CALDER v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

(1969), 8 D.L.R. (3d) 59 (also reported: 71 W.W.R. 81)

British Columbia Supreme Court, Gould J., 17 October 1969

(Appealed to British Columbia Court of Appeal, infra p.43)

Indians -- Aboriginal title to lands -- Whether such title possible after conquest -- Whether title extinguished by acts of Crown.

Real Property -- Aboriginal title to lands -- Whether such title possible after conquest -- Whether title extinguished by acts of Crown.

The plaintiffs, on their own behalf, and as representatives of various Indian bands in British Columbia, brought an action against the Attorney General of British Columbia for a declaration that the aboriginal or Indian title to certain lands comprising more than 1,000 sq. miles has never been lawfully extinguished. *Held*, a preliminary objection to the jurisdiction of the Court and the status of the Attorney-General as defendant on the ground that the matter in question pertained to "Indians and the lands reserved to Indians" and therefore fell within Dominion jurisdiction under s. 91(24) of the *B.N.A. Act, 1867* must be dismissed. The action was an action *in rem*, not *in personam*, and the lands in question were not "lands reserved to the Indians". The lands had historically existed as Crown lands, either provincial or Imperial, and since the vast bulk of the lands were still unalienated the present proprietor was the Crown Provincial.

A second preliminary objection made on the ground that, since various interests in part of the lands had been previously granted by the Crown, all the parties having any interest in the lands were not before the Court must also be dismissed. Joining all such parties as defendants would preclude, for practical reasons, any litigation and would frustrate an adjudication of the plaintiffs' claim.

A third preliminary objection made on the ground that a petition of right pursuant to the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, was a prerequisite to litigation of this type need not be decided. Although it is not usual to decide a case on the merits before dealing with preliminary objections, in this case the comity of the Courts as an institution would suffer if the plaintiffs were judicially told their clearly enunciated claim could not be decided because it was brought in the wrong forum.

Apart from treaty, contract, or Crown proclamation, discovery of *terra incognita* gave an exclusive right to the Crown Imperial to extinguish the Indian title of occupancy either by purchase or conquest. Vacant lands vested in the Crown subject to a right of occupancy in the Indian tribes until such right of occupancy was extinguished by the Crown. It was an agreed fact that no treaty or contract with the Crown, the Hudson's Bay Company or any other of the historical parties to dealings with lands in Canada, had ever been entered into with respect to the lands in question by anyone on behalf of the Indian bands represented by the plaintiffs.

The Proclamation of King George III, made in 1763, as set out in R.S.C. 1952, vol. VI, p. 6127, forbidding the purchase, settlement or taking of possession without special leave or licence of the Crown, of any lands of "the several Nations or Tribes of Indians with whom we are connected and who live under our Protection" did not apply to the lands in question. At the time of the proclamation the Indian bands represented by the plaintiffs were not any of "the several Nations or Tribes of Indians" with whom the Crown was connected or who lived under the Crown's protection.

The lands in question were within the boundaries of the Colony of British Columbia as set out in *Imperial Statute*, 1863, 26 & 27 Vict., c. 83. Between November 19, 1866, when the last mentioned statute was proclaimed, and May 16, 1871, when by Order in Council, the Colony of British Columbia was admitted, as of July 20, 1871, into the Dominion of Canada, the sole sovereignty over the area of British Columbia was in the Crown Imperial. During this period any rights the Indian bands had in the lands in question were totally extinguished by overt acts of the Crown Imperial by way of proclamation, ordinance and proclaimed statute.

All of the proclamations, ordinances and proclaimed statutes affecting land in British Columbia emanating from the Crown Imperial showed a unity of intention to exercise and the legislative exercising of absolute sovereignty over all lands in the colony, a sovereignty which was inconsistent with any conflicting interest, including one as to aboriginal or Indian title.

[*Johson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543; *Tamaki v. Baker*, [1901] A.C. 561; *Warman v. Francis* (1958), 20 D.L.R. (2d) 627, 43 M.P.R. 197; *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272, folld; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Sikyea v. The Queen*, 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65; affd 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613; 52 W.W.R. 193; affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi; *R. v. George*, 55 D.L.R. (2d) 386; [1966] 3 C.C.C. 137, [1966] S.C.R. 267, 47 C.R. 382; *R. v. Prince*, [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234; revd [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81 *sub nom. Prince and Myron v. The Queen*; *R. v. Wesley*, [19321 4 D.L.R. 744, 58 C.C.C. 269, 26 Alta. L.R. 433, [1932] 2 W.W.R. 337, refd to]

ACTION by the plaintiffs personally and as representatives of various Indian bands for a declaration that the aboriginal title to ancient tribal territory has never been lawfully extinguished.

Thomas R. Berger, for plaintiffs.

Douglas McK. Brown, Q.C., *A. W. Hobbs*, Q.C., and *Anthony Hooper*, for defendant.

GOULD, J.:--The plaintiffs sue, as representatives of the Nishga Indian Tribe, the Attorney-General of British Columbia, seeking a declaratory judgment:

> . . . that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory hereinbefore de- scribed, has never been lawfully extinguished.

It was agreed for the purpose of the litigation that "their ancient tribal territory" in question consisted of an area in excess of 1,000 square miles in and around the Naas River Valley, Observatory Inlet, Portland Inlet, and the Portland Canal, all located in northwestern British Columbia, as delineated on the map, ex. 2, and hereinafter sometimes referred to as the "delineated area".

The plaintiffs are appropriate and adequate representatives to bring the action on the part of the Nishga Indian Tribe, also known sometimes as the Nishga Nation. This group of people is one of the several tribes or Indian "Nations" the members of which constitute the aboriginals of what is now the Province of British Columbia. The Nishga language is unique unto the tribe, and the locale of its activities has remained geographically unchanged throughout recorded history. It is approximately as delineated on the map, ex. 2, a vast tract over which the Nishgas have hunted, fished and roamed since time immemorial.

Within the delineated area are located a number of "reserves" -- tracts of land the legal title to

which is vested in Her Majesty in right of the Dominion of Canada, that have been set apart by Her Majesty for the use and benefit of certain Indian bands, pursuant to the *Indian Act*, R.S.C. 1952, c. 149. The Nishga Nation is made up of four bands, the Gitlakdamix, Canyon City, Greenville, and Kincolith Bands. The reserves within the delineated area comprise only a minute fraction of the total area. This judgment speaks *qua* the total area, exclusive of reserves.

Three preliminary objections were raised by counsel for the Attorney-General of British Columbia. In effect they were:

This matter is within federal jurisdiction pursuant to s. 91(24) of the *B.N.A. Act, 1867*, which distributes exclusive powers to the Parliament of Canada to legislate in all matters pertaining to "Indians, and Lands Reserved for the Indians".

The broad argument in support of this preliminary objection was that a provincial Court such as the Supreme Court of British Columbia could have no jurisdiction, and in any event the Attorney-General of British Columbia could have no status as defendant, because the matter in question pertains to "Indians, and Lands Reserved to the Indians". In my view the essence of this action has nothing to do with the legal status of Indians as persons. The action is not *in personam*, it is *in rem, qua* the state of the title to the lands in question, and such are certainly not "lands reserved for Indians". The phrase "Indian Lands" was used in argument in support of the preliminary objection. That phrase occurs from time to time in common usage. I know of only three classifications of land which in law could fit into that generic phrase: lands reserved for Indians (pursuant to the *Indian Act*), "special reserves" (s. 36 *idem*), and "surrendered lands", again pursuant to the *Indian Act*. The lands here in question are not in any of these classifications. Historically, they have existed as lands of the Crown, either provincial or Imperial, and all titles and rights under our law pertaining to the lands have issued from one or other of the two fountain-heads, going back in time to when they constituted *terra incognita*. At this time they exist as lands of the Crown Provincial, which since 1871 has granted a multiplicity of titles and rights to and over parts of the lands, ranging from pre-emptions, fees simple, mineral and mining rights and titles, forestry rights and titles, including a tree farm licence pursuant to the *Forest Act*, R.S.B.C. 1960, c. 153, Crown Grants, to a multiplicity of other alienations. Prior to 1871 the Crown Provincial's predecessor in title, the Crown Colony of British Columbia, similarly completed alienations appropriate to the law of that day. See the evidence of David Borthwick, Deputy Minister of Lands for British Columbia, and exhibits put in through him. As a declaration is now sought that the aboriginal title (if such ever existed) has never been lawfully extinguished, the present proprietor of the unalienated parts of the lands (the vast bulk of the tract is still unalienated) has a very real interest and status in this litigation, and the "present proprietor" is the Crown Provincial. Thus the Attorney-General for British Columbia is properly defendant in this action, and this Court is a proper forum for the *lis*. The Attorney-General of Canada was given notice of this action by the plaintiffs, and his reply (ex. 3) is dated December 31, 1968, and was as follows:

> I have to acknowledge your letter dated December 20, 1968.
>
> I have not received instructions to intervene in this action.

The second preliminary objection was that all the parties having any interest in or over any of the said lands should be before the Court. This would involve many hundreds of defendants, such as

to preclude, for practical reasons, any litigation going forward in any Court. The law does not take kindly to any such frustratory proposition, nor, as the momentary voice of the law in this instance, do I.

A third preliminary objection raised was that a petition of right pursuant to the *Crown Procedure Act*, R.S.B.C. 1960, c. 89, was a prerequisite to this litigation, and that casting the action in the form of a writ seeking a declaratory judgment was not a valid substitute. Reference to this preliminary objection will be made later.

Eight witnesses gave *viva voce* evidence. They were:

> Frank Arthur Calder, a member of the Greenville Band, and president of the Nishga Tribal Council;
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> James Gosnell, Chief Councilor (an elective office) of the Gitlakdamix Band;
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> Morris Jacob Nyce, Chief Councilor, Canyon City Band;
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> William David McKay, Chief Councilor, Greenville Band;
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> Anthony Robinson, Chief Councilor, Kincolith Band;
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> Willard Ernest Ireland, Official Archivist for the Province of British Columbia;
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> Wilson Duff, Associate Professor of Anthropology, University of British Columbia;
>
> David Borthwick, Deputy Minister of Lands for the Province of British Columbia.

Drs. Ireland and Duff are scholars of renown, and authors in the field of Indian history, and records.

I find that all witnesses gave their respective testimony as to facts, opinions, and historical and other documents, with total integrity. Thus there is no issue of credibility as to the witnesses in this case, and an appellate Court, with transcript and exhibits in hand, would be under no comparative disadvantage in evaluating the evidence from not having heard the witnesses *in personam*.

It is an agreed fact that no treaty or contract with the Crown, the Hudson's Bay Company or any other of the historical parties to dealings with lands in Canada occupied by Indians since time immemorial, has ever been entered into, purportedly or validly, with respect to the lands in question, by anyone on behalf of the Nishga Nation. Thus the bulk of decided leading cases on the subject of Indian rights over lands in Canada can have only indirect application. Such cases turn on the interpretation of a contract. In the instant case there is not, and never has been, any contract of any kind to be interpreted. Schultz, Co.Ct.J., in *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619 at pp. 626-7, 63 W.W.R. 485, catalogues some of such cases as follows:

> Aboriginal rights have been recognized in Canada where the reservation of aboriginal rights is contained in a *written* treaty or statute.
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> For example, there is a *treaty* reservation of aboriginal rights referred to in:
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> (1) *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.) at pp. 51-2;

(2) *Sikyea v. The Queen*, [1964] 2 C.C.C. 325 at p. 328, 43 C.R. 83, 43 D.L.R. (2d) 150 (N.W.T.C.A.); affd [1965] 2 C.C.C. 129 at p. 130, 44 C.R. 266, 50 D.L.R. (2d) 80;

(3) *R. v. White and Bob*, *supra*, and

(4) *R. v. George*, [1966] 3 C.C.C. 137 at p. 140, 47 C.R. 382, 55 D.L.R. (2d) 386 (S.C.C.),

while there is a *statutory* reservation of aboriginal rights referred to in-

(5) *R. v. Wesley*, 58 C.C.C. 269 at p. 275, [1932] 4 D.L.R. 744, 26 Alta. L.R. 433 (Alta. S.C., A D.), and

(6) *R. v. Prince*, [1963] 1 C.C.C. 129, 39 C.R. 43, 40 W.W.R. 234 (Man. C.A.); revd [1964] 3 C.C.C. 2, 41 C.R. 403, [1964] S.C.R. 81 *sub nom. Prince and Myron v. The Queen.*

The plaintiffs submit that the Nishgas acquired, and to this day hold, rights over the delineated lands pursuant to the Proclamation of His Majesty King George III, issued October 7, 1763, the same having the force and effect of a statute of the Parliament of Great Britain. The Proclamation in full text is set out in R.S.C. 1952, vol. VI, p. 6127. The particular passage invoked by the plaintiffs follows [pp. 6130-1]:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the 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 their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
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> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;
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> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.
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> And, We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
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> And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if 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; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And We do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:
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> And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Govern- ment and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.
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> And We do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

On this submission the question is, did the Proclamation when made embrace within its ambit the lands in question? Or, alternatively, was it prospective in character, such as to include the lands at some date later than October 7, 1763? This question, with reference to other lands historically occupied by Indians, has had the benefit of judicial opinion in this Province. The case of *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193, decided by the Court of Appeal for this Province, touches directly upon the matter. The Court consisted of Davey, J.A. (now C.J.B.C.), and Sheppard, Norris, Lord and Sullivan, JJ.A. Sheppard, J.A., at pp. 620-1, holds:

> The Proclamation of 1763 does not apply to Vancouver Island. In that Proclamation the Crown states that it is concerned with the "Tribes of Indians with whom We are connected, and who live under our Protection", and with the lands which are "reserved to the said Indians, or any of them". The bands of Indians on Vancouver Island in 1763 were not "Tribes of Indians with whom We are connected, and who live under our Protection", and therefore, the Proclamation of 1763 did not apply to the accused Indians for the following reasons:
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> First, in 1763 Vancouver Island and the bands of Indians thereon were unknown to the Crown. In 1778 Captain Cook landed at Nootka, which was a separate island. In 1792 Captain Vancouver circumnavigated Vancouver Island and formed the settlement at Friendly Cove, Vancouver Island, so that in 1763, the date of the Proclamation, Vancouver Island had not been discovered by any subject of the Crown and until such discovery the Crown could not have been aware that there was such an island or that it was inhabited by Indians.
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> Secondly, the Proclamation refers to lands to the west used by "said Indians", and therefore to lands used by Indians with whom the Crown was then connected or who lived under the Crown's protection. In 1763 that would not relate to Vancouver Island or the Indian bands thereon.
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> Thirdly, in 1763, the date of the Proclamation, the Crown had no lands in Vancouver Island to which the Proclamation could apply as lands "reserved to the said Indians, or any of them".

> The Proclamation dealing with Indian rights was considered in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, where Lord Watson said at pp. 54 and 58:
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> " . . . the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. . . . The Crown has all along had a present proprietary estate in the land, upon which the Indian Title was a mere burden."
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> As the Proclamation deals with Crown lands on which such Indian rights are a burden, it could not have application to the lands of Vancouver Island in respect of which the Crown in 1763 asserted no "present proprietary estate".

The learned appellant Judge's reasoning, in that instance applied to lands on Vancouver Island, is equally applicable to the lands in question. Lord, J.A., at p. 664, says: "I would allow the appeal for the reasons given by my brother Sheppard. I would, however, add these further observations: . . . " The passage that follows does not touch upon the *Proclamation of 1763*.

The opinions of Sheppard and Lord, JJ.A., are the dissent- ing opinions. Majority opinions were written by Davey, Norris and Sullivan, JJ.A. The opinions of Davey and Sullivan, JJ.A., make no reference to the *Proclamation of 1763* but decide the case on another point. The opinion of Norris, J.A., concurs on this point with Davey and Sullivan, JJ.A., but in addition contains a forceful and painstakingly researched opinion that the 1763 Proclamation did apply to the case (and, I add, by analogy would apply to this case). Thus all three opinions touching upon the applicability or otherwise of the Proclamation of 1763 are *obiter dicta*, in the *White and Bob* case. The Supreme Court of Canada, in upholding the majority decision, *R. v. White and Bob*, 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi, did not touch upon the Proclamation.

In *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485, the applicability or otherwise of the Proclamation is part of the *ratio decidendi*. This is a decision of Schultz, Co.Ct.J., and I record with great respect that in my opinion it is an outstandingly lucid opinion on the issue of the *Proclamation of 1763*. Schultz, Co.Ct.J., concludes that he prefers the reasoning of Sheppard, J.A., to that of Norris, J.A., in the *White and Bob* case. In that preference I concur. In result, I hold that the Proclamation does not apply to the lands in question. Before leaving this aspect of the case I record that counsel for the plaintiffs submitted to me a particular argument in support of the applicability of the Proclama- tion which argument was not before the Court of Appeal in *White and Bob*. The argument was that the lands in question were not *terra incoqnita* at the time of the *Proclamation of 1763*, because of the British Admiralty secret instructions (*sic*) to Captain Byron of the Royal Navy, given September 11, 1764, to explore the possibility "that a passage might be found between the latitude of 38 degrees and 54 degrees from that coast into Hudson's Bay" (see ex. 30, p. 3). From the context the quoted latitudes 38° and 54° are both north. From the same exhibit the following passage occurs at pp. 6 and 7:

> When the Season will admit, you are again to put to Sea with the Ship and Frigate, and proceed to New Albion, on the Western Coast of North America, endeavoring to fall in with the said Coast in the Latitude of 38°, or 38°30' North, where Sir Francis Drake, who was the first Discoverer of that Country, found a convenient Harbour for his Ship, and Refreshment for his People.
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> You are to search the said Coast with great care and diligence, from the Latitude above mentioned as far to the Northward as you shall find / it practicable, making all such Observations of the Head Lands, Harbours, Bays, Inlets &cª as may be useful to Navigation, and endeavoring by all proper means to cultivate friendship & alliance with the Inhabitants, where there are any, by presenting them with Trifles &cª as mentioned in the former part of these Instructions. And in case you will find any probability of exploring

> a Passage from the said Coast of New Albion to the Eastern Side of North America through Hudson's Bay, you are most diligently to pursue it, and return to England that way, touch- ing at such Place, or Places, in North America for the Refreshment of your Men, and for supplying the Ship and Frigate with Provisions, Wood & Water, as you shall judge proper. -- But on the other hand, if you shall see no probability of finding a passage from the Coast of New Albion into Hudson's Bay, you are to leave that Coast while you have a sufficient quantity of Provisions left to enable you to proceed to the Coast of Asia, China, or the Dutch Settlements in the East Indies, And you are to proceed to the Coast of Asia, China, or the Dutch Settlements accordingly, touching or not touching at Bengal, or any of the English Settlements as you / shall judge convenient; And having put the Ship and Frigate into a proper condition to return to Europe, you are to make the best of your way with them to England around the Cape of Good Hope, repairing to Spithead, and sending to our Secretary an Account of your arrival & proceedings.

Three comments on this historical document are relevant: First, there was offered no evidence, or even suggestion, that Captain Byron ever in fact made such a voyage; secondly, all the lands in issue here lie north of 54° north latitude (see ex. 2); and thirdly, that the secret instructions were issued after the operative date of the *Proclamation of 1763*. I take the liberty of speculating that had this argument, such as it is, been before the Court of Appeal of British Columbia in *White and Bob*, it would not have changed the opinion of Sheppard or Lord, JJ.A., and from what I have said, it is obvious that the point has not convinced me that Sheppard, J.A., or Schultz, Co.Ct.J., were wrong in their views as to the *Proclamation of 1763*.

The rejection of the submission that the Nishgas acquired and still hold rights pursuant to the *Proclamation of 1763* does not, however, dispose of the plaintiffs' claim. There are other avenues of argument explored by plaintiffs' counsel which re- quire adjudication. The most cogent one of these is the argument based upon a classic and definitive judgment of Chief Justice Marshall of the United States, in 1823, in the case of *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, wherein that renowned jurist gives an historical account of the British Crown's attitude towards the rights of aboriginals over land originally occupied by them, and an enunciation of the law of the United States on the same subject. Set out below are some relevant passages at pp. 572-4:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European govern- ments, which title might be consummated by possession.
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> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
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> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
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> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely

disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

At pp. 587-8:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

At pp. 591-2:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

At pp. 595-6:

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

> So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

For more than 150 years this strong judgment has at various times been cited with approval by such authorities as the House of Lords, *Tamaki v. Baker*, [1901] A.C. 561 at p. 580; the Supreme Court of Canada, *St. Catherine's Milling & Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, *per* Strong, J., at p. 610; Court of Appeal for Ontario (in the same case), 13 O.A.R. 148, *per* Burton, J.A., at pp. 159-60; Ontario High Court, Chancery Division (in the same case), 10 O.R. 196, *per* Boyd, C., at p. 209; Court of Appeal for British Columbia, *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at pp. 646-7, 52 W.W.R. 193; Supreme Court of New Brunswick, *Warman v. Francis* (1958), 20 D.L.R. (2d) 627, 43 M.P.R. 197, *per* Anglin, J., at p. 630.

In 1955 the Supreme Court of the United States in *Tee-Hit- Ton Indians v. United States* (1955), 348 U.S. 272, considered the matter of extinguishing Indian title based on aboriginal possession. Mr. Justice Reed delivered the opinion of the Court (three Judges dissenting), in which he said at pp. 279-80:

> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson v. McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."

And at pp. 281-2:

> In 1941 a unanimous Court wrote, concerning Indian title, the following:
>
> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justifiable, issues." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347.
>
> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

In my view the doctrine of the supreme power of Congress referred to in the U.S. case above-cited is equally applicable in English law in the form of the supreme power of the Crown, usually termed the Crown prerogative.

In examining the doctrine as it applies to the lands in question it is convenient to refer to the period December 2, 1858, to June 1, 1870, and to consider whether or not the lands were within the geographical confines of the prerogative of the Crown Imperial as they then existed, prior to the entry of British Columbia into the Confederation of Canada in 1871. This entails the genesis and evolution of the boundaries of British Columbia prior to and as at July 20, 1871. For source material on this subject I am specially indebted to the excellent monograph of Dr. Willard Ireland, Provincial Archivist for British Columbia, supplied as ex. 20 in these proceedings, and originally published in the *British Columbia Historical Quarterly*, vol. III, 1939, under title "The

Evolution of the Boundaries of British Columbia".

It should be noted here that the northernmost point of the delineated area extends to approximately 56°, 15 minutes N. latitude, and the westerly boundary is the present Alaska-Canada boundary, in particular that part immediately west of the approximate center of Pearse Island, extending northward to approximately 56°, 07 minutes N. The most westerly point of the western boundary, that opposite Pearse Island, is located at approximately 130°, 20 seconds W. Dr. Ireland's monograph, pp. 266-7, reads:

> The first actual definition of a boundary west of the Rockies developed out of the assertion, in an Imperial ukase of the Russian Czar, dated September 16, 1821, of exclusive rights of trade on the Pacific Coast as far south as the 51st parallel. Opposition to this pretension developed immediately both in Great Britain and the United States. The latter power proposed a tripartite treaty, under the terms of which no settlements should be made by Russia south of 55 degrees, by the United States north of 51 degrees, or by Great Britain north of 55 degrees or south of 51 degrees. If necessary, the United States was prepared to accept the 49th parallel as a northern limit for its settlements. This proposition was rejected by the British Government, which preferred to negotiate separately with Russia and the United States.
>
> The discussions with Russia culminated in the convention of February 28/16, 1825. The line of demarcation laid down therein was as follows:--
>
> Commencing from the Southernmost Point of the Island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes North latitude, and between the 131st and 133rd degree of West longitude (Meridian of Greenwich), the said line shall ascend to the North along the Channel called Portland Channel, as far as the Point of the Continent where it strikes the 56th degree of North latitude; from this last- mentioned Point, the line of demarcation shall follow the summits of the mountains situated parallel to the Coast, as far as the point of intersection of the 141st degree of West Longitude (of the same Meridian); and, finally, from the said point of intersection, the said Meridian Line of the 141st degree in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British Possessions on the Continent of America to the North-West.
>
> It was understood that the whole of Prince of Wales Island was to be within Russian territory, and that the boundary between the British possessions and the Russian strip of coast would be a line parallel to the windings of the coast, never more than 10 marine leagues distant therefrom.
>
> Although the exact interpretation of these terms became a matter of serious dispute after Russian America was purchased by the United States, this convention, broadly speaking, established the boundary as it exists today between Canada and Alaska. In other words, it determined the northern limit of British territory on the Pacific coast.

The determination of the southern limit of British Columbia was by the Oregon Treaty of June 15, 1846. The first article of the treaty reads:

> From the point on the 49th parallel of north latitude, where the boundary laid down in existing Treaties and Conventions between Great Britain and The United States terminates, the line of boundary between the territories of Her Britannic Majesty and those of The United States shall be continued westward along the said 49th parallel of north latitude, to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly, through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean: . . .

"By these two conventions the international aspect of the boundary question was settled, although controversies did arise over the interpretation of the rather vague phraseology used, and eventually recourse was had to arbitration before a definite boundary-line was laid down." (Ireland, *ibid*.)

The boundary to the Crown Colony of British Columbia underwent significant changes from the enactment of the *Imperial Statute*, August 2, 1858, 21 & 22 Vict., c. 99, "An Act to provide for the Government of *British Columbia*"--to the enactment effective November 19, 1866, of "An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia", 29 & 30 Vict. 1866, c. 67 [*British Columbia Act, 1866*]. At this time (1866) the boundaries of the Colony of British Columbia were as defined in the *Imperial Statute*, July 28, 1863, 26 & 27 Vict., c. 83, *viz*.:

> British Columbia shall, for the purposes of the said Act, and for all other purposes, be held to comprise all such territories within the Dominions of Her Majesty as are bounded to the South by the territories of the United States of America, to the West by the Pacific Ocean and the frontier of the Russian Territories in North America, to the North by the sixtieth parallel of north latitude, and to the East from the boundary of the United States northwards, by the Rocky Mountains and the one hundred and twentieth meridian of west longitude, and shall include Queen Charlotte Island and all other Islands adjacent to the said Territories, except Vancouver Island and the Islands adjacent thereto.

These boundaries totally surround the delineated area in dispute in this litigation, and were the boundaries by reference obtaining as at November 19, 1866, the date of the proclamation by Governor Seymour of the *Imperial Statute*, "An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia". At that instant the boundaries of British Columbia, as we now know them, came into being. The delineated area is totally within them. From that date, November 19, 1866, the source of sovereignty over the delineated area was the Crown Imperial, alone, until the Order in Council of May 16, 1871, which provided "that from and after the twentieth day of July, One Thousand Eight Hundred and Seventy One, the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada".

I am of the view that between November 19, 1866, and May 16, 1871, during which time there can be no doubt that the sole sovereignty over the area of British Columbia as we now know it flowed from the Crown Imperial, such rights, if any, as the Nishgas may have had, were firmly and totally extinguished by overt acts of the Crown Imperial by way of proclamation, ordinance and proclaimed statute. This entails the examination of a series of legislative events spanning in time from December 2, 1858, to June 1, 1870, thirteen in all. I have added the Roman numbering and dates. Selected excerpts are in most instances quoted.

I. December 2, 1858:

> PROCLAMATION, having the Force of Law to enable the Governor of British Columbia to convey Crown Lands Sold within the said Colony.
>
> . . . . .
>
> Now, therefore, I, JAMES DOUGLAS, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, ordain and enact, that on and after the day of the date of this proclamation, it shall be lawful for the Governor, for the time being of the said Colony, by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony; and every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the lands therein described.

II. February 14, 1859:

PROCLAMATION.

. . . . .

WHEREAS, it is expedient to publish for general information, the method to be pursued with respect to the alienation and possession of agricultural lands, and of lands proposed for the sites of towns in British Columbia, and with reference also to the places for levying shipping and customs duties, and for establishing a capital and port of entry in the said Colony.

. . . . .

1. -- *All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.*

2.--The price of lands, not being intended for the sites of Towns, and not being reputed to be Mineral lands, shall be ten shillings per acre, payable one half in cash at the time of the sale, and the other half at the end of two years from such sale. Provided, that under special circumstances some other price, or some other terms of pay- ment may from time to time be specially announced for particular localities.

3. --It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown Lands, and for such purposes as the Executive shall deem advisable.

4.--Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, as soon as the same shall have been surveyed and made ready for sale. Due notice will be given of all such sales. Notice at the same time will be given of the upset price and terms of pay- ment when they vary from those above stated, and also of the rights reserved (if any) for public convenience.

(Italics added.)

III. January 4, 1860:

WHEREAS, by virtue of an Act of Parliament made and passed in the 21st and 22nd years of the Reign of Her Most Gracious Majesty the Queen, and by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, in conformity therewith I, JAMES DOUGLAS, Governor of the Colony of British Columbia, have been authorized by Proclamation issued under the Public Seal of the said Colony, to make laws, institutions, and ordinances, for the peace and good government of the same, and

WHEREAS, it is expedient, pending the operation of the survey of agricultural lands in British Columbia, to provide means whereby unsurveyed agricultural lands may be lawfully acquired by pre- emption in British Columbia by British subjects, and in certain cases to provide for the sale of unsurveyed agricultural land in British Columbia by private contract;

Now, therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, order and enact.

1. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved, and unsurveyed Crown land in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement) in fee simple, under the following conditions:

. . . . .

3. Whenever the Government survey shall extend to the land claimed, the claimant who has recorded his claim as aforesaid, or his heirs or in case of the grant of certificate of improvement hereinafter mentioned, the assigns of such claimant shall, if he or they shall have been in continuous occupation of the same land from the date of the record aforesaid, be entitled to purchase the land so pre-empted at such rate as may for the time being be fixed by the Government of British Columbia, not exceeding the sum of 10s. per acre.

. . . . .

13. Whenever a person in occupation at the time of record aforesaid, shall have recorded as aforesaid, and he, his heirs or assigns, shall have continued in permanent occupation of land pre-empted, or of land purchased as aforesaid, he or they may, save as hereinafter mentioned, bring ejectment or trespass against any intruder upon the land so pre-empted or purchased, to the same extent as if he or they were seized of the legal estate in possession in the land so pre- empted or purchased.

14. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals, or working the same upon the conditions aforesaid.

IV. January 20, 1860:

PROCLAMATION.

. . . . .

And Whereas, it is expedient that town lots, suburban lots, and surveyed agricultural lands in British Columbia, which have been, or which hereafter may be offered for sale, at public auction, and remain unsold, should be sold by private contract;

Now therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid do proclaim, order, and enact, as follows:--

The Chief Commissioner of Lands and Works for the time being, for British Columbia, and all Magistrates, Gold Commissioners, and Assistant Gold Commissioners, by the said Chief Commissioner authorized in writing in that behalf, may sell by private contract any of the lots and lands, hereinafter mentioned, at the prices, and on the terms hereinafter respectively stated--viz.

a. Town and suburban lots which have been, or hereafter may be offered for sale at public auction, and remain unsold, at the upset price, and on the terms at and on which the same were offered for sale at such auction.

b. Agricultural lands surveyed by the Government Surveyor, which may, or shall have been offered for sale at public auction, and remain unsold, at ten shillings per acre, payable one half in cash at the time of sale, and the other half at the expiration of two years from such sale.

V. January 19, 1861, a proclamation of Governor Douglas amending the proclamation of January 4, 1860, *supra*, in the main legislating the methods of land pre-emption in expanded detail.

VI. January 19, 1861:

PROCLAMATION.
No. 2, A.D. 1861.

By His Excellency JAMES DOUGLAS, Companion of the Most Honor- able Order of the Bath, Governor and Commander-in-Chief of British Columbia.

. . . . .

And whereas I have been empowered by Her Majesty's Government to lower the price of Country Lands in British Columbia, in all cases, to the sum of four shillings and two pence (4s. 2d.) per acre.

Now, therefore, I do hereby declare, proclaim, and enact as follows:--

I. So much of the said Proclamation of the 20th day of January, 1860, as fixed the price of surveyed agricultural land at ten shillings per acre is hereby repealed.

II. The price of all unsurveyed country land in British Columbia, whether acquired by pre-emption or

purchase under the Proclamation dated the 4th day of January, 1860, shall be four shillings and two pence (4s. 2d) per acre.

VII. May 28,1861:

PROCLAMATION.
No. 6, A.D. 1861.

By His Excellency JAMES DOUGLAS, Companion of the Most Honor- able Order of the Bath, Governor and Commander-in-Chief of British Columbia and its Dependencies, Vice-Admiral of the same, &c., &c. Whereas it is inexpedient that any person other than a bona fide settler should take up land under the said Proclamation, and without the occupation and improvement necessary under the said Proclamation to complete his Title as a Pre-emptor.

. . . . .

No person shall be entitled to hold by Pre-emption more than 160 acres under the said Proclamation, or any of them. at one time.

VIII. August 27, 1861:

PROCLAMATION
No. 9, A.D. 1861.

By His Excellency JAMES DOUGLAS, Companion of the Most Honorable Order of the Bath, Governor and Commander-in-Chief of British Columbia, and its Dependencies, Vice-Admiral of the same, &c., &c.

. . . . .

And whereas it is expedient to amend and consolidate the laws affecting the settlement of unsurveyed Crown Lands in British Columbia;

. . . . .

III. That from and after the date hereof, British subjects and aliens who shall take the Oath of Allegiance to Her Majesty and Her Successors, may acquire the right to hold and purchase in fee simple, unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, not being the site of an existent or proposed Town, or auriferous land available for mining purposes, *or an Indian Reserve or Settlement*, under the following conditions.

. . . . .

XXV. Nothing herein contained shall be construed as giving a right to any claimant to exclude free miners from searching for any of the precious minerals or working the same, upon the conditions aforesaid.

(The emphasis is mine.)

IX. May 27, 1863:

PROCLAMATION
No. 7, A.D. 1863.

By His Excellency JAMES DOUGLAS, Companion of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of British Columbia and its Dependencies, Vice-Admiral of the same, &c., &c.

. . . . .

And whereas it is desirable for the protection of Miners, and others searching for the precious metals, to retain in possession of the Crown power to prevent such Miners or other persons from being obstructed or hindered by the Claims, and exactions of persons holding land under the provisions of the Pre-emption Consolidation Act passed on the 27th day of August, 1861;

Now, therefore, I do hereby declare, proclaim, and enact as follows:

I. It shall be lawful for the Governor, for the time being of British Columbia from time to time, and at any time hereafter by any writing under his hand, published in the Government Gazette, to erect any portion of the Colony into a Mining District, and to give to such District a distinguishing name, and to define the limits and boundaries thereof, and also again to abolish or reconstruct any such District, and from time to time to alter and vary such limits and boundaries.

X. April 11, 1865:

No. 27. An Ordinance for regulating the acquisition of land in British Columbia.

. . . . .

3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

4. The upset price of surveyed lands not being reserved for the sites of towns or the suburbs thereof, and not being reputed to be mineral lands, shall be four shillings and two pence per acre.

5. The Governor shall at any time, and for such purposes as he may deem advisable, reserve any lands that may not have been either sold or legally pre-empted.

6. Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, after the same shall have been surveyed and made ready for sale. Due notice shall be given of all such sales; notice at the same time shall be given of the upset price and terms of payment when they vary from those above stated, and also of the rights specially reserved (if any) for public convenience.

. . . . .

9. Unless otherwise specially announced at the time of sale, the conveyance of the land shall include all trees and all mines, and minerals within and under the same (except mines of gold and silver).

. . . . .

12. From and after the date hereof British subjects, and aliens who shall take the oath of allegiance to Her Majesty, Her heirs and successors, may acquire the right to pre-empt and hold in fee simple unoccupied and unsurveyed and unreserved Crown Lands not being the site of an existent or proposed town, or auriferous land available for gold or silver mining purposes, *or an Indian reserve or settlement*, under the following conditions:

. . . . .

51. Leases of any extent of unoccupied and unsurveyed land may be granted for pastoral purposes, by the Governor or any Officer duly authorized by him in that behalf, to any person or persons whom- soever, being *bona fide* pre-emptors or purchasers of land, at such rent as such Governor or Officer shall deem expedient. But every such lease of pastoral lands shall, among other things contain a condition making such land liable to pre-emption, reserve, and purchase by any persons whomsoever, at any time during the term thereof, without compensation, save by a proportionate deduction of rent. And to a further condition that the lessee shall, within six months stock the property demised in such proportion of animals to the one hundred acres, as shall be specified by the Stipendiary Magistrate in that behalf.

. . . . .

Assented to, in Her Majesty's name, this eleventh day of April, 1865.

FREDERICK SEYMOUR.
Governor.

(The emphasis is mine.)

XI. March 31, 1866:

BRITISH COLUMBIA
Anno Vicesimo Nono
VICTORIAE REGINAE
No. 13.

An Ordinance further to define the law regulating the acquisition of Land in British Columbia.

. . . . .

Be it enacted by the Governor of British Columbia, by and with the advice and consent of the Legislative Council thereof, as follows:

I. The right conferred under Clause 12 of the Land Ordinance, 1865, on British Subjects, or aliens who shall take the oath of allegiance, of pre-empting and holding in fee simple unoccupied and unsurveyed and unreserved Crown Lands in British Columbia, shall not (without the special permission thereto of the Governor first had in writing) extend to or be deemed to have been conferred on Companies whether Chartered, Incorporated, or otherwise, or without the permission aforesaid, *to or on any of the Aborigines of this Colony or the Territories neighbouring thereto*.

(The emphasis is mine.)

XII. March 10, 1869:

Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows:--

I. The purchase money for Pre-emption Claims, and the balance of purchase money upon Pre-emption Purchase Claims, held under any of the Laws heretofore, or for the time being, regulating the acquisition and tenure of Pre-emption Claims in that part of the Colony formerly known as the Colony of British Columbia and its Dependencies, shall be, and be deemed to have been, and to be due and payable to Her Majesty, Her Heirs and Successors, as part of the General Revenue of the Colony, as and from the date of the service of an application, signed by the Chief Commissioner of Lands and Works and Surveyor General, upon the person or persons to be affected thereby, and notifying the completion of the Government Survey of the Land specified in such application, and calling upon such person or persons for the payment of the amount for the time being due and payable as aforesaid in respect of such land.

. . . . .

Assented to, on behalf of Her Majesty, this 10th day of March, 1869.

FREDERICK SEYMOUR,
Governor.

XIII. June 1, 1870:

An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia.

[1st June, 1870]

WHEREAS it is expedient to amend and consolidate the Laws affecting Crown Lands in British Columbia:

Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows:--

. . . . .

2. The following Acts, Ordinances, and Proclamations relating to the disposal and regulation of the Crown Lands of the Colony are hereby repealed:--

An Act dated February 14th, 1859:

An Act dated January 4th, 1860:

An Act dated January 20th, 1860:

The "Pre-emption Amendment Act, 1861:"

The "Country Land Act, 1861 :"

The "Pre-emption Purchase Act, 1861:"

The "Pre-emption Consolidation Act, 1861:"

The "Mining District Act, 1863:"

The "Land Ordinance, 1865 :"

The "Pre-emption Ordinance, 1866:"

The "Pre-emption Payment Ordinance, 1869:" and

The "Vancouver Island Land Proclamation, 1862:"

Such repeal shall not prejudice or affect any rights acquired or payments due, or forfeitures or penalties incurred prior to the passing of this Ordinance in respect of any land in this Colony.

PRE-EMPTION.

3. From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (*not being an Indian settlement*) not exceeding three hundred and twenty acres in extent in that portion of the Colony situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Colony. *Provided that such right of pre- emption shall not be held to extend to any of the Aborigines of this Continent,* except to such as shall have obtained the Governor's special permission in writing to that effect.

. . . . .

42. The Governor shall at any time, and for such purposes as he may deem advisable, reserve, by notice published in the Government Gazette, or in any newspaper of the Colony, any lands that may not have been

> either sold or legally pre-empted.

(The emphasis is mine.)

The various pieces of legislation referred to above are connected, and in many instances contain references *inter se*, especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, in- cluding one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

It was argued by plaintiffs' counsel that historically the British Crown as a matter of policy and of law has always acknowledged the aboriginal title of the Indian tribes. Cases were cited in support of this, nearly all such arising out of the interpretation of treaties or contracts. As stated earlier herein, there never has been any treaty or contract with reference to the delineated area. So how does one ascertain what has been the policy of the British Crown as to these lands? There is no more emphatic or unequivocal way of enunciating policy as to a particular subject-matter than by enacting competent legislation as to that very subject-matter, and that is what has happened in this instance: *Vide* I to XIII. What may have been the policy of the Crown Imperial as to other lands is irrelevant in the face of specific legislation as to these lands (I to XIII). In result I find that, if there ever was such a thing as aboriginal or Indian title in, or any right analogous to such over, the delineated area, such has been lawfully extinguished *in toto*. It is not necessary to explore what "aboriginal title, otherwise known as the Indian title" may mean, or in earlier times may have meant, in a different context. Lord Watson, for the Privy Council, in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at p. 55, said:

> There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished.

It should be noted that in the *St. Catherine's* case the lands in question, the territory over which certain of the Ojibewa Indian tribes historically had hunted and fished, were within the *Proclamation of 1763*, and further the subject of a specific Indian land treaty of October 3, 1873. On the latter date the Ojibways had something to treat about -- their rights under the *Proclamation of 1763*. In the instant case sovereignty over the delineated lands came by exploration of *terra incognita* (see *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543), no acknowledgment at any time of any aboriginal rights, and specific dealings with the territory so inconsistent with any Indian claim as to constitute the deal- ings themselves a denial of any Indian or aboriginal title. As the Crown had the absolute right to extinguish, if there was anything to extinguish, the denial amounts to the same thing, *sans* the admission that an Indian or aboriginal title had ever existed. There is nothing to suggest that any ancient rights, if such had ever existed prior to 1871 and had been extinguished, were revived by British Columbia's entry into Confederation and becoming subject to the *B.N.A. Act, 1867*.

It is convenient here to deal with the third preliminary objection of defendant referred to earlier, that this matter required the granting of a fiat as a prerequisite to adjudication. In the light of opinions already expressed it is not necessary to decide on this question so interestingly argued by both counsel. It is not the usual judicial course to decide on the merits and then deal with the preliminary objections, but I think the comity of our Courts as an institution would have suffered had these plaintiffs been told judicially that their clearly enunciated claim would get no adjudication because it had been brought in the wrong forum.

In result the declaration sought is denied. There will be no costs, pursuant to the *Crown Costs Act*, R.S.B.C. 1960, c. 87, of this Province.

One would have to be self-blinded to the events and attitudes of the day to ignore the fact that this litigation is of great concern, and this judgment a deep distress, to the Indian peoples of British Columbia. I take the judicial liberty of recording my opinion that should the Nishgas wish to appeal this judgment, the cost of preparing the appeal books, because of the historical documents germane to the issue, would amount to a sum probably beyond their financial resources. The same sum, in the context of the Provincial Treasury, would be insignificant.

Action dismissed.