Land Claim Settlements
Who Should Pay, Ottawa or Victoria?

MELVIN H. SMITH, QC

The question that I am called upon to answer is, assuming there are to be land-claim settlements, which level of government is to pay for them—the federal government or the government of British Columbia, or both? I will endeavour to show that there is a clear answer to that question to be found in the constitutional documents that brought British Columbia into Confederation in 1871.

However, a preliminary observation is necessary. Very little has been said to date about the *measure* of compensation that ought to be paid to relinquish aboriginal title in specific cases in light of the decision of the Supreme Court of Canada in *Delgamuukw*. Obviously the measure of compensation should vary, depending on how heavy the burden of aboriginal title is in a site-specific situation. For example, the burden of aboriginal title will be the greatest in areas that are and have been occupied since 1846 on a daily basis by native communities for their settlements or other daily uses. On the other hand, those areas that are more remote and are less frequented by a native presence will have a much lighter burden of aboriginal title upon them and therefore the degree of compensation should be much less. It may well be that in British Columbia, much of the lands heavily burdened with aboriginal title are already included in Indian reserves set aside "for the use and benefit" of various native bands throughout the province.

These are difficult judgments to make. I do not believe that these decisions ought to be the subject of negotiation because I have little confidence in government negotiators holding the line or following any fixed criteria on these kind of issues. From what I see, the tendency is for government negotiators to make endless concessions and pay any price to reach an agreement regardless of the high cost to the public interest. Because of the difficulty in making determinations on what I call the *weight* of aboriginal title, I am of the view that these issues should be decided by a court comprised of judges with some expertise in determining land values and arriving at decisions on the measure of compensation in an expeditious way. Australia has followed this course.

Which level of government ought to pay the bill?

The natural tendency is to respond by suggesting that both Ottawa and Victoria ought to share the cost. Certainly this is the basis on which land claims negotiations have been proceeding thus far. But to suggest a joint sharing of costs is to totally ignore the historical and constitutional relationship on native matters that was established in 1871, when British Columbia entered Confederation. Specifically, I am speaking of section 13 of the Terms of Union entered into between Canada and British Columbia and approved 127 years ago on July 20. People's eyes tend to glaze over when I talk about the Terms of Union, but they ought not to, for the Terms of Union are as much a part of the Constitution of Canada as is the Charter of Rights and Freedoms or section 35, which recognizes aboriginal and treaty rights, or any other section of the Constitution.

It is important to realize that these Terms of Union are not some archaic, dead-letter document that are of use only to archivists and students of history. They set out rights and obligations that are very much alive and well. A clear illustration of this occurred a few years ago in respect of the Terms of Union of Prince Edward Island's entry into Canada in 1870. One of the terms of Prince Edward Island's entry into Confederation was that the federal government would at all times provide a ferry link from the mainland to Prince Edward Island. This had been done continuously since Confederation through the CNR, which operated a daily ferry service. In the mid-1970s, a lawful strike interrupted the ferry service between the mainland and Prince Edward Island. The government of Prince Edward Island sued the government of Canada for a breach of the Terms of Union by Ottawa for not maintaining the ferry link. Prince Edward Island was successful before the Supreme Court of Canada and was awarded a substantial claim in damages against Ottawa.

Let me dip back into British Columbia history. British Columbia does not owe its origins to its entry into Confederation in 1871 or even to the Canadian Confederation of 1867. The Crown Colony of Vancouver Island was established by Royal Grant in 1849 and a second colony comprising the mainland of British Columbia was established a few years later. Both colonies were united by Imperial legislation in 1866 to become the area that we now know as British Columbia.

James Douglas, the Chief Factor for the Hudson's Bay Company on Vancouver Island was appointed Governor of the island colony in 1851. By instructions from his Company's head office, Douglas was advised "to consider the natives as the rightful possessors of such lands *only as they occupy by cultivation or had houses built on* such lands at the time when the Island came under the undivided sovereignty of Great Britain in 1846." All other land was "to be regarded as waste, and applicable for the purposes of civilization" (Emphasis added).

To ensure friendly relations with the natives, who far outnumbered the handful of white settlers, Douglas went beyond his instructions and began to enter into agreements with certain native tribes around Victoria, Saanich, Fort Rupert and Nanaimo. Over a six-year period, Douglas entered into 14 such agreements. The agreements preserved to the Indians their village sites and farmlands and permitted them to continue hunting and fishing in unoccupied areas. Even though these agreements were expressly made by the Hudson's Bay Company and not the Crown, subsequent judicial interpretations have found them to be treaties between the Crown and the tribes involved. They are known as the "Douglas" Treaties. Douglas's efforts of this kind were not supported in London and so he discontinued the practice. Apart from a portion of the Peace River district that is included in Treaty 8 negotiated by the federal government in 1899, these are the only "treaties" that exist in British Columbia.

Although abandoning treaty-making as such, Douglas by no means forsook dealing with the native interest. As an alternative, he embarked upon a vigorous policy of establishing Indian reserves. This was a most significant development for it established a direction in white-native relations in this province that is distinct from early colony policy in the rest of Canada. (Supporters of modern-day treaty making are quick to commend Douglas for his early treaty-making efforts, but are inclined to ignore his even more significant efforts at establishing reserves.)

By 1858, the province's non-native population was swelling in the wake of a gold rush. Demand boomed for quality land in good locations for white settlers. Douglas, by now Governor of both the Island and Mainland colonies, responded by establishing Indian reserves. With input from the Indians, he allotted land for band villages, burial grounds,

cultivation, and hunting. Indians were also entitled to the free use of all unoccupied lands until taken up by settlers by pre-emption or homesteading. By 1871, 120 Indian reserves had been established throughout the Colony. But this was only the beginning.

When B.C. entered Confederation in 1871, Ottawa assumed legislative responsibility for its "Indians and Lands reserved for Indians" under the terms of the *British North America Act, 1867*. Article 13 of B.C.'s Terms of Union with Canada placed other obligations on Ottawa. It reads:

> *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, and a policy as liberal as that hitherto pursued by the British Columbia Government, shall be continued by the Dominion Government after the Union. (Emphasis added)

Article 13 goes on to require the Province to provide tracts of land for the establishment of additional Indian reserves "of such extent as it has hitherto been the practice of the British Columbia Government." **In sum, the expressed constitutional obligation of the Province was to provide lands for more reserves. Nothing more. Any and all other constitutional obligations to the native people rested on Ottawa's shoulders.**

No mention was made in the Terms of Union of "Indian title." This was no mere oversight. Just a year earlier in 1870, the legislation that constituted Manitoba as a province specifically mentioned unextinguished Indian title and how it would impact on land conveyances. It is inconceivable that the question of Indian title, so fresh in the mind of federal authorities in 1870 in respect of Manitoba, would be overlooked only one year later when B.C.'s entry to Canada was under consideration. **The better view is that there was recognition by federal authorities in 1871 that B.C. was dealing with the Indian matter differently, i.e. by the establishment of reserves.**

The practice of establishing Indian reserves without entering into treaties sets B.C. apart from the rest of Canada in dealing with the Indian interest. This is born out by the fact that of 2,323 Indian reserves throughout Canada today, 1,634 of them are located in British Columbia. Critics have made much of the fact that, while many in number, the reserves established in B.C. are small in size in comparison to the fewer but larger reserves established on the Prairies. Smallness is due in part to the differences in the topography of the two regions and also due to varying habits, wants and pursuits of the Indians themselves.

On the coast at least, large blocks of agricultural land are in short supply. Moreover, the coastal Indian economy was mainly derived from

the products of the sea. Hence coastal reserves tended to include pocket-sized settlements in valley bottoms and fishing sites along the coast or along riverbanks. In the B.C. interior, reserves were somewhat larger to provide for some measure of future farming and ranching. By contrast, the Prairies were blessed with semi-open plains of vast proportions. The federal government could afford to be generous in allocating reserves on the Prairies and still have adequate land for settlers.

That said, the per capita difference is not all that great. The total area of reserves in Canada is 2.68 million hectares. In B.C., the total area of reserves is 344 thousand hectares or 13 per cent of the total of Canada. B.C. has 17 percent of Canada's status Indians. Incidentally, the total land area contained in Indian reserves throughout Canada comprises 10,021 square miles, which the Canadian Almanac describes as "one of the largest land holdings in the free world."

By the passage of Order in Council PC.1265, dated July 19, 1924, the federal government formally acknowledged that B.C. had satisfied all its obligations of Article 13 of the Terms of Union respecting the furnishing of lands for Indian reserves and described the process as a "full and final settlement of all differences between the governments of the Dominion and the Province." Such an acknowledgment by the federal government is support for the position of every B.C. government up to 1991 that B.C. had fully discharged its obligations to its Indians even though it had done so differently from the rest of Canada.

What has been the practice elsewhere in Canada? Treaty-making has been the usual practice. But have provinces been involved in treaty-making? With the exception of Québec, all Indian treaties entered into since 1867 have seen the federal government as the sole signatory on behalf of government. In northern Québec the situation is different because the constitutional obligation of the government of Québec is different. When the vast northern territories were added to Québec by federal legislation in 1912, it was expressly conditional upon *Québec* obtaining surrenders of aboriginal rights. Consequently, when the government of Québec entered into modern treaties with the Cree and Inuit of northern Québec in 1975, and the Naskapi Indians in 1978, the government of Québec obtained similar surrenders.

No similar express constitutional obligation falls on the government of British Columbia. In fact, the very opposite is the case because section 13 of B.C.'s Terms of Union imposes on the federal government "the charge of the Indians."

Why then has the present government of B.C. involved itself in the treaty-making business? Did the B.C. government wrongfully conclude that because the government of Québec entered into treaties, B.C. is obliged to do likewise? Was there a serious analysis made

of the constitutional differences between Québec and British Columbia on this issue before B.C. plunged headlong into the process? Apparently not.

This is not merely some kind of academic issue akin to how many angels can dance on the head of a pin. The answer to it determines whether the Canadian taxpayer at large or the B.C. taxpayer will pick up the tab for land claim settlements in this province. More than that, the Crown land is owned by the Province. If the responsibility for settling claims is the federal government's alone, as I suggest it is, then the federal government should be required to buy from the province, presumably at fair market-value, any land or resources it wished to include in a land claim agreement. This might have the desirable effect of lessening the tendency of government land claim negotiators to be as generous as they seem willing to be with the public's land and resources.

Over and over in *Delgamuukw,* the Supreme Court of Canada emphasizes that the Province of British Columbia cannot legislate in relation to Indians because that is a matter exclusively given to the federal Parliament under section 91(24) of the Constitution. The Court also said that the provincial government cannot extinguish aboriginal title. The opposite side of the same coin is in section 13 of the Terms of Union, which places the obligation for the "charge of the Indians" exclusively in the hands of the federal government. It seems to me that he who calls the tune constitutionally (in this case the federal government alone) should pay the piper. The government of British Columbia should not only leave land claim negotiations and entering into treaties to the federal government but it should seriously consider serving notice on the federal government that it expects to be indemnified for any failure of the federal government to discharge its obligation toward the Indians as required of it under section 13 of the Terms of Union.