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Note: Quotations in this transcript are paraphrased, not verbatim

This session is about the background and history of treaty making in Canada. It will cover the same ground as some previous presenters but from a slightly different perspective.

I have been legal counsel to the Nisga'a Nation since about 1980. Currently representing Nunavut Tunngavik in their litigation against the Government of Canada on implementation of the Nunavut Land Claims Agreement. Also working on the Manitoba Metis Federation lawsuit that culminated in the Supreme Court of Canada decision last year. Things do not happen quickly in this business.

I will attempt to provide basic legal/constitutional/historical information that informs Crown responsibilities to Aboriginal people under modern treaties, also known as comprehensive land claims agreements

Major Themes

There is a dynamic interplay in Canadian history between legal developments and political developments, legal disputes and political and disputes. They inform each other in Crown/Aboriginal relations, and that has been the case since Europeans arrived in North America. There is a mutual informing between the political and the legal; developments on one influence developments on the other in a dialectic that's been going on for two centuries.

There is a relationship between the concept of Aboriginal title and rights and treaties and treaty rights. The former has been the basis for demands for the latter. The denial of former has historically led to either the delay or refusal by the Crown to enter into treaties, i.e. "You don't have any rights, so there is no reason to enter into a treaty with you."

When discussing treaties it is important to distinguish between historic and modern treaties. The Land Claims Agreements Coalition is concerned with modern treaties, or comprehensive land claims agreements.

For the remainder of this session I will talk about the history of the treaty making process in British Columbia, because that informed what happened in the rest of Canada.

The roots of treaty making can be found in the Royal Proclamation of 1763. Treaty making didn't start in 1763; there had been a process of Europeans entering into alliances and trading relationships and peace and friendship arrangements for some time, but after the British established themselves as the sole European power in this part of North America, they found themselves in a circumstance where their former Aboriginal allies and opponents were armed to the teeth, and far outnumbered the British and the French. It was in order to preserve peace that King George III issued a Royal Proclamation that said, "This part of North America is Indian territory, and there will be no settlement or land taken unless first there is a meeting with the chiefs and headmen. There is an agreement that will allow the acquisition by the Crown of that new land."

Previously there had been examples where individuals had entered into land purchase agreements with Indian people, as they were then referred to, and this had caused some problems. In one of its ironic parts the Royal Proclamation states: "Wherefore great frauds and abuses have been committed against the Indian nations with whom we are allied, henceforth, only the Crown would have the authority to enter into treaties."

Treaty making proceeded apace across Canada following confederation. Following 1870 the west, or that part of the west from the Lakehead to the Rocky Mountains and north into the Northwestern Territory, was acquired from the Hudson's Bay Company (HBC), in one of the first great corporate sell-offs to the Canadian government. Part of the deal was that the responsibility to enter into treaties would be carried by the federal government. Thus there is a series of numbered treaties that took place between 1870 and into the 20th century. But that was only the part of Canada east of the Rocky Mountains.

British Columbia had a different history, was two separate colonies at the time (British Columbia and Vancouver Island) that subsequently merged. In the 1850s B.C. Governor Douglas (also head of HBC) entered into agreements with local B.C. First Nations in the southern part of Vancouver Island. Douglas knew the Crown's responsibilities under the Royal Proclamation. The difficulty was that there were very few settlers either on the island or on the mainland. In order to get land to promote more settlement, it was necessary to acquire it.

Douglas knew his responsibilities, but found himself up against very sophisticated trading nations who were asking quite a lot of the government. So Douglas wrote a letter to England: "Dear England, need to enter into treaties, I'm aware of my responsibilities, please send cash." England wrote back: "Yes, those are your responsibilities, we don't have any cash, raise it yourselves from the settlers."

The difficulty was there weren't enough settlers to raise the amounts of money that the sophisticated First Nations people were insisting on for settlement of their land. What to do? Douglas said "OK, we won't enter into treaties." But he did send surveyors out to talk to the various First Nations on the rest of Vancouver Island and most of the south coast up the Fraser River. He said "Talk to the local First Nations, find out how much land they need to keep for their reserve, and whatever they ask for, mark it out." The surveyors did just that, and created what were called the Douglas Reserves. But that was not a popular policy, and during the 1850s and into the 1860s Douglas was replaced by Commissioner of Lands and Works Joseph Trutch. Trutch had a different view of the situation. He said "Indians can no more have rights to the land than the bears, or the eagles or the wolves. It's a complete fiction. So we are not going to enter into treaties, and you are not going to keep those generous grants of land that Douglas had instructed be laid out. So he cut off the Douglas lands, and refused to enter into negotiations under any circumstances. He also negotiated the terms of union under which British Columbia entered into Confederation.

Article 13 of the British Columbia Terms of Union says that the Dominion Government will have the care and trusteeship of the Indians, "and shall pursue a policy as liberal that heretofore carried out by the Colony." – As liberal as Joseph Trutch's; the most illiberal policy North of 60.

When the federal government had jurisdiction and Confederation had taken place, they said "We better get on with the treaty making." The B.C. government said "Sure, fill your boots, but if you want to give them any land, you'll have to buy it from us." "What?" said the federal government. "Well, the Indians have no rights. If you think they do, fine, but you will have to purchase the Indians' land from the B.C. Crown in order to give some of it back to the Indians." This didn't seem like such a good plan to the feds, so in typical Canadian fashion, nothing happened.

Then in 1875 the federal government disallowed a provincial land statute for failing to recognize Aboriginal title. This action was used a political lever to get the Province to behave itself. But then there was a change of government, and the incoming Liberal government allowed the disallowed law to proceed, which led to 1887, when a bunch of Nisga'a chiefs from the Nisga'a Nation on the north coast just south of the Alaska panhandle, together with some of their Tsimchan neighbours, travelled to Victoria to meet with the Premier and federal officials to say "Let's negotiate treaties." By this time treaties were well underway on the Prairies, many of the numbered treaties were complete.

They arrived at the legislature and famously were turned away, but ended up in a meeting with the Premier in the Premier's house. The meeting was recorded by a transcriber. It's remarkable, because the Nisga'a chiefs, speaking through one of their own who could speak English and translated for the meeting, said, "We want to settle the land question, we want to negotiate a treaty." And Premier Smithe said, "What's this treaty thing you're talking about?" The Nisga'a were a little confused, he didn't know what they were talking about or pretended not to, so they said "It's a piece of paper where we write down what we own and what you own, and what our rights and responsibilities are – a treaty." The Premier looked at his fellow officials, at this point the transcript reads as if the Nisga'a weren't there, and he said "What is it they're talking about?" "I think it's a treaty." one says. "Yes," says another, "that's what they want." "It certainly is," says another, "A treaty." Whereupon the Premier turns to the Nisga'a delegation and says "There is no such thing as these treaties, what are you talking about, where did they hear about this?" The Nisga'a translator said "The chiefs can read books. They know they're being entered into in the rest of Canada." And the Premier responded "I don't know what books they've been reading, but there is no such thing." and sent them on their way.

The chiefs went home and started organizing. The organization took place around what was referred to then and continued to be referred to by the Nisga'a as "The resolution of the land question." The concept of land claims was not part of the vocabulary, rather it was "the land question." And to that end, the Nisga'a formed the Nisga'a Land Committee in the 1890s.

The Nisga'a Land Committee was the first modern political organization created for the specific and express purpose of pursuing a resolution to the land question. It was made up of representatives chosen both on the basis of their traditional family/clan affiliations, as well as from the villages. They met, they organized, they strategized, and the culmination of that was a fascinating document that they instructed a firm of London solicitors to draw up in 1913, called The 1913 Petition.

The Nisga'a, through their London solicitors, asserted that there was a question, and asserted the basis of their Aboriginal title to be in the Royal Proclamation of 1763. It sets out the meets and bounds of the traditional territory, it says that upon a finding that they had Aboriginal title, they would then take a reasonable and moderate position in negotiations to resolve the land question while preserving to themselves how they would live on the land. It was an assertion of Aboriginal title, an assertion of self government, and an assertion of the willingness to enter into and negotiate a treaty based upon moderate and reasonable terms.

So that 1913 Petition had a problem that the London solicitors seem not to have turned their minds to. It was addressed to the Privy Council, but The Privy Council can be one of two things. In Britain in those days the highest court in the Empire was called the Judicial Committee of the Privy Council. It was a court that heard the appeals from the Supreme Courts of the Dominions (Canada, Australia, India, etc.). But you can't start a lawsuit at the Privy Council any more than you can start a lawsuit at the Supreme Court of Canada. Or was it addressed to the other Privy Council, which was another name for the Cabinet, for the Executive? It didn't seem to be asking for a political ruling, it was asking for a legal ruling; it was odd.

London, having received it, immediately sent it back to Canada saying, "We've received this, what shall we do with it?" The Canadian government said "We think you should ignore it." "No, no, no, I don't think we can do that." So there then took place quite a lot of discussion and debate, with pressure coming from London on the federal government. The federal government finally made the Nisga'a an offer, "We will agree that you can have the question of your Aboriginal title, your Petition, heard as a lawsuit commencing in the Exchequer Courts (now the Federal Court), with then appeals to ultimately the Supreme Court of Canada and ultimately the Judicial Committee of the Privy Council, but there are three conditions:

- If you win, you will immediately agree that your Aboriginal title is instantly extinguished
- In return for which you will get to keep the benefits already bestowed upon you (reserve land) and receive annuities similar to those that are being given on the Prairies
- The Government of Canada will retain and instruct legal counsel on your behalf

There is no record kept of the exact way in which the Nisga'a responded, but I suspect it was two words, and and they were not "thank you."

So there then followed a period of political agitation and petitions were drawn up by other tribal groups in other parts of B.C. and indeed the country. As the 1920s arrived and the agitation didn't go away, and there were a lot of political organizations, non Aboriginal organizations supporting the Nisga'a and others who wanted to have these questions answered. The federal government then responded with a Parliamentary inquiry. They called witnesses, and chiefs and legal counsel from across the country travelled to Ottawa, and of course, in hansard is a record of the testimony given by First Nations leaders from all over.

Having heard the assertions of Aboriginal title, and having heard the basis for it, and having heard about the Royal Proclamation, and having listened to the lawyers that established the legal basis for all of this, the House of Commons Committee concluded its consideration. Recommendation was made, the government acted upon it and said, "Here's how we're going to deal with this. We'll make it against the law to raise money to pay lawyers to tell you what your rights are." This 1927 amendment to the Indian Act effectively made pursuing the land question a criminal offense. And thus it remained until the 1950s. A 1952 amendment removed that from the Indian Act.

In 1955 the Nisga'a, under the leadership of Frank Calder, established the Nisga'a Tribal Council expressly as the rebirth of the Nisga'a Land Committee, to continue in the pursuit of the land question. Between 1955 and 1968 they put forward their case both provincially and federally. Famously, Pierre Trudeau, in 1968 said "We cannot have a country based upon historical might-have-beens." So the federal government said no, they would not negotiate.

So the Nisga'a then retained my colleague Thomas Berger, who commenced the litigation that came to be known as the Calder case. The Calder case was an application for a declaration, where you ask the Court simply to declare something. The declaration that they sought was a declaration that the Aboriginal title of the Nisga'a Nation had never been lawfully extinguished. At trial, the judge said "Never lawfully extinguished, never existed. Indians don't have any rights."

The Court of Appeal added a gloss on it, saying "Aboriginal title never existed because in order for an interest in land such as Aboriginal title to exist there must be a grant from the Crown or an Act of Recognition. This never happened, so you never had Aboriginal title."

The Supreme Court of Canada, in a very peculiar case, said that there was Aboriginal title It exists regardless of any grant or Act of Recognition, but it was extinguished by a series of pre-Confederation enactments of the Colonial government. When the Colonial government passed laws enabling itself to give land grants to settlers, it didn't say anything about Aboriginal title. By implication, it must have extinguished the Aboriginal title.

The other three judges said Aboriginal title exists as a matter of common law that does not require any grant from the Crown or Act of Recognition but rather exists by virtue of ownership and occupation of the land since time immemorial. It's a fundamental principle of common law that you cannot expropriate property accidentally, you can only expropriate without compensation by using clear and express language. There has never been a clear and express legislative enactment extinguishing the Nisga'a's Aboriginal title so it continues to exist.

The seventh judge said, "I don't have to decide, because in order to sue the Crown you have to first obtain a fiat." The Calder case, technically, as a matter of law, is a four to three decision on the need to obtain a fiat before you sue the Crown, which has since been abolished; it's a six to zero decision that Aboriginal title exists as a matter of law regardless of any grant or act of recognition; and it's a three to three decision on whether Aboriginal title continued to exist in B.C.

So the federal government said "Perhaps you had more rights than we thought you did." And to that end established what become known as the comprehensive land claims policy, where the Crown would enter into negotiations with people whose Aboriginal title had not been previously extinguished by treaty, and they would enter into these negotiations in order to obtain certainty. Certainty can be obtained by returning to the courts but instead we'll obtain certainty through negotiations. The certainty that they sought was to resolve the uncertainty caused by the tied decision at the Supreme Court of Canada. It's the first time since Europeans arrived and started entering into treaty making with Aboriginal people, where the object was said to be "to eliminate uncertainty." There had never been any uncertainty. Aboriginal people own the land; you have to make a deal with them. But now it's been transmogrified into something that is for the resolution of uncertainty. It's a peculiar notion when you sit at the bargaining table, and one side says "We're going to give you land and money and fishing and hunting rights – that arguably you already have, except for the money – and in return you're going to give us certainty." How much is certainty worth, anyway? What's the market value of converting vague and uncertain rights which may or may not exist into concrete, defined rights which come into effect through statute? A very difficult challenge.

That was 1973, the federal comprehensive claims policy. Then they went to the Province, and said "You're going to join us?" "Nope," said the province, "The way we look at it, in the tradition of Joseph Trutch, is the tied decision at the Supreme Court of Canada cancels it out, leaving the Court of Appeal decision as the law of B.C."

From 1973 to 1990, the B.C. government persisted in that position. Negotiations nonetheless got underway with the Nisga'a in 1976, and of the comprehensive claims policy with the feds, and the Social Credit Party campaigned in 1975 against the NDP, promising that "if elected they will take their just and rightful place at the bargaining table." In 1976 when they showed up, business was outraged, the resource industry was outraged. The Social Credit government said "We're there as observers. That's our just and rightful place." Meanwhile, negotiations were underway in the Yukon, but more significantly the hydroelectric project in Northern Quebec was opposed by James Bay Cree, who sought and obtained an interlocutory injunction, based on the Supreme Court of Canada decision in Calder.

So these political and legal developments across the country inform each other. The James Bay Northern Quebec Agreement was reached. Negotiations continued at glacial speed. There were six groups in negotiations in those days, three north of 60 and three in the provinces. Essentially, at the Nisga'a table, the federal government said "Well, we can only talk about things that are within federal jurisdiction, we can't talk about anything that is within provincial jurisdiction." What would that be? Fish. I spent the better part of a decade and a half talking about fish.

The other thing that happened that is of profound significance was the patriation of the Canadian Constitution in 1982. In the discussions leading up to that it was quite remarkable that in 1980 Prime Minister Trudeau, having failed to obtain provincial agreement through a series of constitutional conferences, decided to go it alone. So he put together a package which was going to be an amending formula and a charter of rights and freedoms. The Charter of Rights and Freedoms, he proposed, recognized everyone's rights and freedoms, except of course for Aboriginal rights. The solution? A statement to the effect that "Nothing about all the rights of all these other people that we're recognizing/guaranteeing will take away any rights that you might have." That became Section 25 of the Charter, a tepid recognition of Aboriginal treaty rights.

Aboriginal people made submissions to the Joint Senate House of Commons Committee on the Constitution in 1980-81, urging that it was simply unfair, there had to be something about Aboriginal and treaty rights in the constitutional package. In 1981 Trudeau agreed. Why? Well, in those days, his westernmost MP was Lloyd Axworthy from Winnipeg, but the NDP had quite a lot of seats in the west. In order to have something resembling a national consensus he needed the NDP, and NDP leader Mr. Broadbent, to his credit, made the inclusion of Aboriginal rights in the constitutional package a condition for NDP support for the package. So indeed one day Mr. Chretien, Minister of Justice announced the clause that became Section 35.

Then there was the Supreme Court of Canada decision which was asked "Can the federal government go it alone?" The Supreme Court answered: "As a matter of law, yes, but as a matter of constitutional convention, no. You need a substantial degree of provincial consent." Trudeau called yet another First Minister's conference in September 1981. It resulted in the changes that led Quebec to opt out, which got a lot of press. What got no press around this time was the complete removal of Section 35. It was taken out without any discussion or announcement. Why? We have been led to understand that it was opposed vociferously by the Premier of Alberta and the Premier of B.C. They were the ones most concerned about it. There then appeared a political outcry. Canadians by and large might not know much about Aboriginal rights, but they sure know when somebody got shafted. Two groups of people got shafted: Aboriginal people and Quebec. People were outraged about the Aboriginal rights. A decision was made to put it back in, but in an altered form. What it had said was "The Aboriginal and treaty rights of the Aboriginal peoples of

Canada are hereby recognized and affirmed." What it would now say is "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." A debate then took place about the meaning of the word "existing" in this context? Does it mean those that exist as of 1982? If so, then the rights that will be in land claims agreements that haven't yet been concluded don't get the same constitutional status as the rights set out in the historic treaties. "Is that what you intended to do?" "No, we mean existing from time to time. What we mean is it didn't resurrect rights that had previously been extinguished."

The challenge it gave goes back to the Calder case. The British Columbia government is saying the Court of Appeal decision is law, and in order to have Aboriginal rights exist, they have to be recognized. We had constitutional recognition, but then they use wording saying "What we recognize are ones that exist." It's like an Escher painting; a very strange way to make law.

At the first First Minister's Conference, held after the Constitution Act, it was agreed to insert Section 35.3, which says "For greater certainty, 'treaty rights' includes rights that exist by way of land claims agreements or may be so acquired." Thus it became clear for the first time that what was being negotiated at the table was not simply something that could be changed at the whim of government, but rather a constitutional relationship between the Aboriginal people and the Crown. Starting in 1983, that became clear. An interesting dynamic now developed at negotiations, where federal staff would say "We might have been able to agree to that, but not now that it's constitutionally protected."

Negotiations then proceeded in fits and starts. In 1986 the federal government issued a new policy on the negotiation of comprehensive land claims. There had been the old policy under the Liberals, established in 1973 and put into a more modern form in 1980, ironically named "In All Fairness." Then in 1986 the Conservatives wanted to have their own policy, so they issued the Blue Book Policy. The Blue Book Policy was an improvement in a number of ways, but the big challenge it posed was that it said, "We will negotiate self government, but we will not include self government in comprehensive land claims agreements in the absence of a further constitutional amendment."

Why would they do that? Because during the 1980s there were these First Minister's conferences that had focused on whether to make the right of self government "express" in a constitutional amendment, and the Crown was offering an approach: "We'll put in the Constitution that we'll negotiate self government with you, then we'll negotiate whether it will have constitutional protection, but in the meantime you'll not have self government." Aboriginal people did not agree with this. This meant that all groups with comprehensive land claims were going to be able to get constitutionally protected self government, that no one else would be able to get. So the government said "We're not going to allow that. As a matter of policy, we're not going to follow the constitution."

Further discussions took place around that, but essentially what it means is that you have then a number of land claims agreements entered into after 1986, and prior to a change in approach taken by the Liberals in 1995 in the so called Inherent Rights Policy, that said "You can negotiate self government, but it cannot be part of the land claims agreement. So we end up with, in Yukon, for example, a land claims agreement referring to and requiring the negotiation of a self government agreement that is not a part of the land claims agreement. What's the significance of that? Primarily constitutional protection. A self government agreement does not have the same constitutional protection as the rest of the comprehensive land claim.

Note: the word "comprehensive" in the term comprehensive land claim is meant to be contrasted with the word "specific" in the term specific land claim. People on the street are not going to know why those adjectives are used. Specific land claims arise from violations of the Indian Act for existing treaties.

The self government provisions of the Nisga'a Nation were negotiated in great detail before the change in policy. In 1996 the Nisga'a Nation entered into an agreement in principle becoming the first modern treaty where all the self government provisions are included integrally within the treaty itself, and every agreement since then does the same. That's why I would say it's not properly lumped together, it's not properly referred to as a standalone self government agreement, because it's in the treaty, unlike Westbank First Nation self government or Sechelt First Nation, where the self government agreement is not connected to a comprehensive land claim at all, and exists as an ordinary piece of legislation without constitutional protection.

In 1998 the Final Agreement was signed. In 1999 it went to the Provincial legislature for ratification, and led to the longest debate in the history of the B.C. legislature. Finally the NDP government imposed closure, it was passed by the Province, and we came to Ottawa. In the spring of 1999 it was signed by Minister James Stewart, but it was decided not to introduce it into the House of Commons until the Fall. Why? "Could be divisive. Just wait. You've been waiting 130 years, you can wait until September."
We did a lot of lobbying, and it was remarkable. The Nisga'a had the political solidarity of the governing Liberals who had entered into the agreement, as well as the NDP, but also worked hard to obtain the support of the Progressive Conservative Party and the Bloc Quebecois. Those four parties were completely onside; however, The Reform Party of Canada was feverishly opposed. They then commenced a philibuster, introducing 474 amendments to the three page statute giving force of law to the Nisga'a agreement, and required votes on them. This

went on for three nights, every amendment was voted down, which led to the only time that my clients stepped off the absolute high road, when they had some T-shirts printed up saying: “Nisga’a: 474; Reform: 0.

The day that it passed the House of Commons was a remarkable day, December 13, 1999. It got third and final reading and we were all up in the galleries. It was quite an emotional moment. It went to the Senate, was passed on April 13, 2000, came into effect on May 11, 2000. It has been subject to litigation, has been challenged first by Gordon Campbell, unsuccessfully, arguing that the self government provisions were unconstitutional. Another group picked it up, etc. until last year, when the Supreme Court of Canada denied leave to a decision of the B.C. Court of Appeal, absolutely vindicating the constitutionality of the Nisga’a Final Agreement.