

FROM WARDSHIP TO RIGHTS

The *Guerin* Case and Aboriginal Law

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INTRODUCTION

THIS BOOK TELLS THE story of the determined search by the Musqueam people to find justice. In 1958, the Canadian government leased over one-third of their small reserve in Vancouver – the highest and the best land – to an exclusive golf club at less than market value and on terms to which they did not agree. They were repeatedly advised to drop the case but their tenacity led to the 1984 decision of the Supreme Court of Canada in *Guerin v The Queen*.¹ That decision recognized for the first time that legally enforceable fiduciary obligations are owed to the Indigenous peoples of Canada and that, in some situations, there is a duty on governments to consult with Indigenous groups concerning their land. In a subsequent decision involving the Musqueam, the court applied the *Guerin* decision to give substance to the then-recent constitutional recognition of existing Aboriginal and treaty rights.² The application and development of the fiduciary duty (to act in the best interests of another person) by the Supreme Court of Canada and other courts was a major factor in the dramatic changes in the laws affecting Indigenous peoples over the years since *Guerin*. The case also had a discussion of the legal nature of Aboriginal title and was a stepping stone in the development of the law that led to its full recognition. It upheld Aboriginal title as a legal right that pre-existed British sovereignty and was not dependent on a grant of rights by the Crown. Taken together, these legal developments had a major and permanent impact on Canadian law, politics, and society.

The importance of *Guerin* has been widely acknowledged by writers on the law and I will examine their views in Chapter 6. Justice Ian

Binnie of the Supreme Court of Canada, who had been one of the lawyers in the case, described it as a “seismic blast.”³ It may be noted here that the importance of the case has also been recognized by non-lawyer writers on Indigenous matters. In his account of land issues in *The Inconvenient Indian*, Thomas King includes the case as one of six stories that frame those issues.⁴ John Ralston Saul describes it as “one of those Aboriginal victories at the highest court that have shaped Canada over the last forty years” and “one of the most important court cases of the twentieth century.”⁵ It may also be noted that its influence has not been limited to Canada. It was heavily relied upon by a majority of the Supreme Court of New Zealand in a 2017 case that found that the government owed fiduciary obligations to the Maori.⁶

For five years, I had the good fortune to be part of the legal team that represented the Musqueam people in their groundbreaking legal struggle. In writing this record of the case, I have drawn upon the recollections of Delbert Guerin and other members of the Musqueam people and my own recollections and those of other members of the Musqueam legal team. I have also drawn upon the trial record, the reported decisions, and contemporary newspaper reports, as well as background research on the legal issues involved, the history of the Musqueam, some of the key individuals involved in the case, and the history, theory, and practice of colonialism in the British Empire generally and in Canada in particular. The details of the Musqueam story provide a compelling context for investigating and explaining that history, theory, and practice as well as the legal principles arising from the *Guerin* case.

My involvement with the case began four years after the Musqueam had commenced it in the Federal Court of Canada. In 1979, I had joined what was then Davis & Company, the largest law firm in Vancouver, to complete the process of requalifying as a Canadian lawyer. I had qualified in England as a barrister in 1974, and, after teaching law at the London School of Economics, immigrated to Toronto to work in a bank with plans of a career in international banking. Having decided to make our home in Canada but defeated by the Toronto

climate, my wife and I headed west by train to settle in Vancouver. I was hired to work on banking files, but shortly after my arrival at the firm, I received a message asking me to meet one of the partners, Marvin Storrow. He explained that the firm was handling a file for a First Nation that required expertise in trust law. He said that, since I was an English barrister, he assumed that I knew all about trusts. Not wishing to contradict a partner, I mumbled words to the effect that I knew something about them. Marvin took my reply as a form of modesty and set me to work. Thus began my involvement in the *Guerin* case and in Aboriginal law, which has lasted for over forty years.

I was one of the counsel in *Guerin* but this book is intended to be more than a lawyer's "war story." In his account of *Mabo*, a landmark decision in the Aboriginal law of Australia, one of the counsel involved in that case commented that "lawyers' 'war stories' about their favourite cases are generally of little interest to anyone, save the author. But the account which follows contains, I hope, some inherent justification and intrinsic interest."⁷ I hope that this is equally true of this book. I have included some anecdotes based on my personal experience but have tried to be as objective and fair as possible in this account.

The *Guerin* case shows that, with determination, Indigenous people can overcome some of the historical disadvantages under which they have struggled for too long and achieve some, although incomplete, measure of justice. In the process of seeking justice for themselves, the Musqueam brought about fundamental improvements in the way the Canadian legal system deals with the rights of all Indigenous peoples. In rejecting the argument that the Musqueam could not enforce the government's obligations to them in the courts (the "political trust" argument), the Supreme Court of Canada strengthened the legal protection provided to all Canadians against the wrongdoings of governments. In that way, *Guerin* provided an example of how the law as enforced in the courts can "move us incrementally towards a just society."⁸ I think that is a story worth telling.

The story is told in the following way. Part 1 investigates and explains the events that gave rise to the case. Chapter 1 discusses colonial theory,

policy, and administration in the British Empire and, in the case of Canada, “Indian policy” until the 1950s, when the events in *Guerin* took place. Chapter 2 gives background material on the Musqueam and those events, including the creation of the reserve at issue in the case; the role of the Department of Indian Affairs and, in particular, Earl Anfield, the Indian agent most involved in negotiating the lease to the Shaughnessy Heights Golf Club (now the Shaughnessy Golf and Country Club); the influence and history of the club; the clash of cultures and power between the band and the club; and the experiences of Chief Guerin. Chapter 3 gives the historical, political, and legal context of the fiduciary relationship recognized in *Guerin* and examines the relationship between the governments and Indigenous peoples in the British Empire and Canada. The fundamentals of fiduciary law are summarized, as are the relevant legal cases prior to *Guerin*, including the political trust cases.

Part 2 explains the working of the case through the courts, including the decision of the Supreme Court of Canada. Chapter 4 explains how the case got to trial, including the discovery of the lease by Chief Guerin and his difficulties in obtaining legal representation. It also provides some of the background of the participants and describes how the trial unfolded. The trial decision is summarized and critiqued (especially on the limited remedy provided), as is the decision of the Federal Court of Appeal, the disappointment it created, and the serious questions it raised for the rule of law in a liberal democratic society by upholding the defence of political trust. Chapter 5 examines the process to get leave to appeal to the Supreme Court of Canada and the legal arguments presented by the parties, and gives a sense of what took place during the hearing. It summarizes and analyzes the three judgments given by the Supreme Court justices.

Part 3 investigates and explains the after-effects of the case and how it had a major and permanent impact on Canadian law, politics, and society. Chapter 6 provides an overall review of legal developments flowing from *Guerin*. The Conclusion gives my views on the impact of the case on Canadian law, politics, and society. It also considers some

of the criticisms of the case and resulting developments, such as the charge of paternalism and even colonialism.

I have told some of this story before as part of a comprehensive study of the fiduciary obligations owed by governments to Aboriginal peoples in Canada.⁹ The objective of this book is less ambitious – it is to tell the story of the *Guerin* case and its impact on Canadian law, politics, and society. It borrows from my earlier book and updates it to cover developments over the last fifteen or so years, but it is not an account of the substantive law, although I hope it will help readers gain a better understanding of that law by explaining its origins. In terms of technical legal doctrine, Professor Leonard Rotman has commented that the judgments in *Guerin* “do not delve into any substantial discussion of Crown-Aboriginal fiduciary relations generally.”¹⁰ This is an accurate observation. The contribution of *Guerin* was broader and more profound than technical legal doctrine. This book takes an equally broad approach to doctrinal issues. In line with the requirements of the Landmark Cases in Canadian Law series, I have tried to keep the general reader in mind and avoid an overly technical account.

Readers who would like a detailed account of fiduciary law in Canada should obtain Professor Rotman’s *Fiduciary Law*.¹¹ It and his earlier book, *Parallel Paths*, contain a detailed discussion of the substantive law relating to fiduciary obligations and Indigenous peoples, as does *The Honour of the Crown and Its Fiduciary Duties to Aboriginal Peoples* by J. Timothy McCabe.¹² Readers who are interested in an introduction to Aboriginal law in Canada may wish to read my book *Aboriginal Peoples and the Law: A Critical Introduction*, published by UBC Press/Purich in 2018.

This book is as much about history as law. It seeks to investigate and explain the forces that led to two key events: (1) the signing of the Shaughnessy Heights Golf Club lease in January 1958 and (2) the decision of the Supreme Court of Canada in November 1984. The former event was a direct result of the history of the British Empire, not just in Canada but around the world. As will be seen, the imperial legacy was still very evident on that fateful day when the lease was

signed. Reflecting the wardship nature of the relationship, it was signed by the government but not by the band, and the government refused to provide a copy to the band for several years. That legacy was still the driving force behind the administration in Canada of “Indian” affairs, including reserve lands. Although the British had made important changes and created a more professional “modern” colonial policy and administration designed to prepare Indigenous peoples for independence, they had not been emulated by their Canadian heirs and independence was not (and is not) an option.

The decision in 1984 also reflected social and political forces that had developed in Canada by then. Indigenous groups had pushed back against the colonial mentality that saw them as a “problem” that had to be solved by loss of their separate legal status through assimilation. They obtained rights under the Constitution, although vague in nature. These constitutional rights, like the *Guerin* decision, demonstrated that, although the law had been primarily a tool for the forces of the colonial society, it could still be used to mitigate the impact of those forces. *Guerin* was key to the history of the Canadian Aboriginal rights movement. Indeed, one writer has compared it to *Brown v Board of Education*, the landmark decision in the US civil rights movement.¹³

Taken together, these two events make *Guerin* an instructive case study to show (1) the continuing impact of colonial thinking on Indigenous peoples, which viewed them as wards whose lives and property had to be managed by colonial administrators until they could be assimilated into Canadian society, and (2) the modern and developing law on Aboriginal rights that commenced in the 1970s and of which the decision in *Guerin* was an important part.

Guerin is about more than technical legal doctrine. It represented a major development in the political character of the relationship between non-Indigenous people as represented by their governments (the “Crown”) and Indigenous peoples. That relationship was first based on treating Indigenous peoples as warriors and necessary allies. It changed in the early nineteenth century when conflicts with other countries ended and British authorities had acquired effective control. The former

allies were then reduced to child-like “wards of the state” without enforceable rights. Wardship and similar terms, such as guardianship and tutelage, were used in a general sense to denote the incapacity and dependency of Indigenous peoples rather than in a technical legal sense. However, it may be noted that the origins of wardship go back to medieval England and the right of a feudal lord to control the lands and take the rent of an orphan heir and to sell that right. It had more to do with profit than protection.¹⁴ *Guerin* was an important step in again recasting the relationship between Indigenous peoples and the Crown from one of wardship to one of rights by rejecting the long-held view that any obligations owed by the Crown were political in nature and could not be legally enforced. This was a major and permanent change in Canadian law, politics, and society.

PART 1

THE CONTEXT

The Colonial Context

FOR THE BRITISH, THE declaration of Vancouver Island in 1849 and then British Columbia in 1858 as colonies meant only two more colonies added to an expanding empire centred on India and the East rather than the western edge of North America.¹ They had potential as sources of raw materials and as settlement destinations for British emigrants but, in the scheme of things, they were insignificant. Viewed in the historical and global context of migrations of populations around the world, the colonies represented just another displacement of hunter-gatherers by farmers.² In contrast, colonialization turned the world upside down for the Musqueam and other Indigenous peoples in the region. As part of the Dominion of Canada from 1871, the unified province of British Columbia remained a colony of Britain until the Balfour formula, proposed at the Imperial Conference of 1926 and implemented in the *Statute of Westminster* in 1931, transformed the Dominion into an autonomous nation within the British Empire.

As we shall see, the colonial legacy persisted beyond 1931 and into the 1950s, when the key events in the *Guerin* case took place. It was the essential backdrop to those events. As observed by anthropologist Michael Kew in 1970, in words that are as true today as they were in the 1950s, “the Musqueam have not been assimilated into Canadian

society but reside physically and socially apart like the members of some tiny colonial territory.”³ The process of encapsulation or incorporation into the Canadian state, society, and economy is still a work in progress.⁴

COLONIAL THEORY AND PRACTICE

In the early days of the fur trade, the British had no great need for land beyond the immediate area of their trading posts. They made use of the hunting and fishing way of life of the Indigenous population, which was largely left undisturbed (except by diseases). With colonialization came an economic system based on agriculture and industry.⁵ These required land and labour. The major contribution of the Indigenous people would be land and resources, and getting them would be the overriding colonial policy. Indigenous peoples were initially used as a source of labour but the preferred workers were immigrants. The Catalogue of Exhibits from Vancouver Island at the London International Exhibition of 1862 noted: “As the colony is at present too poor to pay the passages of labourers from home (a thing it would gladly do if able), the natives will occupy their place in a measure.”⁶

As with all settler colonies, land was the prize to be gained and it could be obtained only if it was acquired one way or another from the existing owners. Pre-emption, or the granting of land to settlers who would occupy and use it in accordance with European notions of land use and improvement, was the predominant method used in British Columbia.⁷ In much of what became Canada, especially on the Prairies, treaties were signed with Indigenous groups under which, according to the written English version of the treaties, they gave up their interest in most of the land to enable settlement. With the exception of small areas of Vancouver Island, no such treaties were signed in the two new colonies. No consent was sought from the Indigenous peoples, and their laws and customs regarding land ownership and use were ignored despite fundamental legal principles recognizing them.⁸ Proclamations allowed the land to be surveyed and granted unless it was the site of

an existing Indian settlement. Rough sketches or surveys were made, fences erected, and Indigenous peoples, such as the Musqueam, dispossessed.

Settlers from the British Isles were attracted by the opportunities to be found in the new colonies, glowingly described in various publications. For example:

In the far West, bordering the great Pacific, facing the once famed “Cathay” of our fathers, to which the hardy mariners of old considered this the way, and forming a key through British America to regions hitherto almost unknown, there is a golden land just brought under official notice, and now attracting public attention. It is a land where the wild Indian is as yet almost in his savage state! it is a land where nature reigns in wonderful majesty! it is a land where a sudden transformation is about to take place! and it is a land whither thousands of the civilized inhabitants of the globe are rushing in hot haste to gather of the new found spoil! ⁹

These new colonies had special attraction to the occupants of those overcrowded islands: “In a latitude the same as that in which we now live, and with a climate in many respects better than our own, there needs but little to call it a second England.”¹⁰ The historian-geographer Cole Harris commented on the special factors that had enabled British settlement: “British Columbians, particularly males of British background, were extraordinarily lucky to encounter a bounteous, depopulated land just when railway, telegraph and post had brought it within relatively easy reach of the outside world.”¹¹

Probably most of the new settlers were too interested in “the new found spoil” and the “sudden transformation [that was] about to take place” to give much thought to the situation of “the wild Indian.” If they had, they would almost certainly have agreed with the predominant justification of overseas settlement going back to at least 1516, when Thomas More explained in *Utopia* that the Utopians were entitled to colonize another country if land in that country was not being

sufficiently used.¹² The theory of the inferior claim of hunters and gatherers was widely used in Canada to justify the dispossession of the Indigenous peoples. This can be seen from a contemporary account from colonial Vancouver Island of a conversation between a settler and a Chief who said that his people did not want the white man “who steals what we have.” The settler replied that “the high chief of King George men [the English], seeing that you do not work your land, orders that you shall sell it. It is of no use to you.” Theory went only so far, however. Recognizing that “we had taken forcible possession of the district,” he said the practical answer to the question of “the right of any people to intrude upon another and to dispossess them of their country” is “given by the determination of intruders under any circumstances to keep what has been obtained; and this, without discussion, we, on the west coast of Vancouver Island, were all prepared to do.”¹³ In the final analysis, the dispossession was explained by “the loaded canon pointed towards the [Tseshah] village.” The Supreme Court of Canada has confirmed that the Indigenous peoples were never conquered.¹⁴ However, duress and the threat of force if they failed to comply with the colonial authorities were always present.¹⁵

If further justification was required, then the civilizing role of Empire would provide it. This role provided the *raison d'être* for colonial administration – an administration that was central to the *Guerin* decision. That arch-imperialist Winston Churchill described the imperial ideal:

What enterprise that an enlightened community may attempt is more noble and more profitable than the reclamation from barbarism of fertile regions and large populations? To give peace to warring tribes, to administer justice when all was violence, to strike the chains off the slave, to draw the richness from the soil, to plant the earliest seeds of commerce and learning, to increase in whole peoples their capacities for pleasures and diminish their chances of pain – what more beautiful ideal or more valuable reward can inspire human effort?¹⁶

Rudyard Kipling, the high priest of the imperial religion, summarized the nobility of the cause in his poem *The White Man's Burden*, urging the United States to follow the British example and take up the burden of unselfishly and tirelessly serving the interests of the “new-caught sullen peoples” of the Philippines by spreading the benefits of civilization. Many religious people thought that “primitive” peoples were being punished by God for having fallen from a previous state of grace and needed religious instruction to be civilized.¹⁷ The scientific basis for those of European ancestry to assist the civilizing process for Indigenous peoples was developed in the latter half of the nineteenth century by the new discipline of anthropology. In England, Edward Tylor set out his thesis that “the savage state in some measure represents an early condition of mankind out of which the higher culture has gradually been developed or evolved.”¹⁸ Many saw it as their Christian duty to help move Indigenous peoples along in this “progressive development.” It was certainly a convenient cover for disposing of them and disrupting the culture and forms of government they enjoyed.

Churchill was not blind to the fact that colonization had “sinister features.” It brought “the figures of the greedy trader, the inopportune missionary, the ambitious soldier, and the lying speculator, who disquiet the minds of the conquered and excite the sordid appetites of the conquerors.”¹⁹ He might well have added the land-hungry settler, who will play a large role in this account. Commencing in the last quarter of the eighteenth century, it was recognized in colonial theory and administration that Indigenous peoples needed protection as well as “civilization.”²⁰ Of special interest to us are the views of Herman Merivale, who became the senior official in the British Colonial Office. He delivered a series of lectures at Oxford University on colonization and colonies from 1839 to 1841. He concluded that “the duties of the colonial government towards the natives comprised within the limits of the colony, then seem to arrange themselves under two heads – protection and civilization ... For the protection of aborigines the first

step necessary is, the appointment in every new colony of a department of the civil service for that especial purpose.”²¹

This protection required an exception to the liberal view of individual freedom that the only purpose for which power could be rightfully exercised over someone against his will was to prevent harm to others. As the philosopher J.S. Mill wrote in his classic work *On Liberty*, “Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end.”²² Humanitarianism was conveniently linked to missionary zeal and commerce. Civilization and imposed government would lead both to the saving of souls and to trade.²³

A key issue in colonial policy was whether the responsibility and power to deal with Indigenous peoples should rest with the central or local government. Merivale was clear:

It is a recommendation of the Committee on Aborigines (1837) that their protection should in all cases be withdrawn altogether from the colonial legislature, and entrusted to the central executive. And in this, I think, even the most jealous friends of colonial freedom must acquiesce.²⁴

The committee had said that the protection of Aboriginal peoples was “not a trust which could conveniently be confided to the local legislatures” on the grounds of the obvious conflict between the interests of settlers and their representatives and those of the Indigenous peoples.²⁵ Merivale saw as one of the most useful functions of a distant central authority – counterbalancing to a certain extent its disadvantages – its ability to arbitrate dispassionately between groups having so many mutual subjects of irritation.²⁶

In practice, as we will see repeatedly in this book, the will and power of the central government to protect Indigenous groups was very limited. In 1861, just as colonialism was getting under way in British Columbia, Mill wrote that English settlers in India thought it “monstrous

that any rights of the natives should stand in the way of their smallest pretensions.”²⁷ They, and not the natives, had the ear of the public at home, with predictable results:²⁸

And when the resident English bring the batteries of English political action to bear upon any of the bulwarks erected to protect the natives against their encroachments, the executive, with their real but faint velleities of something better, generally find it safer to their parliamentary intrest, and at any rate less troublesome, to give up the disputed position than to defend it.

The phrase “real but faint velleities” is one to bear in mind as we examine the failure of the central government to protect Indigenous interests in Canada, including those of the Musqueam.

Merivale saw only three alternatives for the ultimate destiny of Indigenous peoples: their extermination; “their civilization, complete or partial, by retaining them as insulated bodies of men, carefully removed, during the civilizing process, from the injury of European contact”; and “their amalgamation with the colonists.”²⁹ By amalgamation, he meant “the union of natives with settlers in the same community, as master and servant, as fellow-labourers, as fellow-citizens, and, if possible, as connected by intermarriage.”³⁰ It was to be a process of assimilation and the Indigenous peoples were to become assimilated or amalgamated with the settler society once they had reached a sufficient level of civilization. He was clear, however, that successful amalgamation required acting on “the broad principle that the native must, for their own protection, be placed in a situation of acknowledged inferiority, and consequently of tutelage ... a state of fictitious equality is far worse for him than one of acknowledged inferiority, with its correlative protection.”³¹ This tutelage would be expressed as a guardian/ward relationship. In order to implement his policy of amalgamation, Merivale saw a need for British functionaries in the colonies who would have higher qualifications than usual: “Such functionaries must be ready, not to perform negative duties only, but to take the initiative –

to act, devise and control. Unless, they are fit to do this, they are absolutely useless.”³² They had to be ambitious “officers of the higher grade and highest importance.”

One of the more thoughtful settlers in British Columbia was Gilbert Sproat, who was very active in colonial and early provincial affairs, including acting as a reserve commissioner allocating reserves in the province.³³ He wrote *Scenes and Studies of Savage Life* in 1868 based on his early experiences in Port Alberni on Vancouver Island. Sickness and death had been caused by introduced diseases, the change of food, “and the despondency and discouragement produced in the minds of the Indians by the presence of a superior race: the latter being the principal cause.”³⁴ The “Indian” had lost his motivation and his old way of life. He was “bewildered and dulled by the new life around him for which he is unfitted.”³⁵ Probably, little could be done to prevent the “seemingly appointed decay” but it might be possible “to benefit isolated bodies of savages by civilized teachings and example.”³⁶ Their hunting and fishing places had been intruded upon, their social customs disregarded, and their freedom curtailed. Admitting the right of settlers to the land in spite of the opposition of the “savages,” it was a reasonable claim – indeed, of simple justice – that “the injury done to the native population, as a whole, should be counterbalanced, not according to the Indians’ poor ideas of gifts of food or blankets, but by a wise and paternal action of the Crown, in some practical way, on their behalf.”³⁷ His suggestion was to place “about five men, carefully chosen in England,” in isolated native villages to teach the “Indians” any useful employments and arts that they were capable of learning, to improve their moral ideas, and to instruct them in Christianity.

The most detailed and well expressed justification of colonialism was probably written in 1922 by Lord Lugard, a leading theorist on, and advocate for, colonialism and a former governor of Hong Kong and Nigeria. In his classic book *The Dual Mandate*, he defended European empires as being in the interests of both the Indigenous peoples *and* the colonial power:

Let it be admitted at the outset that European brains, capital, and energy have not been, and never will be, expended in developing the resources of Africa from motives of pure philanthropy; that Europe is in Africa for the mutual benefit of her own industrial classes, and of the native races in their progress to a higher plane; that the benefit can be made reciprocal, and that it is the aim and desire of civilised administration to fulfil this dual mandate.³⁸

He placed reliance for this approach on the trust mandate system set up by the League of Nations after the First World War, which will be considered in our discussion of the fiduciary relationship. In 1957, another former governor of an African colony, Sir Alan Burns, wrote *In Defence of Colonies*, concluding:

Many years ago Britain undertook the gigantic task of helping the peoples of various under-developed territories to overcome the handicaps imposed on them by nature and environment; to learn the principles of democracy and honest administration; and to qualify themselves for independence. In many parts of the world the task has not yet been completed and it is inconceivable that we should abandon it half-done.³⁹

With the important exception of the reference to independence, these sentiments would have been echoed by most officials in the Canadian Department of Indian Affairs in 1957 – the year in which the Shaughnessy lease was negotiated by the department.

The writer George Orwell, whose views on colonialism changed dramatically during his time as a policeman in Burma, doubted the sincerity of the claim to be helping the Indigenous population. He denounced

the lie that we're here to uplift our poor black brothers instead of to rob them. I suppose it's a natural enough lie. But it corrupts us, it corrupts us in ways you can't imagine. There's an everlasting sense of being a

sneak and a liar that torments us and drives us to justify ourselves night and day. It's at the bottom of half our beastliness to the natives. We Anglo-Indians [the British in India] could be almost bearable if we'd only admit that we're thieves and go on thieving without any humbug.⁴⁰

This was a minority view and it seems most colonial officials, including those at the Department of Indian Affairs in Canada, were sincere in their belief in “the dual mandate” of acting for “the mutual benefit of [the colonial power] and of the native races in their progress to a higher plane.”⁴¹

THE COLONIAL SERVICES

The colonial policy towards Indigenous peoples was implemented mainly by colonial officials, although missionaries were also involved, especially through residential schools. We shall review later the role of Canada's Department of Indian Affairs and, in particular, that of the Indian agent, the field officer who had direct contact with Indigenous peoples such as the Musqueam. The department was part of the broader system of colonial administration of Indigenous peoples and their lands implemented by the British Empire and by other European empires.⁴² Colonial administration was often part of the military administration, as in central Canada until the 1830s, when it became a separate civil administration, as noted below. It may also have been a part of the commercial operations of large trading firms such as the East India Company, the Hudson's Bay Company, and the British South Africa Company. The East India Company recognized the need for professional administrators and established systems to select them through competitive examinations and to train them. It set up a college at Haileybury that became something of a model for future education of colonial administrators in colonial Asia when the India Office took over administration from the company in 1858.⁴³ Members of the Indian Civil Service formed an intellectual elite – the so-called heaven-born – and

were expected to be familiar with the local language, laws, and customs.⁴⁴ In contrast, the rest of the Empire was administered by administrators who glorified the cult of the amateur until reforms were carried out, especially in the 1940s, with regard to the administration of colonies under the Colonial Office.

In her magisterial survey of the British Empire, Jan Morris described administration of the non-Asian colonies known generally as the Colonial Service:

Jobs in Africa and the lesser tropical colonies went by a kind of patronage. The private interview was the chosen method ... There was no training programme – men were expected to learn their trade on the spot: many subtleties of native life and custom escaped this slapdash novitiate, and British colonial officers were frequently ignorant about complexities like customary law and land tenure. As a whole, the Crown Colonies were ruled by willing all-rounders of very varied quality – what ambitious man, in the days before malaria control, would wish to devote a career to Sierra Leone? They were recruited more for character than brain-power: it was said that a candidate with a first-class degree would actually be regarded as suspect.⁴⁵

This prejudice against professionalism was confirmed by that arch-imperialist Alan Burns, who wrote:

Basing my conviction on a long experience in several colonies, I feel certain that a strong character and sound common sense are far more valuable assets to a colonial official (and the Colonial Service) than the most brilliant academic distinctions. Those whom Kipling has called the “brittle intellectuals” too frequently “crack beneath a strain,” such strains as the loneliness of a “bush” station, the irritations of heat and insects, the perversity of the local people who *will* not realise what is best for them, and the temptations of drink and women ... I believe that an officer of high intellectual and academic qualifications might quite easily be a failure in “the bush.”⁴⁶

This opposition to professionalism and the references to “a strong character and sound common sense”⁴⁷ and “the perversity of the local people” should be remembered when we review the selection and training of Indian agents in the Department of Indian Affairs and the events of 1957 that led to the signing of the Shaughnessy lease in 1958.

We have many accounts, real and fictitious, of the lives of colonial field officers, especially from Africa.⁴⁸ What emerges most clearly is the extent of the power wielded over the Indigenous peoples, and often paternalism and the associated belief in the inferiority of those peoples. Lord Lugard alludes to these in his account of the qualities that must be shown:

The white man's prestige must stand high when a few score are responsible for the control and guidance of millions ... There is no room for “mean whites” in tropical Africa. Nor is there room for those who, however high their motives, are content to place themselves on the same level as the uncivilised races. They lower the prestige by which alone the white races can hope to govern and to guide.⁴⁹

One district officer based in Sarawak described the range of his responsibilities in 1936:

The District Officer was in charge of the prisons and had to turn out the prisoners. He was also the magistrate, so that having remanded a chap in prison he then had him come up before him in court and had to decide whether he was guilty or not guilty. He was also responsible for public works, for maintaining such roads as there might be in the district and drains and so forth. And all this quite apart from his main job of generally administering the people in this area – touring around finding out their troubles, resolving their problems, settling their land disputes and collecting the head tax.⁵⁰

In the first half of the twentieth century, with the expansion of the Empire in Africa,⁵¹ Labour governments in Britain, and growing

independence movements around the Empire, the role changed in line with the new policy of preparing the Indigenous peoples for self-government or independence within the Empire/Commonwealth.⁵² In a break with the long-standing policy that colonies had to be self-sufficient, the central government in London passed legislation in the 1940s to make funds available to promote economic development.⁵³ Training courses for colonial administrators and the greater professionalism discussed below sought to equip them for the new challenges. One internal memorandum noted the growing presence of educated people within colonial territories and warned of the danger posed by “the Un-instructed White.”⁵⁴ Paternalism was still present, however, even as it was being denied. In the words of Alan Burns, “the main thing in my opinion is to find out what Colonial peoples want, and if their wants are not too unreasonable to let them have their way ... The time is long past when we can get away with the attitude that ‘Daddy knows best’; and we must remember that children are perverse enough to grow up.”⁵⁵

As noted, the Indian Civil Service was a professional administration from its early days, whereas the Colonial Service lacked professionalism and preferred to stress character and common sense and a jack-of-all-trades approach. This changed after the First World War and was especially notable after the Second World War as a “Modern Colonial Service” was created. An important part of this development was the recruitment of specialists with professional qualifications and experience. In addition to the Colonial Administrative Service, there were no less than nineteen professional services, such as agriculture, education, forestry, police, and public works. One district officer who joined the Colonial Service after the Second World War observed: “Gone were the days when the District Officer could properly be termed the maid-of-all-work: treasurer, magistrate, prosecutor and defence counsel, road-builder and tax collector all rolled into one. The post-war District Officer was likely to be the leader of a District Team of professionals.”⁵⁶

The other major developments in making the Colonial Service more professional were recruitment of better-educated officers and

better training rather than learning on the job and relying on character and common sense. At last, steps were taken to bring the Colonial Service in line with the Indian Civil Service. Indeed, applicants who might have applied for the latter began applying to the Colonial Service as the inevitability of early Indian independence became obvious. In his history of district officers in Africa, Anthony Kirk-Greene summarizes the change in their educational background and expected sympathy towards the new goal of preparing for independence: "If 'fire in their bellies' had been a feature, at times almost a qualification of the founding [district officers], from 1930 intellectual competence and personal empathy were prize attributes in the final model of the [district officer] in Africa."⁵⁷ Applicants to the Colonial Service were expected to be university graduates, although exceptions were made for ex-servicemen who could show similar intellectual ability.⁵⁸ A competitive selection process replaced the earlier system of patronage.

Key to the new professionalism was the development of training programs starting in 1909 for district officer cadets destined for Africa, which were later extended to other colonies.⁵⁹ A major advance in training resulted after 1946 in partial implementation of recommendations made by a committee of colonial officials and academics chaired by the Duke of Devonshire and generally referred to as the Devonshire scheme.⁶⁰ Successful applicants had to attend and pass a year's post-graduate course at Oxford, Cambridge, or the London School of Economics covering a range of subjects including local languages, economics, law, anthropology, engineering, and geography. Also, mid-career officers could attend university on a year's sabbatical for advanced study. Some of the old-style colonial administrators were not impressed and thought the new training schemes were a waste of time and money: "There is a danger that the courses will produce a number of young men, full of zeal and theory, with more than the usual arrogance of youth, impatient of the slowness of Africans in responding to schemes devised for their benefit, and trying to reach perfection in a few weeks."⁶¹ The professionalism of the Modern Colonial Service provides a good comparison for the state of the Canadian Department

of Indian Affairs in 1958 when the Shaughnessy lease was signed, as will be discussed below.

The basic methods used by colonial administrators to rule Indigenous peoples can be divided into three very broad forms: direct rule, indirect rule, and local self-government.⁶² Direct rule was administration directly by the colonial authorities. It was used in different colonies at different times. “British India,” comprising nearly two-thirds of the country, was under direct rule, while the balance made up of princely states was under indirect rule. Malaya and most of the African colonies were under indirect rule, meaning that British control would be exercised through local bodies such as sultans and chiefs, often using tribal courts to administer what were described as traditional laws. The role of the district officer was supposed to be that of an adviser. Indirect administration was often portrayed as a step towards, or a form of, self-government. It is mainly associated with the activities of Lord Lugard in Northern Nigeria and was described by his biographer, Margery Perham, as “the most comprehensive, coherent and renowned system of administration in our colonial history.”⁶³ In practice, as noted by J.S. Furnivall in 1948, “there is no sharp line between direct and indirect rule, and we find the same power adopting different systems in the same place at different times, and in different places at the same time.”⁶⁴ In his view, the choice was often governed by convenience rather than by principle.⁶⁵ Even where indirect rule applied in theory, colonial administrators often could not avoid the temptation to intervene in administration,⁶⁶ advice had to be asked and acted upon in most matters,⁶⁷ and supposedly customary Indigenous law was, in part, a creation of colonial institutions.⁶⁸

Self-government was considered a step towards ultimate independence within the Empire and was prominent as part of the reforms to colonial policy in the final decades of Empire.⁶⁹ At the time, it was often predicted to take some time. Alan Burns confidently told a group of district officers in 1947: “We are there to teach and to help, not to govern by the strong hand ... Our main job is to teach the Africans and other Colonials to take our places in the administration of the

Colonies. We must try and teach them to do the work that we are doing ourselves, in order that they may replace us. It will be a long time before they are as efficient as we are.”⁷⁰ He assured them: “Believe me, the Colonial Civil Service, with all its imperfections, will be needed for many years to come.”⁷¹ Giving the Reid Lecture to Acadia University in 1959, one historian of the Empire denied that the British were “empire-builders gone out of business”: “Is the British Empire liquidated? No, indeed!”⁷² Another historian of the Empire later referred to the 1950s as “the grand climacteric for the imperial idea,” although he did not know it when he finished his influential book on the imperial idea in 1957.⁷³ In fact, the end of the Empire came sooner than most expected, with the full independence of major colonies starting with India in 1947, and a second and decisive wave of decolonization between 1957 and 1964, including the Gold Coast (Ghana) and Malaya in 1957.⁷⁴

BRITISH COLONIAL ADMINISTRATION AND THEORY IN 1954

The changes that took place after the end of the Second World War were reflected in what one authority on colonial administration describes as “a sudden and silent revolution.”⁷⁵ On the night of 17 June 1954, the Colonial Service, which had existed since 1837, was replaced by Her Majesty’s Overseas Civil Service. Although the full implications would take some years to work out, especially as different colonies gained independence at different times, the change symbolized the end of British colonial administration. Members of the former Colonial Service were encouraged by generous financial arrangements to take employment with the governments of the territories involved. They became more like civil servants in London than the archetypal colonial district officers. The British end of administration would become one in which “there would no longer be any regular establishment, only a series of contract or loan appointments.”⁷⁶ Colonial theory towards Indigenous peoples had also changed: no longer was the colonial

mission expressed as one of protection and civilization as with Merivale in 1839, but rather one of economic development and preparation for independence.⁷⁷

CANADA AND COLONIALISM

Many Canadians speak of colonialism as something that was done to Canadians by Britain (perceiving themselves as the colonized), which ended at some vague time in the past. In fact, of course, the non-Indigenous residents of Canada of whatever ancestry are the heirs of the British Empire and the early predominantly British settlers who dispossessed the Indigenous peoples. Political scientist Alan Cairns noted that “our domestic history is intertwined with a global history,”⁷⁸ and Cole Harris that “most British Columbians today ... are the heirs of and continuing participants in a pervasive, ongoing colonialism.”⁷⁹

Canada is an example of settler colonialism in which the colonizers not only hold the power but also become a majority of the population and intend to change and remain in the colony forever. In the words of Lorenzo Veracini, “settlers exchange countries but also change countries; they literally transform them, aiming for greater productivity and recognizable patterns of land use.”⁸⁰ To do this, they imported settlers, crops, domesticated animals, laws, technology, and ways of thinking from Britain.⁸¹ This was true for Canada. With the exception of settlers, this was also true for non-settler colonies such as those in Asia and Africa. Studies of the history and law of Indigenous peoples in Canada make very little mention of such colonies and their common history and law as part of the British Empire.⁸² Indeed, a former prime minister of Canada even went so far as to claim in 2009 that “we have ... no history of colonialism.”⁸³

On the contrary, Canada was very much a part of the British Empire and, for most of its history, most Canadians (legally British subjects as Canadian citizenship was not separated before 1947) shared a common view of the benefits of colonialism with the colonial officials and businessmen in Malaya or Nigeria. They were enthusiastic imperialists

and proud of their British heritage.⁸⁴ Kipling celebrated Canada's assertion of quasi-independence in his 1897 poem *Our Lady of the Snow*: "Daughter am I in my mother's house / But mistress in my own." However, Canada's inclusion as a senior member of the imperial family was never in doubt. It was included as one of Kipling's "*The Native-Born*" (1895) that called "old England 'home.'" About four million British emigrated to British North America between 1815 and 1915 (about one-fifth of total emigration).⁸⁵ Between 1948 and 1957, over four hundred thousand emigrated from Britain to Canada, and people of British and Irish ancestry made up 60 percent of the Canadian population in 1871, 50 percent in 1941, and 44 percent in 1961.⁸⁶ They saw themselves as members of the British Empire and would have agreed with Stephen Leacock, a prominent political scientist, that "our Empire not only contains in its destiny the chief hope for universal peace, but the chief opportunity towards that abiding plenty and prosperity on which alone universal peace can permanently rest."⁸⁷ In the words of John Darwin, together with Australians, New Zealanders, and the English in South Africa, they viewed "empire as a shared enterprise, a white ethnic commonwealth" and their societies as "new Britains."⁸⁸ Canada was an important part of the Empire that had "dominion over palm and pine" and "lesser breeds."⁸⁹ Canadian law and policy reflected that of the Empire, including with respect to Indigenous peoples. Canadians served as colonial administrators in other parts of the Empire, especially after a program was introduced in 1923 to encourage recruitment from the Dominion.⁹⁰

As noted by Phillip Buckner, Canadians "clearly supported the imperial expansion across the globe. They were proud to see large parts of the map of the world painted red."⁹¹ He details the active role played by Canadians throughout the Empire and argues that it is "patently absurd" to see Canadians as part of the colonized rather than the colonizers – a self-evident proposition but which, for clarity of debate over the numerous current misleading references to "decolonization" and "postcolonialism," needs to be stated. In his words:

Canadian nationalists ... prefer that Canadians be thought of as part of the colonized rather than as part of the colonizers. In fact, as every member of a First Nation is only too aware [this approach is] patently absurd. True decolonization has not and never will take place in Canada, any more than the United States and it is profoundly ahistorical to pretend that Canadians were passive rather than active imperialists. Indeed, Canadians were late converts to the notion of turning the “British” Commonwealth into a multinational Commonwealth. Canada did not endorse the grant of Dominion status to India until after World War Two and then only grudgingly. It did not speak out against South Africa until the 1960s.⁹²

An understanding of the imperialist mentality of Canadians during the 1950s is important to a proper understanding of the facts of the *Guerin* case and why the Musqueam are still suffering from the effects of the Shaughnessy lease.

Significantly for the history of colonial or “Indian” administration in Canada, the most senior official in the Department of Indian Affairs in the early part of the twentieth century was Duncan Campbell Scott. A firm believer in forced assimilation of Indigenous peoples, he was also a firm believer in the Empire, imperial values, and imperial federalism. A prominent poet, he extolled the exploits of Empire builders in his poems. As he saw it, the “manifest destiny of Canada is to be one of the greatest powers in the Federated Empire of England.”⁹³ In this vision of an imperial federation, he echoed the views of John Seeley, an influential Cambridge professor,⁹⁴ and of Viscount Milner, the intellectual and political leader of British imperialism at its height around the end of the nineteenth century.⁹⁵ Milner made a distinction between the Dominions, “new nations sprung from [Great Britain’s] loins” such as Canada and Australia with sizeable British settler populations, and “the Dependent Empire” with over four hundred million non-British people to whom Britain had striven to extend the blessings of civilized government.⁹⁶ No account was taken of the existence of the Indigenous

peoples in the Dominions. Imperial federation had other adherents in Canada who sought closer union between Britain and the Dominions, including representation in the imperial Parliament.⁹⁷

Alan Cairns wrote a penetrating analysis comparing and contrasting the position of Indigenous peoples in former European empires (the Third World) and that of Indigenous peoples in settler colonies (the Fourth World) and especially Canada. In summary:

Although Third and Fourth World peoples were both subject to the hierarchy of imperialism, the latter were never treated as peoples/nations on the road to independence. In Canada, Indian peoples were placed outside the standard working of the majority's constitutional order, and governed in geographically discrete communities by superintendents [Indian agents] who were the domestic counterparts of district officers in British colonial sub-Saharan Africa. The system of Indian reserves could be thought of as transitional appendages to the mainstream constitutional order, while the policy of assimilation – for which church-run residential schools were key instruments – eroded cultural diversity. In the context of Canadian domestic imperialism, therefore, the governing logic of the state was that indigenous difference was transitional: to be overcome by state pressure and inducements.⁹⁸

The policy of the Canadian government was that “domestic empire and internal colonialism were to end by Indians, as individuals, entering the majority society and its unchanged constitutional order on the majority's terms.”⁹⁹ Independence has never been an option for Canada's Indigenous peoples, who are a small (approximately 5 percent) minority: “In the Third World, the imperial power formally departs; in the Fourth World what was the imperial majority remains behind, perhaps no longer imperial, but still the majority.”¹⁰⁰ Cairns notes: “The global overseas empires of European powers in Africa, Asia, and elsewhere helped sustain the historic Canadian Indian policy of wardship/assimilation. The pervasive set of assumptions that undergirded the overseas empire made domestic Indian policy in the imperial era appear to be part of the natural order.”¹⁰¹

The key events of the *Guerin* case took place in the late 1950s. This was a time of change in colonial history worldwide as the “winds of change” blew around the globe. Independence movements were challenging European colonial systems. In 1957, the year when the terms of the Shaughnessy lease were determined, Albert Memmi wrote his classic and searing analysis of the relationship between the colonizer and the colonized, explaining the complex motivations and contradictions and the impacts of colonialism on both.¹⁰² One issue that he described has direct application to the facts of *Guerin*: the inadequacy of colonial administrators who were often unqualified for similar positions in non-colonial situations. Another relevant factor was a paternalism and a corresponding belief that the colonized were incapable of managing their own affairs.

Changes in Canada were slow to come. The identification of Canada with the British Empire and colonial ideology continued well into the 1950s. The country had a “long-standing self-image of itself as a settler dominion, an empire of the north, a British colony that marched progressively and valiantly to its particular version of nationhood.”¹⁰³ As noted by historian Bryan Palmer, “however much the writing was on the crumbling wall of an antiquated, imperialistic understanding of nationhood, the values and attachments of and to this particular identity were still vigorously in evidence throughout Canada ... the older imperialism was often on display.”¹⁰⁴ This was literally the case when the equestrian Durbar statue of Edward VII was removed from India following its independence and re-erected by subscription in Queen’s Park, Toronto.¹⁰⁵ José E. Igartua’s study of newspapers, parliamentary speeches, history textbooks, and public opinion polls shows how Canadian identity remained mainly British into the 1950s.¹⁰⁶ The *Citizenship Act* of 1946 specifically declared that Canadians remained British subjects and continued the preferred position of all British subjects in matters like elections. Textbooks stressed that Canada’s history was part of that of the Empire and that pupils had responsibilities to both the Dominion and the Empire.¹⁰⁷ Historian Arthur Lower wrote in 1958 that “all little Canadian boys and girls have been subjected from the day on which they start school to an unending steeping in

the liquid of imperialism.”¹⁰⁸ In 1956, the *Toronto Daily Star* pointed out that “alone among the Commonwealth members we have no flag, no national anthem. We were the last to accept a native son as governor-general, and there are still Canadians who would like to see a Britisher as our chief-of-state. We must be the only country in the world that denied itself the right to amend its own constitution.”¹⁰⁹ The Suez Crisis of 1956 was an opportunity for imperialist jingoism in some Canadian newspapers, which enthusiastically supported Britain’s invasion of Egypt.¹¹⁰ John Diefenbaker’s success in the federal election of 1957 “was at least partly due to a desire by many English Canadians to reaffirm the importance of the British connection.”¹¹¹ It was not until 1964 that the great flag debate “marked the last hurrah for English-Canadian believers in a British Canada.”¹¹² The sense of Britishness was especially prevalent in British Columbia, as indicated by the histories of the province and its majority British population.¹¹³

Colonial attitudes towards Indigenous peoples were very evident into the 1950s both internationally and in Canada.¹¹⁴ Igartua quotes many examples from Canada. One textbook for grades 7 and 8 used in the 1950s said: “The greatest gift we owe to the red man is our broad land which they allowed us to take over without making any great general war against us ... because of being uncivilized, our Indians could not make use of Canada’s good farm land, nor of the other rich resources that nature has given her. To use these gifts, Canada needed civilized people.”¹¹⁵ Very relevant to our consideration of the *Guerin* case dating back to events that took place in Vancouver in 1957 was the continuing attachment to the values of colonialism evident in the celebrations of the 1958 centennial of the creation of the province. This is revealed in a history of British Columbia written for the celebrations by Margaret Ormsby, the first woman professor of history at the University of British Columbia.¹¹⁶ Her conclusion gives a sense of her views: “Yet never, unless the old British stock became diluted by over-whelming numbers of ‘aliens,’ would British Columbians forget that they were ‘British’ British Columbians.”¹¹⁷ She barely mentions Indigenous peoples in her history, and the few references are in the context of colonial settlement

and are negative: they were “hostile,”¹¹⁸ “marauders,”¹¹⁹ or “depraved.”¹²⁰ Nothing is said about the pre-contact history or the dispossession of Indigenous peoples, and only cursory references are made to the establishment of reserves in the province. It is as though the province had been empty of people at the time of contact – a *terra nullius* – except that, somehow, Indians appeared from time to time, as with the Chicotin War, to disrupt the smooth path of British settlement. The invisibility of Indigenous peoples is evident in many other publications of the time. For example, there are only a couple of passing references in *The Culture of Contemporary Canada*, published in 1957.¹²¹

Mia Reimers’s detailed account of the 1958 celebrations¹²² concludes that “the role of First Nations was virtually overlooked in favour of a whitewashed western and frontier history.”¹²³ They were merely background to tell the story of explorers and pioneers and colonial progress and civilization. During the Queen’s extended visit to Canada the following year, it was noted by the press that the purpose of having Native people on the program was to add colour to the local show. No serious consideration of their concerns was allowed. For example, in Stoney Creek, Ontario, a delegation who wanted to express their views was not allowed to see her.¹²⁴ The prevailing understanding of settlement was that there had been “a peaceful penetration,” an occupation without the violence that had taken place elsewhere.¹²⁵ This was reflected in histories as “the benevolent conquest myth.”¹²⁶ Theories of biological racism resulting in negative views of Indigenous peoples were widespread.¹²⁷ In a speech by Prime Minister Pierre Trudeau in 1969, “Indians” were still seen as a “problem.”¹²⁸

INDIAN POLICY IN CANADA TO THE 1950s

We saw earlier that colonial policy gave responsibility over Indigenous peoples to the central rather than the local government in order to protect them from the settlers represented by the local government. In the case of the colonies of Vancouver Island and British Columbia, this meant the Colonial Office in London rather than the local legislatures.

Once the combined colony of British Columbia entered Confederation in 1871, it meant the federal government. In practice, both central authorities abandoned their responsibility and gave in to the demands of the local government and local residents. This is demonstrated repeatedly in the history of reserve allocation as documented by Cole Harris in his classic study of this topic.¹²⁹ In his words, “the Colonial Office stood aside and the formulation of Native land policy quickly passed into the hands of local officials, all of whom broadly represented the aspirations and values of an incipient settler society.”¹³⁰ After Confederation, the federal government was equally ineffective in protecting Indigenous peoples and their assets, including their reserve lands, from the demands of local settlers.

According to Noel Dyck, “the history of Indian administration is replete with examples of Departmental personnel being obliged to take account of influential non-Indians’ determination to have the government facilitate their interests with respect to Indian lands and trust funds, not to speak of public funds spent on Indians’ behalf.”¹³¹ Indian agents put pressure on Indians to secure a surrender of reserve lands and, according to Brian Titley, this happened frequently.¹³² In 1906, Minister of the Interior Frank Oliver was under pressure from Opposition Leader Robert Borden, who wanted to make large “unused” reserves available for development. Oliver replied that, although Indian rights ought to be protected, they should not be allowed to interfere with those of whites – “and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for.” This was, in effect, a repudiation of any notion of protection or a trust. He said every effort was being made to obtain the surrender of “surplus” Indian land. Shortly thereafter, changes were made to the *Indian Act* to make it easier to get surrenders.¹³³ Further changes enabled the expropriation of reserve land for public purposes without surrender, and the removal of Indians from reserves within towns.¹³⁴ After the First World War, there were demands for reserve land to be transferred to veterans and the Department of Indian Affairs cooperated most of the time.¹³⁵

Early Indian policy in what is now central Canada was based upon military alliances with Indigenous Nations to defend British interests against France and then the United States, but this changed in 1830. The Indian department had formed part of the responsibilities of the British military. To win and keep the support of Indigenous Nations, it was necessary to assure them that their land was safe from the land hunger of local settlers. In the early 1800s, the threat from the United States disappeared and, in 1828, the Colonial Office began questioning the need for an Indian department. The response of the Indian department took the form of a report, the Darling Report, which promoted what became known as the civilization and assimilation program. It recommended a policy based on establishing reserves where Indians could be educated, converted to Christianity, and transformed into farmers.¹³⁶ The plan was approved by the Colonial Secretary in 1830.

A significant change had been made in Indian policy: Indians were no longer to be treated as independent warriors but as wards of the state. The goal of Indian policy was to be civilization and assimilation. The new policy was reflected in legislation such as the *Gradual Civilization Act* passed in 1857. The implementation of the policy was, in practice, left to missionaries and residential schools rather than government officials. The main task of the officials was to keep order on the reserves through Indian agents. By isolating Indigenous peoples, reserves were inconsistent with the stated objective of civilization/assimilation but they were seen by Indian Affairs officials as places of protection against the mainstream society. Over time, officials recognized the inconsistency between “protection” and “advancement.” In 1946, the second most important official in the department wrote a complacent article that defended the department’s record but acknowledged that “perhaps the time has come when the protective reins are becoming a curb on progress and should be loosened.”¹³⁷

The essence of assimilation can be seen from the following quotations. In 1887, Prime Minister Sir John A. Macdonald said: “The great aim of our civilization has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the

Dominion, as speedily as they are fit for the change.”¹³⁸ In 1920, the deputy superintendent of Indian Affairs, Duncan Campbell Scott, told a parliamentary committee: “I want to get rid of the Indian problem ... Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question.”¹³⁹ This philosophy of forced assimilation (or “cultural genocide,” to quote a former chief justice of Canada¹⁴⁰) was accompanied by a belief that Indigenous people would largely die out as separate peoples. In the words of one of Canada’s leading anthropologists, writing of West Coast Indigenous peoples in 1935: “Socially, they are outcasts, economically they are inefficient and an encumbrance. Their old world has fallen into ruins, and helpless in the face of a catastrophe they cannot understand, they vainly seek refuge in its shattered foundations. The end of this century, it seems safe to predict will see very few survivors.”¹⁴¹ The assimilation policy continued despite changes to the *Indian Act* in 1951 that corrected some of its most objectionable features.

In 1867, upon Confederation, the new federal government assumed responsibility for Indian affairs. Under the terms of Canadian Confederation, “Indians, and Lands reserved for the Indians” are within federal and not provincial jurisdiction.¹⁴² The federal government soon passed legislation to consolidate the civilization and assimilation policy. The first act with the title of *Indian Act* was passed in 1876, which, as consolidated in 1880 and subsequently amended, remained in place until 1951. At the time of Confederation, Indian Affairs was the responsibility of the Secretary of State; in 1873, it became a branch of the Department of Interior; in 1880, it was made a separate Department of Indian Affairs; in 1936, it became a branch of the Department of Mines and Resources; and in 1950, it formed part of the Department of Citizenship and Immigration.

From 1830 to the Second World War, “Indian administration remained a backwater government operation that received only sporadic public attention or political scrutiny ... The nineteenth century civilization mentality of policy-makers persisted: paternalism, hegemony, and wardship effectively limited policy options and administrative

innovation.”¹⁴³ As acknowledged by the *Hawthorn Report* of 1966, which was commissioned by the department, Indian administration was “a version of colonialism,” and the Indian Affairs Branch was, for all practical purposes, “a miniature government, rather than an ordinary civil service branch.” It had a reputation for being “particularly authoritarian” and having an “inward looking parochialism” that “laid great stress on field experience for knowing the Indian.”¹⁴⁴

The postwar years saw some efforts to modernize Indian policy and administration in Canada, but nothing like the changes that we reviewed above resulting in a “modern colonial administration” for the British Empire/Commonwealth under the rule of the Colonial Office. These efforts are described in detail by John Leslie in his PhD thesis covering Indian policy from 1943 to 1963.¹⁴⁵ From 1946 to 1948, a special parliamentary joint committee met to consider changes to the *Indian Act*. Leslie notes: “One salient fact quickly emerged: the Indian Affairs Branch possessed neither the staff, financial means, nor expertise to fulfill its mandate of ameliorating Indian conditions and promoting assimilation ... Field administration was a shambles and local record keeping lax.”¹⁴⁶ One First Nation chief bravely criticized the poor calibre of Indian agents.¹⁴⁷ The committee made a number of recommendations, including hiring more Indian agents. In 1947, the department finally issued a field manual for agents and made efforts to hire more agents.

A new *Indian Act* was passed in 1951 but, as also noted by Leslie, “the act once again reflected the philosophical assumptions, values, and paternalistic administrative practices that had guided Indian policy since the nineteenth century.”¹⁴⁸ The Department of Indian Affairs still had control from “womb to tomb” over the lives of Indians and their reserve lands. “In terms of administrative practice much remained as before.”¹⁴⁹ As observed by Dyck, “while some of the most obviously obnoxious features of this system were amended after the war, what remained were many of the lingering assumptions traditionally purveyed by the Department concerning the incapacities and requirements of Indians. What also remained were reserve communities which, from

their very inception, had been prevented from determining their own destiny.”¹⁵⁰

The *Indian Act* of 1951 led to initial optimism but it was not to last. More funding was made available for administration. “Indians” were eligible to receive pension and welfare benefits available to Canadian citizens. Amendments were made in 1956 to the *Citizenship Act* to remove any doubt that Indian people were citizens of Canada. A study was commissioned in 1954 from Harry Hawthorn, an anthropologist from the University of British Columbia, and his colleagues on Indian administration in British Columbia and the condition of BC Indians. Tensions arose thereafter, however. Leslie summarizes events during the latter part of the 1950s: “Ministerial speeches hinting that [termination of Indian status] was a hidden policy objective; band membership disputes arising from a provision in the new *Indian Act*; and expropriation of Mohawk reserves to make way for the St. Lawrence Seaway drew unfavourable public attention to authoritarian Indian administration.”¹⁵¹

Looking back over the period from 1830 to 1960, the fundamental objective of Indian policy did not change: Indians were to be educated on Western civilization to assimilate into mainstream Canada and, until they were considered ready, they were to be protected by isolation on reserves, which were to be managed on their behalf by the Department of Indian Affairs, although subject to the demands for reserve lands from the settler society. According to Leslie, “despite attempts at camouflage by non-Native policy-makers, the basic tenets of post-war Indian policy maintained an eerie continuity with the nineteenth century, particularly in terms of philosophy, policy objectives, and administrative practices.”¹⁵² Instead of “assimilation” and “civilization,” “integration” and “full citizenship” were used, but the fundamentals had not changed.

We are not directly concerned with post-1960 changes to Indian administration as the events that led to the *Guerin* case took place in 1957 and 1958.¹⁵³ We can note that the 1960s did lead to some improved housing and reserve infrastructure as the welfare state approach

was applied. The right to vote in federal elections was extended to Indians in 1960. Indigenous leaders began acquiring more power as they organized in opposition to the federal White Paper of 1969 that sought to terminate the special status of Indian people. First Nations have acquired delegated powers over most aspects of administration of membership and assets. Arguably, Canada has finally adopted the system of indirect administration through Indigenous governments so enthusiastically promoted in 1922 by Lord Lugard in *The Dual Mandate*.

The Hawthorn, Belshaw, and Jamieson report on *The Indians of British Columbia* is an important document in our understanding of the background to the facts of the *Guerin* case.¹⁵⁴ It was completed in late 1955 and submitted to the minister of citizenship and immigration, then responsible for the Department of Indian Affairs. We may note in passing the irony of placing Canada's Indigenous peoples under the minister of immigration but it reflects the view that Indigenous peoples, like immigrants, were not true Canadians and needed to be made so. Leslie describes the scope of the report: "The Hawthorn team's research was a monumental undertaking comprising 34 chapters and 1024 pages of data dealing with all aspects of B.C. Indian community life: history; demographics; ethnic relations; natural resources; occupations; fishing, lumbering and agricultural economies; capital and credit; crime and punishment; liquor, housing; social welfare; band council government; family life; education; and government administration."¹⁵⁵ We will note below some key observations and recommendations from the report on the administration of Indian affairs. Before doing so, it should be pointed out that the report was commissioned by the department and the authors were clearly sensitive to the need to take a diplomatic approach towards their clients. However, it was still received cautiously by the department, which resisted publication. It did not lead to any immediate changes.¹⁵⁶ For our purposes, its chief value is the light it casts on Indian administration in British Columbia at the time the Shaughnessy lease was signed. Although not published until 1958, internal copies were circulated for review and comment and it would have been known to those officials involved in the events leading to the lease.¹⁵⁷

The Hawthorn, Belshaw, and Jamieson report was critical of the policy of direct administration that was “by far the most common in the Province” and of the associated paternalism. Direct administration did nothing to develop initiative and responsibility. Local leadership should be not only recognized but brought into being where it was lacking.¹⁵⁸ The report described the meeting procedures of band councils, noting the limited facilities and the fact that meetings were usually convened by the Indian agent and in his presence. He prepared the agenda and the minutes. The Indian agent did not often approach councils to obtain views on matters of policy.¹⁵⁹ In a passage that has direct implications for the events that led to the Shaughnessy lease and the “manipulation” of the Musqueam reserve, the report declares:

We have been astonished to find that ... all business of a financial kind is transacted through the superintendent’s office, and that officials of the band council seldom come face to face with representatives of the groups with whom they have business. This is one of the most revealing lacks in the administration of Indian Affairs, since it documents with clarity our contention that the focus of administrative action is not the education of the Indian, except in a narrow formal sense, but the manipulation of his property.¹⁶⁰

Also, “on every major issue, it is the superintendent and his staff who obtain the data, who sign the contracts, who see to it that the band makes no mistakes.”¹⁶¹

The report made unfavourable comparisons between Indian administration in British Columbia and colonial administration elsewhere. In recommending that a band council’s decisions should be acceptable unless on review the minister found reason to object to them, the report added that “this last principle is well established in British colonial policy ... in which a native local authority usually considers its by-laws valid unless specific review action is taken against them. We believe that the Indians of British Columbia should have no reason to consider themselves behind-hand in this regard.”¹⁶² The policy of direct rule

followed in British Columbia, rather than the indirect rule that was applicable, as we have seen, in Africa and parts of Asia for many decades, was inefficient:

It is also true that in many parts of the world, such as Africa and India, controlling administrative staffs no larger and often smaller than those in the British Columbia agencies, have carried out more positive and more educative policies for population units that are as great as, and sometimes much larger, than the Indian population of all the agencies in British Columbia, combined. They have been able to do this by delegating responsibility to the local population.¹⁶³

The authors recorded their impression “that the superintendent, like the old-style colonial administrator, is required to know too much about too much.”¹⁶⁴

Echoing the general complaint made decades earlier about colonial administrators in the British Empire, they described the Indian agent as “a Jack-of-all-trades who gains his knowledge from day-to-day experience ... In view of the very special tasks demanded of it, the Indian Affairs Branch depends too much on general experience and too little on training to develop the necessary qualities in its officers.”¹⁶⁵ The report concluded with recommendations for training based on “the experience of service training which has been developed in other countries (particularly Britain and Australia) to meet similar problems.”¹⁶⁶ Specifically, it recommended training based on the Devonshire Courses that, as we have seen, were introduced for the British Colonial Service in 1946.

THE INDIAN AGENT

It was the Indian agent (sometimes called the Indian superintendent) who was the point of contact for residents of the reserve.¹⁶⁷ As Jarvis Brownlie noted in her study of Indian agents in Ontario in the 1930s, “all contact with Indian Affairs was to pass through the agent and he

alone would take care of any issue that arose on the reserve ... The effect of this practice was to entrench Indian agents as power brokers between the department and its 'wards.'¹⁶⁸ They were not simply passive instruments of central power but could play their own considerable part.¹⁶⁹

The Indian agent had extensive power over the lives and property of band members, whose independence was correspondingly diminished. That power came formally from the *Indian Act*, which is a federal statute. "In matters of schooling, management of band monies, reserve lands, wills and estates, local by-laws, community improvements, matters of health and welfare, the Department and especially the Superintendent, were the guiding and controlling powers."¹⁷⁰ Underlying this bureaucratic structure and regulation was the belief that Indigenous people were incapable of managing their own affairs. They therefore had to be subjected to what was essentially a colonial system of government, and reserves became "a series of internal colonies."¹⁷¹ As Rolf Knight observes, the department was "cast in a strongly colonial mould."¹⁷² The Indian agent was, in effect, the Canadian form of the archetypal district officer who ruled Indigenous peoples throughout the British Empire prior to the formation of the Modern Colonial Service following the Second World War. Having set up the system, however, the federal government failed to adequately fund or staff it. Witnesses from the department complained at the *Guerin* trial of insufficient funds to discharge their responsibilities, and officials were often insufficiently qualified and trained.

One role played by the Indian agent that is especially relevant to our consideration of the *Guerin* case was that of intermediary between various types of Indian and non-Indian interests. As pointed out by Vic Satzewich and Linda Mahood, "the nature of 'white' interests revolved mainly around gaining access to Indian land and other natural resources, labour power and souls. These interests were articulated and pursued in a variety of ways and depended on the nature of the communities Superintendents lived and worked in."¹⁷³ Brownlie notes that "leasing lands for various purposes tended to be the prerogative of the department. Typically, department officials insisted on negotiating

contracts for leases, timber, permits, woodcutting contracts and other such matters, rather than letting First Nations people handle these themselves.”¹⁷⁴ An example from the Musqueam was the role of the Indian agent in negotiating leases and the sale of timber from the reserve. The intermediary role even went so far that local tradesmen would send their bills to the department for payment on behalf of band members from band funds.¹⁷⁵ As discussed above, Indian agents and the department often put the interests of non-Indians before those of their “wards.”

Indian agents also had a role in the Indigenous community that went beyond their formal powers. Kew states:

Musqueam people, as did all registered Indians in some degree, came to depend upon the Superintendent for [services under the *Indian Act*] and this dependence extended beyond the sphere of normal business matters and into the inter-personal and even domestic affairs. Complaints about misbehaviour of neighbours’ children, visitors who had overstayed their welcome, family discord and so on, were at times taken to the Superintendent. He in turn sometimes took action – issuing orders for non-members to leave the reserve, delivering horticultural lectures or whatever the case and circumstances required. The Indian Superintendent was, within the social system of the village, a figure of authority, a step above that of chief and council.¹⁷⁶

It is little wonder that some Indian agents let this power go to their heads or became paternalistic. One of them is quoted as writing that “behind all the seeming indifference of the Indians for the officials of the Department, I am glad to say that in their heart, they know the Department is watching with a fatherly eye to their care and protection.”¹⁷⁷

Another wrote in 1935 of his experiences using the classic language of colonial biological racism that might have come straight out of Joseph Conrad’s *Heart of Darkness*, complete with reference to Kipling’s White Man’s Burden:

Possibly another reason may be given why the Indians are increasing, and why their physique is improving, but the reason does not reflect creditably on the white people. It is owing to the infusion of white blood that these results are occurring. A very large percentage of the Indians to-day are not of pure Indian blood, but have a large admixture of white blood, and, as one can imagine, it is not the better class of white men who have thus degraded themselves by intermingling with the Indian women, so that the result morally is not so great as the result physically. However, it will hasten the time when the Indians as such will be no more, but will be absorbed into the white race, and will help to carry the burden that so far has been borne by the white man for his benefit.¹⁷⁸

In his view, the question of “Indian title” was of recent origin and “originally was not brought up by the Indians themselves, but by the white people who expected to gain financially or achieve notoriety, and the feelings of the Indians were stirred up until they fancied that the Government of British Columbia had stolen their lands, their rights, and their privileges ... selfishness was at the bottom of the whole movement.”¹⁷⁹ One power that he had as an Indian agent was that of a magistrate, and he used this power to enforce legislation banning the potlatch.¹⁸⁰

Sometimes Indian agents went beyond paternalism and became petty dictators, especially if they were opposed. Brownlie calls the whole system “a government-sponsored tyranny” and “a primary source of oppression for aboriginal people.”¹⁸¹ She explains that “agents had many ways to control band councils if they so wished – by deposing individual members, by delaying relief payments, by refusing loan requests, and so on. The agent’s range of powers enabled him to exact petty sorts of revenge on those who crossed him.”¹⁸² Dyck observes: “The powers held by an agent made him a formidable opponent: direct and unambiguous opposition by reserve residents could trigger unfavourable forms of retaliation.”¹⁸³ At Musqueam, as on other reserves, it made sense to be on good terms with the Indian agent.¹⁸⁴

Administration of Indian affairs became a goal in itself, and the primary goal of preparing “Indians” to be assimilated was overlooked. There was a failure to develop specific assimilation policies, especially after the retirement of Duncan Campbell Scott in 1932. It was left to the schools to do whatever was necessary. Brownlie discusses this issue in some detail.¹⁸⁵ She concludes: “Ultimately, what becomes clear is that many officials seemed to have abandoned the hope of achieving assimilation in the near future, although they still had to pay lip service to the policy.”¹⁸⁶ There was, of course, a fundamental conflict between the interests of Indian agents and other department officials preparing Indians for assimilation while also preserving their own jobs. This conflict also existed for officials in the Colonial Service as they prepared Indigenous peoples for independence, but with the difference that independence became inevitable as the Indigenous peoples demanded it. In contrast, the Indigenous peoples of Canada did not, generally speaking, support the policy of assimilation and had no prospect of independence.

Indian agents often lacked the qualifications and experience required for the proper exercise of such extensive powers. This lack of qualifications was recognized by Alan Fry in his depressing semi-autobiographical novel about an Indian agent based on his own experiences in British Columbia in the 1960s. The interview process for employment did not require much by way of experience: “He had expected more penetration into what was after all a fearfully limited experience of the people themselves for someone now offering to make a life’s work of solving their problems, but his brief association with a few individuals seemed in some ways to be sufficient.”¹⁸⁷ Once employed, “he did worry at times about the extent to which he was making decisions in areas where more normally someone with professional qualifications ought to have been in charge.” The professional people at regional office “were few in number and spread thin; for much of the work, they could not be available and it was often a case of make your own decision or do without.”¹⁸⁸ Brownlie noted that, during the 1950s, there were few formal qualifications for Indian agents and those hired were simply

expected to be familiar with the office procedures and filing system of the Indian Affairs Branch.¹⁸⁹ There were “no special programs and no employees trained in long-range economic development. In fact, apart from a few engineers and surveyors, the department’s staff had little training for their work.”¹⁹⁰ Some department officials were woefully underqualified to adequately represent the interests of those for whom they were responsible. As noted by Rolf Knight, “while [the Indian agents] were often patronizing, arbitrary, and autocratic, their main failing was that they were ineffectual in protecting Indian interests.”¹⁹¹ They fell far short of the ideal described by Merivale of “officers of the higher grade and highest importance” able to take the initiative. Too often, they and their wards were at a serious disadvantage in dealing with better-qualified and experienced businessmen who knew how to look after their own interests.

With the extensive powers granted to the Indian agent came a corresponding lack of power on the part of band councils and a lack of respect for them.¹⁹² Brownlie observes that “Indian agents could exercise authority over meetings of band councils in important ways. It was their role to call council meetings, act as the chair, and express their own views in deliberations. They were excluded only from the voting process.”¹⁹³ They could also urge headquarters to veto band council decisions they disapproved of. The Indian agent in Fry’s novel observes: “Band councils were often a farce. They were frequently elected in indifference, knowing little and caring less what their responsibilities might be. They went through the formalities of their work under [the Indian agent’s] persuasion while he carried out all the substance of it.”¹⁹⁴ This attitude is criticized by John Steckley in his book on Indian agents: “He was right about the indifference, but not for the right reasons ... The lack of interest in band councils and their representatives was due largely because the substance of leadership had been taken away from them decades before, and had been handed over to Indian agents.”¹⁹⁵

In summary, this chapter has sought to give the context of the *Guerin* case in colonial theory, policy, and administration, including “Indian

policy” in Canada. The signing of the Shaughnessy lease in January 1958, which continues to have such a negative impact on the Musqueam, was the direct result of the history of the British Empire not just in Canada but around the world. The imperial legacy was very evident on the day the lease was signed. It was reflected, in particular, in the administration in Canada of Indian affairs and reserve lands that saw “Indians” as child-like wards whose lives and lands had to be managed by often unqualified colonial administrators until they could be assimilated into Canadian society. It was also reflected in the priority given to the interests of the local settler population and especially the powerful and well connected. We shall now narrow our focus a little and, in the next chapter, turn our attention to the Musqueam, their land, the Shaughnessy golf club, the Indian agent who “negotiated” the lease, and the Musqueam Chief whose actions led to the litigation.

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