Aboriginal Rights, Canada's Specific Claims Policy, and the Case of Lax Kw'alaams.

by
Nikki Shaw
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[redacted]

Dr. T. Rennie Warburton, Supervisor (Department of Sociology)

[redacted]

Dr. Frank Cassidy, Member (School of Public Administration)

[redacted]

Professor Hamar Foster, Member (Faculty of Law)

[redacted]

Dr. Ian MacPherson, External Examiner (Department of History)

Supervisor: Dr. T.R. Warburton

Abstract

A review of scholarly opinion on the source of Aboriginal title suggests that early Canadian jurisprudence compromised the rights of Aboriginal people by defining Aboriginal title as a mere right to use and occupy certain lands at the pleasure of the Crown.

Since confederation Canada has used its authority under section 91(24) of the Constitution Act, 1867, to establish a uniform policy relating to Indians and Indian reserve lands. The standard applied for assessing the interest in reserve land throughout Canada is that applied to post-confederation treaty lands where Canada asserts all Aboriginal interests were extinguished.

In British Columbia reserves were allotted without considering Aboriginal title. The Lax Kw'alaams people repeatedly asked for a treaty and when the government refused they actively resisted the surveying of their lands. They have continued to lobby, organize, and petition for recognition of their title. The Lax Kw'alaams claim involves reserve lands, created by executive act, in which the Aboriginal title was never surrendered. Yet as a condition of settling the claim Canada has demanded an absolute surrender, which it claims will extinguish Aboriginal title.

In response to proposals for an alternative claims process, an Indian Claims Commission was established in 1992 to hear and report on disputed claims. Although the Commission is a step in the right direction, Aboriginal people need a process that: provides settlements within a reasonable time frame; provides direction on implementing decisions; and, that is sensitive to the cultural and political distinctiveness of their societies.

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Dr. T. Rennie Warburton, Supervisor (Department of Sociology)

[redacted]

Dr. Frank Cassidy, Member (School of Public Administration)

[redacted]

Professor Hamar Foster, Member (Faculty of Law)

[redacted]

Dr. Ian MacPherson, External Examiner (Department of History)

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I Introduction

Aboriginal rights, Native claims, and treaty negotiations are the focus of Canada's Indian policy in the 1990's and yet there is little agreement amongst the parties on the nature of Aboriginal title or rights. This thesis explores the relationship between the failure of one of Canada's claims policies and the dispute over the definition of Aboriginal rights. In particular it examines a specific claim against Canada submitted by the Lax Kw'alaams Band of the Tsimshian nation in northwestern British Columbia in the context of Canada's assertion that:

> [T]here is a long established and well developed position as to what is accomplished by reserve creation or surrenders under the Indian Act. To be consistent with past and future surrenders, as well as between different parts of the country, this position must and will be applied consistently...The federal position on this issue is clear, firm and is based on legal requirements.[1]

Chapter two shows that despite the existence of a legal framework for accommodating the rights of Aboriginal people with the demands of settlement, colonial governors in all but Upper Canada uniformly disregarded Aboriginal title and rights. Since confederation Canada has attempted, through its Indian policy, to create uniformity in Indian administration. It is suggested that since reserves were created by a diverse assortment of instruments the nature of the Aboriginal interest in reserve lands probably varies accordingly.

Chapter three introduces the Lax Kw'alaams people of the Tsimshian nation and the events surrounding the allocation of reserves in their territory. During the years of resistance deep divisions were created within Tsimshian society. The government exploited the situation by providing favours to a small cooperative group. In particular it divided the main Tsimshian reserve at the request of this group. As a result of the division two Indian bands were

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[1]Manfred Klein, Director, Specific Claims West, to Harry Slade, Ratcliffe and Company, December 11, 1992).

created, each with their own reserve lands. The division of the reserve, however, was unlawful and it is this division and subsequent transactions relating to the reserve that form the subject matter of the claim considered here.

Chapter four explains how early judicial interpretations of the law on Aboriginal rights and title circumscribed those rights and legitimated the actions of colonial governments. First the courts decided Aboriginal title was not a legally enforceable right to land but rather a right of occupancy at the pleasure of the Crown. Subsequent decisions relating to the nature of the interest in Indian reserve lands adopted the reasoning from these early decisions. In Canada, the Indian Act filled the vacuum created by the denial of an Aboriginal legal and political presence as part of the basic constitutional structure of the country.

Chapter five outlines the emergence of claims policy since 1946. Parliamentary debates beginning that year are testimony to the effectiveness of judicial interpretations of Aboriginal rights in rendering those rights irrelevant. In 1973, the Supreme Court of Canada put Aboriginal rights and title questions back on the Canadian Aboriginal agenda. Following the decision in *Calder*, Canada announced two new policies for claims settlement. The comprehensive claims policy, designed to address Aboriginal title based claims, and the specific claims policy for settling claims where rights were presumably not at issue.

The sixth chapter introduces the Lax Kw'alaams Band's specific claim against Canada based on the unlawful division of Tsimshian Indian Reserve No. 2 in 1888. After fifteen years of negotiations the Band and Canada arrived at a settlement agreement but Canada demanded that the Band provide an absolute surrender of its interest in the land. The problem with this form of surrender is that Canada maintains it will extinguish all Aboriginal interests in the land. The Band would not comply and negotiations were suspended.

In 1992, Canada established an Indian Claims Commission. The Band submitted its claim for review by the Commission. The proceedings and recommendations of the Indian Claims Commission support the Tsimshian position that their interests in Tsimshian I.R. 2 are not the same as their unextinguished Aboriginal rights and title to the same lands.

II Aboriginal Title in Colonial and Post-Confederation Administrations

Understanding the problems with Canada's specific claims policy requires considering it in its legal and historical context. This chapter introduces the concepts of Aboriginal rights and title in a preliminary way to provide a framework for understanding the processes involved in settling Canada. The concern is with doctrine. Judicial interpretations of the doctrine are considered in the fourth chapter. The purpose here is to identify the various sources of Aboriginal rights suggested by contemporary legal scholars. With that background we can better assess Canada's treatment of Aboriginal land rights.

In the past decade a number of legal scholars have attempted to clarify the issue of Aboriginal land rights. Their works have contributed significantly to reframing the question of the nature and sources of Aboriginal rights and title in Canada. The consensus among these scholars, consistent with recent Supreme Court of Canada directives, is that the courts cannot provide adequate solutions to Aboriginal claims. Solutions depend on sound legal principles and a commitment to negotiate settlements.

One leading scholar, Brian Slattery, offered a general theory for understanding Aboriginal rights in the context of the complex history of relations between Aboriginal people and the Crown. Slattery identified three distinct but interrelated sources of Aboriginal rights and title: constitutional structures that evolved in the British American colonies to accommodate the existence of both settlers and indigenous groups; general principles of British Colonial law; and, the Royal Proclamation of 1763.[2] The first two sources set out the rights established before Britain acquired sovereignty.

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[2]Slattery, Brian, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727-83.

According to Slattery, the extensive relations established between European governments, English colonies, and Aboriginal nations in the period 1600-1800 formed part of the embryonic constitutional law governing Britain's overseas colonies.[3] During this period Europeans and Aboriginal nations engaged each other in a range of relationships that included the negotiation of treaties and informal agreements, establishing alliances for various purposes, and wars. The doctrines of Aboriginal rights and title, Slattery argued, can only be understood with reference to these relationships. The constitutional law governing Britain's overseas colonies, referred to sometimes as colonial law and sometimes as the imperial constitutional law, continues to vest Aboriginal nations with a residue of the sovereignty they once enjoyed exclusively.[4]

The doctrine of Aboriginal land rights attributes to Native groups a collective title with certain general features. This collective title is not governed by traditional notions or practices, and so does not vary from group to group. The rights of individuals and other entities within the group are determined, however, by internal rules founded on custom. These internal rules dictate the extent to which any individual, family, lineage, or other sub-group have rights to possess and use lands and resources vested in the entire group.[5]

In the same way that colonial law determined whether a colony was deemed to be settled or conquered, and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of Native peoples. The doctrine of Aboriginal rights applied, then, to every

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[3]Ibid. p. 745.

[4]Slattery, Brian, "Aboriginal Sovereignty and Aboriginal Claims, in (ed) Cassidy Frank, Aboriginal Self-Determination, The Institute for Research on Public Policy, 1991, p.213.

[5]op. cit., p. 745.

British colony that now forms part of Canada, from Newfoundland to British Columbia.[6]

Kent McNeil's work focused on the common law basis of Aboriginal title and the effect of the acquisition of sovereignty on Aboriginal title in settled parts of the country. McNeil's argument is that the doctrine of common law Aboriginal title is based on the presumptions arising in English law from occupation of lands. First, since the law applies only in settled regions it is essential to distinguish the regions to which the Crown has original territorial title by settlement from those acquired derivatively by cession or conquest from France.[7]

In English law it is impossible for the Crown to acquire an original title to occupied lands. At the international level, where the Crown had extensive prerogative powers, it acquired territorial sovereignty over a settlement by occupancy of a territory as a unit . Title to territory and title to lands are two entirely different things. Whereas the Crown might be able to sustain assertions of sovereignty at the international level it could not ignore the physical occupation by Aboriginal people. The only way the Crown could acquire title to occupied lands would be by annexing those lands by act of state before the acquisition of sovereignty.[8] In the case of lands occupied by Aboriginal people, the Crown would have acquired a paramount lordship rather than the lands themselves.[9] By virtue of the doctrine of tenures the common law would give the Aboriginal occupiers title to fee simple estates.[10]

Since our concern is with the Aboriginal interest in lands in a settled colony his analysis applies. The definitive judicial

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[6]Ibid. 737.
[7]McNeil, Kent, Common Law Aboriginal Title, Clarendon Press, Oxford, 1989, p.268.
[8]ibid, p.299.
[9]ibid, p.229.
[10]ibid, p.233.

decisions, however, relate to ceded regions of Canada. In McNeil's opinion, these decisions are of little precedential value in settled Canada.[11]

Slattery's third source of Aboriginal rights was the Royal Proclamation of 1763. Following *St. Catherine's* the proclamation was the only recognized source of Aboriginal rights, and it was held not to apply in British Columbia.

According to Slattery, the proclamation codified the imperial constitutional law relating to Aboriginal rights. The proclamation addressed the constitutional arrangements for the newly acquired territories and the policy measures for the protection of Aboriginal lands. Approximately one third of the proclamation addressed Aboriginal lands.[12]

The first paragraph prohibited colonial governors from granting survey warrants or patents for lands outside the colonies; the second paragraph delineated an exclusive Aboriginal reserve; the third paragraph required the removal of all persons settled within the boundaries of the reserved land; and, the fourth paragraph imposed specific conditions on the purchase of Aboriginal lands.[13]

All colonial governments were subject to the Indian part of the proclamation which said in part:

> [T]he 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 thepir Hunting Grounds.[14]

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[11] ibid, p.269.
[12] Johnston, Darlene. The Taking of Indian Lands in Canada:Consent or Coercion?, University of Saskatchewan, Native Law Centre, 1989, p.4.
[13] ibid, p.5.
[14] Supra note 2, at, p. 75

Although private purchases of Aboriginal lands were expressly prohibited, regardless of whether those lands were within the settled territories or the Indian country (lands reserved by the proclamation), Aboriginal lands were not absolutely inalienable.

> [I]f 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 public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie...[15]

The ultimate protection of Aboriginal land rights was the purchase procedure applicable to all unceded lands in Aboriginal possession. Colonial governors, however, largely ignored the provisions relating to Aboriginal lands.

There were no land cession treaties in Nova Scotia prior to 1763, and after that date the acquisition of the colony by conquest was assumed to obviate the requirement for voluntary cession. The reserves that emerged after 1763 were the product of individual petition, executive order in council or private beneficence.[16] After 1842, reserves were allotted at the discretion of a Commissioner of Indian Affairs and in 1852 an Order in Council vested title to all Aboriginal lands in the Commissioner of Crown lands.[17]

New Brunswick provided no more protection for Aboriginal lands than Nova Scotia. Of more than 100,000 acres set aside in 1810 only 61,293 remained in 1838 due to unchecked encroachments by settlers.[18]

Prince Edward Island was a separate political union as of 1769. It was surveyed in 1764, divided into sixty-six lots and, in 1767,

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[15]op. cit., Royal Proclamation of 1763, reprinted in R.S.C. 1985, App. II, No. 1, paragraph 4, p. 6.
[16]ibid, p. 10-12.
[17]ibid, p. 12-16.
[18]ibid, p.18

granted to absentee British proprietors. Aboriginal interests were ignored and there was no option to petition for Crown grants as Crown lands had ceased to exist. A private benefactor provided a 204 acre parcel and eventually Lennox Island was purchased as a reserve.[19]

The first British governor of the colony of Quebec, James Murray, received Royal Instructions on December 7, 1763 which recognized that.

> 60...Our Province of Quebec is in part inhabited and possessed by several Nations and tribes of Indians, with whom it is both necessary and expedient to cultivate and maintain a strict friendship and good Correspondence.
>
> 61...upon no account (to) molest or disturb them in the Possession of such Parts of the said Province, as they at present occupy or possess.
>
> 62...by Our Proclamation dated 7 day of October, 1763, strictly forbid...all Our Subjects from making any Purchases or Settlements whatever...[20]

Initially the governor and executive council of Quebec adhered to the proclamation. The Constitution Act 1791, divided Quebec into two separate provinces, Upper and Lower Canada.[21] In Lower Canada the general pattern of encroachment on Aboriginal lands prevalent throughout the colonies was repeated. By the 1840 Union Act the Province of Canada was formed and Lower Canada ceased to have a separate legislature. In 1850, Aboriginal lands were vested in a commissioner empowered to concede, lease, or charge any land or property in the reserves without the consent of the Aboriginal inhabitants.[22]

In Upper Canada, Aboriginal lands were under the sole direction of the Imperial authorities until 1839. In 1839, the provincial legislature included unceded Aboriginal lands in an act relating to

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[19]ibid, p.26.
[20]ibid, p. 28.
[21]ibid, p. 35.
[22]ibid, p.39.

Crown lands.[23] This provincial interference in Indian affairs was justified on the grounds that the Crown claimed "the fee simple of all Lands occupied by the Indians in the Upper Province."[24]

Following the division of Quebec in 1791, imperial representatives in Upper Canada negotiated treaties that involved the surrender of specified tracts of Aboriginal lands in exchange for a one time payment. The people would simply retreat to more remote corners of their territory. By 1818 annual payments in perpetuity become a feature of the surrender process. By the late 1820's annual payments were accompanied by the establishment of permanent residential reserves.[25] The 1850 Robinson Treaties of Upper Canada provide the best example of emerging Indian policy.

After 1850 treaties included the reservation of defined lands for residential purposes, compensation, continued hunting and fishing rights on ceded lands, and annual payments in exchange for surrenders of land. Although the Robinson treaties provided the general prototype for those negotiated after confederation, in the Robinsion treaties, lands reserved are lands "kept back" from the surrender.

The Constitution Act, 1867, anticipated and provided for the annexation of existing colonies and the acquisition of new territories. It also delegated legislative authority for Indians and Indian lands to the federal government.[26] The Deparment of the Secretary of State was established in 1868 and vested with responsibility for Indian affairs. [27] The Act establishing the Department repealed the Indian legislation from New Brunswick and

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[23]ibid, p.55.
[24]ibid, p.55.
[25]ibid, p.48.
[26]ibid, p.62.
[27]ibid, p.67.

Nova Scotia entirely and Quebec legislation that was inconsistent with the newly established regime.[28]

In the process of westward expansion Canada negotiated a series of treaties, known as the numbered treaties, between 1871 and 1921. These treaties apply to the western North West Territories, the prairie provinces and a portion of northeastern British Columbia.[29] A plain reading of the numbered treaties suggests that the Native signatories extinguished all their rights and titles in exchange for reservations of land and treaty provisions. At least some of the descendants of the signatories to those treaties maintain their ancestors did not extinguish title or rights on reserved lands, that their treaties guarantee them continuing rights on ceded lands, and, that Canada's reading of their treaties ignores the spirit and intent of the solemn declarations made by both parties.[30]

The written texts are only one component of the numbered treaties. Lengthy verbal negotiations and "outside promises" accompanied each treaty.[31] As Lieutenant-Governor Alexander Morris explained to the Cree and Salteux negotiators of Treaty 4,

> The Queen has to think of what will come long after today. Therefore, the promises we have to make to you are not for today only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.[32]

The colony of Vancouver Island was established in 1849 and control of land and settlement delegated to the Hudson's Bay Company.

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[28]ibid, p.67.

[29]Morse, Bradford W. (ed), Aboriginal Peoples and the Law, Chapter 5; See Price, Richard (ed.), The Spirit of the Alberta Indian Treaties, University of Alberta Press, 1987.

[30]Price, Richard, ed., The Spirit of the Alberta Indian Treaties, Pica Pica Press, 1987.

[31]Morse, Bradford W. Aboriginal Peoples and the Law, p. 397.

[32]Hall, Tony, "The Queen's Allies: For "as long as the sun shines above and the water flows in the ocean," in The Canadian Forum, December 4, 1994, p.29.

James Douglas, the Company's chief factor, negotiatied fourteen land cession treaties within the new colony between 1850 and 1854.[33] These treaties provided the Aboriginal people with a one time cash payment; the preservation of all villages, cultivated lands, and burial sites; and, the recognition of the signatories' right to continue fishing and hunting throughout the surrendered territory as formerly.[34]

The act providing for the government of the mainland colony[35] and the 2 September 1858, royal commission constituting Governor James Douglas in office were both silent on the subject of Aboriginal people.[36] In a despatch dated 31 July, 1858, however, Douglas was advised that:

> The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards [the Indians]....Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of civilization among the natives.[37]

On 4 March 1859, Douglas presented the Secretary of State for the Colonies with a scheme for establishing reserves. Nowhere in the plan did he mention treaties or compensation. Rather, the tribes would be expected to lease portions of their land to support themselves. Within the proposed reserves each family would have their own parcel of land but with no power to sell or otherwise

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[33]British Columbia, Papers Connected with the Indian Land Question: 1850-1875, Government Printing Office, Victoria, 1875, p.5-11.
[34]ibid, p.11.
[35]supra note 2, p. 76.
[36]ibid, p.77, Orders in Council Annexing Letters Patent Granting a Royal Commission to James Douglas as Governor of British Columbia.
[37]op. cit., p. 12, Extract from a Despatch from the Right Hon. Sir E.B. Lytton, Bart., to Governor Douglas, 31 July 1858.

alienate. British law would be enforced and moral and religious training provided.[38]

Again on 11 April, 1859, Douglas was advised to secure surrenders of Aboriginal lands and to provide compensation.

> In the case of the Indians of Vancouver Island and British Columbia, Her Majesty's Government earnestly wish that when the advancing requirements of colonization press upon lands occupied by members of that race, measures of *liberality and justice* may be adopted for *compensating them for the surrender* of the territory which they have been taught to regard as their own.[39]

It is estimated that between 20,000 and 30,000 migrant miners arrived in the mainland colony in 1858.[40] Douglas had not allotted any reserves, by treaty or otherwise, since 1854. This wave of immigrants was to prove as detrimental to the protection of Aboriginal rights in the new colony as the loyalists had in the Maritimes and Lower Canada.

In 1861 Douglas requested[41], but was denied,[42] financial assistance from the imperial government to extinguish the Aboriginal title to the public lands of Vancouver Island. In the mainland colony Douglas was implementing his plan for reserve allocations without treaties. Surveyors were instructed to:

> [T]ake an early opportunity of staking and marking out in the District in which you are now stationed, all Indian villages, burial places, reserves, etc., as they may be pointed out to you by the Indians themselves, subject, however, to the decision of the Magistrate as to the extent of the land so claimed by them.

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[38]ibid, p. 16, Despatch from Governor Douglas to the Right Hon. Sir E.B. Lytton, Bart., 14 March 1859.

[39]ibid, p. 18, Secretary of State for the Colonies to Governor Douglas, C.B., 11 April 1859.

[40]Ormsby, Margaret, A. "Canada and the New British Columbia" in Friesen J. and Ralston, H.K. (eds.) Historical Essays on British Columbia, Gage Publishing Limited, 1980, p.109.

[41]op. cit., p. 19, Douglas to Secretary of State for the Colonies, 25 March 1861.

[42]ibid, p. 20, Secretary of State for the Colonies to Douglas, 19 October 1861.

> Make sketches of the locality and give dimensions of the claim, sending them to this office after acquainting the Magistrate of what you have done.[43]

The position and extent of all lands set aside were to be published in three different places in each district where they were located. The marking out and publishing of Indian Reserves did not mean, however, that they were to be secure, "and should it so happen that circumstances may afterwards render it expedient to relinquish any such reserve, notice of the same is to be likewise posted."[44]

Over the next year reserves were allocated in the lower mainland, and in the territories of the Okanagan and Shuswap people according to Douglas' instructions. They were not surveyed however since,

> His Excellency (believes) that for all present purposes, the marking of such Reserves by conspicuous posts driven into the ground would be sufficient, and that the survey thereof could be postponed until the Colony can better afford the expense.[45]

Before Douglas retired in 1864, he incorporated the task of reserve identification and allocation into the duties of the Department of Lands and Works under the direction of a Chief Commissioner, one Joseph Tructh.[46] After Douglas retired, Trutch's administration embarked on a process of reserve reduction in the mainland colony. None of the Douglas reserves were surveyed and it was easy for Trutch to declare:

> The subject of reserving lands for the use of the Indian tribes does not appear to have been dealt with on any established system during Sir James Douglas' administration. The rights of the Indians to hold lands were totally undefined, and the whole matter seems to have been kept in abeyance, although the Land

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[43]ibid, p. 22, R.M. Parsons, Capt., R.E. to Sapper Turnbull, 1 May 1861, emphasis in original.

[44]ibid, p. 22, Colonial Secretary to Chief Commissioner of Lands and Works, 5 April 1861.

[45]ibid, p. 24, Colonial Secretary to Chief Commissioner of Lands and Works, 9 June 1862.

[46]supra note 2, p. 62, Royal Commission of Governor Seymour of British Columbia, 11 January 1864.

> Proclamations specially withheld from pre-emption all Indian reserves or settlements.[47]

Reserves were simply disallowed with no compensation provided because it was Trutch's opinion, and one which had offical and public support, that:

> The Indians really have 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 be allowed to make a market of them either to Government or individuals.[48]

Further reductions were approved by the colonial secretary on the grounds that,

> 4. The Indians have no power to alienate any portion of their reserves, and no such alienation can be confirmed...
>
> 5. The Indians have no right to any land beyond what may be necessary for their actual requirements...they can have no claim whatever to any compensation for any of the land so excluded, for they really have never actually possessed it.[49]

On 10 June, 1869, the Secretary of State for the Colonies, Earl Granville, appointed the Governor of Newfoundland Governor of British Columbia. Governor Musgrave was appointed to bring the colony into confederation. During the entire period of Musgrave's governorship the Colonial Office showed no substantial interest in Indian affairs. Among the members of the Executive Council Musgrave inherited was Joseph Trutch who Musgrave would subsequently appoint as one of three delegates charged with negotiating the confederation agreement.[50]

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[47]supra note 34, p. 41, Chief Commissioner of Lands and Works to Colonial Secretary, 28 August 1867.

[48]ibid, p. 42, Chief Commissioner of Lands and Works to Colonial Secretary, 28 August 1867.

[49]ibid, p. 45, Colonial Secretary to Chief Commissioner of Lands and Works, 6 November 1867.

[50]Bescoby, Isabel, "A Colonial Administration: An Analysis of Administration in British Columbia, 1869-1871" in Friesen and H.K. Ralson, eds., Historical Essays on British Columbia, Gage Publishing Limited, 1980, p.130.

Musgrave's design of the confederation project included Chinese, Blacks and Natives in a category together. They were considered non-participants but in order to ensure neutrality among these groups they were to be excluded from the franchise and of course from any debate on the terms. The terms made no mention of Aboriginal people.[51]

In 1871 Trutch went to Ottawa to help negotiate the confederation terms.[52] Article 13 dealt with Aboriginal lands and was probably negotiated by Trutch.[53] The terms passed the Senate and House at the end of April and by Order in Council dated 27 May 1871, the date of union was set for 20 July. Trutch was appointed first lieutenant governor of the province on 16 July 1871.

In 1872, I.W. Powell was appointed Indian Superintendent for the new Province. While attempting to secure records relating to Indian affairs in the province he was told the province did not have an Indian policy.[54] Powell soon became aware of the great discrepancy between provincial and dominion Indian policy and the two governments became embroiled in a dispute that continued for four years.

Initially, Powell recommended allocating 80 acres of land to each family. He made no mention of compensation or treaty.[55] The province responded with an offer of 20 acres and limited that to newly created reserves.[56] Powell suspended reserve allocations.

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[51] ibid, p.137.

[52] ibid, p. 146.

[53] Fisher, Robin, "Joseph Trutch and Indian Land Policy" p.269, Article 13. The charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit, should be assumed by the Dominion Government, and a policy as *liberal as that hitherto pursued* by the British Columbia Government, should be continued by the Dominion Government after the Union.

[54] supra note 34, p. 108, Provincial Secretary to Indian Superintendent, 4 November 1872.

[55] ibid, p. 114, Report of the Privy Council, 21 March 1873.

[56] ibid, p. 119, Provincial Secretary to Indian Superintendent, 28 July 1873.

The Department of the Interior was established in 1873 and the Minister of the Interior, David Laird, assumed responsibility for Indian affairs throughout Canada.[57] Laird accepted the provinces position on the status of lands:

> ...it is necessary to remember:-
> That under the operation of the 109th and 146th Sections of the British North America Act of 1867, "all the public lands of the Province of British Columbia are placed under the control of the Local Government...[58]

He went on to discuss Article 13 of the terms of union and explained that:

> When the framers of the Terms of admission of British Columbia into the Union inserted this provision, requiring the Dominion Government to pursue a policy *as liberal* towards the Indians as that hitherto pursued by the British Columbia Government, they could hardly have been aware of the marked contrast between the Indian policies which had, up to that time, prevailed in Canada and British Columbia respectively.[59]

In 1876, the Governor General visited Victoria and presented his views on the Aboriginal title question in British Columbia.

> We must all admit that the condition of the Indian question in B.C. is not satisfactory. Most importantly there has been an initial error ever since James Douglas quitted office in the Government of B.C. neglecting to recognize what is known as the Indian title. In Canada this has always been done. No government whether Provincial or central has failed to acknoweldge that the original title to the lands existed in the Indian tribes and communities that hunted and wandered over them. Before we touch an acre we make a treaty with the chiefs...But in B.C. the Provincial Gov't 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

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[57]supra note 13, p. 70, S.C. 1873, c.4.
[58]op. cit., p. 151, Minister of the Interior to the Privy Council, 2 November 1874.
[59]ibid, p. 152, David Laird, Minister of the Interior, Department of the Interior, Ottawa, 2 November 1874.

sections of the country as greatly to restrict or interfere with the prescriptive rights of the Queen's Indian subjects.[60]

An agreement reached between Canada and British Columbia the same year provided for the establishment of a joint reserve commission to oversee the allocation of reserves in the province. There would be no treaties and no compensation. To the extent consent to the process was a consideration it was limited to the identification of reserve lands.

The agreement provided that,

1st. That the adjustment of the question be referred to three Commissioners; one to be appointed by the Dominion Government, one by this Government, and the third to be jointly named by the two Governments.

2nd. That the Commissioners shall meet as soon after their appointment as possible at Victoria, and make arrangements to visit with all convenient speed, in such order as may be found desirable, each Indian nation in British Columbia, and after full enquiry on the spot into all matters affecting the question, to fix and determine for each nation separately, the number, extent and locality of the reserves to be allowed it.

3rd. That in determining the extent of the reserves to be granted, no basis of acreage be fixed, but that each nation of Indians be dealt with separately.

4th. That the Commissioners shall be guided generally by the spirit of the British Columbia Terms of Union, which contemplates a liberal policy being pursued towards the Indians, and in the case of each nation, regard shall be had to the habits, wants and pursuits of each nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers.

5th. 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 numbers of a nation occupying a reserve, such reserve shall be enlarged or diminished, as the case may be, so that it shall bare a fair proportion to the members of the nation occupying it. The extra land required for any reserve shall be allotted from Crown lands, and any land taken off a reserve shall revert to the Province.

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[60]Lord Dufferin, Governor General of Canada, 20 September 1875, P.A.C., R.G. 10 Volume, 3605, file 2806.

> 6th. That so soon as the reserve or reserves for any Indian nation shall have been fixed and determined by the Commissioners, the existing reserves belonging to such nation, so far as they are not in whole or in part included in such new reserve or reserves so determined by the Commissioners, shall be surrendered by the Dominion to the local Government, so soon as may be convenient, on the latter paying to the former for the benefit of the Indians, such compensation for any clearings or improvements made on any reserve so surrendered by the Dominion, and accepted by the Province, as may be thought reasonable by the Commissioners aforesaid.[61]

Native opposition to the process was widespread but nowhere was it more persistent and active than on the northwest coast. The Indian Reserve Commission operated until 1912 at which time it was supplanted by the McKenna McBride Commission, another joint commission established to finalize the reserve allocations. Native resistance continued locally and provincially, under the umbrella of the Allied Tribes until 1927. At that time a Special Committee of the Senate and House of Commons presented its findings on the status of Aboriginal title in the province. It found that Aboriginal title did not exist. The same year amendments to the Indian Act prohibited the pursuit of the Aboriginal title question.

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[61]op. cit., p. 169, Committee of the Honourable the Executive Council approved by His Excellency the Lieutenant Governor, 6 January 1876.

III Tsimshian Resistance to the Reserve Allotment Policy

The Tsimshian nation is comprised of fourteen tribes, each with their own territories within the larger territorial reach of the nation. Within the Tsimshian nation nine of those tribes have had a particularly close relationship for a very long time. Today those nine tribes are organized within the Tsimshian nation as the Allied Tsimshian Tribes reflecting the long established alliance. The Board of Directors of the Allied Tsimshian Tribes is comprised of the nine Hereditary Chiefs whose responsibility it is to protect the territories of their respective tribes.

The Lax Kw'alaams Band is comprised largely of members of these nine tribes of the Tsimshian nation. Membership rules in the Indian Act, based on patrilineal descent, have created a situation in which there are Tsimshian people who would be Band members according to Tsimshian laws of descent but who are excluded from membership by the Indian Act regulations. Likewise, there are Band members who would not be considered Tsimshian according to Tsimshian law. The Council of the Band, unlike the Board of Directors of the Allied Tsimshian Tribes, is elected from among the general membership. It follows that the councillors of the Band are not necessarily Hereditary Chiefs, Tsimshian, or even Aboriginal. These distinctions are critical to the claim considered in the thesis.

The following account of Tsimshian resistance to the creation of reserves and the imposition of the Indian Act will demonstrate the blatant disregard for Aboriginal people and their rights that characterized the taking of Aboriginal lands in British Columbia. It will also show that from the Tsimshian were prepared to accept the laws of England and enter into treaties in exchange for compensation and protection for their remaining lands.

The time between contact and colonization was relatively short in Tsimshian territory. Sustained contact began with the arrival of the Hudsons Bay Company on the Nass River in 1829 and from the

account of the Tsimshian Chiefs it was the beginning of the land trouble.

> The land trouble started when the Hudsons Bay Company landed, and increased and nothing was done to abate it till the head man of the Hudson's Bay Company married the daughter of the head Chief of the Tsimshian, Legaic. Then this Chief together with his tribe thrust himself between the Indians and the Hudson's Bay Company to prevent the different tribes from invading his son-in-law.[62]

Legaic invited the Company to move to his territory at Lax Kw'alaams and in 1831 Fort Simpson (now Lax Kw'alaams) was established. Nine of the tribes of the Tsimshian nation were then resident at villages in and around Metlakatla Pass in Prince Rupert Harbour. They relocated to their respective territories at Lax Kw'alaams and secured to themselves significant control of an extensive trade network. At the time there were an estimated 45,000 people involved in trade at the fort.[63]

With contact there were also social changes and a degree of political reorganization. One catalyst for change was the arrival of missionaries. William Duncan, a lay missionary with the Church Missionary Society, became a central figure in Tsimshian history during the early years of resistance. Duncan arrived at Fort Simpson in 1857 at the height of the fur trade. His initial efforts at establishing Christianity among the Tsimshian failed and so in 1862 he relocated, with his few followers to one of the old villages at Metlakatla Pass. Almost simultaneous with Duncan's departure a smallpox epidemic broke out at Lax Kw'alaams. The same epidemic devastated the Aboriginal population throughout British Columbia.[64]

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[62]Statement of the United Tribes of Northern British Columbia to the Government of Canada, 1922, A.G.B.C. #1461, p.2.

[63]Chartier, Clem, "Indian": An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867", Saskatachewan Law Review, p.75. The Report of the Hudson's Bay Company Committee identifies the post at Fort Simpson as including two districts; 10,000 Indians from the Northwest Coast district and 35,000 from the Northern Tribes district are estimated as frequenting the post.

[64]Berger, Thomas, R. Fragile Freedoms: Human Rights and Dissent in Canada, Clark, Irwin and Company, 1982, p.228. According to this account the native population of

It would seem this epidemic is related to the considerable influence missionaries achieved throughout the northwest coast. Within a year the population at Metlaktla had grown to a few hundred. Other missionaries arrived in the 1860's and 1870's and by the time the Indian Reserve Commissioner arrived on the scene in 1880 the Tsimshian and the neighboring Nisga'a had reorganized themselves considerably. New mission villages were established at Kincolith, Aiyansh, and Greenville on the Nass.

The community at Metlakatla was entirely self-sufficient with the largest church north of San Fransisco, Duncan was considered a missionary genius. In 1863 governor Douglas granted fifty square miles of land to the community and Duncan was sworn in as a Justice of the Peace and provided with a Native constabulary.[65] Local politics and law enforcement were under the direction of the Metlakatla Council. In 1869 the Metlakatla Council was called upon by Governor Seymour to assist in settling a blood feud that had been going on for several years between the Nisga'a and the Tsimshian nations.[66]

The Council brought charges against Native and white alike for trespass, the sale of alcohol, and other offences. Although sometimes challenged by white traders the authority of the Council was confirmed by the Supreme Court once and on another occasion the Attorney General instructed the Hudson's Bay Company factor to "uphold the Indian law".[67]

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the northwest coast was approximately 50,000 at mid-century, by 1900 it was 10,000.

[65]British Columbia Sessional Papers, 48 Victoria, "Metlakatla Commission", 1884, p.XIX.

[66]Lands and Works Office, Report by Hon. Joseph Trutch, re Treaty Between Nass and Tsimshian Tribes, June 22 1869, p.5. The H.M.S. Sparrowhawk travelled to the Nass and brought the Nisga'a Chiefs down to Metlakatla where Duncan oversaw negotiations for peace. The governor, through Duncan, informed the Chiefs that "he had allowed them on this occasion, for the last time to make compensation to each other according to custom (but)...they must henceforth live according to English law.

[67]British Columbia Sessional Papers, 48 Victoria, "North West Coast Indian Troubles", 1884, p.277.

As we saw in the previous chapter the colonial government had embarked on a reserve allocation and subsequent reserve reduction process in the mainland colony that had created considerable dissension among the Aboriginal population. Although no attempts were made to allocate reserves in Tsimshian territory until 1880 surveyors had arrived in the 1870's and marked out plots around Port Simpson harbour. The Tsimshian were aware both of events to the south of them and of the treaty process underway to the east.

When Indian Reserve Commissioner Peter O'Reilly arrived in 1880 they were prepared. To their surprise O'Reilly stayed only long enough to allot several small reserves on the Nass River and did not return until the following summer. At that time he informed the Tsimshian that their reserve would commence at Lax Kw'alaams and extend south along the peninsula. They presented O'Reilly with a written protest:

> We the Indian population of Port Simpson regret to hear that in your interview with Moses McDonald, one of our chiefs, and others of our people today, you expressed the opinion that our reserve should extend only south of our village site, and include no land to the north of us. Now we cannot feel that this is just, and we wish, by this letter, to strongly protest against any such reserve being assigned us. The land to the south of us for miles is worthless, and would not furnish us with firewood.[68]

The Chiefs described their territory and asserted their right to treaty.

> The whole country, from the Nass River to the Skeena River, has been in the possession of our nation from time immemorial. No treaty has ever been made with us, and we earnestly hope that the Government will not deprive us of our ancient rights, and wrest from us the lands which God gave to our fathers, thus leaving us in poverty.[69]

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[68]Letter of Protest of Indian Chiefs and Others at Port Simpson to P. O'Reilly. Indian Reserve Commissioner, 5 October 1881, P.A.C. R.G. 10, Volume 3818, file 57,837.
[69]Letter of Protest of Indian Chiefs and Others at Port Simpson to P. O'Reilly, Indian Reserve Commissioner, 5 October 1881, P.A.C. R.G. 10, Volume 3818, file 57,837.

As alternatives to O'Reilly's proposed reserve, the Chiefs presented two options. They requested that all their fishing stations on the Nass and Skeena be secured and:

> For a reserve extending from Malco seven miles to the south of our village, and to Con-e-mis, ten miles to the north, and ten miles more or less back from the salt water, together with the islands lying immediately along the coast in the vicinity of our villages.[70]

This first choice included only the village of Lax Kw'laams. In the event this was not acceptable they requested that:

> The whole Tsimpshean peninsula be reserved to us and our children in conjunction with the people of the neighboring village of Metlakatla, excepting only the claims as have already been established by law. The whole of the peninsula to be divided into two portions for the people of Metlakatla and ourselves respectively, according to the population of each place.[71]

O'Reilly rejected both options. In correspondence to the Superintendent General of Indian Affairs he explained:

> A portion of the Tsimpsean Indians reside here (Lax Kw'alaams); the remainder at Metlakatla 16 miles south and in dealing with their reserves I propose to treat them as one tribe.[72]

He reported their request for the entire Tsimpsean peninsula, containing about 350 square miles, a request strongly supported by the Reverend Thomas Crosby, but which he felt was unreasonable. Instead he reserved:

> The entire coastline, from the boundary of the Hudson's Bay Company's land to the southern end of and including Digby Island...with an average depth of five miles. This extensive tract of country (110 square miles) is, for the most part, of a very worthless character.[73]

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[70]ibid.
[71]ibid.
[72]Indian Reserve Commissioner to Superintendent General of Indian Affairs, 8 April 1882, P.A.C. R.G. 10 Volume 1275.
[73]ibid.

O'Reilly also allotted nine small reserves at traditional fishing stations.[74] On the Nass he decided that "it was necessary to make a commonage at the oolichan fisheries to prevent disputes among the large bodies of Indians who resort to them." The Tsimshian, and all other users, could fish a one chain strip along the oolichan grounds but could not build houses, cut timber or occupy the land.[75] For the Tsimshian at Lax Kw'alaams O'Reilly's decisions regarding rights on the Nass provided the initial impetus for resistance.

O'Reilly was aware of the dispute between the Tsimshian and the Nisga'a at Kincolith over territory on the Nass. Two sub-chiefs from Lax Kw'alaams, Clah and Moses MacDonald, were living at Canaan on the Nass and the Kincolith people wanted them removed.[76] O'Reilly explained the situation to the Superintendent:

> On this reserve (Stoney Point # 10) some ten or twelve families, belonging to Lac-kal-tsap village, reside....the Indians from various tribes congregate here, and also on reserves 12 (Lac-tesk or Canaan) and 13 (Red Cliff), for the oolichan fishing....I arranged that the resident Indians should have the exclusive privilege of cultivating the land, while the rights of those who have been in the habit of fishing should not be interfered with.[77]

The Reverend Crosby at Lax Kw'alaams was also concerned with the treatment the Tsimshian were receiving from the government and the Reserve Commissioner.

> [M]uch dissatisfaction has arisen from the way in which the present Land Commissioner has laid out what he calls reserves. In many cases the Indians have not been consulted at all....Not only has no treaty been made with them, but where reserves have been laid out the small amount of land allowed them is a gross injustice to both the Indians and the Dominion Government under whose

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[74]ibid

[75]British Columbia Sessional Papers, 51 Vic., 1888, "Report of the Commission-N.W. Coast Indians", p.458. An additional ten reserves were allotted 7 September 1882.

[76]Indian Reserve Commissioner to Superintendent General of Indian Affairs, 25 March 1882, B.C. Sessional Papers, (No. 5), 48 Vict., 1883, p.87.

[77]ibid, p.86-87.

> care they are placed. The Indians throughout the country are aware of the wrong which is being done them and the sooner these matters are righted the better.[78]

At Metlakatla trouble over reserve allotments was overshadowed by a split in the community concerning religious matters. Duncan was relieved of his post and replaced by Bishop Ridley of the Chuch of England on 29 September 1881. With the support of the vast majority of the Tsimshian, Duncan established an independent church and held services that Christmas.[79]

The following September, amidst rumours that the Church Missionary Society intended to take possession of all the industrial buildings, the store and the church, a government surveyor arrived to survey two acres in the middle of the community that had been set aside for the Society.[80] The Tsimshian dismantled the store and guest house and rebuilt them outside the two acres. Next, they advised the Society to have its school house moved from the reserve to within the two acres if it was intended to use it as a church for the Bishop.

The following notice was then sent to the agents of the Society and posted on the doors of the school house and church.

> We, nine-tenths of the inhabitants of Metlakatla, hereby declare and make known their protest against any and every attempt of the agents of the Church Missionary Society using the school-house on the Indian Reserve at Metlakatla for church and school purposes, until the legal question involved has been decided by the Governor-General in Council.[81]

On 10 December 1882, Ridley occupied the school-house for church purposes. Within a few weeks an Indian Agent, Mr. McKay was sent to Metlakatla. He was told to leave. McKay proceeded Lax

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[78]Thomas Crosby to the Right Honorable Sir John A. Macdonald, Superintendent General of Indian Affairs, 28, June 1882, P.A.C. R.G. 10, Volume 3605, file 2806.
[79]supra note 65, Evidence of William Duncan, p.xix.
[80]ibid, p.xx.
[81]ibid, p.xxi.

Kw'alaams. There the Chiefs told him the government was stealing their land.

> Did you ever see a christian take land from another christian and sell it, not letting know anything about it. We have heard that the Queen, that all the people on the coast and in the interior across the Rocky Mountains are all her children. She calls them such. Is that the way a mother treats her children, takes away their land and not tell them about it. For the Queen, we have heard, has taken it from us; Skeena, Nass and all around us and sold it without our knowledge.[82]

Indian Superintendent Powell reported that the Tsimshian at Lax Kw'alaams had adopted the same attitude as their kin at Metlakatla "and were unwilling that the Indian Act should be applied there until their Aboriginal rights to all lands claimed by them in the Province were acknowledged".[83] He cautioned that:

> [T]he feeling that is encouraged among the Indians at Metlakatla and Fort Simpson against Mr. O'Reilly will no doubt extend to other tribes speaking a kindred tongue on the Skeena and, if not checked on their real source and origin will, in my opinion, operate materially against the proper performance of that officer's duty.[84]

Powell was concerned about the resistance and the involvement of the missionaries. He was also apparently still concerned about the lawfulness of the entire reserve process.

> I should not have considered it desirable for an Agent of the Department to visit the locality until any doubt as to the legality of land allottments there had been removed and the Agent authorized to apply the Indian Act to them, as well as to carry it out in other respects. Should this be done now, and your authority is received to remove all persons from the reserve who have not your approval to remain there I think Mr. McKay's return will not have been detrimental.[85]

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[82]Clah, Minutes of a Meeting at Port Simpson, 8 December 1883, P.A.C. R.G. 10, Volume 3605, file 2806.
[83]Indian Superintendent Powell to Superintendent General of Indian Affairs, 9 January 1884, P.A.C., R.G. 10, volume 3818, file 57,837.
[84]ibid.
[85]ibid..

The Chiefs of the Tsimshian, Nisga'a, and Gitksan nations were organizing. At a meeting in 1884 it was decided the three nations would stand together and prevent the reserve allotments unless their rights were guaranteed. Thei following statement was forwarded to the government.

> The exclusive right we claim to hunt, fish or gather fruit in any particular place is an hereditary right enjoyed by us before the white man came among us. It is a right most rigorously upheld by all our tribes, without exception. Our hunting, fishing and fruit gathering are the principal sources of our livelihood. Do away with them, and we are at the mercy of the whiteman. We are prepared to maintain them in our own way, or are willing for the Government to maintain them for us by law, but we will not permit them to be interfered with.... If Mr. O'Reilly or anyone, comes to mark out reserves here while we are absent at our fishing or hunting we will know that the Government wants to wrong us" else why not wait till we are at our village. If he, or anyone, comes while we are here we will ask him-will the Government maintain our exclusive hunting, fishing and fruit gathering rights? If not, we will not have any reserves marked, nor will we permit any Commissioner or Agent to reside among us.[86]

Tsimshian I.R. 2. was confirmed by Order in Council two days later on 29 February 1884.[87] In September a government surveyor was once again sent to Metlakatla to survey the two acres for the Church Missionary Society. In protest the Metlaktala Council occupied the school house. Charges were laid against seven people on 21 October 1884. On 22 October, the Society and Bishop Ridley were again requested by the Council to leave Metlakatla.

> To Agents of the Church Missionary Society at Metlakatla:-
> We, the Council and people of Metlakatla, having had under consideration the evil effects of a continued opposition on the part of the Church Missionary Society to our declared principle of unity, beg to inform you that we are not willing for this state of things to continue any longer, and we do hereby notify you to leave Metlakatla.

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[86]supra note 67, p. 277, Statement of Chiefs, quoted by Reverend Tomlinson to Chief Commissioner of Lands and Works.

[87]Minute of the Executive Council of the Province of British Columbia, 29 February 1884.

Notice To Bishop Ridley.

We, the Council and people of Metlakatla, having had under consideration your continued presence amongst us and its effect in retarding the progress and peace of our village, have decided to inform you that we are not willing that you should remain any longer here, and we do hereby notify you to leave Metlakatla.

As regards any interest the Church Missionary Society may claim to have in any building erected on our ground, we will be willing to treat with them.

For the Council and people of Metlakatla.[88]

On 28 October 1884, a Commission of Inquiry was established to investigate and report on the disturbances at Metlakatla and elsewhere on the northwest coast. In their report the Commissioners attributed the troubles to the Tsimshian demands to have their title to all the land recognized, the severance of Duncan from the Society, the fact that the two acres at Metlakatla was not part of the reserve and was occupied by the Bishop, and the Indian Council at Metlakatla.[89]

The Metlakatla Council informed the government of their dissatisfaction with the commission and requested the protection of the Queen's law.

We, the Council and people of Metlakatla, desire to acquaint you that we are very much disappointed in Mr. A.C. Elliott, whom you appointed to execute justice and administer law in this part of the Province, in the name of our Great Mother the Queen of England. We know that the Queen's laws are made for the benefit of all. By these laws we have been benefited for more than twenty years, because they were justly administered among us.

We complain-

1st. It was by Mr. Elliott's advice that Bishop Ridley's party took firearms and barricaded the Mission House to defy us, because we had sent a notice on paper to Bishop Ridley asking him to leave Metlakatla. Barricading by the Tsimshian laws and customs means a challenge to fighing and bloodshed, and therefore we blame

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[88]op. cit., p. 287.

[89]supra note 65, p.133. The Commission held hearings at Port Simpson and Metlakatla between 14 and 22 November, 1884.

Mr. Elliott for encouraging the Bishop, and the people with him, to try and tempt us to fight...

We have no confidence in Mr. Elliott, nor in his work as a Magistrate.[90]

The government's position on Tsimshian rights was that:

[T]he "Indians and Council of Metlakatla" imagine themselves entitled to reject any officer sent by the Dominion or Provincial Government who may be so unfortunate as not to meet with their favor... It is my duty to tell you that "Tsimpsean law" is not known to nor recognized by the Dominion or Provincial Governments, and that the Indians of Metlakatla, in common with all other Indians, and whites, are under and bound by the Queen's laws. Your "Council" as you call it, has no legal status, and can have no power or right whatever to make laws, much less enforce them, and I am surprised that you have not been better instructed in this respect.[91]

A Tsimshian delegation, representing both communities, was sent to Ottawa to place their grievances before Sir John A. Macdonald. Another deputation of Tsimshian and Nisga'a Chiefs, accompanied by Reverend Green, travelled to Victoria to protest O'Reilly's work. The following May, Indian reserve surveyor Jemmett arrived on the Nass. The Lax Kw'alaams Chiefs wrote requesting that he stop his work until the land question was settled.

For generations we have lived on the Naas part of the year. Our fathers had large houses there, and spent some months there to gather the small fish and fix their food, and we still hold our claim to those fishing grounds...All we wish in all this land question is our rights; so you have heard our words, and know that we do not wish the land surveyed till it is properly settled.[92]

From the point of view of the Tsimshian at Lax Kw'alaams,

Judge O'Reilly started all the trouble on the Nass between us and the Kincolith people by saying he had given us only one chain for our fishing ground. These people have just a few years ago moved down to (Kincolith) the mouth of the

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[90]supra note 67, p. 290.

[91]ibid, p.290.

[92]Letter of Port Simpson Chiefs to W.J. Jemmett and other Surveyors of Indian Lands on the Nass, 20 May 1886, P.A.C. R.G. 10 Volume 3605, file 2806.

> River and we do not see why they should wish now to plant our fishing grounds that we have held so long.[93]

On 2 June, Jemmett informed Powell that a party from Lax Kw'alaams had headed up the Nass to visit all the villages intending to organize the people to resist the surveys. He had been told by one of them that if they could not get the support they needed on the Nass they would cause trouble at Lax Kw'alaams.[94] Jemmet was informed that the Lax Kw'alaams people planned to build strong houses and a church at Canaan in the autumn, and in Jemmett's estimation, "unless they are prevented they will make every effort to seize and hold the Reserves here and at Red Cliff."[95]

On 8 July 1886, Duncan sent word to Jemmett that there had been a meeting at Metlakatla attended by three head men of one of the Nisga'a tribes and the Tsimshian. He had been requested to write Jemmett on their behalf that they, and all of the Chiefs of the river (Nass), were opposed to his work.[96] On 15 July, Reverend McCullough, agent for the Church Missionary Society at Aiyansh (Kitladamax), sent word to Powell requesting that an Indian Agent be sent immediately to assist him.

> Owing to the excited state into which the Indians of this locality are being continuously thrown by the efforts of Mr. Duncan and the Tsimshians of Port Simpson and Metlakatla, on account of the surveying of the reservations.[97]

He accused Duncan of:

> [S]tirring up the heathen Indians against the Christians of Kincolith and this place, by representing the latter as everything traitorous etc. in allowing the survey of their reserves to take place.[98]

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[93]The Indian Council of Port Simpson to Mr. Jemmett, 29 May 1886, P.A.C., R.G. 10 Volume 3605, file 2806.
[94]Jemmett to Powell, 2 June 1886, P.A.C., R.G. 10 Volume 3605, file 2806.
[95]William Collinson to Powell, 9 June 1886, P.A.C., R.G. 10, Volume 3605, file 2806.
[96]Duncan to J2.emmett, 8 July1886, P.A.C., R.G. 10 Volume 7793, file 27168-
[97]James, B. McCullough to Powell, 15 July 1886, P.A.C., R.G. 10 Volume 7793, file 27168-2.
[98]McCullough to Powell, 15 July 1886, P.A.C., R.G. 10 Volume7793, file 27168-2.

Powell then reported to the Superintendent General of Indian Affairs that:

> [C]anoes had been despatched by the Indians under the guidance of Messr's Duncan and Crosby at Metlakatla and Port Simpson to oppose the surveys of Mr. Indian Reserve Surveyor Jemmett on the Nass River....there was no doubt in our (O'Reilly's and Powell's) minds of the necessity of....completing the survey of the large Reserve on the Fort Simpson Peninsula (Tsimshian I.R. 2.).[99]

Surveyor Tuck was hired and arrived at Metlakatla 24 August 1886. On the first day out he was followed by a canoe carrying ten Tsimshian. Every day he was followed and prevented from beginning his survey. Ten days later there were sixty-seven Tsimshian including some sixteen from Lax Kw'alaams.[100] Indian Agent Hall reported on events surrounding the Tsimshian resistance.

> The Metakatlans, in large force, have camped beside Mr. Tuck and forcibly prevented him from making any survey....About 30 men in relays are detailed to keep guard over Mr. Tuck's party. When I passed I saw Dr. Bluett in the camp of the Metlakatlans. He had not called on Mr. Tuck and his presence there should I think be considered criminal. That Duncan and Co. are at the bottom of this there can be no doubt....(Reverend) Tomlinson is now up Skeena reported to be spreading disloyalty-and every effort is being made to secure the sympathy of the Port Simpsons and Hydahs....The Bishop's Indians at Metlakatla and Kincolith have remained loyal. Port Simpson is much disaffected and a contingency from there will probably join the Metlakatlans. A display of <u>force</u> and determination is now required and <u>real</u> punishment should be meted out to the ringleaders not excepting Duncan and Co. and Crosby.[101]

Ridley recommended removing Duncan, punishing the resistors, and sending a guard to ensure the surveys.[102] Attempts to survey

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[99]Powell to Superintendent General of Indian Affairs, 25 August 1886, P.A.C., R.G. 10 Volume 7793, file 27168-2.
[100]Surveyor Tuck to O'Reilly, 6 September 1886, P.A.C., R.G. 10, volume 7793, file 27162-2.
[101]R.H. Hall, Indian Agent, Port Simpson, to Powell, 2 September 1886, P.A.C., R.G. 10 Volume 7793, file 27168-2.
[102]ibid.

reserves on the Nass and Skeena were being met with the same resistance.

> But for the determined attitude of the Kincolith Indians Capt. Jemmett would have fared badly from the Greenville and heathen Indians....Mr. Collinson (who) says that this long maintained attitude of Mr. Duncan, a conservor of Indian land rights, is producing a waiting policy among his people and he thinks that it will not be possible to start a Council at Kincolith until it is seen who is stronger, Mr. Duncan or the Government.[103]

Albert Leighton, a follower of the Bishop's, complained that Edward Mather, the "Commandant of the Guard over the Surveryor," had threatened him saying that.

> As the Church Indians would persist in helping the white men, then they should be treated as white men. As soon as they (the rebels) had scored their victory over the Government they would then expel from Metlakatla every Tsimshian who would not unite with Mr. Duncan.[104]

Only the adherents of the Anglican Church were loyal, Ridley explained. He noted, however, that since Reverend Crosby had returned from Victoria he had attempted to persuade the Tsimshian at Lax Kw'alaams to abandon Duncan's crusade. But:

> As if to show their contempt they manned two canoes and under Legaic started off for Mr. Tuck's camp and are there now on guard with Mr. Duncan's Indians.[105]

On 6 October, the Tsimshian at Metlakatla constructed a house on the two acres from which they could observe every movement within the mission.[106] On 21 October, Powell reported that the Tsimshian had forcibly taken possession of the mission premises and that due to their large numbers a war vessel with instructions to land an armed force should be despatched to oversee the reserve surveys.[107]

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[103]Ridley to Powell, 21 September 1886, P.A.C., R.G. 10 Volume 7793, file 27168.
[104]ibid.
[105]ibid.
[106]Tuck to Powell, 6 October 1886, P.A.C., R.G. 10 Volume 7793, file 27168-2.
[107]Powell to Macdonald, 21 October, 1886, P.A.C., R.G. 10 Volume 7793, file 27168-2.

Macdonald approved the request[108] and on 28 October H.M.S. "Cormorant" with the County Court Judge, a lawyer, the Superintendent of Police, and several constables departed from Victoria.[109]

The "Cormorant" arrived on 2 November, and the Bishop's followers were sworn in as extra constables. Tuck provided evidence against the "ringleaders" and five were arrested. After placing the prisoners in the lockup at Metlakatla it was determined to begin the surveys "immediately beside the Lock up, and in full view of the entire village."[110] Duncan left immediately for Victoria where he secured written statements from prominent citizens supporting a request of the Metlakatla Tsimshian to the United States government for homestead land in Alaska.[111] The prisoners were taken to Victoria and by 20 December Tuck was able to report that he had completed the surveys of the coast and southern lines of Tsimshian I.R. 2.[112]

A delegation of Tsimshian and Nisga'a Chiefs and Reverends Crosby and Green travelled to Victoria to meet with the Premier. Crosby and Green were not allowed to attend. The Chiefs explained that the reserves were destroying tribal relations. John Ryan spoke on behalf of the Tsimshian.

> There is no difference between the Fort Simpsons, the Nass, and the Skeena Indians. All speak the same language, and our ways are about the same; and we go to work and divide the lands....The Chiefs of the Fort Simpson ate with those of the Nass: the Chiefs of the Fort Simpsons were friendly with those of the Skeena River. They all ate together, and this is what we want. We don't want the Government to break this up...but make it right with us by what in English you might call a treaty among the Indians; and that is all in the world we ask you.[113]

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[109]Powell to Macdonald, 1 November 1886, P.A.B.C., R.G. 10 Volume 7793, file 27168-2.

[110]Tuck to O'Reilly, 9 November 1886, P.A.C., R.G. 10 Volume 7793, file 27168-2.

[111]Wellcome, Henry S. The Story of Metlakatla, Saxon and Co., 1887, p.x.

[112]Tuck to O'Reilly, 20 December 1886, P.A.C., R.G. 10 Volume 11008.

[113]John Ryan speaking, Ryan was one of those imprisoned in November and two years earlier during the "Metlakatla Riots", British Columbia Sessional Papers, "Report of

John Wesley of the Nass also asked for a treaty[114] to which Premier Smithe replied:

> There is no such law either English or Dominion that I know of; and the Indians or their friends, have been misled on that point....It is the Queen's land, but the Queen gives it to her Indian children because they do not know so well how to make their own living, the same as a white man, and special indulgence is extended to them and special care shown.[115]

What the Chiefs asked for was larger reserves, exclusive hunting and gathering rights outside the reserves, and sufficient timber for the oolichan fishery.[116] They wanted a commission sent to the Nass during the oolichan season to hear their requests and to see how many thousands of Aboriginal people depended upon the oolichan fishery.[117]

On 25 March 1887, Duncan and approximately 600 Tsimshian from Metlakatla moved to the Annette Islands in Alaska leaving about eighty people behind with the Bishop.[118] Surveyors Tuck and Jemmett returned in June and both men attended meetings with Chiefs at Lax Kw'alaams. The Chiefs explained they had been promised a commission would come before any more surveying was done. They asked Jemmett to stop the surveys on the Nass until they were consulted.

> The great burden of our hearts is not so much the land on which we reside, as the lands where we get our living-those on the Skeena and on the Nass-where are we going to have our hunting-where are we going to get timber for fuel-for canoes-

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Conferences between the Provincial Government and Delegates from Fort Simpson and Nass River", 3rd and 8th February, 1887, p.254.

[114]ibid, p.255.

[115]ibid, p.255.

[116]ibid, p. 267.

[117]ibid, p. 265.

[118]Wellcom, Henry S., The Story of Metlakatla, Saxon and Co., 1887, p. vii-xi.

for building-if it is only the ground that the government are so anxious to mark out for us? This has nothing on it.[119]

Commissioners Clement F. Cornwall and Joseph P. Planta were appointed on 30 September to:

> [P]roceed to the Naas River and Fort Simpson, and there meet with the Indians of those localities, for the purpose of hearing the expression of their views, wishes and complaints, if any. Such will be the main object and scope of your visit, and you will please be careful-while assuring the Indians that all they say will be reported to the proper authorities-not to give undertakings or make promises, and in particular you will be careful to discountenance, should it arise, any claim of Indian title to Provincial lands.[120]

The Chiefs at Lax Kw'alaams presented the Commissioners with their request:

> Before the others left we wanted the whole country, from the Nass to the Skeena; now the others, the Metlakatlans, have left we have told you what we want now; which is much less. I repeat about the two chains on the Nass, which is one more than now; we want it to be our own-not less and not more-where we get our living; that is what we want, we want it to be our own as long as we live. As long as it is not settled there will always be trouble there. We have told you how much we used to own on the Nass, from Kittix down to the mouth,-all of the fishing; we want to keep a little of that now, that is what we want on the Nass. Now, about the land around here, the land of the Tsimshians, we used to own from Kittix across to Kitsumkalum, on the Skeena, about fifty miles from the mouth, and we owned the whole Skeena down to the mouth; but now we only want to keep the salmon streams, hunting grounds and places where we used to get our berries. About our land we are living on now; we want the whole of the Tsimshian Peninsula, we think it is enough for us.[121]

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[119]Tuck to O'Reilly, Report of Meeting with Tsimshian Chiefs, 6 June 1887, P.A.C., R.G. 10 Volume 11008.

[120]British Columbia Sessional Papers, "Papers Relating to the Commission Appointed to Enquired into the Condition of the Indians of the North-West Coast", 22 February, 1888, p.416.

[121]ibid, p.449.

They did not want the Indian Act. "We want for our foundation the law of British Columbia and the Dominion; let that law settle things for us properly, and not take away the law we had for ourselves...We want the English law for our foundation....we are under that flag and we wish to have their laws."[122] They were concerned about the lands being sold around them and in particular about the Hudsons Bay Company's claim to lands within the village of Lax Kw'alaams. The Commissioners assured them:

> No power can interfere with any Indian reserve, except with the consent of the Indians themselves, otherwise than for public works. Before any part of a reserve is touched, unless for public works, the consent of the Indians has to be obtained, and if their consent is obtained they have to be paid the full price for the land taken. They hold it by the strongest of titles, which nothing can override.[123]

At Metlakatla they wanted their own land, separate from the rest of the Tsimshian. "We want the whole of the Island called Kai-en, instead of the little portion laid off, so that the other Tsimshians can see what we have got here."[124] As Matthew Aucland explained, "there are two sets of Tsimshians-the Metlakatlans and the Port Simpsons Indians (Lax Kw'alaams)-and we want the reserves divided"[125] Albert Leighton repeated the request:

> We want about our land made clear to us, how far the Fort Simpson land is, and how far ours-we mean how much we have got, and how much the Tsimshians...We want a line drawn north of Metlakatla, dividing our land from the Fort Simpsons.[126]

In their report the Commissioners concluded:

> The Indian adherents of the Church Missionary Society, and resident at Kincolith and Metlakatla, put forward no claim of "Indian Title' to the lands of the Province. In all matters they express themselves as loyal to the Federal and

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[122]ibid, Richard Wilson, (Tsimshian) p.450.
[123]ibid, Commissioner Cornwall, p.450.
[124]ibid, Mathew Aucland, p.456.
[125]ibid, Mathew Aucland, p.456.
[126]ibid, Albert Leighton, p.457.

> Provincial Governments, as desiring to come under the "Indian Act," and to have among them Indian Agents. On the other hand the natives of Greenville, on the Nass River, and the Tsimpseans of Port Simpson, stations of the Methodist Church of Canada, strongly urge their claim to ownership in all the country, and speak most determinedly as to what shall be their course of action if their claim be not allowed. They repudiate the idea of the provisions of the "Indian Act" being exercised with regard to them, and decline to receive an Indian Agent...All this seems to have its inception in, and to be a continuance of, the policy inaugurated at Metlakatla, say in 1881, the date of the severance between Mr. Duncan and the Church Missionary Society.[127]

By January there was still no response from the Commission. Instead, an Indian Agent arrived on the upper Nass. The Chiefs protested.

> We wish to send our words to you to tell you what we want and what we do not. A Commission came to us in October and we gave them our words, they wrote them and took them with them, they told us to wait patiently for an answer to come to us and we are waiting-But you are not the answer-and we do not want you, we do not want to see your face till after the Commission has sent us an answer. We are not foolish and we do not forget the words of the Commissioners.[128]

O'Reilly returned in August. Still no word had come regarding the findings of the Commission. Trouble continued between the villages. Clah's canoe was shot at by people in Kincolith who later explained they mistook him for one of Duncan's party and were afraid they were coming to burn down the village. According to Powell:

> Many threats to burn the village of Kincolith by up River Indians and by some of Duncan's Indians (as reported) the people of Kincolith believed that such was intended and would be carried out...The Kincolith Indians have no doubt been threatened and abused a good deal and are easily frightened which caused them to act thus foolishly.[129]

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[127]ibid, p.420.

[128]Chiefs of the upper Nass to Indian Agent Todd, January 4 1888, PAC (R.G. 10, volume 3818, file 57,837).

[129]ibid, Indian Agent Todd to Indian Superintendent Powell, August 7 1888.

A letter from the Chiefs of the upper Nass to the people of Kincolith dated 28 August 1888 reveals the divisions within the Nisga'a nation:

> We the people of the upper Nass desire to know of you why you are letting the land be surveyed without speaking to us and the people of Port Simpson and Skeena first. If you try to get land reserved for yourselves without letting us know it will make trouble amongst us....We did not get an answer from the Commissioners last fall so what ever may be done now, before we see them, we shall stand by what we said to the Commissioners last fall.[130]

Despite their fears the Kincolith people accompanied O'Reilly to Greenville where the Chiefs:

> Made precisely the same demands, almost in the same words as were used at Fort Simpson, but if possible in a more defiant manner. It was apparent they had agreed to act in concert, and indeed one of their speakers, Charles Russ, stated that everything depended on what the Fort Simpson people did, that they would be satisfied if the people of Fort Simpson were satisfied. Like the people of Fort Simpson, these people declined to have any reserves unless their title was recognized, and they were paid for all the land outside the reserves.[131]

Further up the river at the village of Kit-wil-luc-shilth O'Reilly met with Chief Sebassa and his people. Sebassa told him that the Chiefs of the different villages had agreed that unless the whole valley of the Nass river was given to them, and unless they were paid for the land not required by them, they would not have any reserves or allow an Indian Agent to reside amongst them. He received much the same message when he arrived at the village of Chief Scottam. At the village of Aiyansh Chief Abraham stated that they were satisfied and thankful that an Indian Agent had been stationed among them.[132]

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[130]ibid..
[131]O'Reilly to S.G.I.A., Oct. 4 1888, PAC (R.G. 10, Volume 1277).
[132]ibid.

At Metlakatla they wanted the Indian Advancement Act and with that object in mind urged O'Reilly to divide the Tsimshian Reserve No.2.[133]

At Lax Kw'alaams the Chiefs expected to negotiate treaties for the surrender of any of their lands:

> [T]he Indians reiterated their demands on the Government in a very vociferous manner, claiming that the whole country belongs to them; that no treaty has been made with them, that they have not been paid for the lands, and that until they were paid they would not accept any reserves or allow any interference by the Indian Agent, nor would they be governed by the Indian Act.[134]

O'Reilly told them there would be no treaties and no compensation paid.[135] He then informed them that Metlakatla wanted the reserve divided.

> They were strongly opposed....On my return to Fort Simpson, on the 10th September, I again met the Indians at the schoolhouse with reference to this subject. They still objected to any division being made, urging that it would lead to trouble between themselves, and the Indians of Metlakatla, and at the same time handed me a letter protesting against the division being made. I told them I did not consider that they had advanced any good reason why such a division as was asked for should not be carried out, that they refused to accept the Indian Act themselves, but that they could not be allowed to stand in the way of those who wished to conform to the law.[136]

The letter from the Chiefs repeated their requests for the entire Tsimshian peninsula, an extension of the commonage on the Nass, the right to cut timber for various purposes, and, their streams on the Skeena. If the government would grant these requests:

> [W]e desire to have the Indian Advancement Act applied to our village. We wish further to say that we do not wish to have the land divided between us and the Metlakatla people, fearing that trouble will arise between the two villages, such

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[133]ibid..
[134]ibid.
[135]ibid.
[136]ibid.

as that which has arisen on the Nass in regard to the commonage and the timber.[137]

The division posts for I.R. 2 were in place by September although the reserve surveys with the division were not completed until 1892.[138]

Between November 1888, and January 1889, the Methodist Chiefs of the Tsimshian and Nisga'a nations gave statements and affidavits protesting the work of the government during the previous decade. They protested the favoritism shown the Church of England adherents at Metlakatla and Kincolith. Clah of the Tsimshian nation explained:

> We don't know why Judge O'Reilly gave this land to the Kincolith people, ony they are of the Church of England...These Church of England people at Kincolith came down the river. Our fathers for generations owned the mouth of the Nass as our fishing grounds.[139]

They complained about the failure of the government to negotiate treaties with them as they had expected under the Queen's law:

> We should not be in trouble so many years while justice could be had. It is a shame for us to go somewhere else for justice whilst there is the law of England to settle the trouble for us.[140]

Charles Russ of the Nisga'a nation agreed.

> We have all our old traditions about the laws of the past, but we have no story like this one of people taking the land from another without an agreement. So if the white chiefs want our land, we ask them to go by the Queen's law and make a treaty with us.[141]

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[137]ibid, Alfred Dudoward, John Ryan, Richard Wilson, and Joseph Peers, Tsimshian, to Peter O'Reilly.

[138]O'Reilly to S.G.I.A., March 7, 1892, PAC (R.G. 10, Volume 11009).

[139]Clah, Tsimshian, Chief Claytsah, PAC (R.G. 10, Volume 3818, file 57,837).

[140]Richard Wilson, Tsimshian, Charles Russ, Nisga'a, "We have all our old traditions about the laws of the past, but we have no story like this of one people taking the land from another without an agreement. So if the white chiefs want our land, we ask them to go by the Queen's law and make a treaty with us." PAC (R.G. 10, Volume 3818, file 57,837).

[141]ibid, Charles Russ, Nisga'a.

Speaking on behalf of the Tsimshian Richard Wilson protested the division of Tsimshian I. R. No. 2.

> We know the reserves are not strong; for a surveyor came to divide the reserve of the Tsimshians into two parts, giving as much to the one hundred people at Metlakatla as to the eight hundred people at Port Simpson. This was done against our will. This shows us that the reserve is not strong to us....We think the reason is because we, the many, are Methodists, and the few at Metlakatla are Church of England.[142]

In 1904 the province approved a partially free grant of 10,000 acres of land adjacent to Tsimshian I.R. 2, to be sold to the Grand Trunk Pacific Railway Company for terminal purposes. The following year the solicitor for the Company advised the Chief Commissioner of Lands and Works that the company would require additional lands contained within Tsimshian I.R. 2 and requested that the province negotiate with the company for the acquisition of its reversionary interest.[143]

The Privy Council approached the province in April 1906 and asked it to waive whatever reversionary interest it might have in the reserve. The province refused explaning that:

> One of the chief considerations which induced Your Honour's Government to recommend the partially free grant of the said lands to the Grand Trunk Pacific Railway Company was the belief that....the value.... of the reversionary interest of the Province in the Indian Reserve in the vicinity, would be greatly enhanced, a great benefit to the province thereby ultimately accruing.[144]

Metlakatla surrendered 13,567 acres for sale to the Company on 7 August, 1906.[145] The issue of the provincial reversionary interest remained unresolved but it was debated in the House of Commons on

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[142]Richard Wilson, Tsimshian, PAC (R.G. 10, Volume 3818, file 57,837).
[143]Journals of the Legislative Assembly of British Columbia, "Kaien Island Land Grant" 1906, p. F13-23.
[144]Journals of the Legislative Assembly of British Columbia, "Tsimshian Indian Reserve,"1907, p. F33-43.
[145]ibid, p.40.

27 January 1907. At that time the Minister of Justice expressed his view that:

> Indian lands are held by the Crown in right of the Dominion as the guardians of the Indians for whose benefit the lands are held. The province is interested in those lands only in this sense, if at all, that if, at any far distant future time, the whole band of Indians, every individual soul-for whose benefit those lands were held, should become extinct, then those lands, having no owner, in respect of whom a trust would exist, might be said to revert to the Crown in right of the Province.[146]

In response the province placed a notice in the Gazette on 22 February 1907 laying claim to a reversionary interest in all Indian reserves in the province. A second opinion on the nature of the provincial interest in the surrendered land was provided to the Department of Indian Affairs by the Deputy Minister of Justice on 29 March 1907.

> By the surrender and the acceptance thereof the transaction is complete as between the Crown and its government of Canada and the Indians, and assuming that the surrender does not operate to vest the lands in the Crown in its government of British Columbia they are vested in the Crown in its government of Canada, not as reserves, but as Indian lands in trust to be disposed of for the benefit of the Indians.[147]

Even if the lands had become vested in the province by virtue of the surrender, Newcombe maintained that:

> The provincial government, as the matter now stands, can, in my opinion, even if the legal estate is in the Crown in the right of the province, lawfully deal with or dispose of the lands only in accordance with the terms of the trust subject to which the same are held.[148]

British Columbia would not back down from its position and instead agreed to negotiate with the Company. During the course of the

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[146]Debates of the House of Commons, 25 January 1907, p.2103.
[147]Deputy Minister of Justice, E. Newcombe to Deputy Superintendent of Indian Affairs, 29 March 1907, PAC (R.G. 10, volume 7675, File 22168-3 Pt. 1)
[148]ibid.

negotiations the province demanded one half the new parcel and one third of the waterfront as well as $2.50 an acre for the entire parcel. As the Chief Commissioner of Lands and Works saw the situation, "even if the government charged the railway company $5.00 per acre for the reversionary interest, the reserve was practically a gift. If we keep half, the Grand Truck Pacific will still get $3,000,000." In the end the province received $2.50 an acre for the land, a reconveyance of one quarter of the waterfront lots, and would receive an additional one quarter of the townsite proper upon its being finally established.[149]

[149]Correspondence between the Grand Trunk Pacific Railway Company and the Government of British Columbia, PAC (R.G.10, Volume 7675, File 22168-3 Pt. 1).

IV "Pragmatic Accommodation:" The Courts and Aboriginal Title

This chapter is concerned with identifying the legal basis for Canada's assertion that a surrender of Indian Reserve lands extinguishes Aboriginal rights and title. In the second chapter three sources of Aboriginal rights and title were identified followed by an overview of how colonial governors actually disposed of traditional lands. Since the actions of colonial governors are inconsistent with any of the sources of Aboriginal title identified the question arises, "Upon what legal principle did the British or French purport to dispose of traditional lands or establish procedures for their acquisition by settlers or developers?"[150]

Despite the inconsistent application of legal principles to the process of settling Canada and the diversity of instruments adopted in creating Indian reserves, by the 1920's a fairly cohesive legal framework for explaining Aboriginal rights and title was in place. By what has been termed a "pragmatic accommodation of the facts of European settlement and Aboriginal occupation of land" the Canadian courts framed the Aboriginal title question in such a way that Aboriginal title was reduced to a "personal and usufructurary right dependent upon the goodwill of the sovereign.[151]

The legal principle employed to legitimate the dispossession of Aboriginal people was the doctrine of discovery declared by the United States Supreme Court in 1823. The remainder of this chapter will be spent demonstrating the impact of that legal fiction on contemporary policy and law on the nature of Aboriginal title.

In the United States and Canada the rights and claims of states and provinces to lands within their boundaries provided the context for

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[150]Bartlett, Richard, Resource Development and Aboriginal Land Rights, Canadian Institute of Resource Law, University of Calgary, 1991, p.2.
[151]ibid, p.5.

the delineation of the law on Aboriginal rights. Three decisions of the Marshall court in the United States are considered for their influence on Canadian jurisprudence. The nature of the Aboriginal interest in traditional lands was first considered in 1810 in *Fletcher v. Peck* .[152] The question before the court was the authority of the state of Georgia to convey lands in fee simple where the Indian title had not been extinguished. The majority of the court held:

> [T]he nature of the Indian title, which is certainly to be respected by all the courts, until it be legitimately surrendered, is not such as to be repugnant to seizin in fee on the part of the state.[153]

Johnson J. dissenting, argued that Georgia's interest amounted to nothing more than a mere possibility. It was:

> [N]othing more than what was assumed at first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors from their markets.[154]

In his opinion, until such time as the Indian title was extinguished they "were absolute proprietors of their soil."[155]

McNeil suggests that neither Marshall or Johnson seemed to realize that a proper interpretation of English law would have been to accord to the state seisin in fee of a paramount lordship over lands over which the Aboriginal occupiers would have been seised in demesne for fee simple estates.[156]

In 1823, the issue of the Indian interest in traditional land came before the Marshall court again. *Johnson and Graham's Lessee v. M'Intosh* provided the authority upon which all leading Canadian

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[152] *Fletcher v. Peck* (1810) 6 Cranch 87 (USSC).
[153] Chief Justice Marshall, in McNeil, Kent, Common Law Aboriginal Title, Clarendon Press, Oxford, 1989, p.251.
[154] ibid, p. 251, Johnson J., in *Fletcher v. Peck*, p.147.
[155] ibid, p. 251, Johnson J., in *Fletcher v. Peck*, p. 146-7.
[156] ibid, p.252.

cases on Aboriginal title are founded.[157] The crucial finding was that "discovery gave *title* to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[158]

The case involved lands sold once by Aboriginal occupants and subsequently conveyed by grant by the United States. Marshall found in favour of the defendents (grantees) even though he acknowledged the Chiefs as the rightful possessors of the land with the right to sell.[159] He held that private purchases of Indian lands did not convey a title sustainable in United States courts for three reasons: discovery gave the exclusive right to extinguish to the United States; title to the lands sold would be under the Aboriginal occupants; and, the Royal Proclamation prohibits sales of Aboriginal lands.[160]

Beginning with the questionable premise that discovery gave title against other European nations, Marshall moved from territorial title to title to land and asserted that the Crown, as discoverer, had ultimate dominion and consequently a power to grant the soil even while in possession of natives. He did not explain how discovery, even assuming territorial title was thereby acquired, could give title to occupied lands.

In *Worecstor v. Georgia*, Marshall apparently recognized this difficulty and significantly altered his views when he stated that the acquisition of sovereignty gave to the Crown "the exclusive *right of purchasing* such lands as the Natives were prepared to sell." In his reasoning, Marshall provided a comprehensive judicial interpretation of the doctrine of discovery and the doctrines of aboriginal rights and title. First the Chief Justice recognized the

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[157] *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat) 5 L.Ed. 681.
[158] ibid, p.689 (emphasis added).
[159] ibid. p.693.
[160] supra note 153, p.228.

fact that America was occupied by many distinct nations with governments and laws of their own.

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered that annulled the pre-existing rights of its ancient possessors.[161]

He then went on to question whether the rights of manufacturers and agriculturalists could override the rights of hunters and fishermen. He concluded that it was power, war, and conquest, and not any inherent distinction between nations that legitimated colonization. As to settling the conflicting claims made by the European powers,

> The object was too immense for any one of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves.[162]

The doctrine of discovery set out the rights of European nations engaged in the imperialist project and the effect of imperialism on the rights of Aboriginal peoples.

> This principle, acknowledged by all Europeans, because it was in the interest of all to acknowledge it, gave to the nation making the discovery as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either

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[161] Chief Justice Marshall, in *Worcestor v. Georgia*, 8 L.Ed. 6 Peters 515 (1832) 495.
[162] ibid. p.495.

> as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[163]

A successful claim to sovereignty by a European power required both the acceptance of the initial claim by the other powers and physical settlement of the land. To this end the contending powers all sought military alliances and/or peaceful relations with the Aboriginal nations.

> Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their sentiments by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid...[164]

Establishing alliances with the Aboriginal nations did not diminish the pre-existing right of self-government of those nations.

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government...[165]

One case stands out in Canadian jurisprudence for establishing the legal principles upon which questions of Aboriginal rights and title would be decided for almost one hundred years. At issue in *St. Catherine's Milling and Lumber Co. v. The Queen* were lands within the boundaries of Ontario, reserved for Indians by the Royal

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[163] ibid. p.495.
[164] ibid. p.495.
[165] ibid. p.495.

Proclamation, and subsequently surrendered by treaty in 1873. The Dominion and the Province both claimed the surrendered lands.

In making its decision the Privy Council began with the premise that from the moment of the acquisition of sovereignty the Crown had a "substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or extinguished."[166] Aboriginal rights to land, Lord Watson argued, depended upon the general provisions of the Royal Proclamation of 1763 which granted possession of land to all tribes under the Crown's protection. Imperial policy since 1763 stipulated that Aboriginal people were precluded from selling their land privately. Lord Watson took this limitation on the marketability of Aboriginal title, imposed by policy, as evidence that Aboriginal title was a mere "personal and usufructuary right dependent upon the goodwill of the sovereign."[167]

Once it was decided that the Crown had title to unsurrendered Aboriginal lands it followed that upon surrender by the Aboriginal people the land passed to the province by virtue of section 109 of the Constitution. The entire interest of the Aboriginal occupants was held to be terminated, the Dominion was legally incapable of fulfilling the terms of treaties, and the province was under no legal obligation to do so, although the court did advise that:

> Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion of all obligations involving payment of money which were undertaken by her Majesty, and which are said to have been in part fulfilled by the Dominion Government.[168]

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[166]Lord Watson, *St. Catherine's Milling and Lumber Co. v. The Queen,* 14 App. Cas. 46 (P.C. 1888) p.55.
[167]ibid, p.55.
[168]Lord Watson, in *St. Catherine's,* quoted in Bartlett, Richard, Indian Reserves and Aboriginal Lands in Canada: A Homeland, University of Saskatchewan Native Law Centre, 1990, p.66.

McNeil argued that Watson's reasoning begs the question of whether the lands were Crown lands or common law Aboriginal title lands at the time of the union. At least in the settled parts of the country, he suggested, the Crown could not, by issuing a proclamation or extending it to newly acquired territories, reduce the existing land rights to a personal and usufructuary right dependent upon its own good will.

Had the Aboriginal occupants been recognized as holders of fee simple estates then the province could probably not derive any benefit from the surrender since the lands would not have been in the Crown at the time of the union.[169] Upon surrender they would have become lands held in trust by the dominion to be disposed of for the benefit of the Aboriginal owners according to the terms of the surrender agreement. McNeil's argument would support this finding for the settled parts of the country.

The nature of the Aboriginal interest in reserve lands came before the New Brunswick Supreme Court in 1890. Applying the premises of *St. Catherine's* the court held that the interest was "at most, a right of occupancy."[170] In 1902 the issue of accountability for the Aboriginal interest in reserve land came before the Privy Council in *Ontario Mining Company v. Seybold* . The court applied the reasoning in *St. Catherine's* to reserve land and declared that s.91(24) did not vest in the Dominion:

> Any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of Indian title had become free public lands of the province as an Indian reserve.[171]

Once again the obligation of the province as beneficiary of the surrender was recognized but no remedy offered. The duty of the

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[169]ibid, p.68.
[170]supra note 168, p. 66, *Burke v. Cormier*, (1890) 2 C.N.L.C. 34 (NBSC).
[171]ibid, p. 67, *Ontario Mining Co. v. Seybold* (1902) 3 CNLC 203 (PC), p. 213.

province was held to be "at least an honourable engagement to fulfill the terms on the faith of which the surrender was made."[172]

In 1916, the Supreme Court of Canada rejected the application of *St. Catherine's* to Indian reserve lands and concluded that Bands were the full beneficial owners of lands set aside as reserve and of any monies arising from sales. In Duff C.J.'s opinion,

> The Dominion Parliament having plenary authority to deal with the subject of "Indian Lands" and having such authority, a transfer of the Indian title, it is difficult to see on what ground the transfer could be held not to take effect according to its terms or on what grounds the trusts, upon which the transfer was accepted, can be treated as non-operative.[173]

In *Attorney General of Quebec v. Attornety General of Canada*, the distinction between Indian reserves and Aboriginal lands was not made. Duff CJ. wrote the decision. He made no reference to his prior finding in *Giroux* but rather referred directly to the decision in *St. Catherine's,*

> The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the Indians, but to quote once more the judgement of the Board in the *St. Catherine's Milling and Lumber Company* case it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial statute of 1867.[174]

This line of decisions had the cumulative effect of denying Native people any beneficial interest in their lands, whether Aboriginal title lands or Indian reserves. Canada could not be held legally accountable to fulfill the terms of treaties or surrenders under the Indian Act.

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[172]supra note 153, p. 307, Lord Davey, in *Ontario Mining Co. v. Seybold*, p.82.
[173]supra note 168, p. 68, Duff CJ, *Attorney-General for Canada v. Giroux*, (1916), 4 C.N.L.C. 147 (S.C.C.).
[174]ibid, p. 70, *Atttorney General of Quebec v. Attorney-General of Canada* [1921] 1 A.C. 401(PC) at 411-412.

V The Emergence of Native Claims Policies

When Parliament began to address Aboriginal concerns in 1946, Aboriginal rights and title were not even on the agenda. Aboriginal people had been thoroughly recast as Indian wards of the government. Their rights, although acknowledged by a few, were considered an impediment to progress by most. At issue in these early debates was the question of extending the federal franchise to Aboriginal people and the problem of reconciling the rights of citizenship with the existence of treaties and an Indian Act.[175]

A Special Parliamentary Committee assigned with the task of making recommendations on possible amendments to the Indian Act was convened in May 1946 and within two months it held 25 meetings and heard 16 witnesses.[176] Based on these initial meetings the committee established an agenda covering three sessions of Parliament: 1946 Session-hearing of departmental officials; 1947 Session-hearing of Indian, church and other organizations; and, 1948 Session-revision of the Indian Act.

From the first session it was clear that for Aboriginal people protection of their treaty rights and special status were central concerns. Accordingly the Committee recommended establishing a separate interdepartmental committee to survey and report on treaty rights and obligations.[177]

The right to vote, the tax exemption for personal property on reserve, and treaty rights and obligations were considered in tandem throughout the debates. Native people themselves feared that if they were granted the vote they might lose some of their

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[175]Journals of the House of Commons of Canada, Ottawa, August 15, 1946, p.701.

[176]Journals of the House of Commons of Canada, Ottawa, 15 August 1946, p.701. Included as witnesses were the President and Treasurer of the North American Indian Brotherhood and the Chairman of the Legislative Committee of the Native Brotherhood of British Columbia.

[177]Journals of the House of Commons of Canada, Ottawa, 15 August 1946, p.702.

treaty rights. In one member's opinion, "the Indians should be assured that "ancient or treaty rights" would not be compromised" by the extension of the franchise.[178] To other members it was inconceivable that Native people could be both the subject of treaties and full citizens of Canada.

> I believe he (Mr. Case) suggested that some way should be found by the which the Indians would be given the franchise and still retain what he described as their ancient rights. However, in view of the fact that the Indians are wards of the state, I do not see how they can be made citizens of Canada and remain wards of the state at the same time.[179]

There were those in the Committee who recognized the significance of treaties and the common law as a source of rights, however, even they struggled with the problem of including Aboriginal people in Canadian society.

> The thought of the committee has been that the giving of the vote to the Indian will help us to assimilate the Indian. When I say assimilate I do not mean that the Indian would lose his rich background of cultural achievements, or any of the rights he enjoys under treaties, or any of his rights, statutory or at common law; but that he would be recognized as a human being and subject to the attention of those seeking office.[180]

For the majority in the Committee, Aboriginal people had to relinquish all their claims to special rights or status if they wanted to be entitled to the rights of citizenship. The longstanding objective of removing legal distinctions between Aboriginal people and Canadians remained a central concern.

> I feel that one of the great incentives in the way of getting the Indians off the reserves, so that they might live as the rest of Canadians do under normal circumstances, would be to say to them, "if you cease being wards of the governments, if you move out of the reserve and live as other Canadians live, you will get the vote." That would be a great incentive to the Indians.[181]

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[178]Commons Debates, Ottawa, 26 April 1948, p.3315

[179]ibid, p.3317.

[180]Commons Debates, Ottawa, June 15, 1948, p.5259.

[181]Commons Debates, June 15, 1948, p.5261.

Ultimately the motion to extend the vote was withdrawn. By the time the committee tabled its final report it had convened another 128 meetings and heard an additional 122 witnesses. Indian bands and interested organizations had submitted 411 written briefs. The report recommended that all sections of the Indian Act be either repealed or amended. Indian policy would be directed at making "possible the gradual transition of Indians from wardship to citizenship and to help them advance themselves".[182]

Treaty rights were addressed in a separate recommendation calling for the immediate establishment of an Indian claims commission empowered to:

> [I]nquire into the terms of all Indian treaties in order to discover and determine, definitely and finally, such rights and obligations as are therein involved and, further, to assess and settle finally and in a just and equitable manner all claims or grievances which have arisen thereunder.[183]

Both recommendations were aimed at finding final solutions to Aboriginal issues. Alternative recommendations sought to enhance Aboriginal rights and suggested that the treaties provided more than government was willing to admit.

> If we look over the terms of the original treaties, we would find that it was certainly the intention of those treaties that the Indian should be properly cared for, that he should be properly trained, and that the great white mother or queen, who was ruling this country at that time, would see that the Indian was properly recompensed and properly cared for as a result of this surrender of these vast territories.[184]

When its report was tabled the committee was criticized for not establishing an Indian claims commission at the start of the session and for not providing a draft Indian Act for debate in the House. The report was not moved and the committee was dissolved.

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[182]Journals of the House of Commons of Canada, Ottawa, 22 June 1948, p. 648.
[183]ibid.
[184]Mr. Castleden, Canada, Commons Debates, 23 June 1948, p.5757.

A draft bill for amending the Indian Act was introduced in the House in February 1951. A Native delegation arrived intending to participate in the debates, however, in the Minister's opinion they were represented in the House and could discuss their concerns with the appropriate member.[185] Others argued the Native delegation should be recognized as partners with government and that their treaties were evidence of this relationship. Despite suggestions that a special committee be struck to meet the delegates and review the proposed amendments the delegation remained outside as the bill passed first reading.[186]

Two weeks later the debates resumed and the Minister, who had apparently met the Native delegation, expressed his surprise at how seriously he had misunderstood their expectations and aspirations.

> Heretofore we have thought of enfranchisement as being the ultimate role of Indian policy, and let us say frankly that we rather expected that the Indian would want to become as one of us. Nothing could be further from the truth. The Indian has no desire to become as one of us, and all his representations have said: "I hope you are not going to take away from me the right to be an Indian."[187]

During these debates the question of continuing Aboriginal rights was put on the agenda. Within the committee there were those who argued for an expansive interpretation of Aboriginal rights and those who argued extinguishment had already been achieved. To this latter group the issue was how to dismantle the system that had effected the extinguishment and assimilate Aboriginal people into mainstream Canadian society. The recognition of a "prior right to the land" was suggested as the basis for continuing Native rights.

> Some people say certain groups of Indians have no treaty rights, and therefore we have no further obligation to them...Some people say that the Indians have no special legal rights, and why bother about such Indians? I confess that such arguments seem to me quite unsound. The Indians' rights in my judgement result

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[185]Canada, Commons Debates, Ottawa, 27 February 1951, p.734.
[186]ibid, p. 753.
[187]Canada, Commons Debates, Ottawa, 16 March 1951, p. 1352.

> from the fact that America was the Indians' promised land...They owned it by prior right. The Indian settled here first and had been here for thousands of years before the whites ever came. We must never forget that.[188]

The same speaker criticized those who argued that the matter either be written off as finished business or in the alternative that policy be directed toward achieving an end to separate status for Aboriginal people.

> People entertaining such views take the general point of view that we ought to integrate the Indians with the whites just as rapidly as we can. We might even have regulations to impose enfranchisement upon the Indians as one means of achieving that objective. Such people hold also that we should disintegrate and ultimately eliminate the reservation, and they have in mind certain devises whereby that objective could be attained, even by using the present Indian Act."[189]

The Indian Act passed second and third reading without the involvement of the Native delegation.[190] Discussion on the establishment of an Indian claims commission languished for another decade. Bill C-130, legislation proposing the establishment of an Indian claims commission, was introduced in the House on 14 December 1963.

There were recommendations to establish a national Indian advisory council and at a convention of the National Indian Council of Canada, the Minister of Justice promised the legislation would be introduced before Christmas. In February the Minister of Indian Affairs told the House that the government would not continue with the legislation but intended to consult with Indian bands. In March, the minister announced that the legislation would be introduced later in the

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[188]Mr. Blackmore, Commons Debates, Ottawa, May 15, 1951, p.3049.

[189]ibid.

[190]The Indian Act remained in roughly the same form since 1886 except for the the statute revisions of 1906 and 1927. The Act was rewritten and reenacted in 1951 and the present Indian Act is based on the 1951 Act. The 1951 Act removed the prohibitions against the potlatch and seeking or providing legal counsel.

session. By October the portfolio had changed hands. One Member predicted the fate of the legislation.

> What I am afraid of is that this Indian claims commission, like so many other matters, is good for election after election. I can see the government bringing the revised edition of the Indian claims commission legislation and the minister saying that, first of all, he must consult with the Indians and then consult with them some more, and then ask advice, then for more time to study what they have said, and then he will want to consider that, and so on-[191]

Bill C-130 died on the order paper. Without any recognition of a legal basis for their rights Aboriginal people had no recourse for presenting their claims other than the political arena. It was clear they had gained little in the way of political power since the first debates more than fifteen years earlier. The Indian Act was to remain the sole vehicle for meeting the needs of Aboriginal people. And, as one member noted, it could no more be used as a vehicle to address their problems than the political process.

> So long as the Indian affairs branch remains largely an administrative body, so long as its sole function is to administer a piece of legislation conceived by political figures, it will remain as a barrier in the way of progress.[192]

The failure of successive Canadian governments to deal with Aboriginal rights was expressed by one member who lamented,

> It is a sad and sorry indictment I have to make, not of this minister but of all people who have held that position in the past, and not of this government but of all governments that have held office in Canada in the past, because the record is identical. It is a black one, regardless of the government that has been in office, apart from the odd, occasional, little foray of a study into Indian affairs, such as the one held in 1948 and in 1959, 1960 and 1961 by committees which made recommendations; and with respect to the one in 1961 we have heard nothing so far.[193]

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[191] Commons Debates, Ottawa, 2 October 1964, pp. 8696-8699
[192] ibid, p. 8703.
[193] ibid, Mr. Howard, p. 8704.

Consultations with Indian Bands and other organizations in 1968 culminated in a proposal for a "new" Indian policy[194]. The policy objective had not changed and in fact went one step further than previous proposals. Its stated objective was full and equal citizenship for Indian people to be achieved by repealing the Indian Act. But this government also explicitly advocated terminating the unique tenure of reserve lands and doing away with treaties.

> The policies proposed recognize the simple reality that the separate legal status of Indians and the policies which have flowed from it have kept the Indian people apart from and behind other Canadians. The Indian people have not been full citizens of the communities and provinces in which they live and have not enjoyed the benefits that such participation offers. The treatment resulting from their different status has been often worse, sometimes equal and occasionally better than that accorded to their fellow citizens. What matters is that it has been different.

The implications of the policy did not escape Native leaders. Every Indian association in Canada, with the exception of the Nisga'a Tribal Council, rejected the proposed policy.[195]

> We have studied carefully the contents of the Government White Paper on Indians and we have concluded that it offers despair instead of hope. Under the guise of land ownership, the government has devised a scheme whereby within a generation or shortly after the proposed Indian Lands Act expires our people would be left with no land....[196]

Despite twenty years of consultation with treaty nations who consistently maintained that their treaty rights were being abrogated, that in many cases the lands promised under treaty had not been provided, and that their treaties were intended to be guarantees of economic security, the government concluded that,

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[194]supra note 30, p. 620, "Statement of the Government of Canada on Indian Policy", 1969.

[195]Calder Frank, Legislative Assembly of British Columbia, 4 April 1973, p.2186. The Nisga'a took the position that it was just a proposal for a policy and thus worth considering.

[196]op. cit., p. 622

> The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline. The services that have been provided go far beyond what could have been forseen by those who signed the treaties.[197]

Treaty First Nations saw their treaties as embodiments of and protection for their inherent rights.

> To us who are Treaty Indians there is nothing more important than our Treaties, our lands and the well-being of our future generations.

The government, however, sought a mutually agreeable end to the treaty relationship.

> The Government and the Indian people must reach a common understanding of the future role of treaties. Some provisions will be found to have been discharged; others will have continuing importance. Many of the provisions and practices of another century may be considered irrelevant in the light of a rapidly changing society, and still others may be ended by mutual agreement. Finally, once Indian lands are securely within Indian control, the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended.[198]

Given its assertions on the insignificance of treaties and the status of Aboriginal people as wards of the government it is not surprising that claims to continuing Aboriginal rights and title were dismissed out of hand.

> Others relate to aboriginal claims to land. These are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community.[199]

The case for Aboriginal title based claims did receive some support from a member of the House from British Columbia.

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[197] ibid, "Statement of the Government of Canada on Indian Policy" p.620.
[198] ibid.
[199] ibid.

(The minister) maintains that because these claims are not substantiated by written documents they are unreaslistic and non-negotiable. In my view if the minister continues to act on this assumption he will defeat his own basic ends and we shall never solve the Indian problem, at least as far as the Indians of British Columbia are concerned. The Parliament of Canada thought it had put an end to the British Columbia land question in 1927. It may have thought so. Parliament may have thought the issue was dead, but it will not lie down.[200]

The government acknowledged one narrow category of claims. Claims arising from specific breaches of "lawful obligations" as set out in the written terms of treaties or other administrative acts of Parliament would be considered. And, in spite of the widespread rejection of Canada's proposed policy the government mandated an Indian Commissioner, Dr. Lloyd Barber,

...[T]o consult with authorized representatives of the Indians and,
(a) to receive and study the grievances arising in respect of:
(i) the performance of the terms of treaties and agreements formally entered into by representatives of the Indians and the Crown: and
(ii) the administration of moneys and lands pursuant to schemes established by legislation for the benefit of the Indians:
(b) to recommend measures to be taken by the Government of Canada to provide for the adjudication of the claims received that he considers can be demonstrated to require special action in relation to any group or groups of Indians: and
(c) to advise as to categories of claims that, in his judgement, ought to be referred to the courts or to any special quasijudicial or administrative bodies that he recommends as being desirable for adjudication of specific awards.[201]

Native leaders lobbied the government to broaden the mandate of the commissioner to include claims of people in non-treaty areas and claims based on Aboriginal rights. In 1971, the government agreed to allow the commissioner to hear and report on any grievances Native people might present. Under this broadened mandate the Yukon Indians presented their position paper "Together Today for our

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[200]Commons Debates, Ottawa, 29 October 1969, p. 262.
[201]Barber, Lloyd, "Indian Claims Mechanisms", (38) Saskatchewan Law Review, 1973, pp.11-15.

Children Tomorrow" the vision statement of their subsequent comprehensive claim negotiations.[202]

In his final report Barber identified two broad categories of claims, those arising from misfeasance, malfeasance, or nonfeasance in the discharge of treaty provisions, the handling of reserve lands and the management of band funds; and, the failure of the Crown to recognize basic land rights.[203]

Barber's recommendations differed significantly from those of the parliamentary committees of the previous decades in two critical ways. In the first place he did not see the objective of claims settlements as securing a final solution to Native issues but rather as establishing a process for renegotiating the entire relationship. Lasting solutions to Native claims, he advised, would only be possible if settlements provided the means for Aboriginal people to build a future.

> In the final analysis it must be realized that the process of Indian Claims settlement involves not just the resolution of a simple contractual dispute, but rather the very lives and being of the people involved. Desire for settlement does not concern only the righting of past wrongs but as well the establishment of a reasonable basis for the future of a people.[204]

His second major contribution to our understanding of the nature of the issues involved in Aboriginal/state politics was the recognition that new forums for addressing Aboriginal claims would need to be created. The legal complexities of the issues alone demanded the establishment of appropopriate forums, he explained, and this was compounded by the historical differences between Aboriginal nations in their relations with the crown. Existing procedures that could be utilized were identified and included the judicial process, the legislative process, the special tribunal or quasi-judicial approach, and the straight administrative negotiation process. The

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[202]ibid, p. 12.
[203]ibid.
[204]ibid, p.15

most important consideration for successful settlements would be flexibility in the process and equal consideration for settlement and implementation mechanisms.[205]

Barber's recommendations went largely unheeded. Subsequent government policy acknowledged continuing responsibilities for Native people originating with the B.N.A. Act and established a claims resolution process to address claims arising from a breach of government responsibility in its management of Indian lands, moneys, or other assets. Government would also hear claims arising from the non-fulfillment of specific treaty obligations.[206] Preconfederation claims and claims based on Aboriginal rights and title were not considered to be legally enforceable claims and as such were not negotiable. There was little progress in the resolution of Native claims until 1973.

Aboriginal rights were recognized as pre-existing and, at least in some cases, continuing rights by the Supreme Court of Canada in 1973.[207] *Calder* was a major victory for Aboriginal people in their pursuit of a rights based claims policy for its recognition of the common law basis of Aboriginal title. In Parliament there were promises of a new approach to Native issues.

> The Progressive Conservative Pary undertakes to settle fairly the outstanding aboriginal claims of Canada's native people. We intend to work toward a negotiated settlement of disputed treaty and aboriginal claims, and we will do so in full and fair consultation with the native peoples involved...what we are debating today (is) recognition of the principle of aboriginal rights.[208]

The National Indian Brotherhood stated their expectations following *Calder* "where treaties have not extinguished Aboriginal title,

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[205]ibid.

[206]Canada, Minister of Supply and Services, Outstanding Business: A Native Claims Policy, 1982, p. 19.

[207]*Calder v. A.ttorney General of British Columbia,* [1973] SCR 313 (SCC).

[208] Flora MacDonald, Canada, Commons Debates, 11 April 1973, p. 3208.

settlements should be made.[209]" The Union of British Columbia Indian Chiefs elaborated:

> We are asking for compensation for loss of those rights of occupancy and use of lands for which loss we have never received compensation and for adjustment of the compensation in those few cases covered by treaty where the compensation was inadequate...we have been deprived of valuable rights which we used to enjoy exclusively and of right, and have been deprived of them without compensation. That is not just. Our suggestion is that the claim be accepted on principle and that machinery be established...[210]

Canada announced a new policy entitled "Claims of Indian and Inuit People." Claims based on unextinguished Aboriginal title could be negotiated but settlements depended upon the claimant First Nation providing Canada with absolute surrenders of all existing Aboriginal rights and titles for a grantback of certain specified rights derivative of the agreement.

The division of claims into two categories was continued with the new policy. Narrowly defined claims based on breaches of lawful obligations were accepted for negotiations. Such claims depended upon a Band being able to demonstrate Canada had broken its own laws in relation to the Band's reserve based assets. No matter how unjust an action may have been to an Aboriginal claimant if it was legally executed there was no redress. In the relationship between Aboriginal peoples and Canada, where Canada exercises an inordinate degree of discretionary power over the lands and lives of Aboriginal peoples, a standard of accountability that does not incorporate a legal obligation to act in the interests of the Aboriginal people could not be expected to provide just results. The specific claims policy has not provided a forum for addressing many Aboriginal claims. Between claims that are amenable to solution under the specific claims policy and those based on unextinguished Aboriginal title there are probably thousands of claims that do not

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[209]ibid, National Indian Brotherhood statement, quoted by Flora MacDonald.
[210]ibid, p. 3210, Union of British Columbia Indian Chiefs, quoted by Flora MacDonald.

fit either category. For example, claims that involve Aboriginal rights but that do not go to the question of title cannot be pursued under either policy.

Between 1973 and 1990 the Specific Claims Branch of the Department of Indian Affairs received 578 claim submissions. In 1990, 275 of those were in various stages of the process. According to Canada, 204 were resolved, but included in that number were rejected or withdrawn claims. In fact no more than 44 were actually settled. Of 98 claims said to be either being reassessed by the claimant, under litigation or suspended, 22 were actually in litigation. Half as many as had been settled in 17 years. Add to these numbers the thousand or more claims being developed and the failure of the process is clear.[211]

In its critique of the policy the Assembly of First Nations pointed to the artificial division of claims into two categories and called for their replacement with a First Nations rights policy based on the principles of inherent rights and title of First Nations. A general policy based on the recognition of Aboriginal rights would provide a forum for addressing inherently interrelated matters. It would also be consistent with the spirit and intent of the constitutional entrenchment of Aboriginal and treaty rights.[212]

The Indian Commission of Ontario rejected the current standard of lawful obligation applied to judge government responsibility and conduct arguing that the appropriate standard is that of fiduciary obligations.[213] The concept "lawful obligations," first articulated in 1969 is limited to "grievances" arising in respect of the terms of

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[211]Assembly of First Nations, "Doublespeak of the '90's: A Comparison of Federal Government and First Nation Perception of Land Claims Process", Assembly of First Nations, August, 1990, p.11.

[212]Assembly of First Nations, "AFN's Critique of Federal Government Land Claims Policies," National Indian Brotherhood/Assembly of First Nations, Ottawa, August 21, 1990, p.3.

[213]Indian Commission of Ontario, "Discussion Paper Regrading First Nation Land Claims", 1990, p. 21.

treaties and the administration of moneys and lands pursuant to schemes established by legislation.[214]

At the time the concept was put forward government accountablity for the management and disposal of Indian lands had been addressed by the courts and reduced to a matter of political discretion. As the Office of Native Claims Reference Book clearly acknowledged,

> Many Indian claims will probably remain outstanding until the legal nature of the historical Indian-goverment relationship is clarified. The underlying contention in such claims is that the federal government is the Indians' legal trustee...in litigation where this issue has been raised, the government has taken the position that it does not have a legal responsibility for Indians or Indian lands. The term "trust" is perhaps better defined as a "political" or "administrative" trust, which in effect, is merely another way of expressing federal constitutional responsibility for Indians.[215]

This position was rejected by the Supreme Court of Canada in 1984. In 1975, Ronald Guerin a member of the Musqueam Band in British Columbia brought an action against the Crown that was designed to test the political trust theory of government accountability. The action was for breach of trust in relation to a conditional surrender and subsequent leasing of reserve lands. The Band was awarded $10 million in damages. The Crown appealed. At trial the Crown argued that if there was a trust relationship involved it was at best a "political trust" enforceable only in Parliament and not a "true trust" enforceable in the courts.[216]

The Court rejected the political trust line of decisions in three separate assenting judgments. Estey J. found the Crown liable in agency. Wilson J. (with Ritchie and McIntyre J. concurring) found the Crown liable on the basis of trust, while Dickson J. (with Beetz, Chouinard and Lamer JJ. concurring) based his finding of federal

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[214]supra note 30, p.627.

[215]Office of Native Claims Reference Book, 1981, p.21 in Indian Commission of Ontario, "Discussion Paper Regarding First Nation Land Claims, 1990, p.26.

[216]*Guerin v. R.*, Western Weekly Reports [1984] 6 W.W.R.

culpability on the Crown's sui generis fiduciary responsibility with respect to Indian lands. The argument for a fiduciary obligation was stated by the Chief Justice,

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.[217]

The court found that through the confirmation of its historic responsibility in the Indian Act, Parliament had conferred upon the Crown a discretion to decide for itself where the Indians' best interests lie and that,

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.[218]

Following *Guerin* the Specific Claims Policy was revised to include a new section entitled "beyond lawful obligations." However, critics have noted that the amendment to the policy does not go far enough. According to the Indian Commission of Ontario, "any claims policy which does not now incorporate fiduciary obligations over a broad range of transactions, including treaty promises, will be so far distanced from the law of the land that no one could repose any faith in its capacity to resolve claims in a fair and equitable manner."[219]

A third area of contention with the specific claims policy is the federal government's insidious conflict of interest throughout the process. The policy is administered by the Department of Indian Affairs and Northern Development (DIAND) with legal support from

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[217]ibid, Dickson J. p.494.
[218]Ibid, Dickson J., p.501.
[219]supra note 213, p.31.

the Department of Justice. DIAND, indicted as the cause of most of the claims, is responsible for setting the criteria for acceptance into the process and assesses the validity of claims submitted, thus controlling access to the process. The perception that the federal government has appointed itself judge and jury in claims against itself can hardly be avoided.

Once a claim is accepted for negotiation DIAND is responsible for determining negotiation funding for the claimant, setting timetables and meeting schedules, and negotiating compensation agreements with claimants. Throughout the process DIAND acts to protect the interests of the federal government and yet the federal government has a fiduciary responsibility to protect Native people and their interests.[220]

The compensation criteria and the extinguishment factor have also been widely acknowledged as problematic. After many years of negotiations claimants are often invited to accept an offer of money where land was clearly wanted or they are faced with a demand for a release of obligations that were not a part of the claim at hand. Although the federal government acknowledges that in some instances land may be of special value to the claimant, the notion of 'special value' relates only to economic considerations. "Compensation shall not include any additional amount based on 'special value to owner' unless it can be established that the land in question had a special economic value to the claimant band, above its market value."[221]

Government's preference for cash payments as settlement is consistent with the policy position that "the significance of a claim settlement is that it represents final redress of the particular grievance dealt with; a formal release will be sought from the

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[220]Canadian Bar Association, "Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action" The Canadian Bar Association, Ottawa, 1988, p.55.

[221]supra note 213, p. 41, in Outstanding Business: A Native Claims Policy, p.31.

claimants so that negotiation on the same claim cannot be reopened in the future." The experience of First Nations is that settlements are structured to ensure that no continuing obligations of government remain.[222]

All of these criticisms will be seen to be relevant to the claim under consideration here. The experience of the Lax Kw'alaams Band in British Columbia supports the observation of the Assembly of First Nations that the division of claims into two categories, one concerned with rights and one in which rights are presumed to be unaffected, is arbitrary and productive of a poor result. Closely related to this flaw in the policy is the fact that the process adopts an ahistorical approach to deciding the nature of the claims. To Native people their histories have long been incidental to the development of Canadian law and policy. As the courts have recently noted on a number of occasions,

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of primary importance to consider the history and oral traditions of the tribes concerned.[223]

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[222] ibid.

[223] *R. v. Taylor and Williams,* (1981) 62 CCC (2d) 227 at 232.

VI The Lax Kw'alaams Band's Claim

In 1979, the Lax Kw'alaams Band filed a claim against Canada for the loss it suffered as a result of the 1888 division of its main reserve. The legal question in the claim was whether Indian Reserve Commissioner Peter O'Reilly had the authority to divide the reserve against the wishes of the majority of the Tsimshian people and in a manner contrary to that stipulated by the Indian Act.

As a result of the division of Tsimshian Indian Reserve No. 2 (I.R. 2) two Indian bands, the Metlakatla Band and the Port Simpson Band (now Lax Kw'alaams) were created. In 1906, the Metlakatla Band surrendered 13,567 acres in its southern portion of the reserve.[224] The McKenna McBride Commission recommended a 10,468 acre cut-off from the southern portion of the reserve in 1916.[225]

The initial claim related to the loss of the Band's interest in the entire southern portion of I.R. 2 and Canada's violation of its relationship of trust with the Band. In its settlement proposal the Band asked that the existing boundaries of I.R. 2 be confirmed, that Canada take action to return the cut-off lands to Lax Kw'alaams and Metlakatla as jointly held reserve land, and, that Canada provide compensation to the band in the form of land around Port Simpson harbor for the loss of its unsurrendered interest in the 13,567 acres surrendered by Metlakatla in 1906.[226]

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[224]B.C. Sessional Papers, "Tsimshian Indian Reserve," 1907, p.F 40.

[225]The Report of the Royal Commission on Indian Affairs for the Province of British Columbia, 4 vols. (Victoria, 1916), vol. III, confirms that the lands were cut off as of March 20, 1916. The Commission's recommendations were confirmed by federal Order in Council 1265, dated July 19, 1924, and by British Columbia Order in Council 911, dated July 26, 1923. These orders in council were enacted pursuant to the British Columbia Lands Settlement Act, SC 1920, c. 51, and the Indian Affairs Settlement Act, SBC 1919, c.32.

[226]Port Simpson Band Council, "A Specific Land Claim Regarding Tsimpsean Indian Reserve Number 2", Submitted to the Minister of Indian and Northern Affairs, December 5, 1979. "The Port Simpson Band wishes to submit a specific claim for compensation for the loss of the Band's unsurrendered interest in the southern part of Tsimpsean Indian Reserve Number Two."

When the claim was finally accepted for negotiation it was limited to the question of the amount of compensation to be paid to the Band for its unsurrendered interest in the lands surrendered by Metlakatla in 1906. In 1979 there was no recognition of a legal obligation on the part of Canada to act in the best interests of Native people and so the question of breach of trust was not a consideration in negotiations. Canada's concern was to perfect the surrender it had acquired from Metlakatla.

Lax Kw'alaams and Canada agreed to a revised claim in December 1985.[227] After six more years of negotiations the two parties reached a settlement agreement. As a condition of settling claims the Specific Claims Policy states that a formal release of all obligations relating to the claim must be given by the claimant Band. It also states that "claims based on unextinguished Native title shall not be dealt with under the specific claims policy."[228] However, the nature of the release demanded by Canada as a condition of settling the Lax Kw'alaams claim was an absolute surrender. The Band feared Canada might suggest the surrender included the extinguishment of all Aboriginal rights and title to the subject lands.

Paragraph 1.1 of the Agreement provided as follows:

> It is a condition precedent to the coming into force of this Agreement that the Band shall surrender absolutely to Canada, all of its rights and interests of whatsoever nature and kind, if any, it may have in and to the Surrendered Land conditional upon Canada entering into and making payment pursuant to Section 3 of this Agreement.

The form of Absolute Surrender read as follows:

> Witness that the Lax Kw'alaams Band of Indians does hereby absolutely surrender to Her Majesty the Queen in right of Canada, Her Heirs and Successors any and all of the rights and interests of the said Band and its members in lands described as follows....[229]

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[227]Ratcliffe and Company, legal counsel for Port Simpson Band Council, "Re: Specific Claim Arising form 1888 Division of Tsimshian I.R. 2", 1989.

[228]Canada, Outstanding Business: A Native Claims Policy, 1981, p.30.

[229]Ratcliffe and Company, correspondence regarding settlement offer, December 1991.

Concerned with the potential of this form of release to extinguish Aboriginal rights and title, the Council of the Band sought to have the wording of the settlement offer amended. The proposed provision for a release would have limited it to a surrender of the interest created by the establishment of the reserve.

> It is a condition precedent to the coming into force of this Agreement that the Band shall surrender absolutely to Canada, any rights and interests it may have in the Surrendered Land as reserve upon Canada entering into and making payment pursuant to Section 3 of this Agreement.[230]

Canada would neither confirm that an absolute surrender of an Indian reserve had the effect of extinguishing Aboriginal rights and title nor would it amend the language of the settlement agreement to explicitly limit the surrender to the interest created by the establishment of the reserve.

> As to the issue of limiting the scope of the agreement and the surrender to not include aboriginal rights, we have provided wording that is acceptable to us...We have a great deal of difficulty both from a legal and a policy view with the concept of an Indian Act surrender that attempts to limit its scope to not include "Aboriginal Interests" as defined in the agreement. Although I cannot pretend to provide any definitive answers in this area, it would seem possible that a surrender that purported to exclude aboriginal rights may in fact be no surrender at all.[231]

The process deteriorated into one of drafting and redrafting settlement documents that would avoid the potentially damaging surrender provision. During the following year attempts were made to bring the province into the negotiations to secure from it assurances that the surrender, if agreed to, would not be raised in pending treaty negotiations. Finally both governments provided the Band with a clear response to the extinguishment issue, they would take the position that an Indian Act surrender of land extinguished

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[230]Ratcliffe and Company, correspondence regarding settlement offer, December 1991.

[231]Department of Justice to Ratcliffe and Company, September 1992.

Aboriginal title. The province stated that in the alternative it would take the position that title had been extinguished in the process of creating the reserve.

> [I]t is our view that the practical legal ramifications of the absolute surrender under the Specific Claim Settlement Agreement are that any "aboriginal interest" in those lands surrendered disappears. In this context, therefore, any legal recognition of "aboriginal interests" by the Province would not have application to the land surrendered pursuant to the Specific Claim Settlement Agreement.[232]

At that point the Band approached the newly formed Indian Specific Claims Commission and asked for assistance. Canada argued that it was beyond the Commission's mandate either to enter the process after a settlement offer had been made or to consider the appropriateness of Canada's demand for an absolute surrender. The Commission, however, disagreed.[233] The Commission carried out its investigation and held evidentiary hearings at Prince Rupert in March 1994. The Commission released its findings in June 1994. Its Report supports the position of the Band Council. To date Canada has not responded to the Commission report.

To answer the question in a manner satisfactory to the Tsimshian it was essential that the Commission have the opportunity to study not only the law and policy surrounding the issue but also the particular history of the Tsimshian people in its relations with Canada and British Columbia. This history was not considered relevant to the specific claim since the only questions there were the legality of the division of the reserve and the amount of cash compensation to be paid the Band.

In making the argument for distinguishing between the interest of a Band in its lands held as reserve and the interest of an Aboriginal

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[232]Geoffrey Moyse, Ministry of Attorney General, to Harry Slade, 13 November 1992.

[233]Indian Claims Commission, Report on: Claim of the Lax Kw'alaams Indian Band, 1994, p.85-86.

society in its traditional lands at the time of the assertion of British sovereignty, legal counsel for the Band submitted:

> [I]t must be understood that there exists today a tribal system of government and a system of tribal ownership of territories that is a continuation of the social organization that existed long before Europeans came in contact with Tsimshian peoples.[234]

The significance of this observation cannot be overstated. Membership in the Lax Kw'alaams Band and membership in the nine tribes are not coextensive. Inevitably there would be Band members who are not members of any of the tribes voting to extinguish Aboriginal rights and title as a consequence of the settlement conditions. The political leadership of the Band is not coextensive with the political leadership of the Allied Tsimshian Tribes. It is the contention of the Allied Tsimshian Tribes and the Lax Kw'alaams Band Council that the Band does not have the authority to provide the kind of surrender Canada demands.[235]

The land in question in the claim is of great historical importance to the Tsimshian. As one Chief stated, it is the cradle of Tsimshian civilization. Metlakatla Pass and Prince Rupert Harbour are and always have been an area of intensive use by Tsimshian people for purposes of residence and resource harvesting. The Band's legal counsel stressed the importance of finally recognizing Native political and legal systems.

> And the thing that impressed me the most in the testimony of the chiefs, again, is the clear message that we've had so much difficulty understanding in our non-aboriginal legal system, that the people and the land are inseparable.

Whether or not an Indian Act surrender has the effect the Crown asserts legal counsel argued that as a fiduciary Canada had an obligation to protect Aboriginal peoples and that if it chose to do so

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[234]Slade, Harry, Minutes and Proceedings, "Lax Kw'alaams Inquiry" Indian Claims Commission, March 15, 1994, p.13.
[235]ibid, Slade, p.168.

it could exclude Aboriginal interests from its agreement.[236] Harry Slade had been the Band's legal counsel since the claim was first submitted in 1979 and he assured the Commission that it was never envisaged that the Band would be faced with the prospect of surrendering on terms that might have the legal consequence of extinguishing pre-existing Aboriginal rights or title.

Several expert witnesses were called to provide evidence at the hearing. The evidence of Hamar Foster, a law professor at the University of Victoria addressed the issue of the interest in traditional versus specially reserved lands in the context of British Columbia's history. The courts have said the interest is the same, most recently in *Guerin*. It was Foster's opinion, however, that as a historical generalization the statement doesn't seem to hold. In *Guerin*, the issue was whether or not the Crown owed a fiduciary obligation to the particular Native band which had surrendered its interest in the reserve for a particular purpose and under particular terms. The court based the fiduciary obligation upon the fact that Native people, whether its Aboriginal title or whether its land held under a reserve, have a restricted right to alienate.[237]

Foster's view was that the history of the province of British Columbia in the setting aside of reserves for the Tsimshian demonstrated that "the rights that arise as a result of the allotment of reserves and the imposition of the Indian Act regime are quite separate and apart from any question of Indian title as a historical fact, because the notion of Indian title simply played no role in any of that."[238]

From Canada's point of view the problem was that Aboriginal rights were not well enough defined for Canada to risk not securing a surrender. It was argued that to a great extent Aboriginal rights and Indian Act rights were co-extensive and without knowing what

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[236]ibid.
[237]ibid, Foster, Hamar, p.72.
[238]ibid.

the residual rights consisted of Canada required a surrender of all interests.[239]

Canada's primary concern was with the amount of compensation to be paid. It was suggested that the Band had an interest in the land as reserve and perhaps as an Aboriginal right but that the nature of the interest was such that to compensate for one would be to compensate for the other.[240]

The Chair reminded Becker of the Band's assertion that there were in fact two owners, the members of the Band and the Allied Tsimshian Tribes and asked "if we accept that the creation of the reserve did not extinguish title then would Justice concede that Canada is importing into the specific claims policy a requirement that Aboriginal title be extinguished?"[241]

But Canada's position was that it could not accept the risk of overcompensation to the Band and that risk would remain unknown until the precise nature and scope of Aboriginal rights was defined. Becker conceded that it was unusual to seek to extinguish Aboriginal title through the Indian Act and that,

> It does enter this as almost a collateral or back door fashion in that the surrender is, of course, an Indian Act form of surrender, and then the issue is what effect does that have. I really couldn't say too much more about the effect of a surrender under the Indian Act or whether it would or could be used. I'm inclined to believe that the provisions in the Indian Act dealing with surrender are primarily designed to deal with reserves. The effect that that may have on Aboriginal interests that are co-extensive with reserve interests, I guess, is an issue of some debate.[242]

It has already been noted that there are two policies for addressing native claims and one of those policies is specifically designed to

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[239]ibid, Department of Justice lawyer, Becker, Bruce, p.196-7.
[240]ibid, p.197.
[241]ibid, Chair, p.197.
[242]ibid, Becker, p.212.

address Aboriginal title based claims. When a claim involves rights or title but is not presented as a comprehensive claim there is no policy available. Aboriginal people are left to attempt to deal with their claims through the specific claims process or the courts. And it doesn't help when Canada's representatives fail to understand the enormous weight of injustice that Aboriginal people bring with them into any negotiations. For example, Becker was inclined to tell the Commission that:

> There has been some suggestion, or a feeling, that Canada is imposing its will upon the Band requiring them to give up certain Aboriginal rights which they may have to the surrendered area. I submit that that fails to recognize that what we're dealing with here is a consensual agreement. The Band does not have to give up those rights if it does not enter into the agreement.[243]

The Band's legal counsel argued persuasively for the Crown to attempt to find a more reasonable remedy. Alluding to the grave power disparity between Canada and the Tsimshian Slade told the Commission that the Crown's position was clear. The Crown was certain that the surrender would extinguish Aboriginal rights and title and despite evidence and opinion from a law professor that that may not be the case, the Crown, with which the Tsimshian tribes will be engaged in treaty negotiations, has said in this negotiation that the effect of the surrender would be to extinguish. The only possible conclusion is that there is a determination on the part of the Crown to affect the Aboriginal interest through the settlement of this claim by insisting upon a surrender which it maintains will extinguish the Aboriginal interest.[244]

The Commission concluded that it was reasonable for Canada to demand an absolute surrender of the Band's reserve interest. Nevertheless, it found that the effect of the surrender clause as drafted by Canada, extended beyond a surrender under the Indian Act because it also purported to extinguish Aboriginal interests in the

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[243]ibid, Becker, p. 194.
[244]ibid, Slade, p.230.

surrendered lands. The Band could not have anticipated that Canada would also seek a surrender of its Aboriginal interests as a condition of settling its claim. For the following reasons it found Canada was not justified in demanding an absolute surrender.

In the first place, the Band's Aboriginal interests in the surrendered lands were never the subject matter of negotiations and no attempt was made to place a value on these interests. Second, the Band's negotiators were not informed of Canada's demand for an absolute surrender until after the amount of compensation had been agreed to, and the surrender clause was inserted into the draft settlement agreement drawn by Canada. Third, the Band's Aboriginal interests could not have been the subject matter of the negotiations because Canada's Specific Claims policy expressly excludes claims based on unextinguished Aboriginal title. Finally, the release contemplated by the policy must be related to the nature of the claim, which was based on compensation for the value of reserve lands taken without a valid surrender and for damages arising from the lost use of those lands.

The Commission went on to find that the surrender clause should be expressly limited to the reserve interest created by the allotment of Tsimshian I.R. 2 in 1884. Furthermore, the surrender should expressly exclude Aboriginal rights and interests to ensure that they are not extinguished without compensation.

VII Summary and Conclusions

This thesis has been primarily concerned with identifying the legal and historical basis for Canada's insistence that an Indian Act surrender of reserve lands extinguishes Aboriginal rights and title. In making this assertion Canada maintained that it was a well established legal and political requirement that had been, and would continue to be, applied consistently across the country. The issue during specific claims negotiations between Canada and the Lax Kw'alaams Band. The Tsimshian nation has never negotiated a treaty with Canada and maintains it still possesses its rights and title to traditional territory. In fact, the Tsimshian nation, Canada, and British Columbia are currently engaged in a treaty making process based on the continued existence of Aboriginal title.

Canada's position is that the interest in Indian reserve lands and the interest in Aboriginal title lands are the same. A review of the case law on the nature of Aboriginal title in Canada, beginning with the 1888 decision in *St. Catherine's*, would seem to substantiate Canada's position. Three findings in *St. Catherine's* relate to the issues involved in this thesis. The court decided that the rights of Aboriginal peoples owed their existence to the general provisions of the Royal Proclamation and the bounty of the Crown and argued that no title beyond occupancy had ever been recognized by the Crown. It followed that a surrender by treaty of the right of occupancy terminated the Indian interest. Aboriginal peoples could not be considered nations capable of holding lands since they had no regular form of government, they were recast as wards of the government with no internal political rights.

In 1921, the Privy Council applied the reasoning in *St. Catherine's* to Indian reserve lands and found that an Indian Act surrender terminated the Indian interest. The interest in Indian reserve lands was thus equated with the interest in Aboriginal title lands as determined by the court in *St. Catherine's.* In both cases the court held that immediately upon surrender the full beneficial interest in

the land enured to the province in which it was located while the Dominion retained the constitutional responsibility for fulfilling the terms of surrenders and the management of Indian lands and assets.

In the Supreme Court of Canada in *St. Catherine's* the opinions of Strong and Gwynne JJ. both upheld the reasoning of the United States Supreme Court in *Worcestor v. Georgia*. Had their arguments been adopted Aboriginal peoples would have been recognized as distinct political societies with a legal and just claim to the lands they occupied.

When Parliament began to debate the conditions of Native people in 1946 there was no recognition of continuing Aboriginal rights. The debates centred on the Indian Act and treaties, both of which were considered by the majority to have outlasted their usefulness. Emerging policy was aimed at eliminating Indian status, Indian reserve lands, and treaties. In the wake of the rejection of the government's proposed white paper on Indian policy in 1968, an Indian claims commissioner was appointed to investigate and report on the claims of Aboriginal peoples. Commissioner Barber argued for a claims resolution policy that would provide Aboriginal people with a reasonable basis for a future. Aboriginal people were recognized as "citizens plus" rather than wards of the government.

Canada did not adopt Barber's recommendations although it agreed to hear claims based on breaches of lawful obligations. Only claims based on Canada's breach of its own laws would be accepted for negotiation. Claims based on unextinguished Aboriginal title would not be considered. Native rights were still limited to those delegated rights spelled out in treaties or the Indian Act.

Calder was a major victory. It recognized that Aboriginal title was a common law right that did not depend upon the royal proclamation or any other statute or law of Canada. However, the nature of Aboriginal title remained as it had been defined in *St. Catherine's* as the mere right to use and occupy certain lands.

Following *Calder*, Canada announced two new policies, the specific claims policy and the comprehensive claims policy. Specific claims continued to be defined as claims where Aboriginal rights were not at issue. In British Columbia where aboriginal title has not been extinguished it is difficult to conceive of circumstances where Aboriginal rights do not come into play where lands have been wrongfully taken. The history of the Tsimshian presented in the thesis demonstrated that Canada and British Columbia acted together to justify the taking of Aboriginal lands without consent and without compensation.

From the point of view of the Tsimshian they are still the rightful owners of the lands they have occupied since time immemorial. The lands are vested in the Hereditary Chiefs and House groups and the authority to relinquish those lands must come from the appropriate Chiefs. Canada does not recognize the political legitimacy of Aboriginal forms of government, nor does it recognize Aboriginal title as a property right.

In 1971, Commissioner Barber recommended that Canada establish alternative forums for addressing Native claims. Even without creating resolution processes specifically designed to address Native claims Barber recognized existing processes that could be used. More than twenty years later, Canada has still not provided Aboriginal people with neutral forums for settlement. The establishment of the Indian Claims Commission in 1992, as a forum of last resort, falls far short of the type of process Aboriginal people require. The Commission has limited authority and can only report and recommend to Canada alternative settlements. The composition of the Commission, made up as it is of people with years of practical experience with Native issues, is a step in the right direction.

What is needed to provide justice to Aboriginal people is a recognition of the legitimacy of their claims and a process for

settlement that is distanced from the Canadian government and courts. There are already examples of alternative court systems, for example, divorce courts and small claims courts. Currently most Native claims cannot be taken to court, unless of course charges are laid against an Aboriginal person exercising a right that Canada does not recognize. But in most instances claims are statute barred and Aboriginal people must proceed through the specific claims process in an attempt to seek justice.

When Native claims are addressed in the Canadian courts, even if the outcome is a positive one, there is the problem of implementing decisions. A good example of this problem is the *Sparrow* decision which recognized the Aboriginal right to fish. Following the decision Canada developed a strategy for implementing the right known as the Aboriginal Fishing Strategy. This strategy has been applied piecemeal across the country and has created a backlash against Aboriginal fishing rights. Aboriginal people need a process that provides settlements within a reasonable time frame, that provides direction on implementing decisions, and that is sensitive to the cultural and political distinctiveness of their societies.

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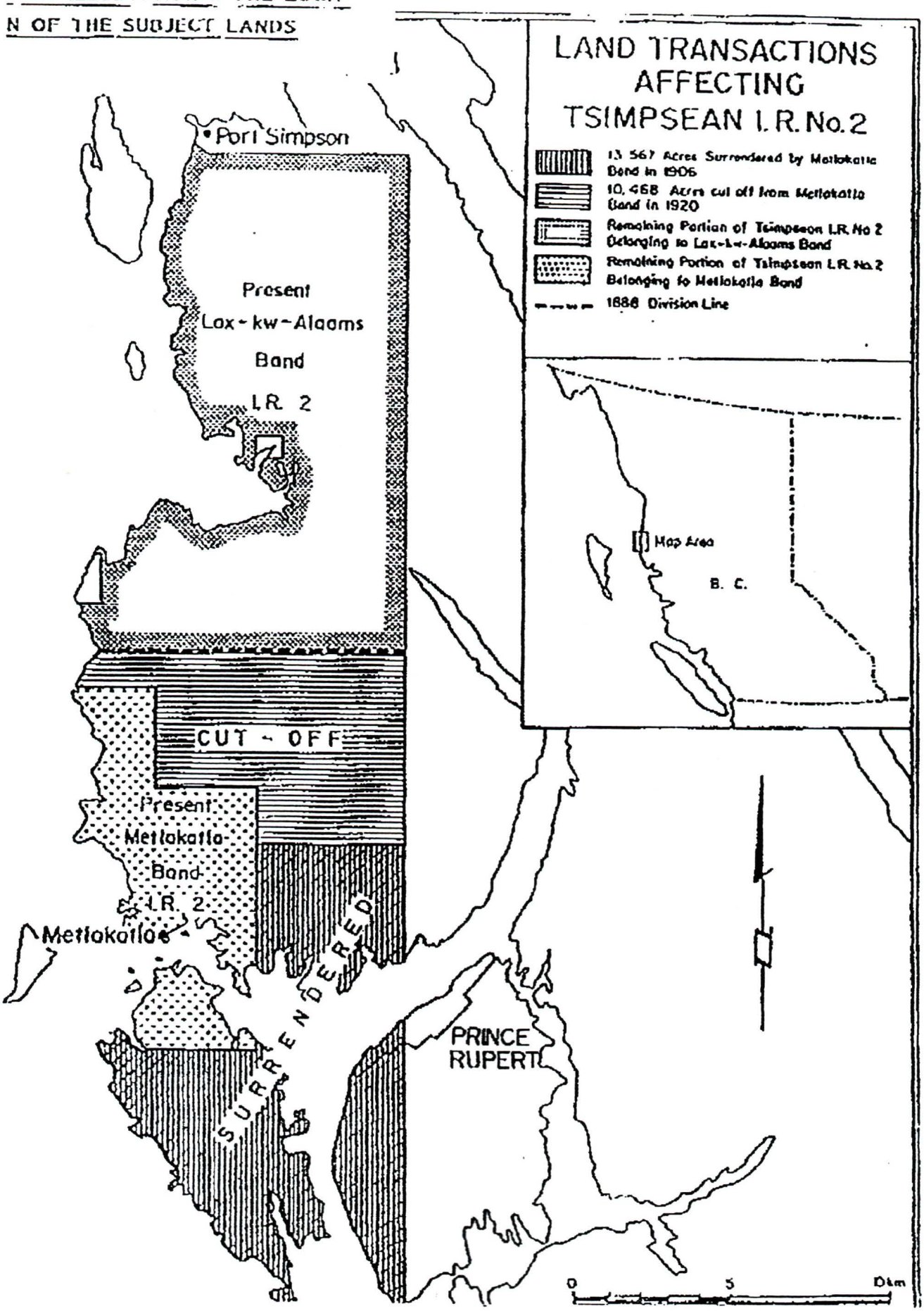

VITA

Surname: Shaw Given Names: Dominique (Nikki) Maria

Place of Birth: Vancouver Date of Birth: 15/08/54

Educational Institutes Attended:

University of Victoria 1986-1995

Degrees Awarded:

B.A. University of Victoria 1988

Related Employment

Researcher/Policy Analyst - Allied Tsimshian Tribes - 1992-1994

Treaty Coordinator - Oweekeno Nation - 1994-1995

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Author: [redacted]

DOMINIQUE (NIKKI) SHAW

January 31, 1995.

(Date)