

The Problem of the Songhees Reserve

An Attempt at Comprehending the Exact Situation as it is Today, and the Duty of the People of Victoria in Regard Thereto

THE spectacle of a community of 30,000 souls being baffled in their endeavors to remove from their path a great obstacle to civic growth and expansion by a small group of Indians, is sufficient warrant for some attempt at comprehending the exact situation as it is today in respect to the Songhees reserve problem and the duty of the people of Victoria in regard thereto.

At various times during the last quarter of a century determined efforts have been exerted by certain public bodies in Victoria and agents of the Government in the direction of inducing the Indians to consent to take up another domicile and accept adequate remuneration for the relinquishment of their present abode. While these attempts have all proved abortive, it has never been suggested, either by the Indians, or those acting in their behalf, that the city was not justified, in view of all the circumstances, in pressing for the opening of the reserve. There is, indeed, absolute unanimity among all parties on a most important point—the wisdom and desirability of the remaining members of the Songhees tribe—about 100 in number—removing from the confines of the municipality.

It has, of course, been universally recognized that, inasmuch as the Indians were granted the use of the land in question by the terms of a solemn treaty, the legal difficulties to be overcome were of the most serious character. It would be extremely foolish for a layman to attempt to unravel any legal tangle, or seek even to state the exact status of this case in respect to the Indians' rights; but one may with confidence assume that a correct pronouncement upon this phase of the matter is the following opinion forwarded the mayor and council on January 17, 1905, by W. J. Taylor, K. C., city barrister, who, by the way, enjoys more than a local reputation as a very able and learned lawyer:

Victoria, B. C., January 17, 1905.
His Worship the Mayor, Victoria, B. C.
Sir—I have the honor to acknowledge receipt of your letter containing the opinion as to the respective rights of (a), The Indians; (b), The Provincial Government; (c), The Dominion Government; (d), The City of Victoria, to the land commonly known as the Songhees Indian Reserve, together with my views as to the best means of bringing about the removal of the Indians.

In reply I beg to state, that in the year 1850 a tract of land within which the land now known as the Songhees Reserve was evidently intended to be included, was conveyed by certain Indians to the Hudson's Bay Company.

For convenience of reference, the document of transfer is set forth and reads as follows:

"Know all men, we the chiefs and people of Kosampoo, have signed and made our mark to this deed on the thirteenth day of April, one thousand eight hundred and fifty, do consent to surrender, entirely and forever, to James Douglas, the agent of the Hudson's Bay company, in Vancouver Island, that is to say, for the Governor, Deputy Governor and Committee of the same, the whole of the lands situate and lying between the Island of the Dead in the Arm or Fleet of Camosun and the head of the said inlet embracing the lands on the west side and north of that line to Esquimalt, beyond the inlet three miles of the Colquitz valley and the land on the east side of the arm enclosing Christmas hill and lake and the lands west of those objects. The condition of our understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children and for those who may follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself with these small exceptions becomes the entire property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. We have received as payment fifty-two pounds ten shillings sterling.

"In token whereof, we have signed our names and made our marks at Fort Victoria on the thirteenth day of April, one thousand eight hundred and fifty.

(Sgd) Hooquoowit his X mark and 20 others
Nobson Benson, M. R. C. S. L., Joseph William McKay"

This treaty relinquished the Indian title to the land. It will be noted that the description of the land in this document is vague, but sufficient definiteness appears to make it operative. The Western boundary line of the tract has since the treaty been definitely surveyed, the shores of Victoria harbor forming the remaining boundary lines.

While the verbiage of the document varies from that commonly used in conveyance, it must be remembered that the document is not an ordinary conveyance but a language used, under the circumstances, doubtless appropriate to the understanding of all parties to the compact.

It will also be noted that the tract was conveyed subject to certain reservations in favor of the Indians, namely a right to occupy and enjoy their village site and enclosed lands together with a right of hunting over the unoccupied portion of the tract conveyed with certain appurtenant rights of fishing.

In the year 1867 (3rd April) the Hudson's Bay company re-conveyed (with certain exceptions not material to this inquiry) Vancouver's Island to the Crown.

At this period, namely, the year 1867, the crown became possessed of the land occupied by the Indians subject to the Indians' rights therein.

By clause 13, of the terms of the union, under which British Columbia entered the Dominion of Canada, it was provided as follows:

"13. The charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the union. To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia government to appropriate for that purpose shall from time to time be conveyed by the local government to the Dominion Government in trust for the use and benefit of the Indians, on applications of the Dominion government; in case of disagreement between the two governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the secretary of state for the colonies."

By section 91 of the British North America Act, all crown lands within the various provinces were

vested in the respective provinces subject to the interests already created therein.

At this time (1871) the land in question became the property of the province but had not then been definitely set apart as an Indian reserve by the province being merely crown land held in right of the province subject to the occupation rights of the Indians. The procedure prescribed by clause 13, for the creation of a reserve after confederation is set forth in the latter part of the clause and is shortly as follows:

(a) Application by the Dominion thereof to the province.

(b) Assent of the province thereto.

(c) Filling an agreement between the province and the Dominion a reference to the secretary of state for the colonies.

Since confederation, so far as I have been able to ascertain upon enquiry and search at the government offices, Victoria, the Dominion has never formally made application to the province for a conveyance of the land nor has the province ever executed a conveyance thereof to the Dominion nor yet set it apart as an Indian reserve. As a matter of fact, ever since confederation, the Dominion government has exercised administrative control of the Songhees Indians without the reserve having been formally created for such purposes. However, it has been judicially declared that neither the province nor the Dominion

derivable from a narrow legal construction of its mere words, qualified by rules outside its terms. An interpretation to be arrived at after considerations of policy as practiced by one government without express obligations but a policy which nevertheless was resolved into definite undertaking by statutory assumption thereof as a duty by another government i. e. the Dominion.

The reasons applied in order to exclude as against the Indians the operation of the rule against perpetuity of estate do not it seems to me, apply to questions relating to the after disposition of such estate. In one case the Indians were treated as an independent body upon a plane of equality for the purpose of contracting whereby the Hudson's Bay company title to the land. The Indians in turn by the words of the treaty secured certain rights and privileges for themselves and their descendants. After the treaty the Indians passed under the control, became wards of and dependent upon the crown for protection and fulfillment of those rights. One privilege retained was a personal right of occupation of the land possessed by each Indian. Neither within the terms of the treaty nor without its terms under existing law, may an Indian or number of Indians dispose of the rights of other Indians, whether in case or in futuro. Even if every Indian living should sell his or her respective occupation right and the Dominion govern-

ment, as trustee should approve of such sale, the title to the land would still remain subject to a prospective encumbrance in favor of any Indian child born after the date of such sale.

For the foregoing reasons, in my opinion, the status of the Songhees reserve is as follows:

(a) The title to the land is vested in the province.

(b) The Indians have rights of occupation and incidental rights of hunting thereover together with fishing rights in adjacent waters.

(c) The Dominion has administrative control of the Indians and the exercise of their rights and privileges.

(d) The city is without status in the premises, save as a public corporation in the exercise of its police power empowered to preserve law, order and morality in the community and the fact that the proximity of the Indians' settlement is a menace to the city's welfare.

(e) Under the existing state of the law, the land cannot be alienated, so as to transfer a marketable title. The consent of all the Indians living, together with the consent of the Dominion and Provincial governments i. e. the executives, would not be sufficient to overcome this difficulty, as any remedy necessitates concurrent legislation by the Dominion and the province.

(f) One method of relief would be to obtain the consent of all Indians living, to a transfer of the land; then have the Dominion pass a statute authorizing a disposition of the rights of the Indians whether in esse or in futuro, and the province pass a statute authorizing the sale of land free from encumbrances.

Provision would have to be made for the approval of the governor-in-council and lieutenant governor-in-council respectively, of any proposals for the removal of the Indians, so as that, in any scheme of rehabilitation of the Indians elsewhere, privileges and advantages should be secured for them equal at least, to those now enjoyed. I have the honor to be, Sir, Your obedient servant,

(Signed) W. J. TAYLOR.

It seems to have been conceded by all those who at any time have been engaged in an attempt to arrange a settlement with the Indians that, in any event, and at any period, whether it be tomorrow, or fifty years hence, no adjustment of the difficulty can be final without legislation both by the provincial and federal governments formally dispossessing the Indians.

But the monumental fact staring the people of Victoria in the face is that the Songhees Indians have shown that they do not wish to remove from the reserve. They have not only repeatedly refused the most generous offers of compensation and rehabilitation, but have indicated by their whole attitude that they are anxious to avoid reaching an agreement, rather than to aid in the bringing of one about.

Now, no one disputes that in this they are acting within their exact rights, nor that, except for the gravest reasons, would it be justifiable to suggest that they should be interfered with in that attitude. But they themselves tacitly admit, by their consent to the opening of negotiations, that such grave reasons exist. And the question naturally arises, How long, under these circumstances, will a situation working such a serious disability to the community be permitted to continue?

Quite recently we have been told that it would be most unwise and impolitic at the present juncture to discuss publicly this matter; that negotiations looking to a settlement were still being carried on by the federal government, and that a harsh word at this time might undo all that has been accomplished in the direction of solving a very delicate problem.

Of course, it is quite apparent that if the Dominion government takes the position that the consent of the Indians must first be secured to any proposed terms of settlement, and if the Indians absolutely refuse to give that consent, we are quite powerless to secure any remedy until there shall be a change of government at Ottawa. But one is inclined to harbor the thought that perhaps the Dominion government might not be inclined to take such attitude in defiance of the wishes of an important city of 30,000 people.

With these considerations in mind, then, let us indulge in a little speculation as to what might result if a certain course of procedure were to be adopted. Suppose that the people of Victoria—not a little set of politicians, but the people of Victoria—were to outline the entire case to the federal authorities and say to them: "We ask that you will be good enough to arrange to have the Songhees reserve thrown open as a portion of the area within the bounds of the city of Victoria by July 1st, 1908. The situation is utterly intolerable. The time has arrived when the preservation of the rights of the Songhees tribe of Indians on their reserve in the heart of this city conflicts with and works an injury to the interests of the entire people." And suppose that a delegation of leading citizens made the trip to Ottawa and in person presented this proposal to the government, is it not reasonable to think that a great light would dawn on the government and that so reasonable a demand would be met?

There would be nothing savoring of the hysterical about such a line of procedure—on the contrary, it would exhibit what has been lacking up to this very moment—a determination on the part of the people of Victoria to resist the perpetuation of what can only be characterized as an abominable and a grievous wrong.

Is it conceivable for an instant that an equal number of white men bound to a similar possession by exactly the same solemn treaty as are the twenty-five Songhees Indian men, would be treated with the consideration shown the latter? Why, their position would be declared untenable in short order; but because those in possession of the reserve are Indians, and not white men, there is an atmosphere of mystery and sentimentalism thrown around them which has been permitted to entirely obscure the real issue.

One is hardly called upon to offer any argument to show how serious a need exists for the immediate opening of the reserve so that it may become a part and parcel of the municipality. Dotted here and there with a number of shabby structures which are the most glaring eyesores, immune from any supervision on the part of the authorities so that sanitary facilities could be applied, a favorite rendezvous for tramps and vagrants, frequently the scene of unseemly proceedings, it is at once a menace to the pretty suburb of Victoria West, which it so closely adjoins, and a blot on the civic landscape.

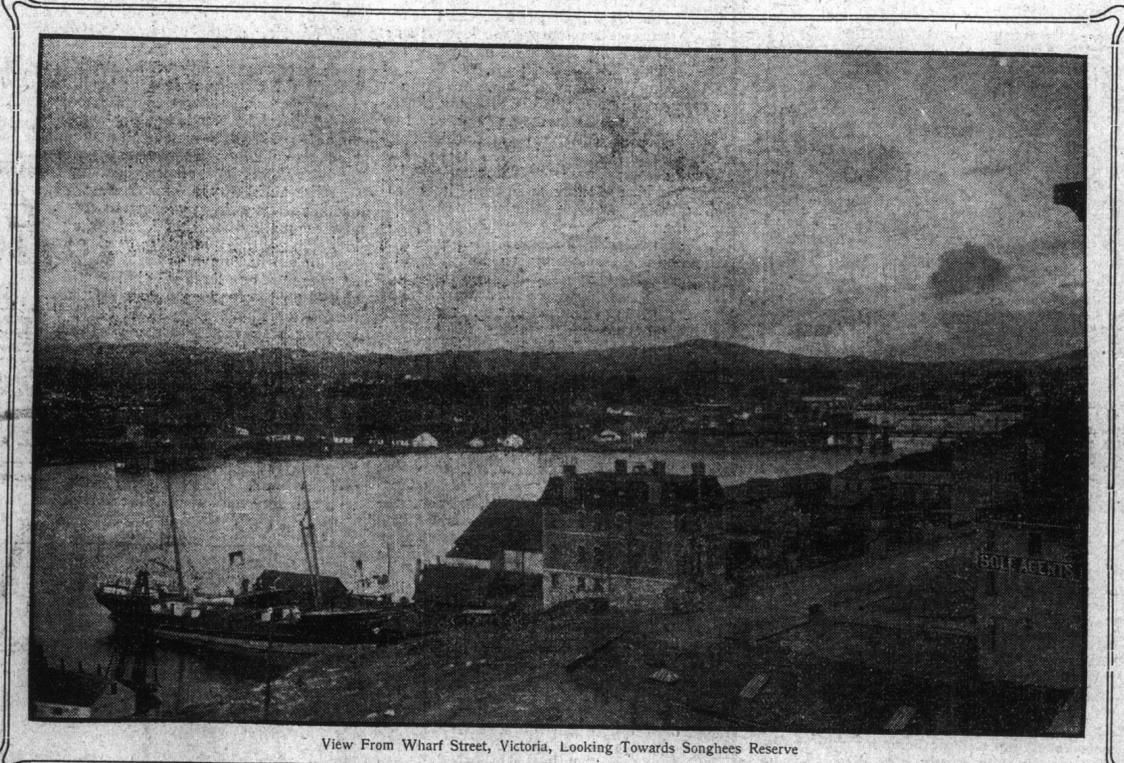
—C. A. GREGG.

Outside of those who make a specialty of fruit growing, those who make a living from the land on Vancouver Island are engaged in mixed farming. Dairying is the most important feature of this, and consequently the most important source of wealth. The farmers depend upon their cows for their living, the other lines providing the luxuries. Because of this, it is quite natural that the breed of cows should receive a good deal of attention.

The Island is divided into several different farming districts which are quite separate and distinct. There is the Victoria district, with a creamery just outside of the city; the Saanich district, with its creamery at Sidney; the Cowichan valley with a creamery at Duncan, and the Comox district, with a creamery at Courtenay. Besides these on Vancouver Island there is a creamery at North Salt Spring, which caters to the business of Salt Spring Island and the smaller islands of the gulf. All of these districts are larger and capable of a good deal of expansion as the land becomes cleared up, and thus larger areas are brought into cultivation. Very few farms but have some uncleared bush land which if cleared would enlarge the place by many acres. Numbers of farms have only one or two spots cleared, perhaps ten or twenty acres out of several hundred. When these have brought the other part under cultivation it can easily be estimated what the expansion of wealth must be.

Nearly all Victorians have gardens of their own and a good many have conservatories, yet the florists do good trade, some of the smaller houses devoting themselves wholly to that department. The fact that the residents want to raise flowers makes them also ready to buy them when they have none themselves.

That the florist business is capable of very extensive development is clear. There is a big demand for flowers in the cold climate of the prairies, which cannot be satisfied by local growers, as the cost of heating is too great. In Victoria usually the thermometer is above the freezing point, except for a week or two now and then, when it falls a few degrees below. There are numbers of towns in Alberta, and the other prairie provinces, where there is not a florist in town and where if the business were cultivated it could be worked up to good dimensions.



View From Wharf Street, Victoria, Looking Towards Songhees Reserve

are bound by alleged acts of acquiescence on the part of various officers of departments which are not brought home to or authorized by the proper executive or administrative organs of the respective governments and are not manifested by order-in-council or other authentic testimony; so that acts of control over the Indians by the Dominion in no wise affect the question of title.

The Hudson's Bay company as absolute lords and proprietors of the territory (subject only to the sovereign dominion of the crown) accepted surrender of the Indians' claim of title upon certain terms.

The crown having subsequently accepted a conveyance from the Hudson's Bay company of the land and revoked the Hudson's Bay company's charter, recognized the treaty terms and vested the proprietary rights in such land in the province subject to the Indians' rights.

Upon the faith of an undertaking given by the predecessors in title of the province, the Indians were induced to relinquish title to the land. One term of the undertaking was that the Indians, their children and children's children and so indefinitely for as long a period as any of the tribe survived, should be permitted to occupy certain parts of the land. Assume Thelluson's Act, (an act which limits the period for which an estate may be entailed) in force at the time. Its existence must have been unknown to the Indians. A law shortening and interfering as it would, with the period of enjoyment of the lands preserved to the Indians by the words of the treaty, could never have been in contemplation of the Indians else they would not have surrendered their claim for so phantomlike a consideration. To get land in consideration of preserving part thereof in perpetuity for the use and benefit of the grantor, and then repudiate the consideration, for technical or other reasons, savours too much of obtaining property under false pretences, to be seriously considered. The Hudson's Bay company when it accepted surrender of the Indian title, entered into an honorable agreement to fulfill the terms upon the faith of which the surrender was made. The company did fulfill those terms. The province as its successor in title, did likewise. The Dominion assented to; assumed and undertook to continue a similar policy of liberal and fair treatment and has never questioned its obligation or sought to infringe upon the rights and privileges of the Indians as set forth in the treaty or to subtract from or restrict those rights by anything outside the plain words of the treaty.

Any such interpretation would be so contrary to the policy of amity, good faith and conciliation observed by the crown as represented by either the Dominion or province in all dealings with Indians, as to warrant a conclusion to the contrary. Prior to confederation, the province in its dealings with the Indians never attempted to apply such a canon of construction to the terms of the treaty as would eliminate the words "and those that follow after us" upon the ground that such words were inoperative in view of the principles against perpetuity set forth in Thelluson's Act. The Dominion having undertaken to continue a policy with the Indians "as liberal as that hitherto pursued by the British Columbia Government" lends strength to the conclusion, that courts would adopt a broader principle of interpretation in construing the effect of the treaty, than ordinarily

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