

301. 26 Feb. '73.

Chalk

Notices

Historical Background of Indian Political Activity

2 lectures — today 26
— Wednesday 28

I'd like to deal with it

a) as part of the reemergence of Indian strength
mostly a product of the past 10 yrs.

2 examples

Eg - Indian offer to rewrite Indian Act (accepted)

Eg - Trudeau & Yukon Indians

b) in 2 parts

1) Indians' place in law (today)

- Indian Act

- Treaty & land rights → (Mushka case)

2) Indian organizations (Wednesday)

Provincial → Union of Chiefs & BCANSI

National → NIB & NCC

1) Legal Position of Indians

a) Indian Act "An Act Respecting Indians" - wards, not persons

new 1951 Act - left out potlatch

- more self govt

- Wards → Citizens

: Vote 1949, 1960

: liquor

: education

Vote → MLA Calder 1949 (Minister w/o Portfolio)

MP's: (2) Len Marchand

Wally Firth

Senators: (2) Gladstone (dead)

Ray Williams

(Re-examine every 10 years)

1961 Hearings on New Act

1960's - Indian consultation - ~~started~~ Native Organ

1973 - Chretien says "You write it!"

Urgent
business

b) Court Cases on Indian rights to Land

2 cases: White & Bob

: Nishga

first, a historical summary of how they developed
then, some comments on the process

Comments on Hall Judgment

1. Court must use modern knowledge

Eg. of War } pp 2-3
Dovey }

Eg. of establishing the fact of a title by anth. evid.

Eg. of its own historical researches

2. Common sense

Eg Tysoe p62

Eg Treaty # 8 p.42

And so the case gets strengthened.

Reckza Case: Supreme Court

	Aboriginal title	Roy. Proc	No jurisdiction
Judson — —	- Extinguished	No	No jurisdiction
Pigeon	- —	—	No jurisdiction
HALL — —	- ^{YES} Defined at not extinguished	Yes.	Has jurisdiction ✓

		a) Treaties	b) Royal Proclam.	c) Aboriginal Title
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White & Bob	Nanaimo County Court	Mr Swencusky judged that treaty applied	Swencusky said it <u>does</u> apply	Swencusky said it is <u>still in force</u>
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	BC Court of Appeal (5 judges)	Majority of 5 judges said <u>yes</u> , it <u>is</u> a treaty. (2 said no) (Dawey, Norris, Sullivan) This won the case for Indians.	Only 3 judges commented and case didn't rest on this. Two said it did <u>not</u> apply. One (Norris) said it <u>did</u> .	Only Norris gave an opinion, in favor of Indians
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Generally, NORRIS gave long opinions in favor of Indians on all 3 points.

	Supreme Court of Canada	Yes, it <u>is</u> a treaty. This was only point ruled on, and won case for Indians	These were left undecided	
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Mushga Case	BC Supreme Court (Gould)	No treaty was involved	<u>No</u> it does not apply	<u>No</u> it has been extinguished
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	BC Court of Appeal (3 judges)	<u>No</u>	<u>No</u>
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	Supreme Court	?	?
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NISHGA CASE: B.C. COURT OF APPEAL

A brief summary of the judgments of Justices Davey, Tysoe and MacLean
May 7, 1970

The Nishga ask for a declaration that their aboriginal title to their tribal territories has not been extinguished. Such a declaration would embody two assumptions: (1) that an aboriginal title enforceable in the courts had existed, and (2) that it had never been extinguished (MacLean).

4 Each case involving aboriginal title has to be considered in its own historical background and on its own particular facts. The buying of native rights is not a principle embodied in the laws binding this Court (Davey). Indian title cannot be recognized in the courts unless it has previously been recognized by the legislative or executive branch of the Government (Tysoe). The Nishga would have to establish that the Crown ensured to them aboriginal rights enforceable in the courts (Davey). There has been no recognition of Indian title in B.C. which has statutory force (Tysoe). If a wrong was done in the course of taking sovereignty, it is not a wrong that the courts can consider. Rights held before cession, and even rights stipulated in a treaty of cession, cannot be enforced in the courts unless the Government incorporates these rights in the law. Even treaties have to be sanctioned by legislation (Tysoe).

2 The Royal Proclamation of 1763 has never applied to B.C. (unanimous).

If Indian title ever existed in law, it was only a right of occupancy, not ownership (MacLean). It cannot be said to have been anything more than a personal and usufructuary right dependent on the goodwill of the Sovereign (Tysoe). The exclusive authority to extinguish it rested in the Government, and it could do so at pleasure, in whatever manner it chose, without the consent of the Indians and without any legal obligation to pay compensation (Tysoe, MacLean). The sovereign authority over the area from 1858 to 1871 was the Colony of British Columbia. Extinguishment was a matter of policy, and the policies could differ in different colonies. Governor Douglas made the Vancouver Island treaties not because he recognized an Indian title, but because of considerations of policy (Davey). Mere policy regarding the Indians, and their statutory rights, are different things (Tysoe). Extinguishment raises political, not justiciable issues. Aboriginal title affords the Indians no claim recognizable in a court of law (MacLean).

3 The policy evolved in the Colony of B.C. on the basis of correspondence with London was to set apart reserves, with the intention of settling the Indians permanently in villages. This policy necessarily involved the extinguishment of Indian title. As a result of the proclamations and legislation, Indians became in law trespassers on lands other than reserve lands (Tysoe). The policy was not to pay in money for the surrender of lands. No colonial legislation recognized Indian title; the opposite was the case. The legislation left no room for a conflicting interest such as Indian title (MacLean). "Actions speak louder than words", the execution of the policy extinguished any Indian title (Tysoe). Article 13 of the Terms of Union was duly carried out: a great many reserves were set apart (Tysoe).

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		<u>Querty</u>	<u>Royal Proc</u>	<u>Aboriginal title</u>
White & Bob 1963-64	County Court	Yes	Yes	Yes
	Court of Appeal	Yes	(NORRIS yes)	(NORRIS yes.)
	Supreme Court	Yes.	=	=
Nishga 1969-73	BC Supreme Court	-	No	No
	Court of Appeal	-	No	No
	Supreme Court	-	3 yes - 3 no (HALL)	3 yes - 3 no (HALL)