OLIVE P. DICKASON

MAKING CLAIM

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Within the first few decades of the twentieth century, the federal government had consolidated its title to much of the Canadian landmass through treaties that extinguished native land rights. The government was eager to open Canada, particularly the West, to new settlement, and it moved effectively wherever valuable land or political considerations came to the fore. But Canada's first peoples have always held different views of rights and ownership. In the last quarter of the twentieth century, they began to press for change.

While the millions who came to Canada from other shores throughout the nineteenth and twentieth centuries carved out new lives for themselves in a wide open land, for the original inhabitants of that land the process was reversed as they were exiled to the margins of the new society. For them, the challenge has been to regain their lost self-determination.

Canada's First Nations have signed about five hundred treaties with the Crown since the days of first European settlement. In the beginning, these agreements were for peace and friendship; only later did they focus on land transfers. The turning point was the Royal Proclamation issued by King George III in 1763, following Pontiac's uprising. In surrendering almost half of Canada's land to an authority – the Crown – that presumed it held underlying sovereign title to all of British North America, Canada's native people surrendered the keystone to determining their own fate. It wasn't until 1973 that the presumption underlying the Crown's contract with the aboriginal inhabitants was challenged, and the reversals that Canada's natives have experienced for centuries began themselves to be reversed.

In 1973, Frank Calder, founder and president of British Columbia's Nisga'a Tribal Council (1955–1974), went to court to establish his people's right to their traditional lands, which they had neither ceded by treaty nor lost in a war. He lost, but on a technicality. Although the judges disagreed on whether the Royal Proclamation of 1763 applied to British Columbia, all but one agreed that aboriginal title existed in law independently of any treaty, executive order, or legislative enactment. Possession of lands when Europeans arrived was proof of aboriginal title. However, the judges did not arrive at a consensus as to how aboriginal title was to be interpreted and dealt with. Neither did they agree on the current state of Nisga'a land rights. But they did affirm that aboriginal rights existed, at least in principle. It was a giant step forward.

Land became an issue very quickly after Europeans arrived in the Americas, particularly in those regions where farming was established as a way of life. As the Spanish Dominican Francisco de Vitoria (1480?–1552), primary professor of sacred theology at the University of Salamanca and a father of international law observed, since the law of discovery applied only to unoccupied territories, it could not be used to support seizure of the lands of Amerindians "any more than if it had been they who had discovered us." He pointed out that at the time of their first voyages to the Americas, the Spaniards "took with them no right to occupy the lands of the indigenous population." His voice, far from being isolated, was simply among the better known of those who expounded the central canonical tradition of medieval legal thought, which had its roots in classical Greece and Rome.

Although "aboriginal right" as a term expressing a principle of law has come into use only comparatively recently, the principle itself is ancient. Aboriginal right – or "Indian title," as it was referred to in colonial times – can be traced back to Justinian's Code, promulgated during the first half of the sixth century. It explicitly recognized that the first inhabitants of a land are its rightful owners: "natural reason admits the title of the first occupant to that which previously had no owner." The code in its turn was based on Roman law, which considered the principle to be self-evident in natural law. It continued in Europe under feudalism and common law. In other words, aboriginal title entered into law in connection with land, and only later was the concept extended to become aboriginal right, which includes self-government. (In spite of its lengthy history and much deliberation, its full

PROVINCIAL ARCHIVES OF MANITOBA / N8150

Chief-elect Robert Fiddler of Deer's Lake East Band on treaty day, June 9, 1910 at Little Grand Rapids, Manitoba.

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legal implications are still not clear.)

Amerindians, for their part, held that since land was for the use of all peoples, everyone had a right to its produce. Using the land entailed the responsibility of taking care of what had been received from previous generations in order to pass on its benefits to the generations to come. Primarily, Amerindians saw the natural world in spiritual terms: in the words of one contemporary observer, "they suppose that all animals, fowls, fish, trees, stones, &c., are endowed with immortal spirits, and that they possess supernatural power to punish any who may dare to despise or make any unnecessary waste of them." Concerning land, they had a clear concept of tribal territoriality, but not of individual ownership of discrete parcels of land. Those peoples who practised agriculture used land communally as organized by kinship, a custom that could come close to individual ownership, as among the Huron.

Legal principles were one thing and political reality something else again, as quickly became evident when Christopher Columbus stumbled on the Caribbean island of Guanahani in 1492, and lost no time in claiming it for Spain, even though it was obviously inhabited. Quickly realizing the weakness of her claim of "discovery," and not to be done out of the rewards of her find (the expedition had been expensive), Spain obtained papal support for her claims. This was done in 1493 with the bulls of Pope Alexander VI, authorizing Spain to bring under her sway "the said countries and islands, with their residents and inhabitants, and to bring them to the Catholic faith." Neither France nor England accepted the bulls, and some of Spain's leading jurists, including Vitoria, denied the pope's claim of the right to dispose of the temporal possessions of non-Christians.

1871

Canada and First Nations sign the first of 11 numbered treaties that secure much of Rupert's Land and the Northwest Territories as Crown property, and guarantee the Canadian government's responsibility for the well-being of the territories' aboriginal inhabitants. By 1899, the first eight treaties are signed.

1905

Treaty 9 is negotiated with the federal and Ontario governments who share the cost of purchasing aboriginal title to land in northern Ontario – the only time a provincial government participates in any of the numbered treaties.

1906

A delegation of Squamish chiefs travels to England to petition King Edward seeking compensation for lands in British Columbia that had been appropriated without payment.

Treaty 10 is established. Aboriginals cede land in northern Saskatchewan to the Crown in return for the government's guarantee of reserve lands, annual payments, education, and farming assistance.

1912

The Nisga'a of northwestern B.C.'s Nass River Valley are the first native group to initiate a land-claim action against the Canadian government.

1921

Following the discovery of oil in the Mackenzie Valley, the government obtains Dene signatures to establish Treaty 11. Claiming the treaty's provisions were improperly implemented and the document had no legal validity, the Dene begin in the 1970s to pursue land-claim settlements in the court.

1923

The government, noting an absence of documents formalizing native land cessions in parts of central and southern Ontario, quietly obtains native signatures to lay claim to some of Canada's most valuable real estate. This marks the last of a major round of treaty making begun in the 1870s.

1930

Under the Natural Resources Transfer Acts of 1930, Indians in the prairie provinces are granted the right to hunt and fish for food, free of provincial regulation, on unoccupied Crown lands.

1939

The government rules that Inuit are a federal responsibility, although they are not subject to the Indian Act.

1951

Jun The Indian Act is substantially revised to give native bands greater autonomy and end restrictions such as the prohibition of native ceremonies and dances.

1960

March 10 Indians are granted the right to vote in federal government elections without having to relinquish their Indian status.

Aug 4 The 1960 Canadian Bill of Rights is passed, affirming the right to equality before the law for all Canadians, including natives.

As word of Columbus's achievement spread, so did the popular belief that it had been a "discovery" in the full sense of the word, giving Europeans the right to claim the land, particularly as it gave evidence of harbouring rich resources waiting to be exploited. It was easy to view the hunting and gathering Amerindians, who in Columbus's words went "naked as their mothers bore them,"as living according to nature "like beasts in the woods," with no more rights to land than deer or jaguars.

A question that was soon raised was the definition of "occupation" or "habitation." Could migratory peoples who "ranged" the land without fixed abodes be classed as inhabitants? Portugal, shortly before Columbus's voyage, had claimed rights of "discovery" along the African coast, on the grounds that without stable settlement the region was *terra nullius*, uninhabited land. Similarly, the legal expression *vacuum domicilium* (no habitations or homes), carried the connotation that the land was legally "waste" because it had not been "subdued"– that is, cultivated. In this sense, much of the Americas was seen as not truly occupied; even semisedentary farming villages were considered not to be true habitations, as they were not occupied year-round. Later the English developed a variant "doctrine of discovery," according to which the discovering power had the sole prerogative to extinguish (by purchase or other means) the occupancy rights of the original inhabitants.

By the eighteenth century, the argument that natural law demanded that people cultivate the land in order to claim it had been widely accepted in Europe. This idea had been advocated by Thomas More (1478–1535) in his *Utopia* (published in Latin in 1516 and English in 1551), and later modified by Swiss jurist Emerich de Vattel (1714–1767), whose elaborate and complex analysis of international law, *Le Droit des gens*, published in 1758, rivalled the works of Dutch jurist and statesman Hugo Grotius (1583–1645) as accepted legal authority. Vattel wrote that the obligation to cultivate the soil meant that peoples who followed the "idle" hunting life rather than undertaking the hard work of farming were taking up more land than was their due, and so could be restricted in their holdings to allow for the expansion of agriculture.

As their loss of land under British settler pressures steadily increased, so did the violence of Amerindians reactions. Recognizing this as a major factor in the wars that ensued, imperial authorities sought to control the situation with a series of proclamations, the most famous of which was that of 1763. Its two best-known provisions marked a turning point in British colonial attitudes toward Amerindian land rights: first of all, that all lands not already been ceded to or purchased by Britain and that formed part of British North America were to be considered "reserved lands" for Amerindians, and secondly, those lands could only be alienated by the British Crown. In other words, individuals were no longer allowed to purchase lands directly from Amerindians, which had led to so much fraudulence and unrest in the past. The British, recognizing that "the Cruelty and Injustice with which they [Indians] had been treated with respect to their hunting grounds" had spurred Pontiac's 1763 uprising, were apprehensive of a generalized Amerindian war. Their principal concern was to keep the peace necessary for their expanding commercial empire to flourish. Protecting land rights was a means to that end.

The Crown, in its move to respect "Indian title," was referring to occupancy and use, not outright ownership ("fee simple" in legal terms). It was assumed that Britain held underlying sovereign title, as the 1763 proclamation's wording indicates: it was "our dominions" that were being reserved for Amerindians and to which the Crown was extending its protection. Not all Indians across Canada have accepted the proclamation; the Innu of Labrador and northern Quebec still do not believe that their rights were affected either by the proclamation or by "the present occupation" by nonaboriginals.

The first postproclamation treaties were signed in Upper Canada. In 1764, there were two, permitting British use

1961

Dec 31 National Indian Council is established in Calgary as an umbrella group for native and Métis concerns.

1968

The National Indian Council splits to form the Canadian Métis Society (Native Council of Canada after 1970; Congress of Aboriginal Peoples after 1994) to represent the Métis and nonstatus Indians, and the National Indian Brotherhood (Assembly of First Nations after 1982) to represent status Indians.

1969

Jun A government White Paper calls for abolition of the Indian Department and the Indian Act within five years, thus eliminating Indian status. The White Paper is abandoned after NIB protest.

1970

Apr 1 The N.W.T. takes over responsibility for governing the eastern and upper Arctic from the Dept. of Indian Affairs and Northern Development.

Sep 1 The Blue Quills Residential School in Alberta becomes the first to be run by aboriginal people, marking the beginning of the end for church-run residential schools in Canada.

The Supreme Court of Canada rules that J. Drybones, a status Indian, had been unfairly discriminated against on the basis of race when he was convicted under a provision that made it an offence for an Indian to be intoxicated off reserve lands.

1971

Inuit Tapirisat of Canada (ITC, formerly the Inuit Brotherhood) is formed to address such issues as the development of the Canadian North and the preservation of the Inuit culture.

1973

Aug 8 The federal government renews the right of natives to initiate land claim negotiations.

Sep 7 The N.W.T government allows the Indian Brotherhood of the N.W.T. to file a claim for approximately one-third of the land.

Court decisions recognize Dene land title to the Mackenzie River Valley and the title of the Cree and Inuit of Quebec. Later overturned, both decisions are a significant step forward in the process of native land claims.

1975

Nov 11 The James Bay and Northern Quebec Agreement, the first aboriginal treaty negotiated since 1923, is signed in Quebec City. The treaty ensures area natives partial self-government, control over hunting, and a large cash settlement.

1976

Jun 8 On the recommendation of the Berger inquiry, the government postpones construction of the Mackenzie pipeline for 10 years pending settlement of land claims with the Dene and Inuit.

1982

Apr 17 The Constitution Act is proclaimed. Section 35 affirms existing aboriginal and treaty rights, defining "the aboriginal peoples of Canada" as Indian, Inuit, and Métis.

BEAVER COLLECTION

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Between 1871 and 1921, eleven numbered treaties were signed between Canada and First Nations, securing much of Rupert's Land and the Northwest Territories for the Crown, and including in its arrangements more than half of Canada's native population. In return for regions surrendered, the government usually offered, in addition to acreage, dollar amounts as presents and further annuities depending on family size. Treaty Six, signed with the Plains and Woods Crees in 1876 and depicted in the artwork at the top of this composite picture, covered much of central Saskatchewan and Alberta. Its provisions included a "medicine chest" clause, unique among the treaties signed, which became the basis for free health care for native people. Members of the File Hills Reserve in Saskatchewan gather on treaty day, 1912, (foreground) to receive treaty monies and goods.

of the portage at Niagara Falls in return for a trade agreement. Other treaties quickly followed, most of them characterized by land surrenders.

While this procedure slowed down Amerindian loss of land, it did not stop it, nor was it intended to. What it did was to ensure that land for settlement was acquired by negotiation rather than by war. Some Amerindian leaders, realizing the ultimate consequences of land loss for their people, began to speak out against the cessions. The best known of these was Tecumseh, who tried to organize a pan-Amerindian alliance to control land deals. He held that no single tribe had the right to cede land on its own, which he said should only be done by all the tribal nations of a region acting together in council. Tecumseh's attempts to rally Amerindians in their own interests had only limited success, and were cut short when he was killed during the War of 1812.

The first Canadian court case in which the land provisions of the Proclamation of 1763 figured was that of *St. Catherine's Milling and Lumber Co. v. R* (1888). The point at issue was whether the lands surrendered in Treaty Three (1873) had accrued to the Crown in right of the federal authority (Canada) or to the Crown in right of the province (Ontario). The court, in ruling in favour of Ontario, held that Indian land rights were those of occupancy and use and were dependent upon the goodwill of the British sovereign. This would not be challenged until Nisga'a Tribal Council president Frank Calder went to court. Though the Nisga'a lost in 1973 in *Calder v. Attorney-General of British Columbia*, the judge's position that aboriginal rights existed, at least in principle, influenced the federal government to initiate its comprehensive land claims process for settling issues concerning unceded lands. Since the Calder case, it has acknowledged the Proclamation of 1763 as "a basic declaration of the Indian people's interest in land in this country," particularly since it was incorporated into the Canadian Constitution of 1982. For their part, Amerindians regard it as their "Bill of Rights," an acknowledgment of the federal government's fiduciary (trust) responsibility for aboriginal peoples as a consequence of the proclamation's reservation to the Crown of the right to acquire Indian lands. The first clear legal recognition of that fiduciary principle came in *R v. Guerin* (1984), when the Supreme Court of Canada recognized that when aboriginal people are involved, it is the duty of the Crown to always act in their best interest.

The trend toward recognizing aboriginal rights received a sharp check in 1991 when a B.C. court, in *Delgamuukw v. British Columbia*, rejected the claim of the Gitksan and Wet'suwet'en to 58,000 square kilometres of traditional lands in northwestern British Columbia on the grounds that the oral evidence upon which the claim had been based was in effect hearsay, and consequently not sufficient to support the claim. Six years later, in 1997, the Supreme Court of Canada on appeal overturned the B.C. court's decision with the argument that oral tradition had not been given sufficient weight. In its opinion, the laws of evidence must be adapted to place oral history on an equal footing with other types of historical evidence. It recommended a new trial.

In the meantime, the Nisga'a were back in the news when they signed a treaty in 1999, the first for British Columbia since the mid-nineteenth century. The treaty, which gives the First Nation exclusive rights to the resources of an area less than one-tenth of their traditional lands in exchange for giving up their tax-free status under the Indian Act, has been hailed as a breakthrough marking "a new understanding between cultures." It certainly included com-

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promises on both sides. On December 13, 1999 the House of Commons passed the Nisga'a Final Agreement Act, with Senate approval pending.

Another major breakthrough last year was the creation of a new territory, Nunavut, out of the Northwest Territories. Comprising more than a fifth of Canada's surface, Nunavut represents the largest native land-claim settlement in the country's history. It also represents the establishment of a new style of "public government" in which the Inuit, who are in the overwhelming majority, have in effect formed the government. But it is a government in which nonnatives are participating, as four of the new legislative assembly's nineteen members are not Inuit. In other words, the Inuit, in regaining control of their own destiny, have done so while recognizing and incorporating the rights of minorities. The political implications of this arrangement for the rest of Canada will probably take some time to work out.

As all this illustrates, the consequences of the Royal Proclamation of 1763 are more in evidence and more widespread in Canada than they have ever been. A recent count of land claims across the land put their number at 3,300. All of British Columbia is under claim. This whole development can be traced, either directly or indirectly, to the proclamation. Comprehensive claims are direct descendants via Calder: this is the type of claim that arises in regions without treaties, but where aboriginal right continues to exist. Specific claims arise in large part out of the land cession treaties, when there is disagreement as to the implementation of terms. What began as a move to protect imperial interests, particularly where expanding commercial interests were concerned, has been transformed into today's movement for the implementation of aboriginal rights. It is a development with the potential to profoundly affect the nature of Canada in the twenty-first century.

CP PICTURE ARCHIVE / KEVIN FRAYER

Above, left: Harry Martin of Greenville, B.C., celebrates in Terrace April 27, 1999 the signing of an historic agreement five days earlier giving the Nisga'a of northwestern B.C. around two thousand square kilometres of territory in the lower Nass Valley, a financial settlement, and resource rights over their own land. The Nisga'a have been in the vanguard of the native land-claims movement in Canada. In 1973, the Supreme Court of Canada recognized that aboriginal title could exist in common law, but achieved no consensus on interpretation or execution. Nevertheless it was a watershed judgment that led the federal government to begin negotiating land claims.

Above, right: Commissioner of Nunavut, Helen Mamayoak Maksagak, at the opening of the new territory's interim legislature in Iqaluit, April 1, 1999. Nunavut, comprising more than one-fifth of Canada's landmass, represents the largest land-claim settlement in Canadian history. About 85 percent of the territory's 27,000 people is Inuit.

1983

Aboriginal peoples are invited for the first time into constitutional negotiations at a series of first ministers conferences that continue until 1987.

The Constitutional Act of 1982 is amended to ensure equal rights to both aboriginal men and women.

1985

June 12 Bill C-31 is passed, restoring Indian status to native women married to nonnative men.

1986

Oct 9 Parliament passes the Sechelt Indian Band Self-Government Act transferring legal title to band lands to Sechelt First Nation in B.C., the first band to break from the Indian Act.

1987

Aboriginal groups successfully argue at a First Ministers Conference that aboriginal self-government is an "inherent right" not a right contingent on the sanctioning vote of provincial and federal parliaments.

1990

Jun 15 New Democrat MLA Elijah Harper, a Cree, refuses consent to the Meech Lake Accord in the Manitoba Legislature, arguing it fails to recognize the rights of aboriginal peoples. Meech dies June 22.

Jul 11 A gun battle erupts between 100 armed Quebec policemen and Mohawk members of the Warrior Society at Oka, Quebec, who are protesting plans to turn nearby land claimed for themselves into a golf course.

1991

Apr 23 The Royal Commission on Aboriginal Peoples (RCAP) is created to study aboriginal issues and find solutions to improve relations between the government and First Nations.

The Aboriginal Justice Inquiry, conducted in Manitoba, concludes that the provincial judicial system had become racist and abusive towards natives.

1998

Jan 7 The federal government apologizes to survivors of Indian residential schools and sets up a $350-million fund for community healing.

Aug 4 The Nisga'a Final Treaty Agreement, B.C.'s first treaty since 1899, is initialed, guaranteeing the Nisga'a of northwestern B.C. self-government, ownership of surface and subsurface resources on their lands, and a share of area salmons stocks and wildlife harvests. The treaty is ratified in the B.C. legislature April 22, 1999.

1999

Apr 1 Canada's newest territory and largest jurisdiction, Nunavut is created. Under the 1993 Nunavut Land Agreement, the Inuit people of the region are granted a form of self-government and a cash settlement of over $1 billion over 14 years.

Dec 13 The Nisga'a Final Treaty Agreement is passed by the House of Commons.