SEE YOU IN COURT:

NATIVE INDIANS AND THE LAW IN BRITISH COLUMBIA, 1969-1985

By

PAMELA JOANNE BUSH

B.A., The University of Toronto, 1984

M.A., The University of British Columbia, 1987

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in

THE FACULTY OF GRADUATE STUDIES

(Department of Political Science)

We accept this thesis as conforming

to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

April 1987

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Political Science

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date April 29, 1987

ABSTRACT

Between 1969 and 1985, native Indians in British Columbia have used the courts in a significant number of cases to pursue goals which can be considered particularly Indian in that they have arisen as a result of the Indians' position as one of the indigenous peoples of Canada. Three general questions with respect to the use of the courts are addressed. First, what goals have native Indians pursued in the courts, and how are these related to the objectives which native Indians are pursuing in the political arena? Second, how have these goals been pursued in court; that is, what legal arguments were used, how were these related to the goals pursued, and how do these affect the possible impact of the cases? Third, what have been the consequences of court action?

Through an examination of the court cases in which native Indians were involved from 1969-1985, four major goals were identified. First, native Indians used the courts in order to ensure that they received the benefits to which they were entitled under the provisions of the Indian Act. Second, native Indians challenged the way in which the federal government had administered the Indian Act. Third, Indians have attempted to preserve their traditional way of life by arguing that federal and provincial legislation which regulates hunting and fishing should not apply to them. Fourth, native Indians have used the

courts in attempts to prevent damage to land and resources to which they have a claim. Native Indians have not attempted to achieve a recognition of their right to self-government through court action; rather they have pursued goals which can be termed "economic" from the viewpoint of non-native society.

Native Indians have used the courts both in order to achieve legal solutions to disputes, and as a means of putting economic and political pressure on governments. In their attempts to use the courts to achieve legal solutions, Indians have achieved some successes. The overall utility of the courts as a means of putting economic and political pressure on governments has yet to be determined, although to date it would appear that native Indians have made some gains by using the courts in this way.

TABLE OF CONTENTS

LIST OF TABLES

ACKNOWLEDGEMENTS

I would like to thank Paul Tennant for the help which he gave me in the preparation of this thesis, as well as the other members of my committee, Don Blake and John Wood.

I would also like to thank Danny Savas who graciously offered me the use of his computer, and who is primarily responsible for the level of computer literacy which I have managed to attain. Frank Flynn also deserves thanks for sharing his computer knowledge with me. I would also like to express my gratitude to my parents for their love and support. I would also like to thank my fellow grad students and drinking companions both for listening to my complaints and for taking my mind off this thesis for hours at a time.

Finally, I would like to thank Paul Daykin for his love and support, without which I could not have finished this thesis.

INTRODUCTION

This thesis has as its subject the use of the courts by native Indians in British Columbia between 1969 and 1985. Three general questions with respect to the use of the courts are addressed. First, what goals have native Indians pursued in the courts, and how are these related to the objectives which native Indians are pursuing in the political arena? Second, how have these goals been pursued in court; that is, what legal arguments were used, how were these related to the goals pursued, and how do these affect the possible impact of the cases? Third, what have been the consequences of court action?

In considering the goals which native Indians pursue in court, I am concerned only with those which are in some way particularly Indian. Indian interests have been defined as those which arise as a result of the native Indians' position as the indigenous peoples of Canada, with a separate culture from that of the dominant society. This definition includes those interests which have arisen as a result of the differential treatment which has historically been given to native Indians because they were Canada's indigenous people. For example, the existence of the Indian Act has created interests which are unique to native Indians.

Native Indians may become involved in court cases in a

number of different ways. First, they may initiate a court action as a result of a dispute which has arisen with another party. An example is provided by the recent court case of MacMillan Bloedel v. Mullin, which arose because of a dispute over logging on Meares Island. Second, they may deliberately provoke a court action by acting in ways which are seen as illegal by those concerned with law enforcement. An example is provided by R. v. Adolph, in which the accused fished in defiance of a conservation closure, while stating publicly an intention to do so. Third, native Indians may become involved in cases which are initiated by others.

In cases which are initiated by others, native Indians have no choice but to respond. However, a number of responses are available to them. In a civil case, it is possible to achieve an out of court settlement. The fact that a court case proceeds indicates that native Indians are pursuing a goal which can only be achieved in court. In criminal cases, it is possible to plead guilty, or to present a defence which is unrelated to the Indianness of the accused. This thesis includes only those criminal cases in which the accused relies on a defence related to his Indianness. Relying on such a defence indicates that an Indian interest is being pursued in court. This is particularly evident in cases where the penalty for being found guilty is slight, and the costs of proceeding with the case exceed the penalty which would be inflicted if the accused was found guilty.

The cases examined have been divided into three categories, based on the nature of the dispute which has led to the court cases. This categorizatioin of cases clarifies the distinctions which exist among cases, and helps us understand why cases may have more or less political significance. The first category consists of cases which involve disputes about the content of particular laws. Both parties to the dispute accept the validity of the law in question, but disagreement exists as to the actual meaning of that law. The judges in these cases are called upon to settle the dispute by determining what the law "really" means. Necessarily then, these disputes must be settled in court because they are disputes about the interpretation of the law.

The second category consists of cases which involve disputes about jurisdiction. The main issue in dispute in these cases is whether the Canadian Parliament or the provincial legislatures have the authority to make laws with respect to certain subjects. Such cases are inherently more political than the cases in the first category as the outcomes will affect the division of powers between the provincial and federal authorities.

The third category consists of cases which involve challenges to legislatures' or governments' authority. It is the validity of certain laws or the legality of the governments' actions which are being called into question. Such cases are inherently political; they indicate disagreement with the govern-

ments' actions or policies. While such disagreement might result in political action, in these instances it has led to legal action. In this category, cases are divided into two subcategories. The first subcategory includes cases which are initiated by native Indians, while the second includes cases which have resulted from criminal charges being laid.

Within each of these three categories, cases have been divided according to the issue area in which the disputes arise. In each issue area three questions are addressed. First, why is this issue of interest to Indians? Second, what goals are being pursued and how? Third, what was the outcome of each case, and what was its significance?

This thesis is divided into five chapters. Chapter 1 provides an overview of the political and legal position of native Indians in B.C., and suggests some of the areas in which native Indians are likely to pursue their interests in court given this position. Chapters 2-5 examine the particular goals which native Indians have pursued in court, as well as the successes and difficulties which native Indians have encountered in their use of the courts. Chapter 2 consists of an examination of those cases which fall into the first category discussed above. The political importance of such cases is limited, as both parties to these disputes accept the validity of the law in question. Chapter 3 considers the cases which fall into the second category - the jurisdictional cases. Chapter 4 deals with those cases in the

third category which have been initiated by native Indians, while Chapter 5 examines the cases in the third category which have resulted from criminal charges. The outcomes of the cases in the last 3 chapters are potentially more significant in political terms as the authority of governments and legislatures is called into question.

CHAPTER 1

THE NATIVE INDIAN/GOVERNMENT RELATIONSHIP: POLITICS, POLICIES, AND LAWS

Native Indians' use of the courts since 1969 to pursue specifically Indian interests cannot be considered in isolation from Indians' overall relationship with the dominant society. Since the time of first contact, Indians have been treated differently from immigrants to Canada, and this separate treatment, coupled with the native Indians' position as one of the indigenous peoples of Canada, has led to the development of interests which are unique to native Indians. In addition, the pursuit of Indian policies by Canadian governments has led to the development of law in Canada which pertains only to native Indians. This law provides options to native Indians when pursuing their interests in court. Finally, the development of native Indian political objectives has occurred in response to the pursuit of these policies by governments, and has affected the development of these policies themselves. It is likely that these political objectives will be reflected in the native Indians' use of the courts.

Consequently, this chapter briefly outlines the Indian policies which have been pursued by the federal and provincial gov-

ernments in Canada, the law which has resulted from the pursuit of these policies, and the native Indian response to these policies and laws.

Three broad policies have been pursued in Canada with respect to native Indians. First, a policy of extinguishing aboriginal title through the purchase of land by the colonial authorities was pursued. Second, throughout most of Canada's history, a policy designed to achieve the assimilation of native Indians has been followed. Third, in the last 15 years, the assimilationist policy has been abandoned, and the two major features of the federal government's policy have been increased consultation with native Indians and a limited recognition to Indian claims of aboriginal rights. Each of these policies has had an impact on Canadian law as it affects native Indians.

This chapter is divided into five sections, as follows:

1) The Extinguishment of Aboriginal Title,
2) Assimilation and Wardship,
3) Consultation and Recognition of Aboriginal Rights,
4) Case Law Before 1969, and
5) A Turn To The Courts?

The Extinguishment of Aboriginal Title

The policy of extinguishing aboriginal title through treaties was not followed uniformly in the early history of Canada. However, this policy was formally expressed in the Royal

Proclamation of 1763, and followed in the 19th and 20th centuries in Ontario and much of western Canada.

Before 1763, no co-ordinated policy with respect to acquisition of land was followed by either the English or the French. As a result of the economic and military conflict between France and England, and the concentration on the fur trade, only a small amount of land was required for settlement. Official English policy from the early 1600's had been concerned with the need to purchase land from the Indians for settlement; however, individuals often ignored Indians' claims to land, or participated in fraudulent dealings with them.

In 1763, the conflict between the French and English was formally ended as France ceded Quebec to Britain in the Treaty of Paris. The Royal Proclamation of 1763 was designed to provide governing structures for the new British colonies in North America, and to outline a policy for dealing with native Indians in the colonies. The Royal Proclamation provided that the land outside the boundaries of the new colonies and the territory of the Hudson's Bay Company and "all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and Northwest..."[1] be reserved for the Indians as their hunting grounds. The Proclamation prohibited the individual purchase of land from the Indians, and instructed any settlers who had settled on lands not ceded to or purchased by

the Crown to remove themselves from that land. The Proclamation also outlined the procedure to be followed in any subsequent land cessions.

As a result of the Royal Proclamation, and of the Imperial policy of purchasing land before 1763, a number of treaties were entered into with the native Indians. While the specific provisions of the treaties varied across Canada, two features were common to them all. First, lands were set aside for the exclusive use of the Indians who were parties to the treaties. Second, all of the treaties included provisions which protected the rights of Indians to hunt and fish in the unoccupied lands which had been ceded.

In British Columbia, James Douglas, Chief Factor of the Hudson's Bay Company, and then Governor of the colony until 1864, followed this traditional Imperial policy by purchasing land from the Indians. However, only 14 treaties were signed in the Fort Victoria area on Vancouver Island, because of a scarcity of funds and the fact that treaties were made only when actual settlement was planned.[2]

After the retirement of Douglas in 1864, the colony's policy changed significantly. Native Indians were viewed by the new colonial administration as an obstruction to settlement and progress, and the existence of any Indian rights to the land which they occupied was denied.[3] This attitude on the part of the colonial administration, and of later provincial governments,

prevented the negotiation of any further treaties with them, and limited the ability of the federal government to negotiate treaties. While the federal government wished to obtain the surrender of Indian title after Confederation, the province retained title over Crown land in most of the province. Consequently, only one treaty, Treaty 8, was made between the federal government and the Beaver and the Slave Indians in northeastern B.C., as this land was held by the federal Crown.[4]

The effect on Canadian law of the policy of extinguishing aboriginal rights is not entirely clear. The actual legal status of the treaties which were entered into is uncertain, although Canadian courts have considered the treaties to constitute obligations enforceable at law, at least in some circumstances. The legal effects of the Imperial policy of purchasing land from the Indians, and of the Royal Proclamation which expressed this policy, are also uncertain. (A consideration of the case law on these issues prior to 1969 is included in section four of this chapter.) At this point, however, it should be said that in purchasing land from the Indians, the Crown was implicitly recognizing that native Indians did have certain rights to the land which they occupied.

Assimilation and Wardship

Before Confederation, the development of Indian policy oc-

curred separately in each of the colonies. However, as the general attitude towards Indians and their relationship to white society was similar in all the colonies, the various policies shared the goal of assimilation.[5] Government officials and politicians believed that it was inevitable that assimilation would gradually take place as native Indians were exposed to the wonders of "civilized" life. However, as the Indians were primitive peoples, the process of adjustment would be difficult. Consequently, an Indian policy was designed to both protect the Indians (from both themselves and from unscrupulous settlers) and to hasten the process of assimilation. The method chosen to achieve this was the segregation of native Indians through the use of the reserve system. On reserves, assimilation could be hastened through education, and negative effects minimized through the wardship of the government.

This paternalistic attitude towards Indians, and the policy which grew out of this attitude, developed gradually from 1830 until about the time of Confederation. Upon Confederation, the authority to legislate with respect to Indians and lands reserved for Indians was given to the federal government in Section 91(24) of the B.N.A. Act (now the Constitution Act, 1867). After Confederation, the now national policy of assimilation and wardship was refined by the federal government.

Before turning to a consideration of the content of this policy, and the Indian reaction to it, it should be noted that

the very existence of Section 91(24) raises legal issues pertaining to native Indians. Most importantly, this section gives native Indians the opportunity to challenge the validity of provincial laws as they apply to Indians and their lands. (The jurisdictional issues which are raised by Section 91(24) will be discussed in greater detail in Chapter 3.)

The existence of Section 91(24) also necessitated the inclusion of references to native Indians in the Terms of Union under which B.C. joined Confederation in 1871. Article 13 of the Terms of Union contained 3 provisions with respect to native Indians: that 1) "the charge of the Indians, and the trusteeship and management of the lands, reserved for their use and benefit, shall be assumed by the Dominion Government"; that 2) "a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union"; and that 3) "to carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the local Government to the Dominion Government, in trust for the use and benefit of the Indians".[6] This article necessitated the passage of subsequent legislation by both the federal and provincial legislatures in order to implement its provisions.[7] It should be noted that no provisions were made in this subsequent legislation for the

protection of native hunting rights, although such protection was ensured in the prairie provinces by a clause of the federal/provincial Natural Resources Agreements.

We now turn to a consideration of legislation which was passed in order to further the goal of assimilation. In order to achieve this goal, Parliament passed a number of Acts which pertained to Indians. These Acts significantly reduced the Indians' ability to control their own lives, as the federal government, through the minister of Indian affairs, was given the authority to make decisions with respect to virtually every aspect of life on reserves. For example, the title to reserve lands was held by the federal Crown, and decisions with respect to the disposition of these lands were subject to the approval of the Minister. The Indian Advancement Acts of 1884 and 1886 gave band councils some fiscal responsibility and the authority to pass enforceable by-laws, although most decisions remained subject to the approval of the Minister.[8] These Acts were meant to educate the Indians in the ways of civilized government, and if possible to destroy tribal organizations. Elected, rather than hereditary chiefs, were encouraged by the government, and the chiefs' duties were linked to the activities of the government, for whom they acted as go-betweens.[9] Parliament also added provisions to the Indian Act in the late 1800's forbidding the potlatch and the Sun Dance, as these were seen to interfere with assimilation.

The government also tried to speed assimilation by reducing the number of status Indians. Membership provisions in the various Indian Acts defined who were Indians for the purposes of the Acts - status Indians. Over time, membership provisions became more restrictive. One example of this was the inclusion of Section 6 in the 1869 Act, which denied status to Indian women who married non-natives. Provisions for the enfranchisement of Indians who were considered sufficiently civilized also reduced the number of status Indians. An Indian who was enfranchised attained the right to vote, property rights, and a lump sum payment of band funds, in return for renouncing status as an Indian.

The establishment of the reserve system in B.C. was a matter of controversy - both between the provincial and federal governments and between these governments and the native Indians.[10] The allotment of reserves had begun under Governor Douglas, and changes to reserve boundaries continued until 1924. In particular, the provincial government wished to reduce the area of the reserves alloted under Governor Douglas.[11] Native Indians in many areas of B.C. protested both the establishment of the reserves and the size and location of reserves, particularly when the provincial government attempted to reduce the size of the reserves.[12] A statement made by Chief David Mackay in 1887, testifying before the Royal Commission of Inquiry into the North

West Coast Indians,[13] provides an example of the native Indian attitude towards reserves.

> What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they now say they will give us so much land - our own land. (14)

Dissatisfaction with the reserve system was expressed in many ways, and led to political action on the part of the Indians. Examples of this action are the presentation of a petition in 1874 to the Indian Commissioner, the formation of the Nishga Land Committee in 1890, and the trip to England made by three chiefs in 1906 in order to place their claims before the King. From 1913-1927, the political activities of native Indians in the province were directed towards a settlement of their aboriginal claim. During this time, native Indians demanded compensation for the loss of their land, education and medical care, and clarification of their hunting, fishing and water rights.[14]

Finally, in 1927, the House of Commons appointed a special committee to inquire into the claims expressed in a petition made to Parliament in 1926 by the Allied Indian Tribes of B.C. In April, 1927, the report of the committee concluded that the Indians had not established any claims to land based on aboriginal rights, but advised that $100,000 be spent in B.C. annually

for the benefit of the Indians, as compensation for the lack of treaty payments in B.C. The committee's decision closed the matter as far as the federal government was concerned. In addition, an amendment to the Indian Act in 1927 provided that any person who received funds from Indians in order to pursue a claim was subject to prosecution. While this amendment was included because of a concern over American lawyers soliciting funds from eastern Canadian Indians to present a claim against the State of New York,[16] it also contributed to the demise of the B.C. Indian land claims movement.

The period from 1927 to the early 1960's was a relatively uneventful one. The federal government continued to pursued its assimilationist policies, which were furthered by the establishment of more residential schools, where native Indian children were punished for speaking their own languages. Later in this period, the federal government began to integrate native Indians into the provincial public school system, as a means of both saving money and hastening assimilation. The Native Brotherhood of B.C. was formed in 1931, drawing most of its support from Indians of the west/central and north coast areas. The main activity of this organization was to represent the interests of commercial Indian fishermen, but it also concerned itself with wider issues, such as social services for Indians and voting rights. Native Indians did not receive the provincial franchise

until 1947, or the federal franchise until 1960. The Native Brotherhood also began publishing the Native Voice in 1946, which was until 1969 the province's only Indian newspaper.[17]

In 1946, a special joint committee of the Senate and House of Commons was established to consider the revision of the Indian Act. The new Act, which came into effect in 1951, was little more than a consolidation and clarification of the Indian Acts of the past. However, the potlatch prohibition was dropped, as was the section which had made raising money for Indian claims an offence, and the land claims question was soon revived. The Nishga Tribal Council was formed in 1955, and one of its major concerns became the settlement of the land question. A new position paper on the issue was drawn up in 1959, which emphasized the importance of resources, such as fish and timber, as well as land. However, when the brief was presented to another joint Senate-House of Commons Committee on Indian Affairs in 1960, it had no noticeable effect.[18]

During the 1960's the need for revisions to the Indian Act became increasingly evident. By this time it had become obvious that the policy of assimilation was not working. Indians remained segregated on reserves, where they suffered from poverty, unemployment and health problems.[19] Growing public concern with civil rights and poverty issues during the 1960's put added pressure on the federal government to do something about the "Indian problem".[20]

A number of new programs were established by the Department of Indian Affairs from 1963-1967 in order to improve conditions on Indian reserves. The major thrust of these programs was to reduce Indian dependence on the department by encouraging local Indian initiative and by convincing the provinces to provide the same social services to native Indians which they provided for other provincial residents. Two programs in particular, the community development program and the establishment of Indian Advisory Boards, provided opportunities for native Indians to become more involved in the political process.[21] However, none of these programs was particularly successful as a result of resistance from the provinces, differences within the department, and Indian dissatisfaction with their limited advisory role. The department's failure during these years to make significant progress despite their efforts "left the Indian problem unchanged and even more visible."[22]

Consequently a broad review of Indian policy was initiated by the Trudeau government after its election in 1968. During this process, consultations were held with Indian groups across the country, which were at the time relatively unorganized.[23] In June of 1969, the federal government outlined its proposed new policy in the White Paper. This proposal outlined a new strategy to achieve the assimilation of Indians into Canadian society. The White Paper proposals were based upon the belief that the

provisions which then existed for Indians, through the Indian Act and the treaties, served only to reinforce segregation and discrimination. The White Paper thus recommended the repeal of the Indian Act; the transfer of federal funds to the provinces so the provinces could provide the same services to Indians as to other citizens; that legislation be implemented to enable Indians to obtain title to their land; that funds be made available for Indian economic development as an interim measure; and that the Department of Indian Affairs be phased out over the next five years.[24]

The Indian response to this proposal was immediate, vehement and negative. Native Indian concerns and desires which had been expressed during the consultation process had been ignored. The White Paper was denounced by Indians as it threatened both their aboriginal and treaty rights. The White Paper described treaty rights as "limited and minimal promises",[25] and aboriginal claims to land were stated to be "... so general and undefined that it is not realistic to think of them as specific claims capable of remedy."[26] This denial of the rights of native Indians, coupled with the White Paper's other proposals, led the National Indian Brotherhood to describe the new policy as a blatant attempt to commit "cultural genocide".[27] In response to the White Paper, native Indians expressed their desire to retain both their culture and their aboriginal and treaty rights. As a result, the federal government withdrew the proposals in 1971.

Consultation and Recognition of Aboriginal Rights

The vehement rejection of the White Paper by native Indian groups led to a new era in federal government Indian policy. As a result of the Indian reaction to the White Paper the federal government began to pay more attention to the desires of native Indians. This increased attention has led to movement on the part of the federal government towards acceptance of the concept of aboriginal rights. The political mobilization of native Indians which occurred as a result of the White Paper has contributed significantly to the evolution of federal government policy. The existence of more broadly representative and more organized native Indian political groups, and the achievement of a broad consensus by these groups with respect to their general goals has facilitated the increased responsiveness of the federal government to native concerns.[28]

The White Paper proposals led to a recognition that consensus existed among Indian groups with respect to their desire not to be assimilated. Over the next few years, native Indians began to present their goal as a desire for the recognition of their aboriginal rights, and in particular their right to self-govern ment. The achievement of this goal would give native Indians the ability to preserve their own cultures, and would give them greater autonomy and control over their own lives, both politi-

cally and economically. Aboriginal rights were seen to flow from native Indians' position as the indigenous peoples of Canada, who have occupied this land since time immemorial. The broad concept of aboriginal rights includes a number of more specific claims. Native Indians are concerned with achieving recognition of their right to a sufficient land base, which includes access to resources. The recognition of aboriginal hunting and fishing rights is also desired. The recognition of these rights would provide native Indians with an independent economic base, which they see as essential if meaningful self-government is to be attained. The achievement of self-government is desired both in itself, and because it would enable native Indians to pursue social and cultural goals which they define for themselves.

While the recognition of aboriginal rights has been presented as the major goal of native Indian organizations, native Indians have also pursued the goal of improving their position in Canadian society in the absence of a full recognition of aboriginal rights. This goal has often been pursued through the political process, as Indian groups have lobbied for funds, participated in government committees and advisory boards in order to ensure that their interests are heard, and attempted to increase their autonomy from the Department of Indian Affairs. This goal has also been pursued outside the political process, as native Indians have improved their economic position through economic development projects.

The federal government has responded in a number of ways to the demands of native Indians for the recognition of their aboriginal rights. In 1974, the Office of Native Claims was established to represent the federal government in land claims negotiations with native Indians who believed they had outstanding claims. In 1975, the joint Cabinet/National Indian Brotherhood Committee was established for the purpose of discussion, and hopefully agreement, on major policy issues. In particular, joint working groups were established to look into Indian rights and claims, Indian Act review, housing, and education. Although the National Indian Brotherhood withdrew from the committee in 1978, claiming that no progress was being made,[29] the very existence of the committee indicated a new willingness on the part of the federal government to consult with Indians on issues affecting them. The Committee also gave native Indians direct experience with the political structure of the federal government. Further consultation with Indians took place when the Special Committee on Indian Self-Government (the Penner Committee) was established to look into the question of self-government. The final report of the committee was presented in 1983.[30]

The rejection of the White Paper also led to changes in the

administration of the Indian Act by the Department of Indian Affairs. Native Indian organizations became more meaningfully involved in the planning and implementation of new programs, particularly in the areas of education and housing. The department also transferred responsibility for the administration of certain programs to Indian bands and associations, although some Indian organizations argued that the necessary authority was not transferred along with the responsibility.[31]

The most important change in the law which has taken place as a result of this new federal government attitude was the inclusion of several sections dealing with aboriginal peoples in the new Constitution Act, 1982. These sections would not have been included had it not been for the lobbying of the three national aboriginal organizations.[32] Section 35(1) provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[33] Section 35(2) defines aboriginal peoples as including the Indian, Inuit and Metis peoples. In addition, Section 37 provides that a first ministers' Constitutional Conference take place within a year of the Act's coming into effect, at which time the question of identifying and defining aboriginal rights will be addressed, with the participation of aboriginal peoples. Although no agreement on the definition of aboriginal rights was reached at the first conference, it was agreed that further conferences should take place in order to give the concerned parties an opportunity

to come to a mutually acceptable definition of aboriginal rights. Section 25 provides that the guarantee of rights and freedoms in the Charter "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada."[34]

Some legislation was also passed which gave native Indians greater control over life on reserves. One example of this was Bill C-31 which was given Royal Assent on June 28, 1985. This bill gives bands the option of assuming control over the determination of their own band membership. The bill also repealed sections of the Indian Act which provided for enfranchisement, and eliminated Section 12(1)(b) which provided that when an Indian woman married a non-Indian she lost her status. The federal government also introduced legislation in late 1985 which would allow the Sechelt Indian band of B.C. to achieve a particular form of self-government,[35] but which did not recognize an Indian right to self-government.

The B.C. government has to some extent gone along with federal government initiatives during this period. The province accepted the inclusion of the sections in the Constitution Act, 1982 pertaining to native Indians, although only after the word "existing" was added to Section 35. The provincial legislature also passed legislation enabling the Sechelt Band to achieve limited self-government. However, the provincial government

continues to maintain that aboriginal title has never existed, and that if it ever did exist it was extinguished long ago. The government also asserts that any compensation for the extinguishment of aboriginal rights is a federal responsibility. This position has limited the progress of land claims negotiations in B.C., as the province retains title to Crown lands in the province.[36]

Case Law Before 1969

The actual legal effect of the government's actions with respect to its native Indian policies has been and continues to be a matter of debate. Court cases prior to 1969 settled a number of legal questions with respect to native law in the areas of aboriginal and treaty rights. This section reviews the most important legal questions which were relevant to the issues of aboriginal and treaty rights, and the case law prior to 1969 which addressed these questions. As the cases before 1969 left a number of these questions unresolved, these questions have continued to be of relevance throughout the period discussed in this thesis.

The concept of aboriginal rights, as rights which are recognized by the law, has been around for a long time.[37] There are four legal questions which are relevant to aboriginal rights or Indian title. These are: 1) What is the source of these rights? 2) What is the nature or content of such rights? 3)Can

these rights be extinguished, and if so how? 4) Can compensation be claimed for the extinguishment of these rights?

The leading case before 1969 was St. Catherine's Milling and Lumber Co. v. the Queen,[38] first heard in 1885, and settled by the Judicial Committee of the Privy Council in 1888. Indians were not parties to the action; aboriginal title became an issue because of a dispute between the federal and provincial governments. The decision in this case left many questions unanswered. The final decision took the Royal Proclamation of 1763 to be the source of aboriginal title.[39] In considering the nature of aboriginal title, the Court found that it was "a personal and usufructuary right, dependent upon the goodwill of the Sovereign."[40] However, the Court did not define precisely what this phrase meant. As for the extinguishment question, the Court made it clear that the sovereign has an uninhibited and exclusive right to extinguish aboriginal title, but again did not go into particulars as to how this was to be done.[41] A few subsequent cases dealt with the question of aboriginal rights, but added little to the decision in this case.

The legal status of the Royal Proclamation of 1763 raised major questions related to aboriginal rights. The Royal Proclamation, which had never been repealed and continued to have the force of a statute in Canada, nevertheless had an uncertain status and scope.[42] Two questions are especially important.

First, while the Royal Proclamation was taken to be the source of aboriginal title in the St. Catherine's Milling case, is it the exclusive source of aboriginal title in Canada, or is it only one of several sources? Second, does the scope of the Proclamation extend west to the Pacific Ocean or is it confined to the territory which was British in 1763? The answer to this second question is of particular relevance to British Columbia.

Two cases in B.C. dealt with these questions before 1969. However, the decisions in these cases were not finally conclusive as one was a lower court judgement, and in the other, only one judge chose to rule on these issues at the higher court level. In R. v. White and Bob,[43] which was decided in the Supreme Court of Canada in 1965, the major issue was not aboriginal rights; however two judges chose to make comments on this matter in the lower courts. Both County Court Judge Swencisky and Mr. Justice Norris of the B.C. Court of Appeal ruled that the Royal Proclamation applied to B.C. They also concluded that the Royal Proclamation confirmed rather than created aboriginal rights, and so was not the exclusive source of aboriginal title in Canada. However, in the case of R. v. Discon and Baker,[44] County Court Judge Schultz ruled that the Royal Proclamation did not apply to B.C. and that aboriginal rights were recognized in Canada only where they were referred to in a written treaty or statute. These cases, then, did little to settle the legal questions which existed with respect to the Royal Proclamation and aboriginal

rights.

While the law dealing with aboriginal rights was very vague in 1969, the law with respect to treaty rights was a bit more specific. There are four legal questions which are of particular importance with respect to treaties. These were; 1)What is the legal nature of Indian treaties? 2) What is, and what is not a treaty? 3) How should treaty provisions be interpreted by judges? and 4) What is the effect of provincial and federal legislation on treaty rights?

In law, the term "treaty" can be used with respect to two separate kinds of documents - international treaties, and contracts. The courts before 1969 did not make it clear which kind of treaty the treaties which were signed with the Indians were considered to be. The legal nature of Indian treaties is rather important, as the answer to this question will determine what agreements will be considered to be treaties, and what kind of compensation must be paid if treaty rights are extinguished or abridged. Rather than making clear the exact legal nature of Indian treaties, the courts in Canada chose to begin by answering these subsidiary questions when they arose. However, the cases which took place before 1969 did make it clear that Indian treaties did constitute legally enforceable obligations.[45]

With respect to the second question, the courts took an expansive view of which documents or agreements are legally

treaties. In the case of R. v. White and Bob, the document relied upon by the accused was of an informal nature, and it was not clear whether Governor Douglas signed the document in his capacity as Governor of the Colony or as Chief Factor of the Hudson's Bay Company. However, the Supreme Court of Canada ruled that this document was a treaty. With respect to the interpretation of treaties, the courts tended to interpret treaty provisions in favour of the protection of native rights in a number of cases.[46]

A number of cases before 1969 dealt with the effect of provincial and federal legislation on aboriginal rights. R. v. White and Bob established that provincial legislation which affected treaty rights would not apply to treaty Indians as a result of Section 88 of the Indian Act. Two cases argued in the Supreme Court of Canada in the mid-1960's, R. v. Sikyea[47] and The Queen v. George[48] established that federal legislation could apply to treaty Indians notwithstanding rights conferred by treaty. A further B.C. case, R. v. Cooper, George and George,[49] in 1968, followed these decisions in ruling that the federal Fisheries Act could restrict treaty rights.

A Turn To The Courts?

The information in the preceding sections suggests that native Indians will use the courts both in order to further the goals which they are pursuing in the political arena, and as a

result of their increased political and economic activity. This section identifies some of the issues which will be investigated in the next four chapters.

Since 1969, native Indians have become more politically active, and perhaps more importantly, have achieved consensus with respect to their general goals. The greater awareness and education of native Indians, plus a new generation of leaders, have both contributed to and been a result of the political mobilization of native Indians.

It would seem reasonable to suppose that the political mobilization and identification of goals which has taken place would lead to an increase in the use of the courts by native Indians, especially when participation in the political process has not produced the desired results. In addition, because native Indians have defined their primary goals in terms of rights, participation in the political process which is aimed at achieving a recognition of aboriginal rights will probably be deemed to be unsatisfactory if native Indians' interests are treated on a par with interests of other groups.

There are additional reasons for supposing that B.C. Indians will make use of the courts in pursuing both land claims and hunting and fishing rights. Only 15 treaties were negotiated with the Indians. In addition, the provincial government has continued to assert that native Indians in the province have no

aboriginal rights, and that if they ever did have such rights, they were extinguished long ago. The provincial government's position makes it unlikely that a political solution to the question of aboriginal rights in B.C. will be found. There is also very little protection for aboriginal hunting and fishing rights in B.C. as few treaties were signed, and there was little recognition of hunting and fishing rights in other legislation, at least until the passage of the Constitution Act, 1982.

The federal government's policy of extinguishing aboriginal rights provides native Indians with a basis in law for arguing that aboriginal rights exist. In addition, jurisdictional arguments are also available with respect to hunting rights, as wildlife legislation is a provincial responsibility while the federal parliament has jurisdiction over Indians. It is also likely that aboriginal rights cases would be more prevalent after 1982, as the inclusion of Section 35 in the Constitution Act, 1982, would seem to have provided another basis for legal argument and to have decreased the risk of using aboriginal rights arguments in court. On the other hand, native Indians may have been somewhat reluctant to use the provisions of the Constitution Act as the basis for legal argument given the fact that a process had been established to define the meaning of Section 35.

Federal jurisdiction over Indians and their lands has led to the development of a separate legal regime for native Indians living on reserves. The most important element of this legal

regime is the Indian Act, although other legislation (such as the Terms of Union) also includes specific legal provisions which affect native Indians. This separate legal regime both provides native Indians with benefits unavailable to non-Indians, and imposes externally designed rules on native Indian activities on reserves. The meaning of many of the provisions of this Indian-specific legislation has never been defined by the courts. Consequently it is likely that native Indians will use the courts to maximize the benefits which are provided by this separate legal regime. In addition, it is likely that disputes about the meaning of certain provisions will occur as native Indians more actively pursue the goals of economic development and increased autonomy. The interpretation of these provisions, and their application in particular circumstances, is a matter which the courts must decide, if the parties to the dispute cannot reach agreement themselves.

In addition, the policy of assimilation and wardship which was pursued by the federal government over much of the period has led to the development of a legal regime, whose most important element is the Indian Act, which gives the federal government a great deal of authority over Indian life on reserves. It is likely that the political mobilization of native Indians will lead to challenges to this authority, particularly if the federal government's exercise of this authority does not meet with their

approval.

The examination of the political and legal position of native Indians in B.C. has suggested a number of questions which can be asked relating to Indians' use of the courts. Have native Indians used the courts in order to establish the existence of aboriginal title and hunting and fishing rights? Have native Indians used the courts in order to maximize the benefits which they receive under the provisions of the Indian Act and other legislation? Have Indians used the courts to settle disputes which arose as a result of their increased political activity? Finally, have Indians used the courts to challenge decisions made by the federal government, particularly with respect to the administration of the Indian Act? These questions will be investigated in the next four chapters, as we examine the particular goals which native Indians have pursued in court, and the consequences of the Indians' court actions.

NOTES

1 Royal Proclamation, 1763. See Peter A. Cumming and Neil H. Mickenberg, eds, Native Rights in Canada, 2nd edition, (Toronto: General Publishing Company, Ltd., 1972), Appendix II, p. 291.

2 Ibid., p. 172.

3 Ibid., p. 180.

4 Paul Tennant, "Native Indian Political Organization in B.C., 1900-1969: A Response to Internal Colonialism," in B.C. Studies, No. 55, Autumn, 1982, p. 14.

5 See Department of Indian and Northern Affairs, The Historical Development of the Indian Act (Ottawa: Supply and Services Canada, 1978), especially pp. 1, 23-36.

6 Quoted in Forrest E. LaViolette, The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia (Toronto: University of Toronto Press, 1973), pp. 15-16.

7 In particular, this led to legislation based on the report of the McKenna-McBride Commission, which had been appointed as a result of conflicts over the size of reserves. This legislation led to a decrease in the size of the reserves then existing by over 47,000 acres and the conveyance of approximately 87,000 acres of other lands to the Indians. The Indians in the province were not pleased by the results of the Commission's work. See Cumming and Mickenberg, Native Rights in Canada, pp. 184-5. Legislation was also necessary with respect to mineral rights.

8 Kathleen Jamieson, Indian Women and the Law in Canada: Citizens Minus (Ottawa: Minister of Supply and Services Canada, 1978), p. 27.

9 Adrian Tanner, "Introduction: Canadian Indians and the Politics of Dependency," in Tanner, ed, The Politics of Indianness (St. John's: Institute of Social and Economic Research, 1983), p. 16.

10 See for example, LaViolette, Struggle for Survival, pp. 98-141, Daniel Raunet, Without Surrender, Without Consent

(Vancouver: Douglas and MacIntyre, 1984).

[11] LaViolette, p. 105 ff.

[12] Ibid.

[13] This Commission had been appointed as a result of a conflict which had erupted in Nishga territory in Northwest B.C. between the Indians and the men who had been sent to survey the reserves.

[14] Raunet, p. 90.

[15] See LaViolette, Chapter 4, for a more detailed account of the native Indian protest.

[16] Department of Indian and Northern Affairs, Historical Development of the Indian Act, p. 121.

[17] Tennant, "Native Indian Political Organization," pp. 28-9.

[18] Raunet, p. 147.

[19] The plight of Indians was documented in H.B. Hawthorn, A Survey of the Contemporary Indians in Canada: Economic, Political, Educational Needs and Policies, Vols. 1&2 (Ottawa: Queen's Printer, 1966-7). Volume 1 was leaked to the press, and so had a significant impact on public opinion.

[20] Sally Weaver, Making Canadian Indian Policy: The Hidden Agenda, 1968-1970 (Toronto: University of Toronto Press, 1981), p. 13.

[21] Ibid., pp. 25-31.

[22] Ibid., p. 44.

[23] Ibid., p. 195.This book provides a detailed account of the policy review process.

[24] Department of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: Queen's Printer, 1969).

[25] Ibid., p. 11.

[26] Ibid.

[27] Noel Dyck, "Representation and Leadership of a Provincial Indian Association," in Tanner, Politics of Indianness, p. 218.

[28] The federal government contributed to this development by funding Indian organizing efforts, as the government required groups to articulate Indian interests following the vehement rejection of the White Paper.

[29] Rick Ponting and Roger Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada (Toronto: Butterworth and Co., 1980), p. 265.

[30] House of Commons, Indian Self-Government in Canada: Report of the Special Committee (Ottawa: Queen's Printer, 1983).

[31] Ponting and Gibbins, p. 179.

[32] See Doug Sanders, "The Indian Lobby", in Keith Banting and Richard Simeon eds, And No One Cheered: Federalism, Democracy and The Constitution Act (Toronto: Methuen Publications, 1983). The three national organizations were unhappy with the final wording of Section 35. We shall see why they were right to be apprehensive about this in Chapter 5.

[33] Constitution Act, 1982, Section 35.

[34] Ibid., Section 25.

[35] However, although legislation was passed, problems occurred in working out the details of financing. In mid-1986 it appeared that the Sechelt Band was unwilling to proceed because of these funding problems.

[36] Department of Indian Affairs and Northern Development, In All Fairness: A Native Claims Policy (Ottawa: Minister of Supply and Services, 1981), p. 30.

[37] For more detailed discussion of the legal issues with respect to aboriginal rights, see Brian Slattery, Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title (Saskatoon: University of Saskatchewan Native Law Centre, 1983), and Doug Sanders, "The History of Indian Rights in the Colonial Period", in Michael Jackson, ed, Native

Peoples and the Law (Vancouver:1979).

[38] [1899] 14 App.Cas.46, [1887] 13 S.C.R. 577.

[39] [1889] 14 App.Cas. 46, at p. 54.

[40] Ibid.

[41] See Cummings and Mickenberg, p. 42.

[42] Ibid., p. 30.

[43] (1966) 52 D.L.R. (2d) 481, (1965) 50 D.L.R. (2d) 613.

[44] (1968) 67 D.L.R. (2d) 619.

[45] Cumming and Mickenberg, p. 58.

[46] Ibid., pp. 61-2.

[47] (1964) 43 D.L.R. (2d) 150.

[48] [1966] S.C.R. 267.

[49] (1969) 1 D.L.R. (3d) 113.

CHAPTER 2

THE INTERPRETATION OF STATUTES

In this chapter, the cases discussed are those which involve a dispute about the content of particular laws. Both parties to the dispute accept the validity of the law in question, but disagreement exists as to the actual meaning of that law. The judges in these cases are called upon to settle the dispute by determining what the law 'really' means. As these cases are concerned with the interpretation of the law as it presently exists, they are unlikely to significantly affect the non-Indian community. The decisions in these cases serve only to clarify or preserve the status quo, rather than to change the place of Indians in Canadian society. However, these cases are important to native Indians, as the clarification of the law may provide benefits which would otherwise be forfeited.

The two statutes whose content has been in dispute in B.C. are the federal Indian Act and the provincial Adoption Act. The Indian Act, as the primary piece of legislation passed by the federal parliament relating to native Indians, establishes the legal framework for life on reserves. The Indian Act contains provisions which determine who is an Indian for the purposes of the Act, the rights and obligations of Indians under the Act, and the allocation of decision-making authority on the reserves. The

legal interpretation of the Act can affect the benefits which Indians gain from the Act, and the authority of band councils on reserves - issues of obvious interest to native Indians.

The application of the Adoption Act to native Indians also raises issues which are of particular concern to native Indians, especially when non-natives are attempting to adopt Indian children while the parents (or Indian relatives or communities) desire that children be raised in Indian communities in order to preserve Indian cultures. This desire to preserve cultural integrity is one which may arise whenever a cultural group is a minority and so threatened by the imposition of the cultural values of the dominant group, and may have even greater salience for native Indians as a result of the assimilationist policies which have been pursued by the federal government in the past.

Before 1969, neither the Adoption Act nor the Indian Act was used by native Indians to any extent as the basis of court action.[1] Since 1969 there have been some 23 cases in which native Indians have presented arguments based on these two statutes.[2] These cases can be divided into seven issue areas: 1)status; 2)debt payment; 3)exemption from taxation; 4)the use of reserve land by non-Indians; 5)the possession of reserve land by Indians; 6)the legal status of band councils; and 7) adoption. The discussion of the cases in each issue area includes a consideration of the goals pursued in each case, and the outcomes of the cases. In addition, the following questions are particularly

relevant to these cases:

1)Have native Indians used the courts in order to maximize the benefits which they receive under the Indian Act?

2)Has there been an attempt to increase the autonomy of band councils through the use of the courts?

3)Has the economic development of reserves led to an increase in legal disputes?

4)Have native Indians used the courts to challenge decisions made by the federal government (or its officials) in the administration of the Indian Act?

Status

In two cases the courts were used in order to determine the status of native Indians under the membership provisions of the Indian Act. In Grant v. the Registrar of Indians,[3] the applicants sought a declaration that they were Indians within the meaning of the Act. The court ruled that they were entitled to be registered as Indians. In the case of C.L.G. v. Smith,[4] the question was whether the adoption of an Indian child by members of another band caused the child to lose his status as a member of his natal band. The court ruled that the child's band status was not affected by his adoption.

The desire of the native Indians who initiated these cases to be declared status Indians reflects an individual interest in

acquiring the benefits created by the Indian Act. While this is an interest which is shared by many native people, cases such as this which deal only with the interpretation of membership provisions and their application to particular individuals are of little interest to the native community in general.[5] In the vast majority of cases, the interpretation of the membership provisions of the Act is straightforward, and consequently decisions in cases such as these are likely to affect few individuals. It should also be noted that decisions such as these have become of even less interest to the native community as a result of Bill C-31, which was given Royal Assent on June 28, 1985. This bill gives bands the option of assuming control over the determination of their own band membership.[6] The impact of the membership provisions of the Indian Act is likely to decrease as bands draft their own membership codes. However, it is likely attention will be paid to judicial interpretation of current membership provisions when this is done.

Debt Payment

In two cases, Fricke v. Moricetown Indian Band[7] and Pacific Credit Bureau Service v. Martin[8] native Indians used the courts in order to avoid the payment of debts. Both cases were initiated by non-Indians who were attempting to collect money from native Indians. Such attempts become complicated as a result of Sec. 89(1) of the Indian Act which provides that "...the real and

personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian."[9] While the basic meaning of this section is fairly clear, questions do arise as to the actual meaning of particular phrases. For instance, in Fricke v. Moricetown Indian Band the question was whether or not band funds deposited in the Bank of Montreal, which was not on the reserve, were personal property within the meaning of the Act.

In both cases the defendant native Indians were seeking to avoid payment of the debts allegedly owed. While such an interest in itself is not particularly 'Indian', if Adam Smith is to be believed, the provisions of the Indian Act did provide these defendants with a uniquely Indian defence. In both cases the defence was successful.

Exemptions From Taxation

In five cases, native Indians used the courts in order to avoid paying taxes. These attempts at tax avoidance were made possible by Section 87 of the Indian Act, which provides an exemption from taxation of the real and personal property of Indians which is situated on a reserve. All of these cases arose because of the difficulty in interpreting exactly what this section means.

In four cases, the native Indians involved were able to establish in court that they were exempt from certain taxes. In Brown v. the Queen in Right of B.C.[10] the B.C. Court of Appeal ruled that electricity was personal property and was therefore exempt from taxation. In Danes v. the Queen[11] and Watts v. the Queen[12] the same court ruled that motor vehicles which were registered for off reserve use were "situated on a reserve" for the purposes of the Act and so were exempt from sales tax. The provincial court ruled that a municipality could not collect a business licencing fee from a business located on a reserve in the case of District of Campbell River v. Naknakim[13] Native Indians were unsuccessful in one case, Leonard v. R. in Right of B.C.[14], when the B.C. Court of Appeal ruled that native Indians were required to pay sales tax on goods purchased at retail outlets which were on conditionally surrendered reserve land.

The legal interpretation of the section of the Indian Act dealing with tax exemptions is important to native Indians for three reasons. First, individuals may find that they have a greater disposable income if court decisions reduce the number of taxes which native Indians are required to pay. Second, court decisions may provide opportunities for economic development on reserves when tax exemptions decrease costs. Third, native people view their exemption from taxation as one of the few rights which aboriginal people have which is recognized by law - although it does only apply to status Indians living on reserves.

It should be noted that this right is one which is created by statute - the Indian Act - and not one which has any independent legal existence. The treaties which were made with native Indians make no specific mention of taxation.[15]

Use Of Reserve Land By Non-Indians

In three cases native Indians used the courts in order to protect their interest in reserve land, where reserve land had been used by non-Indians without a surrender of the land. Two sections of the Indian Act provide for the use of reserve land by non-Indians without requiring a surrender of the land. Sec. 28(2) provides that the Minister may authorize any person to "reside or otherwise exercise rights on a reserve."[16] The band council's authorization is not required, if this is for a period of a year, but is required if the period is any longer. Sec. 28(1) provides that any such agreement made solely by the band council and a non-Indian is void. The Minister may also, under Sec. 58(1) lease any unused or uncultivated land on the reserve with the consent of the band council, or under Sec. 58(3) lease land to which a band member has rights of possession with the consent of that person.

One dispute occurred when B.C. Hydro constructed a transmission line across reserve land, without reaching any agreement with either the band council or the Minister. This led to the

case of Johnson v. B.C. Hydro.[17] Although the band council had been approached and negotiations had taken place, no agreement was ever reached. Nonetheless, construction of the line took place at a time when no members of the band were using the reserve. Negotiations for compensation then took place between the band and B.C. Hydro from September 1971 until 1979, when the band finally got legal advice. At the trial, the question of whether or not B.C. Hydro had acted illegally was not an issue, as this was clearly the case. Instead the defence relied on three propositions. The first, that the band was not legally entitled to bring the action, will be discussed in a later section. The second defence was that the band had acquiesced in B.C. Hydro's occupation of the land, and that in doing so had granted them a license to occupy the land. The third defence was that the statute of limitations prevented the band from commencing an action at this time. The judge ruled that all three defences failed, and awarded general and exemplary damages, because of the "arrogant, callous, and indifferent"[18] conduct of B.C. Hydro in their dealings with the Indian band. While Section 28 was not a matter of dispute in this case it did provide the legal basis for bringing the action in the first place.

Another dispute occurred when two non-native companies leased land on an Indian Reserve. Before the leases expired, separate negotiations were entered into with the band council and with the Minister. Although the facts of these negotiations are

rather complex, essentially what happened was that when the leases expired, no new agreements were in place. Consequently, the band decided to use the land for their own purposes, and when they began to do so, the two firms applied for an injunction to prevent them from doing so, in the case of Springbank Dehydration Ltd. and Seabird Island Farms v. Charles.[19] The injunction was not granted. It should perhaps be noted that the federal Crown was a party to the action with the Indian band, so the question of the legal status of the band was not, and could not be, an issue. The same is true for the next case.

In the final case, A.G. Canada and Kruger v. C.P. Ltd. and Marathon Realty,[20] land which was part of an Indian reserve had been acquired in 1927 for a railway right of way. Provision for such an action was made in Sec. 48(1) of the Indian Act, which required consent of the Governor in Council for such an expropriation. C.P. then tried to transfer the land to Marathon Realty when it no longer needed the land for a right of way. At this point, the federal government and the Indian band began the action to have the land restored to the Crown, as the Railways Act prohibits the alienation of Crown land which has been acquired for railway purposes.[21] This action was successful.

As reserve land is the only land base that native Indians have at present, they have an interest in ensuring that this land is not alienated, and in ensuring that this land is being

utilized in accordance with their desires. In these three cases, native Indians were able to protect their interest in reserve land through the use of the courts.

Indian Possession Of Reserve Land

Native Indians used the courts in four cases to resolve disputes about the possession of reserve land by Indians. The legal disputes in these cases arose because of different interpretations of the Indian Act provisions which govern possession of reserve land. Title to reserve lands is held by the Crown in right of Canada for the use and benefit of the bands for whom they were set apart. Because the land is held by the Crown, property rights which are established in the common law do not apply and are replaced by sections 20-29 of the Indian Act.[22] The major provisions of these sections empower the band council to allot possession of reserve land to band members, subject to the approval of the Minister. The Minister may then issue a Certificate of Possession as evidence of a member's right to possession of that land. The right to possession of land may be transferred, but only to another band member, and only with the approval of the Minister. The actual nature of this right of possession is not made clear by the Indian Act, particularly whether or not it can be revoked by the band council or the Minister.[23] However, whatever the actual nature of these rights, any dispute of a legal nature about the possession of reserve

lands must involve the interpretation of these provisions of the Indian Act.[24]

Four cases involve disputes about the possession of reserve lands. In Leonard v. The Queen,[25] the plaintiff sought a declaration that she was the owner of a plot of land within the Kamloops Indian Reserve. The other three cases involve attempts by band councils to recover possession of reserve lands from individual band members. In Lindley v. Derrickson,[26] an agreement was entered into between the band council and the defendant which involved an exchange of plots of land so that the band council could proceed with planned development. Certain conditions of the agreement were never fulfilled, and consequently the council sought to recover possession of the land exchanged. In Leonard v. Gottfriedson,[27] the band council attempted to recover possession of land which had been allotted to a band member under rather suspect circumstances. In Joe v. Findlay[28] the band council sought a mandatory injunction to remove an individual who had commandeered reserve land without the consent of council in an area where a housing development was planned.

The actual outcomes of these cases are basically irrelevant except to the parties involved. The cases simply demonstrate that native Indians use the courts to settle disputes which have arisen about the interpretation of sections of the Indian Act which govern possession of reserve land. It should be noted

however that two of the cases were linked to development of the reserves. In addition, another legal issue was raised in two of these cases, which is the nature of the powers of band councils. This issue will be examined in the next section.

Legal Status Of Band Councils

The ability of band councils to carry out the wishes of their constituents is obviously an issue of importance to native Indians. Band councils as they presently exist are created by the Indian Act, which sets out both the procedures for the election of band councils, and the powers which they have when elected. Although band councils might be seen as a level of government, any powers which they have to make decisions are those which have been delegated to them by the federal parliament through this legislation.[29] Their powers are further restricted by the Indian Act as most decisions are subject to the approval of the Minister. Because band council powers are limited to those defined in the Indian Act, a degree of uncertainty presently exists as to the legal status of band councils. Although councils are, essentially, the government on reserves, some of the necessary powers of government are not specifically mentioned in the Act. Consequently, questions have been raised as to the band's ability to bring law suits, sign contracts, and generally act in the name of the band.[30].

While native Indians have an interest in clarifying the

legal status of band councils and thus enhancing their autonomy, such a clarification in itself has not been the primary intent of the band councils involved in the cases discussed in this section. Rather, this question has been raised in court in a number of different contexts as a result of band councils' attempts to pursue other goals.

The status of band councils was the primary legal question in four cases. The case of Re Masset Band Council[31] arose as a result of the band council's desire to participate in an inquest into the death of one of the band's members, and the court held that the council was a person capable of participating in an inquest under the Coroner's Act. In the case of Re C. and V.C.[32] the band applied for custody of a child, but the council was held not to be a person capable of applying for custody under the Family Relations Act. In two cases, members of band councils were seeking not to be found liable for breach of contract. In the cases of Cache Creek Motors v. Porter[33] and Zaleschuk v. Bella Bella Indian Band,[34] members of the concerned councils took advantage of the legal uncertainty about the status of band councils and argued that they could not be sued for breach of contract in their individual capacities as members of the band council. Unfortunately for them, the judges did not agree.

The legal status of band councils was also raised as an issue in some of the cases dealing with the possession of reserve

land. In three cases, Johnson v. B.C. Hydro,[35] Lindley v. Derrickson,[36] and Joe v. Findlay,[37] which involved trespass on reserve lands, the defense raised the question of whether the band council had the status to bring the action. In these three cases the band councils were acting independently, and the federal government was not a party to the actions. It was therefore necessary for the councils to establish that they had a sufficient interest in reserve land to initiate such litigation. The answer to this question was an important one to the band councils, as a negative judgement would leave them with no legal remedy for the illegal possession of reserve land, unless the federal government chose to become involved by initiating an action. However, in all three cases it was ruled that the council did have a sufficient interest to bring the action.

These cases demonstrate that while native Indians have an interest in clarifying the legal status of band councils and thereby (hopefully) increasing their autonomy from the Department of Indian Affairs, this issue has not been one which has, in itself, led to court action. Rather, this issue has arisen when band councils have acted independently to pursue other goals through the courts.

Adoption

Native Indians sought to prevent the adoption of native

Indian children by non-Indians in two cases.[38] The major legal question in these two cases was the determination of the best interests of the child. In such cases, the guidance of the law is minimal, and the judge must make a decision based primarily on his subjective opinion of the importance of various factors. The native Indian concern in such cases is that racial and cultural considerations which are of great importance to them may not be given adequate consideration by a non-native judge. Merely the fact that non-natives are given such power in determining the best interests of native children may be seen as a denial of the aboriginal people's right to self-determination.

In John v. Superintendent of Child Welfare,[39] the natural mother of the child sought to revoke her consent to the adoption, and argued that the child would be better off if raised among relatives. The judge ruled that it had not been proven that it was in the best interests of the child to be raised among relatives. In McNeil v. Superintendent of Family and Child Services,[40] the mother's half brother, who lived in Northeast B.C., applied for custody of the child. This application was denied, as the judge ruled that the child had special needs as she was born with a drug addiction, and so could be better cared for where medical treatment was more readily available, such as in Vancouver or Victoria.

In these cases, the native individuals' desire to have their

children raised within the native Indian culture was frustrated not by the content of the law, but by the way in which the law was applied. Although in both cases special circumstances did exist, and the children were adopted by non-natives for reasons beyond the simple determination that white parents were inherently better than Indian ones, native Indians have argued that a cultural bias was evident.[41] In both cases the judges agreed that racial ties were indeed important, yet in both cases other factors were found to outweigh this in determining the best interests of the child.

One other case deals, if somewhat tangentially, with adoption. In Mitchell v. Dennis and Dennis,[42] the plaintiff, who had adopted a child by custom as provided for in the Indian Act, brought a claim under the Family Compensation Act when the child died. The court ruled, with regret, that such a customary adoption conferred no legal rights except those established by the Indian Act. Thus, while the Indian Act does recognize to some extent the traditional practices of native Indians, this is only a limited recognition which does not extend to other legislation.

Conclusion

In the cases discussed in this chapter native Indians have pursued several major goals - the achievement of status, the non-

payment of debts and taxes, the ejection of non-Indians from reserve lands, the settlement of disputes about the possession of reserve land, the right to participate in an inquest, the limitation of contract obligations, and preservation of their culture through the adoption of Indian children by Indian families. In addition, the issue of the legal status of band councils was raised in some cases as a result of bands acting independently to pursue particular goals. While native Indians were not always successful in achieving their goals in court, victories in some cases did provide benefits to those involved, and sometimes to the Indian community generally, which would have otherwise been unrealized.

The Indian Act was originally designed to make native Indians on reserves wards of the federal government, and to give them protection from the actions of settlers, and this is reflected in native Indians' use of the courts. In sixteen cases - those dealing with debt, taxation, contracts, the possession of reserve land, and compensation for the death of a child - native Indians have used the courts and the provisions of the Indian Act to protect their interests, when these interests were adversely affected by the actions of the provincial government or individuals. Native Indians challenged decisions taken by departmental officials in administering the Indian Act in only three cases - the two status cases and Leonard v. The Queen - which were of significance only to the individuals involved. As

the guardian of native Indians, the federal government has given itself a great deal of authority over life on reserves, leaving native Indians few opportunities to challenge its decisions, at least on the basis of interpretations of the Act itself.

In two cases - Re Masset Band Council and Re C. and V.C. - band councils had to use the courts in order to establish their authority to take certain actions, as the legal status of band councils is not clearly defined in the Indian Act. This issue was also raised in three cases dealing with the possession of reserve land. While the primary goal being pursued in these cases was not to increase the autonomy of band councils, the issue of autonomy was raised in court as a result of band councils' attempts to act independently.

Economic development on reserves contributed indirectly to native Indians' use of the courts in two cases, as disputes about the possession of reserve land arose when such development was pursued. In addition, one consideration in the taxation cases was the advantage which tax exemptions could give to businesses on reserves.

TABLE I

INTERPRETATION OF STATUTES

TABLE OF CASES

STATUS		
Grant v. the Registrar of Indians	1983	F.C.T.D.
C.L.G. v. Smith	1984	B.C.C.C.
DEBT		
Pacific Credit Bureau Service v. Martin	1982	B.C.P.C.
Fricke v. Moricetown Indian Band	1985	B.C.S.C.
TAXATION		
Brown v. The Queen	1978 1979	B.C.S.C. B.C.C.A.
District of Campbell River v. Naknakim	1983	B.C.P.C.
Leonard v. R. in Right of B.C.	1983 1984	B.C.S.C. B.C.C.A.
Danes v. The Queen	1983 1985	B.C.S.C. B.C.C.A.
Watts v. The Queen	1983 1985	B.C.S.C. B.C.C.A.
USE OF RESERVE LAND BY NON-INDIANS		
Springbank Dehydration et al v. Charles	1977	F.C.T.D.
Johnson v. B.C. Hydro	1981	B.C.S.C.
A.G. Canada & Kruger et al v. C.P. Ltd.	1985	B.C.S.C.

INDIAN POSSESSION OF RESERVE LAND

Lindley v. Derrickson	1976	B.C.S.C.
Leonard v. The Queen	1976	F.C.T.D.
Leonard v. Gottfriedson	1980	B.C.S.C.
Joe v. Findlay	1978 1980 1981	B.C.S.C. B.C.S.C. B.C.C.A.

LEGAL STATUS OF BAND COUNCILS

Re Masset Band Council	1976	B.C.S.C.
Cache Creek Motors v. Porter	1979	B.C.C.C.
Re C. and V.C.	1982	B.C.P.C.
Zaleschuk v. Bella Bella Indian Band	1984	B.C.S.C.

ADOPTION

John v. Superintendent of Child Welfare	1979	B.C.S.C.
Mcneil v. Superintendent of Family and Child Services	1983	B.C.C.A.
Michell v. Dennis and Dennis	1983	B.C.S.C.

NOTES - CHAPTER 2

1 See Douglas Sanders and Gordon Burrell, Handbook of Case Law on the Indian Act (Ottawa: 1984).

2 Several cases which deal with Motor Vehicle Act violations have not been included in the thesis. Because the Indian Act provisions with respect to traffic regulations apply to anyone driving on reserves, these cases do not deal with a particularly Indian interest, although Indians are more likely to be driving on reserves.

3 [1984] B.C.W.L.D. 8.

4 [1985] 2 W.W.R. 155. Initials are used in the name of this case in order to protect the identity of the child. The same is true for the cases discussed later in the chapter which deal with adoption.

5 This was not true of two other Canadian cases which dealt with the membership provisions of the Indian Act - A.G. for Canada v. Lavell and Isaac et al v. Bedard (1974) 38 D.L.R. (3d) 481. These cases challenged the applicability of Section 12(1)(b) of the Indian Act on the basis that it was discriminatory with respect to sex and race, and consequently should be overridden by the Bill of Rights. These cases were of great concern to both the federal government and native groups because of the prededent which they might set. The number of individuals who might have become status Indians as a result of a decision in favour of Lavell and Bedard would have been large. In addition, a number of Indian leaders were concerned about a precedent which would make the Indian Act subordinate to the Bill of Rights, as they felt this might have had an impact on the special relationship which native Indians have with the federal government. They also saw the discriminatory sections of the Act as a lever which could be used to pressure the government into negotiations on a significant overhaul of the Act. See Harold Cardinal, The Rebirth of Canada's Indians (Edmonton, Hurtig Publishers, 1977), pp. 109-112.

6 The bill also eliminates Section 12(1)(b) of the Act which provided that when an Indian woman maried a non-Indian she lost her status. It also repealed sections of the Act

which provided for enfranchisement, which is essentially another method of giving up status.

[7] [1986] 1 C.N.L.R. 11.

[8] [1982] B.C.D.Civ. 1724-05.

[9] Section 89, Indian Act.

[10] (1980) 107 D.L.R. (3d) 705, (1978) 87 D.L.R. (3d) 337.

[11] [1985] 2 C.N.L.R. 18, [1984] 1 C.N.L.R. 64.

[12] Ibid.

[13] [1984] 2 C.N.L.R. 85.

[14] [1984] 4 W.W.R. 37, [1983] 3 W.W.R. 529.

[15] Richard Bartlett, "Taxation," in Bradford Morse, ed, Aboriginal Peoples and the Law, p. 579.

[16] Section 28(2), Indian Act.

[17] (1981) 123 D.L.R. (3d) 340.

[18] Johnson v. B.C. Hydro, (1981) 123 D.L.R. (3d) 340, at p. 348.

[19] [1978] 1 C.N.L.B. 6.

[20] [1986] 1 C.N.L.R. 1.

[21] It would seem that the important question for the band would be whether the land was legally required to be returned to the reserve, or simply to the Crown. However, this question was not raised in the case, probably because the Crown and the Indians were acting in concert, and perhaps an agreement existed between them that this would occur. Apparently the land was returned to the Crown in trust for the Indian band, as this is stated in the judgement of Mr. Justice MacDonald in his decision in Pasco et al v. C.N.R., [1986] 1 C.N.L.R. 35.

[22] See Douglas Sanders, Legal Aspects of Economic Development on Indian Reserve Lands (Ottawa: Department of Indian and Northern Affairs, 1976), for a more detailed consideration of the effect of these sections.

[23] Richard Bartlett, "Reserve Lands", in Bradford Morse, ed,

Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1985), p. 518.

[24] Some bands on the prairies do not use the provisions of the Indian Act, including those dealing with Certificates of Possession, in alloting land on reserves. Instead, they use traditional methods ofdistributing land. This system does not leave open the possibility of an appeal to non-Indian courts in the settling of any disputes which may arise, although provisions for dispute settlement may exist within the native community. See Sanders, "Legal Aspects," p. 5.

[25] [1978] 1 C.N.L.B. 5.

[26] [1978] 4 C.N.L.B. 75.

[27] [1981] 21 B.C.L.R. 326.

[28] [1981] 3 W.W.R. 60, (1980) 109 D.L.R. (3d) 747, [1978] 4 W.W.R. 653.

[29] It is for this reason that I have included this area in this chapter rather than in the chapter on jurisdiction. While these may appear to be questions of jurisdiction, they are fundamentally different from questions of jurisdiction between federal and provincial governments. In the latter cases, jurisdiction is defined by the constitution, which cannot be changed by either party unilaterally. The constitution, and the court's interpretation of it, provide a limitation on the use of power by either level of government. In the case of band councils, the federal government has the power to determine unilaterally what band councils' powers will be.

[30] House of Commons, Indian Self-Government in Canada: Report of the Special Committee (Ottawa: Queen's Printer, 1983), p. 18.

[31] [1977] 2 W.W.R. 93.

[32] [1983] 3 C.N.L.R. 58.

[33] [1981] 2 C.N.L.R. 34.

[34] [1984] B.C.D.Civil 969-11.

[35] [1981] 3 C.N.L.R. 63.

[36] [1978] 4 C.N.L.B. 75.

[37] [1981] 3 C.N.L.R. 58, [1981] 2 C.N.L.R. 58, [1978] 4 C.N.L.B. 130.

[38] The Supreme Court of Canada ruled that the provincial Adoption Act did apply to native Indians in their decision in Natural Parents v. the Superintendent of Child Welfare in 1975. See Chapter 3.

[39] [1982] 2 C.N.L.R. 40.

[40] [1983] 4 C.N.L.R. 41.

[41] See Daniel Raunet, Without Surrender, Without Consent (Vancouver: Douglas and MacIntyre, 1984), esp. p. 175.

[42] [1984] 2 W.W.R. 449.

CHAPTER 3

THE APPLICATION OF PROVINCIAL LAWS TO INDIANS AND THEIR LANDS

The cases in this chapter all deal with questions of jurisdiction; that is, whether particular provincial laws apply to Indians or Indian lands. The existence of Section 91(24) of the Constitution Act, 1982, which gives the federal Parliament jurisdiction over Indians and lands reserved for the Indians, enables native Indians to challenge the applicability of provincial laws to themselves and their lands. Jurisdictional cases are potentially more significant than those cases discussed in Chapter 2, as the outcomes of the cases may affect the division of power between the federal and provincial legislatures.

There are a number of reasons why a native Indian litigant might challenge the applicability of a provincial law on jurisdictional grounds, even though the subject matter would still be subject to federal legislation. First, this may be the only legal argument available which allows the Indian litigant to attain some specific goal. Second, native Indians might see it as desirable that the federal parliament has jurisdiction because of political considerations. It may be that native Indians have more influence with the federal parliament or that politically it is easier for the federal parliament to pass legislation which is favourable to the interests of native groups. It is also true that provincial governments, particularly in B.C., have

demonstrated a marked lack of sympathy for native concerns. Third, because of federal jurisdiction over Indians, provincial legislation cannot include provisions which differentiate between native Indians and other citizens. Native Indians may therefore prefer federal jurisdiction in areas where they feel they have special needs.

Jurisdictional arguments must also be seen in the light of native Indians' demands for self-government. If the courts conclude that there are certain areas in which provincial laws cannot apply, this may "define a constitutional space within which Indian governments can function as a distinct order of government,"[1] particularly if there are no provisions in the Indian Act or other federal legislation which deal with such areas.

Court decisions in jurisdictional cases may have a greater or lesser impact on the native Indian community depending upon the reasons for judgement. As these reasons are based upon the legal arguments raised in the cases, these arguments must be considered in some detail in order to understand exactly what goals are being pursued. Consequently a brief overview of the relevant law is necessary.

Federal jurisdiction over Indians and lands reserved for the Indians both permits the federal Parliament to make laws with respect to this subject, and prevents the application of certain

provincial laws. Under Canadian constitutional law, provincial legislatures cannot pass legislation dealing with a federal subject matter, and vice versa, but general provincial legislation which deals with a provincial subject matter may apply to a federal subject. However, if general provincial legislation is in conflict with valid federal legislation, or affects the fundamental nature of the federal subject matter, it will not apply. However, the provincial legislation itself will still be valid as it applies to other areas.[2]

Section 91(24) encompasses two separate subjects, Indians, and lands reserved for Indians. The nature of these subjects is quite different; Indians are persons, while land is land. The courts have established that general provincial laws which deal with the use of land are not applicable to reserve land as such laws are laws in relation to a federal subject matter.[3] The question however, of which provincial laws will apply to Indians is a more difficult one. Essentially, it is up to the federal legislature to decide to what extent it is necessary or appropriate to have distinctive laws with respect to Indians.[4] The courts, then, tend to look to the actions and policies of the federal government in distinguishing the elements of "Indianness" which cannot be affected by provincial legislation. However, it has also been argued that provincial laws which affect the aboriginal rights or traditional lifestyle of Indian people are also laws in relation to a federal subject matter.

This question of jurisdiction is further complicated by Section 88 of the Indian Act, which states:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act, or any order, rule, regulation, or by-law made thereunder, and except too the extent that such laws make provision for any matter for which provision is made by or under this Act.[5]

There has been some confusion over what exactly this section means. It has been established that the phrase "all laws in force in any province" refers to provincial laws, not federal laws, and so does not make federal laws subject to the terms of treaties. The question of whether this section applies to Indian lands as well as to Indians has not been settled by the courts.[6] However, it has generally been assumed that the section applies only to Indians, so this question has rarely been raised.[7]

The courts' interpretation of the more general meaning and intent of Section 88 was important in determining the jurisdictional arguments available to native Indians. Two questions with respect to the interpretation of Section 88 were not finally decided until 1985,[8] allowing native Indians to continue using certain jurisdictional arguments in court. One question was whether all provincial laws of general application would apply to native Indians, or whether there might be some

laws of general application which did not apply to Indians as they affected the status of Indians as Indians. The second question was, if there were some laws of general application which would not apply to Indians, then did Section 88 referentially incorporate such laws, thereby making them apply?

The cases discussed in this chapter involve legal disputes in three issue areas - 1) the use of reserve land, 2) adoption of Indian children by non-natives and 3) hunting. Within each issue area two questions are addressed 1) What goals are being pursued in these cases, and how? 2) What were the outcomes of the casés, and what was their significance? Two additional questions are particularly relevant to this chapter:

1)Have native Indians attempted to establish the existence of aboriginal hunting rights through the use of the courts?

2)Have native Indians used the courts in order to obtain interpretations of Section 91(24) and Section 88 of the Indian Act which reflect their interests?

Use Of Reserve Land

Native Indians living on reserves have used the courts in order to free themselves from obligations imposed by general provincial legislation which affects the use of land. The two provincial statutes whose application was in dispute were the Family Relations Act and the Residential Tenancy Act.

In two cases, Derrickson v. Derrickson[10] and Paul v. Paul,[11]

native Indian husbands sought to retain possession of reserve land after a divorce by arguing that the provisions of the Family Relations Act which dealt with the division of property could not apply to reserve lands. When Derrickson v. Derrickson was heard in the Supreme Court of Canada, three questions were considered in deciding the issue. First, could these Family Relations Act provisions apply of their own force to lands reserved for Indians? It was ruled that they could not, as "The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under subsection 91(24) of the Constitution Act, 1867."[12] Secondly, was the Family Relations Act referentially incorporated in the Indian Act by the application of Section 88? While it has often been assumed that Section 88 applies only to "Indians" and not to "lands reserved for the Indians" this issue has not been settled by the courts. The Supreme Court found it unnecessary to rule on this issue as a result of their answer to the third question. This was, do the provisions of the Family Relations Act fall within one of the exceptions of Section 88? The Court found that they did; that these provisions related to the possession of property and were in conflict with similar provisions contained in the Indian Act. Consequently, the Court found that the division of property provisions could not apply to lands on an Indian reserve. However, it was also ruled that an order for compensa-

tion could be made by the court in order to adjust the division of family assets.

In Paul v. Paul, heard at the same time in the Supreme Court of Canada, the issue was slightly different as the appellant sought only interim occupancy of the matrimonial home on the reserve, rather than a division of property. However, the court ruled that occupancy, like possession, was fundamental to the use of land, and therefore the appellant was not entitled to occupancy of the home as provided in the Family Relations Act.

In one case, Toussowasket v. Matthews[13] a band council argued that the provincial Rentalsman's orders could not apply on reserve lands, so that they would have greater independence in changing the conditions of tenancy on a mobile home park on their reserve. A dispute with the non-Indian tenants had arisen after the Westbank Indian Council had taken over the company which had previously run the park. The tenants appealed to the Rentalsman for a settlement of the dispute, and he ruled in the tenants' favour. Consequently, the company appealed the decision to the B.C. Supreme Court where it was argued that the Rentalsman's orders could not apply on reserve lands.

In making his decision, the judge considered each of the 6 orders made by the rentalsman in order to determine whether they affected Indian land or the use of Indian land. The judge ruled that the Rentalsman's orders with respect to rent increases and termination notices did not affect land or the use of land, while

orders regarding the reinstatement of the tenant's water supply and the removal of trailers did affect the use of the land. The latter orders were thus inapplicable within the reserve, and the matter was referred back to the Rentalsman, as provided in the Residential Tenancy Act.

It seems likely that the native Indians who initiated these actions were concerned primarily with their personal interests, rather than with the interests of native Indians as a whole. However, the pursuit of these interests led to a clarification of the law which may be of benefit to native Indians generally, by identifying certain areas in which native Indians are immune from the application of provincial laws. The cases in this section confirm that provincial laws which deal with the use of land will not apply on reserves, and demonstrate that the Indian Act does not include provisions which deal with all aspects of the use of reserve land. This may provide a basis for negotiations with the federal government with respect to a limited degree of self-government.

The Adoption Of Indian Children By Non-Natives

One case deals with the issue of the adoption of an Indian child by non-natives. As was pointed out in Chapter 2, the issue of adoption is important to native Indians because of a desire to preserve their culture. In Natural Parents v. Superintendent

of Child Welfare,[13] native Indian parents sought to prevent the adoption of their child by non-natives by challenging the applicability of the Adoption Act to Indians within the province. The natural parents wanted the child to be adopted according to Indian custom by the mother's sister and her husband. It was held at the first trial that the natural parents' consent to the adoption was not required.[14] Consequently, the natural parents' wishes could be ignored unless another legal argument was available which would prevent the adoption.

The legal argument used in the subsequent appeals was that the Adoption Act could not apply as it was in conflict with the Indian Act, as an adoption by non-natives would deprive an Indian child of its status as an Indian.[15] This argument was successful in the B.C. Supreme Court, but failed in the B.C. Court of Appeal, which ruled that the Adoption Act was a law of general application and so applied to Indians except to the extent that it was inconsistent with the Indian Act. This meant that an Indian child could be adopted by non-natives, but would not lose his status as an Indian as a result.

This decision was appealed to the Supreme Court of Canada, which delivered its opinion in October, 1975. All nine judges ruled that the Adoption Act could apply to Indians, and that adoption could not affect the status of an Indian child. However, there was no majority opinion as to why this was so. Four judges ruled that in the absence of Section 88, the adoption law

would not apply, while four judges ruled that the adoption law would apply on its own, and that Section 88 was simply a restatement of existing constitutional rules. One judge felt it was unnecessary to consider Section 88. The actual effect of Section 88 with respect to provincial laws was not then determined.

It is possible that the native Indian parents pursued this line of argument as it was the only option open to them if they wished their child to be adopted by their relatives. However, the potential legal impact of a victory in this case may also have been a consideration in pursuing this line of argument in court. A decision in favour of the native Indian parents in this case might have led to increased control for native communities over children's welfare. If the Adoption Act could not apply to native children, it would be impossible to compel Indian parents to surrender their children to non-Indians through adoption. While the federal parliament might have then passed legislation which dealt with this issue, it might have been possible to incorporate some of the Indian concerns into such legislation while it was being developed.

Hunting

Historically, hunting and fishing provided the primary source of food and were central to the social organization of native peoples, as religion and education were inextricably

linked to the activities of hunting and fishing. While these activities are no longer quite as central to native Indians' way of life, hunting and fishing remain both economically and culturally important to native peoples. However, the pursuit of these traditional activities has become more difficult, both because of economic development, and because of legislation which has been passed which regulates hunting and fishing.

In B.C., the provincial Wildlife Act regulates the taking of game by all people in the province, and accords no special protection to the hunting rights of native peoples. Although the hunting rights of treaty Indians are protected from the application of provincial legislation by Section 88 of the Indian Act, few Indians in B.C. are the beneficiaries of treaties. The B.C. Wildlife Act does provide that sustenance permits may be issued, but it is not always possible for native Indians to obtain these permits. Consequently, the pursuit of their traditional way of life by native Indians may lead to charges under the Wildlife Act. In addition, many native Indians believe that the Wildlife Act should not apply to them. They assert that they have an aboriginal right to hunt on their traditional hunting territory, and that this right should not be limited by the application of provincial legislation.

Eight court cases have occurred as a result of hunting related charges; in seven cases charges were laid under the Wildlife Act, and in one case charges were laid under the provin-

cial Firearms Act. In all these cases, one obvious goal was to be acquitted from the charges. However, the fact that the penalty for being found guilty in these cases is fairly minor, and that defence arguments were used which were related to the Indianness of the defendants suggests that additional goals were also being pursued. The discussion of these cases has been divided into three sections. The first section examines the cases which deal with treaty Indians, the second section looks at the one case in which non-treaty Indians were charged while hunting on a reserve, while the third section examines those cases which arose as a result of charges laid against non-treaty Indians.

A)Treaty Indians

As one effect of Section 88 is to make the application of provincial laws subject to the terms of treaties, those cases which deal with treaty rights are included in this chapter. Since 1969, two cases in B.C. have dealt with treaty rights and the application of provincial laws. In these two cases treaty Indians used the courts in order to protect their rights to hunt free from the restrictions of provincial legislation.

In R. v. Bartleman[16] the defendant was a member of the Saanich tribe, which had signed a treaty in 1852 which confirmed the right to hunt on unoccupied land within their traditional

hunting area. While hunting in this area, the defendant was charged with offences under the Wildlife Act, forcing him to go to court in order to establish that he had a right to hunt in that area.

The case began in Provincial Court in January 1981, and was finally resolved in the B.C. Court of Appeal in June, 1984. At all three levels, the judges agreed that this was a treaty within the meaning of Section 88, and that such treaties should be liberally interpreted. The Crown argued, however, that the defendant did not have the right to hunt in the specific area where he had been hunting, as this was outside the area ceded by treaty, and that the land was not unoccupied as it was privately owned and used as a game preserve. In the lower courts, the judges agreed with this argument and found Bartleman guilty. The B.C. Court of Appeal overturned this conviction. Mr. Justice Lambert held that the treaty confirmed rights to hunt on unoccupied lands within the tribe's traditional hunting territory, and that this right extended to lands outside the area ceded by the treaty. He also found that the land where Bartleman was hunting was unoccupied land, defining such land as "land that is unoccupied, in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier."[17] This decision suggests that the courts will indeed interpret treaty rights liberally, rather than simply paying lip service to this ideal.[18] However,

this case also demonstrates that treaty Indians must sometimes use the courts in order to ensure that their treaty rights are recognized.

In R. v. Napoleon,[19] the accused was charged with a provincial offence under the Firearms Act when he shot a moose in an area designated a no shooting zone - within a quarter mile of a public highway. Napoleon was found not guilty by the Provincial Court, as he was a treaty Indian and so had a right to hunt in the area in question. Judge McQueen ruled that the effect of the legislation would be to limit treaty rights and so the legislation could not apply to Napoleon.

This decision was overturned in County Court, and the B.C. Court of Appeal concurred with that decision. The court ruled that the duty to hunt with due regard for the safety of others did not reduce or deprive Indians of their right to hunt for food on land to which they had a right of access. Although the accused was not acting in a dangerous manner at the time in question (he was shooting away from the highway), the court held that it would be impractical to ensure the safety of the public by determining the facts in each particular incident. As the Firearms Act provided a more general definition of the standards of safety expected from all members of the public, its effect on the treaty rights in question was deemed to be acceptable. Treaty rights may then be subject to provincial legislation, although it

is unlikely they will be ruled to be so unless such legislation is considered necessary for the protection of the public.[20]

In some circumstances, then, there may be some question as to whether or not treaty rights do protect native Indians from the application of provincial legislation. If charges are laid, native Indians must then go to court in order to receive the benefit of their treaty rights.

B)Non-Treaty Indians - On Reserve

The courts have generally ruled that provincial hunting legislation is legislation relating to land use, and so does not apply on reserves. However, there is no high court decision which conclusively settles the question. Although the Attorney General's office in B.C. generally takes the view that the Wildlife Act does not apply on reserves,[21] charges are sometimes laid. In one case, R. v. Ignace,[22] the defendants were not only hunting on the reserve, but were also hunting on unoccupied Crown land which was off the reserve, which probably explains why charges were laid. They were convicted of hunting wildlife in closed season, but acquitted of the charge of unlawfully having wildlife in their possession, as the deer were killed on the reserve.

C)Non-Treaty Indians - Off Reserves

There is no provincial or federal legislation in B.C. which specifically protects the aboriginal hunting rights of non-treaty Indians hunting off reserve on unoccupied Crown land. Consequently non-treaty Indians have been charged under the Wildlife Act while pursuing their traditional way of life.

In five cases, native Indians used the courts to preserve their ability to pursue their traditional way of life, by attempting to limit the restrictions imposed on their hunting activities by the provincial Wildlife Act. The basic argument used in all these cases was that the provincial Wildlife Act impaired the status and capacity of the Indians as Indians, and so was beyond the legislative competence of the provincial government. The Wildlife Act could not then be considered a law of general application, as it had this effect. Aboriginal rights arguments were used in some cases to support the contention that the Wildlife Act affected the Indianness of the defendants. These cases are discussed here in chronological order, as the legal arguments available in the later cases were affected by decisions in the earlier cases.

R. v. Kruger and Manuel[23] was the first case which dealt with this argument, and it was finally decided in the Supreme Court of Canada in 1977. The defence argued that the Wildlife

Act was not a law of general application, and that the Royal Proclamation of 1763 protected aboriginal hunting rights in territories not ceded to the Crown. They also argued that the aboriginal right to hunt for food on Crown land was a usufructuary right which was a burden on Crown title and as such could only be extinguished by a specific legislative enactment of the federal parliament. These arguments were successful on the first appeal heard in B.C. County Court.[24] The B.C. Court of Appeal ruled that the Wildlife Act was a law of general application, and would therefore, under the provisions of Section 88, apply to native Indians unless it conflicted with a treaty, an Act of Parliament, or provisions of the Indian Act. The court ruled that the Royal Proclamation was a unilateral Act of the Sovereign and not a treaty or Act of Parliament, and therefore the Wildlife Act applied.

Mr. Justice Dickson delivered the judgement of the Supreme Court of Canada. He found it unnecessary to deal with the questions concerning the Royal Proclamation and aboriginal rights as the Wildlife Act only regulated hunting, rather than prohibiting it. The case was therefore decided on the issue of whether or not the Wildlife Act was an act of general application. Dickson stated that two criteria must be considered in determining whether a law is one of general application. The first is the territorial reach of the Act; if the Act does not apply uniformly throughout the entire territory of the province, then it

is not one of general application. Second, such an Act cannot be "'in relation to' one class of citizens in object or purpose."[25] This does not mean that simply because a law has a differential impact on citizens, it is not one of general application. It must be demonstrated that the effect of a law, when passed in relation to another matter, is to impair the status or capacity of a particular group in order to prove that it is not a law of general application.

The Supreme Court found that as far as these criteria were concerned, the Wildlife Act was an act of general application. The court also noted that the presumption is for the validity of a legislative enactment, barring evidence to the contrary. However, Dickson made the following remarks:

> If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter - to "preserve moose before Indians" - it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians.[26]

This statement was to provide the basis of the arguments of two of the later cases.

In R. v. Dennis and Dennis[27] non-treaty Indians were again charged with offences under the Wildlife Act. The defendants were acquitted in provincial court in 1974, as the judge ruled

that since Indians have aboriginal hunting rights the Wildlife Act does affect Indians as Indians, and so the provincial legislation cannot apply to them. In arriving at this conclusion the judge refers to the B.C. Court of Appeal decision in R. v. White and Bob.[28] That decision stated, "Legislation that abrogates or abridges the hunting rights reserved to Indians under the treaties...is legislation in relation to Indians because it deals with rights peculiar to them."[29] The judge in R. v. Dennis and Dennis felt that a logical extension of this proposition was that the Wildlife Act was also legislation in relation to Indians and so beyond the jurisdiction of the province as it also dealt with rights peculiar to Indians. However, the Crown appealed this acquittal after the B.C. Court of Appeal judgement in the Kruger and Manuel case, and the B.C. Supreme Court felt bound to follow that judgement. The defendants were therefore found guilty.

In R. v. Haines,[30] the facts differed from those in the previous two cases in such a way that it seemed likely that a line of argument based on Dickson's decision in R. v. Kruger and Manuel would be successful. Regulations made pursuant to the Wildlfe Act provided that out of season permits could be issued when a person needed to hunt for sustenance. In the case of Kruger and Manuel, such permits were readily obtainable by native Indians, while in the case of Haines, the policy of the Fish and Wildlife Branch in the region was to routinely deny applications for these permits. There was no general provincial policy which

applied to the issuance of the permits; policy was set on a regional basis. Haines' lawyer submitted that in following such a policy, the officials were wrongly "preserving moose before Indians" and so were impairing the status and capacities of Indians.

The trial judge found that Haines did have special hunting rights and that in following the regional policy wildlife officials had acted to deny and extinguish those rights. In doing so, they had exceeded their authority to regulate, and as a result, Haines was acquitted. The Crown appealed the acquittal, and in 1980 the County Court overturned this decision.

The County Court decision was based on two considerations. First, Judge Perry found that there was insufficient evidence to establish that limiting hunting to the open season impaired the status and capacity of native Indians. While the defence introduced evidence with respect to the integral role which hunting plays in traditional culture, the judge found that this evidence did not establish a present need to hunt for food at all seasons of the year. Second, the judge found that even if the officials in the region did overstep their authority by pursuing a restrictive policy, this did not affect the constitutionality of the legislation itself. "It is the immediate effect, object, or purpose, not consequential effects that are relevant in determining whether the sections of the Wildlife Act in issue are laws

in relation to a matter falling within Provincial legislative competence, not side effects in a particular case."[31] He suggested that if an official's acts were in fact ultra vires, an appeal might be made to the courts to overturn the official's decision, but that such an action did not serve to make the law itself inoperative. A further appeal to the B.C. Court of Appeal was unsuccessful, as this court ruled that grounds for appeal are limited to questions of law, while those advanced by the appellant were primarily questions of fact.

In the next case, R. v. Dick,[32] The defence introduced extensive evidence on the importance of hunting to the Indian way of life, and the effects of the Wildlife Act regulations on this way of life. The purpose of this evidence was to clearly establish that the Wildlife Act did impair the defendant's status as an Indian, and also that the policy of the provincial government had changed since the earlier cases. Notwithstanding this evidence, the County Court judge ruled that although the Wildlife Act now had a greater impact on the appellant, there was no substantial change in the policy of the provincial government in its application of the Wildlife Act and so, following the earlier cases, he could not find that the Act impaired Dick's status as an Indian. In making this ruling, the judge seemed to be assuming that it is the intent, rather than the effect of legislation which is important in determining its applicability. In this, he seemed to be following the reasoning of the County Court judge in

the Haines decision.[33]

In the B.C. Court of Appeal, two judges ruled that the issues in the case were not questions of law alone and therefore the appeal was dismissed. However, Mr. Justice Lambert dissented, and ruled that the conviction should be set aside. Lambert ruled that the Wildlife Act, given the evidence presented, did in this case impair the status and capacity of the defendant as an Indian. He said, "In my opinion it is impossible to read the evidence without realizing that killing fish and animals for food and other uses gives shape and meaning to the lives of the members of the Alkali Lake band. It is at the centre of what they do and who they are."[34] He also ruled, for the same reason, that the Wildlife Act was not a law of general application. In doing so, he relied on Dickson's judgement in R. v. Kruger and Manuel regarding such laws. He took this judgement to mean that if the evidence of a case showed that the effect of provincial legislation was to impair the status or capacity of a particular group, then it was not a law of general application. Lambert concluded that the Wildlife Act should be read down in this case, so that it did not apply to the defendant, in order to preserve the constitutionality of the Act. This line of reasoning restricted the effect of the judgement on other cases. Only when evidence could be led which would prove that the effect of the Wildlife Act was to impair Indian status would the Act be read

down. Lambert also concluded that the Wildlife Act was not incorporated by reference under Section 88 of the Indian Act.

This case was appealed to the Supreme Court of Canada, which handed down a unanimous decision (by five judges, including Dickson) on October 31, 1985. This decision, written by Mr. Justice Beetz, provided clear direction to the lower courts on the meaning of Section 88, and therefore on the applicability of provincial laws to native Indians. Beetz stated that he was prepared to assume, without deciding the issue, that the Wildlife Act did impair the status of the defendant as an Indian. He then went on to a careful consideration of Section 88, and its effect with respect to laws of general application. This question had not been decided before in this series of cases, as it had been unnecessary to do so. He concluded that the Wildlife Act was a law of general application, as it applied uniformly throughout the province, and its policy was not to discriminate against Indians, or affect them in a way which was separate and distinct from its effect on other individuals. He then reasoned that there were provincial laws of general application which would affect Indians as Indians and which would therefore not apply in the absence of Section 88. He concluded that the intent of Section 88 was to make these laws apply to Indians and that Section 88 therefore referentially incorporated the Wildlife Act. Consequently, the appeal was dismissed, and Dick was convicted. This decision means that under existing legislation, all provincial

laws of general application will apply to Indians even if these laws affect Indians as Indians, unless they are in conflict with treaties, other Acts of Parliament, or provisions of the Indian Act.

On the same day as this judgement was delivered by the Supreme Court of Canada, that court also ruled on the case of R. v. Jack and Charlie.[35] The appellants in this case had shot a deer for the purpose of carrying out a traditional religious ceremony. The defence relied on three arguments. The first argument was that the Wildlife Act interfered with the appellants' freedom of religion and so should be read down so as not to apply to them. The second argument was that in interfering with aboriginal religion, the Act affected the Indians as Indians and was therefore inapplicable. This was a variation of the third argument which was that as hunting was central to the life of these Indians, the Wildlife Act was inapplicable.

This third argument was dismissed for the reasons given in R. v. Dick. The religious arguments were unsuccessful as the Court found that the Wildlife Act did not interfere with the appellants' freedom of religion.[36] Mr. Justice Beetz found that there was no evidence to the effect that the killing of the deer was part of the religious ceremony. Although raw deer meat was necessary for the ceremony, this could have been obtained without breaking the law. It was therefore concluded that the Wildlife

Act in regulating hunting did not affect the appellants' freedom of religion.

It is obvious that native Indians involved in the five cases discussed in this section were primarily concerned with establishing at least some freedom from the restrictions of the Wildlife Act, rather than with achieving acquittal. The fines upon conviction were not very large for these offences,[37] while the cost of pursuing such a case to the B.C. Court of Appeal or the Supreme Court of Canada is great. Four of the five cases in this section were decided in these courts. In addition, even when the decision in the Kruger and Manuel case made it obvious that the Wildlife Act would generally be held to apply to Indians, native Indians continued to go to court in order to establish that there were at least some circumstances in which the Wildlife Act would not apply. Unfortunately for the Indians, the decision in R. v. Dick made it clear that under existing legislation, non-treaty Indians were subject at all times to the provisions of the Wildlife Act.

Non-treaty Indians used the courts in order to achieve a practical objective - freedom to pursue their traditional way of life - rather than the more political objective of achieving a legal recognition of aboriginal hunting rights. There have been no cases dealing with hunting offences which have been argued solely on the basis of the existence of aboriginal hunting rights. While aboriginal rights arguments might also have led to

greater freedom from regulation, there may have bee a number of reason why such arguments were not used. First, the cases discussed in this section resulted from charges which were laid before the Constitution Act, 1982 came into effect, so arguments based on Section 35 of this Act were unavailable. Second, it may have been thought advisable to settle the jurisdiction issue before any arguments based solely on aboriginal rights were advanced. Third, the jurisdictional argument may have been seen as a stronger legal argument, as the Wildlife Act only regulates hunting, rather than prohibiting it.[38]

Although non-treaty Indians were unsuccessful in achieving their goal in the five hunting cases, two of the decisions in these cases suggest alternate routes which might be followed in achieving the same goal. First, the decision in R. v. Haines suggests that administrative decisions that result in undue restrictions of hunting rights might be challenged in court on the basis that such decisions are beyond the authority of officials. Second, the decision in R. v. Dick establishes that in the absence of Section 88, there would be some provincial laws of general application which would not apply to native Indians, and suggests that the Wildlife Act might be such a law. Consequently, native Indians might now appeal to the federal government to have Parliament amend Section 88 as an alternative method of reducing the impact of provincial wildlife legislation on non-

treaty Indians.

Conclusion

Section 91(24) of the Constition Act, 1867, provides Indians with legal arguments which are unavailable to non-Indians with respect to immunity from provincial laws. Native Indians have attempted to take advantage of this section in a number of court cases, in order to achieve certain goals in the areas of hunting, adoption, and the use of reserve land.

While the facts in any case affect the particular outcome in that case, it can be said that generally, jurisdictional arguments were successful when there was a clear indication in federal legislation that provincial laws should not apply - in the cases dealing with the use of reserve land and treaty rights. Such arguments were not successful when there was no clear indication in federal legislation that provincial laws should not apply - in the cases dealing with adoption and hunting by non-treaty Indians. Jurisdictional arguments may then be useful to native Indians, but only when their interests and the federal parliament's intentions (as expressed in legislation) coincide. If native Indians wish to achieve greater immunity from provincial legislation from that which they currently have, changes in federal legislation will be necessary.

TABLE II

THE APPLICATION OF PROVINCIAL LAWS TO INDIANS AND THEIR LANDS

TABLE OF CASES

USE OF RESERVE LAND		
Toussowasket v. Matthews	1982	B.C.S.C.
Derrickson v. Derrickson	1984	B.C.C.A.
	1986	S.C.C.
Paul v. Paul	1984	B.C.S.C.
	1984	B.C.C.A.
	1986	S.C.C.
ADOPTION OF INDIAN CHILDREN BY NON-NATIVES		
Natural Parents v. Superintendent of Child Welfare	1973	B.C.S.C.
	1974	B.C.C.A.
	1975	S.C.C.
HUNTING		
A) Treaty Indians		
R. v. Bartleman	1980	B.C.P.C.
	1981	B.C.C.C.
	1984	B.C.C.A.
R. v. Napoleon	1982	B.C.P.C.
	1984	B.C.C.C.
	1985	B.C.C.A.
B) Non-Treaty Indians - On Reserve		
R. v. Ignace	1983	B.C.P.C.

HUNTING

C) Non-Treaty Indians - Off Reserve

R. v. Dennis and Dennis	1974	B.C.P.C.
	1975	B.C.S.C.
R. v. Kruger and Manuel	1974	B.C.C.C.
	1975	B.C.C.A.
	1977	S.C.C.
R. v. Haines	1978	B.C.P.C.
	1980	B.C.C.C.
	1981	B.C.C.A.
R. v. Dick	1982	B.C.C.C.
	1982	B.C.C.A.
	1985	S.C.C.
R. v. Jack and Charlie	1979	B.C.C.C.
	1982	B.C.C.A.
	1985	S.C.C.

NOTES -CHAPTER 3

[1] Douglas Sanders, "The Application of Provincial Laws to Indians and Indian Lands," Continuing Legal Education Society of B.C., Indians and the Law (Vancouver: 1982), p. 35.

[2] Douglas Sanders, "The Application of Provincial Laws," in Bradford Morse, ed, Aboriginal Peoples and the Law: Indian, Metis, and Inuit Rights in Canada (Ottawa: Carleton University Press, 1985), p. 452. See also Peter Hogg,Constitutional Law in Canada (Toronto: The Carswell Co. Ltd., 1977), for a more thorough explanation of constitutional law.

[3] Corporation of Surrey v. Peace Arch Enterprises Ltd [1970] 74 W.W.R. 380.

[4] Noel Lyon, "Constitutional Issues in Native Law," in Morse, ed, Aboriginal Peoples and the Law, p. 431.

[5] Indian Act, 1970, Section 88

[6] Derrickson v. Derrickson, (1986) 26 D.L.R. (4th) 175.

[7] The argument was raised in the above case (note 6), although the court found it unnecessary to resolve the issue.

[8] This decision, in the case of R. v. Dick, will be discussed in more detail later in the chapter.

[9] (1986) 26 D.L.R. (4th) 175, [1984] 3 C.N.L.R. 58.

[10] (1986) 26 D.L.R. (4th) 196, [1985] 2 C.N.L.R. 93, [1984] 4 C.N.L. 37, [1983] 2 C.N.L.R. 103.

[11] Derrickson v. Derrickson, (1986) 26 D.L.R. (4th) 175, at p. 184.

[12] Unreported, March 3, 1982, B.C.S.C.

[13] [1976] 1 W.W.R. 699, [1974] 3 W.W.R. 363, [1974] 1 W.W.R. 19.

[14] It was not entirely clear from the judgements why this was the case. However, the Adoption Act provides that consent

of the natural parents is not necessary in certain circumstances. Essentially, in cases where the child is held to be in need of protection, or has been deserted or abandoned, consent can be dispensed with.

15 The Indian parents' argument included a submission with respect to the Bill of Rights. However, because all of the judges who considered the case found this argument to have no basis, and because a consideration of it would unnecessarily complicate matters, it will not be dealt with here.

16 [1984] 55 B.C.L.R. 78, [1981] 1 C.N.L.R. 83, [1980] 1 C.N.L.R. 68.

17 R. v. Bartleman, [1984] 55 B.C.L.R. 78, at p. 97.

18 For those interested in the way in which treaties were negotiated and concluded, this decision provides an interesting example of the treaty process. For example, a letter by Douglas says that the signatures of the chiefs were attached to blank paper, and the wording of the treaty was to be added later when the proper forms were sent from London. It was no doubt this kind of evidence which contributed to the decision in this case.

19 [1985] 6 W.W.R. 302, [1984] B.C.D.Crim. 6165-02, [1982] 3 C.N.L.R. 116.

20 Mr. Justice Taggart, in his decision for the B.C. Court of Appeal wrote, at page 318, "It is not without some difficulty that I have come to the conclusion that the conviction must be sustained."

21 Ed John, "Indian Hunting," in Indians and the Law, p. 16.

22 [1983] B.C.D.Crim. 5684-02.

23 [1977] 4 W.W.R. 300, [1976] 60 D.L.R. (3d) 144, [1974] 6 W.W.R. 206.

24 It should be noted that this case was heard in July of 1974, shortly after the Supreme Court of Canada's decision in Calder v. A.G.B.C. which dramatically increased the legal credibility of aboriginal rights arguments. (See Chapter 4). The decision in County Court was no doubt influenced by this, as was the decision in the next case, R. v. Dennis and Dennis.

[25] Kruger and Manuel v. The Queen, [1977] 4 W.W.R. 300, at p. 304.

[26] Ibid., p. 306.

[27] [1975] B.C.D.Crim., [1975] 2 W.W.R. 630.

[28] (1966) 52 D.L.R. (2d) 481, (1965) 50 D.L.R. (2d) 613.

[29] R. v. White and Bob, (1965) 50 D.L.R. (2d) 613, at p. 618.

[30] [1981] 6 W.W.R. 664, [1980] 5 W.W.R. 421, [1978] 4 C.N.L.B. 135.

[31] R. v. Haines, [1980] 5 W.W.R. 421, at p. 440.

[32] (1986) 23 D.L.R. (4th) 33, [1983] 2 C.N.L.R. 134, [1982] 4 C.N.L.R. 167.

[33] Dickson's initial decision in R. v. Kruger and Manuel does not really clarify this question as to the difference, if any, between the intent and the effect of legislation.

[34] R. v. Dick, (1986) 23 D.L.R. (4th) 33, at p. 44.

[35] (1986) 21 D.L.R. (4th) 641., [1982] 5 W.W.R. 193, [1979] 4 C.N.L.R. 91.

[36] The freedom of religion argument was not based on rights guaranteed by the Charter of Rights and Freedoms as the offence was committed before this came into effect. The Bill of Rights was not called into aid either, as the Wildlife Act is a provincial law, so the Bill did not apply. The question of whether the Bill of Rights might govern the Wildlife Act if this legislation was held to be applicable by referential incorporation under the Indian Act was not addressed. The legal basis relied upon for the claim of freedom of religion was that this freedom was a fundamental principle of law. However, the legal basis for this argument is basically irrelevant, as it was held that the Wildlife Act did not impair the appellants' freedom of religion.

[37] Dick received a fine of only $50 on conviction.

[38] A 1976 decision of the Supreme Court of Canada in another B.C. case had established that federal fishing legislation would apply notwithstanding any aboriginal rights of the defendant. See Chapter 5, for discussion of this case.

CHAPTER 4

CHALLENGES TO GOVERNMENT AUTHORITY

The cases discussed in this chapter and the next involve challenges to legislatures' or governments' authority. The validity of certain laws or the legality of the governments' actions are being called into question. Such cases are inherently political; they indicate disagreement with the governments' actions or policies. Such disagreement might lead to political action, such as lobbying the government or public demonstrations, aimed at changing the government's policy or action. In these cases, disagreement has led to court action.

The cases discussed in this chapter have arisen as a result of disputes about the use of land and resources. As discussed in Chapter 1, most native Indians in B.C. feel that their claims to land and resources have not been settled. In the meantime, economic development is proceeding, and threatening to alienate land before claims can be settled. Disputes have arisen when other groups or individuals have pursued activities which native Indians feel will damage or alienate the land and resources that they have traditionally used, or to which they believe they have a claim. Because governments in Canada are involved in regulating the use of land and resources, native Indians have attempted to protect their interests through court actions which challenge governments' authority, even when the

immediate dispute is with a private individual or company. The cases included in this chapter represent only the tip of the iceberg. Native Indians all over the province have been and are protesting in various ways the economic developments taking place in areas which they claim as their own.[1]

With one exception, the cases considered in this chapter have been initiated by native Indians. As a result of a dispute over the logging of Lyell Island, native Indians formed a blockade across a logging road on the island. Their actions resulted in a court action initiated by the logging companies which were involved. However, this case is an example of native Indians "using the courts", because of the virtual certainty that a court case would result from their actions.

The legal arguments which have been used in these cases can be separated into two general categories. The first category consists of those arguments which attempt to establish that the government has not exercised its authority in accordance with the law. The second category consists of those arguments which attempt to establish the existence of rights which would limit the governments' authority to take certain actions or legislatures' authority to pass certain legislation. In the cases discussed in the next two chapters, legal arguments are used which attempt to establish the existence of four different kinds of rights - aboriginal rights, treaty rights, statutory rights, and

constitutional rights.

The cases in this chapter have been divided into three major sections. The first section includes only one case, Calder v. A.G.B.C.[2] This was the first case in Canada initiated by native Indians which dealt directly with the issue of aboriginal rights. The decision in this case by the Supreme Court of Canada has provided the basis for all subsequent aboriginal rights cases. The second section consists of those cases in which native Indians have argued that the government has not exercised its authority in accordance with the law. This section is divided into three subsections : the first consists of cases in which Indians have sought compensation for allegedly illegal actions of the federal government in the past; the second of cases in which native Indians have challenged decisions of administrative boards; and the third of cases in which native Indians have attempted to prevent government actions which they felt would damage their interests. The third section consists of cases in which native Indians have attempted to protect their interests in land and resources by asserting the existence of rights which would limit the governments' authority to act. Within each section the cases are discussed in chronological order.

The following questions, are relevant to these cases:

1) Are the courts being used to achieve recognition of aboriginal rights to land and resources?

2) Are the courts being used when native Indians feel they are

not achieving their goals in the political arena?

3) How has the native Indians' definition of their goals in terms of aboriginal rights affected their perception of what is progress in the political arena?

4) What kinds of legal arguments have been used in these cases?

5) Has the existence of the Constitution Act, 1982 had an effect on native Indians' use of the courts?

The Calder Case

In 1969, the question of aboriginal rights was directly addressed in Calder v. A.G.B.C. The case was initiated by the Nishga Indians of B.C., who had been struggling since the late 1800's to achieve recognition of their land claims. Finally, in 1967, the Nishga filed a statement of claim in B.C. Supreme Court, asking for a declaration that "the aboriginal title (also known as Indian title) of the Plaintiffs to their ancient tribal territory has never been lawfully extinguished."[3]

The Nishga's action in taking their claim to court did not meet with approval from other native Indian leaders in the province. It was feared that if the case failed, all land claims would be jeopardized.[4] However, the Nishga had three reasons for going to court. First, they had attempted to reach a political solution to the issue through presentations to a joint Senate-House of Commons Committee on Indian Affairs, but had gotten

nowhere. During the presentations, Frank Calder had noted, "The governments in the past have refused us these rights. We can argue until we are blue in the face and the government says this; we say this: and we say that when there is disagreement, it should be settled in court."[5] Second, the judgement in R. v. White and Bob[6] in 1963 raised new hope that the courts might recognize aboriginal title.

Third, the Nishga desire for a settlement of their claims was increasing, as development led to growing encroachment upon their land. In presentations before the parliamentary committee it was noted that traplines were being destroyed by the logging industry.[7] In 1958, Columbia Cellulose, a logging company, first linked the Nass Valley to the provincial highway system when they built a 105 kilometre road into Nishga territory.[8] The fear that economic development would continue to destroy their traditional lands, while little or no progress was made in the political arena, led the Nishga to initiate court action.

The trial began in April, 1969, and was heard by Mr. Justice Gould of the B.C. Supreme Court. The defence presented extensive historical evidence with respect to the boundaries of the Nishga territory, their extensive use of the land and resources, and Nishga concepts of ownership of the land. The activities and policies of the colonial government were also examined. The three key questions which the the Nishga asked the court to consider were 1) Do, or did, the Nishga have aboriginal rights in the

territory in question? 2) Does the Royal Proclamation of 1763, which recognized and affirmed the aboriginal rights of native peoples, apply to B.C.? and 3) Have these rights, if they ever existed, been extinguished by the actions of the colonial government?

Mr. Justice Gould chose to answer only the last two questions. He ruled that the Nass Valley had been terra incognita in 1763, and so the Royal Proclamation did not apply. Secondly, he held that if aboriginal rights had ever existed, they had been extinguished by colonial land legislation before 1871. The Nishga appealed this decision to the B.C. Court of Appeal and were again disappointed. Again, the judges unanimously ruled that the Royal Proclamation did not apply, and that if aboriginal title had ever existed it had been extinguished. With respect to the existence of aboriginal rights, all three judges took the position that for such rights to be recognized by a court of law, they must have been recognized by a prerogative or legislative act of the Crown.[9] At this point, it seemed that those who had opposed the legal route had been correct.

However, the Nishga again appealed, this time to the Supreme Court of Canada. This time the result was a qualified victory. Seven judges heard the case in the Supreme Court in November, 1971, and the decision was handed down in January of 1973. Six of the judges agreed that aboriginal title had existed as a

result of the Nishga occupation and use of the land in question. Mr Justice Hall, in his decision, considered the issue of aboriginal title in the greatest detail. Both Mr. Justice Laskin and Mr. Justice Spence concurred in this decision. Hall stated that "Unlike the method used to make out title in other contexts, proof of the Indian title or interest is to be made out as a matter of fact."[10] He concluded that the evidence presented during the trial did establish the Nishga's aboriginal title. He then reviewed a number of cases and concluded there was "... a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here."[11] And finally, he stated that "...the aboriginal title does not depend on treaty, executive order, or legislative enactment."[12]

Mr. Justice Judson, with whom Mr. Justice Martland, and Mr. Justice Ritchie concurred, was not so specific on the issue of the existence of aboriginal title. He stated that the Royal Proclamation was not the exclusive source of aboriginal title.[13] He then gave his conception of Indian title:

> ...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what aboriginal title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right"...There can be no question that this right was dependent on the goodwill of the Sovereign.[14]

The court was divided on the question of whether or not the

Royal Proclamation applied to B.C. Hall held that it did apply, and Judson that it did not. This question was not particularly important in the resolution of the case, however, as all six judges had recognized that the existence of aboriginal title did not depend on the Royal Proclamation. However, a majority judgement in the Supreme Court of Canada on this issue would have influenced the legal arguments used in other native Indian cases.[15]

Finally, three judges ruled that aboriginal rights had been extinguished while three judges ruled that they had not. No clear statement emerged from the decisions as to how exactly the extinguishment of aboriginal title is accomplished. Judson, after reviewing the actions of the colonial government stated only:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves set aside for Indian occupation.[16]

Hall, having gone into greater detail on the existence of aboriginal rights, also looked more carefully at their extinguishment. He stated that "It would accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent, and that intention must be "clear and plain".[17] However, the

exact meaning of "clear and plain" is not revealed by the rest of the decision. While Hall considered a number of actions of the colonial government and found that they did not clearly extinguish aboriginal title, he did not consider all of the land legislation passed before 1871. Instead, his ruling was "...that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so, and therefore, ultra vires."[18]

The seventh judge, Mr. Justice Pigeon, did not rule on any of the aboriginal rights questions. Instead, he denied the appeal on the basis that the court had no jurisdiction to grant the declaration requested, as a fiat had not been granted by the Lieutenant Governor of B.C. The appeal then failed, but not as a result of a majority denial of the existence of aboriginal rights.

The Supreme Court of Canada did not then decide whether or not the aboriginal rights of the Nishga had been extinguished, and did not provide guidelines to the lower courts with respect to how the extinguishment of aboriginal rights would occur. It was also not clear whether or not the Supreme Court of Canada or the B.C. Court of Appeal decision was precedent. However, the decision in the Calder case did enhance the legal credibility of native Indians' land claims, as six judges acknowledged the existence of aboriginal title. This decision, coupled with the

initiation of a legal action by the James Bay Cree to prevent the development of the James Bay Hydro Electric Project, led to a change in federal government policy towards claims based on aboriginal title.[19] The federal government was now prepared to accept and negotiate land claims based on traditional use and occupancy. The government labelled these claims comprehensive claims, as negotiated settlements might include provisions with respect to such items as hunting, fishing, and mineral rights.

While this new policy was a welcome change, and led to the settlement of two claims in Quebec and an agreement in principle in the western Arctic, little progress has occurred in B.C. with respect to comprehensive claims.[20] The province is very reluctant to accept any responsibility for the settlement of claims and has repeatedly expressed its opinion that aboriginal rights have been extinguished in B.C. Such a position is understandable, given that claims have been accepted for negotiation which cover about two-thirds of the area of B.C.[21]

Challenges To The Legality Of Government Actions Or Decisions

A)Compensation Cases

In 1973, the federal government also outlined its policy with respect to specific claims, which were defined as those claims based on Indian grievances about the fulfillment of treaties or the administration of Indian lands and assets. The federal government had acknowledged its responsibility to nego-

tiate such claims in 1969[22] However, the policy which was developed met with criticism from native groups across the country which centred on the federal government's legalistic approach.[23] For a claim to be accepted for negotiation, it was required that there be a basis in law for that claim. This approach presented problems for some Indian bands, as the courts had never really considered the nature of the legal obligation (if any) of the federal government towards native Indians. While the Indian Act essentially makes native Indians the wards of the federal government, the legal responsibilities of the government when acting in this role had not been established. Consequently, the claims process was unavailable in certain situations, and native Indians found that they had to go to court to clarify the legal nature of their relationship with the federal government.

In two cases, Guerin v. The Queen[24] and Kruger v. The Queen,[25] native Indians took the federal government to court in order to try to establish that the government had not acted in accordance with the law when undertaking transactions with respect to reserve land. Compensation was sought for this alleged illegal behaviour.

The case of Guerin v. The Queen, resulted from a dispute about the federal government's actions in negotiating a lease on surrendered reserve land. In 1957, the Musqueam Indian band had surrendered a portion of their reserve land, which the fed-

eral government then leased to the Shaughnessy Heights Golf Club. Prior to the surrender, the terms of the lease were discussed between the band members and Department of Indian Affairs officials, and the band members assumed that the lease would be according to these oral terms. The surrender document itself did not contain any of these conditions. Subsequently, a lease was signed by the department officials with the golf club, which was considerably different and less valuable than that discussed with band members. The band was unable to obtain a copy of the lease from the department until 1970. In 1975, the chief and councillors of the band began a suit against the federal government alleging that the government was in breach of its trust responsibilities with respect to the surrender, and seeking compensation. An attempt was made to negotiate for compensation, but the department suggested that the band take the matter to court.[26]

The major questions considered by the court(s) were 1)the nature of the relationship between the Crown and the Indian band. That is, could the Crown be held legally responsible for its actions subseqent to the surrender? 2) If the Crown was legally responsible, what was the effect of the oral terms agreed to by the band? 3) Could the band bring the action, given the Statute of Limitations and the doctrine of laches? [27] The doctrine of laches is a common law doctrine whereby people lose certain rights and privileges if they fail to assert or exercise them over an unreasonable period of time.

In his trial judgement of July 3, 1981, Mr. Justice Collier of the Federal Court Trial Division found that a legally enforceable trust was created by the surrender of the reserve land, and that the terms of the trust were those discussed orally with members of the band. He also held that neither the statute of limitations nor the doctrine of laches would apply, as the department had refused to give the band a copy of the lease until 1970, despite repeated requests by the band. Consequently the band was awarded $10 million in damages. This decision was overturned by a unanimous judgement of the Federal Court of Appeal in December, 1982. It was held that although the Indians had an interest in the land which could be the subject of a trust,[28] that the surrender did not create a "true trust" which could be enforceable by the courts. "The extent to which the government assumes an administative or management responsibility for the reserves of some positive scope is a matter of governmental discretion, not legal or equitable obligation."[29] Further, the court held that the oral conditions of surrender could not be a basis in law for a finding of liability.

When the case was appealed to the Supreme Court of Canada, seven judges concluded that the Crown had a fiduciary obligation to the Indian band which was breached when it accepted a lease which was significantly different from that agreed to by the band. The Crown's fiduciary obligation was seen as having its

roots in the concept of aboriginal title. This Indian interest in the land, plus the requirement of surrender to the Crown before land can be alienated, gave rise to the fiduciary obligation.[30] Mr. Justice Estey, who concurred in the result, based his decision on the law of agency.

The court found it necessary to consider the question of aboriginal title in reaching its decision. With respect to the source of aboriginal title, Mr. Justice Dickson said, speaking for himself and three others, "In Calder v. A.G.B.C. this court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands."[31] Further, he said, "Their interest is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act or by any other executive order or legislative provision."[32] He also noted that the Indian interest in land was the same whether dealing with reserve land or with unrecognized aboriginal title to traditional lands.

As to the nature of aboriginal title, Dickson said:

> Indians have a legal right to occupy and possess certain lands, the legal title to which is in the Crown...It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the

> Indians' interest to be inalienable otherwise to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.[33]

This characterization of native title goes beyond previous descriptions, and may have rather interesting implications with respect to extinguishment. Dickson here is apparently speaking of Indian title generally, not just Indian title in reserve lands. If one aspect of this title is that the Crown must deal with the land for the benefit of surrendering Indians, then how can the Crown extinguish Indian title by general legislation which ignores the Indian interest in land? However, it may be that the term "surrender" in this paragraph applies only to surrenders of reserve land pursuant to the Indian Act. For in considering the Crown's fiduciary obligation, Dickson concludes that this arises as a result of Sec. 18(1) of the Indian Act, which confers upon the Crown a descretion to decide where the Indians' best interests lie. On the other hand, he notes that the Crown first assumed this responsibility in the Royal Proclamation of 1763, which dealt with surrenders of aboriginal title in traditional tribal lands. Madame Justice Wilson, speaking for herself and two others, says only "The obligation has its roots

in the aboriginal title of Canada's Indians as discussed in Calder v. A.G.B.C."[34]

The Supreme Court of Canada thus overturned the decision of the Federal Court of Appeal, and reinstated the damages awarded by the trial judge. The court also agreed with the trial judge with respect to his decision on the statute of limitations and the doctrine of laches. This result was hailed as a victory by Indian leaders. It established that the Crown had an obligation to deal with reserve land for the benefit of Indians, and that the Crown's actions could be reviewed by the courts. Not only does the Supreme Court of Canada decision enable Indians to appeal to the courts for relief, but it also expands the "lawful obligations" which the federal government will negotiate through the claims process. In addition, the comments made on aboriginal title are important. This case established with certainty that this title is an independent legal right. In addition, Mr. Justice Dickson's comments on the nature of this title may be helpful to the Indian cause.

One other case dealt with the question of compensation for the federal government's actions with respect to reserve land. This case, Kruger v. The Queen,[35] was heard in the Federal Court of Appeal after the Supreme Court of Canada decision in Guerin v. The Queen. While a number of legal arguments were considered, the case was determined on the issue of whether or not the Crown had breached its fiduciary obligation. The decision then,

expands on the definition of what the fiduciary obligation of the Crown is when dealing with Indian lands.

The facts in this case are rather complicated. In simplified form they are as follows. The Department of Transport required land to build an airport, and so expropriated two parcels of land from the Penticton Indian Reserve in 1941 and 1943. Such expropriations required the consent of the Governor-in-Council, which was given. Before and after these expropriations the Department of Indian Affairs negotiated on behalf of the Indians with the Department of Transport for the amount of compensation to be paid for the lands. The Indians involved reluctantly accepted the compensation offered, and final payment was made in April, 1946.

A conflict of interest question is raised in this case as the Crown was acting both on behalf of the Indians, and as the expropriator of the land. Negotiations for compensation took place between two federal departments. In addition, the Governor-in-Council was required to consent to the expropriation itself, which deprived the Indians of their option to refuse to sell, or to negotiate a sale on their own terms.

However, the majority of the Court held that the Crown had fulfilled its fiduciary obligations. Mr. Justice Urie found that officials from the Department of Indian Affairs had acted to the best of their ability in negotiating compensation. The officials

were well aware of both the value of the land, and their duty to represent the best interests of the Indians. Further, the Indians themselves had agreed to the compensation paid. Consequently, the Crown was found to have fulfilled its legal obligations, although the Governor-in-Council was required to choose between competing interests in expropriating the land. An option remained open to the Indians to take the matter of compensation to the Exchequer Court, which they did not do. In addition it was ruled that the action was barred because of the statute of limitations. No concealment of relevant facts had occurred in this case, as in the Guerin case, to prevent the application of this statute.

Mr. Justice Heald concurred in the result because of the applicability of the statute of limitations. However, he also ruled that the Crown had breached its fiduciary duty. He said :

> However, the Governor-in-Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations. If there was evidence in the record to indicate that careful consideration and due weight had been given to the pleas and representations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations had been made, I would have viewed the matter differently.[36]

However, Heald was in the minority, and unless the case is appealed to the Supreme Court of Canada, the majority decision will prevail. It seems then that the fiduciary obligation of the federal government is limited to the actions of the Department of Indian Affairs.

B)Challenges To Decisions Of Administrative Boards

In many cases, private companies must obtain government approval before proceeding with particular projects. Administrative boards established by the federal and provincial governments hear submissions by interested parties before a decision is reached. In two cases, native Indians used the courts to challenge decisions which were made by such administrative boards. In both cases, the administrative boards were reviewing applications by the Westcoast Transmission Company to construct natural gas pipelines, and native Indians who lived in affected areas participated in the hearings in order to protect their interests in the land and resources of these areas. When the administrative boards made decisions which adversely affected their interests, native Indians appealed these decisions in court, claiming that the boards had exceeded their authority. presentations before such bodies when they feel a decision may affect their interests.

In Union of B.C. Indian Chiefs v. Westcoast Transmission Co.[37], the Union of B.C. Indian Chiefs (UBCIC) sought an adjournment of a National Energy Board (NEB) hearing, so that they would have adequate time to prepare evidence. The purpose of the hearing was to decide if Westcoast Transmission could proceed to construct a natural gas pipeline, and the UBCIC wished to prevent construction because of possible adverse effects to fish spawning areas and wildlife. The NEB had denied a request

by the UBCIC for an adjournment, so the UBCIC appealed to the Federal Court, arguing that the Chairman of the NEB had exercised his descretion unfairly in denying the adjournment, and that they had not been given adequate notice of the hearing. In turn, Westcoast Transmission and the NEB argued that the UBCIC had no status to bring the action in court, and that they had been given adequate notice. Mr Justice Collier found that the UBCIC did have status to bring the action, but that they had been given adequate time to prepare their evidence and that the NEB Chairman had not exercised his descretion unfairly. The UBCIC appealed this decision to the Federal Court of Appeal, but this court upheld Collier's decision.

In 1983, the Alkali Lake Band was an intervenor in public hearings by the B.C. Utilities Commission which was reviewing an application by Westcoast Transmission to build a pipeline. The band was concerned about pipeline construction in areas where the band hunted and fished. The commission refused to award costs to the band for expenses which they had incurred in preparing evidence. In Alkali Lake Indian Band v. Westcoast Transmission[38] the band appealed to the B.C. Court of Appeal to recover these costs. The band stated at trial that the money was needed to complete research which had been requested by the Commission. The Commission decision to deny the band its costs was made after the receipt of a letter from the Minister of Energy, Mines and

Resources, directing the commission not to award intervenor costs. The court therefore found that the commission did not exercise unfettered discretion, and so awarded the band its costs.

Decisions made by administrative boards may have a significant impact on the resources used by native Indians, or upon the ability of native Indians to adequately present their point of view at hearings by such boards. By using the courts to challenge the decisions of such boards, native Indians may be able to prevent damage to the resources which provide the basis for their way of life.

C)Preventive Actions

In three cases, native Indians have used the courts to prevent actions by the federal and provincial governments which they felt were inimical to their interests, by arguing that the governments concerned were not exercising their authority in accordance with the law.

Prior to September, 1975, the province had discussed with the Lower Nicola Indian band the matter of widening and improving a road through the band's reserve. The band told the province they were opposed to any such action, however in September provincial employees entered the reserve to conduct surveys and determine what land was necessary for the improvement of the road.[39] At this point, band mambers informed these employees

that they were not prepared to let any work proceed, and the employees left the reserve. Subsequently, the band took the province to court for trespassing on their reserve.

According to Order-in-Council 1036 passed by the province in 1936, and Privy Council Order 208 passed by the federal government in 1930, which conveyed Indian reserves in the province to the Dominion, the province retained the right to resume up to one twentieth of the land in each reserve for public works. The plainfiff Indian band argued in Moses v. The Queen[40] that these executive orders were not valid as they had not been sufficiently authorized by legislation. Consequently, a surrender of the lands was required under the Indian Act if the province wished to widen the road. Further it was argued that even if the province had a right of resumption, this right had not been validly exercised. The province therefore had no right to enter the reserve and so was trespassing.

However, Mr. Justice Andrews of the B.C. Supreme Court found that the executive orders were valid because authorized by the B.C. Indian Lands Settlement Act (Canada), and the Indian Affairs Settlement Act (B.C.). The province therefore had a right of resumption, and this was a sufficient defence against the action for trespass. It was not necessary to consider whether the province had validly exercised this right, as the province was at this point only surveying the land to ascertain how much would be

required for the road. This judgement was upheld by the B.C. Court of Appeal in May 1979, and leave to appeal to the Supreme Court of Canada was refused. However it was agreed at the Court of Appeal that the judgement in this case would not prejudice future trials which the Indians might bring on the basis that more than one twentieth of their land was resumed or that the right of resumption was improperly exercised.

The next case, Islands Protection Society v. R. in Right of B.C.,[41] ended up in court as a result of growing concern about logging practices in B.C. In 1974, the Islands Protection Society was formed by a number of environmentalists and younger Haida in the Queen Charlotte Islands. This group began to lobby for the establishment of a wilderness area on South Moresby Island. They were aware that Tree Farm License (TFL) 24, held by Rayonier Canada (now Western Forest Products), which covered much of this area was to come up for renewal in 1979. Over the next few years this group gathered information on harvesting practices on TFL 24, and attempted to increase support for greater public participation in land management decisions. In particular, they wished to obtain a public hearing before TFL 24 was renewed. At this point, the Haida land claim had not been submitted to the federal government for negotiation, but the Haida Nation took the position that their claims should be settled before other land use decisions were made.[42]

Public support for participation in land management deci-

sions grew over the period 1975-1979.[43] However, it appeared that the Minister of Forests did not intend to hold a public hearing before renewal of TFL 24, and was not being particularly co-operative in releasing information to the Society. Consequently, the Islands Protection Society and two Haida Indians who had traplines in the area began a court action in early 1979. They asked for a declaration that the Minister of Forests was under a duty to act fairly in exercising his power to renew TFL 24. In the initial pleadings, the petitioners asked for an order that a public hearing be held before the renewal of TFL 24, and an order restraining the Minister from renewing the TFL until this could be done. However, at the hearing of the petition these last two requests were altered and the petitioners asked for an order that before the renewal took place they be supplied with information on the TFL and that they have an opportunity to respond to this.

The initial question which had to be decided at trial was whether the petitioners had standing. Mr. Justice Murray of the B.C. Supreme Court ruled that the Islands Protection Society did not have standing but that the trappers did. He found that Young and Naylor had the right to sue because they were holders of traplines in the area. Young and Edenshaw, the Haida Indians involved, had standing because they had "an occupancy of a substantial nature"[44] which arose from their long use and occupancy

of the land in question for fishing and the harvesting of seafood.

The next question was whether the type of decision which the Minister was to make was one which could be subject to judicial review. Murray held that it was. However, he did not grant the relief requested in this case because the petitioners had not shown that there was a reasonable apprehension that the Minister would not act fairly. Also much of their evidence was based on opinion and belief, and dealt with the Minister's failure to hold a public hearing. The Minister was under no statutory duty to hold such a hearing. The judge did state however, that "I would have preferred to have before me an affidavit from the Minister stating that he is prepared to make his decision on the basis proposed by the petitioners."[45]

After this decision, the Islands Protection Society and the trappers wrote to the Minister requesting information on the renewal of the TFL. The Minister did not respond. Consequently, another petition was filed on April 18, 1979, 12 days before the license was to be renewed. The court again declined to grant the relief requested, Mr. Justice Smith giving no written reasons. However, the Ministry filed an affidavit indicating that the requests for information had been misfiled, and an information meeting was held with the petitioners a week before the new license had to be in place.[46] This did not, predictably, result in a denial of TFL 24's renewal.

Later, the Haida Nation appealed the court case all the way to the Supreme Court of Canada. However, their applications for a full trial were denied in B.C. Supreme Court Chambers and by the B.C. Court of Appeal. Leave to appeal to the Supreme Court of Canada was denied on December 20, 1982, on the grounds that the Judicial Review Procedure Act was a provincial law only applying to B.C.[47] The goal of the desired trial was to obtain a court order forcing the minister to renegotiate the terms of the license. They had hoped to show that the Ministry of Forests had consulted them in bad faith, since the Ministry had told the courts they would include certain clauses in the contract which were subsequently withdrawn.[48]

The next case, Bolton v. Forest Pest Management[49] resulted from a decision by the Forest Pest Management Institute, an association of civil servants carrying out research for the Canadian Forest Service, to test a pesticide in an area used by the Kitsumkalum Indian band of Terrace for food gathering. One band member, Russell Bolton, was the holder of a registered trapline in the area, while a number of band members held food-fishing permits. The band therefore attempted to secure an injunction which would prevent the spraying from taking place. Their action was based on the tort of nuisance. In the B.C. Supreme Court, their application for an injunction was denied as Madame Justice Southin found that they did not have standing to bring the ac-

tion. She did, however, grant an interim injunction until the case could be heard in the Court of Appeal.

On August 16, 1985, Mr. Justice MacFarlane, in Chambers, granted a further interim injunction preventing the pesticide testing until the appeal from Southin's decision could be heard by the full court. The major issue dealt with was whether the plaintiffs had legal interests which would entitle them to bring the action in nuisance. The judge concluded that there was merit in their claim that their particular interest in the resources of the area gave them standing to bring the action. Next, he held that there was some question as to whether the defendants would be protected by a defence of statutory authority, and so there was a serious question to be tried. Finally he concluded that the pesticide spraying should be postponed until after the appeal was heard, as there was "a risk of poisoning the fish, game, and environment generally."[50] As there was no compelling reason for the project to go ahead, an interim injunction was granted. However, the judge made an order that if the appeal was lost, the Indians would be required to pay any costs which the defendants incurred as a result of the injunction.

This case had not proceeded to trial by the end of 1985, so the final outcome of the case is unknown. However, the granting of the injunction itself was a victory for the native Indians involved, as it protected the fish and wildlife of the area at least until the trial.

Assertions Of Rights

In four cases, native Indians have sought to prevent actions which would damage land and resources to which they have a claim by asserting that they have rights which would prevent these actions from taking place.

The first case, Peters v. The Queen[51] was initiated after a company applied to the provincial government for a license to use a foreshore, which had traditionally been used by the Ohiaht Indian Band for gathering clams, as an experimental area for commercial clam production. The Ohiaht band then filed a petition in court, claiming that the right to use the beach for clam gathering was an aboriginal right within the meaning of Section 35(1) of the Constitution Act, 1982, and that it was therefore ultra vires the province to grant the license prior to the First Ministers Conference which was to be held pursuant to Section 37 of the Constitution Act.

The province had given tentative approval to the license, but had agreed to withhold the grant until the legal issues raised by the Indians were decided. In January, 1983, the province made a pre-trial application to have the petition dismissed. The argument to strike out the petition was based on three submissions. The first submission was that the law, as stated in cases binding on the court, was that no aboriginal rights existed in B.C. The second submission was that the court

had no jurisdiction to grant the relief sought, and the third was that the declarations sought could have no practical or legal consequences, as there was no requirement in Sec. 37 that the First Ministers' Conference come to any conclusion on the definition of aboriginal rights. Mr. Justice Esson dismissed the application. He concluded that it had not been decided conclusively by the courts that aboriginal title had been extinguished, and that this was a question which should be decided after a full hearing. He also found that the last two submissions were of questionable merit, and did not provide sufficient grounds to strike out the petition.

The case never reached a full trial, as the First Ministers' Conference was held before it could take place. Unfortunately, no agreement was reached at the Conference with respect to the definition of aboriginal rights. However, by launching the suit, the Ohiaht band was able to postpone the granting of the license until the Conference, which was the aim of the court action. This was only possible however because the province agreed to withhold the license until the legal rights of the Indians could be determined. Such agreement was not always possible, as the next two cases demonstrate.

In Macmillan Bloedel v. Mullin[52] native Indians sought an injunction to prevent the logging of Meares Island by MacMillan Bloedel. The company had first announced its intention to log the island in 1980, but logging was postponed as a result of

public protest. As a result of public pressure, Forest Minister Tom Waterland formed the Meares Island Integrated Planning Team, which involved the public in preparing an integrated resource use plan for Meares.

Participants in the Planning Team included representatives from the two logging companies involved, the IWA, four government agencies, the Village of Tofino, the Alberni/Clayoquot Regional District, the Friends of Clayoquot Sound (FOCS), and the Nuu-Chah-Nulth Tribal Council. The Tribal Council took the position that no logging should take place until the issue of land claims had been settled. The Nuu-Chah-Nulth land claim, which included the area in question, had been accepted by the federal government for negotiation earlier in the year. However, the Planning Team did not consider this issue as it considered "the land claims issue beyond its jurisdiction."[53] The Tribal Council nonetheless participated in the Planning Team.

In November, 1983, the provincial government's Environment and Land Use Committee approved logging of 90% of the island, ignoring the recommendations made by the Planning Team.[54] Consequently, a series of public protests of the planned logging occurred. In April 1984, Tofino residents planned an Easter Festival and Boat Parade to draw public attention to the issue. On April 21, the Clayoquot and Ahousat Bands declared Meares Island a Tribal Park. In October, a 27 foot tall Welcome

Figure, carved by artist Joe David, was erected in front of the Parliament Buildings at a rally attended by 1200 Meares supporters.[55] In October, protestors began to camp in C'is-a-qis Bay. Media coverage grew, especially when spikes were driven into trees by unknown persons. Finally, on November 21, MacMillan Bloedel sent loggers and surveyors to the bay, who were turned back by the protesting environmentalists and Indians. Despite these protests, the provincial government made no move to reconsider its decision.

On November 23, MacMillan Bloedel began an action in the B.C. Supreme Court claiming the right to log Meares Island. They immediately applied for an order to restrain the protestors from interfering with logging. On November 27, the Clayoquot and Ahousat bands began their own action. They asked the court for a declaration that their aboriginal title to Meares Island had never been extinguished, and that any law of B.C. which interfered with that title was ultra vires and of no force and effect. The Indians then applied for an interlocutory injunction which would prevent logging until this issue could be resolved at trial. Unlike the Calder case, this action was supported by many Indian groups in the province. Four Tribal Councils, 12 Indian bands and the Union of B.C. Indian Chiefs were granted status as intervenors on behalf of the Indians of Meares.

In granting (or refusing) an interlocutory injunction, the courts must consider two question. The first is whether or not

there is a serious question to be tried. The second is whether or not the injunction itself should be granted. In making this determination, a number of factors must be taken into account such as whether the payment of damages would be an adequate remedy, and the consequences of the granting of an injunction on the parties involved and on any third parties.

In the B.C. Supreme Court, Mr. Justice Gibbs concluded that the Indian bands' claim had no prospect of success at trial, for a number of reasons. First, he concluded that aboriginal title had been extinguished in B.C., following the decision of the B.C. Court of Appeal and the decision of Mr. Justice Judson in the Supreme Court of Canada in the Calder case. Second, he said that if this was not the case, these rights were nonetheless subject to the application of provincial laws such as the Forest Act, which applied uniformly throughout the province and which was not intended to affect Indians as Indians. Finally, he held that there was insufficient evidence presented to support the Indians' claim to aboriginal title.

Gibbs also held that even if there was a serious question to be tried, the injunction should not be granted. He noted that to grant the injunction requested by the Indians might lead to a rash of similar applications throughout the province, not necessarily limited to logging isues, which would create havoc with economic development in the province. These "potentially disas-

trous consequences" tipped the balance of convenience in favour of MacMillan Bloedel, and an injunction restraining the protestors was granted.

This decision was appealed to the B.C. Court of Appeal, which handed down its judgement in March, 1985. All five judges agreed that there was a serious question to be tried with respect to the Indian's land claims. The issue of aboriginal title was described as a complex one, and one which should be decided at trial, particularly given the split decision of the Supreme Court of Canada in the Calder case. The judges did not agree on the second question. Three judges held that an injunction should be granted to the Indian bands. Mr Justice Seaton (with Mr. Justice Lambert, concurring) held that MacMillan Bloedel would not suffer irreparable damage if logging was postponed on Meares Island, while the clear cut logging of Meares Island would prevent the Indians from enjoying any aboriginal rights which they might be found to have. Further, logging might destroy evidence which the Indians required to prove their claim.

Seaton also concluded that an injunction would not destroy the provincial economy. He noted that if other injunctions were sought, cumulative effects could be considered at that time. On this point he also noted, "There is a problem of tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that."[56] Mr Justice Macfarlane, in separate reasons, also con-

cluded that an injunction should be granted, essentially for the same reasons as Seaton. Craig and MacDonald did not agree with this conclusion;[57] however, as they were in the minority, the injunction was granted. MacMillan Bloedel and the provincial Crown applied for leave to appeal this decision to the Supreme Court of Canada, but this was denied.

The final fate of Meares Island will not be known until the trial. (The trial had still not begun by the end of 1986.) However, this case was a significant victory for native Indians. It established the legal credibility of aboriginal rights arguments, in that all five judges of the B.C. Court of Appeal agreed that the existence of aboriginal rights was an issue that should be decided at trial. It also established that assertions of aboriginal rights can provide the basis for the granting of an injunction. This means that native Indians can now use the courts in order to prevent the continued alienation of land to which they have a claim, at least until their rights are determined. Finally, the granting of this injunction has preserved Meares Island in its present state at least until the trial takes place.

In August, 1985, three Indian bands sought an injunction in the case of Pasco v. C.N. Railways[58], when CN Rail attempted to proceed with their double tracking project along the Thompson River. This court action was preceded by months of negotiation and discussions aimed at avoiding it. In 1980, a federal-provin-

cial Task Force had been established in order that environmental concerns could be addressed before construction on the project began. In 1983, this Task Force was replaced by the Environmental Assessment Panel. One of the Panel members was Chief Robert Pasco of the Oregon Jack Indian Band. However, as the Panel noted in its final report, two issues not dealt with by the review process were protection of heritage resources and the protection of Indian fishing sites and access to them.[59] In January, 1985, Chief Pasco resigned from the Panel because of a conflict between his responsibilities as chief and his duties as a panel member which arose as a result of CN's plans to begin construction through the Oregon Jack Reserve.

This planned construction led a number of affected Indian bands to file a petition in B.C. Supreme Court seeking an injunction to prevent the railway work. This led to a meeting between CN and representatives of the Indian bands in early February. At this meeting CN agreed to postpone construction for a month and to allow the Indians to participate in the planning process. As an order-in-council was necessary before CN could proceed with its work, the bands also attempted to postpone construction by lobbying the federal government. The Alliance of Tribal Councils, which represented several of the bands, make a presentation to the House of Commons Fisheries Committee requesting a one year delay in the project. Although the Committee's motion to that effect was defeated in the House of Commons. However, the

federal Cabinet became involved in the dispute, in particular the Ministers for Transport, Indian Affairs, Fisheries and Oceans, and the Environment, and meetings were held with the concerned Indians and CN officials.

On March 27, Andrew Thompson was appointed by the Ministers of Transport and Indian Affairs to facilitate negotiations between CN and the Indians. However, negotiations on a design review process deteriorated when CN began site preparation on supposedly uncontested portions of the track, and native Indians arrived on the site to protest this action. On April 13, both parties appeared in the B.C. Supreme Court seeking injunctions. Chief Justice MacEachern responded by sending both parties back to the negotiating table. Negotiations resulted in an agreement allowing CN to begin construction on certain portions of the track. However, this construction led to damage to the river which was greater than that expected by the Indians. The Indians presented their own plan to CN, suggesting alternative construction methods, but this was rejected by CN, who said this plan would be too expensive.[60]

Finally, on August 17, both parties once again appeared in Chambers to argue the case of Pasco v. CN Railways. The Indians sought an interim injunction, pending trial, stopping construction of the project. CN also sought an injunction preventing the Indians from interfering with the construction. The native

Indians based their action on the assertion of three separate rights. They argued that they had a property right in the river itself, arising from the ownership of the federal government, in trust for the band, of reserve land adjoining the river. Second, the allotment of specific fishing rights to the band created a proprietary right in the band. Third, they claimed rights based on aboriginal title. Mr. Justice MacDonald granted the injunction on the basis that there was a serious question to be tried with respect to the bands' claim of property rights to the river itself. Because this claim was based on a property right, the judge found that the urgency of the project was not so pressing as to require that work proceed before the extent of these rights were determined at trial. The judge further noted that if the claim had been based solely on the question of aboriginal rights, the injunction would not have been granted. In this case, the balance of convenience would have favoured proceeding with the construction. This decision was upheld by the B.C. Court of Appeal, and CN Railways application for leave to appeal to the Supreme Court of Canada was denied.

It may be that negotiations between CN and the Indians could take place before the trial is heard and will result in an acceptable solution to the dispute. If no agreement is reached before trial, and the Indians win that round as well, CN could still pursue the double tracking project through the expropriation of the land required. However, such an action would require

the approval of the federal cabinet under Sec. 35 of the Indian Act, thus returning the dispute to the political arena. The Indians said during the case that such a development would be a welcome one. In addition, the decision in the Guerin case suggests that the government would have to at the least look seriously at the Indians' concerns before consenting to any such expropriation. If the native Indians lose the case at trial, this decision will still have allowed more time for negotiation with CN, which may lead to modifications to the project.

In the final case, native Indians used the courts in order to make a moral statement about the justice of the legal system, rather than working within the legal system to achieve a particular goal.

In November, 1985, 17 Haida went to court as a result of actions which they had taken in order to prevent logging on Lyell Island. Logging of the South Moresby area, where Lyell Island is located, had been a matter of dispute for several years, and had already led to the Islands Protection Society case. After that case, the South Moresby Resource Planning Team had been established in 1979 to facilitate public participation in the resource planning process. Although the Planning Team did not have a mandate to consider the land claims issue, two members of the Skidegate Band Council had participated in this process, while maintaining that land claims in the area should be settled

before further land use decisions were made.[61] The Planning Team submitted its report to the provincial government in 1983, and by October 1985, logging had all but stopped on Lyell Island, as the provincial government was unable to reach a consensus on future land use on the island. However on October 18, the government announced that some logging would be permitted on Lyell Island, while a newly appointed wilderness advisory committee considered the fate of this, and other areas.

The Haida Indians strongly criticized this decision, particularly as logging had all but come to a halt on the island, and announced that they intended to prevent any further logging. On October 30, the Haida formed a blockade across the road on the island, and prevented loggers from proceeding with their work. This protest resulted in court proceedings initiated by Western Forest Products Ltd. and Frank Beban Logging Ltd. These companies sought an injunction to restrain the Haida from interfering with logging, which was granted. Over the next three weeks, 67 Haida were arrested as they persisted in blockading the road.[62] All of those arrested were charged with mischief by the RCMP. However, as these charges appeared to have little effect on the blockade, Western Forest Products Ltd. again went to court to seek contempt of court charges against 17 of the Haida, which carry a heavier penalty than do mischief charges. At this time, the federal government offered to help resolve the dispute, but the province rejected the offer as the matter was before the

courts. In addition, a number of groups had stated their support for the actions of the Haida, including the Native Brotherhood of B.C., a number of church groups and the B.C. Federation of Labour (including a top official of the IWA).[63]

As a result of the contempt of court charges, the Haida appeared in court in the case of Western Products v. Collinson[64] in November, 1985. The Haida did not use a "legal" defence to the charges; instead they asserted their ownership of the land in question and stated that they had a religious obligation to protect it. The Haida were not represented by lawyers during their court appearances. "We will not be taking a lawyer into court because we don't want to create an illusion of justice...The issue of our lands is too important to leave to lawyers who are unfamiliar with our people,"[65] said Miles Richardson, spokesman for the Haida nation. Throughout their court appearances, Richardson emphasized that the issue before the court was not the technical matter of contempt, but the broader issue of justice. However, Chief Justice McEachern refused to accept this argument, stating that it was his duty to "do justice according to the law."[66] He stated that the Haida had the option of pursuing their land claim through the courts, but that in the interim they must follow legal orders. Haida efforts to raise the land claims issue during cross-examination were thwarted by C.J.C. McEachern, as the issue was not before the court.

Ten of the Haida were convicted of contempt of court, and at sentencing, a week later in Vancouver, nine of the Haida refused to promise not to return to Lyell Island, and refused to apologize for their actions which they said were necessary to protect their lands. As one of the accused said, "I'm not pleased to be caught between your sense of law and my sense of justice, but I cannot betray justice for law."[67] These nine were sentenced to 5 months in prison, but their sentences were suspended by the Chief Justice, although with the provision that if they returned to the island, the sentences would have to be served. One Haida who promised not to return to the island was given no sentence.

In this case, native Indians used the courts to publicize their land claims, and to call into question the justice of a legal system which threatens people with jail sentences when they act to protect their land. The implicit question asked by the Haida was, why should we be forced to spend millions of dollars in court costs in order to prove that this land is ours, when we have lived here for thousands of years?[68]

The Haida's actions led to an offer by B.C. Attorney General Brian Smith to discuss the matter with them. The decision to make this offer was no doubt influenced by the support which many groups gave to the Haida. In addition, a Vancouver Sun province wide poll indicated that 63% of British Columbians believed that the province should negotiate with the Indians on the land claims issue, while only 21% were opposed; 50% thought the Indians were

justified in their actions on Lyell Island, while only 31% believed they were not.[69]. Nonetheless, logging did resume on Lyell Island in 1986 in the areas where logging permits had already been granted. However, the Haida, environmental groups, and the federal government have continued to put pressure on the provincial government to halt logging. Although it is unlikely that a settlement of the Lyell Island dispute will occur in the near future, the Haida's actions both increased public awareness of the land claims issue, and forced the provincial government to respond (at least in some way) to their concerns.

Conclusion

All twelve cases discussed in this chapter are examples of native Indians using the courts in order to protect their interests in land and resources. With the exception of the Calder case, all these cases were initiated as a result of specific actions which threatened Indian interests in land and resources. Most of these cases arose in areas where native Indians' land claims have not been settled. However, the courts have also been used to protect native Indians' interests in reserve lands.

Two of the cases, Guerin v. The Queen, and Kruger v. The Queen, were pursued in order to obtain compensation for the federal government's actions in the past. These cases established that the federal government did (and does) have a

fiduciary obligation to the Indian people in managing their reserve lands, and that the government's actions in this respect are subject to judicial review. In addition, the Guerin case is significant because of the comments made in the decision with respect to aboriginal rights. On a more practical level, the compensation awarded the Musqueam band in the Guerin case provides the band with capital which can be used to further economic development.

The rest of the cases were pursued in order to prevent the alienation of lands and resources in which native Indians' had an interest. A variety of legal arguments were used in order to achieve this goal in court. The separate legal regime which governs reserve lands provided the basis for the legal arguments used in the two cases which involved reserve land - Moses v. The Queen and Pasco v. C.N. Railways. In four of the cases, the legal arguments used were unrelated to the "Indianness" of the litigants. These cases were based instead on the tort of nuisance, the review of the fairness of a minister's actions, and reviews of the decisions of administrative bodies. In three cases the legal arguments used were based on aboriginal rights. However, in Peters v. The Queen, the court was asked only to grant a temporary injunction until the question of aboriginal rights could be dealt with by the Constitutional Conference. Only two cases, then, Calder v. A.G.B.C. and MacMillan Bloedel v. Mullin were based primarily on assertions of aboriginal rights.

This suggests that the primary goal which has been pursued in court has been the protection of Indian interests in land and resources, rather than the legal recognition of the existence of aboriginal rights.

It is difficult to say at this time whether or not native Indians' use of the courts in these cases has been particularly successful, as a number of important cases have yet to be finally resolved. However, in the cases in which Indians were granted injunctions it can at least be said that the use of the courts has been beneficial, as the areas in question have been preserved as they were until the Indians' rights can be decided. This would not have occurred in the absence of court action.

In most of these cases the courts have not been used in order to achieve a final settlement of the dispute, but have been used in order to force the government to take native Indians' concerns seriously. In two cases, the courts were used in order to enhance native Indians' ability to represent their interests before administrative bodies. In the Islands Protection Society case, the litigants were attempting only to achieve greater public input into the decision to renew TFL 24. In Peters v. The Queen the Ohiaht band only wanted an injunction to prevent the further alienation of their traditional territory until aboriginal rights could be considered at the Constitutional Conference. In the Meares Island and Calder cases, the courts were asked to

make declarations that aboriginal rights had not been extinguished. In neither case would these declarations settle the dispute; rather a return to the political arena would be necessary. Finally, if there is a victory for the Indians in Pasco v. C.N. Railways, this will mean a return to the political arena if C.N. wishes to continue with the project, as expropriation will be necessary, which will require the consent of the Governor-in-Council. These court cases could not, then, lead to a final settlement of the disputes which precipitated them; but might lead to a more serious consideration of native Indians' interests when political decisions are made. In addition, Indians' may impose economic costs on companies or the provincial government by going to court, which may convince these parties that it would be beneficail to negotiate.

The Lyell Island dispute demonstrates a different kind of use of the courts, although the basic goal is the same. In the court case which resulted from the blockade of the logging road, no "legal" arguments were used by the Haida. The court case instead provided the Haida with an opportunity to question the justice of the provincial government's and the court's actions, in a very public forum. The courts were used in this instance in order to pressure the government into negotiating a settlement, and to publicize the Haida claims. This publicity led to greater public support of native claims, and more pressure on the provincial government to take some action on this issue.

None of the cases discussed in this chapter relied upon an argument based on the content of the Constitution Act, 1982. It seems likely that arguments based on Section 35 of the Act will not be used to establish rights to land until the Constitutional Conferences on Aboriginal Rights have either led to a consensus on what this Section means, or until it becomes obvious that no consensus will be reached.

Some of these cases demonstrate the problems which native Indians have encountered in attempting to participate in the political process. The Nishga made numerous attempts in the political arena to achieve the recognition of their land claims, but were ignored until they took their case to court.In the three cases which dealt with logging disputes - the Lyell Island case, the Meares Island case, and the Islands Protection Society case, - native Indians tried to achieve recognition of their concerns before decisions were made which affected their interests. In all three instances, political decisions were finally made which appeared not to take into account the concerns which had been expressed. Also, in the first two cases, the planning teams which were established were not given a mandate to consider aboriginal rights issues. Consequently, the major concerns of native Indians were not addressed. The same thing occurred during the planning of C.N. Railway's double-tracking project along the Thompson River. Although an Environmental Assessment

Panel was established, the panel was not authorized to deal with the protection of Indian fishing sites and access to the river. It was only when native Indians threatened court action that C.N. Railways agreed to allow native Indians to participate in the planning process.

It would appear then that native Indians' concerns with respect to economic development have not been adequately addressed in the political process. The federal and provincial governments have been unwilling to address the issue of Indian land claims when taking specific decisions on individual development projects. However, it is these projects which have threatened to alienate lands and resources in which native Indians claim an interest. It has not been native Indians' definition of their goals in terms of aboriginal rights which has led to an unwillingness on the part of native Indians to accept government decisions with respect to land use. Rather, it has been the governments' tendency to ignore the issue entirely which has led to court action.

With the exception of the compensation cases, all of the cases discussed in this chapter have arisen because of an underlying and ongoing dispute between native Indians and the federal and especially the provincial government. The governments' continuing policy of allowing economic development to continue before a settlement of the native Indians' claims is achieved is at the root of all these individual disputes. Even where the

immediate dispute is with a private company, the federal and provincial governments control the development of the resources, and are consequently involved in these disputes. Because the conflict which exists is between the native Indians and the government, it might be possible to seek a solution to the disputes in an arena other than the legal one. However, it has been the failure of these other options which has driven native Indians to court in the first place.

TABLE III

CHALLENGES TO GOVERNMENT AUTHORITY

TABLE OF CASES

THE CALDER CASE		
Calder v. A.G.B.C.	1969	B.C.S.C.
	1970	B.C.C.A.
	1973	S.C.C.
CHALLENGES TO THE LEGALITY OF GOVERNMENT DECISIONS/ACTIONS		
A)Compensation Cases		
Guerin v. The Queen	1981	F.C.T.D.
	1982	F.C.A.
	1984	S.C.C.
Kruger v. The Queen	1981	F.C.T.D.
	1985	F.C.A.
B)Challenges To Decisions Of Adminstrative Boards		
U.B.C.I.C. v. Westcoast Transmission Co.	1977	F.C.T.D.
	1981	F.C.A.
Alkali Lake Band v. Westcoast Transmission	1984	B.C.C.A.
C)Preventive Actions		
Moses v. The Queen	1979	B.C.S.C.
	1979	B.C.C.A.
Islands Protection Society v. R. in Right of B.C.	1979	B.C.S.C.
	1982	B.C.C.A.
Bolton v. Forest Pest Management	1985	B.C.S.C.
	1985	B.C.C.A

ASSERTIONS OF RIGHTS

Peters v. The Queen	1983	B.C.S.C.
Macmillan Bloedel v. Mullin	1984	B.C.S.C.
	1985	B.C.C.A.
Pasco v. C.N. Railways	1985	B.C.S.C.
	1985	B.C.C.A.
Western Forest Products v. Collinson	1985	B.C.S.C.

NOTES - CHAPTER 4

1 One example of native Indian action which has not yet gone to court is the attempt to stop logging in the Stein Valley. In addition, the Gitksan Wet'suwet'en Tribal Council began an action in 1985 seeking a declaration of aboriginal title. A number of other Indian bands, in less well publicized actions have protested economic development by blocking roads and occupying construction sites.

2 (1973) 34 D.L.R. (3d) 145, (1971) 13 D.L.R. (3d) 64, (1970) 8 D.L.R. (3d) 59.

3 Daniel Raunet, Without Surrender, Without Consent (Vancouver: Douglas and MacIntyre, 1984), p. 150.

4 Douglas Sanders, "The Nishga Case", The Advocate 36 (February-March, 1978), p. 129.

5 Raunet, Without Surrender, Without Consent, p. 148.

6 (1965) 50 D.L.R. (2d) 613, (1966) 52 D.L.R. (2d) 481.

7 Raunet, p. 147.

8 Ibid., p. 181.

9 This conclusion followed from the judges' interpretation of the Act of State doctrine. In the Supreme Court of Canada, Mr. Justice Hall ruled that this doctrine had been erroneously applied by the B.C. Court of Appeal, at pp. 209-10, and the same was implied by Mr. Justice Judson.

10 (1973) 34 D.L.R. (3d) 145, at p. 173.

11 Ibid.

12 Ibid., at p. 199. Mr. Justice Hall also commented on the importance of defining the nature of aboriginal title at some point in the future, although counsel did not request that this be done in this case. Defining the nature of aboriginal title would be dey in determining whether compensation would be required for its extinguishment.

[13] Ibid., at p. 151.

[14] Ibid., at p. 154.

[15] See the series of fishing cases dealing with the effect of Article 13 of the Terms of Union discussed in Chapter 4. If it had been ruled that the Royal Proclamation did apply to B.C., the argument that aboriginal fishing rights were consdtitutionally protected would have been an easier one to make.

[16] (1973) 34 D.L.R. (3d) 145, at p. 166.

[17] Ibid., at p. 209.

[18] Ibid., at p. 216.

[19] Department of Indian Affairs and Northern Development, In All Fairness: A Native Claims Policy (Ottawa: Minister of Supply and Services, 1981), p. 11.

[20] Ibid., p. 30.

[21] Kahtou, Vol. 3, No. 15, (Oct.-Nov., 1985), pp. 16-17.

[22] Department of Indian Affairs and Northern Development, Outstanding Business: A Native Claims Policy (Ottawa: Minister of Supply and Services, 1982), p. 13.

[23] See for example, Bradford Morse, "The Resolution of Land Claims," in Morse, ed, Aboriginal Peoples and the Law, pp. 629-645.

[24] [1984] 6 W.W.R. 481, [1983] 2 F.C. 656, [1982] 2 F.C. 385.

[25] (1986) 17 D.L.R. (4th) 491, [1982] 1 C.N.L.R. 50.

[26] "Musqueam Band To Appeal Upset of $10 Million Award," Vancouver Sun, December 22, 1982, p. A7.

[27] It should be noted that one advantage of negotiationg a claim with the Office of Native Claims was that the government agreed that these technicalities would not prevent them from acception a claim.

[28] It is in this context that Mr. Justice LeDain considers the question of aboriginal title. He considers the authorities with respect to aboriginal title in order to arrive at the

conclusion that this title is "of the nature of a right of property," and therefore can be the subject of a trust.

[29] [1983] 2 F.C. 656, at p. 719.

[30] Note that as this is the basis for the Crown's fiduciary obligation, this obligation exists only with respect to the Crown's dealings with surrendered land. The Crown had argued that a finding of breach of trust would have seriously hampered the ability of the Crown to act on behalf of Indians (See Marvin Storrow, "Breach of Trust Actions Against the Federal Government," in Continuing Legal Education Society, Indians and The Law (Vancouver, 1982) pp. 49-50.

[31] [1984] 6 W.W.R. 481, at p. 495.

[32] Ibid., at p. 497.

[33] Ibid., at p. 499-500.

[34] Ibid., at p. 517.

[35] (1986) 17 D.L.R. (4th) 491, [1982] 1 C.N.L.R. 50.

[36] Kruger v. The Queen (1986) 17 D.L.R. (4th) 491, at p. 623.

[37] [1982] 1 C.N.L.R. 173, [1979] 2 C.N.L.R. 67.

[38] [1984] 53 B.C.L.R. 323.

[39] The province had previously improved roads in other Indian reserves, but had always received the consent of the band before proceeding. See Lawrence P. Page, "Order-in-Council 1036 and the Moses Case," in Continuing Legal Education, Indians and The Law, p. 3.2.03.

[40] [1979] 5 W.W.R. 100, [1977] 4 W.W.R. 474.

[41] [1979] 4 W.W.R. 1.

[42] Evelyn Pinkerton, "Taking the Minister to Court: Changes in Public Opinion About Forest Management and Their Expression in Haida Land Claims," B.C. Studies, No. 7, Spring, 1983, pp. 75-9.

[43] Ibid., p. 80.

[44] Islands Protection Society v. R. in Right of B.C., [1979] 4

W.W.R. 1, at p. 12.

[45] Ibid., at p. 23.

[46] Murray Rankin and Mark Horne, "Procedural Fairness - Standing - Statutory Power of Decision - Judicial Review Procedure Act - Islands Protection Society et al v. R. in Right of B.C. et al," U.B.C. Law Review, Vol. 14, 1979, pp. 221-2.

[47] South Moresby Resource Planning Team, South Moresby: Land Use Alternatives, (Victoria: Queen's Printer, 1983), p. 18.

[48] Pinkerton, "Taking the Minister to Court," p. 83.

[49] [1985] 66 B.C.L.R. 127, [1985] B.C.D.Civ. 1893-08.

[50] Bolton v. Forest Pest Management, [1985] 66 B.C.L.R. at p. 136.

[51] [1983] 2 C.N.L.R. 110.

[52] [1985] 61 B.C.L.R. 145, [1985] 2 W.W.R. 722.

[53] Meares Island Planning Team, Report: Meares Island Planning Options (Victoria: 1983), p. 11.

[54] Participants in the Planning Team had criticized the government for providing inadequate funding. In particular, there was little or no money available for economic assessments of alternative (non-logging) uses, and studies of non-timber resources. The three options advanced were 1) total preservation; 2) preservation of half the island with a 25 year deferral in logging the rest; and 3) preservation of half of the island while allowing logging on the rest. Three members of the committee supported the total preservation option. This option was also approved by a public meeting held in Tofino on June 2.

[55] Friends of Clayoquot Soundand Western Canada Wilderness Committee, Meares Island: Protecting a Natural Paradise, (Tofino: 1985), pp. 55-6.

[56] [1985] 61 B.C.L.R. 145, at p. 160.

[57] Mr. Justice Craig concluded that no injunction should be granted as the Indians would not suffer irreparable damage if logging were to take place. He notes that even if aboriginal title was held to exist, the solution would be compensation for the land and interest of the Indians,

rather than a denial of the provincial Crown's authority to make decisions. Second, he notes that the logging planned is in the least sensitive area of the island, and that environmental damage would be limited. Mr. Justice MacDonald's reasons for denying the injunction are not quite as clear. He seems concerned with the possibility of future injunctions being granted and their economic consequences. He also refers to the fact that the courts cannot prescribe a final solution to the issue, which must be settled through negotiations. Any injunctive relief granted by the courts could not be permanent, but would last only until final settlement through negotiations. He notes that the advantage of an injunction on negotiations is obvious.

58 [1986] 1 C.N.L.R. 34, [1986] 1 C.N.L.R. 35.

59 Federal Environmental Assessment Panel, Report: C.N. Rail Twin Tracking Program, British Columbia, (Ottawa: Minister of Supply and Services, 1985), p. 9.

60 The information in the previous two paragraphs came from various newspaper articles in the Globe and Mail and the Vancouver Sun, at the time of the dispute.

61 South Moresby Planning Team, p. 246.

62 This information is also from various newspaper articles in the Globe and Mail and the Vancouver Sun, at the time of this dispute.

63 "Fed backs Haidas, loggers," Vancouver Sun, November 28, 1985, p. A1, and Christie McLaren, "Churches back Haida in frestry feud," Globe and Mail, November 27, 1985, p. A1.

64 [1985] B.C.D.Civ. 902-02.

65 John Cruikshank, "The battle of who owns B.C.," Globe and Mail, December 3, 1985, p. A7.

66 John Cruikshank, "Haida not criminals, judge tells B.C. court," Globe and Mail, November 29, 1985, p. A2.

67 Keith Baldrey, "Haidas vow to fight on," Vancouver Sun, December 7, 1985, p. A1.

68 The Haida's use of the courts in this situation can be viewed as an example of "ethnodrama", as described by Robert Paine. See his article, "Ethnodrama and the 'Fourth World': The Saami Action Group in Norway, 1979-81," in Noel

Dyck, ed. Indigenous Peoples and the Nation State (St. John's: Institute of Social and Economic Research, 1985), pp. 190-236, for a discussion of the role of ethnodrama in the relationship between indigenous peoples and governments.

69 Larry Pynn, "Talk land issue, poll tells Bennett," Vancouver Sun, November 30, 1985, p. A1.

CHAPTER 5

CHALLENGES TO GOVERNMENT AUTHORITY: THE FISHERIES ACT

The cases discussed in this chapter challenge the validity of the federal Fisheries Act as it applies to Indians. The outcomes of these cases may affect the federal Parliament's authority to legislate with respect to the native Indian fishery, and are consequently of great importance to native Indians and to the federal government. In addition, this chapter also includes a number of cases which resulted from a massive raid by the fisheries department in 1983. 130 people were charged with fisheries offences, and the raid soon became known as "The Sting". As only a few of these people were non-native,[1] this action was seen by the native community as a direct attack on their reputation, and an attempt to make them the scapegoat for the poor management of the resource by the fisheries department.

All of these cases have resulted from criminal charges being laid under the Fisheries Act. As there have been quite a number of cases dealing with fisheries offences, this series of cases demonstrates the way in which court decisions may affect the legal arguments used in court through closing off avenues which had previously been pursued. This limitation of options will affect the specific goals which are pursued by native Indians in these court cases. While their basic interests may not change, the manner in which these are pursued in court may alter.

Fish, and particularly salmon, were central to the traditional cultures of many of the indigenous societies of the Pacific Northwest. They remain important today, both as an element of the economy of native Indians and for the role which they play in traditional religion and culture. The ability to continue fishing in the waters of B.C. is therefore one of the major goals of native Indians and their organizations in the province. In addition, a recognition by the provincial and/or the federal government of aboriginal fishing rights would be seen as a symbolic and moral victory for the indigenous people of Canada.

While the native Indian fishery remained unregulated for a number of years after B.C. was first settled, Indians soon became subject to increasing regulation as the use of the resource intensified. While at present there are provisions in the regulations made pursuant to the federal Fisheries Act which provide for food fishing licences for native fishermen, native Indians have a number of objections to the current regime. They agree with the basic goal of the Fisheries Act, which is to conserve the resource, but disagree with how this occurs.

First, there are objections that native Indians do not play a large enough role in the management of the resource. The regulations are imposed upon the native Indians, rather than developed in consultation with them. Secondly, the Indians claim they have been the victims of bad management of the resource by

the Fisheries Department.[2] This bad management leads to a situation in which native Indians suffer more than other user groups. Because they fish mainly on the rivers, and so have last access to the fish, emergency closures affect them more severely. In addition, Indians feel that they are made the scapegoats for this bad management, as fisheries officials try to shift the blame from themselves to the native fishery.[3] Thirdly, on a number of occasions, regulations and closures have resulted in situations where some bands have not been able to catch enough fish for food.[4] Fourth, while the Fisheries Act does provide for native food fishing licenses, it is illegal to sell these fish. Natives claim they have traditionally traded fish, and that this activity is protected by their aboriginal fishing rights.[5] Finally, and underlying all these particular grievances, native Indians believe they have a right to fish arising from their traditional use of the resource from time immemorial. The imposition of regulations by the federal government is seen as depriving them of this right.

Given these objections to the current Fisheries Act regulations, some native people continue to catch and sell fish in defiance of the regulations.[6] When they are caught they are charged under the Fisheries Act. In some cases, the native Indian bands have chosen to act publicly in defiance of fishing closures which they considered to be unjust. In these cases those involved expected to be charged, but fished anyway as a

protest against the closures.

This chapter is divided into three sections. In a number of cases, legal arguments were used which attempted to establish the existence of rights which would prevent the application of the Fisheries Act in these and similar cases. These cases are discussed in the first section. During the 1970's a number of Indian bands passed fishing bylaws pursuant to Section 81(o) of the Indian Act. The cases in the second section all address the question of the legal status of these bylaws given conflicting provisions of the Fisheries Act. The third section consists of those cases which arose as a result of "The Sting".

The following questions are relevant to the cases discussed in this chapter:

1) Have the courts been used in order to attempt to establish aboriginal fishing rights?

2) If so, how is this related to native Indians' definition of their goals in terms of aboriginal rights?

3) What kinds of legal arguments have been used in court cases aimed at establishing the invalidity of the Fisheries Act as it applies to native Indians? Which of these have been successful?

4) What effect has the Constitution Act, 1982, had on native Indians' use of the courts in Fisheries Act cases?

Rights Cases

Native Indians in B.C. have used a variety of legal arguments in order to try to establish that the Fisheries Act does not apply to them. These arguments have changed over the years as decisions in some court cases have set precedent which has either helped or hindered a particular line of argument. By 1969, the courts had established that treaty rights were subject to valid federal legislation, and that the Fisheries Act did apply to treaty Indians.[7] However, non-treaty Indians had not attempted to establish in court the existence of other rights which would limit the applicability of the Fisheries Act. This state of affairs soon changed.

In October, 1970, about 150 Indians held a "fish-in" at Peachland Creek in order to protest attempts by fisheries officers to prevent them from fishing in the creek. As a result, the chief of the band, Noll Derriksan, was charged with three counts of illegal fishing, for which he was fined $3 in Provincial Court.[8] The case of R. v. Derriksan[9] was subsequently appealed to the County Court, the B.C. Court of Appeal, and the Supreme Court of Canada. The defence argued that Derriksan had an aboriginal right to fish in that creek, that this right was protected by the Royal Proclamation of 1763, and that consequently he was not subject to the fishery regulations.

The lower courts decided the case by ruling that Derriksan

had no aboriginal right to fish for food, and that the Royal Proclamation of 1763 did not apply to B.C.'s Okanagan Valley. In reaching this conclusion, the Provincial Court judge relied on the B.C. Court of Appeal ruling in the Calder case, while the County Court judge relied upon the judgement of Mr. Justice Judson in the Supreme Court of Canada ruling in the same case. However, in the B.C. Court of Appeal and the Supreme Court of Canada it was found unnecessary to rule on these issues. In both courts it was ruled that even if the defendant enjoyed such aboriginal rights, these rights would nonetheless be subject to the federal Fisheries Act. The Supreme Court of Canada judgement in R. v. Sikyea[10] was relied upon in reaching this conclusion. Now neither aboriginal rights nor treaty rights could be used as a defence to charges under the Fisheries Act.

The next case dealing with such charges was R. v. Jack[11] which was heard by the Supreme Court of Canada in 1976. In this case it was argued that there was a constitutional limitation on the federal government's ability to regulate native Indian fishing contained in Article 13 of the Terms of Union of B.C. and Canada of 1871. Article 13 provided that "a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union."[12] The defence argued that the policy prior to 1871 had been not to regulate the Indian fishery. In Provincial Court, Judge Heard ruled that even though the colonial government had not regulated

the Indian fishery, it had pursued this policy because of the assumption that the resource was inexhaustible. In addition, it was thought prudent at the time to allow Indians access to this resource to reduce hostilities as settlement advanced. Given that circumstances changed, leading to competition for a scarce resource, the judge considered that the policy followed by the federal government in the Fisheries Act was as liberal as that followed prior to 1871.

Jack and his co-accused then appealed this decision to the B.C. Court of Appeal, which dismissed the appeal on the grounds that the appellants had no status to appeal to Article 13 of the Terms of Union. In the Supreme Court of Canada, all nine judges agreed that the convictions should be upheld, although Dickson concurred for separate reason. Chief Justice Laskin wrote the decison for the majority. He disagreed with the B.C. Court of Appeal, and held that the appellants could defend against the charges by challenging the constitutionality of the legislation under which they were charged. However, he found that there was no protection of fishing rights to be found in Article 13, and that even if there had been, this would have been subject to conservation measures.

Mr. Justice Dickson took a different approach in his decision, although he concurred in the result. He accepted the position of the defence that the word "policy" in Article 13

referred to the pre-confederation fishing policy of the colonial government. He then considered carefully what "a policy as liberal" as that policy would be given the changing circumstances of the fishery. He concluded that native Indian food fishing, and to some extent Indian commercial fishing, should have priority over non-native sport and commercial fishing, while conservation measures would take precedence over Indian fishing. According to this decision, the federal government would be required to regulate the fishery according to this set of priorities if it wished to avoid constitutional challenges. However, in this particular case, he did not allow the appeal as the Indians' right to fish had been limited because of the need for conservation. He did note though, that fishery officers decisions on what is necessary for conservation were not immune to review by the courts. Notwithstanding these reasons, it appeared that this constitutional argument was also at a dead end, given the judgement of the majority. However, the reasons written by Laskin were not altogether clear and so were subject to varied interpretation, as we shall see.

In July, 1978, a number of charges were laid against members of the Bridge River Band and the Fountain Indian Band for fishing during a closure made pursuant to Section 4 of the B.C. Fishing Regulation.[13] This was an extra two day closure, in addition to the regular three day a week closure, and members of the band particularly objected as they had been unable to catch enough

salmon for their food requirements for the previous two years. A confrontation had been expected, and the news media as well as nine extra fisheries officers from around the province were present at the time.[14]

The argument used in this case, R. v. Bob[15] was that the accused had been granted an exclusive right to fish in this area; a right which had been recognized under the Indian Act through the Indian Reserve Commission of 1870. This right, sanctioned by the Indian Act, was argued to prevail over the Fisheries Act regulations. If regulations were necessary, these could be properly enacted under the Indian Act. Alternatively, it was argued that this right was a property right, which could not be expropriated by the Fisheries Act without express words and compensation.

Judge Diebolt ruled in County Court that Bob's exclusive right to fish had been established by the evidence. However, he held that this did not render the Fisheries Act inoperative. He noted that although he could understand why the Indian people would "feel more comfortable" if regulations were made under the Indian Act, the use of the Fisheries Act could provide more effective, co-ordinated protection of the resource. On this point he concluded, after a consideration of the leading hunting and fishing rights cases, that whatever the nature of the right which was established, it would still be subject to regulation

for conservation purposes.

With respect to the second argument, Judge Diebolt held that even if this exclusive right to fish were a property right, the Fisheries Act did not expropriate this right, but merely regulated the time of fishing. But he also noted "So long as the priorities as earlier indicated in Mr. Justice Dickson's reasons in R. v. Jack are maintained, and any closure of the river for conservation does not "fall primarily on the Indian fisheries", then it cannot be said that the right is expropriated."[16] So, despite the new argument, and "somewhat reluctantly", the judge found Bob guilty as charged, although he was given an absolute discharge.[17]

The next case, R. v. Dawson,[18] heard in Provincial Court in October, 1981, is relatively uninteresting, as it was decided on rather narrow grounds. The accused, a status Indian of the Nimpkish band, was charged with fishing without a license on the Fort Rupert Indian Reserve. The Fort Rupert Band had acquired title to the reserve by an 1891 agreement with the Hudson's Bay Company which included a clause which protected their fishing rights. The court ruled that even if this clause could be raised as a defence, it would not apply to the defendant as he was not a member of the band and did not acquire the rights of band members even though he was accepted on the reserve. Dawson also relied on the concept of aboriginal right in his defence, but this doctrine was held not to apply to reserves, but only to unoc-

cupied Crown land.

In the summer of 1979, members of the Fountain Indian Band again defied Fisheries Department closures. Food fishing permits issued to the band allowed fishing from Monday to Thursday, while members of the band proceeded to fish on Friday, August 3 and Friday, August 17. In 1979, there was a dramatic and unexpected increase in the sockeye run of approximately 70%. As a result, commercial fishing time was increased by 100% in the first part of August, and later in August was increased by 200-300%. At the same time, no increase in native food fishing was permitted. No doubt it was this discrepancy which led to the native Indian defiance of the closure.

On August 17, in a dramatic helicopter raid, fisheries officers arrested four band members. The resulting case, R. v. Adolph[19] was heard in Provincial Court September 9-11, 1980. The defence argued that given the facts of the case, and the decision of the Supreme Court of Canada in R. v. Jack the defendants should be acquitted. It was established that the closure in effect was "neither reasonable or necessary" for conservation purposes, and that priority had been given to the commercial fishery, rather than to the native Indian food fishery. As a result, it was found that the defendants had a lawful excuse to fish, and they were acquitted. In reaching this decision, Judge Shupe appeared to follow Dickson's reasons in R. v. Jack al-

though his reasons on this point were not entirely clear.

However, in both the County Court and the B.C. Court of Appeal, the Terms of Union argument failed. In these courts the defence did not rely on Dickson's decision in R. v. Jack. It was argued that the facts established in this case distinguished it from that one, and that Laskin's judgement for the majority could be interpreted as establishing a constitutional limitation on the federal government if certain facts could be proven. However, both courts in following Laskin's judgement in R. v. Jack interpreted it to mean that there was no inhibition on the federal government's power to legislate with respect to the fishery arising out of Article 13. In particular, Mr. Justice Taggart of the B.C. Court of Appeal relied on Laskin's statement in R. v. Jack that "Whatever policy may have existed in pre-Confederation B.C. of tolerance of Indian's fishing for food...there does not appear to have been any basis in law to ordain the policy."[20] Taggart stated that consequently, "It would take very clear evidence of the pre-Confederation ordination of the policy by law, coupled with a construction of Article 13 favourable to the appellants, to enable me to say that a constitutional limitation on the federal legislative power in relation to fisheries exists."[21] As no such evidence existed with respect to the ordination in law of the policy pursued before 1871, conservation measures would apply to Indians whether or not they were absolutely necessary, and whether or not priority was given to the

commercial fishery. Consequently, the defendants were found guilty.

Two events occurred in the early 1980's which provided new hope for legal defences to fisheries charges. The first was the adoption of the Constitution Act of 1982, which included a section recognizing aboriginal rights. Section 35(1) of the Act reads "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[22] While this section, particularly when read in conjunction with other sections of the Act, is of course open to a variety of interpretations,[23] it does appear to afford greater protection of aboriginal and treaty rights than had existed. Secondly, the Supreme Court of Canada decision in Guerin v. The Queen[24] gave greater legal validity to claims of aboriginal rights.

The first case to be heard in County Court[25] after these events was R. v. Wilson.[26] It was argued that Article 13 of the Terms of Union deprived Parliament of the authority to legislate so as to restrict aboriginal rights. Evidence was led with respect to the historical use of the fishery and lands to establish aboriginal title to the land in question, including rights to an unrestricted fishery. However, Judge Errico, following the decision of the B.C. Court of Appeal in R. v. Adolph, ruled that whatever the aboriginal rights of the appellant, these did not demonstrate constitutional incapacity on the part of the federal

government. Such rights did not form a basis in law to ordain the pre-Confederation policy of non-intervention in the aboriginal fishery. The appeal was therefore denied.

The next case, R. v. Seward[27] involved charges of fisheries offences against six native Indians whose fishing rights were protected by treaty. Two arguments were advanced. First, while it was acknowledged that it had been established that treaty rights could be limited by federal legislation, there had not been a clear decision as to how such a curtailment might take place. However, Provincial Court Judge Greer found that he was bound by the B.C. Supreme Court decision in R. v. Cooper, George and George,[28] which held that treaty rights were subject to the Fisheries Act.

Second, the defence argued that Section 35 of the Constitution Act, 1982, protected the treaty rights of the accused. With respect to this argument, Judge Greer held that the word "existing" in this section limited its applicability to those rights which were acknowledged when the Constitution Act, 1982, came into effect. Since it had been decided prior to that time that treaty rights were subject to the application of the Fisheries Act, this section could not be called in aid. Judge Greer therefore ruled that "In conclusion, and with a large measure of regret and reluctance, I have concluded that the defence put forward by the Accused cannot succeed."[29] On appeal, this decision was upheld by the B.C. County Court in November, 1985.[30]

The Adolphs of the Fountain Indian Band found themselves in trouble once again, in August, 1983, when members of the band again proceeded to fish during a fisheries conservation closure. This time, four were arrested, leading to the case of R. v. Adolph (Victor Jr.).[31] In provincial court, all four were convicted and ordered to pay total fines of $750.[32] In County Court it was argued that the Royal Proclamation applied to B.C., and that the policy of the Proclamation was followed in pre-Confederation B.C. The decision of the Supreme Court of Canada in Guerin v. The Queen was said to support this argument. Second, it was argued once again that Article 13 placed a constitutional limitation on the federal government's power to regulate the fishery. The application of the Royal Proclamation to B.C. was an ordination in law of the pre-Confederation policy.

Unfortunately for the Adolphs, Judge MacDonald found that the Royal Proclamation did not apply to B.C. He felt bound to follow the B.C. Court of Appeal in the Calder decision which had concluded that the Royal Proclamation did not apply. He found also that Dickson's judgement in the Guerin case provided no support for this argument. Although Dickson had commented on the Royal Proclamation in his decision, he had not stated that it applied to B.C. As a result of this finding, Judge MacDonald felt bound to follow the rulings in R. v. Adolph and R. v. Jack with regard to the Terms of Union argument. It is likely that

this case will be appealed further as the Royal Proclamation decision is an important one, and one which can only be resolved in the favor of native Indians in the B.C. Court of Appeal or the Supreme Court of Canada, given the earlier cases.

In R. v. Sparrow,[33] the defence was based on the protection which Section 35 gave to the accused's aboriginal right to fish. In December, 1985 in County Court, Judge Lamperson held that while the defendant might have aboriginal rights, he was bound by the decision of the B.C. Court of Appeal in Calder v. A.G.B.C.[34] He further ruled that even if the defendant had an aboriginal right to fish, this would still be subject to the Fisheries Act, given the decision in R. v. Derriksan. Section 35 did not help any, for the same reasons as in R. v. Seward.

This decision was appealed to the B.C. Court of Appeal, and although the appeal wasn't heard until 1986, putting it outside the time frame of this thesis, a discussion of the decision is included here because of its importance. The Court of Appeal held that Sparrow had an aboriginal right to fish which was given constitutional protection by Section 35. A consideration of the nature of the aboriginal right led the court to conclude "There continues to be a power to regulate the exercise of fishing by Indians even where that fishing is pursuant to an aboriginal right but there are now limitations on that power."[35] The essential limitation on the government's power to regulate was found to be that the Indian food fishery must be given priority over

the interests of other groups when allocating rights to fish. Regulations could infringe on the food fishery, but only if they could be reasonably justified as being necessary for conservation purposes. Because Sparrow's conviction had been based on an erroneous view of the law, and as the facts relevant to the case had not been fully determined at the first trial, the court directed that a new trial be held.

Although this case has not been fully resolved by the courts to date as Sparrow is appealing the ruling directing a new trial, this decision was important as it is the first majority decision by the courts which has recognized that aboriginal rights place a limitation on the federal government's power to regulate the fishery. In addition, the Court of Appeal also stated in this decision that the B.C. Court of Appeal decision in the Calder case was not binding on the lower courts, and had not been binding since the Supreme court of canada decision in the same case. The judges felt it necessary to calrify this issue "because of the apparently wide acceptance of this fallacy,"[36] notwithstanding the Court of Appeal judgement in the Meares Island case.

Band Bylaw Cases

Section 81(o) of the Indian Act states that band councils may make regulations with respect to "the preservation of fish and wildlife" on the reserve. Such regulations come into effect

only with the approval of the Minister. This section has led to a series of cases in which Indians charged with fishery offences argue that it is regulations made pursuant to this section which should govern fishing on Indian reserves, rather than the Fisheries Act.

The first case, R. v. Billy,[37] reached the B.C. Court of Appeal in March, 1977. It was argued that the Fisheries Act Regulations did not apply on reserves as provision for regulating fishing was made by Section 81(o) of the Indian Act. The appeal was dismissed as the band council had not passed any fishing regulations and so there was no law in existence contrary to the Fisheries Act. Further the court stated that it had been "authoritatively decided" that there were no exceptions in favour of Indians to the fishery regulations whether the offence was committed on or off reserve. In doing so, they referred to the decisions of the Supreme Court of Canada in R. v. Sikyea, and R. v. Derriksan.

The other four cases occurred after band councils had passed fishing regualtions under Section 81(o) which had been approved by the Minister.[38] The arguments raised and the facts in all four cases, R. v. Leech,[39], R. v. Baker,[40], R. v. Jimmy,[41], and R. v. Joseph and Lewis,[42], are essentially the same. The accused, while fishing in accordance with their band bylaws, were charged with violations under the Fisheries Act. In court, it was argued that there existed two inconsistent federal enact-

ments, and that as the band bylaws were the more specific and detailed of the two, these should prevail.

In each case, this argument was unsuccessful in Provincial Court. It should be noted, although it is probably obvious, that the band bylaws in question all permit greater access to the fishery resource for native Indians than does the Fisheries Act. It is not then obvious that the bylaws are a more detailed attempt at conservation, even though they were passed under Section 81(o). The Provincial Court judges all took the position that the Fisheries Act regulations could not be displaced by the band bylaws. The most detailed judgement was in the case of R. v. Joseph and Lewis, which stated that the bylaw in question was ultra vires Section 81(o) as it didn't "accord with a rational interpretation of preservation, protection and management."[43]

However, in the three cases which were appealed (all but R. v. Leech) the lower court decisions were overturned. The courts ruled that where two inconsistent but valid federal enactments existed, the more specific of the two must be the one which applies. Even though the provisions of the band bylaws were more permissive, in all the cases these were held to be the more specific of the two sets of regulations as they were meant to regulate only food fishing on reserve lands. In the case of R. v. Joseph and Lewis, Judge Catliff ruled that "it was not for the court to decide the wisdom of the band's management of the fish-

ery."[44] Although none of these cases have been appealed beyond the County Court level, so far this legal approach has been more successful than that pursued in any of the first series of cases.

"The Sting"

In January, 1983, 129 native Indians were arrested in a massive raid by fisheries officers after a four month undercover operation. Journalists and photographers were invited to accompany the officers in the pre-dawn raid. 340 charges were laid for illegal sale of fish and 54 vehicles were seized.[45] Native Indians in the province were outraged.

As only one non-Indian was arrested, they saw this action as outright racism and an attempt to discredit native fishermen, using them as scapegoats for mismanagement of the fishery. The presence of the media during the arrests contributed to this view. A number of explanations were suggested with respect to the reasons for the raid. Ed Newman of the Native Brotherhood of B.C. suggested this was a move against Indian band fishing by-laws.[46] United Fishermen and Allied Workers Union president Jack Nichol charged that the raid was designed to appease U.S. fishing interests, and to speed passage of the international fishing treaty.[47] It was also suggested that the raid was meant to divert attention from the Pearse Report on the fishery, which had recommended increased native involvement in the fishery. In addition, the raid came soon before the first First Ministers'

Conference on Aboriginal Rights.

Fisheries department officials denied the charges of discrimination, and maintained that the raids were prompted by concern over dwindling stocks of chinook and sockeye salmon. The native Indians were not pacified by this assertion, noting that the undercover operation was set up in an area where virtually the only access to the river was through reserves.[48]

The Indian groups involved in the raid met on January 18 and agreed to a co-ordinated defence strategy in fighting the charges.[49] Although an aboriginal rights defence was considered, this strategy was not pursued in court. Instead, all but one of the cases[50] were defended on the basis that the Crown had no evidence to prove that the sales were illegal. In one case, R. v. Saul,[51] a constitutional argument was advanced. It was argued that Section 37 of the Fisheries Act, which dealt with the sale of fish , was ultra vires the federal government as it dealt with property and civil rights - a provincial area of jurisdicion. This latter argument, while successful in provincial court, failed on appeal to the B.C. Supreme Court.

This was however, the only case which went to trial in which the Crown succeeded in obtaining a conviction.[52] When the "no evidence" defence was successful, even after appeals by the Crown, proceedings in the remaining cases were stayed. This defence was successful politically as well as legally, as it

suggested that the native Indians were not in fact guilty of poaching, but had been the victims of a publicity stunt of the fisheries department. However, despite this victory, native Indians remain bitter about "the sting", viewing it as one more example of the dominant society using the law to harass members of their community.

Conclusion

The cases discussed in this chapter suggest that the legal recognition of aboriginal rights as aboriginal rights is not the primary goal of native Indians in their use of the courts with respect to fishing charges. While some of the legal arguments used attempted to establish the existence of aboriginal rights to fish, many of the arguments were based on the existence of other rights, such as treaty rights or reserve rights. Many of the cases have been based on the argument that the Terms of Union guarantees Indians certain fishing rights. In addition, band by-laws have been passed by some bands and their validity tested in court. This suggests that the major goal being pursued in court is freedom from the application of Fisheries Act regulations, rather than the recognition of aboriginal rights to fish.

Native Indians have been attempting to establish the existence of special rights with respect to the fishery, which are particular to Indians. In doing so, they have relied upon laws which apply only to Indians, such as Article 13 of the Terms of

Union and Section 35 of the Constitution Act, 1982. Native Indians have not challenged the validity of the Fisheries Act generally, but only its application to them.

As noted above, Section 35 of the Constitution Act has provided the basis for some of the cases which arose as a result of charges under the Fisheries Act. Initially, it appeared that the value of this section was rather limited, due to the inclusion of the word "existing" in the section coupled with the decisions which were handed down in earlier fishing cases. However, the B.C. Court of Appeal decision in the Sparrow case suggests that this section may provide some protection for aboriginal fishing rights.

The problem which appears to exist for native Indians in these cases is that the Fisheries Act only regulates fishing, rather than prohibiting it. The cases of R. v. Derricksan and R. v. Seward established that whatever the rights of native peoples, they are still subject to the application of the Fisheries Act, notwithstanding Section 35 of the Constitution Act. To some extent, the willingness of the courts to uphold the validity of the Fisheries Act is probably due to the perceived need for conservation, which benefits native Indians themselves. While native Indians agree with the need for conservation, they have been unhappy with the regulations of the fisheries department, which they feel do not give the Indian food fishery priority over

sport and commercial fishing. Consequently, in the later cases they have attempted to establish that Indian fishing rights should be subject only to conservation measures, and that the courts may determine whether or not conservation measures were strictly necessary. This argument was successful in the Sparrow case in the B.C. Court of Appeal, as the court found that Section 35 placed a constitutional limitation on the federal government's power to regulate the fishery. Whether or not this decision will have the effect which native Indians desire is yet to be seen.

The other argument which has been quite successful to date has been that band bylaws must prevail over Fisheries Act regulations when the two are contradictory. However, such bylaws must be approved by the Minister of Indian Affairs, so the federal government still effectively retains control. Still, it may be much easier, politically, to achieve approval for band bylaws than to achieve meaningful participation in decisions made by the Department of Fisheries and Oceans.

TABLE IV

CHALLENGES TO GOVERNMENT AUTHORITY: THE FISHERIES ACT

TABLE OF CASES

RIGHTS CASES

R. v. Derriksan	1971	B.C.P.C.
	1974	B.C.S.C.
	1975	B.C.C.A.
	1976	S.C.C.
R. v. Jack	1975	B.C.P.C.
	1976	B.C.C.A.
	1976	S.C.C.
R. v. Bob	1979	B.C.C.C.
R. v. Dawson	1981	B.C.P.C.
R. v. Adolph	1980	B.C.P.C.
	1981	B.C.C.C.
	1983	B.C.C.A.
R. v. Wilson	1985	B.C.C.C.
R. v. Seward	1985	B.C.P.C.
	1985	B.C.C.C.
R. v. Sparrow	1985	B.C.C.C.
	1986	B.C.C.A.
R. v. Adolph (Victor Jr.)	1985	B.C.C.C.

BAND BYLAW CASES

R. v. Billy	1977	B.C.C.A.
R. v. Baker	1983	B.C.C.C.
R. v. Leech	1983	B.C.P.C.
R. v. Jimmy	1985	B.C.C.C.
R. v. Joseph and Lewis	1985	B.C.C.C.

"THE STING"

R. v. Campbell	1984	B.C.C.C.
R. v. Douglas	1983	B.C.P.C.
	1984	B.C.C.C.
R. v. Gibson	1984	B.C.C.C.
R. v. Grant	1984	B.C.C.C.
R. v. Mitchell	1984	B.C.S.C.
R. v. Narcisse	1984	B.C.S.C.
R. v. Saul	1983	B.C.P.C.
	1984	B.C.S.C.

NOTES - CHAPTER 5

1 The number of non-natives charged was a matter of dispute. Indians claimed that only one of those charged was a non-native, while the Fisheries Minister claimed that 17 were non-native. Ron Rose, "Fish raid protests to be deferred," Vancouver Sun, October 23, 1985, p. B10.

2 Phillip Mills, "Fraser fish war explodes as Indians ignore ban," Vancouver Province, July 18, 1978, p. 1.

3 Generally approximately 10% of prosecutions on fisheries related charges are against native Indians. Although this number is quite low, commercial and sports fishermen are eager to point to the illegal sale of fish by native Indians as one of the problems with the industry.

4 See R. v. Bob, [1979] 4 C.N.L.R. 71, at p. 72.

5 Indeed, evidence led during one of the fishing cases shows that in the early years of colonization, the settlers themselves relied upon, and encouraged, Indian trading of fish. See R. v. Jack et al, Unreported, May 1, 1985, B.C.P.C., at p. 2.

6 "The Native Fishery,for food or cash it's a claim on history," Vancouver Sun, October 23, 1985, p. B10.

7 See Chapter 1.

8 "B.C. Indian fined $3 in fish case," Globe and Mail, August 31, 1971.

9 (1976) 71 D.L.R. (3d) 159, (1975) 60 D.L.R. (3d) 140.

10 (1964) 43 D.L.R. (2d) 150.

11 [1979] 5 W.W.R. 364.

12 Article 13, Terms of Union.

13 "Indians restrict access to river," Vancouver Sun, July 7, 1979, p. A7.

[14] R. v. Bob, [1979] 4 C.N.L.R. 71, at p. 72.

[15] [1979] 4 C.N.L.R. 71.

[16] Ibid., at p. 80.

[17] "Indian fishing victory considered just first win," Vancouver Sun, August 31, 1979.

[18] [1981] B.C.D.Crim. 5490-04.

[19] (1984) 3 D.L.R. (4th) 291, [1982] 3 C.N.L.R. 63, [1982] 2 C.N.L.R. 149.

[20] R. v. Jack et al, [1979] 5 W.W.R. 364, at p. 366.

[21] R. v. Adolph et al, (1984) 3 D.L.R. (4th) 291, at p. 300.

[22] Section 35(10), Constitution Act, 1982.

[23] See for example, Noel Lyon, "Constitutional Issues in Native Law," in Bradford Morse, ed, Aboriginal Peoples and the Law (Ottawa: Carleton University Press, 1985).

[24] [1984] 6 W.W.R. 481, [1983] 2 F.C. 656, [1982] 2 F.C. 385.

[25] All of these decisions are fairly recent and so unreported. Provincial Court decisions are difficult to find, and so I will limit my consideration of the cases to the County Court level, except in the case of R. v. Seward.

[26] [1985] B.C.D.Crim. 5490-07.

[27] [1986] B.C.D.Crim. 5683-01, Unreported, January 30, 1985, B.C.P.C.

[28] (1969) 1 D.L.R. (3d) 113.

[29] Provincial Court of B.C., January 30, 1985, unreported, p. 19.

[30] It should be noted that this interpretation of Section 35(1) is consistent with other judgements reached across Canada. See R. v. Eninew, (1984) 10 D.L.R. (4th) 137, (1984) 1 D.L.R. (4th) 595, and R. v. Nicholas, (1984) 55 N.B.R. (2d) 413.

[31] [1986] B.C.D.Crim. 5683-03.

[32] "Natives served fines over poached fish," Vancouver Sun,

January 31, 1985.

[33] [1987] 1 C.N.L.R. 145, [1986] B.C.D.Crim. 5683-02.

[34] (1973) 34 D.L.R. (3d) 145, (1971) 13 D.L.R. (3d) 64.

[35] [1987] 1 C.N.L.R. 145, at p. 185.

[36] Ibid, at p. 165.

[37] [1982] 1 C.N.L.R. 99.

[38] Cliff Atleo, the Executive Director of the Native Brotherhood ofB.C. said that the first bylaws (passed by the Squamish Indian band) were approved before the Depatment of Justice had given their opinion on the legal consequences of this action - which may be one reason why they were approved.

[39] [1983] B.C.D.Crim. 5686-01.

[40] [1983] B.C.D.Crim. 5490-08.

[41] [1985] B.C.D.Crim. 5490-03.

[42] [1985] B.C.D.Crim. 5490-05.

[43] Larry Pynn, "Indian fishing methods ruled illegal", Vancouver Sun, July 10, 1985, p. A12.

[44] "Fishing convictions against band members set aside,"Vancouver Sun, October 24, 1985, p. A15.

[45] Ron Rose and Moira Farrow, "Raids net poaching suspects," Vancouver Sun, January 15, 1983.

[46] Ron Rose and Moira Farrow, "Poaching crackdown 'attack on Indian people'," Vancouver Sun, January 13, 1983.

[47] "Raids aimed at speeding fish treaty," Vancouver Sun, January 14, 1983.

[48] "Fish officials defend charges," Globe and Mail, April 5, 1984, p. BC3.

[49] "Ottawa will regret raids," Vancouver Sun, January 20, 1983.

[50] These were R. v. Mitchell, R. v. Narcisse, R. v. Campbell, and R. v. Grant. Two cases involved charges of resisting a peace officer - R. v. Gibson and R. v. Douglas. These

cases were dismissed as the two accused were attempting to prevent the illegal seizure of vehicles by the peace officers.

51 [1985] 2 C.N.L.R. 156, [1984] 3 C.N.L.R. 163.

52 "Last charges against Indians dropped in fish selling case," Globe and Mail, April 4, 1984.

CONCLUSION: YOU WIN SOME, YOU LOSE SOME

Native Indians used the courts to a significant degree between 1969 and 1985; however, Indians have used the courts to pursue only some of the objectives which they are pursuing in the political arena. As noted in Chapter 1, the primary goal which Indians have pursued in the political arena has been the recognition of the aboriginal right to self-government, which includes economic rights to land and resources. The achievement of this goal would give native Indians greater control over their own lives, enabling them to choose to pursue their traditional way of life, and would also it is hoped, lead to an improvement in the economic position of native Indians. However, as this goal has not been easy to achieve, native Indians have also attempted to attain the same ends through a variety of means in the absence of a recognition of their aboriginal rights.

In the courts, native Indians have not attempted to achieve a recognition of their right to self-government; rather they have pursued goals which can be termed "economic" from the viewpoint of non-native society. Three factors can be identified which help explain why "economic" goals have been pursued in court. The first factor is that legal opportunities exist which allow native Indians to pursue these goals. Since the time of first contact, native Indians have had special economic rights which

have been recognized (or bestowed) by legislation or by the actions of governments. The very existence of reserves gives native Indians special economic rights to land and resources on the reserves, and the Indian Act provides additional economic benefits such as exemption from taxation. The few treaties which were signed in B.C. and the Royal Proclamation of 1763 also recognized special Indian rights to land and resources. In addition, by entering into treaties the government implicitly recognized that native Indians had special rights. On the other hand, governments did not recognize any special political rights of native Indians. Both the Royal Proclamation and treaties refer to Indians as the subjects of the King or Queen. In addition, the early Indian Acts established a form of government for reserves which was unrelated to traditional Indian forms of government, which were ignored by departmental officials.

The second factor which has contributed to native Indians' use of the courts to pursue economic goals is the immediate importance of land and resources to native Indians. Indians depend upon land and resources for their livelihood, and must act to protect these when they are endangered, in order to preserve their way of life. Economic development posed an immediate and irreversible threat to these resources which demanded an immediate response. In addition, the actions of the dominant society threatened to reduce the already limited access to resources

which native Indians had enjoyed. As many governments have learned, groups react much more strongly when previously enjoyed rights are threatened, than when additional rights are denied.

Third, native Indians have encountered difficulties in pursuing their economic goals in the political arena. Despite protests and presentations, governments have largely ignored Indian claims to land and resources when making specific decisions on land and resource use, while land claims negotiations have proceeded at a snail's pace. When governments in Canada make decisions about the use of land and resources, they are subjected to pressure from many competing groups. The political attractiveness of recognizing Indian claims is not great when competing groups offer jobs and economic development in return for access to resources. Court decisions may force governments to take native Indians' claims into account, thereby removing the political responsibility for such decisions from governments. In addition, the use of the courts by native Indians can increase the cost of ignoring Indians' claims, both in terms of court costs and by postponing economic development, thereby causing companies or governments to pay interest and other costs while waiting for a court decision.

We now turn to a consideration of the particular goals which have been pursued in court, as well as the successes and difficulties which Indians have encountered in their use of the courts. Native Indians used the courts in order to ensure

that they received the benefits to which they were entitled under the provisions of the Indian Act when disputes arose with private individuals or the provincial government. The Indian Act creates a separate legal regime on reserves which gives native Indians special economic rights, and native Indians used the courts in sixteen cases dealing with debt, taxation, contracts, and the possession of reserve land in order to obtain the benefit of these rights. While native Indians were not successful in attaining their goals in all of these cases they did win some of the cases, thereby achieving benefits which would otherwise have been unrealized.

Native Indians challenged the administration of the Indian Act by the federal government in only five cases, and three of these cases - those dealing with status and the possession of reserve land - were of importance only to the individuals involved. The federal government gave itself a great deal of authority over life on reserves, and a great deal of discretion in the exercise of that authority, when the Indian Act was drafted, leaving few opportunities for legal challenges to the administration of the Act. However, one successful challenge to the federal administration of this Act was made in Guerin v. The Queen, in which the Musqueam band won $10 million in compensation from the federal government. In addition, and perhaps more importantly, this case established that the federal government

did have a fiduciary obligation when acting on behalf of native Indians, and that the government's actions could be subject to judicial review. However, the effect of this judgement was subsequently limited in Kruger v. The Queen, when the court found that this fiduciary obligation applied only to the actions of the Department of Indian Affairs, rather than to the actions of the government generally.

Although the Guerin case was a substantial victory for native Indians, its effect should not be overstated. The case established that the federal government had a fiduciary obligation when acting with respect to the conditional surrender of reserve land; however there are a number of sections of the Indian Act which give The Minister of the Department of Indian Affairs a great deal of discretion in making decisions on behalf of or "for the benefit of" native Indians in other areas. For instance, band by-laws must be approved by the Minister before they come into effect, and there is no mention in the Act of considerations which the Minister must take into account in granting or denying this approval. Decisions of the federal government with respect to many areas covered by the Indian Act may not then be subject to judicial review.

Despite the need for Ministerial approval of by-laws, native Indians on some reserves were successful in obtaining approval of by-laws dealing with the management of the fishery on reserves. Consequently, native Indians were able to challenge the applicab-

ility of the federal Fisheries Act to native Indians fishing on reserves in five cases. This defence to charges laid under the Fisheries Act was successful in the last three cases when these were appealed to County Court. While these decisions have benefited native Indians living on reserves where band by-laws dealing with the fishery had already been approved, they may have a negative impact on subsequent approvals of such by-laws by the Minister.

The special legal regime which applies to native Indians as a result of the Indian Act and federal jurisdiction over Indians has caused legal disputes to arise when native Indians have pursued economic development on reserves, and when band councils have acted independently to pursue particular goals. In the Toussowasket case, this special legal regime was an advantage, as it enabled native Indians to challenge the applicability of the provincial Residential Tenancy Act to reserve land. However, in five other cases which dealt with the issue of the legal status of band councils, this regime only created another legal hurdle for native Indians to overcome in attempting to achieve their goals. In two cases, this special regime also provided native Indian husbands involved in matrimonial disputes with legal arguments unavailable to non-Indians.

Native Indians have also used the courts in order to try to prevent the adoption of native children by non-natives. In one

case, a jurisdictional argument was used, while in the other two cases native Indians attempted to establish that it was in the best interests of the children to be brought up within the Indian culture. None of these arguments was successful in preventing the adoptions from taking place.

Native Indians have used the courts in 32 cases in attempts to increase their access to resources (particularly fish and wildlife) and to prevent damage to land and resources to which they have a claim. However, Indians attempted to achieve these goals by using arguments designed to achieve the legal recognition of aboriginal rights in only four cases - Calder v. A.G.B.C., Macmillan Bloedel v. Mullin, R. v. Derriksan, and R. v. Sparrow. Alternative legal arguments were used in the other 28 cases, although assertions of aboriginal rights were used in some of these cases in order to support the arguments which were advanced. This suggests that the primary goal which has been pursued in court has been the protection of Indian interests in land and resources, rather than the legal recognition of the existence of aboriginal rights.

Native Indians have had limited success to date in their attempts to preserve their ability to pursue their traditional way of life by arguing that federal and provincial legislation which regulates fishing and hunting should not apply to them. The jurisdictional arguments which were used in court cases arising from charges laid under the provincial Wildlife Act were

unsuccessful, given the absence of any clear intent in federal legislation to protect Indian hunting rights. The courts have also been reluctant to rule that the federal Fisheries Act does not apply to Indians, notwithstanding any treaty, reserve, constitutional or aboriginal rights which native Indians may assert. Because federal and provincial legislation only regulates hunting and fishing, rather than prohibiting these activities, the courts have ruled that this legislation will apply to native Indians. One exception to this rule has been that the courts have upheld the hunting rights of treaty Indians, as Section 88 of the Indian Act explicitly states that the application of provincial laws to Indians is subject to the terms of treaties. In addition, the recent B.C. Court of Appeal decision in the Sparrow case established that aboriginal rights to fish are given some protection by Section 35 of the Constitution Act. Although the court ruled that the federal government retained the power to regulate Indian fishing, this case established that there are now limitations on that power. Band by-laws have also in some cases provided some protection for native Indians from the application of the Fisheries Act.

Native Indians have been successful, at least so far, in several cases in which the courts were used to prevent damage to land and resources. Legal arguments based on the tort of nuisance, and the existence of reserve and aboriginal rights

enabled native Indians to obtain injunctions which preserved land and resources until the rights of Indians could be determined at trial.

Ironically, given native Indians apparent reluctance to use aboriginal rights arguments in court, such arguments have led to important victories. The Calder case (and the clarification of its meaning in the Guerin decision) established that aboriginal title was an independent legal right which might not have been subsequently extinguished. This decision contributed to the change in the federal government's policy on the negotiation of comprehensive claims. Although little progress has been made as a result of the provincial government's reluctance to participate in negotiations, the provincial government's staunch assertions that aboriginal rights have been extinguished were undermined in the recent B.C. Court of Appeal decision in Macmillan Bloedel v. Mullin. This decision stated that the question of the continuing legal existence of aboriginal rights was a question which remained unanswered, and that this was a question which should be answered at trial. In addition, the court granted the Indians an injunction which prevents the logging of Meares Island until their rights can be determined at trial, establishing an important precedent.

In one case, Western Forest Products v. Collinson, the Haida used the courts as a public forum where they questioned the justice of the legal system and of the provincial government's

actions. Although this case did elicit sympathy and support for the Haida from the general public, little concrete progress has been made to date in achieving practical recognition of their land claims. In addition, since the blockade, media coverage of the Lyell Island dispute has focussed more on the environmental conservation issue rather than on the issue of Indian land claims.

In conclusion, it can be said that native Indians have used the courts both in order to achieve legal solutions to disputes, and as a means of putting political and economic pressure on governments. In their attempts to use the courts to achieve legal solutions, Indians have achieved some successes, particularly in those cases dealing with the interpretation of the Indian Act and in the Guerin case. These successes would not have been achieved in the absence of court action. Indians have encountered some difficulty in their attempts to establish legal limitations on parliaments' authority to regulate hunting and fishing, however, the recent interpretation of Section 35 of the Constitution Act in the Sparrow case was a significant victory.

It is difficult to say at this point whether or not native Indians can achieve a settlement of their land claims by using the courts as a means of putting economic and political pressure on governments to negotiate their claims. To date, native Indians have achieved some limited gains in this area by using the

courts. Certain areas have been preserved until the rights of Indians can be determined, and the Calder case contributed to the federal government's decision to negotiate comprehensive claims. In addition, the publicity which has resulted from the cases has increased public awareness of Indians' claims. However, the courts may still decide that aboriginal title has been extinguished, in which case these gains may mean little. If this occurs, native Indians may find it difficult to continue to press for the recognition of their claims, as their use of the courts implies a recognition of the legitimacy of court decisions. However, this seems to be a risk that at least some native Indians are willing to take.

BIBLIOGRAPHY

Books and Articles

Asch, Michael. Home and Native Land: Aboriginal Rights and the Canadian Constitution. Toronto: Methuen Publications, 1984.

Cardinal, Harold. The Rebirth of Canada's Indians. Edmonton: Hurtig Publishers, 1977.

Continuing Legal Education Society of B.C. Indians and the Law. Materials prepared for a Continuing Legal Education seminar held in Vancouver, 1982.

_____. Indians and the Law II. Materials prepared for a Continuing Legal Education seminar held in Vancouver, 1985.

Cumming, Peter, and Mickenberg, Neil, eds. Native Rights in Canada. 2nd ed. Toronto: General Publishing Co. 1972.

Department of Indian Affairs and Northern Development. The Historical Development of the Indian Act. Ottawa: Treaties and Historical Research Centre, 1978.

_____. In All Fairness: A Native Claims Policy. Ottawa: Minister of Supply and Services, 1981.

_____. Outstanding Business: A Native Claims Policy. Ottawa: Minister of Supply and Services, 1982.

_____. Statement of the Government of Canada on Indian Policy, 1969. Ottawa: Queen's Printer, 1969.

Dyck, Noel, ed. Indigenous Peoples and the Nation State: Fourth World Politics in Canada, Australia and Norway. St. John's: Institute of Social and Economic Policy, 1985.

Federal Environmental Assessment Panel. Report on the C.N. Rail Twin Tracking Program, B.C. Ottawa, Minister of Supply and Services Canada, 1985.

Friends of Clayoquot Sound and the Western Canada Wilderness Committee. Meares Island: Protecting a Natural Paradise. Tofino, 1985.

Hawthorn, H.B. A Survey of the Contemporary Indians in Canada: Economic, Political, Educational Needs and Policies, Vols. 1 & 2. Ottawa: Queen's Printer, 1966-7.

Hogg, Peter W. constitutional Law in Canada. Toronto: The Carswell Co. Ltd., 1977.

House of Commons. Indian Self-Government in Canada: Report of the Special Committee. Ottawa: Queen's Printer, 1983.

Inuit Committee on National Issues. "Statement of Fundamental Rights". Yellowknife, 1984.

Jackson, Michael. Native Peoples and the Law: Supplementary Materials to Native Rights in Canada. Vancouver: University of B.C., 1981.

Jamieson, Kathleen. Indian Women and the Law in Canada: Citizens Minus. Ottawa: Minister of Supply and Services, 1978.

Laviolette, Forrest E. The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia. Toronto: University of Toronto Press, 1973.

Meares Island Planning Team. Meares Island Planning Options: Report. June 30, 1983.

Morse, Bradford, ed. Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada. Ottawa: Carleton University Press, 1985.

Pibus, Christopher J. "The Fisheries Act and Native Fishing Rights in Canada: 1970-1980", University of Toronto Faculty of Law Review 39:1 (Spring, 1981) 43-54.

Pinkerton, Evelyn. "Taking the Minister to Court: Changes in Public Opinion About Forest Management and Their Expression in Haida Land Claims", B.C. Studies 57 (Spring, 1983) 68-85.

Ponting, J. Rick, and Gibbins, Roger. Out of Irrelevance: A Socio-political Introduction to Indian Affairs in Canada. Toronto, Butterworth and Company, 1980.

Rankin, Murray and Horne, Mark. "Procedural Fairness-Standing-

Statutory Power of Decision-Judicial Review Procedure Act-Islands Protection Society v. The Queen in R. of B.C.", U.B.C. Law Review 14 (1979) 205-223.

Raunet, Daniel. Without Surrender, Without Consent. Vancouver: Douglas and MacIntyre, 1984.

Sanders, Douglas. "The Indian Lobby". In And No One Cheered: Federalism, Democracy and the Constitution Act. Edited by Keith Banting and Richard Simeon. Toronto: Methuen Publications, 1983.

_____. Legal Aspects of Economic Development on Indian Reserve Lands. Ottawa, Department of Indian and Northern Affairs, 1976.

_____. "Lawyers and Indians". Paper presented at Legal Profession Seminar, December 16, 1978, Vancouver.

_____. Native People in Areas of Internal National Expansion: Indians and Inuit in Canada. Copenhagen, International Working Group on Indigenous Affairs, 1973.

_____. "The Nishga Case", The Advocate 36 (1978) 121-136.

Sanders, Douglas and Burrell, Gordon. Handbook of Case Law on the Indian Act. Ottawa: Minister of Supply and Services, 1984.

Slattery, Brian. Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title. Saskatoon: University of Saskatchewan Native Law Centre, 1983.

South Moresby Resource Planning Team. South Moresby: Land Use Alternatives. Victoria: Queen's Printer, 1983.

Tanner, Adrian, ed. The Politics of Indianness. St. John's: Institute of Social and Economic Research, 1983.

Tennant, Paul. "Native Indian Political Organization in B.C., 1900-1969: A Response to Internal Colonialism", B.C. Studies 55 (Autumn, 1982), 3-49.

_____. "Native Indian Political Activity in British Columbia, 1969-1983", B.C. Studies 57 (Spring, 1983), 112-136.

Venne, Sharon Helen. Indian Acts and Amendments, 1868-1975: An Indexed Collection. Saskatoon, University of Saskatchewan Native Law Centre, 1981.

Weaver, Sally. "The Joint Cabinet/National Indian Brotherhood Committee: A Unique Experiment in Pressure Group Relations", Canadian Public Administration 25:2 (Summer, 1982) 211-239.

_____. Making Canadian Indian Policy: The Hidden Agenda: 1968-1970. Toronto: University of Toronto Press, 1981.

Cases

A.G. Canada & Kruger v. C.P. Ltd., [1986] 1 C.N.L.R. 1.

A.G. Canada v. Lavell, (1974) 38 D.L.R. (3d) 481.

Alkali Lake Indian Band v. Westcoast Transmission, [1984] 53 B.C.L.R. 323.

Bolton v. Forest Pest Management Institute, [1985] 66 B.C.L.R. 127, [1985] B.C.D. Civ. 1893-08.

Brown v. The Queen in Right of B.C., (1980) 107 D.L.R. (3d) 705, (1978) 87 D.L.R. (3d) 337.

C.L.G. v. Smith, [1985] 2 W.W.R. 155.

Cache Creek Motors Ltd. v. Porter, [1981] 2 C.N.L.R. 34.

Calder v. A.G.B.C., [1973] 34 D.L.R. (3d) 145, [1971] 13 D.L.R. (3d) 64, (1970) 8 D.L.R. (3d) 59.

Corporation of Surrey v. Peace Arch Enterprises, [1970] 74 W.W.R. 380.

Danes v. The Queen, [1985] 2 C.N.L.R. 18, [1984] 1 C.N.L.R. 64.

Derrickson v. Derrickson, (1986) 26 D.L.R. (4th) 175, [1984] 3 C.N.L.R. 58.

District of Campbell River v. Naknakim, [1984] 2 C.N.L.R. 85.

Fricke v. Moricetown Indian Band, [1986] 1 C.N.L.R. 11.

Grant v. Registrar of Indians, [1984] B.C.W.L.D. 8.

Guerin v. The Queen, [1984] 6 W.W.R. 481, [1983] 2 F.C. 656, [1982] 2 F.C. 385.

Isaac v. Bedard, (1974) 38 D.L.R. (3d) 481.

Islands Protection Society v. R. in Right of B.C., [1979] 4 W.W.R. 1.

Joe v. Findlay, [1981] 3 W.W.R. 60, (1980)) 109 D.L.R. (3d) 747, [1978] 4 W.W.R. 653.

John v. Superintendent of Child Welfare, [1982] 1 C.N.L.R. 40.

Johnson v. B.C. Hydro, (1981) 123 D.L.R. (3d) 340.

Kruger v. The Queen, (1986) 17 D.L.R. (4th) 491, [1982] 1 C.N.L.R. 50.

Leonard v. The Queen, [1978] 1 C.N.L.B. 5.

Leonard v. Gottfriedson, [1981] 21 B.C.L.R. 326.

Leonard v. R. in Right of B.C., [1984] 4 W.W.R. 37, [1983] 3 W.W.R. 529.

Lindley v. Derrickson, [1978] 4 C.N.L.B. 75.

McNeil v. Superintendent of Family and Child Services, [1983] 4 C.N.L.R. 41.

MacMillan Bloedel v. Mullin, [1985] 61 B.C.L.R. 145, [1985] 2 W.W.R. 722.

Michell v. Dennis and Dennis, [1984] 2 W.W.R. 449.

Moses v. The Queen, [1979] 5 W.W.R. 100, [1977] 4 W.W.R. 474.

Natural Parents v. Superintendent of Child Welfare, [1976] 1 W.W.R. 699, [1974] 3 W.W.R. 363, [1974] 1 W.W.R. 19.

Pacific Credit Bureau Service v. Martin, [1982] B.C.D. Civ. 1724-05.

Pasco v. CN Railway, [1986] 1 C.N.L.R. 34, [1986] 1 C.N.L.R. 35.

Paul v. Paul, (1986) 26 D.L.R. (4th) 196, [1985] 2 C.N.L.R. 93, [1984] 4 C.N.L.R. 37, [1983] 2 C.N.L.R. 103.

Peters v. The Queen, [1983] 2 C.N.L.R. 110.

Re Masset Band Council, [1977] 2 W.W.R. 93.

Re C. and V.C., [1983] 3 C.N.L.R. 58.

R. v. Adolph, (1984) 3 D.L.R. (4th) 291, [1982] 3 C.N.L.R. 63, [1982] 2 C.N.L.R. 149.

R. v. Adolph (Victor Jr.), [1986] B.C.D. Crim. 5683-03.

R. v. Baker, [1983] B.C.D.Crim. 5490-08.

R. v. Bartleman, [1984] 55 B.C.L.R. 78, [1981] 1 C.N.L.R. 83, [1980] 1 C.N.L.R. 68.

R. v. Billy, [1982] 1 C.N.L.R. 99.

R. v. Bob, [1979] 4 C.N.L.R. 71.

R. v. Campbell, [1984] 3 C.N.L.R. 142.

R. v. Cooper, George and George, (1969) 1 D.L.R. (3d) 113.

R. v. Dawson, [1981] B.C.D. Crim. 5490-04.

R. v. Dennis and Dennis, [1975] B.C.D. Crim. , [1975] 2 W.W.R. 630.

R. v. Derriksan, (1977) 71 D.L.R. (3d) 159, (1976) 60 D.L.R. (3d) 140, (1975) 52 D.L.R. (3d) 744.

R. v. Dick, (1986) 23 D.L.R. (4th) 33, [1983] 2 C.N.L.R. 134, [1982] 3 C.N.L.R. 167.

R. v. Discon and Baker, (1968) 67 D.L.R. (2d) 619.

R. v. Douglas, [1984] 3 C.N.L.R. 65.

R. v. Eninew, (1984) 10 D.L.R. (4th) 137, (1984) 1 D.L.R. (4th) 595.

R. v. George, [1966] S.C.R. 267.

R. v. Gibson, [1984] B.C.W.L.D. 5.

R. v. Grant, [1984] B.C.W.L.D. 2.

R. v. Haines, [1981] 6 W.W.R. 664, [1980] 5 W.W.R. 421, [1978] 4 C.N.L.B. 135.

R. v. Ignace, [1983] B.C.D. Crim. 5684-02.

R. v. Jack , [1979] 5 W.W.R. 364.

R. v. Jack and Charlie, (1986) 21 D.L.R. (4th) 641, [1982] 5 W.W.R. 193, [1979] 4 C.N.L.R. 91.

R. v. Jimmy, [1985] B.C.D. Crim. 5490-03.

R. v. Joseph and Lewis, [1986] 2 C.N.L.R. 108.

R. v. Kruger and Manuel, [1977] 4 W.W.R. 300, [1976] 60 D.L.R. (3d) 144, [1974] 6 W.W.R. 206.

R. v. Mitchell, [1984] 3 C.N.L.R. 151.

R. v. Napoleon, [1985] 6 W.W.R. 302, [1984] B.C.D. Crim. 6165-02, [1982] 3 C.N.L.R. 116.

R. v. Narcisse, [1984] B.C.W.L.D. 2.

R. v. Nicholas, (1984) 55 N.B.R. (2d) 413.

R. v. Saul, [1985] 2 C.N.L.R. 156, [1984] 3 C.N.L.R. 163.

R. v. Seward, [1986] B.C.D. Crim. 5683-01, unreported - January 30, 1985, - B.C.P.C.

R. v. Sikyea, (1964) 43 D.L.R. (2d) 150.

R. v. Sparrow, [1986] B.C.D. Crim 5683-02.

R. v. White and Bob, (1966) 52 D.L.R. (2d) 481, (1965) 50 D.L.R. (2d) 613.

R. v. Wilson, [1985] B.C.D. Crim. 5490-07.

St. Catherine's Milling and Lumber Co. v. The Queen, [1889] 14 App.Cas. 46, [1881] 13 S.C.R. 577.

Springbank Dehydration Ltd. v. Charles, [1978] 1 C.N.L.B. 6.

Toussowosket Enterprises v. Matthews, unreported - March 3, 1982-B.C.S.C.

Union of B.C. Indian Chiefs v. Westcoast Transmission, [1982] 1 C.N.L.R. 173, [1979] 2 C.N.L.R. 67.

Watts v. The Queen, [1985] 2 C.N.L.R. 18, [1984] 1 C.N.L.R. 64.

Western Forest Products v. Collinson, [1985] B.C.D.Civ. 902-02.

Zaleschuk v. Bella Bella Indian Band, [1984] B.C.D. Civ. 969-11.