

Archival Records for Aboriginal Rights and Title Cases

The following list is an introduction to archival resources concerning significant Canadian Aboriginal rights and title cases in Canadian common law. Each case is depicted through five fields. The “*At Issue*” field supplies the legal context of the disagreement that brought the issue to court. The “*First Nation[s]*” field identifies the First Nation[s] intimately involved in the case. The “*Holding*” field describes the court’s decision. An effort is made to note lower court decisions and appeals. Attention is given to the courts of record.¹ The “*Significance*” field offers commentary on the decision’s significance for the evolution of Canadian Aboriginal Common Law. The “*Archival Sources*” field cites the pertinent sources used at trial held at the BC Archives. Archival material from other archives has also been cited; however, the focus of this document is records located in the BC Archives. The “*Secondary Sources*” field cites published works that consider the case in question. The case citation follows the *Canadian Guide to Uniform Legal Citation 7th ed.*

The cases covered in this document begin in the second half of the twentieth century, specifically in the 1960s in what Professor Hamar Foster refers to as the second legal campaign for aboriginal rights and title in British Columbia. This is a period when the so-called “Indian land question” moved formally into Canadian courts. Since first contact there has been consistent aboriginal resistance to the English colonial project to acquire settler rights to land used and/or occupied by First Nations societies. But only in the twentieth century was this resistance couched in the language and formality of English common law. The first campaign can be traced to formal petitions in the first decade of the twentieth century. The Cowichan Petition of 1908 highlights this period. These petitions were accompanied by committees and councils – the Indian Rights Committee, the Allied Indian Tribes of British Columbia, the Nisga’a Land Committee – newly organized to manifest for rights and even send delegations to such European centers of authority as the Vatican. As the formalities of political activism found expression in Aboriginal protest reaction grew until 1927 when Ottawa amended section 141 of the *Indian Act* making it illegal to “raise money from any Indian or Indians for the purpose of prosecuting any claim against the Government” without the permission of the Minister. This clause was not removed from the *Indian Act* until 1951, cuing a second twentieth century phase in Aboriginal manifestation for rights and title, this time focused on the court.

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

a. At Issue: In 1963 two First Nations men from the Nanaimo area on Vancouver Island, Clifford White and David Bob, were arrested for hunting deer out of season. The conviction by L. Beevor-Potts, a Magistrate, was on a charge of having six deer carcasses during closed season contrary to the provisions of the *Game Act [R.S.B.C. 1960, c. 160]*.

¹ Information Access Operations Branch services support a government-wide framework for the management of recorded information. This service Government record The “court of record” identifies the level of court

b. First Nation[s]: *Snuneymuxw*, member of *Naut'sa mawt* Tribal Council.

c. Holding: Judge A.H.J. Swencisky, C.C.J. allowed an appeal by the accused and ruled in their favor. Both men claimed a treaty right to hunt based on the conditions expressed in the Douglas Treaty for the region of Nanaimo signed by Douglas with "The Nanaimo Tribe" in 1854. The Crown appealed the decision and on December 15, 1964 Justice Norris of the BC Court of Appeal dismissed the Crown's appeal. The Crown then appealed to the Supreme Court of Canada and on November 10, 1965 the Supreme Court ruled in favour of the BC Court of Appeal and dismissed the Crown's appeal. The Court of Appeal held the accused were within their rights by virtue of s. 87 of the *Indian Act*. A valid treaty existed covering the hunting rights of the accused; the provisions of the provincial *Game Act* did not apply. The British Columbia government had argued that the Douglas Treaties were only agreements to purchase land. They also argued that hunting laws were "laws of general application." Such laws are meant to apply equally to all citizens. Under the *Indian Act* such laws apply to all status Indians. However, in the Douglas Treaties the First Nations were promised that they were "at liberty to hunt over the unoccupied lands as formerly." This promise overrode any provincial laws and the *Indian Act*.

Nanaimo County Court:

Justice: A.H.J. Swencisky, C.C.J.

BC Court of Appeal: (6 C.N.L.C. 629 (B.C.C.A.)

Justice: Norris.

Counsel for the Appellant: T.B. Bowen-Colthurst, Q.C. and A.W. Hobbs.

Counsel for Respondents: T.R. Berger.

Quorum: Justice Davey, Justice Sheppard, Justice Lord, and Justice Sullivan.

Supreme Court of Canada: 6 C.N.L.C. 684.

d. Significance for Aboriginal Common Law: This was the first case in Canadian common law to recognize the Douglas Treaties as treaties in Canadian law. The British Columbia Court of Appeal found that the 14 agreements arranged between the Colony of Vancouver Island's second governor and Hudson's Bay Co. chief factor James Douglas and Vancouver Island First Nations were treaties within the meaning of the *Indian Act*. The Court of Appeal accordingly recognized the treated First Nations' right to hunt in exclusion of the *B.C. Game Act*. The *Snuneymuxw Treaty* was officially created on December 23, 1854.

Secondly, Justice Norris's reasons on appeal formerly considered Aboriginal title as a legal interest in Canadian law. These reasons foreshadowed the *Calder* case's recognition of Aboriginal title and represent an early step towards the contemporary BC Treaty process.

Thirdly, the decision is a precedent for the liberal interpretation of the meaning of a treaty in the context of Aboriginal rights and title

e. Archival Sources Referenced at Trial:

Primary Sources

Government Sources:

1. **NW970.5 B862ca., BC Archives** – Case file of the *Court of Appeal: Regina v. Clifford White and David Bob*.
2. **Fort Victoria [Douglas] Treaties, MS-0772, BC Archives.**

Private Sources:

1. *Thomas Berger fonds*, University of British Columbia Library Rare Books and Special Collections. – *Records of the lead counsel for the Snuneymuxw first nation.*
2. *Wilson Duff fonds, GR- 2809, BC Archives.* – *Records of leading anthropologist and witness at trial.*
3. *The Colonist*, Victoria, B.C. Colonist Printing and Publishing Company, **one microfiche NWp 971.94 C719.** – *Colonists and settlers debated the status of Aboriginal land title in the late nineteenth century. The quality and extent of reporting of the legislature was unreliable when extant. The Colonist newspaper offers a source for this debate. The Colonist ran a series of articles in April 1875 when William Tolmie moved to have the government publish all records concerning the “Indian land question” and William Smithe moved to strike a committee to examine and report on the papers. The 1875 publication “Papers Connected to the Indian Land Question” marks the last known location of the Douglas treaties until they resurfaced in R. v. Bob and White. This does not explain the various discrepancies found between the original treaties and the published copies.*

f. Secondary References:

1. Hamar Foster, “The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title,” *UBC Law Review*, vol. 23, no. 3 (1988–89), p. 632
2. _____ We Are Not O’Meara’s Children: Law, Lawyers and the First Campaign for Aboriginal Title in British Columbia, 1909-1928.” In eds., Hamar Foster, Heather Raven, and ---3. _____, Heather Raven and Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Vancouver: UBC Press, 2007.
4. Raymond Frogner, “Innocent Legal Fictions”: Archival Convention and the *North Saanich*

Treaty of 1852,” *Archivaria* 70 (Fall 2010): 45–94.

5. Thomas Issac, *Aboriginal Law: Cases, Materials, and Commentary*, Saskatoon, Purich Publishing, 1999, pp. 28-41.

6. Anne Lindsay, “Archives and Justice: Willard Ireland’s Contribution to the Changing Legal Framework of Aboriginal Rights in Canada, 1963–1973,” *Archivaria* 71 (Spring 2011): 35–62.

7. Official Web Site of Snuneymuxw First Nation: <http://home.snuneymuxw.ca/> [consulted 2012.01.18].

8. Borrows, John and Len Rotman, *Aboriginal Law: Cases and Materials*, 3rd. Edition, Toronto: Butterworths, 2007.

2. *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, 34 D.L.R. (3rd) 145

a. At Issue: The Nisga’a sued for a declaration “that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory... has never been lawfully extinguished.”

b. First Nation: Nisga’a

c. Holding: The court divided the claim into three issues: 1. Did Aboriginal title exist? 2. Had Nisga’a title been extinguished? 3. Did the court hold jurisdiction to make this decision? Six of seven justices affirmed the first question; the court split evenly on the question of the legal foundations of title and its extinguishment; and the claim failed on a question of procedure because the plaintiffs failed to obtain the consent of the Attorney-General to sue the Crown.

d. Significance for Aboriginal Common Law: *Calder* is the first decision in Canadian common law to recognize Aboriginal title existed prior to and independent of European contact and flows from traditional Aboriginal land use and occupancy. The decision shifted the source of Aboriginal title beyond the *Royal Proclamation of 1763*, grants by the Crown, and subsequent government legislation, towards Aboriginal custom and tradition. While six Judges confirmed Nisga’a title existed, the question remained as to whether this title continued to exist. The *Calder* decision did not address the question of the precise nature and legal characteristics of aboriginal title. After *Calder*, there was significant legal uncertainty on the existence of aboriginal title and its implications on the Crown’s title in BC.

Many see the *Calder* decision as the threshold to the post-colonial era of Aboriginal/settler relations where Aboriginal cultures and traditions formed the foundation for evidence of rights and title. More immediately, the *Calder* decision challenged the federal Government’s 1969 White Paper on Aboriginal rights which argued for uniform Canadian rights and questioned the unique status of Aboriginal peoples within Canada. The policy was rescinded after *Calder*. The decision moved

government policy in the direction of Section 35 of the *Constitution Act* [1982] which recognized and affirmed “existing Aboriginal rights and title.”

e. Archival Sources Archival Sources Referenced at Trial:

I. Federal Government References

1. British Columbia. *Report of the Royal Commission on Indian Affairs for British Columbia*. Victoria: Acme Press, 1916. 4 vols. Known as the *McKenna McBride Commission Report*. Contents: v.1: Babine, Bella Coola, Cowichan, Kamloops; v.2: Kootenay, Kwawkwalth, Lytton; v.3: Naas, New Westminster, Okanagan, Queen Charlottes v.4: Stikine, Stuart Lake, Treaty No. 8, West Coast, Williams Lake. **BC Archives NW 970.5 B862.**

-Cited as “Exhibit 6” at trial. Presented by Mr. Brown representing the A-G. For transcripts to this published report see **GR-1995**. Transcripts were not referenced at trial. Berger presents a section of the report printed from microfilm. Berger marked the documents but described this as “not prejudicial.” Trial Judge suggested issues of weight and admissibility for this document be “discussed over lunch.” For further archival material for this commission see **GR-123** [correspondence for Commission’s activities]; **B-1387** [correspondence and representations received by the Commission]; **GR-1967** [Commission on claims of Indians in BC, 1912]; **GR-2043** [correspondence regarding Commission].

2. “Report on the Indian Title in Canada with Special Reference to British Columbia,” 20 August 1909, **RG10 File 1, Vol. 11/208, Series B-8** Library and Archives Canada (LAC);

– *Dominion Government report by T.R.E. McInnes, barrister, concerning BC Government’s 1908 attempt to have BC provincial courts recognize government proprietary rights on reserves.*

3. “Report of the Deputation before Sir Wilfrid Laurier,” 26 April 1911, **F/52/C16 at 51**, BC Archives, *Prince Rupert News*, 29 April 1911, **RG-10 Ser. C-II-3 Vol. 11/047, file 33, part 6**;

4. *Chief Inspector of Indian Agencies/Indian Commissioner for BC - Skeena River Agency - Land matters including: reserve ownership disputes (Upper Nass and Kincolith bands); leases; surveys; claims for and purchase of additional reserve lands (Maps and Plans) (Shannon file). T-16090-1609, RG10 vol. 11056, file 33/8, series C-II-3.*

5. “British Columbia Indian Land Question – Documents Concerning Nishga Band’s Petition and Meetings in regards to it.” 1913-1919 **RG-10, ReelC-12062, File 27150-3-4, Vol. 778**;

6. *“Inspector of Indian Agencies/Indian Commissioner for BC - General correspondence re land including: claims of Allied Indian Tribes of BC on land question and petitions of Indian Rights of Association, Nishga, and Friends of Indians of B. C. , 1911-26; survey of new reserves allotted by Royal Commission, 1924-29; reserves in Railway Belt, 1907-24 (Shannon file), 1907-1929, **RG-10, Reel T- 16087-16088, File 33/General, Part 6, Vol. 1047, Series C-II-3;***

7. *“Nass Agency – Correspondence Regarding Surveys of Reserves on the Nass River, Primarily the Kincolith Band of Nishga Indians, 1908-1922,” **RG10 Reel: C-14809, File: 27, 161-1, vol. 7538.***

8. *“-British Columbia Indian Land Question – Correspondence Regarding the Nishga Band’s Land Claims and other Interior Tribes (Publications, Newspaper Clippings)” 1913-1917, **RG-10, Reel C-12062, File: 27150-3-4, Part 1, Vol. 7781.***

9. *“-Nass Agency - Exhibits - Tsimpsean No. 1 to No. 12 and Nishga, Q1 to Q15, 1914-1915,” **RG-10, Reel, T-3956, File: 506D, Vol. 11019.***

10. - **Canada. Supreme Court.** *Reasons for judgement in the case of Frank Calder et al. v. Attorney General of British Columbia (Nishga’a Tribal Lands case). **GR-2307** - Appeal heard Nov. 29 – Dec. 3, 1971; Judgement given on Jan. 31, 1973 [stored off site: CUBE #913158-0001]*

11. *Royal Commission on Indian Affairs in British Columbia – Draft Report **GR – 672;***

12. *Handbook of the Indians of Canada, Ottawa, King’s Printer, 1913. BC Archives **Library NW 970.1 C219.***

*-Referenced in court as “Exhibit 17” Berger claims to have “only a small portion of it,” but does not explain what portion. There is no discussion concerning the authenticity of the copies. He refers to it as “perhaps the most authoritative work in this whole area.”[p.110].However, this 632 p. book contains only one page on the “Niska.” It’s unclear from the transcript if this is what Berger is referencing. Moreover Berger does not point out that this is a copy of an American study **Handbook of American Indians North of Mexico, published as Bulletin 30, Bureau of American Ethnology, and edited by Frederick Webb Hodge.** It was reprinted under direction of James White, F.R.G.S. Secretary, Commission of Conservation. This project was under direction of the Geographic Board of Canada, 1912. Finally, the court requests W.E. Ireland to leave a copy from the archives. Ireland is assured it won’t be marked and “reference would be made to it so that it doesn’t become enmeshed in the tools of the Court.”[p.110]. It appears that Ireland agreed.*

13. Canada. Parliament. *“Special Committees of the Senate and House of Commons meeting in joint session to inquire into the claims of the Allied Indian Tribes of British*

Columbia, as set forth in their petition submitted to Parliament in June 1926. Proceedings, reports and the evidence.” Ottawa: King’s Printer, 1927. Appendix no. 2 to the Journals of the House of Commons, 1926-27 (**BC Archives: NW 970.5 C214p**).

Also published as *Appendix to the Journals of the Senate of Canada (Special Joint Committee of the Senate and House of Commons appointed to inquire into the claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926. Report and evidence*. Ottawa: King’s Printer, 1927 (**BC Archives: NW970.5 C214cr**). --Cited as “exhibit 4” in the trial transcript, the introduction of this document opens the question of reliability of historical documents in court. The Court references Justice Norris in *White and Bob v. R.*

II. Provincial Government

1. British Columbia Government, *re: Indian Land, BC Judiciary*, **GR-1727** - Vols. 504 and 525, BC Archives.

–records of a 1908 BC Government unsuccessful attempt to have provincial courts recognize government proprietary rights in Indian reserves. Not mentioned in *Calder*.

2. *Records of the Office of the Indian Reserve Commissioner for British Columbia (1884-1898)*, **GR-0123**, BC Archives.

-Published by the

3. *Indian Reserve Commission records (1876-1878)* **GR-0494**, BC Archives.

4. *Attorney General’s records*, **GR-0429**, BC Archives.

III. Private

1. Census of Warre and Vavasour.

Cited in court as “Exhibit no. 8,” this is the first of twelve historical documents Berger introduces in court using W.E. Ireland’s bone fides to guarantee the authenticity of the documents. GR-0332 Great Britain Colonial Office. This is cited in the House of Commons Parliamentary papers.

2. Paul Kane, *Wanderings of an Artist Among the Indians of North America*. **BC Archives NW970.1 K16 1967**

Cited as “Exhibit #9” in court. There have been two printings of this publication. It is difficult to know what version is being referenced at trial. The BC Archives version is a 1967 reprint by Hurtig Publishers of the 1925 edition published by the Radisson Society of Canada, Toronto.

3. *Thomas Berger fonds*, University of British Columbia Library Rare Books and Special Collections,
4. *Louis Lebourdais fonds*, **MS-0676** - 1888-1947. Quesnel; telegrapher, MLA Originals, ca. 1917-1945, 1.3 m.
Records of the Western Union Telegraph Co. includes 19th century work in the Naas Valley region.
5. *Wilson Duff fonds*, **GR-2809**: Wilson Duff's original research into the Niska. For Nishga'a research see, in particular Duff's "Nishka" research: M-1,NIS-1, reel **B6047**, mfilm file no. 140, Niska "A," Box 4, [former box no.: M-1:BOX 12: 812]; M-1,NIS-2, reel B6048, mfilm file no 141, Niska "B," Box 4, [former box no.: M-1:BOX 12: 812]; M-1,NIS-3reel B6048, mfilm file no 142, Niska "C" (maps, photo, notes) Box 4, [former box no.: M-1:BOX 12: 812].
-Duff looks at land title allocation by the two Royal Commissions (1886 and 1915).
6. John Murray McShane Clark, "Statement of Facts and Claims on Behalf of the Indians of British Columbia," 1910, **NWP 970.593s. Box 141, file 7**. BC Archives, 1910;
7. "Richard McBride to Wilfrid Laurier," 19 November 1910, **GR-441, Box 149** BC Archives.
-McBride explaining BC's position to deny Aboriginal groups fiat to sue the Gov't over issues of land title.
8. *Franz Boas Papers* **MS-1425**
9. <http://www.nisgaalisims.ca/welcome> – Official web site of Nishga'a first nation.
10. Homer G. Barnett, *The Coast Salish of British Columbia* (Eugene, Ore.: University of Oregon Press, 1955)
11. R.T. Matson & Gary Coupland, *The Prehistory of the Northwest Coast* (San Diego: Academics, 1995) at 154–77, 220–25
12. *O'Meara Correspondence*. **MS-1950, Box 141, files 2-12**.
-Correspondence of the early legal counsel for the Nishga'a first nation.
13. James Hendrickson, "The Aboriginal Land Policy of James Douglas, 1849-1864," *BC Studies Conference Paper*, 1988. **Library NWP 971.1 H498 1988**. BC Archives

14. *The Cowichan Petition, 1913. BCARS, F/52/C83.*

-- *Early Nisga'a petition to have the BC government recognize Aboriginal title.*

IV. Colonial Dispatches, Colony of B.C. Proclamations, and Legislative Council of B.C. Ordinances (*Dispatches, Proclamations and Ordinances cited at trial, note: several publications and grey literature document published collections of early Ordinances and Proclamations. These include:*

- a.) Lowther, Barbara J., *A Bibliography of British Columbia: Laying the Foundations, 1849-1899.*
- b.) Fraser, Joan, "Bibliographic Notes on pre-Confederation 'Laws' in British Columbia," *BC Studies*, no. 77, Spring 1988: 54-63.
- c.) Fraser, *Concordance to Colonial Office and Micromedia films of Pre-Confederation Acts, Ordinances and Proclamations for the Colony of Vancouver Island, Colony of British Columbia, and the United Colony.* University of Victoria Law Library, 1987.

A. Nine Proclamations of the Colony of British Columbia cited at trial:

[Note: The Public Records Office, London, holds relevant Colonial Office files. *Series C.O. 306-Colony of Vancouver Island, Acts, 1853-1863; (mf B-1487 LAC)* and *C.O. 61-Colony of British Columbia, Acts, 1858-1869. (mf B-1487 LAC)*]

- 1.) *Proclamation Having the force of law to enable the Governor to convey Crown Lands sold within the Colony.* 2 December, 1858 [cited in *R. v. Calder*, p. 332]. **Colonial Office Series (C.O.) 61, No. 4 Public Records Office (P.R.O.) BC Archives Microfilm; BC Archives, - GR- 549 Provincial Secretary, Proclamations, 1858-1918. p. 5.**
- 2.) *Proclamation respecting the method to be pursued with respect to the alienation and possession of Agricultural Lands, and of Lands proposed for sites for Towns, in British Columbia; and with reference also to the places for levying Shipping and Customs duties; and to establishing a Capital and Port of Entry in the said Colony.* 14 Feb, 1859 [cited in *R. v. Calder*, p. 332]. **C.O. Series 61, No. 6, P.R.O., B.C. Archives Microfilm. Royal Statutes of British Columbia (R.S.B.C.) 1871 Table 136; BC Archives, - GR- 549 Provincial Secretary, Proclamations, 1858-1918. p. 8.**
- 3.) *Proclamation, Respecting the Acquisition of Land in British Columbia, 4th, January, 1860.* [cited in *R. v. Calder*, page 332]. **C.O. Series 61, No. 17 P.R.O. BC Archives Microfilm, R.S.B.C. 1871 table 151; BC Archives GR-547– Index to Proclamations and Ordinances (original), 1858 to 1871.** [published notice **BC Archives, - GR- 549 Provincial Secretary, Proclamations, 1858-1918. p. 20**
- 4.) *Proclamation providing that Town Lots, Suburban Lots, and Surveyed Agricultural Lands Offered for Sale at Public Auction and remaining Unsold, May Be Sold By Private Contract.* 20th January 1860. [cited in *R. v. Calder*, p.333]. **Colonial Office Series 61, No.**

18 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 table 153; BC Archives, GR-549 Provincial Secretary, Proclamations, 1858-1918, p.21.

5.) *Proclamation having regard to the form of Land acquired under provisions of previous Proclamations.* 19 January 1861. [cited in *R. v. Calder*, p.333]. **Colonial Office Series 61, No. 31 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 163. BC Archives, GR-549, Provincial Secretary, Proclamations, 1858-1918, p.33.**

6.) *Proclamation lowering the price of Country Lands.* 19 January, 1861. **Colonial Office Series 61, No. 30 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 163a; BC Archives, GR-549, Provincial Secretary, Proclamations, 1858-1918, p.34.**

7.) *Proclamation respecting occupation of Pre-empted Land.* 28 May, 1861. [cited in *R. v. Calder*, p.333]. **Colonial Office Series 61, No. 35 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 167. BC Archives, GR-549, Provincial Secretary, Proclamations, 1858-1918, p.21.**

8.) *Proclamation to amend and consolidate the Law affecting the settlement of unsurveyed Crown Lands in British Columbia.* 27 August, 1861. [cited in *R. v. Calder*, p.333]. **Colonial Office Series 61, No. 38 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 170; BC Archives, GR-549, Provincial Secretary, Proclamations, 1858-1918, p.41.**

9.) *Proclamation for the protection of Miners from being obstructed by the claims and exactions of persons holding Land under the Pre-emption Consolidation Act.* 27 May, 1863. [cited in *R. v. Calder*, p.333]. **Colonial Office Series 61, No. 38 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 191; BC Archives, GR-549, Provincial Secretary, Proclamations, 1858-1918, p.61.**

B. Ordinances Enacted by the Governor with consent of the Legislative Council of B.C. cited at trial:

1.) *An Ordinance for regulating the acquisition of Land in British Columbia.* 11 April 1865. [cited in *R. v. Calder*, p.333]. **Colonial Office Series 61, No. 27/65 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 241.**

2.) *An Ordinance further to define the Law regulating the acquisition of Land in British Columbia,* 31 March, 1866. [cited in *R. v. Calder*, p.334]. **Colonial Office Series 61, No. 13/66 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 255.**

3.) *An Ordinance respecting Pre-emption Claims.* 10 March, 1869. [cited in *R. v. Calder*, p.334]. **Colonial Office Series 61, No. 11/69 (P.R.O) BC Archives Microfilm, R.S.B.C. 1871 Table 321.**

4.) *An Ordinance to amend and consolidate the Laws affecting Crown Lands In British Columbia*. 1 June, 1870.[cited in *R. v. Calder*, p.334]. **BC Archives Microfilm, R.S.B.C. 1871 Table 356.**

c. Colonial Dispatches:

“We have before us a collection of dispatches.”
Colonial Dispatches cited at trial.

1.) *Calder*, p. 329 described as a dispatch between the Colonial Office and James Douglas dated July 31, 1858. Archival citation: “*Dispatch from London Lytton to Douglas*” July 31, 1858. **CO 410/1, p. 147**

2.) *Calder*, p. 330 described as “the last dispatch of the Governor, which conveniently summarizes his efforts.” “Despatch to London Douglas to Newcastle,” March 25, 1861 - received 27 May **4779, CO 305/17, p. 126;**

3.) *Calder*, pp. 330-331 described as “the full reply.” “Despatch from London Newcastle to Douglas,” October 19, 1861. **CO 410/1, p. 334**

f. Secondary References:

- Asch, Michael. “Post-Calder, Canada’s Judiciary Struggles to Reconfigure Native Rights,” *CSQ Issue*: 28.1 (Spring 2004).
- Barbeau, Marius (1950) *Totem Poles*. 2 vols. (Anthropology Series 30, National Museum of Canada Bulletin 119.) Ottawa: National Museum of Canada.
- Brock, Peggy, *The Many Voyages of Arthur Wellington Clah: A Tsimshian Man on the Pacific Northwest Coast*. Vancouver: UBC Press, 2011.
- Galois, Robert, “The Indian Rights Association, Native Protest Activity and the ‘Land Question’ in British Columbia, 1903-1916,” (1992) 8 *Native Studies Review* 1.
- Kanakos, Jeannie L., “The Negotiations to Relocate the Songhees Indians, 1843-1911,” (*MA Thesis*, SFU, 1974).
- McNeary, Stephen A. (1976) *Where Fire Came Down: Social and Economic Life of the Niska*. Ph.D. dissertation, Bryn Mawr College, Bryn Mawr, Penn.
- May, Edwin Peter, “*The Nishga Land Claim, 1873-1973*” (*M.A. Thesis, Simon Fraser University, 1979*).
- Ormsby, Margaret, *British Columbia: A History*, 1958.
- Patterson, E. Palmer, II (1982) *Mission on the Nass: The Evangelization of the Nishga (1860-1890)*. Waterloo, Ontario: Eulachon Press.
- Raunet, Daniel (1996) *Without Surrender, without Consent: A History of the Nisga’a Land Claims*. Revised ed. Vancouver: Douglas and McIntyre

- Sapir, Edward (1915) "A Sketch of the Social Organization of the Nass River Indians." *Anthropological Series*, no. 7. *Geological Survey, Museum Bulletin*, no. 19. Ottawa: Government Printing Office
- Shankel, George Edgar, "The Development of Indian Policy in British Columbia," (PhD. Diss. University of Washington, 1945), BC Archives F/52/C16
- Sterritt, Neil J., *et al.* (1998) *Tribal Boundaries in the Nass Watershed*. Vancouver: U.B.C. Press.
- "The Nisga'a Treaty," Special Edition of *BC Studies*, Number 120, (Winter 1998/99).

3. R. v. Guerin, [1985] 1. C.N.L.R. 120 (S.C.C.)

a. At Issue: In 1958 the federal Government opened a 75-year lease for a portion of the Musqueam Reserve to the private interests the Shaughnessy Golf Club. The Musqueam Band claimed the final written agreement contained terms of lease that were different those presented to them and others were not presented or explained to them at all when the Band voted to accept the terms of lease. Representatives were not consulted on the final terms of the agreement which gave the Shaughnessy Golf Club a very significant discount lasting until 2033. The Band also maintained the generous lease is not the product of a trustee. In 1970 Chief Guerin discovered the lease in an office of the Dept. of Indian Affairs. The Musqueam sued the Federal Government arguing both the terms of the lease and the secretive manner of its arrangement and maintenance breached the government's fiduciary duty to the Musqueam people.

b. First Nation: Musqueam

c. Holding: The case was filed in December 1975. Three levels of court heard the case. On July 3, 1981 Mr. Justice Collier of the Federal Court, Trial Division found in favour of the Musqueam awarding the band \$10 million. The Crown appealed and the Federal Court of Appeal set the award aside. The Court ruled the government owed only a "political trust" and not a legally enforceable trust obligation. The oral promises concerning the Golf Club lease were ruled *ultra vires* being not incorporated into the written agreement the Department of Indian Affairs brokered with the Musqueam. The Musqueam appealed to the Supreme Court of Canada and the Court ruled in favour of the Band on November 4, 1984 reinstating the original award at trial.

Appellant: Delbert Guerin, Chief of the Musqueam Indian Band, other appellants are Band Councillors.

Solicitors for the appellants: Davis and Company, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

Chief Justice: Bora Laskin

Puisne Justices: Roland Ritchie, Brian Dickson, Jean Beetz, Willard Estey, William McIntyre, Julien Chouinard, Antonio Lamer, Bertha Wilson

d. Significance for Aboriginal Common Law:

Guerin provided a legal remedy to First Nations concerning how the Federal Government managed their affairs. The case established that the Crown owed legally enforceable fiduciary obligations to Aboriginal peoples. The fiduciary obligation was subsequently incorporated into the protection of existing Aboriginal and treaty rights to be found in the vaguely worded s. 35 of the Constitution Act 1982 and so gave substance to that section.

Guerin's substantial explanation of the Constitution Act's recognition and affirmation of existing Aboriginal and treaty rights is this decision's most significant contribution.

Since *Guerin* the decision in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 has outlined the Crown's fiduciary duty when creating reserves.

e. Archival Sources:

i. Federal Government Sources:

- *Constitution Act 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35(1)
- *Indian Act*, R.S.C. 1952, c. 149 (now R.S.C. 1970, c. I-6).
- *Trustee Act*, R.S.B.C. 1960, c. 390, s. 98 (now R.S.B.C. 1979, c. 414)

f. Secondary References:

- Coupland, Gary & R.T. Matson. *The Prehistory of the Northwest Coast* (San Diego: Academics, 1995) at 154–77, 220–25
- Cowper, D. Geoffrey "Fiduciary Obligations and Aboriginal Peoples: The Candid Account of an Insider" (2006) 64 *The Advocate* 523.
- Dunkley, Katharine. *Indian Rights and Federal Responsibilities: Supreme Court Musqueam Decision*. [Ottawa]: Library of Parliament, Research Branch, 1985.
- Hudson, Michael "Crown Fiduciary Duties under the *Indian Act*" in Andrea Morrison & Irwin Cotler, *Justice For Natives – Searching For Common Ground* (Montreal: McGill & Queen's University, 1997) at 257–8.
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- Barnett, Homer G. *The Coast Salish of British Columbia* (Eugene, Ore.: University of Oregon Press, 1955)
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4. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

a. At Issue: 51 *Delgamuukw*, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of *Delgamuukw* and *Haaxw* (and others suing on their own behalf and on behalf of thirty-eight *Gitksan* Houses and twelve *Wet'suwet'en* Houses), made

claims for “ownership” and “jurisdiction” over 133 distinct territories. Combined, the area amounts to 58,000 square kilometres of northwestern BC.

b. First Nation:

Gitksan and Wet’suwet’en

c. Holding:

In 1984 the 35 Gitksan and 13 Wet’suwet’en Hereditary Chiefs instituted proceedings against the Province of British Columbia. In March 1991, Chief Justice McEachern of the Supreme Court of British Columbia issued its ruling dismissing the appellants’ claims to Aboriginal title, self-government and Aboriginal rights in the territories at issue. The case then went to appeal and in June 1993 the five member British Columbia Court of Appeal unanimously rejected McEachern J.’s finding of “blanket extinguishment” of all the plaintiffs’ Aboriginal rights by colonial or provincial enactments. The appeal Court did not agree on the other elements of the original claim. In March 1994 the Gitksan and Wet’suwet’en and the Province of British Columbia were granted leave to appeal and cross-appeal the decision of the British Columbia Court of Appeal to the Supreme Court of Canada. The Parties then attempted a negotiated agreement that broke down in February 1996. Litigation resumed and the Supreme Court released its decision on December 11, 1997. Justice McEachern’s decision was overturned and the Gitksan and Wet’suwet’en were recognized as holding unextinguished, non-exclusive Aboriginal rights a definitive basis for ownership and jurisdiction was not defined.

Chief Justice: Antonio Lamer

Puisne Justices : La Forest, L’Heureux-Dubé, Sopinka, Cory, McLachlin and Major JJ.

d. Significance for Aboriginal Common Law:

Delgamuukw confirmed that common law Aboriginal title, recognized as a common law Aboriginal right prior to 1982, was “constitutionalized ... in its full form” by section 35 of the *Constitution Act, 1982*. The decision is also significant because it legitimizes Aboriginal oral history as evidence of Aboriginal rights and title. *Delgamuukw* explained the rules of evidence must be adapted to accommodate oral histories, but did not mandate the complete admissibility of oral histories or how they should be given weight. Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge. The court did not explain what procedure or standards a trial court should apply to determine whether the oral tradition of a particular group should be admitted. *Delgamuukw* also explained the features and proof of Aboriginal title. Not only does it affirm the constitutional status of aboriginal title but provides a framework for its interpretation.

e. Archival Sources:

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f. Secondary References:

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