CLAIM BASED

ON

NATIVE TITLE

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UNION OF B.C. INDIAN CHIEFS

SUBMISSION

TO THE

PRIME MINISTER AND GOVERNMENT OF CANADA

BY THE

UNION OF BRITISH COLUMBIA INDIAN CHIEFS

AS TO THE

CLAIM BASED ON NATIVE TITLE

TO THE LANDS NOW FORMING BRITISH COLUMBIA

AND THE

WATERS CONTAINED THEREIN OR ADJACENT THERETO

Vancouver, B.C.

December, 1971.

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A. INTRODUCTION

The Submission herein made to the Prime Minister and Government of Canada is made on behalf of all the Indians of British Columbia by the Union of British Columbia Indian Chiefs ("the Union"). The Union is a society incorporated under The Societies Act of British Columbia. Its constitution provides that full membership is open to one representative of each Indian Band in the Province, who shall in each case be the elected Chief of the Band unless in any case the Band members shall elect some other member for this purpose in place of the Chief. At the Annual General Meeting at which this Submission was approved, there were present 161 full members from the 191 Indian Bands in British Columbia.

The constitution further provides that there shall be a fifteen-member Chiefs' Council, which is the governing body of the Union. For this purpose, the Province is divided into fifteen Districts. Every other year, the full members from each of Districts 1 to 7 elect one of their number to the Council for a two-year term, and in the alternative years the members from each of Districts 8 to 15 do the same. Every District is currently represented on the Council.

It will thus be seen that the Union, in both its general membership and its executive organization, is truly representative of all the Indians of British Columbia.

A Position Paper outlining the principles of the claim based on native title and various possible approaches to its formulation and presentation, as well as alternative methods for its settlement and the use of the proceeds thereof, was prepared on the instructions of the Chiefs' Council and considered by them on 26th June, 1970; this Position Paper, revised as agreed by the Chiefs' Council, was considered, further revised, and approved by the Union in General Meeting on 18th November, 1970.

After discussion with and advice by experts on various matters and particularly with respect to areas where alternative approaches or methods had been put forward, a draft Submission was prepared and was approved with some amendments at a meeting of the Chiefs' Council on 2nd and 3rd October, 1971;

a revised draft was considered and finally approved in its present form by the Union membership in General Meeting on 17th and 18th November, 1971.

It can therefore truly be said that this Submission, authorized for presentation by that last-mentioned meeting, is a carefully considered presentation on behalf of the Indian Bands of British Columbia.

In this Submission we have deliberately rested our case on reason, logic and arguments from authority and precedent.

While we recognize that the Claim itself is substantial, and

its implications far-reaching, we have avoided extreme or provocative language. We are confident that in putting our Claim forward in this manner, and in avoiding emotional or prejudicial statements, we are appealing to a sense of right and justice alone, and are thus relying on principles that are the recognized bases for decision and action according to the Canadian concept of justice.

But we do not wish the deliberation of our statements to give rise to any misunderstanding of the depth and intensity of our feelings or to a misapprehension of the emotional involvement of the Indians of British Columbia in what they regard as a crisis in their relations with the Government and fellow-citizens.

We ask the Prime Minister. and Government of Canada to realize what a shock it was to the Indians, especially of British Columbia, to be told in 1969 that grievances relating to claims based on native (aboriginal) title to land "are so general and undefined that it is not realistic to think of them as specific claims capable of remedy" except through the new policy then proposed - a policy which, if unaltered, totally rejects this historic Claim.

For the Indians of British Columbia, sometimes as individuals, sometimes as organized groups, have for generations maintained a claim for compensation, adjustment or restitution,

based on denial, without their consent and without compensation, of their ancient rights to use and enjoy the land that was theirs. The Indians of British Columbia have long been conscious of, and have endured with patience but a mounting sense of grievance, the positive loss and hardship which have flowed to them as a result of the occupation of their lands and the denial of compensation in any sense comparable to the value of what was taken.

The hardship and injury have been both to the spirit and to the body: to the spirit in the loss of dignity consequent upon being deprived of former freedoms and rights and made dependent upon the edict and the largesse of an alien authority, and to the body in physical poverty and degradation resulting from the loss of a means of physical livelihood and a way of life not remotely compensated for by the meagre hand-outs of cash and services ordained by the white occupier.

Persistently and patiently the Indians of British Columbia have sought redress. Always the appeal has been to constituted authority, by means of peaceful persuasion. Frequently there has been at least indirect admission of the justice of our Claim, accompanied occasional by grudging and minor adjustments (the institution of the British Columbia Special Grants is an illustration): never has there been a total denial but equally certainly never has there been

satisfaction. Meantime, the lot of the Indian on many of the Reserves continues to be sub-standard, his culture vanishing, his role one of enforced dependency.

Now however the Indians of British Columbia have been aroused, largely by the shock of the 1969 White Paper and accompanying statements, to a new sense of urgency and determination. As demonstrated by the formation of this Union, they have a new sense of unity and purpose. This can be channelled into constructive patterns of co-operation in a new and dignified future only if justice is done.

This Submission represents a renewed and concerted effort to obtain justice: the unequivocal recognition of our Claim and an unqualified commitment to effective action based upon the right to

redress thus established. Justice and right are concepts dear to both non-Indian and Indian citizens of Canada. The continued denial thereof by one to the other can surely no longer be contemplated.

B. DESCRIPTION OF THE CLAIM

The claim of the Indian peoples of British Columbia hereby submitted with respect to the denial or, in a few isolated cases the surrender, of their rights to the occupancy and use of land is based on the doctrine of aboriginal or native title.[1] This claim the Government of Canada, in its recent White Paper on Indian Policy, has declined to entertain.[2]

In this respect, the Union supports in principle the paper entitled "Aboriginal Title" as agreed by representatives of Indian organizations and their legal advisers in Montreal on 17th and 18th September, 1971, a copy of which is attached hereto as Appendix "A".

C. BACKGROUND OF THE CLAIM

There are weighty arguments in favour of the recognition of native title on the American continent in both national and international law, dating back to the sixteenth century. It was recognized in Canada in statutory enactments of the British Government before Confederation and of the Government of Canada after Confederation. It was recognized in treaties across Canada over a period of some two hundred years, applicable to about one-half of the Indian population of Canada. The other half, including the great majority of Indians in British Columbia, were as a result first of colonial and later of federal government policy, not given the opportunity to enter into treaties.

[1] The title forming the basis of the claim has heretofore been variously designated "aboriginal title", "Indian title", and "native title". Hereafter in this Submission the expression "native title" is adopted as the designation of the title upon which the claim is based.

[2] Statement of the Government of Canada on Indian Policy 1969

Most important is the fact that for a century, the position of the Federal Government has given official recognition to the concept of native title. In controversies with the provinces it has, though not always as successfully or vigorously as we would like, consistently taken a position based on a practical application of the concept of native title. It cannot now depart from that position without a total loss of credibility. If it wishes to retain the confidence, respect and support of the Indian people, it must withdraw from its new and inconsistent position.

This is particularly applicable to the situation in British Columbia, where for generations spokesmen for the Indian people have advanced the claim based on native title, a claim which although never satisfactorily settled or adjusted, has never been abandoned by the Indian people and has never heretofore been categorically refused by the Government of Canada. In a paper presented to the same meeting of the Union at which this Submission was approved, Chief William Scow of Alert Bay, B. C. has summarized the strenuous and continuing efforts of the Indians of British Columbia to obtain a just and lasting settlement of their Land Claim. This paper is attached as Appendix "B". And yet it is suggested in the White Paper referred to, that although the Indians should accept new and sweeping reforms, placing in question the whole matter of Indian status for the future, this should be done without any further discussion of, let alone any commitment on, the matter of the Indian Land Claim.

We therefore reiterate our objections to the White Paper, and maintain our general position on policy as set forth in our “Brown Paper”; and we repeat that success and co-operation in the implementing of any policy requires as its foundation the creation of a sense of respect and confidence. This can only come if justice is done with respect to our Land Claims.

D. BASIS OF THE CLAIM

The claim is advanced on the basis that the Indians of British Columbia had native title to the territory now comprising British Columbia, which title conferred certain rights to the use of the land, including hunting and fishing; that they have been deprived of the use and benefits of these rights with respect to

the land itself and are being progressively deprived of the hunting and fishing rights over the land without any - or without adequate, - compensation; and that they are entitled to compensation for such of the rights as may be irreplaceable and restitution of such rights (especially hunting and fishing rights) as are capable of restitution.

1. Historic Policy.

A brief review of the historic background of the treatment of native title and Indian rights in British Columbia will illustrate the basis of the claim.

In what is now British Columbia, the earliest settlements with the Indians were made on Vancouver Island as a result of treaties or agreements negotiated with individual tribal units by Sir James Douglas. Although Douglas signed only one of these agreements - the Nanaimo Treaty of 1854 - which he signed as Governor, several were negotiated while he was both Chief Factor and Governor. The Hudson's Bay Company was in fact an instrument of Imperial policy, and the decision

in Regina v. White and Bob[3] seems to have settled that these agreements had the force and effect of Treaties. Certainly there can be no doubt as to the policy of these settlements, or as to the recognition of the basic facts behind them on which that policy was based.

The early settlement documents all included a surrender, by the Indians concerned, of "the whole of the lands" therein described,[4] on the condition or understanding that

> "Our village sites and enclosed fields, are to be kept for our own use . . . and for those who may follow after us, . . . it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people

[3] Regina v. White and Bob (1965) 52 W.W.R. 193
[4] See Treaty with Teechamitsa Tribe, 29 April, 1850.

forever, it is also understood that we are at liberty to hunt over the unoccupied carry on our fisheries as formerly. "[5]

The pertinent facts emerging are:

(a) The Indians surrendered "the whole of the lands" except those parts reserved for their own use, and

(b) They retained "the liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly".

In support of the claim based on native title, three separate and important points emerge from a consideration

of these early Treaties. These points can best be made in the form of the following questions:

First, how could the Indians be invited or agree to surrender the whole of the lands unless it was recognized that they had some form of right or title thereto? The answer is self-evident: there was such recognition.

Second, having surrendered the whole, were they adequately compensated therefor? The answer, as will be demonstrated in a later portion of this Submission, is clearly: No.

Third, having been assured of the retention of the liberty to hunt over unoccupied lands and to carry on their fisheries as formerly, have they suffered loss or diminution of those rights since

[5] Ibid.

that time? The answer is equally clearly that they have suffered such loss or diminution and are continuing to suffer it in increasing measure.

It seems clear that the policy of the administration of the Colony of Vancouver's Island was to recognize native title, and to compensate Indians for the surrender of their rights thereunder in cases where that was done. It also seems clear that this was in complete conformity with the policy in effect in the rest of what was to become Canada, which was of course based upon the Royal Proclamation of 1763 which recognized

> "The Possession (by the Indians) of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them as their Hunting Grounds…" (underlining and parentheses added)

> ". . . for the use of the said Indians, all the Lands and Territories not included within the limits of Our Said Three New Governments…"

British Columbia was of course not specifically included within those last mentioned limits at that time, and there has long been a difference of opinion as to whether that Proclamation applied to British Columbia then or when it became a Colony of the British Crown.[6] But whether or not that Proclamation extended to British Columbia as a matter of law, at least with regard to the Colony of Vancouver's Island, (one of the predecessor colonies to the Province of British Columbia) the policy of recognizing an Indian title to those lands not previously colonized by white settlers was in conformity with that in the rest of Canada. The policy further recognized that title could only be extinguished by purchase from the Indians, which right of purchase should be exercised only by the Crown.

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[6] This issue is raised in the Nishga case (Calder et al v. Attorney-General of British Columbia) now before the Supreme Court of Canada. The trial judge and the B. C. Court of Appeal have both held that it did not apply. This case, and the issues involved, will be referred to again later. [*Secretarial Note (2023):* the Calder decision from the Supreme Court of Canada in 1973 accepted the Nishga appeal, ruled the Royal Proclamation 1763 applied in BC, and overturned the lower courts' decisions – confirming that the Snuneymuxw/Nanaimo treaties were "treaties" in the constitutional sense.]

The instructions from the Colonial Office to the Governors of the Colony of British Columbia are replete with passages which confirm the policy, as are the replies thereto. Two extracts will serve to illustrate this. The first is July

31, 1858 from Sir E. B. Lytton, to Sir James Douglas when he was Governor of both British Columbia and Vancouver's Island, containing the following:

> "Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with natives for the cessions of land possessed by them, that substance should be supplied to them in some other shape . . ."

The second is from Lord Carnarvon, in 1859:

> "…in the case of the Indians of Vancouver Island and British Columbia Her Majesty's Government earnestly wish that when the advancing requirements of colonization press upon lands occupied by members of that race, measures of liberality and justice may be adopted for compensating them for surrender of the territory which they have been taught to regard as their own."

There has also been controversy surrounding the question of what was, and what should be, the policy with respect to Indian title and the acquisition thereof and settlement with the Indians therefor, after the time when British Columbia entered Confederation in 1871. But it is clear that the position of the Federal Government at that time was in favour of recognition and acquisition. The Federal Government in practice retreated from this position from time to time in respect of individual areas in order to reach a settlement with British Columbia, but they have never previously rejected the principle; and the fact remains that the Indian people of British Columbia have never abandoned their position

or their claims based thereon. It is the Federal Government which has the continuing responsibility for the welfare and interests of Indians, and to which this continuing claim for redress is therefore properly made.

The constitutional authorities for this position are found in Sections 91(24) and 109 of the British North America Act. Section 91(24) reserves to federal jurisdiction legislative power in relation to "Indians and lands reserved for the Indians". Section 109 reserves to the Provinces all lands "…subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same".

An important illustration of the powers conferred on the Federal Government is found in 1875 when the Federal Government disallowed the British Columbia Crown Lands Act of 1874.[7] Among the reasons given by the Federal Minister of Justice for the disallowance of the legislation was that, with slight exception, the Indians of British Columbia had never surrendered their lands to the provincial government or the Imperial Crown and it was contrary to the policy of England, and later Canada, not to compensate Indians for surrender of their lands and the Act made no provision. for compensation.

2. Actual Treatment

Another point is clear. If the claim based on native title be resisted on the ground that native title to all lands in British Columbia has been extinguished, the question arises: what were the circumstances of that extinguishment? In the case of those comparatively few instances where it was surrendered by formal treaty or agreement, some form of compensation or consideration was given therefor. The question in these cases now is: was that compensation fair and adequate? For the remainder, the extinction of title - if in fact it has been extinguished - was not accomplished by negotiation nor accompanied by compensation measured by the value of the rights of occupancy and use formerly

[7] Canada Gazette, Vol. 8, No. 33, July 1874 to June 1875, p. 1134, published Saturday, March 20, 1875.

enjoyed. At various times Reserves were set aside for their exclusive use, but even there the title is vested in the Crown, and their former right of occupancy and use of the remaining lands has been effectively denied. The same question therefore arises: was that treatment, or lack of compensation, fair and adequate?

Put another way, either the title was taken and the rights extinguished by the exercise of some right of an occupying power, exercised through the prerogative of the Crown, in which case the title was in effect expropriated without compensation; or if there was no formal extinction or expropriation, the title still exists but the Indians have been effectively denied the rights to use and occupancy, again

without compensation. The basic question, in this Submission, remains the same: is this fair treatment and, if it is not, what is the fair treatment and/or adequate compensation for what has been done.

3. Recent Recognition.

The existence of this native title has been recognized by Statute of Canada as recently as 1943, and of British Columbia in the revised Statutes of 1960. We refer to Chapter 19 of the Statutes of Canada, 1943-44 and Chapter 187 of the Revised Statutes of British Columbia, 1960. Those reciprocal Acts give effect to the agreement between Canada and British Columbia regarding the development of Mineral claims on Indian Reserves in the Province, and each one contains as a schedule the Agreement of 1943 itself, in which is found the following opening provision:

> "Whereas from time to time Treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to territories now included in the Province of British Columbia, such considerations including the setting apart for the exclusive use of the Indians of certain definite areas of land known as Indian Reserves;"

Of course the fact is that most of the Reserves in British Columbia were not set up as a result of Treaties, that the consideration paid under the Treaties was not meaningful and that there was really no consideration paid for the taking

over by the white men of the rights of the Indians to their other territories: in by far the greater part of the province, as has already been said, although certain tracts were set aside as Reserves, title thereto is vested in the Crown and the former rights of occupancy and use of the remainder have been denied. However, the salient fact for the purpose of this claim is that as late as 1943 the Government and Parliament of Canada recognized that there had been native title and that that title had given the Indians "personal and usufructuary rights to territories . . . in British Columbia".

In addition to this recent domestic recognition, such title has been recognized in other jurisdictions - e.g. Spain as a colonizing power, Great Britain in North America and her other then colonial possessions, by the United States and, as seen earlier, by Canada. Authorities argue strongly that it is a doctrine of international law and that there is therefore a presumption that Canadian law corresponds to it. It is surely too late for Canada now, either expressly to take the position that we are not going to recognize that there was such title or, while paying service to the concept, to imply that it is of no practical application in the sense of founding ascertainable claims on its existence.

4. Summary

Quite simply, therefore, a claim is hereby presented

to the Government of Canada on the following basis:

(a) That the Indians of British Columbia had native title to the lands formerly used or occupied by them;

(b) Over the years since the arrival of the first white settlers, the Indians were progressively and are now totally denied the rights which that title conferred insofar as the land itself is concerned, and are progressively being deprived of the rights to hunt and fish over those lands;

(c) That this has been done in a very few cases by agreement but with only nominal compensation, and in all other cases without agreement and without compensation;

(d) That the Government of Canada must now accept the validity of the Indian claim based on native title and agree with the Indians of British Columbia on suitable terms of reference for settling that claim.

E. PLACING AND TIMING OF THE CLAIM

The Union of B. C. Indian Chiefs has decided to present its claim direct to the Government of Canada at this time for the following amongst other reasons:

1. The actions which have resulted in the present situation of the Indians and which therefore give rise to this claim have been acts of state, first of the colonial power and later of the Government of Canada, extending for a period of over one hundred years. The remedy for such a situation can only be by a further act or acts of state, necessarily involving legislation to redress the wrong.

2. The land claim of the Indians of British Columbia is, apart from the matter of hunting and fishing rights, primarily for compensation, not for a declaration of present title. The claim arises out of actions carried out at different times, in different areas, and during periods when there were different authorities responsible for the general system of land tenure and land grant - respectively the Hudson's Bay Company, the Colonial Administration, and the Provincial Government. The Federal Government has the constitutional responsibility for Indian affairs, and therefore has the responsibility for accepting and dealing with their claims based on native title. If the Government of Canada should feel that, having accepted the Indian claim, it may have a claim for contribution or otherwise howsoever against the Government of the Province, that is a

matter that must be sorted out between those two Governments, and not be allowed to prejudice and delay the dealing with the claim itself.

In putting forward the claim in this manner at this time, we recognize that there is a case involving native

title in British Columbia presently before the Supreme Court of Canada - the Calder case previously referred to. In this action, the Nishga Tribe submits in effect that its title to its tribal lands has never been extinguished, and seeks a judgment so declaring.

In our Submission, it is no disrespect to the Court, and will in no way involve dealing with a matter which is *sub judice*, for the Government of Canada to accept our claim and deal with it now.

The claim hereby put forward is on a quite different footing from the contention of the Nishga Tribe. The claim here does not deal with the question of whether native title still exists: our Submission is that the Indians did have native title prior to the coming of the white settlers (the Courts have already settled that question) and that whatever may be the present situation with regard to the title itself, the Indians of British Columbia have been and are now effectively denied the rights to the occupancy and use of the land which that title carried with it, and have therefore been deprived of the benefit of that title without any, or without adequate, compensation. As previously stated, the claim here is primarily for compensation, not restitution or a declaration of present title. And for the reasons stated, only the Government and Parliament can deal with that claim.

Furthermore, the claim hereby put forward requires to be dealt with on its merits and its merits will not be affected one way or the other by the outcome of the Calder appeal. For ours is a claim for compensation based on the denial of rights of occupancy and use inherent in native title. If it be held by the Supreme Court of Canada that the title in question in that case still subsists, our claim for denial or loss of rights of use will still have to be dealt with - unless it were to be supposed that the Government would then restore the whole of British Columbia to the Indians for their occupancy and use. If it be held

that the title in question no longer exists, then that does not alter the fact of its previous existence, and the claim for compensation for loss of the benefit of that title again remains unaltered.

It is therefore clear that the Government should accept and deal now with the claim hereby submitted, without delay, because this claim will not be affected by the outcome of Calder, nor in doing so will the Government in any way be affecting or prejudicing a matter which is *sub judice.*

F. STATEMENT OF THE CLAIM

At this point it is appropriate to state the basic claim in summary form as follows:

a) That the Indians enjoyed native title to the lands comprising British Columbia prior to the settlement of the area by white people, and that this title conferred upon them the enjoyment of a personal and usufructuary right of occupancy and use of those lands, such use including the right to use and exploit all the economic potential of the land and the waters adjacent thereto, including game, produce, minerals and all other natural resources, and water, riparian, foreshore, and offshore rights.

b) That at various times and by means varying from simple proclamation, through adverse occupation to specific legal enactment, the Indians were deprived of the rights which this title conferred. In the words of the Treaties and in view of Colonial legal concept, the land became “the entire property of the white people forever"; again, in the view of the legal system later imposed on the entire Province, the entire territory became Crown lands to be disposed of as the Crown saw fit, and the Indians no longer had the right of occupancy and use which their title conferred upon them.

(c) That under the early Treaties or agreements the "surrender" of their rights by the Indians was accompanied by a purported "cash compensation" which even if actually received by the Indians, was so paltry even in terms of those days' values, as to be totally inadequate and inequitable in

any real sense of the meaning of those words. In fact, the Indians never received any "cash compensation" from these early Treaties, but were usually "paid" in kind - most particularly Hudson's Bay Company blankets.[8] In particular, under the Treaties surrendering the lands around the Victoria area, a cash consideration was stated in the Treaty as 2 pounds 10 shillings per man. This "consideration" was the retail selling price of three Hudson's Bay Company blankets and the "cash" the Indians actually received was the three blankets. These three blankets had a wholesale price of 17 shillings per blanket.[9] With the exception of Treaty No. 8, in the rest of the Province no consideration at all was paid to the Indians in terms of direct

compensation for land taken or rights lost.[10]

(d) That in addition to the other rights incidental to native title, up to the time of settlement by the White man the Indians in British Columbia collectively enjoyed the unfettered right to hunt and fish over all the territory within the province; that in certain cases (where there were Treaties or Agreements) the Indians were assured of the liberty to hunt over the unoccupied lands and to carry on their fisheries as formerly; that with respect to hunting, the rights guaranteed by the

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[8] The only time the Indians actually did receive any cash compensation was under Treaty No. 8 whereby each Chief was to receive $32.00, each Headman $22.00 and each ordinary man $12.00. As well, the Indians were to receive some farming equipment, ammunition or other goods, and annual payments of $25.00 for each Chief, $15.00 for each Headman and $5.00 for each ordinary man.

[9] Duff, w., Fort Victoria Treaties, B. C. Studies, Fall 1969, see for example Treaty with Teechamitsa Tribe, 29 April, 1850.

[10] As to the general proposition that there was total lack of real compensation or consideration for the rights lost, it is sometimes suggested that the setting aside of the Reserves in perpetuity for the eclusive benefit of the Indians constituted the consideration. Inasmuch as the Indians had previously enjoyed the complete and exclusive right to the use and occupancy of all the lands, it is impossible to support an argument that setting aside a fraction of what was formerly enjoyed exclusively is “consideration” or “compensation” for taking away the remainder, which had been theirs anyway.

Again, it is sometimes argued that the annual grants to the Indians in British Columbia and/or the welfare and other services provided to the Indians over the years should be regarded as "compensation". With respect to the one argument, we state without hesitation that the total of all the grants is miniscule in comparison with the value of what was taken; and with respect to the other, that since Indians are also citizens of Canada, that since all citizens enjoy the benefits of welfare programmes and services and since the standards of welfare and other services extended to white citizens compare more than favourably with those extended to Indians, it is impossible to accept that these are "compensation" for what was lost. Indeed, the absurdity of this argument is apparent from the fact that its necessary implication is that welfare and other services to non-Indians (services of which the Indian had no need prior to white settlement and his confinement to Reserves) is “compensation” for being white.

Treaties or Agreements as well as those previously enjoyed in areas where there were no agreements, have in fact been largely denied or eroded by Provincial game laws as to seasons and limits, by measures such as the Migratory-Birds Convention Act or by subsequent occupation by white

settlers - all entirely without compensation; but with respect to fishing rights, while the traditional right to take fish as formerly has not been denied or eroded to the same extent as has been the right to hunt, nevertheless the right is under increasing pressure and attack as for instance with respect to the right to take salmon or kokanee.

(e) That these rights were of real value and compensation or adjustment should now be made on the following basis:

(i) With respect to land (including minerals and timber) the rights have been taken from the Indians without any, or without adequate, compensation; that although valuation now is difficult, they are capable of valuation in terms of money, and that since it is not practical now to talk of restoring the rights to occupancy and use of the land comprising British Columbia, compensation for what has been taken is the only just and equitable course;[11]

(ii) With respect to the guarantee of continuation of hunting rights, the Indians have never consented to the taking away of these rights nor agreed to be bound by International Treaties or other laws limiting them; accordingly, the claim in the first instance is for restitution; where this is impossible, by reason of jurisdictional or other obstacles, the claim is for compensation;[12]

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[11] The reference to money compensation or award here and throughout this Submission must be read subject to the qualification below under the heading “Land Adjustment”.

[12] We wish to make it clear that the term “hunting rights” as used here includes the hunting of seals and whales on or in the sea, and that the problems created by the Pacific Fur Seals Convention Act, the Whaling Convention Act and the Conventions themselves are therefore included in the claim, and that what is required is restoration of the rights to hunt, or compensation.

(iii) With respect to fishing rights, since under the B.N.A. Act the entire field is given to the Parliament of Canada, no problem of divided jurisdiction arises as in the case of hunting. It is true that the Government of Canada has placed limitations on its jurisdiction by such measures as the International Salmon and Halibut Conventions, and restoration of the full rights of Indians to carry on their fisheries as formerly may be subject to the necessity of some negotiation on this account. Subject thereto, the claim here is for preservation of the rights without further erosion, and restitution where the rights have been abrogated, subject to a claim for compensation where the value or practical advantage of the right has been diminished by actions such as industrial pollution, construction of power dams etc. which have diminished or destroyed the fishery beyond hope of restoration. The particular heads of the claim for preservation and restoration would require to be carefully canvassed, but would include such matters as the traditional use of herring eggs, cessation of interference with the traditional right to take kokanee, the right to take and use fish for trading and commercial purposes, at least as between Indians as formerly if not for wider commercial uses, the right to use traditional fishing stations etc.[13]

Land Adjustment

While the basic Claim is for compensation, and it seems that in general the practical way to deal with the Claim is by means of a money award, we wish to make it clear that this general statement of the Claim is without prejudice to the settlement of certain current or potential individual Claims for adjustment of the boundaries or extent of Reserves.

[13] Insofar as the problem of the Indian as a commercial fisherman is concerned, it is generally conceded that since the right of fishery granted was "to carry on our fisheries as formerly", the restoration of this right should not be argued as carrying with it all the forms of commercial fishing as now developed, on a non-restricted basis. It is restoration of the former rights, and their preservation, that is desired. However, in settling the details of this aspect of the Claim, account will have to be taken of the fact that the Indian fisherman was not just some sort of crude and primitive savage fishing solely for his own and his family's food: sophisticated forms of fishing had been developed, including the use of weirs, reef-netting etc., and as in the case of game, the produce of the waters supported an abundant life and formed an article of trade and commerce as between the Indian Bands.

Reference to some of these claims is made in Part "J" of this Submission dealing with Riparian or Foreshore Rights. Other claims concern such matters as the granting of additional lands to adjust or compensate for lands taken for easements or rights-of-way, continuing claims for enlargement of present boundaries of some Reserves to compensate for lands taken from those Reserves without consent or without compensation, or because Reserves when set up were inadequate to accommodate the population, adjustment of the result of the McBride-McKenna Commission settlement etc.

All these claims settled will also have to be adjusted and settled - some under the Foreshore Rights claim hereby made part of this Claim, some by a continuing Claims Commission to deal with individual grievances or claims as distinct from this general Land Claim, others by individual negotiation or settlement with the particular party or authority involved. The general question of additions to and title to Reserve lands also requires settlement eventually, although where this requires a general policy decision, discussion must await the acceptance of this Submission and agreement at least in principle on the settlement of this general Claim.

The point is that although the general Claim is for compensation in terms of money, compensation in some cases in terms of land adjustments or additions must not be taken as being thereby abandoned or ruled out.

G. EXTENT OF THE CLAIM

1. Geographical

The claim as submitted is based on the position that native title extended to all the territory now included in British Columbia.

While native title is a concept well known and recognized in both domestic and international law, it is not comparable to a title system as we understand such a system today. Generally speaking, it is

based on use and occupancy, and has been defined in Canada as being "a personal and usufructuary right".[14]

These features of the title, and the fact that proof of native title before the United States Indian Claims Commission requires "proof of actual exclusive and continuous use and occupancy for a long period of time . . ."[15]sometimes gives rise to the suggestion that the claim based on native title can relate only to areas in actual and habitual use in some literal sense.

However, claims before the U. S. Claims Commission

proceed not upon common law or on international law, but under the statute law of United States and upon the terms of reference derived therefrom. In Canada we do not have this limitation, and there are solid grounds for the contention that the claim here relates to all the territory of the Province. The first such ground is the argument based on the nature of Indian life riot to white settlement and the setting up of the Reserve system, the second is the argument based on statements or decisions of authorities.

The first ground can be summarized as follows. In their original condition, the Indians in British Columbia derived their living in part only from actual cultivation of the soil, but in the main from the natural products of the forest, land and water - i.e. actual timber products, as well as game and fish. Thus while there were established and identifiable areas where they had their settlements and in some cases their cultivated lands, they had also the much larger areas which each tribe used for its traditional timber production, berry-picking, hunting and fishing activities. The records by which these areas might be capable of precise identification or delineation as tribal regions are less available today than are the records with respect to the settlements; nevertheless research has been done and does indicate that such areas embraced the entire Province.[16]

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[14] St. Catherines Milling and Lumber Co. v. The Queen (1888) 14 A.C. 46.

[15] Native Rights in Canada, Supplementary Report - "United States Indian Claims Commission", by Professor Kenneth Lysyk, presently of the Faculty of Law, University of Toronto.

[16] Wilson Duff, The Indian History of British Columbia (Anthropology in British Columbia Memoir No. 5, 1961 [secretarial note - possibly 1964], Victoria, BC.

Furthermore, even though within those areas the tribes may not have occupied or used the remote or mountainous portions in the literal sense, they nevertheless used them in a very real sense. Being so dependent upon the existence of fish and game and other natural products for their continuing livelihood and in this sense using the waters and lands for this purpose, they were in a very practical sense dependent upon the balance of nature and used all the physical features of land and water that made up that balance. Thus if the Indian could be said to use the waters of a certain river or lake - or of the sea within a certain area - for his fishing, he could also be said to be using the areas which are the sources of the head waters within that area. And if he used only a certain area of forest for the physical act of hunting, he nevertheless used also the higher and more remote areas which were, for many species, the breeding and feeding grounds for the game which he found and took in the other areas.

In this sense, therefore, there is support for the position that, quite apart from the areas which the tribe occupied or used in the literal physical sense, they did continuously use the more remote areas contiguous to, and in many cases serving to mark the boundaries between, the individual tribal areas. It is true that this argument would not be apt in support of a claim based on a system of legal title; but we are dealing with a claim based on native title, and it is

clear that the nature and extent of that title does derive from, and is properly to be measured by, the nature and the way of the life that gave rise to it.

The second ground for the general position that the title related to the whole of the territory in British Columbia is found next in the opinions of experts, and from analogous decisions of United States Courts, and the recent report of the United States Federal Field Committee with respect to native rights in Alaska. The following is a summary of three such opinions or decisions:

(a) Professor Wilson Duff, Anthropologist, of the University of British Columbia has spent over two decades studying the Indians of British Columbia and has concluded:

"It is not correct to say that the Indians did not 'own' the land but only roamed over the face of it and 'used' it. Thy patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they didn't subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food-gathering. Even if they didn't sink mine shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as a source of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the Province

was formerly within the owned and recognized territory of one or other of the Indian tribes."[17]

(b) Although, as seen, the United States statute setting up their Claims Commission restricts the Indian claims before the Commission to lands "actually in their use and occupation", the U. S. Court of Claims has given a wide interpretation to the extent of Indian title. Thus in The Tlingit and Haida Indians of Alaska v. The United States,[18] Judge Laramore was asked amongst other things to decide "whether the claimant Indians had Indian title to the lands and waters claimed in Alaska . . . and if so, the extent of land and waters so owned".

The Court held that the Indians did have a claim and concluded:

[17] Wilson Duff, op. cit.

[18] The United States Court of Claims #47900, decided October 7, 1959.

"We do not mean to depart in any sense from the rule of long standing that Indian title to lands must be shown by proof of actual use and occupancy from time immemorial. But as is obvious from a study of the many cases involving proof of Indian title to lands both in this Court and at the Indian Claims Commission that where the Indians have proved that they used and occupied a definable area of land, the barren, inaccessible or useless areas encompassed within such overall tract and controlled and dominated by the owners of that surrounding land, as well as the barren

mountain peaks recognized by all as the borders of the area of land, have not been eliminated from the area of total ownership but rather have been assigned no value in the making of an award, if any, to the Indians."[19]

(c) In October, 1968, the Federal Field Committee released its report "Alaska Natives and the Land". Having noted at page 86 that:

"The Alaska Native land claims are primarily based upon 'aboriginal use and occupancy' - and the 'rights' associated with this use. Understanding of 'aboriginal use and occupancy' in both an historic and a current context is of primary importance.",

the Committee made the following (amongst other) findings of fact which are relevant here:

"The aboriginal Alaska Native completely used the biological resources of the land, interior and contiguous waters in general balance with their sustained human carrying capacity and this use was only limited in scope and amount by technology.

"In their use of the biological community for livelihood the Native people 'occupied' the land in the sense of being on and over virtually all of it in pursuit of

[19] The United States Court of Claims #47900, decided October 7, 1959.

their subsistence, but they did not 'occupy' the land in any agrarian or legal sense as understood by Angio-American Jurisprudence."

2. Specific Extent

(a) Surface Rights

The claim for compensation includes a claim for

the loss of use of the surface rights including timber as well as hunting and fishing, and water, riparian and off-shore rights.

(b) Mineral Rights

The rights of occupancy and use on which this claim is based included the right to exploit minerals as part of the economic resource of the land. It was not until the imposition of a system of land tenure derived from colonial (English) law that the right to exploit minerals was separated from the right to occupy and use the land.

The claim accordingly includes compensation for minerals. This is supported by the authorities quoted in the section immediately following.

3. Valuation

The value to be attributed to the rights in question is the value at the time of taking. Although native title is defined as the right to use and occupy lands, it was held in The Tlingit and Haida Indians of Alaska v.

The United States[20] that native title is as valuable as a fee simple title. Referring to this case, Professor Lysyk in "Native Rights in Canada" states:

> "Accordingly it (native title) includes all the natural resources of the lands involved including vegetation, timber, mineral resources etc."

and further down the page he states:

> "The approach, in short, is to weigh the factors that might be expected to affect sales prices in the light of knowledge existing at the time of taking."[21]

In a paper prepared for the Union, and entitled "Approaches to Settlement of Aboriginal Title Claims in Alaska", attached as Appendix "C", Professor Lysyk further elaborates on this principle of valuation:

> "Consistent with a line of earlier authority, the Court[22] took as its starting point the proposition that "equitable and just compensation for land held by Indian title is measured by the date-of-taking fair market value of the uncompensated for property rights." The Court elaborated on hr general approach to valuation, as follows:
>
> > "Ownership by Indian title, although merely a possessory right of use and occupancy and, therefore, less than full fee simple ownership, is the complete beneficial ownership based on the right of perpetual and exclusive use and occupancy. The value of land held by Indian title is the same as that held in fee simple and not the value to its primitive occupants relying upon it for subsistence . . . Absent statutory modification, aboriginal title carries with it the same standard of valuation that would be applicable were the property held by recognized Indian title or by fee simple ownership . . .

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[20] The United States Court of. Claims, op. cit.
[21] Native Rights in Canada, op. cit.
[22] [secretarial note – footnote illegible]

> The jurisdictional act neither by its terms nor its legislative history provides for any other valuation standard . . .”

The value of the land includes the fair market value of its mineral content."

Although the value may have to be assessed at the dollar value at the time of taking, payment should of course be in terms of today's dollar equivalent of those former dollars.

4. Date of Taking

It follows that, in determining the value, a decision will have to be made as to the date of taking. We recognize that there are difficulties here, and we are not at this point, for reasons which will appear, making a submission in detail as to the date.

There are two possible approaches:

> (a) That the date was the date at which the Colonial land laws took effect - 1849 with respect to Vancouver Island and 1858 with respect to the Mainland. This assumes that on and from these dates, by the fact of Proclamation or assertion that the territories now belonged to the Crown, these land laws took precedence over native laws and thereby abrogated the exercise of the rights of occupancy and use conferred by native title. This approach has the advantage of simplicity and finality; however it is open to the objection that in fact the rights of occupancy and use were not actually or physically ended or denied in a blanket

> fashion, but the incidents of those rights - possession and use of the surface itself and the minerals, rights to hunt and fish - continued in many areas for many years thereafter. These rights were in fact progressively eliminated, the actual date of effective physical denial varying from area to area in accordance with,

respectively, (inter alia) the pace of white settlement, various enactments with respect to land and the setting up of Reserves, the enactment and enforcement of fisheries laws and regulations. This feature of the situation is enlarged upon below, in our Submission as to the proper method of determining the date for valuation

(b) That the date varies from area to area in accordance with the date or dates of the effective physical denial of the benefits of native title, the actual dates for valuation purposes being thus for determination in accordance with the facts of each situation.

This approach has the disadvantage that a variety of dates would thus be involved, requiring separate valuation of separate areas. However, it has the advantage that, unlike the first approach, it accurately reflects the physical facts of the situation and is

entirely consistent with the basis on which this Submission and the Claim is founded.

For the Claim hereby submitted is independent of the question of whether native title has in fact been legally extinguished, but rests on the fact that the benefits of that title - the rights of occupancy and use - have been abrogated or denied without any, or without adequate, compensation. The valuation of the Claim depends therefore upon the time or times at which the benefits of those rights were physically denied.

We accordingly strongly urge that the date of taking for the purpose of valuation be, for the various definable areas of the Province, the date at which the various rights of occupancy and use of those areas were physically lost to the Indians.

On this question, we agree that there may be some difficulties in arriving at precise dates. The difficulty stems from the fact that in some areas for many years after 1849 and 1858 respectively, the Indians did in fact continue in occupancy and use of both the surface and the hunting and fishing rights; these rights were not physically ended at one time, but progressively over the years and by varying degrees and methods.

We submit, however, that a logical and reasonable basis with respect to land and minerals is to take, for the few areas which were the subject of Agreements or Treaties, the dates of those Treaties, and for the areas occupied by Bands which were not the subject of Treaties, the date upon which the Reserves were established - or upon which the last Reserve was established - for the Bands occupying those respective areas.

With respect to the Treaty areas, the facts speak for themselves: on the dates of the Treaties, the Indians concerned ceded the land, except for their actual settlements. With respect to the non-treaty areas, it is appreciated that the setting up of the Reserves did not operate at law to diminish the rights of the Indians to the lands outside the Reserves.[23] However, the establishment of the Reserve or Reserves in each area can be said to amount to the conclusive physical assertion by the white man that he had the rights to the lands, as against the Indian, and to determine the small areas to be set aside for the exclusive occupancy and use of the Indian, and to control and determine the disposition of the rights to occupy and use the remainder of the lands. It seems therefore that in determining the point of time at which

the claim for compensation for land should be valued, no better guide can be found than to use the dates upon which these physical arrangements were made as being the date of taking for land and minerals in the area concerned.

[23] See, for example, proceedings of the 1913-16 Reserve Commission, in its meeting with the Kuldoe Band at Hazelton, B.C., on July 13, 1915 (on microfilm in Provincial Library, Victoria, B. C.)

With respect to hunting and fishing rights, it is submitted that the same principle should be followed: that the valuation of those rights which have been lost and which are not to be or cannot be restored, be based on the dates upon which the various restrictions were imposed by enactment of game and fishery laws and regulations and their extension to or application against the Indians.

The determination of the respective areas, the effective dates with respect to each area, and the valuation to be made accordingly, are all perfectly possible, but it is a field requiring detailed research and discussion. It is therefore not one on which it is appropriate to suggest specific dates in this Submission: rather these are precisely the types of question for determination in detail by the Commission or Committee procedure which we are asking should be established for the purpose of settling this Claim in detail. Authority to examine and determine these matters should of course be included in the terms of reference.

Finally in this connection we emphasize the point, made later in detail in parts "H" and "K" of this Submission,

that while there may thus be a number of separate determinations of value because different dates apply in different areas, these should not be treated as individual awards to individual bands or tribes, but the total so found should constitute one award for the benefit of the Indians of British Columbia.

5. Interest

The claim includes simple interest at five percent per annum on the value of the rights taken without formal agreement, from the date of taking to the date of payment, on the grounds that this is a compulsory taking, the Indians were not consulted and no compensation was given. Interest at the foregoing rate should also be paid where additional compensation is awarded to provide adequate compensation for lands surrendered under Treaties.

H. PROCEDURES FOR DEALING WITH THE CLAIM

Experience in other jurisdictions suggests two alternative methods for dealing with and settling the Claim in detail. One is the Claims Commission method, the other is an overall Legislative Settlement. Although, for reasons which will be indicated, we have on balance some preference for the Claims Commission method, either method would be acceptable, subject to the general conditions hereinafter set forth.

The basic point which is emphasized is that the detail of settlement involves first the essential policy decision by the Government of Canada that the moral and legal responsibility for accepting the principle of the Claim based on native title can no longer be denied and that the necessary measures to give justice to the Indians of British Columbia will be put in hand at once.

It follows that, whichever method is followed, the next essential requirement is the enactment of legislation reflecting the policy decision. The details of the legislation and the means by which the decision is implemented will however vary in important particulars depending on which method is adopted. We therefore summarize the alternatives and some of the implications in what follows.

It is obvious that the largest question, once the Claim is accepted in principle, is how to value it. General

principles have been outlined earlier as part of this Submission (Part "G", Sections 2, 3, 4 and 5; pages 34 to 42) but these or any other principles will require to be applied specifically by some body to determine the total value or solution to the Claim here made in general. It will therefore be necessary to refer the investigation and determination of these matters by some means, constituting clear terms of reference, to a Commission or Committee.

(a) Claims Commission

If the Claims Commission method be followed, what will be required is the enactment of legislation

i)Accepting the justice and validity of the Claim as set out herein;

(ii) Recognizing that the Indians of British Columbia, prior to white settlement, had rights of occupancy and use of the territory now comprising British Columbia, in accordance with the concept of native title;

(iii) Recognizing the nature and extent of those rights as set out earlier in this Submission;

(iv) Recognizing that the Indians of British , Columbia have been denied the benefits or those rights without compensation;

(v) Expressly providing that compensation will be assessed and paid for the denial and/or loss of those rights generally and that restitution will be made where possible;

(vi) Setting out clearly the factors that are to be taken into account in valuing the rights thus denied or taken and fixing the compensation;

(vii) Providing for the appointment of a Commission to value the rights thus denied or taken;

(viii) Empowering the Commission to hold hearings to determine the value in detail and providing that Submissions may be made by the Indians on value, compensation and restitution;

(ix) Empowering the Commission to make findings of value in specific cases and to make a total award on the conclusion of its hearings;

(x) Empowering the Commission to deal also with the questions of riparian or foreshore rights as set out in Part "J" of this Submission as part of the general Land claim;

(xi) Further empowering the Commission to deal with questions such as Land Adjustments referred to under that heading in Part "F" hereof, and to deal with the claims and grievances of individual Bands on a continuing basis, and laying down procedures therefor.

(b) Legislative Settlement

The object of the Legislative Settlement method is to combine the statutory recognition of the Claim and the actual financial settlement thereof into one legislative enactment, whereas the Commission method separates the two processes. However, there will in any event have to be an inquiry to determine actual values: the difference would seem to be mainly whether that process takes place before or after the legislation which authorizes the settlement.

In a paper prepared for the Union, entitled "Approaches to Settlement of Aboriginal Claims in Alaska" (attached as Appendix "C") Professor Lysyk has outlined the procedures followed prior to the introduction of legislation into the United States Congress intended to settle those claims. A Federal Field Committee was appointed which, after extensive inquiries recommended an overall lump sum settlement and the method of its payment and administration. The legislation, if enacted, will incorporate those provisions to the extent to which Congress approves. The same process could be applied to the Claim of the British Columbia Indians.

We do not wish to appear to dictate how the Government should conduct the detail of its relations with Parliament, but it occurs to us that if the Legislative Settlement method is followed, it might be appropriate to have the investigation and settlement of the value of the Claim conducted by a Parliamentary Committee.

In any event, the first essential requirements remain the same as outlined above: namely, a policy decision to accept the Claim followed by legislation (either a Bill or Resolution introduced by the Government in Parliament;

(i) containing provisions to the same set out in Items (i) to (vi) under the Claims Commission method above;

(ii) setting up a Parliamentary or other Committee to investigate and report upon the value of the Claim and other matters referred to above;

(iii) making it clear that it is the intention, upon receipt of the report, to introduce further legislation embodying an overall final settlement.

It would be possible then, after the investigative process is completed, to bring in the overall legislative settlement.

(c) The Preferred Method

With respect to the U. S. experience, the argument in favour of the Legislative Settlement method is generally put forward on the grounds of its relative speed and comprehensive nature, while proceedings before the U. S. Claims Commission have been said to be slow and expensive. However, as pointed out earlier, the Legislative method also involves an investigative process - in the case of the Alaska Native Claim, by a Federal Field Committee over a period of two years or more - which must be completed before the final settlement can be legislated. This procedure the Government has not yet started in Canada, so there will be a delay factor here whichever method is adopted.

Furthermore, there is an objection to the Legislative Settlement process in that even although there may be a commitment in principle to introduce final legislation

embodying an overall settlement when the committee has reported, that report will take considerable time, and there is no means of enforcing the commitment. Whereas if the Claims Commission method is followed, the final legislation can be introduced at once, and the Commission empowered to award the settlement, without necessity of further legislation. The same or contemporaneous legislation can set up the method of paying and administering the award so that no further basic legislation would be needed if the Claims Commission method is followed.

Also, the objections to the Claims Commission method as followed in the United States arises in considerable part because the procedures before that Commission involve the necessity of the Indians establishing in each case the fact and the extent of their title, as well as the value. Since all these matters are in issue before that Commission, the process is slow and costly. Under the method advocated here, however, the fact and the extent of the rights previously enjoyed by the Indians as conferred by their native title would have been recognized by the legislation setting up the Commission, and would not be in issue. The real point of inquiry would be the value and the possibility of restitution, so that the cost and time of the Commission procedure here would be much less onerous.

Finally, in addition to the basic claim based on Indian title, there is in British Columbia the question of foreshore rights which, as stated below, we wish to have dealt with as part of the general land claim. Although the hearings might proceed separately from hearings in connection with the valuation of our land claim, the nature of the inquiry and of the adjustments or settlements to be made under this head, are such as are much more appropriately dealt with by a Claims Commission and really do not permit of being satisfactorily disposed of by an overall legislative settlement.

On balance, therefore, our preference is for a Claims Commission, and we submit that this is the procedure which should be followed. We wish to make it clear, however, that while there might have to be a series of hearings to determine value in different areas, there should not be separate awards to individuals, but a total award to be paid and administered as outlined below.

However, an essential point upon which there must be agreement before there can be any settlement, is that the Indians have the right to a voice in the selection of the Commission. This could be satisfied by providing a three-man body, of whom one is to be appointed upon nomination by the Indians and one by the Government, these two then agreeing upon a third person who shall be appointed as Chairman. It should also be agreed that the Indians will be consulted in the framing of the legislation which would set up the terms of reference

J. RIPARIAN OR FORESHORE RIGHTS

The Indians of British Columbia were given the clear understanding that when Reserves were set up which fronted on water, whether tidal or fresh water, then they would have the full right to use and enjoy the foreshore - that is, they had rights to cross and use all lands down to the water's edge along the full front of the Reserve, whether at high tide or low tide, high water or low water, and thus of course had full rights of access to the water.

As recently as 1924 the Indians had been assured by the Provincial Government that their foreshore rights would be protected in the same way as any other landowner or occupier of land. Indeed, this very position was stated in a letter from John Oliver, the then Premier of British Columbia, to the Superintendent General of Indian Affairs on April 23, 1924.

In many instances these foreshore or riparian rights have been eroded or abrogated by actions of the Federal or Provincial Governments or their respective agencies. Accordingly, these rights should now be restored to the Indians and preserved for them by the Federal Government by whatever measures are necessary, for instance, by purchase, negotiation or action under the Quieting Titles Act. Where restoration proves to be impossible, adequate compensation must be awarded and paid for the benefits thus denied.

Although the particular circumstances and the appropriate remedy may vary from case to case, these instances are so widespread and their results so far-reaching in terms of loss to the Indian Bands concerned that the Claim in this respect is included as part of the general Land Claim.

From the time British Columbia entered Confederation in 1871 there has been a controversy over the ownership of foreshore rights. Under the applicable clause in the Terms of Union:

> ". . . the charge of the Indians and the trustee-ship and management of the land reserved for their use and benefit shall be assumed by the Dominion Government. . . and in the case of disagreement between the two governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred to the decision of the Secretary of State for the Colonies."

As a dispute as to the quantity of land to be transferred arose immediately, the actual transfer by the Province was not completed until 1938. However, in 1924, an agreement was reached by the Dominion and Provincial Government: to settle the matter of "Public Harbours" in British Columbia. Each of the Governments passed similar Orders-in-Council (the Dominion, P. C. 941 and the Provincial, 0/C 507) reflecting the agreement. Each Order-in-Council contained a clause whereby the "ownership of all other ungranted foreshore of tidal or non-tidal waters and lands covered with water in British

Columbia . . . belong to and are vested in the Province,"

Consequently in 1938 when the lands set aside as Reserves were actually transferred to the Dominion Government, by Provincial Order-in-Council No. 1036, (which is completely silent as to the disposition of foreshore rights) the Provincial Government adopted the attitude that ownership of the foreshore remains vested in the Provincial Crown by virtue of the agreement of 1924. Unless the foreshore was specifically included in the grant establishing the Reserve, the Indians would only have the rights of access and use over the foreshore.[24]

Despite the Provincial Government's assurances that the Indians would have the same riparian rights as any other landowner or occupier of land these rights have been constantly eroded or abrogated by actions of that Government. Order-in-Council No. 1036 transferring the lands for the use and benefit of the Indians contained a clause reserving to the Province the right to enter upon any of the lands so conveyed

[24] Without such a grant, a Reserve would include the foreshore only if the Reserve was within the Railway Belt and set aside at a time when ownership of foreshores within that belt was retained by the Dominion Government by virtue of the agreement of 1924. Similarly, a Reserve would include foreshore if the Reserve was set up bordering on a national harbour as ownership of the foreshore in that harbour was also reserved to the Dominion Government by virtue of the agreement of 1924.

> ". . . for making roads, canals, bridges, towing paths or other works of public utility or convenience; so nevertheless the land so resumed shall not exceed one-twentieth part of the lands aforesaid . . ."

This clause in effect allows the Provincial Government to expropriate up to five percent of Reserve land without compensation. Further, this clause has been abused in certain instances by the Provincial Government. For example, in 1959 the Tsawwassen Band was subjected to an alienation of some 7.682 acres of their Reserve land for an access road to a new ferry slip. An additional 0.13 acres was also alienated for a highway turnabout and this land included a thirty-three foot right of way which bordered on part of the Reserve's foreshore. The land thereby became a public highway vesting in the Provincial Crown and consequently the Tsawwassen Indians no longer had the right of access to this foreshore.

A similar attitude is adopted by the Provincial Government regarding the matter of accretion where an Indian Reserve fronts on water. Again the Provincial Government argues that if it owns the foreshore (by virtue of the Federal-Provincial Agreement of 1924), then the subsequent transfer of the Indian Reserves in 1938 did not include the foreshore. Consequently an accretion to land forming a Reserve fronting on water claimed by the Provincial Government is an accretion to the foreshore, not to the Reserve.

This attitude is entirely contrary to the common law view of Canada in Attorney-General of British Columbia v. Nielson[25] wherein it was decided that accretion, being a gradual and imperceptual accumulation of land out of the sea or river, belongs to the owner of the land contiguous to and touching upon the water. Thus at common law such accreted lands would accrue to the Dominion Government for the use and benefit of the Indians as the owner of the land contiguous to and touching upon the water.

The Provincial attitude that such accreted lands belong to the Provincial Crown by virtue of their ownership of the foreshore has in certain instances denied the Indians the opportunity to develop such

[25] Attorney-General of British Columbia v. Nielson (1956) S.C.R. 819.

land. For example, in July of 1969 the Musqueam Band claimed some 377 acres of tidal flats as accreted land and requested that these lands be added to the Reserve. The Federal Government refused to transfer these tidal flats for the reason, inter alia, that the foreshores were never included in the Reserve when the lands were transferred to the Federal Government in 1938. Thus, the Federal Government adopted the Provincial Government's argument that ownership of the foreshore remained vested in the Provincial

Government under the 1924 Agreement, therefore the band was directed to negotiate directly with the Provincial Government.

The attitude adopted by the Provincial Government, and now apparently accepted by the Federal Government, is entirely contrary to those respective Governments' position at the time the Reserves were to be set aside when British Columbia entered Confederation in 1871. Consequently the Land Claims question cannot be considered settled until this matter is satisfactorily disposed of.

K. USE OF PROCEEDS OF SETTLEMENT

Since substantial sums would result in total from awards made under the terms of reference contemplated herein, it is essential to consider the questions of who should benefit, and how the benefits should be shared. The two obvious alternatives are:

1. That each case where a Reserve was set up or a Treaty or Agreement concluded be treated entirely separately and that the amount of the award in that particular case be reserved exclusively for the use of the Band or Indians concerned;

2. That while each case forms a separate claim in detail, the totality of the awards be regarded as received under one general claim on behalf of, and be used for the equal benefit of, all the Indians of British Columbia through their respective Bands.

Professor Lysyk has summarized "the basic approach: philosophy, policy objectives and means" in his paper dealing with the proposed Alaska Native Settlement, as follows:[26]

> "The current measures can be said to reflect the general philosophy expressed in the Federal Field Committee reports that the land claims legislation should not only serve as a means of settling the legal and moral claims, but should be seen also as an opportunity to provide a foundation for social and economic advancement for the natives.

> The stated policy objectives, apart from achieving a fair and just settlement of native claims, include maximum participation by natives in decisions affecting their rights and property, the vesting in them as rapidly as feasible of control over the lands and moneys provided under the legislation, and the accomplishment of these objectives without establishing permanent racially defined institutions or rights, without creating a reservation system or lengthy wardship or trusteeship, and without additional tax exemptions or privileges. The rights of natives as citizens of the United States and of Alaska would be undiminished."

Subject to reservation as to the meaning and implication of the term "racially defined institutions or rights", and subject to the further modification noted below,[27] we submit that these policy objectives form suitable guidelines for the use and administration of the proceeds of the settlement of our claim, and accordingly submit that Alternative 2 above be accepted and followed.

The following factors are also relevant in this regard:

> (1) The treaties or establishments took place many years ago - it is by no means clear that the present day descendants or successors in title of the Indians involved could be determined with sufficient certainty to ensure that a distribution of proceeds today

[26] Appendix "c", pages 18-19.

[27] The differences in the present situation as between B. C. and Alaska also indicates that the reference to reservation wardship and trusteeship should, in its application to B. C. be modified as though reading "further reservation, system, or further lengthy wardship or trusteeship".

on an individual family or band basis be possible or equitable.

(2) In formulating the terms of reference, general principles many be laid down; yet there are many individual reserves and settlements, where the circumstances differ. If the results were handled entirely separately, inequalities and injustices may develop.

(3) Compensation will be awarded on the basis of land in occupancy or use at the time the rights were lost or denied. One hundred years ago, there were great differences in the size of areas occupied or used by different tribes or bands - and these differences did not depend on the numbers of Indians belonging to the tribe, but rather on the habits and economy of the region. To allocate the proceeds separately now would likely prejudice members of some bands which were less nomadic than others one hundred years ago.

Attention is drawn to the material under the heading "Machinery for Administering the Settlement" in Professor Lysyk's paper.[28] We are strongly attracted by the idea of an Indian Development Corporation to administer the funds along the lines of the proposed Alaska Native Development Corporation.

The setting up of such a Corporation, the distribution of its shares to Indians, and election of Indians as Directors, should have great benefit in terms not only of the financial returns enjoyed, but in the

development and training of the Indian people in terms of awareness and skill in the administration of financial and business affairs.

We have already proposed that the awards be regarded as constituting one fund for the benefit of all the Indians of British Columbia, the benefits of which are made available to and through the Bands. In view of the existing provisions for organization of Bands and Band Councils, we do not propose the constitution of regional corporations as has been suggested in Alaska, but would in general envisage the payment of earnings of the Development Corporation on a per capita basis to the Councils of the various

[28] Appendix "C", pages 31 ff.

Bands to be administered and paid in turn by the Council for the benefit of the Band, as they may determine. The acceptance of responsibility by the Councils for administration of these benefits will further broaden the benefits and opportunities for training and administration.

Again admitting that the amount of the total settlement will be very substantial, we are prepared to recommend that the payment of the total award be divided and made annually over a period of years, as is proposed for Alaska. The concept of the award as a fund to be administered for the benefit of all the Indians as is proposed, lends itself to such a system of annual payments into the treasury of the Development Corporation until the total of the award has been paid in,

these payments to be invested as received and the total from time to time on hand to be invested and administered by the Corporation in accordance with the general principles herein suggested.

L. CONCLUSION

Finally, while it must be clear that the settlement awarded is compensation for past takings and/or denials of rights, and not in substitution for present rights under the Indian Act, it is submitted that the settlement of our land claim and the administration of the fund represented by the award along the lines here proposed, will have important and far-reaching implications for the future status and welfare of the Indian people.

The Government has said it wishes to discuss new concepts of Indian organization and administration. The acceptance of our claim and the implementation of this Submission will redress an ancient and serious wrong, remove a legitimate and deep-seated sense of grievance over past events, and produce an atmosphere conducive to co-operative discussions of future developments. The participation by the Indians in the benefits and other advantages of one award which is made in recognition of rights and administered by their own people and not as a continuing hand-out or quasi-subsidy paid out and

administered by others, will make it possible for the Indians to enjoy again some proper sense of dignity and self-sufficiency.

This, coupled with the practical opportunities for and advantages of development, training and administration

which would flow from a settlement of this nature, and all its implications for the future, make this Claim and this proposal not only a redress of grievances or an onerous demand for further payment, but a prospect for the mutual advantage of all the citizens concerned, Indian and non-Indian alike.

Respectfully submitted,

on behalf of the Union of British Columbia Indian Chiefs by the undersigned, being all the members of the Chiefs' Council.

[signature page]

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Respectfully submitted,

On behalf of the Union of British Columbia Indian Chiefs by the undersigned, being all the Members of the Chiefs' Council.

Harry Dickie

J A Greene.

APPENDIX "A"

ABORIGINAL TITLE

1.

Text as agreed at the meeting of representatives of Indian organizations and their legal advisers in Montreal on 17th and 18th September, 1971.

INTRODUCTION

This is a Position Paper on the territorial aspects of Native Claims based on aboriginal title. It does not deal with questions of local government and their relationship to aboriginal rights. Neither does it deal with any questions of constitutional protection of native rights. This statement represents a consensus of the native representatives present at Montreal on 17th and 18th September, 1971.

NATIVE SOVEREIGNTY

Prior to colonial settlement in North America, the native people had uncontested dominion over their tribal territories and all the people therein. They could govern, make laws, wage war, and had their own political, social, cultural, economic, educational and property systems. Each tribe had absolute control over the resources and products of its land. In other words, the tribes had political sovereignty, To native people their title to their tribal lands was explicit in this political sovereignty. The actions of the colonial

2.

powers in entering into treaties with native peoples were an acknowledgment of sovereignty and a recognition of native rights to the land.

THE ARRIVAL OF THE COLONIAL POWERS

With the arrival of the white man, the colonial powers gradually assumed political control over the land and the native people with whom they came into contact. The colonial legal system accepted the territorial boundaries established by the tribes, but imposed their own concepts of native rights. In their pursuit of lands for settlement they imposed significant limitations upon native sovereignty and native territorial rights. In Canada the limitations centered around a government monopoly on land acquisition (by the Royal Proclamation of 1763) and the description of the native (aboriginal) land title as a “usufructuary right”.

THE CONCEPT OF USUFRUCTUARY RIGHT

Native title as defined by English law connotes rights as complete as that of a full owner of property with one major limitation. The tribe could not transfer its title; it could only agree to surrender or limit its right to use the land. English law describes native title as aright to use and exploit all the economic potential of the land and the waters adjacent thereto, including game, produce, minerals and all

3.

other natural resources, and water, riparian, foreshore, and offshore rights. The colonial legal system called this kind of title a "usufructuary right". To the extent that the use of the concept of "usufructuary right" limited native rights as they had been understood by the native peoples, it was an arbitrary and self-serving action of the colonial legal system.

HOW THE COLONIAL SYSTEM DEALS WITH USUFRUCTUARY RIGHT

Since limited native rights were recognized by the colonial legal system, under the rules of that system, the rights could only be dealt with by legal means. In certain parts of Canada, treaties were entered into to deal with some of the rights of the native tribes and the Government paid some compensation. In the treaties the Government undertook certain obligations and guaranteed certain rights (such as the right to hunt and fish which the native people had exercised from time immemorial). In other parts of Canada the colonial authorities did not comply with the rules of their own legal system and white settlement (and other land use) took place on native lands without proper dealings with native people. In yet other parts of the country native people had, until very recently, or still have, use and control of their land but the Government is permitting gradual interference with use and control without first recognizing and dealing with native title.

4.

The highest standards of dealings were to be maintained by the Crown, because by colonial legal theory it alone had the power to protect native rights as trustee of the native interest. Although the Crown in the past has failed to honour its moral and legal commitments, it must now respect those obligations and recognize native rights. The use of the land must be preserved or restored or the native rights otherwise dealt with to the satisfaction of the native people involved.

LEGAL CONSEQUENCES OF NATIVE OR ABORIGINAL TITLE TODAY

By the British North America Act the obligation to deal with native claims is upon the Federal Government. Provincial laws cannot extinguish native claims based on aboriginal title. Recognition by the Federal Government of aboriginal title means:

(a) A recognition of the obligation to deal with claims in the non-treaty areas of the country. In the areas where native people have lost or are gradually losing the use of the land, either the full use of the land must be protected or restored or the claims based on native title must be dealt with to the satisfaction of the native people involved.

(b) In the areas where native people still have the use and control of their lands, no encroachment

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is permissible without the consent of the native people involved.

(c) If treaties meet adequate standards of fairness, a recognition of treaty promises as they were understood by the native people. If the treaties fail to meet adequate standards of fairness, this failure must be acknowledged and fair and adequate arrangements made to the satisfaction of the native people involved.

(d) A recognition of the obligation to restore or, with the consent of the native people, to compensate for the loss of specific rights (such as hunting, fishing or trapping rights) which are either preserved in treaty areas or which exist in non-treaty areas as part of unextinguished native rights and which have been curtailed by government action.

APPENDIX "B"

THE LAND QUESTION

A Paper Prepared by

Chief William Scow

For delivery to the Annual General Meeting of the Union

Victoria, B. C.

17 November, 1971

1.

THE LAND QUESTION

When Parliament passed the Potlatch Law in 1884, there were about 17,765 Indians in the coastal region directly affected by it. The Indian population of the province was declining at the time, and it continued to decline until 1929 when it reached its lowest point - an estimated 12,366 in that part of the province. In 1938, the year that Parliament directed its attention to the potlatch issue for the last time, the population trend had just been reversed, and by 1939 the Indian population had increased to 13,303. The Southern Kwakiutl Group, of the central Coast region, though only a relatively small portion of the total Indian population, provided the leaders who mobilized and sustained the opposition to the law and its enforcement. Figures for 1917 (the closest year to the first arrest in the Alert Bay trials, 1914-22, for which there are available figures) show an estimated 1,890 in the total Kwakiutl population, and by 1929, the next year for which figures are available, there were only 1,088 in the Southern group. Although the Southern Kwakiutls were the focus of the prosecutions between 1914 and 1922, the Potlatch

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Law controversy became, for all coastal Indians, a memorable experience. It is reported by Hawthorn and his associates that:

> "a number of current (1958) beliefs and attitudes had their origin in the long struggle around this institution (the potlatch) and have survived today with something of a life of their own."

What these beliefs and attitudes are, they do not specify. The evidence suggests, however, that particular experiences during the potlatch issue developed a general sense of injustice. Even the missionaries had recognized that the potlatch was central to the social organization of the Indians.

The Indians came to consider the missionaries' efforts to eliminate this basic institution along with court and police actions, as an unjust denial of the Indian past. William Scow, one of the Kwaukiutl potlatchers convicted in 1922, now Chief Scow and several times president of the Native Brotherhood of British Columbia, is considered to be one of the outstanding Indian leaders in all Canada; he expressed the Indian view when speaking to Mr. R.A. Howy, then Deputy Superintendent-General of Indian Affairs, that:

> "when you took the potlatch away from us, you gave us nothing to take its place."

3.

Chief Scow's statement means that the whites were unable to create a substitute institution which would continue the past and provide the basis for the anticipation of the future as did the potlatch.

The Potlatch Law experiences were not the sole factor responsible for developing the Indians' sense of injustice; there were many others also related to the settlement process. One gains some notion of the Indians' feelings resulting from the European invasion, the conflict, and the subordination as well as the cultural change in the letter of Chief Billy Assu, a Kwakiutl of the Cape Mudge band and a defendant in the 1922 potlatch trials.

Unavoidably of course, the policies of the federal and provincial governments relating to land and reserves involved displacement and resettlement for the Indian. The Indians of today manifest feelings of suspicion and distrust not only about the (to them) unwarranted negation of their traditions but also about the Reserve system. This "Reserve psychosis" a term first employed by John Dewey and used again in the same sense by Kenneth Burke in Permanence and Change

4.

refers to a particular frame of mind, a rigidly integrated complex of attitudes which makes the Indians over-defensive about the management of their Reserves and resources and about their rights in relation to the Reserves. The “Reserve psychosis” was a product of many actions. As in the case of the potlatch, general social unrest gradually became focused around a claim to the ownership of the whole province, and the protest grew from a simple expression of belief to a complex legal case.

Five years after Confederation, Treaty No. 1 with the Chippewa and Swampy Cree in southern Manitoba was signed, followed eighteen days later, August 21st, 1871, by Treaty No. 2 with the Chippewa and others in central and southwestern Manitoba and what is now southeastern Saskatchewan. Two years later Treaty No. 3 was signed with the Ojibway Indians in Southern Ontario, and in 1874, Treaty No. 4 with the Indians of southern Saskatchewan. As settlement continued westward, and the government felt it necessary to settle the land title problem, treaties were signed at various intervals from 1875 to 1923. But of all the treaties signed, the only

5.

ones negotiated with the Indians of British Columbia were the Hudson's Bay purchases of 1850, 1851 and 1852 and Treaty No. 8 in 1899 covering only the Indians of northeastern British Columbia who were grouped with the Cree, Beaver, Chipewyan, and others of northern Alberta and the Northwest Territories. The Indians of coastal British Columbia, to whom payments had been made and for whom the Reserves had been established in 1850, 1851 and 1852, were thus left to watch the continued expansion of the Dominion of Canada by treaty while making no further agreements of their own. Later in 1927 this was to be the peg on which the British Columbian Indians hung their legal case. In respect to this, Rev. P.R. Kelly stated at the hearings in 1927:

> "It is quite true that it is a matter of fact, and we do not question it for a moment, that the Indians of British Columbia have been treated as generously as other Indian tribes throughout the rest of the Dominion. But

> within recent years, shall I say during the past twenty-five to thirty years, Indian tribes have been curtailed in their activities. You know as well as I do, Senator Barnard, that they were a law unto themselves and upon consulting advisers here and there, even as white men do, it came to the surface that their title had not been ceded."

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If it had not been ceded, then in view of the fact that their ancient rights were taken away, why should not a formal recognition be made and a consideration equivalent to that conceded to other tribes of Indians in other parts of the Dominion be granted to the Indians of British Columbia? That was at the back of all this trouble.

At the same time they watched settlement in their homeland expand conspicuously, they experienced a reversal of policy on the part of the colonial, and later the provincial, officials in 1865 after Governor Douglas left office. Before this reversal by local action, Imperial policy was based upon a conception of the Indians as the owners of the land; tribal groups were considered to be independent nations. But the Colonial Office, although aware of the land abuses perpetrated by settlers, was quite powerless to exercise local control. Abuses had been taken note of much earlier in the Royal Proclamation of 1763, when the purchase of reserved lands from Indians by private persons was forbidden, and squatters on reserved lands were ordered “to remove themselves from such settlements”. This document, furthermore, looked upon

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the Indians as allies and instructed Governor Murray, on December 7th, 1763, to "treat with the said Indians, promising and assuring them Protection and Friendship on our Part." Sir James Douglas was to follow these instructions in his turn. In a dispatch of 1859 to the Secretary of State for the Colonies, he said:

> "As friends and allies the Native races are capable of rendering the most valuable assistance to the Colony (this in part, would have been military service if the "Fifty-four or fight" attitude of the Americans had been maintained as regards the boundary of British Columbia) while their enmity would entail on the settlers a greater amount of wretchedness and physical suffering, and more seriously retard the growth and material development of the Colony, than any other calamity to which, in the ordinary course of events, it would be exposed."

An additional facet of the Douglas policy was that the title of the reserved lands of the Indians remained with the Crown and was inalienable. This meant that white people could not purchase the lands, and also that no single Indian could sell tribal lands. Sir James went even a step beyond this: proceeds from the land were to be used exclusively for Indian purposes.

8.

A crucial part of the Douglas policy for establishing reserves was to let the Indians fix the boundaries. In a letter to Ottawa after his retirement, Douglas stated his procedure for locating boundaries:

> “14th October 1874
>
> To this enquiry I may briefly rejoin. that in laying out Indian Reserves no specific number of acres was insisted upon. The principles followed in all cases was to leave the extent and selection of the lands entirely optional with the Indians who were immediately interested in the reserves; the surveying officers having instruction to meet their wishes in every particular. This was done with the object of securing their natural or acquired rights. It was never intended that they should be limited or restricted to a possession of ten acres of land, on the contrary we are prepared, if such had been their wish, to have made for their use more

> extensive grants. These latter reserves were necessarily laid out on a large scale, commensurate with the wants of these tribes. This letter may be regarded and treated as an official communication."

In view of the fact that the Secretary of State for the Colonies had given Governor Douglas a carte blanche for dealing with the Indians and the land problem, his decisions were in effect Imperial policy. Three years before

his retirement in 1864, Governor Douglas transmitted from the House of Assembly of Vancouver Island to the Secretary a petition for three thousand pounds for the purpose of purchasing lands from the Indians. The petition, dated March 25th, 1861, was denied by the Secretary although he was "fully sensible of the great importance of purchasing, without loss of time, the Native Title to the soil of Vancouver Island." It was his advice that the colony should provide the funds as "it is essential to the interests of the people of Vancouver Island and trifling in the charge it would entail." According to the historical evidence, neither the colony nor the Dominion government ever took the recommended steps for settling the land title question.

In the petition for funds to extinguish the native title on Vancouver Island, Sir James stated the Indian conception of title to their lands:

> "As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain district, they would not fail to regard the occupation of such portions of the Colony

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> by white settlers unless with the full consent of the proprietary tribes as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers and perhaps disaffection to the Government that would endanger the peace of the country."

The view expressed by Trutch and Ball and Helmcken is one which many British Columbians have continued to hold. In the Terms of Union the idea became the now famous thirteenth clause; "liberal policy as that hitherto pursued by the British Columbian Government shall be continued by the Dominion Government after the union." By having this conception of colonial policy regarding Indian affairs incorporated into the Terms of Union, the advocates of the Trutch-Ball-Helmcken point of view strengthened the province's hand in dealing with the Dominion government as it perpetuated the idea that justice had been properly attended to when the Indians were assigned what enterprising white men deemed to be sufficient land for the purposes of an Indian family. This policy was more than the expression of the settlers' desires through their political leaders; it was a major stroke by which the Indian was denied the opportunity to share or participate in the appreciation

11.

of land values as a result of settlement. White men could pre-empt 320 acres and buy as many more. Some Indians were assigned as little as nine acres, almost none were acquainted with pre-emption laws, and in any case few had the necessary capital far purchasing land. In a different perspective, it could be said that again the white man visualized no future for the Indian.

The Indian Protest: Before 1875

When Rev. P.R. Kelly appeared before the Joint Committee of Parliament in 1927, he declared:

> "I want to say this, speaking on behalf of the Indians of British Columbia, that this, I take it, is the culmination of about fifty years of endeavour on the part of the Indian tribes of British Columbia to obtain a hearing. I say this to bring before you the importance of the effort made by the Indian tribes of British Columbia."

Undoubtedly Dr. Kelly had the petition of 1874 in mind as the beginning of the endeavour. Still, prior to 1874 sufficient preliminary activities had occurred to indicate the earlier development of the Indian protest movement,

12.

characterized by the jealousy and the general resentment which had accrued from thousands of incidents between Indians and settlers and between Indians and officials during the gold mining period. Soon this resentment was organized into the action represented in the petitions and deputations directed to local officials. The Indian was trying to do something about local, specific abuses and was depending upon local authorities. He was reacting, as before, directly to the settlers and their attitudes but now he had learned to write, or more likely to have had written, formal petitions. The settlers' reactions to the organized protest of the Indians were summarized in this document:

> "I cannot get wood off my land except by a sort of permission. I cannot build as I intended to do. Everybody says "Sure what the devil is the good of a Government that can't put a few siwashes off a man's land." I said always "I'm waiting for Powell." Now Powell (Commissioner of Indian Affairs, Victoria) has not fixed it, nor is there even a probability that he can or will. The idea that I have had from the first in this affair is that you must make the Indians respect your power. They have a hundred times more respect for a gunboat than all the talk in creation."

13.

The B.C. Papers also published another letter regarding the ownership of land which shows the general resentment of the Indians:

> " Maple Bay, April 27, 1869
>
> In the case of dispute between Mr. Rogers and the Indians, I summoned Te-cha-malt on a charge of trespass, but as I found it was a case of dispute, as to the ownership of the land, and on the Indian promising not to interfere until I received further instructions from the Government, Mr. Rogers also agreeing to let the matter stand over, I have taken no further action. Te-cha-malt made use of very improper language, and was very insolent. He said he was the Chief, and that the land was his. He also said that Governor Seymour could not take the land from him, that if the Governor sent his gunboat he would fetch his friends from all parts, and hold the land against him. He also said the Governor was a liar, and had not fulfilled his promise to pay for the land he had taken. And they told me that he did not care for me or the prison either, that I had no power over the Indians.
>
> John Morley"

We have seen from the potlatch controversy that the whole of native life in the northwest was becoming unsettled. Because social control had broken down, it became

14.

possible for Indians who had never before had the sanctioned right to potlatch to secure trade goods and engage in the ceremonial practices. In earlier days raiding parties from the north had ventured into the

southern region; but in the colonial period thousands went to Victoria and later, Vancouver. Governor Douglas even found it necessary in 1860 to use a gunboat to tow canoes away from the settlement. Begg records:

> "the northern Indians at Victoria were so numerous at Victoria in March, that on the 16th of that month H.M.S. Tribune was commissioned to tow the Indians and their canoes out as far as Johnston's Pass, in charge of Sheriff Heaton, whence they must shift for themselves."

Father Fouquet referred to Governor Seymour's speaking to sixty chiefs and 4,000 Indians in the area that is now New Westminster. While increased mobility resulted in the accentuation of certain aspects of tribal organization and the eventual disintegration of others, the settler's problem impinged upon that of the natives over the questions of pasture for stock, especially horses, potato grounds, and the location and size of reserves. There is no longer any precise way to trace the emergence of the Indians' resentment and the increase

15.

in violence. The few documents which we assume to be valid indices are characterized by individualized hostility rather than any group action.

General resentment could be expressed before a magistrate or directly to a surveyor or a settler, but it took on a different character when converted into action in the form of petitions and delegations to colonial, later provincial, officials. From the outcome of the Te-cha-malt case, the Indians involved may have learned the importance and effectiveness of protest and the role of the government I such actions. In May, 1869, the Lands and Works Department reported as follows on the dispute:

> "In reference to the dispute between Mr. Rogers and the Cowichan Indians as to the section of land (Section 14, Range 7) Quamichan District, reported in your letter dated April 27, I have the honour to inform you that this matter had already, before your report was received, been brought

under the consideration of His Excellency the Governor on the complaint of the Chiefs of the tribes residing on the Cowichan Reserves, that the section of land above named having formerly been part of the land reserved for their use, had been cut off by Mr. Pearse without their concurrence or knowledge.

16.

"His Excellency granted these Chiefs an opportunity of stating their case at a personal interview with himself, from which statement corroborated to some extent by the evidence of Mr. Robertson, who was one of Mr. Pearse's surveying party when the reserves were laid out in 1867, it appeared that there must have been a misunderstanding between Mr. Pearse and these Indians as to the exact limits of the lands to be held in reserve for them, and being willing to take a favourable view of the claim of the Indians to the land in the dispute, His Excellency has directed me to hold the section of land in question under reserve for their use, and to notify Mr. Rogers that his Pre-emption Record of this land, having been made by me under the mistaken supposition that the said land was open for pre-emption, must be cancelled."

But even though this case may have provided some political education for the Cowichan Indians, the available evidence indicates that in several areas the missionaries quite likely played a central role in organizing the resentment into a demand for the recognition of Indian rights and the restitution or adjustment of the reserved lands. Though they were anxious to change the cultural values and systems of the natives, the missionaries also resented, and some protested, the actions of the settlers and the nature of government policy. It was possible for the missionaries, and later

other white people, to play the role of organizer shortly after the reversal of policy was initiated and important colonial officials became provincial appointees. By this time Mr. Duncan controlled a whole village and was well established among the Tsimshian as were a number of Roman Catholic missionaries and others in the Fraser Valley and along the lower part of the Coast. The continued success of the missionaries appeared to be based upon their alignment of their political actions with Indian interests; thus they served the Indians in more roles than that of go-between in Indian-white relations or Indian-government actions. Although we do not know which missionaries or other white people were instrumental in framing the following petition of protest addressed to Indian Commissioner Powell, it is obviously a more sophisticated document than the Indians by themselves could produce:

"The petition of the undersigned, chiefs of Douglas Portage, of Lower Fraser, and of the other tribes on the seashore of the mainland to Bute Inlet, humbly sheweth:

> 1. That your petitioners view with a great anxiety the standing question of the

> quality of land to be reserved for the use of each Indian family.
>
> 2. That we are fully aware that the Government of Canada has always taken good care of the Indians, and treated them liberally, allowing more than 100 acres per family; and we have been at a loss to understand the views of the local government of British Columbia, in curtailing our land so much as to leave in many instances but a few acres of land per family.
>
> 3. Our hearts have been wounded by the arbitrary way the local Government of British Columbia have dealt with us in locating and dividing our Reserves. Chamiel, ten miles below Hope, is allowed 488

acres of good land for the use of 20 families; at the rate of 24 acres per family; Popkum, eighteen miles below Hope, is allowed 369 acres of good land for the use of four families; at the rate of 90 acres per family; Cheam, twenty miles below Hope, is allowed 375 acres of bad, dry, mountainous land for the use of 27 families; at the rate of 13 acres per family; Yuk-yuk-y-yoose on the Chilliwack River, with a population of seven families, is allowed forty-two acres, five acres per family; Sumaas (at the junction of Sumaas River and Fraser) with a population of seventeen families, is allowed 43 acres of meadow for their hay, and 32 acres of dry land; Keatsy, numbering more than 100 inhabitants, is allowed 108 acres of land. Langley and Hope have not yet got land secured to them, and white men are encroaching on them on all sides,

19.

4. For many years we have been complaining of the land left us being too small. We have laid our complaints before the government officials near to us. They sent us to some others; so we had no redress up to the present; and we have felt like men trampled on, and are commencing to believe that the aim of the white men is to exterminate us as soon as they can, although we have been always quiet, obedient, kind and friendly to the whites.

5. Discouragement and depression have come upon our people. Many of them have given up the cultivation of land because our gardens have not been protected against the encroachments of the whites. Some of our best men have been deprived of the land they have broken and cultivated with long and hard labor, a white man enclosing it in his claim, and no compensation given. Some of our enterprising men have lost their cattle, because white men had taken the place where those cattle were grazing

and no other place left but the thickly timbered land, where they die fast. Some of our people are now obliged to cut rushes along the bank of the river with their knives during the winter, to feed their cattle.

6. We are now obliged to clear heavy timbered land, all prairies having been taken from us by white men. We see our white neighbors cultivate wheat, peas, etc., and raise large stocks of cattle on our pasture lands, and we are giving them our money to buy the flour manufactured from the wheat they have grown on same prairies.

7. We are not lazy and roaming-about people,

20.

as we used to be. We have worked hard to buy agricultural implements, cattle, horses, etc., as nobody has given us assistance. We could point out many of our people who have those past year bought with their own money, ploughs, harrows, yokes of oxen and horses; and now with your kind assistance, we have a bright hope to enter into the path of civilization.

8. We consider that eighty acres per family is absolutely necessary for our support, and for the future welfare of our children. We declare that 20 or 30 acres of land per family will not give satisfaction, but will create ill feelings, irritation among our people, and we cannot say what will be the consequence.

9. That, in case you cannot obtain from the Local government, the object of our petition, we humbly pray that this, our petition, be forwarded to the Secretary of State for the provinces, at Ottawa.

Therefore, your petitioners humbly pray that you may take this our petition into consideration, and see that justice be done us and allow each family the quantity of land we ask for.

And your petitioners, as in duty bound, will ever pray .... "

When this petition of 1874 was entered in the proceedings of the Committee in 1927, Dr. Scott, Deputy Superintendent-General, indicated that as a consequence a royal

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commission was appointed and that "the Indians and the Government got together, and decided upon what land should be reserved." That was the first real attempt on the part of the Government to adjust the difficulty, with respect to reserves, and to carry out the terms of Article 13. Within twelve years, the petition was the method used by all the Indians who wished to protest about some abuse or other. According to Andrew Paul's testimony, the land title question had become a "Great national question" in 1874 and still was in 1927. While one may not want to give this complex of issues the definition of a "great" national question, it is evident that Indians, missionaries, government officials, and settlers were considerably agitated. The continued defensive line of the province in response to Indian protests and the actions of the federal government, the increasing political education of the natives, the gradual loss of unrestricted resources for the natives, and the partial urbanization of some tribes - these were just a few of the factors which operated to define the idea of an aboriginal title, a title that could be extinguished only by a "meeting in council" and some kind of settlement. For them, settlement by potlatch was the

22.

traditional way, but as white people could not understand the native view of potlatching, the idea of extinguishing the aboriginal title by negotiation was taken up as a substitute. It later acquired a symbolic importance, highly surcharged with emotions, which no one envisaged in 1874.

The Indian Protest: 1874 - 1917

The petition of 1874 was concerned with the acreage being allotted to each Indian. In March of the same year, the Legislative Assembly passed an act for the purpose of consolidating the laws affecting Crown lands in the province. Because no cession of the Indian title had been obtained, the act was disallowed in March, 1875. The Provincial Legislature amended it, and after consultation with the Dominion government regarding a procedure for the selection and allotment of Reserves, the Act went into operation. The federal government had recognized the Indian title by signing treaties with the eastern Indians; its failure to do so in British Columbia resulted in increased jealousy, reported by Commissioner Powell in 1876. In September of this year, Lord Dufferin,

23.

Governor-General of Canada, urged the recognition of the aboriginal title. Later high ranking officials from Ottawa, including Sir Wilfrid Laurier, either protested or made promises to do all possible to "get justice done." The argument of the Provincial Government was simply that justice had been done.

None the less continued complaints necessitated the appointment of a commission in 1887, "to Enquire into the Conditions of the Indians of the Northwest Coast." But 1887 appears to have become better known as the year that a fairly large group of delegates went from Fort Simpson to Victoria to interview the provincial government. Mr. Kelly recalled the feelings of that year, in his submission to the Committee of 1927:

> "At that time they brought before the Government this fact, that they were not adequately provided for as far as land was concerned, and they became conscious of the fact that in days to come rights which they had inherited from time immemorial would be taken away from them. Even at that early date, forty years ago, they were conscious of that, and it was brought to the notice of the provincial Government.

24.

> “About that time, when Reserve Commissioners went around and approached the Haida Tribe of the Queen Charlotte Islands, I heard this from the lips of those who were present asking them to state a certain area of land to be set apart for them with which they would be satisfied. The Chiefs who gathered in council together said this, "Why would we ask you to set lands apart for us? This territory is ours and it has been ours as far back as we can remember. Any time any other people claimed our lands we disputed them with force. Why are you coming here and asking us to say what area of land would satisfy us?" They told the Commissioners that they were not prepared to name any area because the whole area of land was theirs."

What had made the Fort Simpson Indians conscious of the land problem were the restrictions regarding the cutting of timber as well as their restricted acreage. One of the Indians at the interview stated that "we want to be free on the top of this land of ours." MacInnes reports part of this interview:

> "They said: 'our Reserve is very little; and we have not got any timber land; neither have we got our hunting grounds. These are what we want and what we came for. We want you to cut out a bigger Reserve for us, and what we want after that is a treaty.'”

The Premier told these Indians that there was no

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such thing as a treaty with Indians, and gave them to understand that certain lands had been given to them as a matter of charity, for which they should be very thankful. I quote the Premier's remark from the report of this conference issued by the Provincial Government, at page 256:

> "Hon. Mr. Smithe: 'There is no such law either English or Dominion that I know of, and the Indians or their friends, have been misled on that point. The land all belongs to the Queen. The laws provide that if a white man requires a piece of land he must go to the land office and pay for it, and it is his. The Indian is placed in a better position; a reserve is given to each tribe, and they are not required to pay for it. It is the Queen's land just the same, but the Queen gives it to her Indian children because they do not know so well how to make their own living, the same as white man, and special indulgence is extended to them and special care shown.'"

This was a denial of the Indian title as early as 1887, and of course it was a negation of the whole treaty system used before and after 1887 by the Dominion government for the purpose of extinguishing the aboriginal title.

The land title issue was one that easily maintained a strong bond between a missionary and his congregation, for the

penetration of the settlers continued and the negative policy of the government had been by now made quite clear. The evidence suggests that the Indians felt hopelessly trapped and were willing to take more extreme action than before.

As yet no test question had been raised to determine what would happen to the reserved Indian lands if a tribe died out or if a tribe no longer had a use for the land. In Imperial policy it was assumed that the land belonged to the Crown and was inalienable. But British Columbia had taken the point of view that the title should revert to the province. Until 1875 the concern of the Indians had been with acreage and location. Now they had a new conception of their rights, and the provincial reversionary right, admitted by the federal government in the order-in-council on Nov. 5, 1875, became increasingly important to them. There was no final surety for the Indian with respect to the title of his lands; thus one more factor was added to the problems of acreage and location.

Between 1887 and 1906 the agitation continued to grow, but little satisfaction was given. No important clarification of the issues had been accomplished by 1906, and one may

27.

suspect that the Indians had become more than dissatisfied; they were now distrustful of provincial and federal policy. In 1906 three important chiefs, including Joe Capilano, were sent to London in order to call upon His Majesty King Edward VII and place their claims before him. According to Shankel it was

> "in the spring of 1906 that at a meeting of the Indians of Cowichan a decision was reached to send a deputation to England to petition the King in the matter of the land. The delegates accordingly left in July bearing a petition in which they complained:
>
> 1. That the title of their land had never been extinguished,
>
> 2. That white men had settled on their land against their wishes,
>
> 3. That all appeals to the Canadian Government had proved vain,
>
> 4. That they had no vote and were not consulted with respect to Agents."

Shankel's interpretation of the move is a limited and questionable one. He says "it was an ill considered move, to be sure, with no hope whatsoever of any immediate result. Considering their lack of knowledge of Government administration they cannot

28.

be censured. However, the very fact that they should undertake such a trip and at such expense is striking evidence in itself how deep were their feelings on the matter." MacInnes has stated that:

> “The King was always looked upon by the Indians as friendly to their peculiar rights and privileges, first as an Ally and subsequently as a Protector and Great Father. The Indians on the other hand at no time made, and to this day will not make, an appeal to a colonial, provincial or federal government in Canada as the sovereign power from whom they ask recognition of their title. Their appeal has always been made, and from British Columbia is now being made, direct to the King.”

In 1909 British Columbia undertook to dispossess the Skeena Indians, near Prince Rupert, of some land. This action precipitated increased activity on the part of the Indians and their white advisers and friends. In the spring of 1909 a petition was presented to His Majesty by three Indians representing twenty tribes, and quite naturally it was referred to the Government of Canada. Also in 1909 the "Indian Tribes of the Province of British Columbia" was formed for the purpose of stating Indian grievances and promoting a solution of the issues.

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In 1909 the premier of British Columbia again denied the existence of the Indian title; "Of course it would be madness to think of conceding the Indians' demands. It is too late to discuss the equity of dispossessing the red man in America." The increased tempo of activity carried over into 1910 when the "Friends of the Indians", organized by white folk, became active; they, too, went to Victoria to interview the premier, Sir Richard McBride. In March of 1910 another deputation of Indians went to Victoria and were told by the premier that his government held the opinion that the Indians had no title to the public lands of the province. And it was in the summer of 1910 that Prime Minister Sir Wilfrid Laurier met with groups of Indians at Prince Rupert and at Kamloops. He told the northern Indians at Prince Rupert that "the only way to settle this question that you have agitated for years is by a decision of the Judicial Committee, and I will take steps to help you." The steps taken by the Dominion government included the appointment of J.A.J. McKenna as a special commissioner and the establishment of the Joint Royal Commission on Indian Affairs in British Columbia, which sat from 1912 to 1916.

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Protests reported by the commissioners had by 1916 changed their character. They were no longer general and vague. The general resentment had been converted into a demand for a specific plan of action, namely a settlement of the aboriginal claim. Increased sophistication on the part of the Indians is revealed by the British Columbia Land Situation: Memorandum for the Government of Canada, stated to be a "statement of facts", made on behalf of the Douglas Portage chiefs. Not only did it incorporate facts of previous actions and attitudes, but it also contained an argument leading to a request for government action. Similarly a delegation of ninety-six Indians who went to Victoria in 1910 to wait upon the premier of the province was armed with specific demands, with documents of various kinds, and with their plea written down, as was the memorandum of the Douglas Portage chiefs. A record was thus accumulating, and the line of action could be delineated as the protest evolved into the final, complicated action of the 1927 parliamentary joint committee hearing of the Senate and the House of Commons. It was in this Memorandum that the aboriginal title claim made its first appearance as a legal claim.

On May 27th, 1918, the Nishga - a Tsimshian group

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from the Nass River country which had been politically active since at least 1887 when representatives went to Victoria and which had taken independent action in 1915 by sending a delegation to Ottawa - had their agents send a report to the Lord President of His Majesty's Privy Council, The Nishga Petition, first received by the Dominion government on June 19, 1913, became singularly important in the minds of all Indians. It claimed title to the land on the basis of the Declaration of 1763, and generally explained the Indian thoughts on the land title question. Since this Petition was rejected by an Order-in-Council in June, 1915, the Nishga group in 1918 sent the report to London, and from then on Indian action was promised on the assumption that their case was pending before the Privy Council. Administrators later

called this assumption a fiction. When the Allied Tribes presented their claims in the final parliamentary action of 1926-27, the opening sentence of their statements indicates that "the general view held by us with regard to the report of the Royal Commission was correctly stated by the Agents of the Nishga Tribe on 27th May, 1918." with respect to specific conditions and modes of procedure, the

Allied Tribes further used the Nishga proposal that "the matter of lands to be reserved (should) be finally dealt with by the Secretary of State for the Colonies." The Allied Tribes wanted all other matters of business to be attended to by the Parliament of Canada.

In the process of cultural change and in the development of institutions for the new conditions of living, the Tsimshian, Haida, Kwakiutl and Coast Salish have apparently found it more feasible to develop collective action and political solidarity than have other regional groups in British Columbia. These coastal tribes have attempted to secure support from all the Indians in British Columbia, but they have had limited success as is evident from the issues and problems of collective action which separate interior from coastal Indians. The Executive Committee of the Allied Tribes met in Vancouver, in February, 1919, and "an alliance of tribes was formed subsequently," thus bringing more tribal groups into the organization. It is also at this time that more formal action was taken to secure additional assistance from outsiders. James A. Teit, who is famous in anthropological history and

literature as an associate of Franz Boas, was appointed to a post known as Special Agent. In this way the Allied Tribes was developing further strength to conduct the campaign.

The publication of the Native Voice is a product of the new Indian, and it is in the Canadianization of the Indian that finds the significance of the paper for the national life of Canada and the changing Indian.

It was from among the latter group that the founders of the N.B.B.C. and the staff of the Native Voice came.

In the Minutes of the Special Joint Committee considerable space was devoted to statements by Indian witnesses and to briefs submitted by various Indian and white groups and government officials as well as experts on specially elected subjects. Furthermore, members of the Joint Committee who had visited reserves during the recess of Parliament also served as formal witnesses. In preparation for the revision of legislation, the work of Parliament in securing data, opinions, and points of view on small as well as large questions was handled by a Joint Committee of twelve Senators and twenty-two

members of the House of Commons; the Committee held 128 meetings over a period of three years, during which 122 witnesses were heard and 411 written briefs received. The minutes and reporting of evidence filled 3,211 pages. Finally, there was, of course, considerable space in Hansard, devoted to the discussion of the bills to revise Indian legislation. The first meetings of the Committee were held in the spring of 1946, its last meetings were held in 1948; the first public consideration of new legislation was in 1950; and a bill was finally enacted in 1951.

When Mr. Kelly told the Committee during his first appearance that "they want to be heard and heard very thoroughly," he was actually speaking for people he did not represent, for not only Indians but whites too felt more than indignant at the state of Indian affairs. They were morally shocked. They, too, wanted to be heard; they all felt with revised legislation and a new era of administrative action the problems of the Indians could be solved, the sense of shame neutralized, and a new stage in national evolution achieved. Experts in the fields of medicine, education, and the social sciences, clergymen

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of several denominations, and administrative officials, along the Committee and the witnesses, exhibited those acclaimed virtues of citizenship and public responsibility in the earnestness, sincerity and devotion with which they participated in the work of the Committee for the first two years. Canadians were shown some startling facts of the Indians' state, such as the high disease and mortality rates, utterly neglected school systems, and inadequate teaching personnel - in fact, so many extreme deviations from the ordinary sense of decency and of public responsibility that some of the conditions revealed could be nothing less than shameful and shocking.

If some of the revelations were shocking in their apparent simplicity, it is equally true that many were incomprehensible. Interested Canadians, with the franchise, who had learned a great deal about themselves and their national life during World War II, were just as hard put for understanding as were the better-informed Indians. It is recognized, however, that through Political behaviour and such political processes as parliamentary inquiries, not only individuals

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but groups of people learn something about themselves. The purpose of such an inquiry is exactly that - to find out what kind of "people we are". And it was this process of discovery that the struggle for identity reached a peak; yet there was not a full revelation of that struggle as seen in the day-to-day moral crises in the lives of the Indians, or in the departmental and denominational bureaucrats. If more had been known of these, then the public aspects of Indian affairs in Canada would become clearer.

And so party politics for Indians started. In the May issue "Citizens Welcome ‘Boss’ Johnson" described a meeting of some Indian chiefs with Premier Byron Johnson. In the same issue, the C.C.F. party advertised an Indian candidate, Mr. Frank Calder, who later won the election and became the first Indian representative in the provincial Assembly. In early 1950 Chief Scow, accompanied by Frank Assu, as president of the N.B.B.C. went to Victoria and thanked the Assembly for the right to vote. Certainly this mode of behaviour is outside traditional or even the modified forms of potlatch conduct, but it the type

of deference to high authority that has characterized the Northwest Indians since the days of Queen Victoria.

APPENDIX "C"

APPROACHES TO SETTLEMENT OF ABORIGINAL TITLE CLAIMS IN ALASKA

A Paper Prepared by

Professor Kenneth Lysyk

September 3, 1971

APPROACHES TO SETTLEMENT OF ABORIGINAL TITLE CLAIMS IN ALASKA

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APPROACHES TO SETTLEMENT OF ABORIGINAL TITLE CLAIMS IN ALASKA

The purpose of this paper is to outline the legal framework within which a legislative solution for Alaskan native land claims is presently being sought, and to note the more significant features of current proposals for settlement.

The claims are based upon aboriginal use and occupancy of lands in Alaska, and the fact that no treaties for surrender of their aboriginal title have ever been entered into with the Indians, Eskimos and Aleuts comprising the native population of what is now the State of Alaska. A variety of terms has been employed to refer to the native proprietary interest, including "Aboriginal title", "original title", "aboriginal rights", "Indian title", "native title" and "aboriginal right of occupancy". In the following discussion these terms will be used interchangeably.

A. The Nature of Aboriginal Title Claims in Alaska: Legal and Moral Considerations

One of the many issues on which differences of opinion continue to be expressed in the current discussions on settlement of Alaskan native land claims is whether such claims are "legal" in nature, or whether the basis of such claims is to be found simply in a moral obligation resting

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upon the government of the United States to compensate for the taking of native lands. Legal counsel and spokesmen for the natives have consistently maintained that their claims are supportable in law. Should a satisfactory legislative settlement prove to be unattainable, they feel they would not be without recourse in the courts. Expressions of opinion from the government side, on the other hand, tend to view the question in terms of a moral obligation – a claim against, the conscience of the United States.

There is general agreement that there is a at least a moral obligation resting upon the United States to compensate the natives for the taking of lands subject to aboriginal title. The record of proceedings before the congressional committees charged with the issue(1) discloses virtual unanimity of opinion on the existence of such an obligation, and the desirability of a just and equitable settlement to discharge the obligation.

An extensive treatment of the legal issues presented by the Alaskan native land claims is beyond the scope of this paper. Some of the principal developments will be briefly reviewed in the following paragraphs by way of supplying context to the current proposals for settlement.

3.

1. Aboriginal title claims in the United States prior to 1946

The logical point of commencement for any review of the history of Indian claims litigation in the United States is the doctrine of sovereign immunity. The doctrine precludes proceedings against the United States except to the extent that Congress has authorized suit. Until 1946 no authorizing enactment conferred jurisdiction to entertain Indian claims generally. As a result, an Indian tribe could not commence proceedings in the Court of Claims unless and until it had obtained a special jurisdictional act from Congress authorizing suit. Since 1881 Congress has enacted a series of jurisdictional acts authorizing the Court of Claims to hear specified claims by specified tribes or groups of Indians against the federal government. In 1946 a general jurisdictional act, the Indian Claims Commission Act, conferred broad jurisdiction on the newly-constituted Indian Claims Commission to

hear and determine existing Indian claims. A further provision gave the Court of Claims jurisdiction with respect to claims accruing after the date of coming into force of the Act (August 13, 1946).

Indian claims litigated in the Court of Claims therefore depended, in the first instance, on the terms of the special jurisdictional act authorizing suit. The first jurisdictional act authorizing judicial determination

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of the right to recover for original Indian title was passed in 1929.(2) When the issue first came before the United States Supreme Court in 1946 in the Tillamooks case, where the action was based upon a special jurisdictional Act of 1935, it was held that the claimant Indians were entitled to compensation for a taking of lands to which they had aboriginal title.(3) In that case the taking had occurred in 1855, and in subsequent proceedings the Supreme Court held that the claimants were not entitled to payment of interest since 1855 on the principal sum awarded inasmuch as the action was not one which attracted the protection of the Fifth Amendment to the Constitution of the United States. (4)

2. The Indian Claims Commission Act of 1946

The section of the Indian Claims Commission Act which confers jurisdiction on the Commission does not in terms authorize suits based on aboriginal title.(5) However, the Commission has construed the Act as conferring jurisdiction over such claims and has, on many occasions, awarded compensation in respect of such claims. The jurisdiction of the Commission to entertain claims based on aboriginal title has been sustained by the courts.(6)

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> "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation."

Three dissenting members of the Court; speaking through Mr. Justice Black, held that the first Organic Act for Alaska, 1884, constituted recognition of Indian title in the material sense.

A further question relates to the circumstances, if any, in which compensation is payable for a taking of unrecognized Indian title. As noted above, the second Tillamooks decision(11) held that recovery in that case was not based on the Constitution's Fifth Amendment. In Tee-Hit-Ton, the majority held as a general proposition that compensation for unrecognized Indian title could not be claimed under that constitutional clause. Mr. Justice Reed explained the result in Tillamooks on the bases that in that case recovery was based upon a statutory direction in the special jurisdictional act to pay for the aboriginal title.(12) It would appear, therefore, that unrecognized title is compensable where Congress has so directed, expressedly or impliedly.

4. The post Tee-Hit-Ton situation respecting claims for compensation for extinguishment of aboriginal title.

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The Tee-Hit-Ton decision appears to contemplate recovery for claims based on Indian title in two situations. First, where there has been some form of congressional "recognition" of Indian title, a taking will be compensable under the Fifth Amendment to the Constitution. Second, in the case of "unrecognized" Indian title, compensation will be payable only where there is something in the nature of a statutory direction to pay, on which issue reference will be had to the jurisdictional act authorizing suit.

It is not essential that the jurisdictional act expressly require compensation for taking of aboriginal title. In post-Tee-Hit-Ton decisions allowing recovery for such a taking, reference has been made to the legislative history as a means of ascertaining congressional intent. On this basis, and subsequent to the Tee-Hit-Ton decision of 1955, the courts have permitted recovery for a taking of aboriginal title both under the Indian Claims Commission Act(13) and under the terms of a special jurisdictional act.(14)

8.

5. The legal basis for the aboriginal title claims in Alaska

(a) the constitutional and statutory framework

The Tee-Hit-Ton case itself involved lands in Alaska, and subsequent to that decision the Court of Claims in the Tlingit (15) litigation has found the United States liable to pay compensation in respect of a taking of certain aboriginal title lands in southeastern Alaska. The constitutional and statutory framework has been well canvassed in these and other decisions, and in submissions recently made to the congressional committees conducting hearings into the Alaskan native land claims. However, there is little agreement on the legal consequences of the principal instruments and enactments. Discussion has centered around the 1867 Treaty by which Alaska was purchased from Russia for $7 million (together with a clause added by way of release, or title guarantee, for which an additional $200,000 was paid), the Organic Act of 1884 and the Statehood Act of 1958. Little purpose would be served by a detailed account of the areas of disagreement concerning the legal effect of these milestones in the history of the Alaskan native claims issue. It may be noted, however, that in Tee-Hit-Ton, with respect to the issue of "recognition", Mr. Justice Reed (delivering the

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opinion of the Court) made reference to the congressional enactments of 1884 and 1900, which had been viewed in an earlier Alaskan case(17) as constituting recognition of Indian ownership, and stated: (18)

> "We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the status quo until further congressional or judicial action was taken."

The minority, as noted above, was of the view that the Organic Act of 1884 afforded recognition of the Indian title.

It should not be overlooked that the court decisions, including Tee-Hit-Ton, are fully consistent with the existence of aboriginal title over Alaskan lands. The issue is whether there is a legal right to compensation arising out of the extinguishment of such title, and that in turn hinges upon whether the relevant legislation discloses an intention by Congress to "recognize" the Indian right of occupancy, or whether there is something in the nature of a statutory direction to compensate for extinguishment of "unrecognized" Indian title. Tee-Hit-Ton stands for the Proposition that the jurisdictional provision added to the Indian Claims Commission Act respecting post-1946

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claims (19) does not disclose a congressional intent to confer a legal right to claim compensation for extinguishment of aboriginal title. The Court of Claims in the Tlingit litigation found that the special jurisdictional Act of 1935 did disclose such an intention with respect to the 'land claims of the particular groups of Alaskan natives (the Tlingit and Haida Indians) for whose benefit that Act was passed.

In the absence of some special congressional enactment authorizing suit, therefore, the Tee-Hit-Ton decision presents a serious obstacle to a court action against the United States by Alaskan native groups seeking compensation for the extinguishment of aboriginal title.

(b) the Tlingit case

The Tlingit litigation is of interest as a recent example of a judicial determination of compensation for a taking of aboriginal title lands in Alaska. The claims related to lands in southeastern Alaska representing some 17.5 million acres, and comprising six different areas with different dates-of-taking ranging from 1891 to 1929. Liability and assessment of compensation were determined in separate decisions of the Court of Claims.

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In the result, compensation was set at $7.5 million. With respect to some 2.6 million acres, acres, the Court held that aboriginal title remained unextinguished.

Consistent with a line of earlier authority, the Court took as its starting point the proposition that "equitable and just compensation for land held by Indian title is measured by the date-of-taking fair market value of the uncompensated for property rights."(21) The Court elaborated on the general approach to valuation, as follows :

> ‘ . . . Ownership by Indian title, although merely a possessory right of use and occupancy and, therefore, less than full fee simple ownership, is the complete beneficial ownership based on the right of perpetual and exclusive use and occupancy. The value of land held by Indian title is the same as that held in fee simple and not the value to its primitive occupants relying upon it for subsistence. . . . Absent statutory modification, aboriginal title carries with it the same standard of valuation that would be applicable were the property held by recognized Indian title or by fee simple ownership. . . .

"The jurisdictional act neither by its terms nor its legislative history provides for any other valuation standard. . .".

The value of the land includes the fair market value of its mineral content.(23)

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12.

(c) the pressure for settlement: the land freeze and the injunctions

Two developments have lent urgency to the question of settling native land claims in Alaska. First, a "land freeze" imposed by former Secretary of the Interior Udall in December of 1966, and since extended, prevents disposal of all public lands in the State subject to native claims based on aboriginal title. Extensive filing of such claims occurred in late 1966 and early 1967, with the result that most land disposal in the State was affected. Secretary Udall took the position that he was legally bound to impose the freeze because of the guarantee in the Organic Act of 1884 that Alaskan natives would not be disturbed in their use and occupancy.(24) This has proved to be a controversial issue, however, with the view being expressed by others (notably State officials) that the freeze was the result of a policy decision rather than a legal obligation. Under the Statehood Act, the State of Alaska is entitled to select and receive a transfer ("patent") of 103 million acres of the public domain. A small portion of its entitlement has been patented to the State, and additional areas have been tentatively approved for patenting. At present, however, the State is denied effective use, and revenues from, the greater part of the land to which it is entitled under the Statehood Act.

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13.

An action brought by the State to compel issuance of patents and the granting of approval to certain lands selected by the State was not successful: State of Alaska v. Udall.(25)

The second development arose out of the oil discovery off the North Slope of Alaska, and a proposal to run a pipeline across the State to an ice-free port on the south coast. One of the injunctions that has been issued against proceeding with the pipeline is based on unresolved Indian title claims.

6. The issues

There is a continuing difference of opinion as to whether the Alaskan native land claims represent a legal, as well as a moral, obligation. It has been noted that there is little disposition to challenge the existence of a moral obligation.

The strongest argument against the existence of. a "legal" obligation proceeds from the holding in the Tee-Hit-Ton case. On the other hand, as the Tlingit case illustrates, the courts are prepared to compensate for a “taking”" of aboriginal title lands where the jurisdictional act, and its legislative history, can be said to disclose

a congressional intent to make this a justiciable issue. Further, where extinguishment of aboriginal title occurred prior to 1946, claims filed with the Indian Claims Commission would have been compensable. At present there are ten Alaskan claims based on aboriginal title, filed with the Commission prior to the statutory deadline, and which are being held in abeyance pending the outcome pending the current congressional hearings on a proposed legislative solution.(26) Again, even if a claim to compensation against the United States could not presently be sustained in a court action, there is a line of authority supporting the proposition that unextinguished Indian title can be vindicated in proceedings against third parties. In other words, the claim may be "legal" in nature in the sense of being enforceable against third parties, if not against the United States government. The extent of such rights against third parties, and the extent to which they may be asserted by the natives themselves rather than by the United States on their behalf, are matters on which the present state of authorities leaves room for differences of opinion.

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15.

(a) by the Indian Claims Commission

The aboriginal title claims filed by Alaskan natives under the Indian Claims Commission Act within the time period stipulated by the Act, and being held in abeyance by the Commission,(28) relate to a relatively small portion of Alaska.

Under the Indian Claims Commission Act, claims to be heard by the Commission were required to be filed within five years after the date of approval of the Act (August 13, 1946), and claims existing prior to that date , but not presented within the five-year period, are barred from future consideration by any court of administrative agency.(29) Claims accruing after August 13, 1946 are to be presented to the Court of Claims.(30)

It appears that one reason why few claims from Alaska were filed within the statutory five-year period is that the Act was not generally made known to, or was not well understood by, much of the native population of Alaska. (31)

A further difficulty with proceeding in the Indian Claims Commission is that aboriginal title remains unextinguished in much of Alaska, so that the claims could not be said to have existed as of the date of coming into force of the Act in 1946.(32)

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16.

(b) by the Court of Claims

While claims accruing after 1946 may be presented to the Court of Claims, the Tee-Hit-Ton decision presents an obstacle to claims based on unrecognized Indian title. A new congressional

enactment would likely be required either “recognizing” the native title, or directing payment of compensation for extinguishment of "unrecognized" title.

c) generally

Perhaps the strongest objection to litigation, whether in the Court of Claims or in the Indian Claims Commission, relates to the nature of the adjudicative process itself and, more specifically, to the time element involved. All of the parties have an interest in a speedier settlement than the litigation process appears capable of providing. The federal government has a strong interest in resolving the oil pipelines issue free of the complications of native land claims. The state of Alaska is anxious to have the "land freeze" lifted. The natives are understandably reluctant to repeat the experience of the Tlingit litigation in which more than thirty years elapsed from enactment of the jurisdictional act to a judgment in their favor.

17.

Another factor that should be noted has to do with the kind of remedy, or form of compensation, obtainable. The courts, or the Commission, can award money compensation only. The Alaska natives, however, regard continuing rights to land to be an important, indeed essential, element of a satisfactory settlement.

2. Proposals for a legislative solution

(a) background

Following the first hearings of the Senate Committee on Interior and Insular Affairs on Alaskan native land claims in 1968, the Federal Field Committee for Development Planning in Alaska was asked to undertake an analysis of factors affecting congressional resolution of the land claims problem. In February, 1969, the Federal Field Committee issued a comprehensive report, entitled, "Alaska Natives and the Land", describing the land and the resources of Alaska, together with a second report entitled, “Alaska, Native Land Claims: Major Elements of a Proposed Settlement". The latter was put in the form

of a bill incorporating the major elements of a possible settlement: land grants; money compensation for lands already taken and lands to be extinguished by the legislation; and establishment of appropriate adjudicatory and administrative

bodies for implementing the Act.(33) An amended version of the bill brought forward by the Department of Interior was passed by the Senate at the end of that session, but the measure did not get through the House of Representatives.

A number of bills dealing with Alaskan native land claims have been introduced in the present session of Congress. The principal measures are as follows:

(i) a bill sponsored by the chairman of the Senate Committee (Senator Jackson), identical to the measure previously passed by the Senate, and presently designated S. 35;
(ii) a bill sponsored by the chairman of the House Committee (Congressman Aspinall) , designated HR 3100;
(iii) the most recent Administration bill (S. 1571 in the Senate; HR 7432 in the House); and
(iv) the bill sponsored by the Alaskan Federation of Natives (S. 835 in the Senate; HR 7039 in the House).

(b) the basic approach: philosophy, policy objectives and means

The current measures can be said to reflect the general philosophy expressed in the Federal Field Committee reports that the land claims legislation should not only serve as a means of settling the legal and moral claims, but should be seen also as an opportunity to provide a foundation for social and economic advancement for the natives.

19.

The stated policy objectives; apart from achieving a fair and just settlement of native claims, include maximum participation by natives in decisions affecting their rights and property, the vesting in them as rapidly as feasible of control over the lands and moneys provided under the legislation, and the accomplishment of these objectives without establishing permanent racially defined institutions or rights, without creating a reservation system or lengthy wardship or trusteeship, and without additional tax exemptions or privileges. The rights of natives as citizens of the United States and of Alaska would be undiminished.

While the proposed legislation would not, as a matter of law, end the jurisdiction of the Bureau of Indian Affairs in Alaska, it is apparently anticipated that the settlement would, as a practical matter, obviate the need for the Bureau in the State.(34)

The Administration bill expressly states that no precedent would thereby be created for reopening or renegotiating past settlements with any other groups of American Indians.

20.

(c) <u>the terms of settlement</u>

While all bills agree on a compensation package comprising both land grants and cash settlements, there is disagreement on the terms of cash payment; the amount of land to be granted, the land selection process, the number and nature of corporations to be established to administer the proceeds of the proposed settlement, and the treatment to be accorded non-resident Alaskan natives.

The most difficult area in which to obtain agreement has proved to be that relating to the amount of land, and the kind of title in land, to be granted. As to the latter, various proposals have specified areas of fee simple title, of surface rights only, of mineral rights only, of subsistence resources (hunting and fishing rights) only, or some combination of these.

In the following section, primary attention will be paid to current proposals and, in particular, to the most recent measure brought forward by the Administration in April of this year.

21.

C. Elements of proposals for a Legislative Solution

The substantial amounts of money and land involved in the proposals for settlement must be related to the Alaskan context. Alaska comprises an area of some 365 million acres, and the Alaskan natives have filed formal claims to approximately 340 million acres, or more than 90% of the total. Under the Statehood Act, the State of Alaska is entitled to select 103 million acres. The total native population - Indian, Eskimo and Aleut - is an estimated 60,000, representing about 20% of the population of the State.

A common feature in proposals for settlement, at least since early 1967,(35) has been the combining of money payments with land grants. These two elements of the compensation "package" are discussed separately below.

1. Money

(a) amount of payment

The Federal Field Committee proposals distinguished between compensation for native title already extinguished and compensation for native title to lands in respect of which such title had not yet been extinguished. The former would have been compensated for

22.

by a payment of $100 million, calculated roughly on the basis of $1 per acre for 100 million acres. For extinguishment of remaining native title, the Committee’s preference was for a scheme pursuant to which the natives would share in the revenues from leasing or sale of public lands in Alaska over a period of ten years. Two alternative proposals involved grants of full mineral rights over specified areas

or to a specified total acreage.(36) Subsequent Administration proposals abandoned the division between compensation relating to already extinguished aboriginal title and compensation for aboriginal title to be extinguished by the terms of the settlement act itself.

The money component of the current Administration bill totals $1,000 million. Half of that would take the form of payments of $25 million per year for twenty years; the other half would come from a portion of the revenues (a 2% royalty) from the leasing land sale of minerals on certain lands in Alaska, to continue until $500 million had been derived therefrom.

Other bills presently before the Senate and House committees also envision a total money payment of $1,000 million, made up of Treasury revenues plus a share of future revenues from development of Alaskan resources.

23.

The bills differ as to the number of years over which instalment payments from Treasury would be stretched out. The Alaska Federation of Natives bill would require, in addition to the $500 million payable from Treasury, a perpetual 2% royalty with no ceiling to be placed on the amount payable thereunder.

(b) <u>method of calculation</u>

While there appears to be a considerable measure of agreement at present that the money component of the settlement should be in the order of $1,000 million, that sum represents a judgment figure and is not the product of a precise mathematical computation. The following extracts from the proceedings of the congressional committees will serve to illustrate the course of development, and to indicate the criteria to which reference was made in arriving at a dollar figure:

(i) Steward Udall (then Secretary of the Interior) to the Senate Committee, July, 1968: (37) "The second consideration that I would like to submit as a general proposition is that I think Congress should be liberal and generous with the native people of Alaska and their

claims in part, as I said a moment ago, because of their need, in part also because we have ignored their rights and we have been slow in giving them a forum where they could be

24.

heard. 1 think really the difference between the position that and the native people will present to you today and that of the Department, when you get down to the two basic issues of how much money, is a difference that represents a judgment as to what is fair and equitable. This is where this committee and its sister committee on the House side are going to have to sit and make a judgment on this matter.

"You would be interested in knowing how we came in our negotiations with the Bureau of the Budget to a determination of $3,000 per person, which is the figure on which the $180 million provision is based. As a yardstick, indeed, it was practically picked out of the air. The argument that I made, and that my people made, to the Bureau of the Budget, when we decided to go this route rather than the route of the Court of Claims, was that the Congress certainly should be no less liberal with the natives of Alaska than it had been in the instance of the most liberal treatment it had given to any Indian group in the United States. The most liberal treatment that we could find was the treatment given the Seneca Indians a few years ago in the settlement of the Kinzua Dam issue. That settlement averages about $3,000 per person."

(ii) Walter Hickel (then Secretary of the interior) to the House Subcommittee, August, 1969:(38)

"The sum of $500 million as a fair and equitable settlement can be arrived at by at least two different methods. First, if $1 per acre is established as a fair average value for all of the lands in Alaska, and the native aboriginal claims are recognized for the entire State, the monetary value is approximately $375,296,000".

25.

This figure should then be reduced by $12,500,000 which represents the approximately 14,500,000 acres patented to the natives and incorporated native villages under the provisions of the bill. If the sum of $500 million is discounted by 4-5/8 percent over a period of 20 years, a present value of the monetary settlement would be approximately $322 million. On the other hand, if a discount rate of 7 percent, the current long-term rate on Federal Government bonds, is used, the present value would be approximately $267 million. This, therefore, establishes the discounted value of the $500 million as a fair value on a per-acre basis. Second, if the value of the $500 million is computed on a per capita basis for each Alaska native the amount is $5,367 per native if a discount rate of 4-5/8 percent is used and $4,450 per native if a discount rate of 7 percent is used. On the basis of our investigation of the awards made by the Indian Claims Commission on a per capita basis either one of these figures is reasonable."

(iii) Alaska Federation of Natives, brief responding to questions asked by Congressman Aspinall (1969): (39)

"Question III. Did you contend that if the alleged non-proven aboriginal title is extinguished, the Natives should be paid the present value of the land?

"Question III-C. Is the Native request for $500 million plus an overriding royalty intended to reflect the present value of the lands?

“Question III-D. If not, how is the figure computed?

26.

“Answer. (As these three questions are closely related, one answer will be submitted for the Group).

“The Alaska Natives do not seek the full value of any lands which may be taken as a result of a legislative settlement. Although it is well established that compensation is to be measured at the time of taking, Tlingit and Haida Indians of Alaska v. United States, 389 F. 2d 778, 782 (9th Cir. 1968), and although the forthcoming legislation will constitute the taking, they are only asking for a small fraction of that value.

"The law concerning the measure of compensation for the extinguishment of aboriginal title is summarized by the Ninth Circuit in the Tlingit and Haida case, 389 F 2d. at 782:

> ‘This court has held that equitable and just compensation for land held by Indian title is measured by the date-of-taking fair market value of the uncompensated for property rights. . . . (citing cases).
>
> 'The fair market value of property, in the absence of an actual market, is the estimated or imputed fair market value based on sufficient evidence which justifies a conclusion as to the fair market value which would be established when an informed seller disposes of his property to an equally informed buyer.... (citing cases).
>
> ‘... The value of land held by Indian title is the same as that held in fee simple and not the value to its primitive occupants relying upon it for subsistence. . . (Citing cases). . . Absent statutory modification, aboriginal title carries with it the same standard of valuation that would be applicable were the property held by recognizing Indian title or by fee simple ownership... (citing cases) . . .We adopt the fair market value standard as correct . . .’.

27.

"Conservatively estimated, the value of lands now held by aboriginal title is, at least, in the tens of billions of dollars. This great value was recently illustrated by the more than $9,000 million which was paid on September 10, 1969, for the right to explore for oil on 400,000 acres of land which have been consistently and exclusively used and occupied by Natives for thousands of years. (The 400,000 acres come to approximately one-tenth of one percent of the land used and occupied by Natives). Under these

circumstances, $500 million plus two percent of the fruits of the land to which title is to be extinguished amounts to very much less than the present value of land.

"If compensation for extinguishment of aboriginal title were to be determined by the courts, in conformity with established legal principles, the Natives would be entitled to much more than the amount here sought. However, all interested parties - including AFN - agree that a complete and final legislative settlement is far more preferable than years of complex litigation. To achieve such a settlement, the Natives are willing to accept much less than the value of what is being given up.

“The Natives' compensation proposals are not arrived at in any precise mathematical way. As there are so many unknowns, and as value judgments are involved, any proposal (and any legislation) must reflect political and ideological factors. The AFN proposal considers the following factors:

“(a) The Natives' desire to present a proposal which is politically realistic and which will help to advance a full and final legislative settlement by Congress;

“(b) The immense value of the lands being given up;

[Note: pages 28-34 were not included in the archived print document.]

35.

Summary

In the United States there is general governmental acceptance of the proposition that there is, at the least, a moral obligation to compensate Alaskan natives in respect of claims based upon aboriginal title.

There is not the same unanimity of opinion on the question of whether these are "legal", as well as moral, claims. The Tee-Hit-Ton case stands in the way of an action, against the United States for

compensation for extinguishment of "unrecognized" Indian title unless and until there is some further congressional action constituting either a "recognition" of the native title or a direction that compensation be paid in respect of unrecognized title. The courts have allowed recovery where the necessary congressional intent was disclosed by the terms (and legislative history) of a special jurisdictional act, and under the Indian Claims Commission Act of 1946. Further, there is a line of authority supporting the legal enforceability of aboriginal title as against third parties. Legally contentious areas include the basis for the "land freeze", and for injunctions against land use pending resolution of the native land claims.