

# Litigation and the BC Treaty Process —

Some Recent Cases in a Historical Perspective

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to

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**BC Treaty  
Commission**

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## “I’ve read the Bill of Human Rights, and some of it is true.” — Leonard Cohen

By adding “in historical perspective” to my title, I know I have taken certain liberties in carrying out the task assigned to me for this conference. In my defence, I suppose I could say that it is unrealistic to expect a legal historian to stay in the present for very long. Or I could say that I have learned from experience that, when you are presenting on the afternoon of the second day of a two-day conference, most of what you wanted to say about current issues will have been said already. So you had better come up with something new (or, in my case, something old). But the real reason I have tweaked my topic in this way is that I think history is important. What is happening today has deep roots, and to a certain extent we are all playing roles that others have played before us, not just a few decades ago but more than a century ago. Indeed, only two blocks away stands the Marine Building, where the Allied Indian Tribes of British Columbia met in the summer of 1923 with the dominion minister of the interior, and then adjourned for five more days of intensive meetings in Victoria. They were trying to negotiate a settlement of the BC Indian Land Question, or at least to agree on a process for submitting it to the courts. In short, we have been here before.

The comments of the trial judge in a recent aboriginal title decision underscore this point. “For the Tlingits,” he wrote,

[t]he primary concern ... is the road proposal. It will open up the heartland of the Tlingit territory for the first time, and therefore raises concerns about their ability to sustain the land-based economic, social and cultural system on which they collectively rely as an aboriginal people.<sup>1</sup>

Similarly, it was the economic and immigration “boom” of the first decade of the twentieth century, with its soldier settlement schemes and railway construction, that led to petitions, delegations and, occasionally, even violence. And for the first time lawyers, whose involvement with aboriginal people had until then had been largely confined to prosecuting and defending them in criminal cases, became involved. Not many — in fact, by the end there was only one. But the result was a twenty-year campaign for aboriginal title that ended only when parliament effectively put a legal end to it in 1927.

So I am going to try to link up the past with the present, and I will start by dividing the history of litigation and negotiation in the Land Question into three periods. The first comprises the 125 years or so from colonization to the Supreme Court of Canada’s decision in the Nisga’a case in the early 1970s. The second covers the 25 years from then until that Court’s ruling in *Delgamuukw* at the end of 1997. And the third is of course where we are now. Legally speaking, each of these three periods was defined by a distinct and fundamental disagreement between aboriginal people and non-aboriginal governments about the rights of the former that stood squarely in the way of negotiating treaties.

In the first period, the stumbling block was the very existence of aboriginal title as a legal concept and the ability of the crown to keep this question from being litigated. In the second period aboriginal title was conceded to exist as a legal concept but its content — that is, whether it was a true property right — was contested. And in the third the issue has, until recently, been whether the obligations set out in the *Delgamuukw* case apply *before*, as well as *after*, the aboriginal title of a particular First nation has been established by litigation. One by one, these obstacles — there are of course others - have been removed.

### **1. Aboriginal Title and the Sovereign Immunity of the Crown, 1849-1973**

Historically, the issue in British Columbia for most of the past 150 years was not whether to litigate or negotiate aboriginal rights. It was whether aboriginal people were capable, practically and legally, of suing the crown, and whether the province would agree that there was anything to litigate or negotiate about. For most of this period — that is, from the creation of the colony of Vancouver Island in 1849 to the early years of the twentieth century — aboriginal people lacked the resources to engage in land claims litigation. And when they managed, around about 1908, to find a couple of lawyers who would assist them, they encountered a legal obstacle. Litigation against the crown was not only expensive. It was — because of the crown’s sovereign immunity from suit — a privilege; and British Columbia would neither consent to be sued nor agree to have the matter of aboriginal title referred to the courts.



I think that the first document that specifically requested a judicial determination of aboriginal title in terms that caused Ottawa to sit up and take notice was probably the much-neglected Cowichan Petition of 1909. Drafted with the assistance of missionary Charles Tate, lawyer and priest Arthur Eugene O'Meara, and Toronto barrister John Murray McCheyne Clark, KC, it was presented by O'Meara to the colonial authorities in London, England in April of that year.<sup>2</sup> This document, and the considerable unrest in the Nass and on the Skeena at the time, ushered in a period of legal activity on the aboriginal rights front that was unmatched until our own day. Between 1909 and 1911 the dominion government of Sir Wilfrid Laurier commissioned a legal opinion on the issue of whether there was unextinguished aboriginal title in BC; responded to numerous other aboriginal petitions; and attempted to secure the agreement of the province to a court reference. Then, when it became clear that British Columbia would not consent to such a reference, Ottawa made plans to proceed in court unilaterally.<sup>3</sup> However, the Conservative Government of Robert Borden replaced Laurier and the Liberals in the autumn of 1911, and took aboriginal rights off the table.<sup>4</sup> One result of this move was the Nisga'a Petition to the British Privy Council two years later.

What was BC's position with respect to litigation? I think that the most succinct statement of it is contained in a draft letter dated 19 November 1910 from Premier Richard McBride to Prime Minister Laurier. A court decision in favour of the Indians, wrote McBride,

would affect the title to all the land on the mainland ... and more than half of the land ... on Vancouver Island, and would have a most disastrous effect on our financial standing and would jeopardize the very large sums of money already invested in this province by English and other investors. I think you will agree with me that this is too serious a matter to be submitted to the determination of any court, however competent from a legal point of view. In other words, the considerations involved in this matter are political considerations and not legal question [sic] ... The Government of British Columbia therefore cannot agree to submit to a determination even by the Privy Council [of] a question of policy of such importance.<sup>5</sup>

McBride subsequently went to London, where he told the secretary of state for the colonies, the Right Honourable Lewis ("Loulou") Harcourt, that Britain's policy had to be "hands off British Columbia," and that the province would never alter its position on aboriginal title.<sup>6</sup> Although legally questionable even in 1911, this remained British Columbia's position for decades to come, and it prevailed in the face of both aboriginal petitions and the dominion's rather short-lived opposition. In 1927 an exasperated Ottawa finally reinforced BC's stance by having the dominion parliament amend the Indian Act to make it practically impossible for aboriginal people to retain lawyers to prosecute claims against government.<sup>7</sup>

Although land claims activity resumed after this restriction was dropped in 1951, the legacy of crown immunity was pointedly re-affirmed when the Nisga'a, after losing badly in the BC court of Appeal, managed to bring their case before the Supreme Court of Canada in the early 1970s. Although the Supreme Court ruled that aboriginal title is a part of Canadian law and split 3:3 on whether the Nisga'a still enjoyed such title, the Court dismissed their appeal. Four of the seven justices were of the view that, because the Nisga'a had not obtained the permission of the BC government to sue the crown, the case was not properly before the court — the same obstacle that had defeated the Nisga'a and the Allied Tribes forty years earlier.<sup>8</sup> And although this was its death rattle, BC argued that, because the technical ratio of the Supreme Court ruling did not deal with the merits, the Court of Appeal's decision — that aboriginal title can exist only if conferred by treaty, statute or agreement — was still the law of the province.<sup>9</sup> In the late 1980s the Court of Appeal emphatically repudiated this interpretation of the legal status of its earlier decision, but until then — and, indeed, even for a few years afterwards — BC continued to take the position that there was nothing to negotiate.<sup>10</sup>

But it would be misleading to give the impression that there were no treaty negotiations whatsoever in these early years. There were of course the *Douglas Treaties* that were made by the colonial authorities in the 1850s and there was *Treaty 8*, negotiated by the dominion at the end of the nineteenth century.<sup>11</sup> Less well known are the negotiations conducted between Ottawa and a number of provincial aboriginal groups, notably the Indian Rights Association, the Interior Tribes of British Columbia and the Allied Indian Tribes of British Columbia, between 1908 and 1927.



There was even a period in the 1920s when the senior dominion Indian Affairs official in the province believed that a settlement was only months, perhaps even weeks, away.<sup>12</sup> But these initiatives left most of BC unaffected, and the province took no real part in any of them. Eventually, Ottawa decided that it, too, would no longer contemplate or discuss making treaties in British Columbia or facilitate a judicial resolution of the dispute.

Why did this serious and dedicated campaign to settle the BC Indian Land Question, either through negotiation or litigation, fail? Three factors stand out. The first is the lack of unity among aboriginal people and of course their lack of political power.<sup>13</sup> They could not vote, they could not stand for election, they could not get their claim into court and their numbers had been declining since contact. The second factor is the intransigence of the province. And the third is the inability of the dominion government to make up its mind as to what it should do.<sup>14</sup> This last consideration is particularly important because it meant that BC's position prevailed by default. Notwithstanding its fiduciary responsibilities and a legal opinion that supported the existence of aboriginal title in the province, Ottawa would not go it alone and would not force the matter into the courts.

Certainly much has changed since those days: we have the *Nisga'a Treaty*, judicial decisions acknowledging aboriginal rights, constitutional protection for such rights, a treaty process and a general acceptance that major changes must occur. But not everything has changed; and progress was slow after the legislative ban on land claims was lifted in 1951, when the second major campaign for aboriginal title in BC — the current one — began to take shape. There were many reasons for this, but certainly one was that the politicians in Victoria and Ottawa, including the lawyers and judges from whose ranks some of them were drawn, knew little of the history of the Land Question. For them, land claims were not only something new; they were something that Indians had cooked up when they had time on their hands and nothing else to do. As a consequence, I think a good argument can be made that McBride's assessment of the situation in 1910 does not sound as dated as it should, even today. The complex relationship between aboriginal title and economic prosperity is as important now as it was when McBride — who no doubt thought he was doing posterity a favour — managed to keep the courthouse doors firmly closed. And we were well into my second period before it began to become clear just how wide those doors might open.

## 2. The Nature of Aboriginal Title, 1973-1997

In the mid-1970s the *Nisga'a* case and Cree opposition to Quebec's hydroelectric power project in James Bay obliged Ottawa to change its position yet again on aboriginal rights. A federal land claims policy was instituted, pursuant to which significant treaties were made in the northern regions of this country. In 1982 Canada's constitution was amended to recognize and affirm "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."<sup>15</sup> A number of Supreme Court of Canada decisions were handed down that revived a centuries-old tradition of jurisprudence that had been largely forgotten in this country by the mid-1800s and that poured content into some of these rights.<sup>16</sup> In the wake of Oka, the federal government established the Indian Claims Commission to report on treaty and *Indian Act* claims.<sup>17</sup> And in British Columbia a special treaty process was established.

However, although the right to litigate aboriginal rights was no longer an issue, British Columbia continued to resist during the 1970s and 1980s by refusing to participate in the *Nisga'a Treaty* negotiations and by maintaining that there was no aboriginal title in the province. And, much as they had before the First World War, resource extraction and settlement pressures were forcing more and more aboriginal people to take action. By 1985, for example, the writ in *Delgamuukw* had been filed and the Lyell Island blockade in Haida Gwaii was in place. Legally, however, the turning point was the Meares Island decision. For the first time, a BC court ruled that the matter of aboriginal title was sufficiently important to justify issuing an injunction against logging. In that case, Seaton, JA wrote that the

proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have been recently logged ... The Indians wish to retain their culture on Meares Island as well as in urban museums.<sup>18</sup>

Significantly, this passage, dealing as it does with the problem of ensuring that what is being negotiated or litigated will still be there when these processes are over, was resurrected and quoted two weeks ago in the Haida decision — as to which, more below.<sup>19</sup>



Within two years of Meares Island the *Delgamuukw* lawsuit went to trial, and between the decision of the trial judge in that case and the Court of Appeal's ruling in 1993, Canada, British Columbia and the First Nations Summit agreed to set up the BC Treaty process. I don't think anyone thought that the road ahead would be easy, but the change was historic in its implications.<sup>20</sup> British Columbia had finally acknowledged that McBride was wrong: aboriginal rights had a legal as well as a political dimension, and the province had to come to terms with this. The problem was that for some, aboriginal rights were no more than non-exclusive rights to hunt and fish on crown land, while for others they amounted to a form of ownership and governance. This gap, together with other important differences, made progress at the negotiating tables difficult. And it was not bridged, at least with respect to land title, until *Delgamuukw* reached the Supreme Court of Canada and that Court ruled that aboriginal title was in fact a right to the land itself.<sup>21</sup> But then a new gap — an abyss, some might say — opened up between the parties.<sup>22</sup>

It became clear that governments and First Nations took a very different view of what *Delgamuukw* required governments to do while treaties were being made. And in this respect I think that something else Justice Seaton said in 1985 in the Meares Island case is instructive. Responding to the argument that halting logging on the island would render investments throughout the province uncertain, he agreed that there was a problem with forest tenures and aboriginal title that had not been dealt with in the past. But he did not agree that this meant that the courts should back off. "We are being asked to ignore the problem as others have ignored it," he wrote. "I am not willing to do that."<sup>23</sup> This passage is not quoted in the recent Haida decision, but I rather think that it helps to explain that case and a number of others.

### 3. The Meaning of the *Delgamuukw* Decision, 1998 —

For years the courts have been making the obvious point that judges cannot write treaties, and the Supreme Court of Canada added its voice to this chorus in *Delgamuukw* by urging negotiated solutions. Since then, however, decisions have been handed down that go beyond mere cheerleading. Most of these decisions are clearly intended to facilitate and protect negotiated settlements. Whether they all actually do so is a matter for debate.

#### (a) Governance

The first one worth noting is *Campbell et al. v. AGBC et al.*<sup>24</sup> Launched by Premier Campbell and Attorney General Plant before they held those offices, the litigation was in essence a challenge to the self-government provisions of the *Nisga'a Treaty*.<sup>25</sup> Indeed, until this case it was unclear whether the courts would hold that there was room in s.35 of the *Constitution Act*, 1982 for an inherent right of aboriginal self-governance. The Supreme Court of Canada had left the question open, and the plaintiffs argued that confederation had extinguished any rights to self-government aboriginal people may have had by exhaustively distributing all governance powers between parliament and the provincial legislatures.<sup>26</sup> Justice Williamson, however, ruled not only that a limited form of self-government survived confederation and was affirmed by s.35, but that the Nisga'a Treaty properly and legitimately gave that limited right definition and content.<sup>27</sup>

Is this a correct statement of the law, i.e., is *Campbell* an aberration? I think not. Certainly there are passages in the Supreme Court of Canada's recent decision in *Mitchell v. MNR* that imply that the justices of that Court may be ready to follow suit. In his concurring reasons, Justice Binnie continued to leave open the possibility that s. 35 might protect aboriginal or treaty rights of governance, and referred to, without expressly adopting, the Royal Commission on aboriginal people's characterization of "shared sovereignty" as a defining characteristic of Canadian federalism.<sup>28</sup> So it seems likely that the basic thrust of Justice Williamson's decision — which really could not be appealed — will ultimately be affirmed.<sup>29</sup>

Ironically, we would not have arrived at this point so quickly if the current premier and attorney general had not forced the issue with their lawsuit. In this respect the question in the treaty referendum that seeks to confine the legal status of aboriginal governments to that of a municipality therefore looks rather like an attempt to turn back the clock.<sup>30</sup> Certainly it is dangerous, because the authority of the province even to participate in treaty making is "a nasty little constitutional issue" that everyone in the current treaty process has, for good practical reasons, chosen to avoid.<sup>31</sup> And given the federal government's unquestioned authority to do so, there appears to be nothing to prevent Ottawa from negotiating *Campbell* forms of governance (the case, that is, not the man) with individual First Nations without provincial participation.<sup>32</sup> Nothing, at least, apart from Ottawa's traditional reluctance to tweak provincial sensibilities in this way. But that reluctance may be weakening.<sup>33</sup>



### **(b) Costs for Litigating Aboriginal Title**

The *Campbell* case can be seen as an explicit judicial affirmation of the treaty process employed in the Nisga'a negotiations. But the court there was dealing with a *fait accompli*. Other recent cases of note are concerned more with the failures of treaty making in BC, and not simply because their backdrop is a process that a number of First Nations have refused to join and in which no treaties have been signed. Some of the judgments go further, explicitly referring to the state of treaty negotiations as a factor in the decision. In *Nemiah Valley Indian Band v. Riverside Forest Products Ltd.*, for example, Justice Vickers ordered Canada and British Columbia to pay the future costs of the plaintiff Indian Band's aboriginal title action. The defendants had argued that costs should not be awarded because the Tsilhqot'in and Xeni Gwet'in had "failed to take advantage of the availability of public funding for treaty negotiations," but the court disagreed. Citing both the state of treaty negotiations generally and the fact that the provincial government's proposed treaty referendum had cast "a cloud ... over the entire process," Justice Vickers concluded that it would be "unfair and unreasonable" to "require the plaintiffs to engage, against their better judgement, in treaty negotiations." He also noted that they had already "invested" years in the litigation process. "If I were to accede to the arguments of the defendants," he concluded,

It would mean putting the litigation on hold to pursue an uncertain process that is about to be redefined by a referendum whose questions are unknown. In addition, I cannot ignore the fact that the current process has yet to produce a completed treaty.<sup>34</sup>

This decision signals something very new. Costs are supposed to *follow* the event, in the sense that they are generally awarded to the successful party *after* the trial is over. Here they were awarded in advance, before the outcome is known. And although the Court of Appeal made a similar order in favour of the Okanagan Indian Band a few weeks earlier, that court made no reference to the referendum or the treaty process and had described the jurisdiction to make such an order as narrow and exceptional. It had only made the order, according to Justice Newbury, because the case was a test case on a matter of "public importance."<sup>35</sup> But as Attorney General Plant subsequently asked, "What aboriginal case isn't a test case in BC?"<sup>36</sup> Justice Vickers' ruling suggests that the attorney general's question may have been answered. Whether these decisions (as they appear to do) will encourage litigation or spur the parties in the treaty process to improve it remains to be seen. In this connection, it is perhaps worth noting that the Ministry of the Attorney General has recently announced that operational funding for the BC Treaty Commission will be reduced and funding for "consultation units and advisory committees" will be eliminated.<sup>37</sup>

### **(c) Provincial Jurisdiction**

Next up is the rather difficult decision in *Paul v. British Columbia* (Forest Appeals Commission), which the Court of Appeal decided in June of 2001.<sup>38</sup> Frankly, it raises too many complex constitutional issues to go into in a survey of this sort.<sup>39</sup> The result of the decision, however, is that the province does not have constitutional authority to confer jurisdiction to decide questions of aboriginal title or rights on a provincial official or tribunal. Only courts have such jurisdiction. Now, this cannot mean that provincial officials may not take aboriginal rights and title into consideration when planning resource development on lands subject to aboriginal claims, because that would surely be inconsistent with the crown's duty to consult. Nor, I think, does it mean that — short of an actual treaty — the province cannot enter into agreements with First Nations about matters of mutual interest. Generally speaking (and subject to questions of capacity), anyone, whether an individual, a corporation or a government, may make a contract with anyone else.<sup>40</sup> Constitutional problems arise only when the province attempts to legislate aboriginal rights or have its tribunals adjudicate them. But the case does appear to mean that, instead of being the ultimate decision-maker, courts will move to the head of the line. By this I mean that, instead of reviewing tribunal decisions on aboriginal rights, courts will determine them in the first instance, either by assessing the defence of aboriginal rights in a prosecution, or by hearing applications for an injunction or a declaration as to whether the crown is consulting adequately.<sup>41</sup> Or, perhaps, even by deciding lawsuits brought by First Nations for trespass on their lands. This is basically what the dominion's lawyer recommended that Ottawa do, as trustee for the Indians, in 1909 and what Kent McNeil has recommended much more recently.<sup>42</sup> Like the cases on costs, this decision therefore appears to move us, at least in the short to medium term, in the direction of litigation.<sup>43</sup>

### **(d) The Presumption of Aboriginal Title**

The most important issue that the Court of Appeal has addressed recently is, however, the obstacle I referred to earlier as characterizing the post-*Delgamuukw* legal environment. That is, the assumption by governments that the only aboriginal rights they are legally obliged to recognize are rights that have been defined by a treaty or found to exist by a court.



What the Court of Appeal would ultimately say about this assumption was anticipated last year in Justice Huddart's dissent in the Paul case, where she described the assumption as "flawed."<sup>44</sup>

Seven months later, in *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* a majority of the court agreed.<sup>45</sup> And a month after that a unanimous panel in *Haida Nation v. British Columbia (Minister of Forests)* confirmed this to be the law. "The issue," said the court, "is an important one."

If the Crown can ignore or override Aboriginal title or Aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of Aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed Aboriginal title or rights, even on an interim basis.<sup>46</sup>

Referring to the contrary view as the "timing fallacy," Justice Lambert ruled that proof of aboriginal title is not a condition precedent to the crown's obligation to consult about, and to try to accommodate, possible infringements of that title. He conceded that there could be no conclusive determination of whether there has been an infringement, and whether it was justified, until the precise nature of the rights involved has been proved. Nonetheless, the duty to consult and accommodate is legally binding from the moment a First Nation makes a credible *prima facie* claim, and constitutes "an alternative framework" for reconciling aboriginal claims and the public interest.<sup>47</sup> Given that there is now both a duty to consult once a claim is made and a supervisory role for the courts, the Haida case may also undermine governmental policies against litigating and negotiating a treaty at one and the same time.<sup>48</sup> Justice Lambert added that, when a court ultimately comes to consider "the aboriginal title ... of the Haida people," the way in which the duty to consult and accommodate has been discharged would have a "very significant impact" upon the determination as to whether any infringements were justified. Given that the Haida commenced a title action in the BC Supreme Court soon afterwards, I imagine that this latter statement may have prompted some late night sessions in the halls of government.<sup>49</sup>

At least one commentator has already characterized these decisions as judicial legislation.<sup>50</sup> To a certain extent, this is a phenomenon that became inevitable once Delgamuukw resurrected the law contained in the *Royal Proclamation* of 1763 and the foundational 19<sup>th</sup> century cases, because taking aboriginal rights seriously after all these years necessarily entails some new thinking. But the judges' reasons all cite Supreme Court of Canada decisions in support, and the principle that governments should be prudent when potential legal or constitutional rights are at stake is not a new one. After all, courts do not generally decide in advance whether such rights have been violated: they tell us afterwards, and it is then that we find out what the violation will cost us.<sup>51</sup> It seems to me that these cases are simply saying that this principle, which certainly applies to police searches, also applies to forest tenures. In fact, we were probably told this more than a hundred years ago in another piece of logging litigation, *St. Catherine's Milling*. In that case the Judicial Committee of the Privy Council stated that provinces could not use aboriginal title lands "as a source of revenue [until] the estate of the Crown is disencumbered of the Indian title."<sup>52</sup> Because for over a century BC maintained — uniquely — that there was no aboriginal title in the province to extinguish, it did not regard the principle as applicable. *Delgamuukw* and the *Haida* case, I would argue, reinforces *St. Catherine's* by adding the logical corollary that if governments seek to access this source of revenue before the title issue is resolved, they need to consult and negotiate with the First Nation claiming ownership. If they do not, they are taking a significant legal risk.

Does all this mean that in this fourth, post-*Haida* period, incentives are now in place for more meaningful negotiations, both at the treaty table and elsewhere? I think that is what the courts intend to happen, and there is no doubt that the periods are getting shorter. It took over a century to get over crown immunity, a quarter of that to re-establish aboriginal title as a property right, and only four years to confirm that aboriginal title has some clout even before it is litigated. But more meaningful negotiations are also what the Supreme Court of Canada was aiming for in *Delgamuukw*, and it did not quite work out that way. It is, perhaps, too early to tell.

The reality, I think, is that negotiated settlements are, in the end, the only solution. But they may be possible only if the courts provide a framework that gives all the parties a better idea of where they stand, and if the parties — all the parties — are truly committed to making just and honourable settlements.



<sup>1</sup> Quoted by Rowles, JA in the Court of Appeal's review of that decision. See *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2002] BCJ No. 155 at para. 130.

<sup>2</sup> A copy of the petition may be found in the Vancouver City Archives (VCA).

<sup>3</sup> Details of this proposal may be found in Hamar Foster, "A Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question" in G. Blaine Baker and Jim Phillips, eds. *Essays in the History of Canadian Law*, Vol. VIII (Toronto 1999) at 171-212.

<sup>4</sup> See McKenna to McBride, 29 July 1912, excerpted in Special Joint Committee, *Report and Evidence* (Ottawa, 1927) at 9. This was not the first time that Ottawa backed down on the title question: they had done so in the 1870s in order to secure BC's agreement to setting up the Joint Indian Reserve Commission.

<sup>5</sup> McBride to Laurier, 19 November 1910, GR 441, Box 149, BCARS, cited in Jeannie L. Kanakos, *The Negotiations to Relocate the Songhees Indians, 1843-1911* (MA thesis, SFU, 1974) at 71.

<sup>6</sup> *The British Columbia Indian Situation: Report of Interview Had with the Government of British Columbia at Victoria, on 23<sup>rd</sup> January 1912* (Conference of Friends of the Indians of British Columbia) at 3: VCA, PAM 1912-2. This is a transcript of the meeting, and McBride made his report on his talks with Harcourt at the outset.

<sup>7</sup> RSC 1927, c. 98, s. 141.

<sup>8</sup> *Calder v. AGBC* (1973), 34 DLR (3<sup>rd</sup>) 145 (SCC). This immunity was not removed until 1973, too late for the Nisga'a case.

<sup>9</sup> *Calder v. AGBC* (1971), 13 DLR (3d) 64 (BCCA).

<sup>10</sup> In *R. v. Sparrow* (1987), 32 CCC (3d) 65 at 80-84, the BC Court of Appeal emphatically rejected the province's interpretation of the legal effect of their decision in *Calder*. That decision, the court said, had "not, since the pronouncement of the judgment of the Supreme Court of Canada in the same case, been binding on anyone." The notion that it did was an "error" and a "fallacy," and amounted to treating the Supreme Court decision as if it "did not exist."

<sup>11</sup> On the Douglas Treaties see Hamar Foster and Alan Grove, "The True Interests of the Whites: A New Perspective on the Short History of Treaty Making in Nineteenth Century British Columbia" (forthcoming). On Treaty 8, see Arthur J. Ray, "Treaty 8: A British Columbia Anomaly" *BC Studies* no. 123, Autumn 1999 at 5-58 and, most recently, the FCTD decision in *Benoit v. Canada*, [2002] FCJ No. 257.

<sup>12</sup> Ditchburn to the Indian agent at New Westminster, 2 March 1923, National Archives of Canada, RG10, Vol. 11047, File 33/General, Part 7. Ditchburn states that the minister had informed the Allied Tribes the previous year "that the Government of Canada were prepared to concede the fact that the Indians had a case and that if it reached the [Judicial Committee of the Privy Council] the decision, *no doubt*, would be in the Indians' favour [and so] was prepared to discuss with them a method of settling this long-standing dispute" [emphasis added]. Ditchburn also said that such a settlement was expected "during the late spring or early summer months..."

<sup>13</sup> The point about power is obvious: Indians could not vote, could not get their claims into a court and had to raise nearly all the funds for their lobbying themselves. For examples of disunity, see the opposition of the United Tribes of BC (nine Tsimshian groups) to the Judicial Committee of the Privy Council hearing the Nisga'a petition, and the intervention of two interior chiefs in the 1927 parliamentary hearings in order to contest the position of the Allied Tribes: see letter dated 10 March 1919 from Henry D. Pierce to the Privy Council, PRO, PC 8/1240 and Special Joint Committee, *Report and Evidence* above n. 4 at 135-146.

<sup>14</sup> Deputy Superintendent Duncan Campbell Scott himself stated that the history of the issue revealed "the Provincial Government ever constant in the stand that there is no Indian title in the Provincial lands, and the Dominion Government uncertain of its position on that question..." (Special Joint Committee, *Report and Evidence*, above n. 4 at 6-7).

<sup>15</sup> *Constitution Act*, 1982, s. 35(1).

<sup>16</sup> E.g., *Guerin v. R* (1984), 13 DLR (4<sup>th</sup>) 321, *CPR Ltd. v. Paul*, [1988] 2 SCR 654 and *R. v. Sparrow*, above n. 10.

<sup>17</sup> According to its most recent annual report, "the settlement of specific claims continues to be a painfully slow process:" see *Indian Claims Commission: Annual Report 2000-2001* (Ottawa 2001) at 1.

<sup>18</sup> *MacMillan Bloedel Limited v. Mullin et al.*, etc. (1985), 61 BCLR 145 (CA) at 151, 156 (per Seaton, JA) quoted by Lambert, JA in *Haida Nation v. British Columbia (Minister of Forests)*, [2002] BCJ No. 378 at 3.

<sup>19</sup> See text accompanying notes 46-49.



<sup>20</sup> See Hamar Foster and Alan Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers" (1993) 27 *UBC Law Review* 213.

<sup>21</sup> *Delgamuukw v. British Columbia* (1997), 153 DLR (4<sup>th</sup>) 193 (SCC) and see Hamar Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* 'Invented Law'?" (1998), 56 *the Advocate* 221.

<sup>22</sup> For an account of this gap that goes beyond the merely legal see James Tully, "Reconsidering the Treaty Process" in *Speaking Truth to Power: A Treaty Forum* (BCTC 2001) at 3-17

<sup>23</sup> *MacMillan Bloedel Limited v. Mullin et al.*, above n. 18 at 160.

<sup>24</sup> *Campbell et al. v. AGBC/AG Can* (2000), 79 BCLR (3d) 122 (BCSC). The decision has not been appealed, presumably because the Nisga'a Treaty obliges the parties to uphold the treaty and because the appellants (the premier and two cabinet ministers) and some of the respondents would now be the same parties.

<sup>25</sup> See Hamar Foster, "Honouring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty," *BC Studies*, No. 120, winter 1998/99 at 11 and Doug Sanders "We Intend to Live Here Forever': A Primer on the Nisga'a Treaty" (1999), 33 *UBC Law Review* 103.

<sup>26</sup> The argument is an old one: see Foster, "Honouring the Queen's Flag," preceding note, at 34-35.

<sup>27</sup> Above n. 24 at 158.

<sup>28</sup> *Mitchell v. MNR* (2001), 199 DLR (4<sup>th</sup>) 385 (SCC). See also Patrick Macklem, "Recent developments in Aboriginal Rights: A Thematic Overview" (CLE, *Aboriginal Law Conference* 2002) at 1.1.10-1.1.11.

<sup>29</sup> It could not be appealed because Mr. Campbell and Mr. Plant became premier and attorney general, and the Nisga'a treaty obliges the parties to uphold and defend the treaty. Even if it did not, Campbell and Plant would be both appellants and respondents, and would have to instruct counsel for both sides. One wonders if this was considered when the original proceedings were launched.

<sup>30</sup> Question 9, as originally proposed, read: "The Province will negotiate Aboriginal Government with the characteristics and legal status of Local Government" (Select Standing Committee on Aboriginal Affairs Report, 2001 at 19). As tabled in the Legislative Assembly on 12 March 2002, it reads: "Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia." The substitution of "should" for "will" is arguably a softening of the government's position.

<sup>31</sup> See Patrick Macklem, "The Probable Impact and Legal Effect of the Proposed Treaty Referendum" in Vol. 59, Part 6 of *the Advocate* (2001) 895 at 902.

<sup>32</sup> Lawyers tend to name legal principles after the cases that established them: a "*Mareva*" injunction for example, or a "*Corbett*" application. Given the premier's position on the issue, it would therefore be even more ironic if the inherent right to self-government comes to be known as "*Campbell*" self-government.

<sup>33</sup> Federal policy currently excludes such an approach. However, the Hon. Robert Nault indicated on March 15, 2002 that the federal government was "looking at all its options," including governance initiatives under the Indian Act and the First Nations Land Management Act (transcription prepared by Media Q Inc. for INAC, 15 March 2002).

<sup>34</sup> [2001] BCJ No. 2484 at paras. 26-29. Since this case was decided, the questions have been announced: see, e.g., n. 30, above.

<sup>35</sup> *British Columbia (Ministry of Forests) v. Okanagan Indian Band* [2001], BCJ No. 2279 (BCCA) at para. 37.

<sup>36</sup> Vaughn Palmer, 'Who Pays? Rulings on Natives to be Appealed,' *Vancouver Sun*, 14 December 2001. I am grateful to Alan Grove for drawing this reference to my attention.

<sup>37</sup> *Ministry of the Attorney General and Minister Responsible for Treaty Negotiations Service Plan Summary* 2002/03-2002/04 at 4.

<sup>38</sup> [2001] BCJ No. 1227 (14 June 2001). The constitutional issue in this case was whether the BC legislature had authority to confer jurisdiction on a district manager, an administrative review panel or the Forest Appeals Commission to decide questions of aboriginal title and rights. The court held (Huddart, JA, dissenting) that it did not.

<sup>39</sup> For a commentary that is critical of the majority decision see Thomas Isaac, "Provincial Jurisdiction, Adjudicative Authority and Aboriginal Rights: A Comment on *Paul v. BC* (Forest Appeals Commission)" in Vol. 6, Part 1 of *the Advocate* (Jan. 2002) at 77-88.



<sup>40</sup> I say “short of an actual treaty” because treaty making is, pursuant to s. 91(24) of the Constitution Act, 1867, an exclusively federal responsibility; see text accompanying n. xx, above. It should also be noted that one writer has suggested that *Paul* precludes BC from making bilateral agreements with First Nations that recognize aboriginal rights. See Barbara Fisher, “The Constitutional and Fiduciary Duties of the Provincial Crown: The Impact of Recent Decisions on the Duty to Consult & the Determination of Aboriginal Rights” (*CLE, Aboriginal Law Conference 2002*) at 4.1.14-15 and 4.1.17. Admittedly, these questions are complex (and getting more so).

<sup>41</sup> As to which, see the discussion of the *Haida* case accompanying notes 46-49, below.

<sup>42</sup> See “A Romance of the Lost,” above n. 3 and Kent McNeil, “The Onus of Proof of Aboriginal Title” (1997), 37 *Osgoode Hall Law Journal* 775.

<sup>43</sup> On the other hand, as Donald, JA, stated in his concurring reasons at para. 104, it is “pointless ... to tie up forest tribunals with complex aboriginal rights cases when they are destined for court anyway.” Justice Donald was also worried (para. 95) “about the appearance of a tribunal so closely connected to the government deciding cases of aboriginal rights when that same government may be an adversary in the dispute.”

<sup>44</sup> Above n. 38 at para. 119.

<sup>45</sup> Above, n. 1. As Rowles, JA, put it at para. 174, the Supreme Court of Canada has said that s. 35(1) of the Constitution Act, 1982 provides a foundation for negotiating and settling aboriginal land claims. Therefore to “say, as the Crown does here, that establishment of the aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims.”

<sup>46</sup> [2002] BCJ No. 378, at para. 10 [emphasis added].

<sup>47</sup> *Ibid.*, at para. 11 and 14. As Lambert, JA, put it at para. 41, the fact that conclusive determinations must await trial does not mean “there is no fiduciary duty on the Crown to consult the aboriginal people in question after title is asserted and before it is proven to exist, if, were title to be proved, there would be an infringement.”

<sup>48</sup> On 15 March 2002 the Hon. Robert Nault (above n. 33) acknowledged that the federal government had a policy “that says that you have to put your lawsuit in abeyance if we’re going to be at the negotiating table so that we can have freedom to talk about the issues. But look, ” he added, “ you know these processes are fluid.” Although he did not mention the fact that this is not the rule in ordinary civil suits, his remarks may nonetheless represent a relaxation of the policy.

<sup>49</sup> And not only there: the *Haida* case, rather surprisingly, also imposed a duty to consult on *Weyerhaeuser*, the forest company involved in the case. Fisher, above n. 40 at 4.1.10-4.1.13, provides a thoughtful criticism of this aspect of the decision.

<sup>50</sup> Fisher, *ibid.*, at 4.1.01 and 4.1.12.

<sup>51</sup> Cf. Huddart, JA in *Paul*, above n. 38 at paras. 118-119.

<sup>52</sup> *St. Catherine’s Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46 (PC) at 59.