PROLOGUE

The Seven Years' War (1756–63) had brought the English and French battle for empire in North America to an end, but in the immediate aftermath the conquerors faced a number of critical problems. Key among them was the need to secure Aboriginal people's loyalty to the Crown and prevent them from clashing with newcomers over land. This was an especially difficult and urgent challenge, as many Native groups had earlier sided with the defeated French. For many years, moreover, all Native groups had benefited economically and politically from having both the English and the French court their favour. Now Aboriginal people were very anxious about the potential adverse effects that British domination would bring. Indeed, in the Great Lakes region, Aboriginal discord about this turn of events boiled over in May 1763 in Pontiac's Uprising (1763–64).

To quell unrest and gain the favour of Native people, King George III issued the Royal Proclamation of 1763 declaring that lands "of our dominions and territories" that had not been "ceded to us" were reserved for Indians "as their hunting grounds." The Proclamation further professed that it was "our Royal Will and Pleasure" that the territories beyond the existing colonies and the region granted to the Hudson's Bay Company be reserved for the present "under our Sovereignty, Protection and Dominion, for the use of the said Indians." Finally, the decree specified that only the Crown had the right to purchase Indian land at public assemblies of Indians convened specifically for that purpose. Although the purpose of these pronouncements was to win Native loyalty, they subsequently served as foundational principles in Canadian Native rights law.

The Proclamation had this impact partly as the consequence of a late nineteenth-century federal-provincial legal battle that most Canadians have never heard about. This feud, which is remembered in law as *St. Catherine's Milling and Lumber Company v. Regina* (1888), arose when the federal government granted a small timber company a licence to harvest trees from off-reserve Crown lands in the Treaty 3 (1873) area of Northwestern Ontario. The Ontario government objected, saying that the lands in question belonged to the province. In doing so, the province raised questions about the nature of Aboriginal rights in land that the Ojibwa had surrendered to Canada in 1873. The Judicial Committee of the Privy Council in England, which was the final arbiter of Canadian legal disputes until 1949, ultimately decided the issue based on its interpretation of the Royal Proclamation. The Judicial Committee concluded that the Ojibwa had only held personal rights to use lands in unceded territories "at the pleasure of the Crown." In other words, the Ojibwa had not surrendered outright ownership of the Treaty 3 area to Canada. Accordingly, the British justices ruled in favour of Ontario.

In this way, although Aboriginal people had not even been party to *St. Catherine's Milling*, the case had the effect of narrowly defining their land rights in Canadian law until late in the twentieth century, when Canadian courts revisited the issue in response to legal petitions by First Nations. Needless to say, when First Nations eventually learned about the implications of *St. Catherine's Milling*, they were affronted by the notion that their land rights derived from the Crown and continued only at its pleasure. Understandably, they believed that their rights originated from their use and occupancy of traditional territories before Europeans arrived on the scene and should continue in force until they were to surrender them voluntarily through negotiations.

First Nations had begun pressing these perspectives even before *St. Catherine's Milling*. In 1881 the Nisga'a sent a delegation from their Northwest Coast homeland to Victoria to demand that their land rights be respected. Subsequently, other First Nations from British Columbia joined in the struggle, sending petitions to Victoria, Ottawa, and London. Soon the Nisga'a decided to seek legal redress also. Accordingly, in 1910 they hired a lawyer to prepare a petition to the Judicial Committee of the Privy Council. Politicians and government officials feared the potential outcome of a Nisga'a petition. Accordingly, the federal government took steps to block the Nisga'a and others from petition-

ing the Judicial Committee or taking other legal action. One of the most egregious moves involved amending the Indian Act in 1927 to bar Indians from soliciting funds to hire lawyers to fight claims cases. This ban remained in effect until 1951. By that time, the Supreme Court of Canada had become the final arbiter of the country's legal disputes. Politicians were confident that the court would rule in their favour.

After the ban against hiring lawyers was lifted, the Nisga'a resumed the quest to have their Aboriginal title recognized in Canadian law. In 1969 they finally had their day in court in the now-famous case of *Calder v. British Columbia*. Through their lawyer, Thomas Berger (subsequently B.C. Supreme Court Justice Berger), the Nisga'a argued in the Supreme Court of British Columbia that their Aboriginal title had never been extinguished in accordance with the procedures specified by the Royal Proclamation. Indeed, this had not happened elsewhere in British Columbia either, except for small scattered tracts of land on Vancouver Island that were covered by the Douglas Treaties of 1850–54 and the Treaty 8 (1899) area of the northeastern portion of the province. The provincial government replied in its defence that the British government had never intended that the Royal Proclamation be applied in British Columbia, and even if it had, colonial land legislation had implicitly extinguished any Native titles.

The Nisga'a claim eventually reached the Supreme Court of Canada where, in 1973, six of the seven justices (one abstained) concluded that Aboriginal title had existed in the province prior to colonization; three of them held that colonial and provincial legislation had not extinguished that title, while three rejected this idea. Although this split decision disappointed the Nisga'a, *Calder* raised the probability that Aboriginal title existed in all areas of Canada that had not been surrendered by treaties publicly negotiated for that express purpose. The decision did not define what the scope of any existing Aboriginal titles might be, however. The Liberal government of Prime Minister Pierre Elliott Trudeau reacted to the worrying issues *Calder* raised by creating a complex claims procedure. For the first time, substantial funding became available for historical research concerning Aboriginal title claims (referred to as comprehensive claims) and those pertaining to disputes arising from the interpretation and implementation of historic treaties (known as specific claims).

While *Calder* progressed through the courts, other developments were taking place that also would have a profound impact on Abo-

riginal rights litigation in Canada. The late 1960s and 1970s was a time of growing political activism by First Nations and the Métis. By the time Trudeau pushed for constitutional reform in the late 1970s and early 1980s, Aboriginal political leaders had become very effective on the national stage in advancing their agendas. They demanded inclusion in federal-provincial discussions about repatriating the Constitution. Their activism bore fruit in Section 35 of the Constitution Act (1982). This clause afforded protection to existing Aboriginal and treaty rights. Also, it broadly defined Aboriginal people to include First Nations, the Inuit, and the Métis. Section 35, however, failed to specify the extent and nature of existing Aboriginal and treaty rights. The politicians left it to the courts to settle these contentious issues.

In these crucial ways, *Calder* and Section 35 set the stage for the modern claims litigation era in Canada. Together they raised several fundamental questions: What Aboriginal and treaty rights had survived in various parts of Canada? What was the scope of Aboriginal title? Who are the Métis and where do they live? What is the nature of their culture and their rights? All these questions had major historical components.

As Canada moved toward *Calder* and the Constitution Act, a development took place in the United States that would affect the nature of some of the historical evidence that other experts an I would eventually present in Canadian court battles from the mid-1980s on. In 1946 Congress passed the Indian Claims Commission Act, which created the United States Indian Claims Commission (USICC) to address the grievances that American Indian tribes held against the federal government. The commission operated for thirty years. Very quickly it focused on title and land cession issues. The federal government (the defendant) and tribal groups (the plaintiffs) from across the country hired experts to present and challenge historical evidence regarding the use and occupancy of traditional tribal territories by hundreds of tribal claimants.

The operation of the USICC had a lasting impact on North American Native history for several reasons. Substantial funding for research in the field of American Indian history became available for the first time. This new research focused on economic life, especially land use and tenure, topics that had not previously been of primary scholarly concern. Claims work also acted as a catalyst for an interdisciplinary approach to Indian history because initially most of the experts who

appeared before the commission were anthropologists and archaeologists. They applied anthropological and archaeological theories and perspectives in their interpretations of diverse documentary evidence. Their approach came to be known as ethnohistory. During the latter half of the 1950s and 1960s, these ethnohistorical experts published aspects of their research in leading scholarly journals and monographs.

When I was a graduate student in historical geography at the University of Wisconsin–Madison in the late 1960s, I was drawn to the emerging ethnohistorical scholarly literature because it was especially relevant to my developing interests. As an historical geographer, I was fascinated by the effects that Western Canadian Native peoples' participation in the European fur trade had had on their inter-tribal relations, migrations, economic life, and ecological circumstances. At the time, I was unaware that much of this scholarship had originated with Claims Commission cases. Perhaps ironically, I did not learn of this connection until I began appearing as an expert witness in Canada over thirty years later. Acting in that capacity, I became interested in studying the claims resolution processes in which I had become involved. Many years earlier during my graduate student days, however, *Calder* was just beginning to wind its way through the Canadian courts, a journey that did not end until two years after I completed my doctorate in 1971. The Constitution Act was still eleven years away. Thus, when I immigrated to Canada in 1971, I had no idea that one day I would head down the path described in the following chapters and be drawn into some of the country's most important landmark legal cases.