LETTER FROM BRITISH COLUMBIA

Reflections on the 40th anniversary of the Calder decision

Edward Allen

January 31, 2013 marked the 40th Anniversary of the Supreme Court of Canada decision Calder et al. v. Attorney-General of British Columbia, [1973] SCR 313 (“Calder”). This anniversary gives the Nisga’a Nation a particular moment of pause since Frank Calder himself is no longer with us to share in this milestone. Yet it also provides us with an opportunity to reflect on his legacy and on the initiatives of which he was a part. These accomplishments include a profound shift in Canadian jurisprudence and a reshaping of the political landscape of British Columbia, ultimately leading to the first modern-day comprehensive land claims agreement in B.C. — a treaty that includes the constitutionally protected right of self-government. These developments continue to guide the approach of the Nisga’a Nation as we move forward.

1890 Land Committee and 1913 Petition

These outcomes are the result of a singular but far reaching objective of the Nisga’a Nation — to resolve the land question. Its roots go back to the 1887 meeting with the premier of British Columbia and the formation of the first Nisga’a Land Committee in 1890. Those original efforts culminated in a petition to the Privy Council in England setting out the demands of the Nisga’a Nation. Accompanying the Petition was a statement that was unanimously adopted at a meeting of the Nisga’a Nation held at Kincolith on the 22nd day of January, 1913:

We are not opposed to the coming of the white people into our territory, provided this be carried out justly and in accordance with the British principles embodied in the Royal Proclamation. If therefore, as we expect, the aboriginal rights which we claim should be established by the decision of His Majesty’s Privy Council, we would be prepared to take a moderate and reasonable position. In that event, while claiming the right to decide for ourselves the terms upon which we would deal with our territory, we would be willing that all matters outstanding between the Province and ourselves should be finally adjusted by some equitable method to be agreed upon which should include representation of the Indian Tribes upon any Commission which might then be appointed.

From this remarkably prescient statement, which has guided the Nisga’a Nation for over a century, one can see some basic principles behind the Nisga’a approach to the land question. The first is the demand for a treaty. Second, any treaty would not only include recognition of our territory, but also the right to ‘decide for ourselves’ how we would deal with that land; that is, through self-government. Third, the Petition highlighted our willingness to take ‘a moderate and reasonable’ position in order to arrive at an acceptable compromise. Despite these impressive efforts, there is no record the Petition was ever heard.

Instead, in 1927, the federal government made it illegal for Indians in Canada to organize or raise money to retain counsel to pursue land claims. Nonetheless, the efforts of the Nisga’a Land Committee established the mandate for the next generation of leaders to pursue the land question.

Frank Calder

Frank Arthur Calder was born August 3, 1915 at Nass Harbour. Although he was the third son of Job and Emily Clark, they consented to his adoption to Arthur Calder (Na-qua-oon) and Louisa Calder to raise as their own son. This was because of a vision. An elder in the Nisga’a Village of Gingoł had dreamed that Emily would conceive a son who would carry the chiefly spirit of Na-qua-oon’s own child who had drowned. Four years later, Na-qua-oon presented a very young Frank Calder to the Nisga’a chiefs who were gathered at a meeting to consider the land question. Some at this meeting had described their struggle as equivalent to shifting an immovable mountain. Na-qua-oon stated, “I’m going to send this boy to school where the K’umsiwa [white people] live. And I’m going to make him learn how the white man eats, how the white man talks, how the white man thinks, and when he comes back, he’s going to move that mountain.”

After studying at residential school, Frank went
to high school in Chilliwack and then to the University of British Columbia — the first status Indian ever to be admitted there. He studied theology and graduated from the Anglican Theological College in 1946. Opting not to be ordained, he ran for the CCF (precursor to the NDP) in the riding of Atlin and became the first Aboriginal person elected to a Canadian legislature — even though he did not have the right to vote.¹

Frank Calder was also one of the key leaders in establishing the Nisga’a Tribal Council in 1955 to pursue the mandate of the hereditary chiefs set out in the 1913 Petition. However, it soon became apparent that while it was no longer illegal to organize and discuss land claims, the federal and provincial governments had no intention of entering into a treaty with the Nisga’a Nation.

Expressing the spirit of the times, in 1969 Prime Minister Pierre Trudeau summarized the dismissive outlook of Canada. Trudeau gave the following comment in respect of the Nisga’a demands for recognition of our Aboriginal rights:

Our answer is ”no”; we can’t recognize Aboriginal rights because no society can be built on historical ‘might have been’.

Frank Calder approached Thomas Berger to represent the Nisga’a in a legal action to finally address the land question. In 1967, the Nisga’a Tribal Council commenced an action in the Supreme Court of British Columbia against the Attorney-General of British Columbia 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.” A legal declaration was the preferred approach of the Nisga’a leadership because it would allow the court to state the legal conclusion that Nisga’a aboriginal title still existed without having to immediately address the consequences of that conclusion. It was hoped that Canada and B.C. would prefer to negotiate a comprehensive settlement with Nisga’a Nation rather than face any subsequent legal proceedings to enforce the declaration.

The parties to the case agreed that the territory subject to the action consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet, and the Portland Canal, all located in northwestern British Columbia. The action was dismissed at trial by the Supreme Court and the Court of Appeal of British Columbia rejected the appeal. The Nisga’a Tribal Council then appealed to the Supreme Court of Canada.

In his book, One Man’s Justice: A life In the Law, Thomas Berger summarized the hurdles in bringing forth this claim. His first concern was how to frame the case so that the courts would take it seriously. Aboriginal title was not taught in law school, and judges had no experience in adjudicating such claims. Indeed, as co-counsel to the Calder case Don Rosenbloom recounted, this case was not even on the radar screen of many members of the legal profession who apparently were equally dismissive of even the existence of Aboriginal title.

Changes to Aboriginal Law

On January 31, 1973, the Supreme Court of Canada released the reasons for judgment for Calder. Six of the seven judges who heard the case ruled that Aboriginal title existed as a matter of law in Canada, regardless of any grant or act of recognition by the Crown. Three justices, led by Judson J., ruled however that any existing title of the Nisga’a Nation had been extinguished by the laws pertaining to land enacted by B.C. prior to Confederation. Three justices, led by Hall J., ruled that the laws enacted by B.C. did not evince a clear and plain intent to extinguish Aboriginal title. Therefore Nisga’a title continued to exist. The seventh deciding judge, Pigeon J., ruled on the basis of a technicality that the action was not properly brought before the court. With four of seven justices dismissing the appeal, our action was dismissed.

However, despite the technical result, Calder has served ever since as a catalyst for important changes in the field of Aboriginal law. As we shall see below, the reasoning behind the decision introduced a pluralistic perspective into Canadian law, opening the door to concepts of legal ownership from sources other than the laws enacted by Canada or B.C.

In his reasons for decision of the Court of Appeal, Chief Justice Davey had commented that the Nisga’a people “were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property . . .” In rebuking these false and outdated notions, Justice Hall commented at page 346:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and
The Supreme Court of Canada, Ottawa, Ontario.
incomplete and when they were thought to be wholly without cohesion, laws or culture.

As Michael Asch observed in the 30th anniversary of the Calder decision, Let Right be done,2 Calder marked a significant departure from the previous stereotypical descriptions of Aboriginal society. He wrote at page 191:

Rarely in the history of a country is a court judgment so momentous that it causes society to reexamine basic premises . . . among these must be counted the 1973 judgment of the Supreme Court of Canada in Calder et al. v. Attorney-General British Columbia. It mounted a fundamental challenge to the way in which Canada constructs Aboriginal rights and, in so doing, propelled this issue from the periphery to the center of Canadian political life.

The language of Calder has also influenced the interpretation of s. 35 of the Constitution Act, 1982. Some of the origins in Canadian law for the recognition of inherent rights can be found in the language of Judson J.’s ruling at page 328:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, 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 Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right”. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. [Emphasis added.]

This language has been mirrored in the leading cases on interpretation of s. 35 such as R. v. Van der Peet, [1996] 2 SCR 507 at paragraphs 30 – 33:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

. . . This approach to s. 35(1) is also supported by the prior jurisprudence of this Court. ... in the judgments of both Judson J. and Hall J. (each speaking for himself and two others) the existence of aboriginal title was recognized . . .

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in Calder, supra, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying “the land as their forefathers had done for centuries”...

[Emphasis added.]

Thus Calder introduced a perspective that has informed the current doctrine concerning the construction of s. 35.

Calder has also contributed to developments in policy and jurisprudence internationally, particularly in common law jurisdictions. One example can be found in New Zealand. The Treaty of Waitangi Act 1975, No. 114, 1975 (New Zealand) established the Waitangi Tribunal and gave the Treaty of Waitangi recognition in New Zealand law for the first time. The Tribunal was empowered to investigate possible breaches of the Treaty by the New Zealand government or any state-controlled body, occurring after 1975. It was also empowered to recommend, but not enforce, remedies. In the proceedings of the Motunui — Waitara report, Waitangi Tribunal 1983 section 10.1, Calder was cited:

Nonetheless the approach of the New Zealand Courts, and of successive Governments, does not compare favourably with that taken by other Courts and Governments in their consideration of Indigenous minorities. In North America for example treaties with the original Indian populations have been recognized by the Courts, and in areas not covered by treaties, common law rights are regarded as vesting in native peoples by virtue of their prior occupation (refer for example, Calder v Attorney-General of British Columbia (1973) 34 DLR 145)

Uncertainty

One of the key outcomes of the Calder decision is the political and economic uncertainty which manifested itself in a number of contexts.
Uncertainty could be seen at the personal level expressed in the comments of leading politicians and legal thinkers of that time. Chief among these were the remarks of then Prime Minister Pierre Trudeau. Following the decision, he admitted, “perhaps you have more legal rights than we thought you had when we did the White Paper.”

There was also uncertainty amongst ranking federal officials who advised the Government of Canada. At the 30th anniversary of the *Calder* decision hosted by the University of Victoria in 2003, retired Justice Gérard La Forest of the Supreme Court of Canada commented on the surprise he personally experienced when *Calder* was decided. La Forest had been Assistant Deputy Attorney General of Canada and explained that even the leading policy advisors of the day were caught completely off guard by this development.

Uncertainty as to existence of Aboriginal title became a new variable in British Columbia’s political landscape. Despite the result, the leadership of Nisga’a Tribal Council decided that it would proclaim the result in *Calder* to be a victory for the Nisga’a Nation. The case had been a way to put British justice and the Canadian legal system on trial. Following the decision, the leadership stated that the *Calder* decision had put the issue of legal uncertainty in British Columbia front and centre. A very young Nelson Leeson, who later served as President of Nisga’a Nation, had been brought in to assist with communications for the Nisga’a Tribal Council. He received strict instructions that whenever a camera was pointed anywhere in his direction, he was to ensure that he captured airtime and promoted the message of the Nisga’a Nation. Eventually, uncertainty acquired a political life of its own creating pressure for resolution.

As one example of the far-reaching effects of this uncertainty, the results of a 1990 Price Waterhouse study on the economic impacts of uncertainty reached the following conclusions:

- Uncertainty was associated with a $1 billion impact and affected 1,500 jobs.
- Lost capital expenditures in the mining industry were estimated to be $50 million per year, and a further $75 million per year of expenditures were delayed an average of three years.

To this day, one can see the lasting effects of this uncertainty. The federal Aboriginal Affairs and
Northern Development website includes:

The federal government is negotiating treaties in British Columbia (BC) in order to resolve questions of uncertainty with respect to land ownership and usage, the management and regulation of lands and resources, and the application of laws . . .

Uncertainty about the existence and location of Aboriginal rights create uncertainty with respect to ownership, use and management of land and resources. That uncertainty has led to disruptions and delays to economic activity in BC. It has also discouraged investment.4

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Land Claims Policy

Soon after Calder, there was shift in addressing land claims generally. In 1973, the federal government announced a new “comprehensive claims policy.” The 1981 version of the policy, entitled In All Fairness, recounted the history:

[B]y early 1973 the whole question of claims based on aboriginal title again became a central issue; the decision of the Supreme Court of Canada in the Calder Case, an action concerning the right of assertion of Native title by the Nisga’a Indians of British Columbia, established the pressing importance of this matter. Six of the judges acknowledged the existence of aboriginal title. The court itself, however, while dismissing the claim on a technicality, split evenly (three-three) on the matter raised: did the native or aboriginal title still apply or had it lapsed? At the same time, the Cree of James Bay and the Inuit of Arctic Quebec were trying to protect their position in the face of the James Bay Hydro Electric project.

It is from these actions that the current method of dealing with Native claims emerged. [Emphasis added.]

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Nisga’a Final Agreement

Aside from these important impacts on the fields of law, politics and international Indigenous rights, the main intent behind launching the case was to force the Crown to the negotiation table. The Calder decision accomplished that objective.

Canada came to the negotiation table with the Nisga’a in 1976. British Columbia did not, holding to its position that since the Supreme Court split on whether Aboriginal title had been extinguished, the reasoning of the B.C. Court of Appeal applied, in which case Aboriginal title had never existed in British Columbia. It was not until 1990 that B.C. finally joined the table.

When the language of the Nisga’a Final Agreement was finalized, the historical contribution of Calder was of course highlighted in the Preamble to our treaty:

WHEREAS the Nisga’a Nation has sought a just and equitable settlement of the land question since the arrival of the British Crown, including the preparation of the Nisga’a Petition to His Majesty’s Privy Council, dated 21 May, 1913, and the conduct of the litigation that led to the decision of the Supreme Court of Canada in Calder v. the Attorney-General of British Columbia in 1973, and this Agreement is intended to be the just and equitable settlement of the land question.

Of course Frank Calder was with the negotiating team in Ottawa during the federal ratification process for our treaty. As the federal ratifying team wound its way through the House of Commons and Senate, many of us distinctly recall the House of Commons debate when the Reform Party of Canada filibustered the bill by posing 471 amending motions to the proposed settlement legislation, each of which had to be voted upon. All during the late evening, on the parliamentary channel which was broadcasting the votes in the House, the camera just managed to capture in the distance, in the upper rows of the gallery above the fray, the profiles of two elderly gentlemen — Frank Calder and Rod Robinson — both of whom were vigilantly monitoring the progress of the legislation.

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Campbell Decision

We celebrated the effective date of our treaty, but a few days later the Nisga’a Nation was once again in the Supreme Court of B.C. The Liberal opposition in the B.C. legislature, which included then-leader of the Liberal Party Gordon Campbell, future Attorney General Geoff Plant, and future Minister of Forestry (and eventually Aboriginal Affairs) Michael de Jong, had jointly filed a legal challenge to the constitutional validity of the Nisga’a Final Agreement. Campbell and his colleagues primarily took issue with the Nisga’a Government provisions of the treaty.

In their statement of claim, they asserted that the treaty violated the constitution because parts
of it set out Nisga’a Government legislative jurisdiction inconsistent with the exhaustive division of powers granted to Parliament and the Legislative Assemblies of the provinces by sections 91 and 92 of the Constitution Act, 1867. Second, they submitted the legislative powers set out in the treaty interfere with concept of royal assent. Finally, they argued that non-Nisga’a Canadian citizens who reside in or have other interests in the territory subject to the Nisga’a Government were denied democratic rights guaranteed to them by Section 3 of the Canadian Charter of Rights and Freedoms.

Ironically, in this instance it was the challengers to the treaty that faced a number of interesting hurdles. The first was that the onus was on Campbell to disprove the validity of the treaty. Second, as parties to the treaty, B.C. and Canada were obligated to defend the Nisga’a Final Agreement from any such legal challenge. On this basis, it marks one of the very few instances in Canadian litigation in which the Crown in right of Canada and a Province actually defended the constitutionally protected right to self-government.

In this instance, Calder once again provided the framework of reference for consideration of Aboriginal rights that had been lacking prior to 1973. At paragraph 20, Justice Williamson wrote in his decision:

It is not disputed that long before the arrival of Europeans, the Nisga’a occupied substantial areas of the Nass Valley in northwestern British Columbia. They had identifiable cultural traditions, language, territories, and systems in place for governing themselves. This history was reviewed in both the majority and the dissenting judgments in Calder v. Attorney General of B.C., 1973 CanLII 4 (SCC), [1973] S.C.R. 313.

On the issue of the s. 35 right of self-government, Justice Williamson ruled at paragraph 179:

For the reasons set out above, I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga’a Final Agreement does the latter expressly.

In other litigation respecting the treaty, the B.C. Court of Appeal arrived at the following conclusion on the legal validity of the Nisga’a Final Agreement:

The Treaty has been carefully crafted to respect constitutional principle and to fit into the wider constitutional fabric of Canada. It is what it purports to be: an honourable attempt to resolve important but disputed claims, to achieve reconciliation, and to lay the foundation for a productive and harmonious future relationship between the Nisga’a Nation and the non-Aboriginal population of Canada.

Conclusion

On the occasion of the 40th anniversary of the Calder decision, we continue to celebrate the many accomplishments of Frank Calder, the legacy of that generation of great leaders, and the many important outcomes that have resulted from the Calder decision. These outcomes include a sea change in Canadian jurisprudence which now includes recognition of self-government; a shift in the political landscape of Canada that recognizes the uncertainty that continues to challenge Canadian political, social, and economic institutions in the absence of reconciliation; and a major shift in policy to address the issue of land claims in Canada. As a result of the treaty, the Nisga’a Nation has begun to reap major benefits from economic developments in the Nass Valley. There has also been a resurgence in our pride and self-confidence as we live under rules that we make ourselves. Never again will we be subject to the vicissitudes of the Indian Act. We can only wonder at what we may be able to celebrate at our 50th anniversary.

Edward Allen is Director of Communications & Intergovernmental Relations for the Nisga’a Lisims Government. He thanks Jim Aldridge, QC, for his comments.

Footnotes
1 Martin, Sandra “Frank Calder, Politician and Nisga’a Chief” Globe and Mail, November 9, 2006.
4 http://www.canoe-aandc.gc.ca/eng/1100100016299/1100100016300
5 Sga’íinsim Sin la’gatl (Chief Mountain) v. Canada (Attorney General) 2013 BCCA 49.