

SUBMISSIONS OF THE
NISHGA TRIBAL COUNCIL

TO THE
SPECIAL JOINT COMMITTEE OF THE
SENATE AND HOUSE OF COMMONS
ON THE CONSTITUTION OF CANADA

DECEMBER 15, 1980

The Nishga Tribal Council would first like to take this opportunity to thank the Committee for giving us the opportunity of filing this brief and appearing before you to make a formal submission.

The Nishga Tribal Council represents approximately 4000 Nishga people, living primarily in the Nass Valley of northwestern British Columbia. Our lands lie adjacent to the southern extremities of the Alaskan panhandle. We are, for the most part, a coastal people.

The history of our people since the first white contact is the history of our struggle for recognition of aboriginal title to our lands. Our people are resolved to carry this struggle on until the Canadian nation, your Parliament, the Courts, and your people, see fit to justly settle our claim to the ownership of our lands.

You must understand our situation. No government, colonial, provincial, federal, or imperial, has signed a treaty with our people to extinguish our ownership of lands we inhabit. We maintain that we are the lawful owners of our lands. We are not foolish in taking such a position. In 1887 one of our

Chiefs, David Mackay, speaking to an 1887 Royal Commission appointed to inquire into the conditions of the Indians of the North West Coast said this about our land:

"They (the government) have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land--our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, places where they got their berries; it has always been so. It is not only during the last four or five years that they have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white people who live in towns and have their stores and other businesses, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land."

Many years later one of our elders, Gideon Minesque, told the McKenna-McBride Commission sitting in 1915:

"We have heard that some white men, it must have been in Ottawa; this white man said that they must be dreaming when they say they own the land upon which they live. It is not a dream--we are certain that this land belongs to us. Right up to this day the government never made

any treaty, not even to our grandfathers or our great grandfathers."

To this day we take the position that until governments sit down and negotiate a settlement with us, we maintain the aboriginal title to our lands. Such a position is completely consistent with the traditions of how settlement took place in this country. Our position is consistent with British common law which dictated that aboriginal people within British colonies maintained their aboriginal title until such title was extinguished by treaty. Our position is also consistent with British colonial policy that directed the colonial government to come to agreement with native people before settlement proceeded. Our position is consistent with policies carried out in the colonization of Canada, where your governments carried out a treaty-making process as you proceeded to settlement of this nation. Indeed, our position is consistent with the Royal Proclamation of 1763, which declared our aboriginal title.

Regrettably, through a series of unfortunate circumstances, your governments neglected to make settlement with our people.

For well over a hundred years, our people have fought for

a just and equitable settlement of our claims. We have participated and made representations before the Royal Commission hearings of 1887 referred to above. Again, we also appeared before the McKenna-McBride Commission hearings between 1912-1916. We were the authors of the famous Nishga Petition of 1913 that was directed to the Privy Council in England. We also were active participants in the formation of the "Allied Tribes of British Columbia" organization of 1916, a powerful inter-tribal organization which held meetings, raised funds, and sent petitions to Ottawa. Finally, after so many years of frustration and anger, we launched the Supreme Court case (Calder et al v. The Attorney-General of British Columbia), a court case where we sought a court declaration that we have maintained our aboriginal title to our lands.

As no doubt you are aware, the Supreme Court of Canada deadlocked on the substance of our lawsuit.

Of the seven members of the Court who sat judgment in our case, three judges held that our people maintained aboriginal title to our lands, and three judges held that although we had had an aboriginal title to our land, our

title was extinguished by colonial legislation. The tie-breaking judge chose not to decide the case on the merits of the action; rather, he dismissed the case on a technicality.

Up to this point, the federal government refused to even recognize the justice of our claim to ownership of the lands. Even the present Prime Minister rejected the concept in Vancouver on August 8, 1969, a position that was consistent with the "Statement of the Government of Canada on Indian Policy, 1969".

After reviewing the weighty decisions of the Supreme Court of Canada in our case, the Liberal government headed by the present Prime Minister announced a reversal of policy on August 8 1973. We would like to take this opportunity of expressing our deepest thanks and gratitude to the federal government for finally recognizing our special proprietary rights to our lands. We would also like to take this opportunity of thanking the Conservative and New Democratic Parties for their contemporary support of our position.

After the federal government made its 1973 announcement

that it wished to negotiate with us to settle this outstanding dispute, we were forced to approach the provincial government to seek their participation in the negotiations. As the Province owns all the Crown land in British Columbia, it was unrealistic to consider a negotiation process without provincial involvement. Our people since that time have spent seven frustrating years trying to convince the provincial government to recognize aboriginal title. During this period, both the previous NDP administration and the present Social Credit government have refused to recognize the concept of aboriginal title or indeed to recognize that we have any special proprietary interest to talk about at the negotiation table. Although the present government in Victoria announced in 1976 their willingness to participate in "discussions" with us and the federal government, there has been no meaningful progress to those negotiations as the provincial government obstinately refuses to recognize our underlying proprietary interest in the land.

The Canadian Constitution, 1980

The history of our people, and our struggle for recognition of aboriginal title, brings us to our reason to make this

historic mission to Ottawa and to appear before your honourable Committee. We strenuously object to the Canadian Charter of Rights and Freedoms as presently drafted. It is pathetic to think that after our people have had such a long history of a special constitutional relationship with your government, this proposed Constitution for our country is silent about our distinct special role in your society. We thought the purpose of a constitution is to protect the interests of the individual, of minorities, especially groups that were easy targets for abuse and discrimination. What do we find for ourselves with the present proposals?

We discover only one reference to native people in the proposed Charter. To our astonishment, that reference, found in Article 24, simply tells us that the Charter of Rights and Freedoms will not be interpreted in such a way as to deem any of our common law rights to have been taken away. We always perceived that a nation's constitution and charter of rights should be an affirmative declaration of an individual's rights and protections in a society. Article 24 and the Charter generally offer us no affirmative declarations of protection.

The Charter only tells us that the courts will not deem any provisions of the Charter to be taking away whatever rights we may have at common law. This situation is intolerable to us. To tell us that our only rights are those outside of the Constitution is to tell us that we must fall back on the common law as it is today or might be tomorrow. It tosses us out into the political winds, subject to the whim and fancy of future governments, the courts, and the white majority of our society.

Any student of the present jurisprudence on aboriginal title in this country, especially anyone who has analyzed the judgment of the Supreme Court of Canada in our case (*Calder et al v. Attorney-General of B.C.*), will immediately recognize that this area of law is presently in a confused and unsatisfactory state. Yet the Charter, as presently drafted, only tells us that, unlike other Canadians, our special rights must be left in the uncertain winds of judicial and political process, indeed at present, into the winds of an area of jurisprudence in which there is as yet no definitive judicial pronouncement.

We seek an expressly stated provision in the Charter which pronounces that Indian people maintain aboriginal title to lands they inhabit until such interests are extinguished by treaty.

One of the most disturbing aspects of the government's refusal to entrench aboriginal title in the Constitution at this point is that it has done so against the advice of many major studies on constitutional reform of the last few years.

For example, the Canadian Bar Association, in its 1978 report entitled "Towards a New Canada", wrote:

"In particular, we must scrupulously abide by our agreements with native peoples and recognize their claims as they are established. Indeed, constitutional recognition of our commitment to abide by our obligations should be expressly set forth in the Constitution.... In taking this action, we are responding to the claims of simple justice."

The Pepin-Robards Committee went even further in its recognition of this simple justice. "Canadian policy has traditionally accepted both the special status of native people and their permanent attachment to the land."

The Committee's Report went on:

"We believe that it is now appropriate that specific attention be paid to the constitutional position of the first Canadians. More specifically, both provincial and federal authorities should pursue direct discussions with representatives of Canada's Indians, Inuit and Metis with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native people in Canadian society."

There is no acceptable solution that does not recognize aboriginal title. To not include it in the Charter of Rights and Freedoms is to abandon forever the prospect of reaching this "mutually acceptable" solution.

The government's present intransigence is even more difficult to understand in light of its willingness to entrench recognition of the Royal Proclamation of 1763, a document wholly concerned with aboriginal title, in its 1978 "Constitutional Amendment Bill".

The proposed Charter, in its present form, by ignoring the whole subject of aboriginal title, flies in the face of all of these contemporary proposals on

constitutional change.

To entrench the concept of aboriginal title in the Constitution will finally force the provincial government to recognize our title to the land and to participate meaningfully in a negotiation process leading to the settlement of this long outstanding dispute. Such an entrenched provision will lead to a just and equitable settlement of our claim. As both the present government, and the opposition parties, all express their frustration over the provincial government of British Columbia's intransigence in refusing to recognize the concept of aboriginal title, you as members of the Committee, and the Parliament of Canada, have this precious opportunity to finally force the provincial government of British Columbia to recognize our special rights and to negotiate towards a settlement. We perceive that you and the Parliament hold what may be the last key to our people being treated with justice by your society.

In calling for the entrenchment of aboriginal title in the Constitution, the Prime Minister and the Indian Affairs Minister John Munro tell us to patiently wait for patriation of the Constitution. They then tell us

that we will be the first order of business when the first ministers sit down to discuss constitutional amendment after the Constitution is in Canada.

Such a position is at best politically naive, and at worst misleading and fraudulent. The facts are simple. Constitutional amendment after patriation will require the consent of the provincial governments. As British Columbia is the only province with large tracts of untreated lands, entrenchment of aboriginal title in the Constitution would require consent of the Province of British Columbia. To suggest that that consent would be forthcoming defies and ignores the history of our relationship with the provincial government from the beginning. Indeed, this history dates back to colonial administrations. One theme remains constant in the colonial governments' policy 1849-1871, through the period of Liberal, Conservative, New Democratic and Social Credit provincial administrations. No government in British Columbia has ever recognized the concept of aboriginal title. No government in British Columbia has ever recognized we have special proprietary interests in our land. Over and over again the present Social Credit

government in Victoria states in unequivocal terms their refusal to recognize the concept of aboriginal title.

Do we not have reason to assume that this government, which will be called upon to consent to a constitutional amendment after patriation, will vehemently resist entrenching our title within the Constitution? If they are not even willing to recognize informally our title for purposes of our present negotiations, how can anyone expect them to consent to the enshrinement of our title constitutionally?

The claim to our land is based on our time-immemorial occupation of our Valley. At no time were we the subject of conquest. At no time were we the subject of treaty. The Royal Proclamation of 1763 set out how governments were to respect the concept of native ownership of lands unextinguished by treaty. Territory upon territory, as you colonized this land, treaties were signed. But you neglected to make a settlement with our people--thus forming the grounds for our just and rightful claim to ownership of the lands we inhabit.

It is with incredible dismay and great disappointment that we realized that our special rights and interests were completely ignored in the proposed Constitution, even though the federal government has recognized our just claim since 1973. You as a Committee, and the Parliament of Canada, hold the onerous responsibility of charting the future course of the aboriginal title issue in this country. Our destiny is in your hands. Aboriginal title must be entrenched in the Constitution before patriation. To suggest that it will happen after the Constitution is brought home is to ignore the political reality of our history and relationship with the provincial administrations in British Columbia. To make such a suggestion is to mislead the Canadian public and indeed our people about what really will happen after patriation. Such a suggestion will not pacify our people. We know, better than anyone, that the government is really telling us that our special rights and interests will never be enshrined in the Constitution. If aboriginal title is not entrenched constitutionally at this time, there will never be a settlement of the British Columbia land question. That is the stark reality of the situation. It is that legacy that you will leave to this nation. That in

turn will leave a festering sore of discontent that we, the Nishga nation, are resolved never to let you forget.

We plead with you to recommend to Parliament that "aboriginal title" be a right conferred in the Charter to all untreatied native people of Canada. Such an entrenchment of our interests will give us the iron clad protection we as a minority in Canadian society deserve and expect from a new Canadian Constitution.