were going to play the white man's game. No longer were issues such as acreage, agents and white intruders to be the causes of protests. The larger issue of aboriginal rights would now be carried to the highest authorities. And, what better time to do so than now that both Provincial and Dominion administrations were bogged down in a march of confusion!

In 1909 the Nishgas raised $500 to gain a legal opinion on their case, approached the Port Simpson Indians with a view to coalescing efforts and obtaining a court ruling on their

claims, and requested an order from Indian Superintendent A.W. Powell prohibiting further settlement until such a court ruling had been obtained.[8] Two other developments in the same year proved to be portentous: a group of twenty Indian tribes drafted a petition which was then taken by three of their representatives to the King with a request that their grievances over land rights be placed before the Privy Council. This Petition had been precipitated by the action of the Provincial Government in alienating some land belonging to the Skeena Indians. The delegation to London was told that its Petition would be referred to the Governor-General with a stipulation that the Government of Canada send a report to the Imperial Government.[9] The Indian Tribes of the Province of British Columbia was formed to bring about a unified voice that could state Indian grievances and work for solutions to these.

That developments were taking place did not escape the notice of officials of the Indian Affairs Department. A letter from Inspector A.E. Green to his superiors in Ottawa warned of a "very widespread movement among the Indians of British Columbia pointing to having the land question cleared up..."[10] Green was assured "that the Department has already employed the services of a gentleman to look thoroughly into the whole land question."[11] This gentleman was Thomas R.E. MacInnes who was instructed to report his findings upon

completion of his investigation into Indian grievances. He wrote in 1914:

> The Indians on the other hand at no time made, and to this day will not make, an appeal to a colonial, provincial, or federal government in Canada as the sovereign power from whom they ask recognition of their title. Their appeal has always been made, and from British Columbia is now being made, direct to the King. [12]

Writing later in 1909, Green corroborated accounts of the Nass Indians' determination to resist white encroachment, and their proposed formation of an Indian Rights Association for the far West. Green also reported that the Association's first meeting was called for December 1909 in Victoria, and that he had been made treasurer of money collected for legal defense, an honour he felt compelled to accept lest he lose the confidence of the Nass Indians.[13] He was later reprimanded for becoming involved with the Association and ordered to resign from the position he had accepted.

The 1909 Petition and the efforts to organize into some kind of united front showed that the Indians were not allowing either government to function under the illusion that the land issue was dead. The period of relative inactivity which had followed the Indians' disappointment at the failure of the 1887 Commission to solve their land question had proved to be a time of regrouping. In this, the Indians were aided by an organization formed in Victoria in March 1910, called the Conference of Friends of the Indians of British Columbia.

At a meeting in Victoria, August 24, 1910, these white sympathisers issued a statement of their objects and work. Stating that they had formed a non-political body whose interest would be the well-being of the Indian people, they hoped to be the means of a co-operative movement amongst missionary organizations working for Indians so as to bring about as rapidly as possible a solution of the British Columbia land problem. In particular, the Friends of the Indians would work to secure that the question whether the Indian tribes are entitled to an interest in unsurrendered lands should be submitted to the Judicial Committee of the Privy Council; to secure that upon such reference the Indian tribes would be individually represented by their own counsel; to conduct important investigations regarding Indian claims and British sovereignty on the Pacific Coast; to secure an agreement between the Provincial Government and Indian tribes regarding material facts and historical evidence so that the issue might be simplified and rapidly decided. The Friends also planned to investigate existing Indian conditions, influence both public opinion and the attitude of the Indian tribes towards conciliation and final settlement, and aid in bringing about the solution of local Indian land problems.[14]

The Friends of the Indians was the first white organization to support the Indians' claims for land rights. The

Indians also obtained support from Toronto where a group called the Moral and Social Reform Council of Canada promoted Indian rights. Once more the Government of British Columbia had indicated its refusal to recognize Indian land rights when Premier Richard McBride had told a group representing twenty tribes that they had no claim to land in the province. It was during this period that another white supporter became involved in British Columbia Indian affairs, the Rev. Arthur E. O'Meara. A lawyer turned Anglican clergyman, O'Meara was retained as legal advisor to the Indians. In 1910 the Nishga, who had formed the Indian Rights Association, delegated O'Meara to take their protests to England when he toured that country on a fund-raising drive for an Anglican Theological Seminary to be established in Vancouver. O'Meara, who had already gained first-hand experience in the area of native rights when working as a missionary in the Yukon, now became an indefatigable worker in the cause of Indian rights in British Columbia. His activities also provided ammunition for the detractors from the Indian cause who claimed that the "agitation" over land rights was the work of white instigators.[15]

Such an attitude presumed that the Indians were incapable of promoting their own cause. A few reports in newspapers of that time show that 1910 was a year of great activity for

the Indians as they developed tactics to deal with their opposition. The Prince Rupert Weekly Empire of May 27, 1910 reported:

> The redmen of the Nass country do not welcome the white men with open arms and smiles of heartfelt greeting. In a word, the Indians, under the impression that they own the country, lock, stock, and barrel, that they always have owned it, and, please Providence, they always will own it, frankly tell all white intruders to keep out and stay out. [16]

In the Vancouver Province, July 4, 1910, a page one article headed "Indians Go to Law to Recover Lands" outlined the reasons for the Nass Valley Indians seeking a court ruling on their claims. The same report also explained that the Nass Indians had developed a vocabulary to deal with the land issue, a few samples being:

| | | |
|---|---|---|
| tka-bak-daga-dit | = | wholesale appropriation |
| liks-zap | = | foreign power |
| King George People, or government that has come upon us | = | white people |
| inguit | = | bondmen |
| Yuqu | = | law establishing the white man's title to Indian land [17] |

The same newspaper, on June 2, 1910, under the heading "Redskins Talk of War If Land Is Taken", reported that Agent Perry felt the latest trouble resulted from "intemperate boasting by certain white men who have taken a perilous pleasure in taunting the Indians." Perry also reported that the Nass River Indians were "highly civilized, law-abiding and conscious of establishing the principles of international

law in regard to their ownership of land. They will defend their land even as the Boers did theirs." [18]

These reports reminded readers that the land issue had now become the most pressing problem to confront both Dominion and Province, both jurisdictions being presented with many petitions by various Indian groups. The 1909 Petition to the King had received the attention of the Canadian Department of Justice which had recommended that the land claims issue be brought before the courts. To this end, the Dominion Government passed enabling legislation, amending the Indian Act to allow for a judicial decision. The Dominion also negotiated with British Columbia when, in May 1910, representatives of both governments met in Ottawa and drew up a list of ten questions for submission to the Supreme Court of Canada. The questions fell into two groups: three dealt with the matter of Indian title and seven with the size of reserves. After being approved by representatives of Canada and of British Columbia, as well as by O'Meara acting for the Indians, the questions were sent to Premier Richard McBride. [19] His refusal to consider the first three questions, which dealt with the Indian title, meant that a possible solution to the problem of native rights had been frustrated.[20]

In the same year, 1910, Sir Wilfrid Laurier visited British Columbia and met with Indian delegates at Prince Rupert.

After listening to their claims for title to their land, the Prime Minister gave the impression that he would support a move to "settle this question that you have agitated for years... by a decision of the Judicial Committee."[21] A delegation of Friends of the Indians met in December with Premier McBride to seek his support for taking the land claims issue to the Judicial Committee of the Privy Council. McBride is reported to have dismissed the whole matter as being inconsequential, the Indians, according to the Premier, being satisfied with the liberal treatment they had been accorded. On March 3, 1911, a delegation of ninety-six Indians presented a memorial to McBride and the Provincial Executive and stressed that they and their people were not at all satisfied over the land title issue. Once more McBride dismayed his visitors by attributing the "agitation" to the "pernicious advice of some unscrupulous whites", and blandly stated that until a few months earlier he had not even known of any dissatisfaction existing amongst the Indian tribes.[22] The Provincial Government would clearly not budge from its obdurate position and the next move would have to be directed at the Dominion Government. Not only had the Prime Minister been encouraging when interviewed at Prince Rupert the previous summer, but a letter from Inspector Ditchburn to the Secretary, Department of Indian Affairs, June 15, 1910, indicated that the Dominion

Government was sympathetic to the Indian claim:

> I will take an early opportunity of communicating to the Indians on the reserves within this inspectorate the assurance that the Department will make every effort to secure for them the fullest measure of justice in the matter, and that no necessity exists for independent action on their part, and that to take the law into their own hands would only tend to prejudice their case. [23]

In April, 1911 a delegation of Friends of the Indians and the Moral and Social Reform Council of Canada met with members of the Dominion cabinet to urge early attention to the problems faced by Indians and their land claims. The Rev. O'Meara also obtained permission to interview Prime Minister Laurier and pressed amongst other issues, for the settlement of the Nishga land claim:

> I have to add a few words about the Indians and the exact position on the Nass River. At the time of the meeting of the Indians in Victoria representatives of the Nass River Indians, to the number of five - each from a separate village and representing together the whole tribe - waited upon me and asked me to lay especially before your government the position that exists in the Nass River Valley.

O'Meara then discussed some circumstances connected with the Nishga claim. He reminded the Prime Minister that the people "based their claim on the 1763 Proclamation especially reserving the country of the far west for them and guaranteed to remain theirs through the protection of the Crown." He had recently called on officials at the Land Office in Victoria to show them plans of the Nass River Valley. The

scores of applications for land purchases in the Valley had amazed O'Meara. Therefore, to assert their claims to the territory, the Indians had drawn up a strong statement beginning: "Standing well within our constitutional rights we prohibit you from entering this territory..." and they had served copies of this statement upon those going into the valley with the intention of settling there. O'Meara also reported that the Provincial Government continued to take applications for purchase of land in the Valley, the attitude of the Premier being that if the Nishga, or any other Northern natives, should use force to keep out settlers, "he would send in hundreds, and possibly thousands, of the Provincial Police."[24]

In support of O'Meara's delegation, a group of chiefs representing nine tribes sent a memorial to the Minister of the Interior refuting what they felt were incorrect statements of the Provincial Premier. The delegation of "Friends" did not leave Ottawa empty-handed. They reported that the Prime Minister had replied that the Dominion Government accepted its position as being the guardian of the Indians and must look after the Indians if their rights were impaired. The Prime Minister also reminded the delegation that it was not easy to bring a government, in this case the British Columbia Government, to court and that if the British Columbia Government contended that Indians have no right and no claim,

the Dominion would try to have Premier McBride agree to place the case before the Supreme Court and the Privy Council to seek a determination of the matter. Laurier was also reported to have said that the Indian claim deserved to be tested in court and for this reason he was happy to report his Government's willingness to submit to the Imperial Government the report which the delegation had asked to be sent. [25]

That the situation in the Nass River Valley was deteriorating under the impact of settlement is evident from a letter sent to the Vancouver World, April 27, 1911, by the Anglican Archbishop of Caledonia:

> In the Nass River there has been a particularly bad feeling among the Indians. There, our missionary, Rev. J.B. McCulloch, is doing his utmost to promote loyalty to the King. And it is a difficult task. If the missionary attempts to combat the resentment which the Indians bear the land grabbers, the natives get it into their heads that the missionary is against them and is aiding the white men who are making it unlivable for them along the river banks. [26]

The Victorian Colonist, July 21, 1911, carried a letter from S.W. Pollard, Chairman of the Indian Land Committee, a Nass River Indian, who claimed that the people of the Nass River were "law-abiding and loyal subjects of the King" and threatened nobody. Indeed, the Indians had resisted efforts of "certain unscrupulous white men" who endeavoured to excite them. The thousand Indians now living off the lands of the Valley were raising produce needed by towns growing up in

Northern British Columbia. The writer also claimed that over the past fifty years, whites had enjoyed an equal opportunity to cultivate land in the Nass River Valley but had "done nothing" and even now "did not want the land for cultivation but for speculation." He ended his letter by saying that the people "desire the Nass River Valley lands to be withdrawn from settlement and wholesale staking, until Indian claims are rightfully settled." [27]

Under the administration of Laurier, the Dominion had appeared to be set for a judicial hearing on the question of Indian land claims in British Columbia, a course favoured by Indian leaders and their white supporters. But the 1911 general election saw the defeat of the Liberals and a Conservative government under Robert Borden in power. The new Prime Minister received a petition in March 1912 asking for his support in seeking a judicial decision on the land claims issue. The Dominion adopted a conciliatory attitude and resumed negotiations with British Columbia in an effort to settle the problem of the aboriginal title claim, the reversionary interest held by the Province, and reserve acreage. By Order in Council of May 24, 1912, Dr. J.A.J. McKenna was appointed with the designation of Special Commissioner to investigate Indian claims and to negotiate with the Provincial Government for the settlement of problems in connection with these claims.

It was McKenna's conviction that the problems of the Indians which resulted from the Province's reversionary right could be settled only by a special commission representing both governments. To this proposal Premier McBride agreed. Out of this McKenna-McBride Agreement came the Royal Commission of 1913. Its members were J.P. Shaw and D.H. Macdowall representing British Columbia; N.W. White and J.A.J. McKenna representing the Dominion; and E.L. Wetmore, a joint appointee who became the Commission's chairman. The terms of reference under which the Commission would operate were centred around issues relating to reserves. Reserve lands which the Commission found to be excessive would be subdivided and auctioned by the Province which would then share the proceeds with the Dominion Department of Indian Affairs. Should the Commission find that some bands required more land or that new reserves were needed, the Province would facilitate the acquisition of such land. Once the Commission had completed its survey of reserves, all such land would be conveyed to the Dominion together with all rights of control. Only in cases where a tribe had become extinct would the unoccupied land revert to provincial control.[28] The Commission presented its final report in June, 1916 but issued interim reports. Working well within the scope of its terms of reference, the Commission concerned itself with the problem of acreage. But, as has been previously noted,

the Indian protest had developed from a concern over acreage to the more fundamental concern over aboriginal rights. The Commission did not address itself to this problem and the struggle for recognition of Native title to ancestral lands took a dramatic turn when, just two months after the Commission began its work, a group of Nishga presented a Petition to the Privy Council in London, May 1913.

For the next three years, the protest over Indian land rights in British Columbia would, as a result of this Petition, revolve around the Nishga Tribe. The move to by-pass Canadian courts could have been the result of the Nishgas' perception that the St. Catherine's Milling Case had demonstrated how heavy the odds were against a claim for recognition of Indian title in a Canadian court. Another factor influencing the Nishga decision to appeal directly to London could have been the encouragement the tribe had received from Laurier before he was defeated in the 1911 general election. In a printed pamphlet written by Arthur O'Meara on behalf of the Friends of the Indians, and sent to the Minister of Justice in April 1913, the "honorary advisor to the Nishga" claimed that in May 1910 the Department of Indian Affairs had instructed its agents to assure British Columbia's Indian leaders that a judicial decision on their claims would be secured. O'Meara also referred to the Prince

Rupert meeting with Laurier when the former Prime Minister was reported to have assured a delegation of chiefs that their claims would be submitted to the Judicial Committee of the Privy Council. In May 1911 a delegation of "Friends" had persuaded the Government of Canada to send a despatch reporting in part on the 1909 Petition to the Secretary of State for the Colonies who told that "an equitable solution should be arrived at." O'Meara then referred to assurances of action obtained from Prime Minister Borden and explained that after considering the difficulties that had accompanied the 1909 Petition the Nishgas had, in August 1912, decided to independently place a petition before the Privy Council. In January 1913, the Nishga Tribe had prepared an explanatory statement for submission to the Secretary of State for the Colonies and members of the Dominion cabinet, claiming that aboriginal rights had been guaranteed by the 1763 Proclamation and recognized by various acts of the Parliament of Great Britain, and condemning the "attitude of neglect and unco-operativeness of the British Columbia Government." O'Meara claimed that on March 27, 1913, in a meeting with the Prime Minister and the Minister of Justice, the latter had supported the proposed action of appealing to the Judicial Committee.[29]

The account given by O'Meara of events leading to the decision to send the Petition to London has an echo in a

statement issued in 1916 following a conference of British Columbia Indians. This statement describes the McKenna-McBride Agreement as an act which the Indians interpreted as having the door closed against them. It was the Nishgas who then felt that a single tribe should present a direct and independent petition to the King's Great Court, the Privy Council, in hopes that the door to the Judicial Committee would then be opened, first for the Nishgas and later for all tribes.[30] It is clear that through their long experience in protesting the land policies of the Provincial Government and their unique tribal organization which made them the most tightly-knit of all Northwest Coast Indians, the Nishga were the most obvious choice for the move of sending an appeal directly to London.

Since the Nishga had carried on "full consultations" with the Dominion Government before sending their Petition, its contents should hardly have surprised the Indian Affairs Department. Containing fourteen points, the Petition stated the Nishga claim to the Nass River Valley, a claim based on the 1763 Royal Proclamation which gave the Tribe its rights under the British Crown. The Petition again asserted the Nishga belief that the disputed territory had never been ceded to, or purchased by the Crown "or by any other person whomsoever." The territory now known as British Columbia had, through various Imperial Statutes,

been recognized as part of the "Indian Territories". But certain actions of the Provincial Government, carried on under terms of its "Land Act", were violations of the 1763 Proclamation and constituted threats to the rights of the Nishga Tribe. The protests against these acts had gone unheeded by the Provincial Government which had persisted in its policy of surveying and selling Indian land in the Nass River Valley. The Petition concluded with a reference to the Agreement of September 1912 and a claim that the actions of the Provincial and the Dominion Governments could not take away any of the rights claimed by the Nishga tribe.[31]

In an explanatory statement prepared for submission to the Secretary of State for the Colonies and to some members of the Borden cabinet, the Nishga had listed four advantages that would result from the recognition of aboriginal rights. First, Indians would be placed in a position to reserve for their own use and benefit such portions of their territory as would be required for the future well-being of their people. Secondly, they would be able to use in a much more advantageous manner than before the fisheries and other natural resources pertaining to their territory. Thirdly, they would be able to work towards the ending of the system of reserves now being applied and the instituting of individual ownership. Also, the uncertainty and unrest would come to an end and the Indians would be able to take

their place as citizens.[32]

After receiving the Petition on May 21, the Privy Council referred it to the Dominion Government on June 19, 1913. A letter from the Lord President of the Privy Council sent to the London lawyers of the Nishga explained that the Petition had not been referred to the Judicial Committee because a Royal Commission appointed under the Agreement of 1912 was at that time considering the whole question of aboriginal rights. This information was incorrect as the terms of reference of this Royal Commission did not include any consideration of native rights, an item quickly seized upon by a delegation of Nishgas who presented a memorial to the Royal Commission in Victoria on September 19, 1913. Furthermore, the delegation reminded the Commission of its own refusal to consider the aboriginal title question because it lacked the authority to deal with the matter.[33] The Nishgas protested the manner in which their claims were being dealt with and reminded the Commission of the Prime Minister's promise not to allow it to arbitrate in the Nishga claim. This lack of confidence in the Commission had some foundation in the early actions of the group who had shown that they would be quite amenable to removing land from Indian reserves if faced with a'good'case to do so.[34]

The Indians saw danger in what would happen to their title claims if these were not met before the Commission

completed its delimitation of reserves. This would mean that if they surrendered title to their lands, any compensation paid would be for land that had been reserved, and not for those parts of the province not yet covered by a treaty. The expectation of a large award in compensation would thus be diminished. Any hopes of achieving a settlement close to their original demands were pinned on their being able to obtain a judicial decision from a court outside of Canada, in this case, the Imperial Privy Council. But the Indians' legal counsel had been advised that if the Petition was to be considered by the Privy Council, the matter must be litigated in the Canadian courts.[35]

By this time a new figure had appeared in the complicated issue that bedeviled the Borden government: Duncan Campbell Scott had been appointed Deputy Supt.-General in the Department of Indian Affairs on October 11, 1913. By the time of his appointment, Scott had already known of the McKenna-McBridge Agreement, the Nishga Petition, and the referral of the latter to the Dominion Government. He had to act immediately, and called a series of meetings with the legal advisers of several Indian groups. Scott, as a result of these meetings, felt convinced that the Indians of British Columbia held "erroneous" views about the nature of their land title and exaggerated ideas of its value. He also felt that Indians in British Columbia were under misconceptions

as to the conditions which had governed treaties between the Crown and Indians in other provinces. As a result, Indians expected compensation of "very large value", an important factor in the pressure being brought to bear on the government. Scott decided to counter with a memorandum submitted to the government on March 11, 1914. His proposals were accepted by Order in Council of June 20, 1914. His main point was that the claim be referred to the Exchequer Court of Canada when the Indians had agreed to accept the findings of the Royal Commission on the reserve question, and that the Indians would then accept "benefits to be granted for the extinguishment of title in accordance with the past usages of the Crown."[36]

Although a form of agreement with the Indians was prepared, nothing came of the proposals because these were condemned outright by legal advisers to the Indians. The major objection raised was the suggestion that the Royal Commission should be the arbiter in land claims, the Indians still being under the impression that their Petition was before the Privy Council and that a ruling was delayed only because of procedural problems. Some inter-departmental correspondence indicated that the Scott proposals were in line with what had already become the course of action of the Dominion Government. In a letter to the Minister of Justice,

William Roche, Supt.-General of Indian Affairs, asked for clarification of the legalities involved in the Nishga presentation made to the Royal Commission.[37] Doherty replied on December 17, 1913:

> I should be disposed to think that the Imperial Government would not be inclined to initiate proceedings for the determination of the Indian claim, if there be a remedy by proceedings in the local courts, nor can I see any reason why the claim should not be determined locally if the Government of Canada should determine to press it...
>
> If the Government propose to maintain the claim of the Indians, it would be advisable to institute proceedings in a proper case under the statute to which I have referred, and the case could then be carried, if necessary, on appeal to the Judicial Committee with the advantage of the opinions of the local courts as in ordinary cases. If the Government do not propose to uphold the claim, I think the inadvisability of making any reference of this petition should be represented to the Colonial Office; and the Indians would in consequence presumably be left without any intervention or support from this Government and in face of the deliberate opposition of Government of British Columbia, to pursue such legal remedies on their own behalf and at their own expense as the very meagre prospects of the situation might afford.[38]

The tactics of the Dominion Government were becoming clear. The Petition should be downplayed as much as possible, lest it provide a rallying point for more Indian protest, and this could best be done by seeking a settlement through the intervention of Canadian courts, if a judicial decision were needed.[39]

Opposed to this was the attitude of the Indians who

felt that by agreeing with the Dominion Government, they would not have a settlement on their own terms. They sent a deputation from the Nass River Valley to interview Scott and other officials and were reminded of a letter sent by the Privy Council to the effect that the Petition was in the hands of the Dominion Government. To this the Nishga delegation replied that they could not accept the Scott memorandum and had counter proposals. There were four important points in the Nishga submission. (1) That when the Royal Commission on Indian Affairs for the Province of British Columbia had published its findings, each tribe that may consider such findings insufficient shall be permitted to apply for additional lands to be reserved. Should such application not be agreed upon by the two governments and the applicants, the Secretary of State for the Colonies, acting in terms of Article 13 of the "Terms of Union" should act as arbiter. (2) The Nishga proposals also stated that in fixing compensation, regard should be had to all terms and provisions of any Treaty made between the Crown and any tribe of Indians in Canada. (3) A third proposal stated that in fixing compensation, regard should also be had to all restrictions and disabilities imposed upon Indians by Provincial Laws and those imposed by Canadian regulations relating to the Fisheries. (4) The final proposal asked that all remaining matters, including an equitable method of fixing

compensation, should be adjusted by enactment of the Parliament of Canada.

By Order in Council of June 1915, the Dominion Government rejected the Nishga proposals on the grounds that the Royal Commission was already a joint body representing both governments and therefore its findings should be regarded as final. The Government could not agree to any proposal that would reopen the question of Indian Reserves in British Columbia. As for the three other proposals made by the Nishga, the Government position was that the June 1914 Order in Council made provision for a judicial decision on the question of Indian title which, if found to exist, should be surrendered under terms "in accordance with past usage of the Crown in satisfying the Indian claim... before the case could be presented to the Exchequer Court." [40]

By now it had become clear that the conciliatory posture of the Borden Government had given way to a harder line. The First World War was in progress and the Government wanted the noisome problem of land claims settled. There were far more urgent calls on the resources of the cabinet than Indian land claims. Already in March 1914, W.D. Roche had urged the Prime Minister to expedite settlement by removing the onus of compensation from the Provincial Government to the Dominion Government, except for claims related to reserves. This, Roche reasoned, would remove any

serious provincial objection to the Dominion seeking a judicial decision.[41] There had also been some sabre rattling by D.C. Scott who, in a letter to O'Meara, had warned that if the Nishga did not co-operate with the Royal Commission, "which is to adjudicate finally on these matters, they would appear to close all channels of action for the future." [42]

An interesting sidelight into the workings of the bureaucracy that was dealing with the Nishga Petition can be found in a Memo from the Department of Indian Affairs, dated September 1, 1915. The Memo outlines "action" taken by the Government on the question of Indian land title in British Columbia as follows:

| | |
|---|---|
| November 3, 1913 - | Dr. Roche presents Nishga Petition to the Hon. C.J. Doherty. |
| December 17, 1913- | Doherty advises Roche with reference to the Nishga Petition. |
| October 26, 1914 - | O'Meara addresses Doherty on the Nishga Petition. |
| November 14, 1914- | Doherty advises O'Meara "not to advise or concur in any proceedings looking to a decision in which the courts of the Dominion shall not have an opportunity to express their views." |
| June 19, 1915 - | An Order in Council confirms the previous Order in Council of June 20, 1914. [43] |

The exercise in paper-pushing had not produced any real results. Was this because the two levels of government had still not grasped the urgency with which the Nishga viewed the settlement of their claim? Of course, the official view

was that the Royal Commission must first complete its findings. Then, presumably, the Indian tribes would be willing to settle on the government's terms, as long as there was no outside interference.[44]

This latter factor could not be ignored. The official mind was extremely sensitive to frequent reminders that others were carrying out a watching brief on behalf of the Indians. As always, the "Friends" were vocal. At their 1915 Conference, called to consider the Nishga Petition, they had scoffed at the Order in Council which asked the Indians to surrender their title before submitting the question of title to the Exchequer Court of Canada. This, said the Friends, was like saying, "If you first surrender all your rights, we will submit to the courts the question whether you ever had any rights." The Conference also pointed out that no assurance had been given that the Terms of Union would be practically carried out. On the contrary, the Indians were being asked to accept the findings of the Royal Commission as a final settlement. The "Friends" again stated their belief that the only real hope for the Nishga lay in directing an independent petition to the Judicial Committee. The Friends also called on other tribes to back the Nishga and to consider similar action as that of 1913.[45]

More pressure on the Dominion Government came from a

London-based group led by Canon Tucker of St. Paul's. They had published a two-page pamphlet calling for support of the Nishga Petition. Canon Tucker had also written to William Roche criticising his Department for its "failure" to act on Indian claims. In his reply, Roche made four points: he questioned whether the provision of funds for organizations such as the "Friends" was appropriate; he expressed the opinion that the only "constitutional method of obtaining the judicial view of His Majesty in Council relating to a question limited to the internal affairs of Canada" was by appeal from the local courts; he stated that the Nishga Petition had never received any support from the Government; and, he reiterated the official stand that any court action on the title issue would have to be preceded by acceptance of the Order in Council of 1914 and then, only, would the Government be ready to provide the Indians with assistance to carry their claim through to the Judicial Committee of the Privy Council.[46]

Official touchiness at the prospect of "outside agitators" had long been known. Despite the determination of the Nishga, some officials were still convinced that the Indians would "co-operate" if left to their own devices. Shortly after the Tucker correspondence, the Department of Indian Affairs received a report from Commissioner McDowall on his visit to the Nishga in October 1915. He had found

"useful and earnest support given by certain influential members of the Nishgas" and singled out three men, Woods, Mercer and Barton as being especially friendly. They had, according to McDowall, persuaded the Indians to omit all reference to Indian title from discussions the Commissioner had conducted. The inference was plain: the Indian children would all obey their great white father. Just leave them alone![47]

Another aspect of the Indian land protest was the manner in which a small tribe, the Nishga, had become the focal point of the struggle for aboriginal title. The effort was more remarkable if one bears in mind that the tribe, according to the 1914 census, numbered a mere 807 souls spread over thirty reserves in the Nass River Valley.[48] But there are plausible explanations for this role of the Nishga. Their remoteness had made them an independently-minded people with a strong sense of self-sufficiency. Blessed as they were with a beneficent environment which supplied most of their needs and still provided them with the wherewithal to play an important role in the Indian economy of the Northwest Coast, the Nishga had developed into a proud people. Over the ages that they and their forebears had occupied the Valley, they had resisted intrusions by other native groups and would not now tolerate white newcomers with their alien ideas of land tenure. Aided in

their struggle by a closely-knit tribal structure, the Nishga were probably the most unified of all West Coast tribes and their leaders could depend on tribal support in the long campaign to raise funds, draft petitions and send delegations to fight for the cause of aboriginal title. More than that, the Nishga were attracting the kind of support that pointed to the long-awaited goal of a unified voice for the Native people. In February 1915, at Spence's Bridge, a coalition of Coast and Interior tribes formed the Allied Tribes of British Columbia to further the goals of the 1913 Petition. In the minds of the Indians, this Petition had assumed vast importance and they were still convinced at this stage that the Privy Council was considering it. While the Allied Tribes organized, the Nishga continued to pressure the Dominion Government.

In April 1916, a Nishga delegation spent six weeks in Ottawa where it placed its case before the Prime Minister, the Minister of the Interior, and the Deputy Superintendent of Indian Affairs. Delegates also met with Sir Wilfrid Laurier, reminding him of statements made at Prince Rupert in 1910 and seeking support from the opposition in Parliament. The Delegation emphasized that the Royal Commission's report was expected shortly and asked that it not be finally dealt with until issues contained in their Petition had been decided or,

at least, until Indian tribes had been allowed to make representations regarding the Commission's findings. Since the delegates did not obtain a definite answer from the Government, they placed copies of the statement with the Prime Minister, the Minister of the Interior, and sent copies to the Governor-General and the Secretary of State for the Colonies. They also declared their intention of doing all they possibly could to bring their Petition before the Judicial Committee of the Privy Council.[49] Response to this proposal was quick: on April 10, Dr. Scott reminded his assistant, W.H. Walker, that it would be "inadvisable to accept these proposals" and recommended that "the terms of the Order in Council of the 24th June 1914 be not modified or altered."[50]

For the Allied Tribes, the next move was a conference in Vancouver when they combined with the Indian Rights Association in June 1916. Appropriately, the first speaker was a Nishga, Chief Andrew Barton, described as "eloquent and to the point" by a news reporter. Barton represented the new wave of Indian leaders who were rapidly developing skills as lobbyists, propagandists and political tacticians. In his ringing address, the Nishga chief reaffirmed "our main desire is the acknowledgement of our tribal rights to the land, with no clash with the rights of the neighbouring tribes... We claim that our right should be declared in

court before we choose what treaty to accept.[51] The Conference approved two resolutions:

1. that the terms of the Order in Council of June 1914 be rejected as being unsatisfactory;

2. that a committee be formed to devise a general plan of action, to report to all tribes on the results of their deliberations, and to work for the preservation of all rights and claims in cooperation with the Nishga Tribe.

The Conference also considered the claim made by both levels of government that Indians do not own the foreshores to their reserves. Another topic for debate was the persistent claim of the Provincial Government to a reversionary interest in reserve lands. (It was later learned that the Provincial Government would give up its reversionary interests if the Indians agreed to accept the findings of the Royal Commission.) A third topic covered at the Conference revolved around the Government's failure to discuss hunting and fishing rights of Indians.[52]

The alacrity with which the Committee, decided upon by the delegates at this Conference, was formed is an indicator of the zeal that permeated the protest movement. Reporting later in June, under the signature of the Rev. Peter Kelley, a Haida, the Committee recommended that the Nishga Petition be recognized and accepted as a test case by all the Indian tribes of British Columbia. The Committee also recommended that those matters not specifically included in the Nishga

Petition, such as Indian rights in hunting and fishing, rights in the fore-shores of reserves, and the question of the reversionary interest claimed by the British Columbia government in Indian reserves, be brought before the Judicial Committee of the Privy Council, for decision if possible at the same time as the Nishga Petition, in whatever manner may be advised as most expedient by counsel in Canada and England. The Committee further stated that "Indians are subjects of His Majesty and the obligation for their protection has been placed on and accepted by the Dominion of Canada, but Indians are neither wards nor citizens of the Dominion and there existed no real relation between the tribes and Canadians." Another point to be emphasized was the right to free speech and assembly, the right to collect funds from the tribes, and the right to be advised and represented by counsel of their own choice.[53] This last section of the Committee's report was not just rhetoric, it was intended to still the critics who maintained that white agitators, working for monetary gain, were at the root of the protest movement.

The Conference and its aftermath had been remarkable for its spirit of moderation. While it was still the prime objective of the movement to bring its case to the attention of the Judicial Committee, the Indians were willing to accept an out-of-court settlement which they felt was

reasonable. In reporting this to Dr. Scott the Secretary to the Committee, J.A. Teit, claimed that he had persuaded the Indians from including a statement "that the Indians would not be willing even to consider the findings of the Commissioners." [54]

Meanwhile, the tireless O'Meara periodically sent copies of a petition that the question of land rights be decided by a Judicial Committee of the Privy Council, to various ministers, and the Secretary of State for the Colonies. O'Meara's efforts drew a reply from the Governor-General, the Duke of Connaught, in a letter which was to add to the growing confusion over land rights:

> His Royal Highness has interviewed the Honourable Dr. Roche with reference to your letter of the 29th May and your interview with me and I am commanded by His Royal Highness to state that he considers it is the duty of the Nishga Tribe of Indians to await the decision of the Commission, after which, if they do not agree with the conditions set forth by the Commission, they can appeal to the Privy Council in England, when their case will have every consideration. As their contentions will be duly considered by the Privy Council in the event of the Indians being dissatisfied with the decision of the Commission, His Royal Highness is not prepared to interfere in the matter at present and he hopes that you will advise the Indians to await the decision of this Commission. [55]

This was in contrast to the sharp letter received from C.J. Doherty two years earlier when the Minister had told O'Meara that no appeal could be heard by the Privy Council before the courts of Canada had heard the claim. Was the

letter an indiscretion on the part of the Governor-General? Was there no co-operation between his office and the Dominion Government? Would the letter increase the tempo of the protest movement? Would the two sides in the issue of the Judicial Committee now find themselves in positions which would preclude any compromise? The new counsel for the Allied Tribes had made a startling beginning in his new role.

Another major development in 1916 was the publishing of the Report of the Royal Commission. On June 30, four massive volumes were presented to both governments. The Commission had settled the question of reversionary interest and the equally vexing one of acreage and location of reserves. Even before it had begun its work, the Committee, because of an understanding between McKenna and McBride, had discussed the issue of aboriginal title. It had added 456 reserves to the existing 1,103 in the Province, added 113,000 acres to reserve land, and had submitted a list of suggestions designed to benefit Indians, these ranging from recommendations for the administration of reserves to fisheries. But the Commission had also cut off 47,000 acres from existing reserves, land which the Indians claimed far exceeded in value that of the additional acreage.[56] In any case, the Allied Tribes were not about to give up their struggle. The Commission's report was not regarded as a final arbitration. That would

come from the Judicial Committee:

Protest mounted quickly. The Standing Committee of the Allied Tribes repudiated the Report on grounds that it had not dealt with the fundamental question of aboriginal title, that it had ignored the clause in the Terms of Union which permitted the Secretary of State for the Colonies to act as an arbiter, that it had added lands which were inadequate and of inferior quality to those cut off, that it had failed to adjust inequalities between tribes, and that it had not recommended that the half of the proceeds from cut-off lands, claimed by the Province, should be paid into a trust fund for the benefit of Indians.[57] The statement of the Allied Tribes included a list of proposals covering the now-familiar ground of Indian title, adequate reserve acreage, fair compensation for land taken away, and hunting-fishing rights. Of these proposals the two which had most bearing on the Report of the Commission were numbers 9 and 10 dealing with beneficial ownership of land and a system of individual title.[58]

Now that the Report had been lodged with both governments, the three sides in the triangle began their manoeuvers. For their part, the Allied Tribes decided that pressure on the Dominion Government should be continued and issued a pamphlet, "Statement of the Committee of the Allied Tribes of British Columbia for the Government of Canada."

> The Committee, having some reason to fear that the two Governments may at an early date pass Orders-in-Council adopting this Report, is desirous to remind the Government of Canada of the strong representations which ever since the Commission was appointed, have been made by the Indian tribes.... Now we declare that until either the Governments shall have conceded the tribal ownership of our territories claimed by us and upon the basis of such ownership shall have adjusted our foreshore rights...or the issues contained in the Nishga Petition and all other issues connected with them which require to be decided, shall have been decided by the Judicial Committee... we are unanimously and firmly determined to stand with the Nishga Tribe and not to consider the Report of the Royal Commission. [59]

The reference to a decision by the Judicial Committee of the Privy Council at this stage, February 5, 1919, seems coincidental since less than two months earlier, lawyers representing the Nishga Tribe in London had received a reply from the Lord President of the Privy Council in response to a Petition sent earlier in 1918. Dealing with the request that the Nishga Petition be heard by the Judicial Committee, the Lord President stated that if the Tribe contend that they "have suffered an invasion of some legal right," the proper course would be to litigate the matter in the Canadian courts "from whose decision an appeal in the ordinary way can come to the Judicial Committee." The Lord President also expressed his opinion that the course advocated by the Nishga "would be an unconstitutional interference with the local jurisdiction." The letter also stated that if the

Indian claim had no legal basis, the constitutional procedure then would be for the Secretary of State for the Colonies to recommend referral to the Judicial Committee. Thus, the Lord President advised the Nishga that he could take no further action on the Petition.[60]

As already noted, the Lord President's letter, confirming the stand of the Dominion Government, did not daunt the Indians. They still worked under the assumption that the Nishga Petition would reach the Judicial Committee. This is evident from a letter written on April 25, 1919 by James Teit.[61]

> It may be or probably is true, that a good deal of the money spent by the Indians has been squandered unwisely and without effect, but the majority of the chiefs and Indians of almost all the tribes are very anxious to have the question of their rights determined and so far they favor the plan of trying the method which has hitherto been followed by them and advised by the Friends of the Indians and the Committee of the Social Service Council of Canada. I believe they have done this because the Government's proposals were not satisfactory to them or did not meet them far enough.[62]

A study of news reports, circa 1919, would suggest that while the Allied Tribes had a strong central organization, with promising leaders like Peter Kelly of Masset emerging, organization at the local level was weak. One exception was the Nishga Tribe where the protest movement flourished. Thus, in September 1919, Indian Agent C.C. Perry once more reported to his superiors about the "stir on the Nass River."

This time, the action took place in the local Salvation Army Hall where a mass-meeting was called to hear the Rev. O'Meara, and to voice protests "at the Government and the white men in general." Perry concluded with a plea "to have these questions dealt with as expeditiously as possible...as the feeling is growing stronger in this connection amongst the Indians." [63]

Even age-old quarrels between the Nishga and Indian groups who claimed parts of the Nass River Valley were being thrust aside in the quest to bring the Petition to the Judicial Committee. On November 21, 1919, the Prince Rupert News reported on a rally held to support the Petition of the Nishga Tribe. Differences were settled as the Nishga and their neighbours pledged mutual support in "carrying forward the Indian case, until either they have obtained a judgement of the Privy Council or the governments have arrived at a basis of settlement with them."[64]

Yet another voice warned the Indian Affairs Department of the growing dissent, this time Agent W.E. Collison:

> I might here draw attention of the Department to the unsettling effect this continued agitation is having upon the Indians. Within the last two months several meetings, attended by delegates from the several Indian tribes, have been held at Prince Rupert and also on the Upper Nass River for the purpose of discussing and furthering the aims of the land question. More tribes are being drawn each year into the agitation and the general effect of this continued unsettlement is most unsatisfactory. In many ways it is gradually undermining the loyalty of the Indians and creating

> a spirit of suspicion and distrust among them regarding anything that may be done to further their interests. The prevailing idea being to let everything remain as it is until the "land question" is settled. I need not point out that so long as this state of mind exists, all progressive movement is handicapped and hampered. Knowing them as I do and having the advantage of being able to speak to them in their own languages, I feel that an early solution of this vexed question would be in the best interests of the present as well as the future welfare of the Indians. [65]

In the face of such evidence, that the Indians were not going to accept the report of the Royal Commission, what was the second side of the triangle, the Provincial Government, doing? The Liberals under H.C. Brewster had come into power in November 1916, shortly after the Report had been published, and showed much less enthusiasm for the work of the Royal Commission than had the previous regime. Public opinion was also swinging against the seemingly unending dispute over land claims. The Victoria Daily Times of May 1, 1917, attacked the cost ($316,782.00) of the Commission and acidly commented that but for a change in government, "the Commission might have become a permanent institution."[66] The new government opposed its predecessor's willingness to surrender reversionary rights, and, despite the efforts of Dr. McKenna to seek a compromise, the whole issue of aboriginal rights again flared up. In March, 1920, the Allied Tribes produced a list of grievances under the heading "A Half Century of Injustice Towards the Indians of British Columbia"

in which they charged the Dominion Government with neglect of its duty as protector of Indian interests, refuted any suggestion that Canadian courts could adjudicate in the land claim case, declared the report of the Royal Commission to be weighted against Indian interests, and the McKenna-McBride Agreement ultra vires.[67]

When John Oliver became Premier in March 1919, he showed a more sympathetic attitude towards the Indians and requested the Allied Tribes to submit their proposals for settlement of the land claims. The organization responded by holding a series of meetings to draft such a proposal. The Provincial Government had also passed three pieces of legislation which were to attract the attention of the Department of Indian Affairs: an amendment to the Placer Mining Act; an amendment to the Provincial Mineral Act; an Act allowing the Province to negotiate directly with the Indians. D.C. Scott, in a memo to Prime Minister Arthur Meighen, warned of possible danger and reported that he had objected to the Provincial Government without success. Scott also notified the Prime Minister that British Columbia wanted to reconsider six reserves listed in the Commission's Report. Scott indicated willingness to abandon the present position of complete confirmation of the 1916 Report and asked for Meighen's advice. Responding in another memo,

the Prime Minister concurred with Scott and added in the margin: "We cannot press the matter further. It is a responsibility of the Justice Department."[68] Either the Dominion officials were capitulating in the face of continued obstructionism on the part of the Province, or the Dominion Government was frustrated over the long delay in adopting the 1916 Report.

In June 1920, the Allied Tribes issued a statement declaring their willingness to compromise in the question of settlement of unsurrendered lands. The Dominion Government's draft bills, Numbers 13 and 14, putting into effect the Royal Commission's Report, were singled out for criticism as the Allied Tribes saw in these bills a tactic to bring about compulsory enfranchisement of Indians. The statement listed five reasons for opposition to the franchise at this stage: (1) tribal unity would be destroyed; (2) tribal rights would not be recognized; (3) the Nishga Petition would be frustrated; (4) reserves would break up; (5) many Indians would become drifters. The statement called for a special committee to study Bills 13 and 14.[69] Once more, the exigencies of practical politics made for strange bedfellows: the Provincial Government, unhappy over certain sections of the bills, joined the Allied Tribes in opposing passage of the legislation. The passage of Bill 13 in April 1920 was accompanied by various pledges to the Indians, designed to

calm their fears over their settlement claims. Once a change in government had taken place in Ottawa, King's Liberals found the John Oliver Provincial Government quite willing to negotiate and sent the new Superintendent-General of Indian Affairs, Charles Stewart, to Victoria.

The third side of the triangle, the Dominion Government, had been urging adoption of the 1916 Report and had prepared enabling legislation to that effect. By early 1920, the Meighen government was expressing concern over the lengthy delay that resulted from provincial tactics. The Prime Minister's letter to T.D. Pattullo, British Columbia Minister of Lands, dated January 6, 1920, was urgent:

> The essential thing is to come to a solution of the Indian reserve problems of British Columbia. As stated in my letter of 1st December, the position of the Federal Government has been made known repeatedly and is thoroughly understood. We do not claim to be the sole arbiters of the question. We are not able, however, to progress toward a common understanding until we have at least the definite views of the British Columbia Government. After more than three years of waiting, and finally after perusal of your letter of December 19th last, we are still without those views and proposals.[70]

With the change in government the Liberals continued to press for some kind of settlement and Charles Stewart, Minister of the Interior and Superintendent of Indian Affairs, met with Indians in Vancouver in July, 1922. The friendly attitude of John Oliver's Government had encouraged the

Minister to hope for an early adoption of the Royal Commission's Report. Nothing notable appears to have come from the meeting of July 1922 except for a report that in his address on the 24th, Mr. Stewart had said: "....am authorized to say that the Federal Government is prepared to give the Indians of British Columbia everything that has been given to the other tribes of Canada, who, unlike you, have treaties with the Government."[71] Stewart promised to return the following summer for a further meeting.

In the interval, the protest movement continued to be active. In a letter to T.D. Pattullo, dealing with lands to be set aside for reserves, Agent-General Ditchburn noted: "As the Indians of the Nass Agency requested large territorial areas on the basis of 160 acres for each man, woman, and child, and all streams from their source to the peaks of mountains, with 160 acres of land on each side, it has been impossible for me to make any recommendations for these Indians as I considered that they were out of all reason."[72] And, to underline their determination, the Nishga, acting independently of the Allied Tribes, sent a telegram to the Governor-General on June 5, 1923 requesting that the Governor-General "not sanction" the proposed Order in Council which would allow for the adoption of the Royal Commission's Report.[73] Another development, while the Indians were

preparing for the next visit of Stewart, was a conference of the Executive Committee of the Allied Tribes. Held in Vancouver's YMCA Building on February 23, 1923, to decide on claims that were to be presented to the Federal Government, the Conference was noteworthy, in the Rev. Peter Kelly's words, for being the "first time in history our body is purely an Indian organization. It is for the Indians, by the Indians and all Indian tribes in the Province are represented."[74]

Did this last comment indicate that Indian leaders had grown in confidence to such a degree that they felt able to act independently of their white advisors, most notably, the Rev. O'Meara? By this time, Peter Kelly had emerged as a convincing speaker and a tenacious organizer. That his ability to create a "nuisance" had been noticed by officials of the Department of Indian Affairs becomes evident in a letter from Ditchburn to Scott in 1923. Complaining that Kelly had not been cooperating with him, Ditchburn expected that now that James Teit was dead "Kelly will consider himself the only authority to speak for the Indians in further negotiations and therefore it may be just as well for you to keep him guessing with regard to the set of encyclopedias which he asked you for, for as long as he expects something I am inclined to think he will not make much effort in opposition to a reasonable settlement of the aboriginal question - that is the Indian trait in him."[75]

Despite all the posturing, the fine rhetoric, and the expressions of concern for the welfare of his "Indian charges", Ditchburn revealed that the Federal Government's chief representative on Indian Affairs in British Columbia still could not shake off the condescending sneers, and stereotyped views of the settler mentality. Ditchburn's insulting comments on Kelly contrast with views published only a few weeks later in the Vancouver Sun. The author, Howard T. Mitchell, wrote of the Rev. Peter Kelly displaying "a high standard of intelligence," of his being someone who had "played an outstanding part in the missionary work of his church," and of "representing the younger generation of Indians who would work for their people."[76] A few years later, Kelly was to prove an impressive witness before the Joint Parliamentary Committee of 1927.

Certainly, there is evidence that some Indians were questioning the usefulness of Arthur O'Meara. A Constable Newnham, in a letter to Agent Collison, June 30, 1923, reported that the Indians of Kincolith in the Nass Valley had described O'Meara as "a fine old gentleman but of no further use to them." The Indians would not provide O'Meara with any money and, although pressing on with the idea of presenting their case to the Privy Council as soon as possible, had decided that "the services of Mr. O'Meara are

no longer needed on their behalf."[77] That some change in attitude towards O'Meara had taken place following the March 17, 1920 letter from the Governor-General, seems apparent. Shortly before the first meeting with Stewart, the Indians had questioned whether O'Meara should be retained as general counsel. When they met with Mr. Stewart, they designated O'Meara as "Counsel for the Alliance of Indian Tribes of British Columbia". Significantly, the Interior tribes no longer pressed for recognition of aboriginal title as a condition of settlement of claims, an indication that O'Meara no longer gave them advice. But none of this swayed the tenacious O'Meara from his determination to press for a hearing before the Judicial Committee. His spate of letters and memoranda continued to reach Ottawa. But, increasingly, it was the voice of Kelly, supported by Barton of the Nishga Tribe and Andrew Paull, now Recording Secretary to the Allied Tribes, that represented the Indians in their dealings with government.[78]

On July 27, 1923, a five-day conference at Vancouver, between Stewart and the Executive Committee of the Allied Tribes, convened. Mr. Stewart conceded that the Indians were entitled to a judicial decision and promised the assistance of his Department in seeking such a decision. Dr. Scott joined the Conference and negotiated with the Indians on a variety of topics including: fishing rights,

hunting licenses, timber rights, funded moneys, education, medical care, and hospitals. The Indians agreed that if their claims were met, they would not seek a judicial decision on their title. These claims were listed in a pamphlet and were later to become the basis for any deal involving extinguishment of title. At least one of these claims demanded Scott's immediate attention - that of fishing rights. Amazed to find that Indians were not allowed fishing licenses, outside of reserve areas, and then only for food-fishing, Scott negotiated with the Provincial Department of Fisheries and began the process which would allow Indians to become commercial fishermen on the same basis as white people were allowed to operate.[79]

At this point, a sharp difference in outlook between Stewart and his deputy, Dr. Scott, became apparent. While Stewart favoured a judicial decision, Scott felt that the Indians had made preposterous claims, were relatively well-treated in British Columbia, and could very well end up in a worse position than presently was the case, should they risk a court decision. His view is summed up in a letter to Stewart:

> The Indian claim is at best doubtful. They have been told by Hon. Mr. Newcombe that, in his opinion, they would not succeed. If they did not succeed, they would have nothing, or worse than nothing, to expect from the Province. Some of the Indians, urged by their advisers, say they wish "to press on to the Privy Council," but I do not think the Indians can be said to support

> this request unanimously. The interests of the Indian population generally would be jeopardized by a reference to the Courts, and we should, I think, resist, as guardians of their estate, all efforts to worsen the position of the Indians as a whole. [80]

The Indians, in addition to the list of claims submitted, also wanted equal representation on a new commission to investigate the Indian land claim, effectively annulling the Report of 1916. They also sought a settlement of two and a half million dollars and reimbursement to the amount of $100,000 of their expenses to date in seeking redress.[81]

Significantly, the Province had not sent any representatives to the Conference, arguing that issues concerning Indians were to be settled between the two levels of government. It seems that Scott's view prevailed in provincial circles for, shortly after the Conference ended, the Government of British Columbia, by Order in Council, adopted the Report of the Royal Commission. This led to furious activity by the Allied Tribes, anxious to persuade the Dominion Government to assist them in obtaining a judicial decision. In late 1923 the Allied Tribes presented a list of questions to the Department of Justice. The reply was that Statute 51 (Bill 13, enabling adoption of the Report) did not bring about "an actual adjustment of all matters." It was intended as "a legislative adjustment of all such matters and thus effecting final settlement under the laws of Canada without the concurrence of the Indian

tribes of British Columbia." [82] There were more last-minute protests in the form of memoranda by the Allied Tribes, but on July 19, 1924, the Government of Canada, by Order in Council, adopted the Report of the Royal Commission.

After eight years of intensive effort, the Indians had failed to stop passage of the Report. They felt that the Province and the Dominion no longer were receptive to their claims. The feeling that an appeal to the Privy Council was now imperative, grew to full pitch, and to this end, activity now was directed. In early October, a deputation of the Allied Tribes met with cabinet ministers in Vancouver, demanding recognition of the aboriginal title and promising a continuance of the struggle to take the claim to the Privy Council.[83]

Although the Nishga had played a secondary role in the past few years, their influence on the larger organization, to which they still belonged and in which one of their leaders, Chief Barton, was prominent, was clear. The Nishga tenacity of purpose, the unswerving drive that had characterized their earlier efforts to obtain recognition of their claims had become a part of the make-up of the Executive Committee of the Allied Tribes. Two Nishga tactics, that of sending delegations to officials and of regarding the

Judicial Committee of the Privy Council as the arbiter in their dispute with the two governments, had become part of the tactics of the Allied Tribes. Placing the 1913 Nishga Petition before the Privy Council still remained an important goal of the Allied Tribes. The Nishga had provided the catalyst around which the Allied Tribes had built their protest movement. In the Nass River Valley, the meetings continued. Groups at various Nishga village councils kept alive the hope of recognition of native title to the valley and representatives of the Dominion Government continued to report on the cool attitude shown by the Nishga to any attempt to provide them with "services."

As they had done before, the Nishga showed their familiar penchant for independent action when they decided to carry their struggle to the highest possible forum. Included in the party of Federal cabinet ministers who were visiting British Columbia in October 1924, was the Prime Minister, Mackenzie King. When he stopped at Prince Rupert on October 13, he granted a hearing to a delegation of Nishga, with O'Meara as their general counsel. The presentation, made by Arthur H. Calder, followed a now-familiar line. The Nishga wanted financial assistance from the Federal Government to carry their Petition to the Privy Council, a course said to have been approved by King's predecessor,

Laurier, in an earlier meeting with the Nishga. The delegates also reminded Prime Minister Mackenzie King of Stewart's statement in the House, indicating support for the Privy Council appeal. The Prime Minister's reply was in character. He promised to consider the matter and assist if such was felt to be the course that should be taken.[84]

The Nishga had not lost their impetus. A letter from Indian Agent W.E. Collison to his superiors in Ottawa warned of O'Meara's continued activity in the Nass Agency with the aim of raising funds for an appeal to the Privy Council. Collison added that he could not but notice a "distinctly hostileattitude on the part of the Indians towards the government and its officials. This attitude often found expression in violent speeches at public meetings, in denunciation of the government..."[85] By now, the Federal Government had become the target for Indian hostility, there being a feeling that the officials in Ottawa had betrayed the Indian cause and had not lived up to their obligation as guardians of the native people.[86]

Two items also added to the perplexity of the Department of Indian Affairs. The Provincial Government had stated a claim to reversionary rights of reserves falling in the Railway Belt. The Province charged that the Dominion Government's failure to recognise the cut-offs in the Belt

constituted a failure to complete the 1912 Agreement.[87] The Deputy Superintendent was at a loss as to a course of action for he wanted to avoid, at all costs, a court case with the Province, feeling that the latter was in a much stronger legal position than the one enjoyed by the Federal Government. The second item was a letter from O'Meara to the Minister of Justice (August 17, 1925) suggesting that a joint committee of Parliament be appointed, this committee to investigate the whole issue of Indian title. This represented a new strategy: the letter had not been sent to the Department of Indian Affairs but to the Minister of Justice. Speaking in the House of Commons, the Hon. Charles Stewart confessed his state of mind:

> I defy anyone to get them (the Indians) down to a concrete basis, as, for example, so much for education, so much for relief and so forth. That is one great difficulty and it looks hopeless to me... I do not know what to recommend. It seems to be an unending difficulty, and I do not see that the government would be warranted in paying expenses of representatives of the Indians to go over and argue the case before the Privy Council unless we have something very concrete presented to us.[88]

In June 1926, a memorial was presented to Parliament outlining the history of the Indian Claim and stressing the promise made by Charles Stewart that the Federal Government would assist the Indians in taking their case to the Judicial Committee of the Privy Council. The Petition contained in the memorial also included another request for a

Special Committee which could consider the safeguarding of the aboriginal rights of the tribes of British Columbia and other matters pertaining to the obtaining of a judicial decision on the land question.[89] In March, 1927, Parliament acted on this petition and appointed a Joint Parliamentary Committee, consisting of six members from each of the Houses of Parliament. British Columbia informed the Minister of the Interior that the Province would not be represented. The Committee first met on March 22 and completed its report on April 14, 1927.

Appearing as the first witness before the Special Committee, Dr. Scott gave a comprehensive review of the convoluted history of the Indian land claim issue. His sentiments echoed those he had expressed in earlier correspondence with Commissioner Ditchburn, namely, that the Indians of British Columbia enjoyed greater privileges than would have been the case had their title been extinguished by treaty and that, by inference, their claim was exorbitant and untenable. Scott saw dangers in any reference of the Indian claim to the courts, feeling that such action would impair the Agreement of 1912 and lead to events which could leave the Indians at great disadvantage. Even a successful appeal to the courts by the Indians would work to their disadvantage: "If the Indians win, there will be a cloud on all the land titles issued by the Province, and this point

will always be an obstacle in the way of reference."[90]

Two spokesmen represented the Interior Tribes: Chief John Chillihitza of the Nicola Valley Indian Tribes, and Chief Basil David of the Bonaparte Indian Tribe. Neither made a claim to any land, based on the principle of native title. On the other hand, both representatives of the Allied Tribes of the Coast, Andrew Paull, now General Secretary of the Tribes, and the Rev. Peter Kelly, stressed the aboriginal title as the foundation of their claim. This covered all lands of the Province other than those covered by treaty. Kelly expressed the confidence that his people had in the ultimate justice of the Queen. Should the plea fail, "then we would have to accept from you, just as an act of grace, whatever you saw fit to give us....If we press for that, we are called agitators, simply agitators, trouble makers, when we try to get what we consider our rights...if we are turned down now, if this Committee sees fit to turn down what we are pressing for, it might be another century before a new generation will rise up to get where we are today."[91] The Committee was impressed by Kelly's eloquence and dignity but not by the Rev. Arthur O'Meara, whose ramblings were to be his last hurrah. At one point in the hearing, a committee member told O'Meara that he was impeding the work of the Committee.[92] The other representative of the Allied Tribes, Andrew Paull of the

Squamish Tribe, spoke with wit and eloquence on the history of the Indian situation in British Columbia, and gained "national recognition" as a spokesman for his people.[93]

The Special Committee made two decisions of fundamental importance to the Indian people. One was its refusal to recognize aboriginal title to the lands in dispute. The Committee ruled:

> Having given full and careful consideration to all that was adduced before your Committee, it is the unanimous opinion of the members thereof that the petitioners have not established any claim to the lands of British Columbia based on aboriginal title ...it is the further opinion of your Committee that the matter should now be regarded as finally closed.[94]

The other item concerned a recommendation that an annual grant of $100,000 be paid into a fund for the benefit of British Columbia's Indians, this money to be used for technical education, the provision of hospitals and medical attention, the promotion of agriculture, stock-raising and fruit culture, and in the development of irrigation projects. The Committee ended its report with a suggestion that its findings be widely circulated amongst the Indians of the Province "in order that they may become aware of the finality of the findings and advised that no funds should be contributed by them to continue further presentation of a claim which has now been disallowed."[95]

Another part of the Committee's findings covered a

variety of claims as listed in the Memorandum sent to Ottawa in November 1919. The Committee dealt with some of the claims and provided information as to how these were being met and made recommendations on how these claims could be dealt with more effectively. Thus it assured the Indians that reserves not yet conveyed by the Province to the Dominion, including those in the Railway Belt, would be conveyed at a later date. The Claim (No. 4) that Indians be given foreshore rights in their reserve areas was dealt with through negotiations with British Columbia, the agreement stating that Indians be given riparian rights and foreshore rights as other citizens of the Province. The Committee also dealt with tribal ownership of reserves, individual ownership and title to parcels in reserve lands, and hunting, fishing and water rights. In general, the Committee met the claims or assured the Indians of positive action. However, the claim for reimbursement of money spent in advancing the cause of aboriginal title was turned down on grounds that such action had been on the initiative of the Indians.[96]

The Report of the Special Committee was regarded as a defeat for the Allied Tribes and for the Nishga in particular. Although the Rev. O'Meara still continued to collect money for an appeal to the Judicial Committee of the Privy Council until just a few weeks before his death at Chilliwack in

April 1928,[97] it was clear to observers that the 1927 Decision had shattered Indian desires to continue the struggle for recognition of aboriginal title. An air of defeat settled in and soon after the 1927 Report, the Allied Tribes of British Columbia ceased to exist. The great movement to have the Indian Claim heard before a Special Committee had been a rallying point and had provided much of the impetus for the Indians in their tenacious pursuit of the Department of Indian Affairs in a search of justice. In pressing for this Special Committee hearing, they had risked their long-held plan of a Judicial Committee decision. They had also passed up the option held out by the Federal Government, namely, that they take their claim to the Exchequer Court of Canada. Now they had lost entrance to all these avenues of appeal. The 1927 Report had been a final decision from which there could be no appeal. Had the Indians erred in their strategy? Should they have risked an adjudication by a Canadian court? There is some evidence that, but for the defeat of the Laurier government, the Indian title question would have been submitted to the courts. The matter was shelved until the 1920's and the push for a Special Committee which the Indians saw not as the hearing, but as a means of allowing them to take their case to the Judicial Committee of the Privy Council.[98] The question then is, was the decision to

seek a hearing before the Judicial Committee the correct one? There was one inescapable fact that faced the Indians and their advisers. Ever since the St. Catherine's Milling Case, every Canadian court, including those later involved in the Calder Case, had turned down the appellants for recognition of aboriginal rights. The Privy Council, because it was distant, could be expected to be more objective than the local courts might be. The same reasoning would apply when comparing British Columbia courts with the Supreme Court of Canada, the latter being more favorably disposed towards Indian claims. It is also ironic that Quebec, with its concerns for minority rights related to the situation of French-speaking Canadians, has consistently supported appeals of a political-social nature directed at the Privy Council. (Remember, the Privy Council is "an instrument of Colonialism!") Quebec has always felt that the Privy Council would ensure a fairer judgement.

The argument has been put forth that a better tactic than that of seeking a Judicial Committee decision would have been that of obtaining a Supreme Court hearing and then an appeal to the Privy Council. But we should bear in mind that the idea of taking complaints to "the Queen" had some appeal, not only to Indians but to whites as well. Whatever speculation is now possible, for the Indians who had built up their protests to a crescendo and had anticipated a

hearing before the Judicial Committee, the 1927 Report meant defeat, and a long hiatus in the land claims struggle resulted. But, this is understandable for the Committee's decision, pragmatic if not principled, was regarded as the final word and quickly went into effect. Sanders views the decision this way:

> You say, NO! you haven't got a claim. You say it in an odd way. You say, 'You haven't proved it.' To a lawyer this is an equivocal kind of thing. What standard is needed to measure proof? In any case, the Indians haven't gone to Ottawa to prove anything. They have gone to say, 'This should go to court. Give us a hearing before the Judicial Committee.' What the Parliamentary Committee did was to abort very quickly any such move and, at the same time, refer obliquely to 'conquest', historically a ludicrous notion in this instance. Then you say, 'We'll pay you a hundred thousand dollars a year, anyway to put you on the same basis as the Treaty Indians on the Prairies', thus making the whole idea absurd. Then you put the amendment in the Indian Act, preventing the collection of money to organize! [99]

As noted before, some critics of the protest movement maintained that the "agitation" over land rights was entirely the work of whites, most notably the Rev. Arthur O'Meara. In his article on O'Meara, Patterson remarks that "he gave rigid advice." [100] Whatever O'Meara's role, the idea of taking the claim to the Judicial Committee was probably the best possible course for the Nishga, and later the Allied Tribes. The tradition in the Empire surrounding aboriginal title held that the question should not be left to local

assemblies and courts. It would be far better to seek the ruling of judicial bodies that are as far removed from the scene as possible. Local assemblies were viewed as being one-sided in their attitudes to disputes over aboriginal title and thus not able to arbitrate fairly. Hence, the tradition of the Imperial Court's retaining control of indigenous affairs long after local assemblies had been given self-governing powers. In Canada, at least technically, control over Indian policy was retained by the Imperial Government as late as 1860.[101]

Was the effort to take the Nishga Petition to the Judicial Committee a complete failure? On the surface it would appear to have been so. After the collapse of the Allied Tribes of British Columbia, a new organization was formed. In 1930 the Native Brotherhood came into being. In contrast to the earlier organization, its members showed caution in their actions and avoided the land claim. They felt that because of the prohibition in the Indian Act (not repealed until 1951) they would jeopardize any chances they might have of working for the betterment of Indian people if a land claim protest were mounted. This view was not unanimous amongst members of the Native Brotherhood but, because of the division in their ranks, the leaders allowed the land claim issue to fade. Instead, the claims of the

Brotherhood became organized around a different approach.

Interviewed in Victoria, Frank Calder, then MLA for Atlin, stated that his people, the Nishga, never "dropped the case but carried the fight into other channels."[102] Even before the 1927 Decision, the organization and drive that had been fostered by the land claims dispute was being broadened to include other issues. The creaking and often cumbersome administrative apparatus of the Indian Affairs Department came under attack.[103] The missionary-inspired action to destroy totem poles was protested.[104] There were advances in educational facilities for Indians, most notably the building of Coqualeetza Institute in Chilliwack, of which Frank Calder is an alumnus. With the arrival of Charles Stewart in Vancouver, to confer with Indian leaders, the protest movement had scored a gain in prestige. Stewart was the first Superintendent-General of Indian Affairs to visit with Indians in British Columbia.[105] Shortly after Mr. Stewart's visit, Dr. Scott also met with the Allied Tribes and at once attended to the grievance over Indian fishing rights. This action continued until the 1930's when a share in the commercial fishing industry of British Columbia was firmly established for native fishermen. The campaign for what could be called "equal rights", the extension of the franchise to Indians, was launched now that any appeal to the Judicial Committee had been vetoed for it

was now considered politically wise to seek the right to vote. Appropriately, it was a member of the Nishga Tribe, Frank Calder, who became the first Indian to sit as a member in any Canadian Parliament. Mr. Calder became MLA for the sprawling riding of Atlin in 1949. The Potlatch Law had long been cause for anger amongst the Indians. Inspired by missionary zeal, the government of Canada had banned the ceremony which was at the centre of North-West Coast Indian culture. Potlatchers were jailed and the ceremony was carried on only under a cloak of secrecy. In 1951 the despised Law was dropped from the Indian Act. Another struggle revolved around payments of the old-age pension. Here, outright discrimination was practised, whites receiving nearly twice as much as the amount paid to Indians, and that only after a fight to bring about universal eligibility for pensions had been won. The Brotherhood started its own newspaper, The Native Voice, which was to become an important sounding board for Indian aspirations. First published in December 1946, The Native Voice kept alive the protest movement and focused on its leaders, men like Peter Kelly and Andrew Paull. Most importantly, the great defeat of 1927 had placed before the nation in a way no other effort might have done, the issue of aboriginal title in British Columbia.[106]

Because of the long Depression and the coming of World

War II, the land claims issue had to take second place to social and economic concerns. Like a pebble dropped into the stagnant waters of indifference towards Indian aspirations in British Columbia, the Nishga Petition had spread its eddies. After 1913, the Government in Victoria would never again be allowed to close its eyes to the concerns of the Indian people. Even during the apparent hiatus of the 1930's and 40's, Indians used the opportunity to organize at the local level and politicize their people more extensively so that not only a few strong personalities would speak for them. When a protest movement once more emerged, it would have a broad base of popular support.

Chapter Five

## THE CALDER CASE

> Aboriginal title comes from immemorial occupation of a territory and not from statute. A government must extinguish these aboriginal rights to get clear title to the land.
>
> - Thomas Berger

By the end of the Second World War, a growing movement amongst Indians for the extension of the franchise to their ranks had become evident. The Federal Government, realizing the need to deal with matters such as the treatment of Indian veterans, set up a Special Joint Committee of the House of Commons and the Senate to investigate and to report on matters pertaining to Indians. Twelve senators and twenty-two members of the House of Commons met for the first time in the spring of 1946 and continued their sittings for three years. The early hearings were characterized by the litany of shocking evidence presented on the treatment and condition of Indians, a picture of deprivation, neglect, bureaucratic bungling and sheer stupidity on the part of those appointed to "care" for the Indians of Canada emerging from stories told to the Committee.[1]

That the Committee would have to deal with the two leading spokesmen for West Coast Indians, Andrew Paull and Peter Kelly, soon became evident, Paull telling the Committee,

"...I want to speak my mind, and not for you to tell me what to say."[2] Perhaps the most pressing matter for consideration was the question of the franchise, which also involved citizenship, a privilege still not extended to the Indian people. On this issue, Peter Kelly told the Committee:

> As our brief points out, we would like the Indian to hold on to his aboriginal rights, and not to take all that away from him at one stroke but extend to him the right of citizenship. Only by so doing do we think that gradually if men will go to them - from what I have seen all men conduct election campaigns, they go to every place; if the Indian has the vote they will go to him; and not only go to him, but they will see that he is properly treated. [3]

The case for a major revision of the Indian Act was clear and the Prime Minister promised legislation in 1950. Bill 267 was given first reading in June, but was greeted with such universal criticism for being inadequate, that further revisions were promised. During this period, members of the Native Brotherhood of British Columbia were particularly active in Ottawa, establishing contact with political figures and other Indian organizations. The revised legislation, presented as Bill 79, was the result of extensive consultation with Indian organizations. The period of dormancy was over, and the 1951 revision of the Indian Act marked the beginning of a resurgence in the struggle to obtain recognition for aboriginal title.

One of the ideas emerging from the Report of the Special Joint Committee of 1946 had been that of a Canadian Indian Claims Commission along lines of one established in the United States.[4] The idea met with considerable support both from Indians and officials. The two major parties in the House of Commons made the establishment of such a Commission part of their policy and British Columbia's Indians could cherish expectations of a final settlement of their claims. Speaking years later, on September 23, 1968, Jean Chretien, Minister of Indian Affairs and Northern Development, stated in the Commons that a bill creating such a Claims Commission would be presented to parliament "in the weeks to come." Then came an about face by the Trudeau government. In June, 1969 it stated:

> The government had intended to introduce legislation to establish an Indian Claims Commission to hear and determine Indian claims. Consideration of the questions raised at the consultations and the review of Indian policy raised serious doubts as to whether a Claims Commission as proposed to Parliament in 1965 is the right way to deal with the grievances of Indians put forward as claims.[5]

In August 1969, Mr. Trudeau ventured to British Columbia and stated that on the question of Indian claims his government's answer was "No!" The Prime Minister urged the Indian people to "forget the past and look to the future."[6] This

remarkable comment can probably be attributed to developments in Ottawa where the government had tabled its statement on Indian Policy in the House of Commons. The White Paper outlined a policy designed to see the end of "special status" for the Indians and the achievement of "equality". Response from Indian leaders was immediate: a nearly unanimous chorus of condemnation. The Government and the Opposition had misread Indian aspirations. Integration into the mainstream meant, for the Native People, the eventual loss of their identity. Paramount in their plan to retain this identity was the retention of the aboriginal right to their land. As an Indian leader responding to Mr. Trudeau's comment told the Conservative Party's Standing Committee on Indian Affairs and Northern Development:

> "Without land, Indian people have no soul - no life - no purpose. Control of our land is essential for our cultural and economic survival."[7]

The time had come for some action in the matter of aboriginal title. Four years earlier, a British Columbia court had been forced to look at the question, but had been able to by-pass any definitive ruling on native title when the case was finally adjudicated by the Supreme Court of Canada on a minimal adjudication. This case, known as Regina v. White and Bob, was to prove an incentive for the Nishga to begin action in their own legal battle. The

White and Bob case received the attention of Maisie Hurley, widow of lawyer Tom Hurley who had been noted as a defendant of Indians on the West Coast. At the time of the White and Bob case, Mrs. Hurley was editor of The Native Voice and it was she who promoted the appeal in County Court against the charge of hunting deer out of season. Judge Swencisky, in reversing the convictions, held that the defence argument that the land on which the deer had been taken had been covered by a treaty of 1854, was valid. The Province took the case to the British Columbia Court of Appeal where Chief Justice Davey, ruling for the majority, held that the document of 1854, and signed by Chief Factor for the Hudson's Bay Company, James Douglas, was indeed a treaty. Mr. Justice Norris wrote a lengthy separate judgement which included the argument that "the Indians' aboriginal rights had legal force."[8] Dissenting from the majority, Judge J.A. Sheppard held that the Proclamation of 1763 did not apply to Vancouver Island, since the area was unknown to the Crown at the time of the Royal Proclamation. In his separate judgement, Mr. Justice Norris held that the Treaty of 1854 indeed gave the accused the benefit of exception from provincial game laws and that the Royal Proclamation is "still in full force and effect." After making a number of references to the historical basis of his ruling, Judge Norris found that: "Prior to British Columbia entering Confederation in 1871, no legislation had

been passed extinguishing the aboriginal right of the Indians to hunt; after British Columbia entered Confederation in 1871, it had no power to pass legislation in relation to 'Indians and lands reserved for the Indians.' "[9] Referring to the question of aboriginal rights, Mr. Norris dealt at length with the judgements of Chief Justice Marshall of the United States Supreme Court (Johnson v. McIntosh) and the St. Catherine's Milling Case. The opinion of Mr. Justice Norris was that "the aboriginal right is a very real right and is to be recognized although not in accordance with the ordinary conception of such under British law."[10]

In 1965, the Supreme Court of Canada, without dealing with aboriginal rights, concurred with the judgement of the provincial Appeal Court. The White and Bob Case had brought to the forefront the importance of the Royal Proclamation as an issue in any contest over aboriginal title. The success of White and Bob, even if only on a limited adjudication, was another factor in the Nishga decision to seek a court ruling on their claim to title of ancestral lands. A flurry of organization developed around the proposed legal move. Maisie Hurley contacted Tom Berger who was once more to appear on behalf of the Indians. Mrs. Hurley felt that the Nishga claim was a good vehicle for issues raised in White and Bob to be taken to court. The case had not succeeded in achieving a court ruling on aboriginal rights because it had

been won on the narrow ground of the validity of a treaty. Perhaps this had been a good tactic: it had given the Indians an opportunity to raise the issue in court, it had resulted in the Norris judgement, and it had increased the credibility of the whole claim.[11]

In his analysis of the Calder Case, Lysyk deals with the problem of credibility:

> Indeed, so completely had it (the question of Indian title) 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.[12]

Certainly in European legal terms, the issues have been buried for over a half century and the present generation of lawyers and judges is unfamiliar with the problem. Things with which lawyers and judges of the late nineteenth century were familiar had now to be relearned. The framework had to be understood anew and the question remained, would the courts pick up those threads? In some way or other, would they say that things should be laid to rest? However, because of our precedent-oriented legal system, with courts going back to previous centuries for precedents, this connection could be achieved and a search made to resolve issues left alone since the Nineteenth Century.[13] This meant that the Calder Case was seen as picking up what had been attempted in White and Bob, and picking it up in a way that would ensure

that the courts would deal with the issue and not have a way out as they had found in the earlier case. The question of aboriginal title would finally have to be faced by a Canadian court of law.

There was another question to be considered. The Constitution had placed the jurisdiction over "Indians and Lands Reserved for the Indians" in the hands of the Federal Government. On what grounds would the Nishga proceed? It was decided that the Crown, represented by the Province of British Columbia, owned the land and its natural resources. Thus, the Nishga would seek for a declaration that their aboriginal rights to ancestral lands had never been extinguished and continued to be in force. The Federal Government declined to become involved in the case and the Nishga went to court in October, 1969. Representing the Attorney-General of British Columbia was Mr. Douglas McK. Brown, assisted by A.W. Hobbs and A. Hooper. On the bench of the British Columbia Supreme Court was Mr. Justice J. Gould.

Because this hearing was to be the first of three on the issue of the Nishga claim that title to ancestral land had never been extinguished, and because the later judgements against the claim followed the broad outline of Mr. Justice Gould's ruling, some details are appropriate here. For the plaintiffs it was argued that their Indian title to ancestral tribal territory had never been extinguished. The territory

in question comprised more than 1,000 square miles in and around the Nass River Valley, Observatory Inlet, and the Portland Canal in Northwestern British Columbia. A map of the area, with an outline done in black felt pen to show the section included in the Nishga claim was submitted to Judge Gould. (See Appendix 2) The plea was unique in Canadian legal history, the plaintiffs seeking no compensation. Also, they were alone amongst native tribes who had sought for recognition of native title not having entered into any treaty or contract with the Crown, the Hudson's Bay Company, or any other historical party to dealings with lands in Canada occupied by Indians since time immemorial.[14]

For the defendants, it was held that the Royal Proclamation of 1763 did not apply to the lands claimed by the Nishga Tribe, since the nation to which they belonged was unknown to the Crown in 1763 and the lands in dispute were terra incognita. It was further held that between November 19, 1866 and May 16, 1871 the whole sovereignty of the area of British Columbia "flowed from the Crown Imperial." Such rights as the Nishga Nation might have held, if they had indeed held any rights at all, were firmly and totally extinguished by overt acts of the Crown. This extinguishment had been accomplished by way of proclamation, ordinance and statute. Such statute had lawfully extinguished any rights the Nishga might have held. Therefore, the Tribe's claim should be disallowed.[15]

In his judgement, Mr. Justice Gould pointed out that there were certain undisputed facts: the Nishga language was unique to the tribe; the locale has remained geographically unchanged throughout recorded history; the tribe had a long tradition of hunting, fishing and roaming over the same tract; their reserves form only a small part of the delineated area.

Raising preliminary objections, Crown Counsel had pointed out that the matter fell within the jurisdiction of the Federal Government, in terms of Section 91, Classification No. 24 of the British North America Act of 1867 which distributes exclusive powers to the Parliament of Canada to legislate in all matters pertaining to "Indians and the lands reserved for the Indians." Thus the Supreme Court of British Columbia could have no jurisdiction in the matter and the Attorney-General could have no status as defendant. To this objection, the Judge ruled that the action dealt not with the legal status of the Indians as persons but the state of the title to the lands in question and such are not "lands reserved for Indians."

Raising a second objection, Crown Counsel argued that all parties having any interst, and not just the Nishga chiefs at the trial, should be before the Court. The judge ruled this suggestion to be impracticable. A third objection raised to the Nishga claim was that the Petition of Right pursuant

to the Crown Procedure Act was a prerequisite to the litigation in progress. The judge pointed out that in the acknowledged absence of any treaty or contract, this argument did not hold, as there was nothing to be contracted.

For the Nishga, it was submitted that they held their rights over the disputed land pursuant to the Royal Proclamation of 1763, this having the effect of a statute of Parliament of Great Britain. Judge Gould, in dealing with this point, asked whether the Proclamation embraced the lands in question and, if so, was the Proclamation prospective in character? Referring to the White and Bob case and the dissenting opinion of Judge Sheppard, as well as to the St. Catherine's Milling Case, the Judge felt that the same arguments applied and the Crown had in 1763 held no proprietary rights over Vancouver Island nor over the Nishga area.

Holding that the lands in question were not terra incognita in 1763 because the Royal Navy had in 1764 given instructions to Captain Byron to explore the possiblity of a passage between latitude $38^0$ and $54^0$, the Crown must have been aware of the existence of such lands. The Judge would not accept this argument as being historically accurate. Referring to the famous judgement of Chief Justice Marshall in Johnson v. McIntosh, Justice Gould repeated Marshall's ruling that the right of the discoverer was recognized by

other nations as an absolute title, subject only to the Indian right of occupancy. The other nations of Europe also recognized the absolute title of the Crown to extinguish that aboriginal right. This definition is incompatible with the idea of an absolute and complete title resting with the Indians. The British Constitution holds that all vacant lands rested in the Crown which could grant title by various means. No distinction had been made between vacant and Indian-occupied lands. The title, subject only to the right of occupancy by the Indians, was admitted to be in the King. Lands, then, to which the Royal Proclamation referred, were lands which the King had a right to grant, or to reserve for Indians.

Mr. Justice Gould held that the boundaries of British Columbia as existing in 1866, that is, before the colony joined Confederation, encompassed the disputed area and that between 1866 and 1871, by a series of proclamations and statutes, such rights as the Nishga may have had were totally extinguished by the Crown. Judge Gould then examined a series of legislative events spanning the years 1858 to 1870 and held that these pieces of legislation are connected and reveal a common intention to obtain absolute sovereignty over lands of what is now known as British Columbia, including the conflicting interest of "aboriginal title."

As for the plaintiffs' argument that historically the

British Crown as a matter of policy and of law always acknowledged aboriginal title belonging to the Indians, Judge Gould pointed out that nearly all cases cited in support of this contention arose out of an interpretation of treaties or contracts. But there had never been any treaty or contract with the Nishgas. Therefore, what was the policy of the British Crown in this instance? The best way of enunciating policy is by enacting competent legislation, as had been done in this case, between 1858 and 1870. The Judge then found that any aboriginal title that might have existed had been lawfully extinguished in toto. There had been nothing to suggest that any ancient rights, if such had been in existence prior to 1871 and were extinguished, were revived by British Columbia's entry into Confederation.[16]

The judgement of Mr. Justice Gould was appealed to the British Columbia Court of Appeal and a judgement, handed down on May 7, 1970, rejected the Nishga appeal. Following substantially the argument of Mr. Justice Gould, Mr. Justice MacLean ruled that "if there ever was an 'Indian Title' it had been extinguished by pre-Confederation legislation passed in the Colony."[17] Of note is the passage quoted by Justice Gould and repeated by Chief Justice Davey of the Appeal Court. Originating with Lord Watson in the St. Catherine's Milling Case, the passage appears to form the kernel of the arguments developed by those judges who found against the

Nishga claim:

> The learned trial judge (Gould, J.) has reviewed the pre-Confederation legislation of the Colony from 1858 till the province entered Confederation in 1871 and has held, I think correctly, that:
>
> '....In result I find that, if ever there was such a thing as aboriginal or Indian title in, or any right analogous to such over, the delineated area, such has been lawfully extinguished in toto. It is not necessary to explore what aboriginal title, otherwise known as Indian title may mean, or in earlier times may have meant, in a different context.' Lord Watson, for the Privy Council, in St. Catherine's Milling and Lumbering Co. v. Reg. supra, said at p. 55:
>
> '....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 on that point. It appears to them to be sufficient for the purposes of this case that there has all along been vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished.[18]

Why would the judge have felt that it was "not necessary to explore" such a fundamental concept as aboriginal title when this was central to the Nishga claim? Granted that in European terms, aboriginal title is a dimly-understood concept, surely a judge of the Appeal Court could have been expected to provide a definition! Mr. Justice Norris was, of course, no longer on the bench, having retired to his home in Pitt Meadows.

Why had Calder and the Nishga Nation brought their claim to court at this particular time? Calder's view was that the Indians knew intuitively that this was the right time and

proceeded despite massive expressions of misgiving.[19] There had also been a whole series of coincidences: there had been a National Commission on Indian Rights and Treaties under the auspices of the National Indian Brotherhood; in the spring of 1969, Indians across Canada were saying that they wanted to give priority to the issue of claims.[20] In June, 1969, the Federal Government had tabled its statement on Indian policy, creating a wave of discussion and drawing attention once more to the underlying question of aboriginal title. One of the paradoxes, Douglas Sanders points out, was that the only leader amongst Indians to support the White Paper was Frank Calder. Yet, while he favoured "equality" and self-reliance, he disagreed with the Government on its stand regarding Indian land claims. [21]

During the 1960's, the Red Power Movement amongst Indians in the United States had found an echo in Canada. Given wide coverage, especially by the electronic media, Indians had dramatised their aspirations in a series of "incidents" ranging from occupations of offices of the Department of Indian Affairs, to blockades of roads crossing reserve lands. Court action such as the Nishga undertook was certain to receive the kind of national attention that even the most cynical politician could not ignore.

Then, 1970 was a year of great activity amongst the Indians in this Province. Organizations of varying degrees

of radicalism had sprung up and a ferment had set in amongst younger Indians who had formed the Union of British Columbia Indian Chiefs. The Conference of the National Indian Brotherhood, Vancouver, 1970, was hailed as a major step in the Native struggle for rights and the Union of British Columbia Chiefs pledged to carry the fight for land title. But the idea of taking the Calder Case to its conclusion before the Supreme Court of Canada, with the support of the National Indian Brotherhood, was rejected. The independently-minded Nishga once more stood alone, criticized for acting precipitately. In other parts of Canada, the ferment over land rights was gathering momentum. Quebec was approaching some kind of litigation in the James Bay case and various Indian organizations were forming study groups to consider possible action in land claims.[22]

For Frank Calder, the call to postpone any further court action was ill-timed. He had found his destiny. The people of Canada would know that the "Little Chief" and his tribe were not to be denied! [23] The Calder Case went to the Supreme Court of Canada in November, 1971. The Court was not at full strength, only seven out of nine judges hearing the historic case: Judges Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin comprised the bench. The plaintiffs were again represented by Thomas Berger and the defendants by Douglas McK. Brown. The court delivered its judgement on

January 31, 1973, three judges ruling against the Nishga claim, and three in favour. The seventh judge, Mr. Justice Pigeon, did not address himself to the question of aboriginal title, but rather, rejected the claim on procedural grounds. Delivering judgement for those who held against the Nishga claim, Mr. Justice Judson developed an argument which approximated that used by Mr. Justic Gould in the British Columbia Supreme Court. Then Judson dealt with the McKenna-McBride Commission's Report and the 1920 Dominion Act to Provide for the Settlement of Differences between the Governments of the Dominion of Canada and the Province of British Columbia Respecting Indian Lands and Certain Other Indian Affairs in the Said Province. Judson referred to Section 2 of the Act, which contained the clause empowering the Governor in Council to carry out the provisions of the agreement between Dominion and Province. Judson then ruled that the result was the establishment of new, or the confirmation of old, Indian reserves in the Nass area. Although Frank Calder had pointed out to the Court that these reserves were demarcated over the objections of his tribe, Judson held that the Federal Government had acted under powers conferred by Section 91 of the B.N.A. Act. The Judge further pointed out that alienations which had been carried out in the disputed area, whether fee simple, natural gas leases or other, were not consistent with the

existence of aboriginal title, as was the establishment of a Railway Belt.[24]

Turning to the appellants' argument that the 1899 Treaty (No. 8) with certain tribes of the North-Eastern section of British Columbia constituted a recognition of aboriginal title by the Dominion twenty-eight years after the Province had joined Confederation, Justice Judson asked whether this meant recognition in the rest of the Province? The Respondents held that the original title of the Indians, if it ever had existed in the Colony, had been extinguished prior to Confederation. After discussing at length various United States precedents, Justice Judson concluded that the sovereign authority elected, in the Nishga case, to exercise complete dominion over lands in question, an act which was adverse to any right of occupancy which the Nishga might have had. The Crown had done so when, by legislation, it had opened up such lands for settlement, subject to the reserves of land set aside for Indian occupancy. Judson also concurred with Justice Pigeon that the 1960 Crown Procedure Act applied as a necessary prerequisite to bringing action such as had been done by the Nishga.[25]

In his dissent, Mr. Justice Hall, speaking for Judges Laskin and Spence, too, argued that "...the Petition of Right Procedure should not, and does not, apply to proceedings

seeking declaratory or equitable relief." The appellants were challenging the constitutional validity of certain acts and proclamations of colonial governors Douglas and Seymour, hence the fact that the appellants had not obtained a fiat under the Crown Procedure Act was not imperative to their action.[26]

Having dealt with Judge Pigeon's objection, Justice Hall turned to the question of aboriginal rights. He contended that those who would deny the Nishga their claim had misinterpreted the "act of state" doctrine since the Nishgas were not claiming that their title had originated from some previous sovereign, nor are they challenging an Act of State. They are asking the Court to recognize that their aboriginal title, one gained through occupancy since time immemorial, had not been extinguished by settlement of the North Pacific coast.[27] Dealing with the lengthy list of proclamations and statutes cited originally by Justice Gould, events which had supposedly given the Province sovereignty before its entry to Confederation, Hall dismissed these as follows: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment."[28] While Mr. Justice Judson had recited these proclamations with approval, Justice Hall saw them as enactments merely describing the situation under the common law. The Nishgas did not dispute the Crown's title. If there were indeed anything in

these proclamations which extinguished title by implication, then it was beyond the powers of the governor or his council to do so, that right being vested in the Crown.

Dealing with the treaties entered into by other Indian bands, Hall pointed out that 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. Hall asked: "Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish Indian title? What other purpose did they serve?"[29] Pointing out the explicit wording of Treaty No. 8 (1899), namely "... the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for her Majesty the Queen and her successors forever, all the rights, titles and privileges whatsoever, to the lands included within the following limits, this is to say..." [30] Hall asked, "If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?"

Using court decisions going back to Marshall (Johnson V. McIntosh), Justice Hall pointed out the difficulty in defining "aboriginal title" but emphasized that whatever the term included, there was a clear understanding that usufructuary interest in ancestral lands constituted a burden on the title held by the Crown, extinguishable only by Parliament and

inalienable, except to the Crown.[31] This had been the policy of Britain in dealings with Indians. The policy had been enunciated by the Royal Proclamation of 1763, and it had been continued by the Dominion Government. The testimony of Professor Wilson Duff had provided impressive evidence of the concept of aboriginal title as held by the Nishga. This right of ownership, in existence long before the British established sovereignty over the area, had never been extinguished by surrender, statute, and must be held to be in existence.[32]

The legal implications of the famous split decision in the Calder Case will, no doubt, occupy trained minds for many years to come. This thesis concerns itself with the history of the case and must follow a somewhat different course to that which is of interest to legal minds. The case for the Nishgas had actually been lost, but Frank Calder maintained that the decision really constituted a victory of sorts for his people. Arguing in similar vein, W.H. McConnell writes:

> The acculturation process, because of the different characteristics of Indian society, has created difficult problems of social adjustment accompanied by much misery, and because of their lack of numbers and influence the Indians have had little effective voice in the formulation of official policies affecting them. When all of the above factors are considered, one might query whether the Nishgas, whatever the validity of their legal claim, might not raise an argument of 'historical estoppel' against the Canadian government.[33]

Even if the legalities of the white man's system deny the Nishga their claim, the Tribe had proved that it indeed had credibility. Three judges of the Supreme Court of the Land had found enough merit in the Nishgas' arguments to rule in their favour. The legal system could go no further. Now it was for the politicians, urged on by a public that for once could forget its apathy towards the Indian people, to act in seeking some resolution of the historic dispute.

> Our message has been simple:
> Get off our land!
>
> - Frank Calder

Within days of the Supreme Court's decision, Prime Minister Trudeau met with Frank Calder and members of the Nishga Tribal Council. Mr. Trudeau conceded that the Indians probably had more legal rights than he had thought when his government had prepared its White Paper in 1969. He added that he was prepared to review his policy and bring it before the Commons. He pledged himself to action on the question of what he called "legal rights."[34] For the Nishga, this about-face by the Prime Minister represented a moral victory and justified in part their effort in taking their case to the Supreme Court. In their jubilation, the Nishga expressed a wish of sharing their victory with other tribes in Canada.

In April, 1973, the House of Commons debated the "Aboriginal Title" paper which had been prepared in 1971. However, while the responsible committee approved the principle of aboriginal rights, the House took no action. Outside the Commons events, which had some bearing on the Nishga struggle for recognition of their land rights, took place. One event involved the Yukon Native Brotherhood which now had the satisfaction of seeing negotiations with the Federal Government begin. The Brotherhood had presented a brief asserting legal rights to the Territory which is still a non-treaty area. The second event took place in Quebec where the Superior Court heard applications for an injunction against the huge James Bay power project. In another northern community, the Northwest Territories, Mr. Justice Morrow of the local Supreme Court began hearings into a notice of claim of aboriginal title. On August 8, 1973, Mr. Jean Chretien, Minister of Indian Affairs and Northern Development, announced government acceptance of the principle that there ought to be compensation when Indian lands are alienated, and stated his belief that the provinces should pay a share of the compensation involved in the settling of claims. 'This was a moot point, since a ruling of the Privy Council in 1910 had placed responsibility for compensation on the Dominion Government.[35]

More specifically, the Nishga Tribe had to review their

own position. One inescapable fact needed facing: integration with the dominant culture had already advanced to such a stage that any thought of retreating was impractical. Frank Calder was a prime example. He had long been a member of the Legislative Assembly of British Columbia, representing the New Democratic Party in the Atlin riding. As a member of the Opposition to the seemingly eternal Social Credit Government led by W.A.C. Bennett, Calder had frequently spoken in the Assembly on behalf of the native people of his Province and in particular the Nishga cause. In this effort he had been supported by his colleagues in the New Democratic Party's caucus. Thus Mr. Calder's role in the court actions against the Province was a natural outcome of his years of attacking the Provincial Government for stalling over a settlement.

However, during the period that the Supreme Court of Canada deliberated over the Nishga application, an election (1972) in British Columbia saw the defeat of the Bennett government and the ascent to power of Dave Barrett's New Democrats. Pledging his support for the legitimate aspirations of the native people, the new Premier announced that Mr. Calder would become a member of the cabinet. This was seen by some observers as a reward for the MLA's long years of service to his party and an opportunity for Calder to be in a unique position in pressing for recognition of aboriginal rights.

Other observers were not slow in pointing out the anomaly of Calder's position, that of a cabinet minister in a government which, because of the vagaries of politics, he now was opposing in the Supreme Court of Canada.

Indeed, when the historic split decision of the Supreme Court was handed down, Frank Calder was still a cabinet member in the Barrett government. Mr. Calder claimed that his loyalty to his people transcended political affiliations. Whether he had intended it this way or not, Calder had demonstrated to the Nishga that there was another side to the balance sheet in their dealings with whites. Social, medical and educational benefits could offset in part the historic injustices suffered.[36] The Government of British Columbia announced plans to assist native fishermen in expanding their share of the westcoast fishing industry, by advancing money for the development of a cannery to process the catch of native fishermen. Another move of the New Democrats was the appointment of a defeated New Democratic Party candidate in the recent Federal general election, Frank Howard, to the special position of liason between native organizations and the provincial government. Mr. Howard's appointment was not universally popular, some Indian leaders denouncing the move as paternalism on the part of tne government and some opposition members charging patronage. Mr. Howard's short tenure produced no notable

results for the Indians.

Another step taken by the Barrett government was the designation of Norm Levi, Minister of Human Resources, as the cabinet member in charge of negotiations with the native people. A former social worker, Mr. Levi had a reputation for being a sympathetic minister when involved with the disadvantaged, and some Indian leaders had hopes of a breakthrough in the provincial area. Mr. Levi announced that he was willing to meet with any Indian organization in frank discussion of their problems. The Nishga were not reluctant about this invitation and a meeting with the Minister was arranged for February 15, 1974. Present were Mr. Levi, the Minister directly responsible for Indian-Provincial matters, Alex MacDonald, Attorney-General, and two civil servants. The Nishga Tribal Council sent most of the men whose names had appeared as appellants in the Supreme Court of Canada, as well as Don Rosenbloom, their legal Counsel. Leading the Nishga delegation, and playing his dual role with the experience he had gained during his years of exposure to the media, was Frank Calder. The meeting had been called because, in the words of Mr. Rosenbloom, the Government "has never given a commitment that they would join with the Federal Government in discussing these land claims problems." The lawyer asked for such a commitment,

in view of the announced intention of the Federal government to enter into negotiations with the Nishga and the Province. [37]

A portion of the minutes of that meeting bears quoting in full as an illustration of the mood of the Nishga and the tactics of a government which, like its predecessors had come to appreciate the economic and political consequences of recognition of the Nishga claim:

> Calder: The Federal Government has agreed to meet separately on the Nishga case with the Provincial Government. On behalf of the delegation, I know they have listened very carefully and they understand that you have to go back to the cabinet and discuss. They would like to be with you when you talk with the Cabinet. Now that the Session is on, how soon can we hear word of this request before the Cabinet?
>
> Levi: I don't want to hedge, but this is too important an issue to rush right in. We will attempt to get some answer back to you. We don't want to treat it lightly. There will be considerable discussion and I am quite aware there is no possibility of getting anything done within the next 4 weeks as meetings are scheduled. In all fairness to the importance of this, we will wait until after the session is over, this will give us more time.
>
> Calder: Can you assure all of us here that you will do this on a priority basis? This is what we ask. We know what the session is all about; we know everyone is busy during the session, but we would welcome the assurance that this is top priority. We hope it will be favourable so the three of us can sit down.

Levi: We will report back and attempt to get this on and we want to give enough time to this in order to deal with it properly. We will be in touch with you and I am sure you will be nudging us re this.

McKay: I have to report back to my people - 760 people. This delegation has cost $10,000 out of our own funds. Reading between the lines and comparing this with the government's attitude of six months ago, is the government receptive?

Levi: We are willing to listen and nobody else has been willing to listen in the past.

Calder: If the Federal Government was to walk in with us one day, would you be prepared to listen to us both?

Levi: That is an intersting question. We are listening now, we have people advising us - however, this is not likely to happen... Cabinet needs sufficient time to deal with this. 38

Another announcement from the energetic Barrett Government dealt with the formation of a new and separate school district to be controlled by the Nishga. After full consultation with the Tribal Council, the Government would assist in the creation of this new district to cover the Nass River Valley. In 1976, the new Social Credit Government of William Bennett brought the Nishga School District, No. 81, to fruition with an announcement by the Minister of Education that the people of the Nass River Valley had become the first Indian community in the Province to control their schools. The new School Board announced a policy of assisting students in retaining the traditional culture of their ancestors. This

move would entail the study of the Nishga language, history and folklore. While the Board had to look outside the Nass River Valley for most of the teachers who were to staff the schools, it was careful to recruit those who were sympathetic to the development of a program of native studies. Directing this program was a Nishga teacher at the secondary school. In a burst of pride, the people followed with a ceremonial raising of the totem, such an important symbol in their ancient culture. The program includes the teaching of traditional skills in which the Nishga have excelled and has attracted attention as other Indian tribes seek to improve their status.

The people who had carried their campaign for recognition of their land claim to the highest court in the country, were once more leaders and pioneers in the struggle for dignity and pride.

## CONCLUSION

The Nishga have always maintained that their land is not for sale. Thus in their court action, they sought nothing more than a declaration of their aboriginal rights. Now that legal recourse has been carried to its conclusion, it is fair to assume some political settlement will be the next recourse for, implied in any judicial recognition of title, would have been the question of compensation. It is this compensation that the courts have always had in mind. As Douglas McK. Brown commented in the British Columbia Supreme Court: "The implications of a court ruling in favour of the Nishgas are staggering." Without doubt, this spectre has been one of the stumbling blocks to any meaningful negotiations with the Province and at some stage the Nishgas might have to declare their willingness to seek a settlement "involving a package of hunting and fishing rights, compensation, services and allocation of lands."[39] If only to allay fears of massive cash payments across the country, the Nishgas should bargain for more enduring compensation and this should include the right to a greater say in their affairs.

Shortly after taking office as Minister of Labour in the new Social Credit government, Allan Williams, invested with special responsibility in Indian Affairs, announced his

Government's willingness to commence the search for a basis for negotiations with the Nishgas. The promise was a limited one but it held out the hope of a new era in the drawn-out saga. The Nishga hailed the announcement, and their enthusiasm was echoed by the then Federal Minister of Indian Affairs and Northern Development, Jud Buchanan. A framework for the start of negotiations followed the appointment of representatives by each of the groups in the triangle. One condition insisted upon by all parties has been that of secrecy. However, after years of talks and closed-door meetings, the hoped-for agreement has not even taken shape. Since the start of the discussions, the Minister, Allan Williams, has made statements which appear to indicate a change of heart on the part of the Provincial Government. At least, this is how some observers interpret the Minister's utterances. The prediction made by Mr. Williams when talks first began, that a settlement would not be quickly realized, has proved prophetic.[40]

The Nishga Case has lead to changes in public opinion. The Indian claim for recognition of land rights now has a ring of legitimacy that makes the public receptive to some kind of settlement. Both governments, and in particular the British Columbia Government, must now face an historic obligation: the Nishga must be given full recognition of their aboriginal rights. In making their split decision, the judges of the

Supreme Court of Canada indicated that settlement is not a legal matter. It is the political arena, with its ability to be flexible and adaptive, that must ultimately live up to the spirit and intent of the 1763 Royal Proclamation.

# APPENDICES

Appendix 1

## TABLE OF NASS RIVER TRIBES - 1894

| Name | No. | Area (acres) | Area Cultivated | Present Population |
|---|---|---|---|---|
| Kit-lac-da-Max | 1 | 2700 | 21 | 260 |
| Tsim-man-wien-chit | 2 | 60 | - | - |
| Seaks | 3 | 25 | - | - |
| Shu-marl | 4 | 150 | - | - |
| Shu-marl | 5 | 4 | - | - |
| Awatal | 6 | 60 | - | - |
| Kit-wil-lue-shilt | 7 | 430 | 5 | 104 |
| Audegulay | 8 | 260 | - | - |
| Lach-kal-tsap | 9 | 3700 | 11½ | 197 |
| Stony Point | 10 | 380 | - | - |
| Black Point | 11 | 30 | - | - |
| Lach tesk | 12 | 250 | - | - |
| Red. Cliff | 13 | 650 | - | - |
| Kincolith | 14 | 1250 | 7 | 216 |
| Kincolith | 14A | 435 | - | - |
| Kiwiamax | 15 | 5 | - | - |
| Tal-a-naat | 16 | 160 | - | - |
| Georgie | 17 | 70 | - | - |
| Kullan | 18 | 140 | - | - |
| Skamakouust | 19 | 70 | - | - |
| Kin-melit | 20 | 45 | - | - |
| Slooks | 21 | 10 | - | - |
| Stagoo | 22 | 240 | - | - |
| Kt-sin-et | 23 | 240 | - | - |
| Git-zault | 24 | 150 | - | - |
| Nit-zim-a-gou | 25 | 600 | - | - |
| Tack-wan | 26 | 575 | - | - |
| Ksh-wan | 27 | 130 | - | - |
| Scow-ban | 28 | 84 | - | - |
| Zaul-yap | 29 | 460 | - | - |
| Kit-lac-da-Max | 1A | 640 | - | - |
| Audegulay | 8A | 225 | - | - |

No. 1 has estim. 100 acres pasture & 2579 of timberland.
No. 7 has 425 of timber.
No. 9 has 3688½ of timber.
No. 14 has 1233 of timber.

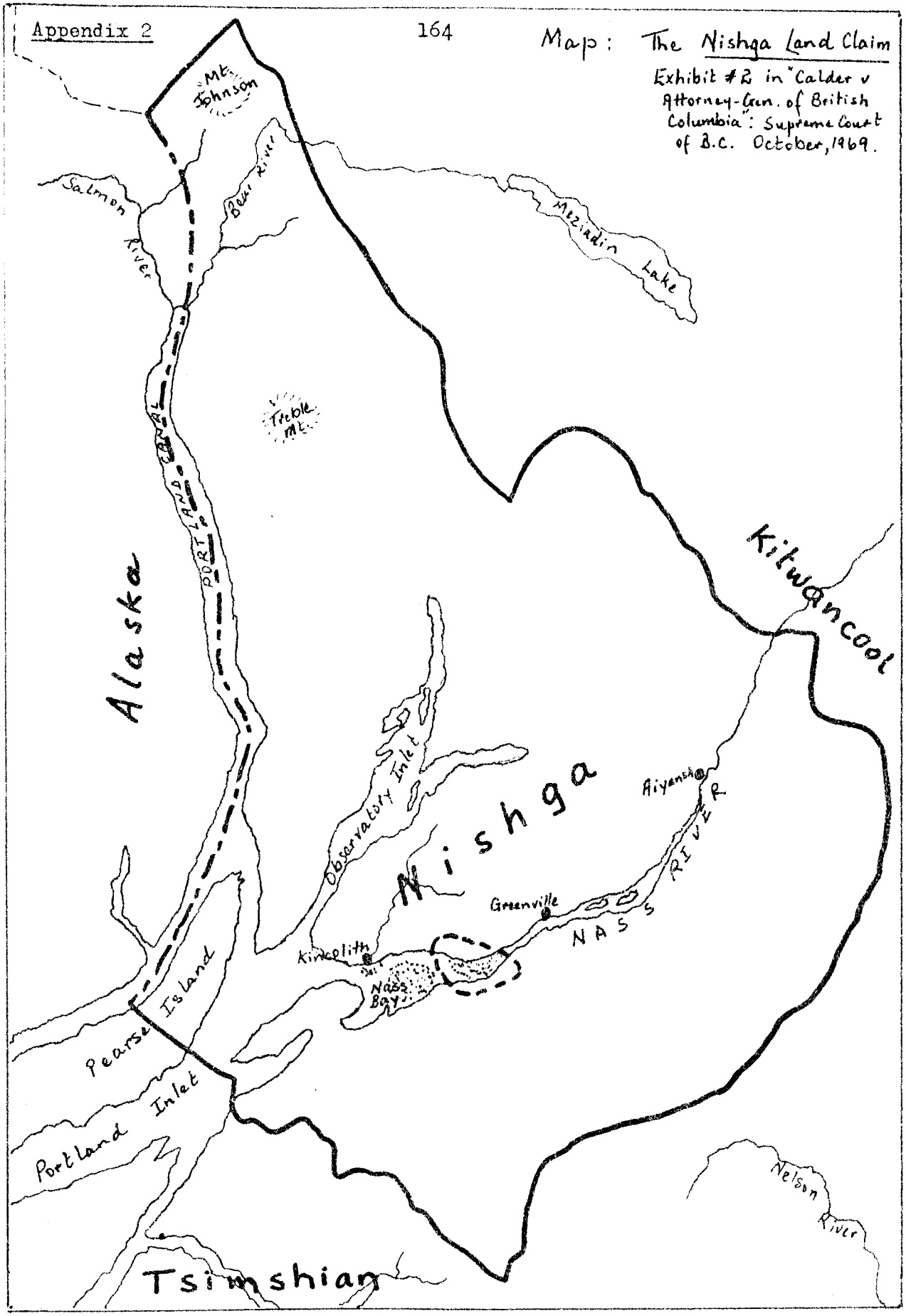
Locations of above areas listed in same register:

1. 45 miles from mouth of Nass River
2. near trail to Skeena Forks
3. On an island at mouth of Seaks River
4. Nass River, near Shumark Creek

5. Nass River, fishing station near No. 4
6. Nass River at Amatal
7. Nass River at Kit-wil-lue-shilt
8. Nass River at Audegulay
8a. Immediately opposite No. 8
9. Nass River at Lechkalstsap, Kiltaw Wilskishtump
10. Nass River at Stony Point
11. Nass River at Black Point
12. Nass River at Canaan
13. Nass River at Red Cliff
14. Nass River on right bank, near mouth
14a. Extension of No. 14
15. Kimaumax River, 9 miles north of Fort Simpson
16. Kimaumax River, 2½ miles from mouth
17. Portland Canal, near Blue Point
18. Portland Canal, at mouth of Salmon River
19. Portland Canal at mouth of Bear River
20. Observatory Inlet at Salmon Cover
21. Observatory Inlet at Dawkins Point
22. Observatory Inlet four miles north of No. 21
23. Observatory Inlet at Perry Bay
24. Observatory Inlet at head of Alice Arm
25. Observatory Inlet opposite Larcom Island, Hastings Arm
26. Observatory Inlet, about 2 miles North of No. 25
27. Observatory Inlet, Hastings Arm, Ksh-Wan River
28. Observatory Inlet 2½ miles north of North Point
29. Nass River, ½ mile below No. 7
1a. An extension of No. 1

Map: The Nishga Land Claim

Exhibit #2 in "Calder v Attorney-Gen. of British Columbia": Supreme Court of B.C. October, 1969.



Appendix 3

PORTION OF STATEMENT OF NISHGA TRIBE
TO SECRETARY OF STATE FOR THE COLONIES
JANUARY 22, 1913

By reason of our aboriginal rights above stated, we claim tribal ownership of all fisheries and other natural resources pertaining to the territory above-mentioned.

For more than twenty-five years, being convinced that the recognition of our aboriginal rights would be of very great material advantage to us and would open the way for the intellectual, social and industrial advance of our people, we have in common with other tribes of British Columbia actively pressed our claims upon the Governments concerned. In recent years, being more than ever convinced of the advantages to be derived from such recognition and fearing that without such the advance of settlement would endanger our whole future, we have pressed these claims with greatly increased earnestness.

Some of the advantages to be derived from establishing our aboriginal rights are:

1. That it will place us in a position to reserve for own use and benefit such portions of our territory as are required for the future well-being of our people.
2. That it will enable us to a much greater extent and in a free and independent manner to make use of the fisheries and other natural resources pertaining to our territory.
3. That it will open the way for bringing to an end as rapidly as possible the system of Reserves and substituting a system of individual ownership.
4. That it will open the way for putting an end to all uncertainty and unrest, bringing about a permanent and satisfactory settlement between the white people and ourselves, and thus removing the danger of serious trouble which now undoubtedly exists.
5. That it will open the way for our taking our place as not only loyal British subjects but also Canadian citizens, as for many years we have desired to do.

.....

We are also informed that in the course of recent negotiations, the Government of British Columbia has contended that under the terms of Union the Dominion of Canada is responsible for making treaties with the Indian Tribes in settlement of their claims. This attempt to shift responsibility to Canada and by doing so render it more difficult for us to establish our rights, seems to us utterly unfair and unjustifiable. We cannot prevent the Province from persisting

in this attempt, but we can and do respectfully declare that we intend to persist in making our claim against the Province of British Columbia for the following among other reasons:

1. We are advised that at the time of Confederation all lands embraced within our territory became the property of the province subject to any interest other than that of the province therein.

2. We have for a long time known that in 1875, the Department of Justice of Canada reported that the Indian Tribes of British Columbia are entitled to an interest in the lands of the province.

3. Notwithstanding the report then made and the position in accordance with that report consistently taken by every representative of Canada from the time of Lord Dufferin's speeches until the spring of the present year, and in defiance of our frequent protests, the Province has sold a large proportion of the best lands of our territory and has by means of such wrongful sales received a large amount of money.

4. While we claim the right to be compensated for those portions of our territory which we may agree to surrender, we claim as even more important the right to reserve other portions permanently for our own use and benefit, and beyond doubt the portions which we would desire so to reserve would include much of the land which has been sold by the Province.

We are not opposed to the coming of the white people into our territory, provided this be carried out justly and in accordance with the British principles embodied in the Royal Proclamation. If, therefore, as we expect, the aboriginal rights which we claim should be established by the decision of His Majesty's Privy Council, we would be prepared to take a moderate and reasonable position. In that event, while claiming the right to decide for ourselves the terms upon which we would deal with our territory, we would be willing that all matters outstanding between the Province and ourselves should be finally adjusted by some equitable method to be agreed upon which should include representation of the Indian Tribes upon any Commission which then might be appointed.

The above statement was unanimously adopted at a meeting of the Nishga Nation or Tribe of Indians held at Kincolith on the 22nd day of January, 1913, and it was resolved that a copy of same be placed in the hands of each of the following:

The Secretary of State for the Colonies, the Prime Minister of Canada, the Minister of Indian Affairs, the Minister of Justice, Mr. J.M. Clark, K.C., Counsel for the Indian Rights Association of British Columbia, and the Chairman of the "Friends of the Indians of British Columbia."

W.J. LINCOLN,

Chairman of Meeting

Appendix 4

IN THE MATTER OF THE TERRITORY OF THE NISHGA NATION OR TRIBE OF INDIANS

TO THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

The HUMBLE PETITION of The Nishga Nation or Tribe of Indians

SHEWETH AS FOLLOWS:

1. From time immemorial the said Nation or Tribe of Indians exclusively possessed, occupied and used and exercised sovereignty over that portion of the territory now forming the Province of British Columbia which is included within the following limits, that is to say: Commencing at a stone situate on the south shore of Kinnamox or Quinamass Bay and marking the boundary line between the territory of the said Nishga Nation or Tribe and that of the Tsimpshean Nation or Tribe of Indians, running thence easterly along said boundary line to the height of land lying between the Naas River and the Skeena River, thence in a line following the height of land surrounding the valley of the Naas River and its tributaries to and including the height of land surrounding the north-west end of Mitseah or Meziadan Lake, thence in a straight line to the northerly end of Portland Canal, thence southerly along the international boundary to the centre line of the passage between Pearse Island and Wales Island, thence south-easterly along said centre line to the centre line of Portland Inlet, thence north-easterly along said centre line to the point at which the same is intersected by the centre line of Kinnamox or Quinamass Bay, thence in a straight line to the point of commencement.

2. Your Petitioners believe the fact to be that, when sovereignty over the territory included within the aforesaid limits (hereinafter referred to as "the said territory") was assumed by Great Britain, such sovereignty was accepted by the said Nation or Tribe, and the right of the said Nation or Tribe to possess, occupy and use the said territory was recognized by Great Britain.

3. From time to time since assuming sovereignty over the said territory the Crown has by Proclamation and otherwise recognized the right of the said Nation or Tribe so to possess, occupy and use the said territory, and, in particular, by the

Proclamation of His Majesty King George the Third issued on the 7th day of October, 1763, having the force and effect of a Statute of the Parliament of Great Britain, it was (amongst other things) enacted as follows:

"And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure that no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North West, or upon any Lands whatever which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them."

"And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our special Leave and Licence for that Purpose first obtained."

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

"And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians;

"In order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some Publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie; and in case they shall lie within the Limits of any Proprietary Government they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And We do, by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all Our Subjects whatever; provided that every Person, who may incline to trade with the said Indians, do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of Our Colonies respectively, where such Persons shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by Ourselves or by Our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade; and We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all Our Colonies respectively, as well Those under Our immediate Government as Those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited, in case the Person, to whom the same is granted, shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as

aforesaid."

"And We do further expressly enjoin and require all Officers whatever, as well Military as Those employed in the Management and Direction of Indian Affairs within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons, whatever, who, standing charged with Treasons, Misprisions of Treason, Murders, or other Felonies or Misdemeanours, shall fly from Justice, and take Refuse in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Tryal for the same."

4. The said Nishga Nation or Tribe is one of the nations or tribes of Indians mentioned in the said Proclamation as being under the protection of the Sovereign, and all members thereof are Your Majesty's loyal subjects.

5. No part of the said territory has been ceded to or purchased by the Crown, and no part thereof has been purchased from the said Nation or Tribe by the Crown or by any person acting on behalf of the Crown, at a public meeting or assembly or otherwise, or by any other person whomsoever.

6. No part of the said territory is within the limits of the territory granted to the Hudson's Bay Company.

7. By Statutes from time to time passed the Imperial Parliament, as to Your Petitioners submit, recognized the territory now known as British Columbia as being part of the "Indian Territories," as appears from the Statute 12 and 13 Vict.cap.48, entitled "An Act to provide for the Administration of Justice in Vancouver's Island," and earlier Statues therein recited, and from the Statute 21 and 22 Vict.,Cap.99, entitled "An Act to provide for the Government of British Columbia."

8. From time to time the Government of the Province of British Columbia and various persons acting in the name of the Crown, under the assumed authority of the "Land Act" of British Columbia, have made surveys of, granted records of pre-emption of, sold and issued patents for, various parts of the said territory.

9. Together with this Petition are presented two blue prints taken from maps of the said territory prepared in the office of the Surveyor-General at Victoria, in the said Province, showing the various transactions which on the 26th day of September, 1912, had been so entered into in respect of portions of the said territory as aforesaid.

10. Your Petitioners allege that the said transactions and all other similar transactions which have been entered into in respect of any part of the said territory have been so entered into in violation of the provisions of the said Proclamation of King George the Third and without competent authority.

11. From time to time Your Petitioners have delivered to surveyors of the said Government entering the said territory for the purpose of surveying portions thereof, and to persons entering the said territory for the purpose of pre-empting or purchasing portions thereof under the assumed authority of the "Land Act," written notices of protest, of which the following is one:

"Whereas we, the Indian people of the Aiyansh Valley, Naas River, British Columbia, being the lawful and original inhabitants and possessors of all the lands contained therein from time immemorial; and being assured in our possession of the same by the Proclamation of His Majesty, King George III., under date of October 7th, 1763, which Proclamation we hold as our Charter of Rights under the British Crown;

"And whereas, it is provided in the said Proclamation that no private person do presume to make any purchase from us of any lands so reserved to us, until we have ceded the same to the respresentatives of the Crown in public meeting between us and them;

"And whereas, up to the present time our lands have not been ceded by us to the Crown, nor in any way alienated from us by any agreement or settlement between the representatives of the Crown and ourselves;

"And whereas, our case is now before the Privy Council in England and we are expecting a settlement of the difficulty at present existing between ourselves and the Government of this Province at an early date;

"We do therefore, standing well within our constitutional rights, forbid you to stake off land in this valley, and do hereby protest against your proceeding further into our country with that end in view - until such time as a satisfactory settlement be made between the representatives of the Crown and ourselves.

"Issued by the members of the Indians Land Committee elected by the Indians of the Upper Naas."

12. On the 3rd day of March, 1911, delegates representing the said Nishga Nation or Tribe waited upon the Government of British Columbia, asserted the title of the said Nation or Tribe in respect of the said territory, and protested against the refusal of that Government to recognize such title.

13. Notwithstanding the facts stated in the last preceding two paragraphs hereof the Government of British Columbia and the various persons to whom reference has above been made, have persisted in the course set forth in paragraph 8 hereof.

14. Your Petitioners are aware of the provisions of the agreement made in the year 1871 and set out in Article 13 of the "Terms of Union", and they are also aware of the provisions of an agreement made between a Special Commissioner of the Government of Canada and the Premier of British Columbia on the 24th day of Séptember, 1912, relating to the matter of the so-called reserves, and approved by the Government of Canada on the 27th day of November, 1912, subject to a certain modification mentioned in the Order in Council made on that day. Your Petitioners humbly submit that nothing contained in either of the said two agreements does or can take away any of the rights which they claim.

Appendix 5

59,335-4A

16 December, 1918

Gentlemen,

Referring to your letter of the 27th May last on the subject of certain claims of the Nishga Tribe of Indians in British Columbia, I am directed by the Lord President of the Council to state as follows:

1. One of the matters in dispute is set out in the Petition lodged by you on the 21st May, 1913, as "the nature and extent of the rights of the said Nishga Nation or Tribe in respect of the said Territory". The other is the question whether the Land Act of British Columbia is ultra vires of the Legislature of that Province.

2. If the contention of the Nishga Indians is, as it appears to be, that they have suffered an invasion of some legal right, the proper course would, in His Lordship's opinion, be for them to take such steps as may be open to them to litigate the matter in the Canadian Courts, from whose decision an appeal in the ordinary way can come to the Judicial Committee. It would seem that any intervention by the Crown by referring the

matter specially direct to the said Committee would be an unconstitutional interference with the local jurisdiction.

3. If however the claim of the Indians does not rest on any legal basis, but is, in effect, a complaint of the executive action of the Provincial or the Dominion Government, it would appear that, in accordance with constitutional principles governing relations between the Crown and the Colonial Governments a special reference to the Judicial Committee to consider the action of the Dominion or Provincial Government could only be ordered on the recommendation of the Secretary of State for the Colonies, and that he would only advise such a reference after consulting, and in accordance with the advice received from the Dominion Government.

In these circumstances His Lordship cannot see his way to take any further action on the Petition.

I am, etc.,

(Sgd.) ALMERIC FITZROY.

MESSRS. SMITHS, FOX AND SEDGWICK,
26 LINCOLN'S INN FIELDS,
W.C.2.

Appendix 6

## STATEMENT OF NISHGA TRIBE

We the Nishga Nation or Tribe of Indians in general meeting assembled, having before us the assurances regarding our Petition which were given by His Royal Highness the Duke of Connaught as His Majesty's Representative in Canada, by letter addressed to our general Counsel on 25th September 1916, and having before us also the Report of the Royal Commission on Indian Affairs for the Province of British Columbia, and having carefully considered that Report, beg to make this statement:

The general view held by us with regard to the findings of the Royal Commission was correctly stated in the communication sent by our Agents to the Lord President of His Majesty's Privy Council on 27th May 1918.

Also, we have now taken into account the fact that the Report of the Royal Commission ignores not only our land rights but also the power conferred by Article XIII of the "TERMS OF UNION" upon the Secretary of State for the Colonies.

Also we have considered the fact that the whole work of the Royal Commission has been based upon the assumption that Article XIII contains all obligations of the two Governments towards the Indian Tribes of British Columbia, which assumption we cannot admit to be correct.

Also we have been unable to find by our examination of the Report of the Royal Commission that by its findings any adequate additional lands are provided for the Nishga Tribe.

Moreover we are not willing to agree to the cutting off of any reserved lands under the provisions of the McKenna-McBride Agreement.

For the reasons set out in the Communication sent by our Agents in May 1918 and those set out in this Statement, we now declare that we are dissatisfied with the Report of the Royal Commission and do not agree to the findings contained in that Report.

Therefore, relying upon the assurances contained in the letter of the Duke of Connaught given on behalf of His Majesty the King, we respectfully ask that this our Statement be forwarded by His Excellency the Duke of Devonshire now

Governor-General of Canada to His Majesty the King, and that the contentions contained in our Petition be considered by His Majesty in Council and be referred to the Judicial Committee of His Majesty's Privy Council.

The above Statement was unanimously adopted at a meeting of the Nishga Nation or Tribe of Indians held at Aiyansh on 6th, 7th and 8th days of October 1919.

| | |
|---|---|
| W.J. Lincoln | President |
| A.N. Calder | Vice President |
| Jas.E. Stewart | Secretary |

Appendix 7

FRANK ARTHUR CALDER - Autobiography

Personal: Born August 3, 1915, Nass Harbour, Nass River, British Columbia.

Parents - Chief Job Clark and Emily Lisk. Adopted and raised by Chief Arthur Calder.

Education: Coqualeetza Residential School. Chilliwack High School - Graduated 1937. Anglican Theological College, University of British Columbia. Graduated in 1946 with a Licentiate in Theology.

Activities: First Canadian Indian to be elected to any Canadian parliament. First elected in 1949 to the British Columbia Legislative Assembly, representing the Constituency of Atlin.

Appointed as Minister without Portfolio, 1972-3, in the government of Dave Barrett. Resigned after a minor personal scandal. In the 1975 Provincial General Election, stood as a Social Credit Candidate. Defeated in the 1979 General Election.

Founder and First President of the Nishga Tribal Council, 1955 - 1974.

Leader in the campaign to take the Nishga Land Claim to the Supreme Court of Canada, the "Calder Case" resulting in the split decision of 1973.

In 1974 became Director of Land and Resources Evaluation involving the Nishga Land Settlement.

Honorary Chief Lissims of the Nishga Tribe. Also, past Secretary, Business Agent, and Chairman of the Legislative Committee, Native Brotherhood of British Columbia.

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