

History of the Land Question

Reading: Duff text pp 60-71

NRC 114-132

Duff - Ft Victoria Treaties. BC Studies No 3. Fall '69

- have discussed segments of it before
 - : Nishga fight & Nishga case
 - : Ft Victoria Treaties, White & Bob case } re-read your notes
- now I want to put the entire story together
- It ^{has been} is the most important single issue between Indians and governments
 - : focus of grievance - long standing deep bitterness which is hard to understand
 - : if Indians do have special legal rights in Canada these grow out of land rights
aboriginal rights primarily rights to land (or compensation for lands)
- It involves 2 main aspects (in which BC differs from Canada)
 1. Indian Reserves - and why policy in BC has been different from Canada
 2. Indian Title - unextinguished in BC unfinished business
 - a) Treaties - BC non-treaty Indians
 - b) Hunting and fishing rights (still in dispute)
 - c) Indian Claims Commissioner
 - d) Nishga case - it is what is being tested in law

Differences are results of different colonial policies

1849-71 VI & BC were separate from Canada

we have to go back in history to see policies develop.

1. Nechga case - like to start the discussion with it and end

Refresh your memory

Nechga asked BC Supreme Court for a declaration that their aboriginal title had never been extinguished

- rejected

- appealed to BC Court of Appeal

- rejected

being appealed to Supreme Court of Canada (opening)

a very severe blow to Indians land case
(in effect, they do not have a legal case)

a) Not really a matter for the courts

aboriginal rights } can't be dealt with in courts
treaty rights } unless incorporated into law

b) Whatever aboriginal title may have been:

a sovereign govt can extinguish it - when it wants

- many way
without consent, without compensation

In ^{colony} BC, land laws and proclamations extinguished any native title long before Confederation

BC Policy (Colony) not to recognize title
not to make treaties
to settle any claims by reserves.

All points will be argued again.

2. Aboriginal Title - what is it? exists in 2 senses

a) Indian sense: we owned the land
want that recognized, want to negotiate

b) Legal sense - a concept in British law
- legal recognition of special rights of occupancy
and use vested in the native people
- not sovereignty (British took sovereignty by
discovery and settlement)

See Fulton brief
Appendix A
1972

it is whatever rights the Indians had after British took ^{over}
" " a burden on the sovereignty of the Crown
" " what treaty Indians gave up by treaty
(and BC Indians say they haven't given up)

Canada recognized it
BC denied it

Mishya case says it has been extinguished

It is what whole Land Question is about
Indians want it recognized, so they can negotiate
a settlement.

[and it is recognized in English law NRC p11
growing out of clear concepts
of ownership

3 Early British Policy: in NA, became Canadian policy

- a. recognize native title
- b. extinguished by TREATY
- c. compensation, RESERVES

4. Royal Proclamation - NRC - Read segments
- ^{statute} Law in No. America

- a) Reserved to Indians all lands not purchased by Crown
- b) only to crown, by treaty (→ Canadian treaties)

Crucial - does it apply to BC?

included: all lands lying to the westward of the sources of the rivers that flow into (the Atlantic)

(Nishga) - it doesn't apply to BC

- unknown country

- Nishga were not a tribe "with which we are connected"

Horne } - not entirely unknown
Berger } - a statute continues to speak

Any questions?