

ONE HUNDRED YEARS OF ADVOCATING FOR JUSTICE: LITIGATING THE CALDER CASE

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“Cursed be he that removeth his neighbour’s landmark.”

Deuteronomy 27:17, often quoted by early 20th century Nisga’a chiefs when protesting government land policy

When Frank Calder told the tenth Annual Nisga’a Convention that if they went to court it would not be them but British justice that would be on trial, he was echoing words that another aboriginal leader had spoken more than half a century earlier. In March of 1911 Haida Chief Peter Kelly told Conservative BC Premier Richard McBride that the reason their delegation of nearly one hundred chiefs had come to Victoria to meet with him and his cabinet about their aboriginal title was simple. It was “because of our great faith in British justice, and our confidence that, wherever the Union Jack floats, there reigns justice of the highest order, unmolested, not only to white men, but unto every British subject, which we lay claim to be in the fullest sense.” Heady stuff.

In fact, Kelly had to “lay claim” to be a British subject “in the fullest sense” because he knew he was not. Although he was subject to the Criminal Code, the Indian Act and a few criminal laws that applied only to Indians, he could not vote or stand for office; he could not pre-empt or buy land; and although he would not have wanted to, he could not hold or attend a potlatch. But he thought he could make a good legal case, a case based on English common law and the BNA Act, that the aboriginal peoples of British Columbia still had title to their traditional lands.

Kelly represented a new kind of figure in the history of the BC Indian land question. His nineteenth century predecessors were equally convinced of the justice of their cause but did not know how to put their case in language that would get the attention of government, and had been frustrated in their attempts to do so. Thus when a Tsimshian and Nisga’a delegation to Victoria in 1887 protested the creation of Indian reserves and demanded that treaties be made like the ones east of the mountains – the seven numbered treaties made on the prairies between 1871 and 1877 - BC Premier William Smithe professed to know nothing about them. And when one member of the delegation said that the information came from law books, the premier affected to know nothing of that, either.

Notwithstanding their disadvantaged position, however, these chiefs could put their case eloquently. When a royal commission visited the Nass River later that year and told the chiefs that their views about their title to the land were wrong, at first they laughed. When they saw that the commissioners were serious, the laughter stopped. “We took the Queen’s flag and laws to honour them,” said Charles Russ. “We never thought when we did that that she was taking the land away from us.” Such were the early days of what, since the 1870s, had become known as the BC Indian land Question. And the name of one of the men who addressed the commission in 1887 was Job Calder.

The first wave of residential school graduates, pressure on aboriginal lands caused by boom times and, finally, lawyers transformed the land claims movement. It changed from one that relied for support on missionaries and pleas for justice to one that cited cases and statutes and employed a lawyer or two –

even, for a few years, J.M.M. Clark, KC, of Toronto. But the transition was gradual. Thus in 1910 when a *Victoria Daily Colonist* reporter interviewed some Nisga'a land question "agitators" and asked them why they thought their case was strong, they answered first with *Deuteronomy 27:17* and told him that "God hates injustice." The reporter told them that this was unlikely to impress a court and then asked, basically: "what else ya got?" He was clearly gob-smacked by the answer.

They had the Royal Proclamation of 1763, they replied, adding that the courts had ruled that it had "the effect and operation" of an imperial statute. They continued in this vein until the reporter asked them how they knew all this whereas he, a white man, did not. Shades of things to come.

But not then. Although the Cowichan, the Nisga'a and a number of other nations almost succeeded in getting the land question into court in 1911, the defeat of the Laurier government in the general election held that year put an end to such hopes. British Columbia continued to refuse to countenance any discussion, in court or out, of aboriginal title, and the new Conservative dominion government agreed to take it off the table. Instead, Ottawa and Victoria agreed in 1912 to set up a commission – the McKenna-McBride Commission - to adjust the size of reserves.

The Nisga'a Land Committee, the Indian Rights Association, the Friends of the Indians of BC, the Interior Tribes of BC and other organizations had all been active in this period, and opposition to the McKenna-McBride Agreement brought them closer together. The Nisga'a, always somewhat independent, filed their own petition to the Imperial Privy Council in 1913, and it became the document around which much of the movement's energy was focused; but they also co-operated with the Allied Indian Tribes of BC, which was formed in 1916 as a direct result of dissatisfaction with McKenna-McBride. And for the next eleven years they worked at getting treaties or, failing that, getting into court. But the legal, political and economical obstacles were too great, and the First World War put an end to any willingness to intervene that the imperial government may have had before 1914. By 1927 parliament effectively made land claims illegal and dismissed the arguments advanced by the Nisga'a and the Allied Tribes as chimerical.

The name of one of the Nisga'a who had worked so hard in the cause in those years was Arthur Calder.

Between the dismissal of the Allied Tribes' claims by a joint parliamentary committee in 1927 and the dropping of the law against pursuing land claims in 1951, the BC Indian Land Question went underground. Indeed, the impression among most elders was that the law not only prohibited the raising of funds for land claims without permission; it also forbade meetings or even talking about the land question. In any event, the Great Depression and the Second World War ensured that everyone had other things to worry about.

Perhaps the first sign that the BC Indian Land Question had only been sleeping was the revival of the old Nisga'a Land Committee in 1955 as the Nisga'a Tribal Council. Many fine leaders were involved, and one of them was Frank Calder, adopted son of Arthur, who was determined to revive the strategy pursued by his father and by the lawyer for the Nisga'a between 1910 and 1928, Arthur Eugene O'Meara. That

that strategy was, somehow, to get the BC government – which refused to acknowledge Nisga’a or any other aboriginal title -into court.

BC was not about to change a policy that it had consistently followed since before Confederation, so delegations to Victoria had little effect. Neither did Calder’s election as the first aboriginal MLA. But nearly a century of frustration finally led the Nisga’a to authorize a court action, and Calder looked to a young lawyer named Tom Berger to take on the job. Berger had just won a victory in a treaty rights case on Vancouver Island and - as he once put it – he did not have many clients yet and was happy to take on pretty much whoever walked in the door.

Rediscovering and using legal arguments that O’Meara, Kelly, the Nisga’a and the Allied Tribes had advanced from 1909 to 1927, Berger and the Nisga’a Tribal Council lost in the Supreme Court of British Columbia in 1969. So they appealed, and suffered an even worse loss. A unanimous Court of Appeal agreed with the trial judge that any title the Nisga’a may have had at contact had been implicitly extinguished by colonial legislation; and the justices went on to rule that, because the province had never recognized aboriginal title by treaty, statute or other governmental act the Nisga’a never had any title in the first place.

Nonetheless, the Nisga’a Tribal Council, in the face of concerns and objections by virtually every other First Nation in BC, appealed to the Supreme Court of Canada. And in 1973 that Court ruled, 4:3, that the case was not properly before them because the plaintiffs did not have a *fiat* from the attorney general authorizing the court action. At the same time, however, six of the justices stated that aboriginal title was a part of Canadian law whether governments recognized it or not; and three of these six were of the view that the title of the Nisga’a had never been extinguished.

For nearly fifteen years BC maintained that the only binding part of the Supreme Court’s decision was the ruling on the *fiat*, and therefore that in BC the Court of Appeal’s decision was the law. This was technically correct but ultimately a doomed strategy, and it was not Ottawa’s view. Soon after the Supreme Court handed down its decision, Prime Minister Trudeau, who in 1969 had set his face against aboriginal title and treaties, told Frank Calder, “Your people have a lot more rights than I thought you did – but it will take us a decade to define what they are.” He was half right.

The federal government instituted a comprehensive land claims process and in BC the Nisga’a were first in line. However, because the province refused to participate, little progress at the negotiating table was possible. Finally, in the 1990s BC was obliged by court decisions and pressure from the business community to join the negotiations, and in August of 1998 a treaty was signed. By 2000 all three parties had ratified the treaty, 113 years after Job Calder and other Nisga’a leaders had made their first formal demands. It was the first treaty made in the province since 1899, and the first to which the local government was party since the colonial period.

Suggested further reading: *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press 2007), edited by Hamar Foster, Heather Raven and Jeremy Webber.