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December 11, 2007

British Columbia Utilities Commission
900 Howe Street, Box 250
Sixth Floor
Vancouver B.C. V6Z 2N3

Via email: Commission Secretary BCUC: EX [Commission.Secretary@bcuc.com]

Dear Sirs/Mesdames:

British Columbia Utilities Commission in the Matter of the Utilities Commission Act, R.S.B.C. 1996, c. 473 And A Filing by British Columbia Hydro and Power Authority of the 2007 Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71
**Response of Haisla Hereditary Chiefs and Switlo to Motion of Carrier Sekani Tribal Council (12-4)**

The following is all respectfully submitted for the Haisla Hereditary Chiefs and self in response to the Motion of the Carrier Sekani Tribal Council (CSTC). This submission is long but it is respectfully submitted so fully so as to fully inform the Commission Panel for present and for also any future purposes, and thus the patience of the Commission Panel is respectfully hereby requested. The subject area is not easy to briefly address. In particular I flag that there are two cases referenced in detail herein that offer much assistance to the Commission Panel, the *Cook case, infra*, and the *Heiltsuk case, infra*.

I must state for the record that I pursue Indigenous rights and assist Indigenous nations and specifically say the doctrine of aboriginal rights is bad law (www.switlo.com) and not helpful nor practical in the resolution of any outstanding issues between the Crown, Her Governments and people, and Indigenous nations, their governments and people, and thus is not helpful to, *inter alia*, the economic and investment environment, the addressing of systemic racism, and respectful relations of all kinds so as such I do not advocate for the doctrine of aboriginal rights; and that

This is not to be construed as any admission as to the applicability of the doctrine of aboriginal rights to any Indigenous nation in the northwest and west central British Columbia so called for convenience sake. I must refer to domestic cases on the doctrine of aboriginal rights (consultation and accommodation) solely in response to Mr. McDade's motion brought for the CSTC, which seeks an order from the Commission Panel regarding consultation and accommodation, and in compliance with my duty to the BCUC (court).

There is no legal definition of "First Nation" for purposes of the BCUC. The CSTC is merely a BC non-profit society advocating before the Commission Panel and has no ability, with all due respect, to assert anything directly to the Commission Panel, even if assertion were sufficient, to raise that so raised and to meet the burden of proof in this motion. There is nothing to support opening up the scope of the Hearing for this society, and the bringing of this motion terminates their standing as an intervenor.

I repeat that said on November 27, 2007 (T8: Pages 1454 – 1472 inclusive). I also direct to that said by learned friends (T8: Pages 1473 – 1487, especially Pages 1479 –1482).

The BCUC is quasi-judicial. Learned counsel agrees with me (Exhibit C12-22; T4: Page 554, Lines 19-22, Page 575, Lines 13-14, Page 576, Lines 6-7, Page 577, Lines 2-4).

Societies are allowed standing by the British Columbia Treaty Commission to negotiate under the land claims policy (BC Treaty Process). Mere bare assertion of aboriginal title is sufficient to commence negotiations but which negotiations are not about aboriginal title but about terms of land claim settlement agreements.

> "[82] The treaty negotiation process does not require a First Nation to prove, in the legal sense, its aboriginal rights and title. The process is based on the assertion of the existence of aboriginal rights and title by the negotiating First Nation. This assertion is used by the Province for the purpose of identifying the interest or areas which the First Nation wishes to negotiate. There is no evaluation or assessment of whether the asserted claims are sufficient to meet the legal criteria for the proof of aboriginal rights and title.
>
> [83] For the purpose of the treaty negotiation process, neither Canada nor British Columbia accepts or denies any First Nation's assertion of aboriginal rights or title.
>
> [84] Under the British Columbia Treaty Process, the First Nations are allocated negotiation support funding."
>
> *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 (released on November 30, 2007) http://www.courts.gov.bc.ca/Jdb-txt/SC/07/17/2007BCSC1722.htm

The BC Treaty Process is set up under legislation very different from the legislation governing the BCUC and I do not propose to review all of that here in this submission as I do not consider it necessary as it is part of the public domain, but should it be necessary, the Commission Panel and all participants can easily access the BC Treaty Commission's incorporation documents and the federal and provincial legislative framework. I provide the British Columbia Treaty Commission Agreement. (Notice therein the need to define the term, "First Nations"). The BCTC website is www.bctreaty.net.

A society's standing in court to pursue aboriginal title can and should be challenged, as it must be and is here (and was challenged on December 10, 2007 in Final Argument). The Carrier Sekani Tribal Council ("CSTC") has no standing in the BCUC to pursue aboriginal title.

> "In Willson et al. v. British Columbia & Canada (Attorney General of), 2006 BCSC 228 the court had to dance around the fact that an incorporated society cannot bind an Indigenous nation. With the cooperation of the parties the problem was avoided by allowing the society standing in the proceedings only for issues that do not require the society to try to put the assets and sovereignty of an Indigenous nation on the table:
>
> "[2] The applicant, the Kaska Dena Council ("the KDC"), a society incorporated under the Society Act, R.S.B.C. 1996, c. 433, applies pursuant to Rule 15(5)(a)(iii) of the Rules of Court to be added as a defendant.
>
> [3] When the application was heard on November 3, 2005, counsel for both the plaintiffs and the Attorney General of Canada took the position that the KDC as an incorporated society, lacked capacity or standing as a representative of aboriginal people to advance a claim for aboriginal rights or title ...

[5] Her Majesty the Queen in Right of British Columbia ("British Columbia") takes no position on the KDC's application to be added as a defendant.

[6] Counsel for Canada no longer opposes the KDC's application, subject to one condition intended to ensure the action is not transformed into an aboriginal title or rights claim on behalf of those represented by the KDC. ...

[47] Appointment of a case management judge will serve to ensure that the parties (including the KDC) adhere to their unanimous resolve not to extend the scope of this case into the question of proof of aboriginal rights and title. ..."

(Note that the Kaska Dene appear to be represented in terms of being an ethnic minority through participation in land claims negotiations and otherwise and therefore it is questionable that that nation remains in existence. I have not met any Kaska Dene and I have not heard any contrary positions that suggest continuing nationhood. But I had the same opinion of the Gitxsan until I met and spent time observing and speaking with them and realized the contrary was true.)

It is no surprise here that the province of British Columbia decided to take no position regarding societies and Indigenous nations. The province is trying to cut a lot of deals through a lot of societies. It could not mislead the court by insisting societies do represent the Indigenous nations and of course could offer nothing in support of such argument. Nor could the province side with Canada and thereby admit it does not have what it represents it has and thereby undermine its marketing efforts to convince industry there is "certainty."

Here is the difference that perhaps explains why land claims negotiations in which the government of Canada is a party are well funded and underway with societies incorporated under the laws of British Columbia but the Attorney General of Canada will not accept a British Columbia society speaking to such things in Her Majesty's courts.

In order to have standing in court you must be the person affected - it must be your assets, not those of your neighbours that the dispute must be about. You cannot simply access the courts to ask the court to protect or decide on something that is not yours or that you are not directly involved in or will not be impacted on by the decision. There must be an actual case before the court, with actual affected parties and between only those parties. It cannot be speculative or "moot."

In domestic courts, if the Indigenous nation presents itself as such, the issues raised are not justiciable, as the court was clear to point out in the first instance in the Delgamu'ukw case, and Justice Ian Binnie of the Supreme Court of Canada issued warning about. The only way the domestic court can proceed is for the Indigenous nation to directly represent itself and submit to the court by accepting domestic ethnic minority status thereby directly abandoning sovereignty and accepting the mere bare assertion of Her Majesty's sovereignty. This means accepting the doctrine of discovery as good and applicable law. Such a representation cannot be made by a society incorporated under the laws of British Columbia. Anything the society does is obviously not binding on the Indigenous nation.

A lawyer speaking for the Indigenous nation would tend to be accepted and relied upon by the court, as occurred in the Delgamu'ukw case. But the question then becomes whether that lawyer was carrying into that courtroom the symbols of authority that serve to actually bind the Indigenous nation(s) to the lawyer's representations. If the lawyers are not so properly authorized by the applicable Indigenous law, as in the Delgamu'ukw case, the court has been seriously mislead by the lawyers. The court should be able to rely upon the representations of the lawyers that they have full authority to act and that the representations are binding on the client. That is part of the lawyers' duty to the court.

In Delgamu'ukw, for example, while the courts may have thought it enough to have the lawyers appear it was not enough to actually bind the Gitxsan to the representations made in those courts by those lawyers. Getting instructions in such cases is not merely to appease the governing body of the lawyers, it must support and evidence binding representation, and all Indigenous nations have extremely well developed laws in that respect that continue in effect and have not been abandoned. They are most visible to outsiders on occasions such as namings and funerals.

You cannot simply call for a meeting and take a show of hands of those who show up, as the 'Delgamu'ukw lawyers' did, and say you have the authority to speak for the nation and have your words bind the nation. All governing bodies have symbols of authority, be it the Pope's ring, or the display and presence of those during the elaborate rituals of openings of parliaments. The authority rests with the Indigenous Nation and a person can only be authorized to represent or more accurately 'help' the nation in accordance with that nation's laws.

However if someone comes forward in the context of land claims negotiations and says there is no Indigenous nation in existence who continues to demand a treaty with Her Majesty but only remnants now comprising a domestic ethnic minority who wish to pursue a land claim settlement agreement, and there is nothing said by the Indigenous nation (because a corpse cannot speak), and sufficient time passes to enable a reasonable conclusion that indeed it is a corpse and not simply comatose with the possibility of wakening, then abandonment has occurred and the very point of absence of a voice to contradict what the society represents seals the deal.

Of course none of this is comprehensible to most Indigenous people because it is all legalese. They usually have no idea what these well paid society directors and officers who control their own remuneration and often that of their close relatives are doing. But the Indigenous people rest comfortably knowing that they never borrowed the money and that these society directors and officers do not carry the symbols of authority of their nation and therefore cannot bind them."

Switlo, "For what it's worth: The Tahltan play, a last hurrah?", April 09, 2006, www.switlo.com

This is in addition to the fact of no standing that arose once CSTC proceeded to seek change to the scope it was no longer in compliance with the terms of being intervenor as set out in Exhibit A-22 (T8: Page 1455, Line 19 to Page 1457 Line 13 inclusive). I confirm that in making this response we have in no way waived position of requirement of compliance with Exhibit A-22.

In Exhibit C21-2 Mr. McDade said of the CSTC,

> "3. The Intervenor wishes to bring forward evidence to establish that:
>
> (a) *Its members* hold aboriginal title and rights over an area affected by the reservoir operations of Alcan, including the Nechako River downstream of the Kinney Dam and the northern portion or the Nechako reservoir; (Exhibit C21-2)
>
> "4…(c) To establish that the agreement contains financial incentives and disincentives which will impact water flows in the Nechako system in quantity, timing and temperature which may have potential adverse effects upon *the Intervenor's* aboriginal rights and title;"
> …
> 8. In British Columbia in the 21st Century, we submit that the fair and lawful treatment of First Nations is a fundamental component of the 'public interest'. Further, insofar as the Electricity Purchase Agreement at issue in this proceeding results from the utilization of water resources to which the Crown holds the underlying title, there is a significant issue to be heard as to whether the Crown's title is burdened by underlying aboriginal title *owned, in part, by the Intervenor members*.
> …
> 12. The Intervenor submits that where these impacts include impacts upon *asserted* aboriginal interests, the Commission has the jurisdiction to, and is bound to, consider the adequacy of consultation and accommodation with that First Nation in determining whether to make an order with respect to the proposed contract." [emphasis added]

The representations made by Mr. McDade, completely unsupported by any evidence, in item 8. above that "the Crown holds the underlying title" are contrary to the Declaration of the Carrier and Sekani of April 15, 1982 (the "Declaration"), in the public domain since that time, including being contained in "Carrier Sekani Tribal Council, A CSTC Background," February 2007 at page 5 available on their website:

> "April 15, 1982
>
> WHEREAS we of the Carrier and Sekani Tribes have been, since time immemorial, the original owners, occupants and users of the north central part of what is now called the province of British Columbia and more specifically that area of the said province outlined in red contained in the map attached hereto as schedule 'A' (hereinafter referred to as 'the said lands'),
>
> AND WHEREAS in addition to the original ownership, occupancy and use, we have exercised jurisdiction as a sovereign people over the said lands since time immemorial,
>
> AND WHEREAS this original ownership, occupancy and use, and jurisdiction by our people over the said lands has never been surrendered by our people through conquest, treaty or any other legal means to the British crown or to its colonial governments or to the Crown in right of the province of British Columbia or to the Crown in right of Canada or to any other government.
>
> AND WHEREAS this original ownership, occupancy and use by our people, and jurisdiction over the said lands has never been superseded by law,

> AND WHEREAS much of the said lands is, without our consent, now occupied and its resources used by people not indigenous to our lands,
>
> AND WHEREAS such occupation and use by non indigenous people to the said lands is without compensation to our people,
>
> WE, the representatives of the Carrier and Sekani Tribes hereby declare and assert our continued original ownership, occupancy and use of, and jurisdiction over the said lands and all its resources,
>
> AND WE further declare and assert the continued existence of those rights which flow from our original ownership, occupancy and use of, and the jurisdiction of the said lands and all its resources,
>
> AND further we hereby demand of the governments of Canada and British Columbia compensation for their past, present and proposed use and occupancy of our lands and all its resources."

Those Indigenous nations who speak through the Declaration, speak of ownership, as do the Haisla through the Haisla Hereditary Chiefs. There is no reference therein the Declaration whatsoever to the doctrine of aboriginal rights. There has been nothing done or said that detracts in any way from what is said in the Declaration and there is no evidence that there has been anything done or said that detracts in any way from what is said in the Declaration such that Mr. McDade can say as he has.

A society incorporated under a province (CSTC, under BC, in 1979) does not hold "aboriginal title." Nor do society members. The intervenor, CSTC, is a society. A society cannot assert "aboriginal title and rights" anywhere but through the BC Treaty Commission.

Mr. McDade for the CSTC stated that he was here for only one reason (T4: Page 589, Lines 2-11), reflected in his motions. He (CSTC) cannot then be here at all "as an incorporated society, [CSTC] lacked capacity or standing as a representative of aboriginal people to advance a claim for aboriginal rights or title':

> "In *Willson et al. v. British Columbia & Canada (Attorney General of)*, 2006 BCSC 228 the court had to dance around the fact that an incorporated society cannot bind an Indigenous nation. With the cooperation of the parties the problem was avoided by allowing the society standing in the proceedings only for issues that do not require the society to try to put the assets and sovereignty of an Indigenous nation on the table:
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> [5] Her Majesty the Queen in Right of British Columbia ("British Columbia") takes no position on the KDC's application to be added as a defendant.

[6] Counsel for Canada no longer opposes the KDC's application, subject to one condition intended to ensure the action is not transformed into an aboriginal title or rights claim on behalf of those represented by the KDC. ...

[47] Appointment of a case management judge will serve to ensure that the parties (including the KDC) adhere to their unanimous resolve not to extend the scope of this case into the question of proof of aboriginal rights and title. ...'

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It is no surprise here that the province of British Columbia decided to take no position regarding societies and Indigenous nations. The province is trying to cut a lot of deals through a lot of societies. It could not mislead the court by insisting societies do represent the Indigenous nations and of course could offer nothing in support of such argument. Nor could the province side with Canada and thereby admit it does not have what it represents it has and thereby undermine its marketing efforts to convince industry there is 'certainty.'

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the lawyers that they have full authority to act and that the representations are binding on the client. That is part of the lawyers' duty to the court.

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Switlo, "For what it's worth: The Tahltan play, a last hurrah?", April 09, 2006, www.switlo.com

There should never have been any attempt by a society (CSTC) to turn this Hearing into and to extend the scope of this Hearing into a question of aboriginal rights and title.

Mr. McDade says,

> "The aboriginal title issues raised by this project and this agreement remain unresolved." (T3: Page 297, Lines 16 – 18 inclusive).

There *are no* "aboriginal title issues raised by this project and the agreement." And the CSTC, a society, cannot raise them.

Mr. McDade says,

> "So the failure to consult arises from the fact that there are resources, in this case water, being utilized that potentially are infused with aboriginal rights and title."(T8: Page 1436, Line 26 to Page 1437, Line 3)

There *is no* fact "that there are resources, in this case water, being utilized that potentially are infused with aboriginal rights and title." The fact is, the evidence is, the water is owned by Indigenous nations. They never gave up ownership and they never traded it for crystallized aboriginal title at any time. And the Carrier and Sekani cannot be said to continue to contemplate trading their ownership for rights under a land claim settlement agreement using the CSTC as negotiators as the CSTC have been terminated:

> "During the 28th [March 28, 2007], a **unanimous vote was made by the CSTC membership to abandon the BCTC process**. The BCTC process is not capable of resolving the CSTC governance and land grievances. Clear direction was given to the CSTC Chiefs and Staff, from the present community members, that the framework for treaty negotiations currently being used by BC and Canada is not working."
>
> Carrier Sekani Tribal Council website: http://www.cstc.bc.ca/cstc/76/treaty+forum+2007

(Note that the CSTC website is under the domain of the province of British Columbia: "bc.ca" which is consistent with being under the jurisdiction of the province.)

I submit that the reason that the mandate to the CSTC was withdrawn is because Carrier and Sekani now realize as do many others, that the BC Treaty Process, not a true treaty process but rather a land claims settlement process under policy is not consistent with the Declaration:

> "Aboriginal peoples are being asked under the BC Treaty Process to agree to negotiate 'modern-day treaties' which are in fact 'Land Claims Agreements'. The federal government has not changed its Comprehensive Land Claims Policy implemented in 1973 subsequent to the Calder case and revised in 1981 and in 1986. The Comprehensive Land Claims Policy produces Land Claims Agreements which do not have the same legal effect that the 'Numbered Treaties' have. These Land Claims Agreements are not 'Treaties' as defined by and understood in the international context. These are merely settlement agreements, such as are entered into between parties who do not wish to continue the expensive exercise of going to trial once litigation has been commenced; they are simply local domestic agreements between two parties instituted under a local governmental policy; they do not have the protection of international law, particularly the 1969 Vienna Convention on the Law of Treaties.
>
> Land Claims Agreements create Land Claims rights and not 'Treaty rights' in the international sense or sense of the existing 'Numbered Treaties'; this is notwithstanding whatever label Her Majesty gives those Land Claims Agreements rights. Including Land Claims Agreements rights under the definition of 'treaty rights' in the Canadian Constitution does not make those Land Claims Agreements rights something more than they are. Rights under Land Claims Agreement cannot become internationally understood, recognized and protected treaty rights any more than calling a cup of coffee an 'apple' actually makes that cup of coffee an apple. A cup of coffee will always remain a cup of coffee having the characteristics of a cup of coffee and not those of an apple, for example, regardless of what you label that cup of coffee. It is trite common law that labelling a document an agreement does not in and of itself make that

document a legally binding agreement under the common law. The elements of an agreement which make an agreement in common law must be present. You can have a legally binding agreement which looks like a letter if that letter contains the elements of an agreement. 'A rose by any other name is still a rose'."

(Switlo, "Trick or Treaty," 1996, http://www.switlo.com/pdf/trick-or-treaty.pdf)

It perhaps helps to simply remind,

1. "Indigenous title" as in title in the whole in the Indigenous nation but may be subject to *de facto* permissions to the Crown where there are no *de jure* permissions as per treaty (as exist in other parts of Canada such as Crown treaties with the Cree and Anishnabe), an allodial title in common ownership in the nation, present nationals restricted from alienation and obliged by Indigenous law to protect for generations hence but being fully able subject to same to benefit from present use, including from exercise of economic sovereignty, subject to applicable land tenure systems under Indigenous Law (see for example Haisla in C12-2);

   "Many Indians we spoke with felt that Indians are entitled to whatever they receive from the government – and more – because the United States is their land. Since Indians were here first, they suggested, this land has always belonged to them and they have the right to use it as they see fit." (page 16)

   "Walking a Mile: A First Step Toward Mutual Understanding: A Qualitative Study Exploring How Indians and Non-Indians Think About Each Other," A Report from Public Agenda by John Doble and Andrew L. Yarrow with Amber N. Ott and Jonathan Rochkind, research by Ana Maria Arumi and John Immerwahr, 2007, www.publicagenda.org.

2. "Aboriginal title" manifests under the doctrine of aboriginal rights that is founded on the doctrine of discovery, the 3-part extinguishment test for which is set out in *obiter* in Delgamu'ukw by then Chief Justice of the Supreme Court of Canada Antonio Lamer (since deceased on November 24, 2007), title which "crystallizes" upon the Crown's assertion of sovereignty and ownership of underlying title, which by definition, Indigenous title no longer exists where Aboriginal title exists

   "38 … As I explained in *Adams*, at para. 26, [*R. v. Adams*, [1996] 3 S.C.R. 101] aboriginal title is simply one manifestation of the doctrine of aboriginal rights …"

   R. v. Côté, [1996] 3 S.C.R. 139 (The judgment of Lamer C.J. and Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by the Chief Justice);

   Since aboriginal title is a type and forms part of the doctrine of aboriginal rights, the doctrine says can justifiably interfere where meaningful economic component and public interest. Evidence demonstrates both so even if could prove aboriginal title, burden of proof to justify interefence is met by the evidence on record here:

   "161 The test of justification has two parts, which I shall consider in turn. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. … legitimate government objectives also include "the pursuit of economic and regional fairness … By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (Adams, supra) would fail this aspect of the test of justification. …
   …

> 165 …In my opinion, the development of agriculture, forestry, mining, and *hydroelectric power*, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis." [emphasis added]
>
> *Delgamuukw, infra*.

3. "Settlement lands" and "lands subject to land claims agreements," for example, "Nisga'a Fee Simple Lands" (Nisga'a Final Agreement) as in "rights that now exist by way of land claims agreements or may be so acquired." (section 35(3) of the *Constitution Act, 1982*), but "rights" that nonetheless remain subject to the section 35 doctrine, which doctrine holds those "rights" can be lawfully infringed upon (including to the point of continued existence but inability to exercise), and Aboriginal title can no longer be exercised if it even continues to exist, which is questionable.

Mr. McDade admits that the CSTC *does not* have "aboriginal title"

> "The CSTC bands have aboriginal title over the lands covered by the northern part of the Nechako reservoir and the Nechako river watershed, and the Nechako River itself." (T3: Page 296, Lines 10-14)

He says the CSTC *bands* have it. The society, CSTC, is *not* the bands. The society provides services to bands, and to which bands can and has changed.

> "The Tribal Council is an advocate for, and frequently represents the interests of its member-nations. The Council also provides technical and professional services to its member-nations in the areas of fisheries, education, economic development, community and infrastructure planning, forestry, financial management, and treaty negotiations."
>
> http://www.cstc.bc.ca/cstc/7/about+cstc
>
> "In 2001-2002, there were 78 Tribal Councils providing advisory and program services to 475 First Nations. There are 135 First Nations not affiliated with a Tribal Council but 16 of these, with a population of 2000 or more, also receive funding for advisory services. Approximately 80 per cent of the on reserve population reside in communities where Tribal Councils or large unaffiliated First Nations provide advisory services."
>
> Indian and Northern Affairs Canada Tribal Council Program (website)

(Consider how complex it can get where there numbers some 633 Indian bands, some close to 100 tribal councils, umpteen non-profits incorporated provincially and federally, "national aboriginal organizations," "PTOs," hundreds of hereditary chiefs, clan mothers, elders, more than 50 nations, confederacies, alliances, unions – and that does not even include past the artificial cut of the US-Canada border (from Indian Country perspective).)

Mr. McDade is not here for the bands. He is here for the society:

> "*The CSTC is appearing* to register its opposition to this application at this time." (T3: Page 296, Lines 15-16) [emphasis added]

And the society is not mandated, not to say that that would be sufficient for standing, which is specifically denied, but to emphasize the point.

To allow the CSTC standing on the sole issue it raises herein would be to endorse an even lesser standard as is acceptable for the BC Treaty Commission, and the BCUC cannot do that. The BC Treaty Commission requires proof of mandate. As a quasi-judicial body, the BCUC can accept evidence of a more flexible nature that may not otherwise be accepted in a court:

> "Information admissible in tribunal proceedings
>
> "40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.
>
> (2) Despite subsection (1), the tribunal may exclude anything unduly repetitious. …"
>
> *Administrative Tribunals Act*, SBC 2004, c. 45

But it cannot, I submit, change the rules for standing and allow a party to have adjudicated that which the party could never have adjudicated in court. The BCUC has a specific regulatory purpose and cannot step outside that jurisdiction. It is never anticipated that its jurisdiction would be expanded into a court of determination of "aboriginal title."

One letter signed by one person who did not present himself for cross- examination is not evidence. (Exhibit C21-1). Mr. McDade appears as legal counsel only, and not as expert providing evidence and his submissions and assertions in written motion are not evidence and are not supported by any evidence.

There is nothing before the Commission Panel and no one before it. This motion is moot.

Yet I proceed in response to the motion in order to most fully address the issues raised by the implications of the motion by the CSTC and Mr. McDade's presence at the Hearing for benefit of the BCUC.

There is no evidence before the Commission Panel for the CSTC but if the Commission Panel determines there is by virtue of the exhibits, then zero weight is to be given it but for the 1987 Agreement of course, which is a fact. (T4: Page 511, Line 20 – Page 524, Line 16 inclusive)

We set the grounds for an adverse inference throughout, which succeeds as no evidence was tendered in response.

There were submissions previously before the BCUC that contain a reference to cases decided by Mr. Justice Burnyeat in turn quoting Wigmore on Evidence, 3rd Edition, regarding adverse inference, available at the BCUC resource library:

"… Wigmore on Evidence, the 3rd Edition:

'Ö The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate it as the most natural inference that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions, and they are also open always to explanation by circumstances, which makes some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.' "

G-70-05 - BCTC VITR Application May 31, 2006 - Volume 42 Proceedings at Hearing BCTC-VITR/Sea Breeze – VIC May 31, 2006 Volume 42 Page: 7843 Line 1 – Page: 7844 Line 23

There is only, with all due respect, a letter from David Luggi on CSTC letterhead. And Exhibit C21-1 discloses that David Luggi cannot provide evidence, just that "benefits" are wanted because of "expected" reduced water flow. The evidence proves that that is not a reasonable expectation, that water flow will be reduced, and the Commission Panel has already made the determination of fact that water flow into the Nechako will not be reduced, and in any event, an expectation falls far short of meeting the burden of proof. This is all based on because the BC Treaty Commission allowed the CSTC to commence land claim negotiations, since withdrawn from.

Pulling out of the BC Treaty Process means no more BC Treaty Process funds. So we cannot dismiss the possibility of this as an attempt to secure operating funds from Alcan or BC Hydro or both by trying to tie up this process and therefore potentially impact their business/economic opportunity, which if fell victim to could open up the BCUC to liability or at very least allegation of *ultra vires*. This risks integrity of the BCUC processes – and if the CSTC doesn't like that, it can take it up with the province to suggest changes to the BCUC's governing legislation. After all, they are a lobby group. But the CSTC cannot bring on a case such as the recently behemoth Tsilhqot'in decision of Vickers, J. A society would not have standing to do so.

"In what one observer described as 'the second Chilcotin war,' a court case that also spanned 15 years finally concluded with a sweeping but ambiguous ruling. Justice David Vickers found that Tsilhqot'in chief Roger William had proven aboriginal title to a vast area near Williams Lake, 2,000 square kilometres of the 4,500 claimed by his people. But because the Tsilhqot'in had changed their land claim to 'all or nothing' at some point in the complex case, Vickers was unable to make the binding ruling that would grant title to that remote valley.

William, whose people are the hardest of the hardcore opponents to current treaty negotiations, said he's willing to negotiate. But not through the B.C. Treaty Commission, and 'the talks are not going to be long.'

Justice Vickers decided early on that taxpayers should pay for the Tsilhqot'in legal team. It will no doubt infuriate many to find that while the federal and provincial defence teams billed $11 million between them, *the Tsilhqot'in lawyers rang up $18.2 million*.

Don't blame us for that, said lead Tsilhqot'in lawyer Jack Woodward. It was the government's denial of even the most obvious facts about the area's history that dragged proceedings out to 337 trial days, including night sittings in the remote valley where elders recounted their relationship to the land.

'*If you compare it to the over $1 billion that's been spent on the treaty process, it's clearly worth it,' [lawyer Jack] Woodward said*. 'It's the best investment the government ever made, because they're not going to spend another billion dollars on the treaty process, fruitlessly.'

Well, today it's obviously not fruitless. And Woodward's suggestion that land settlements will suddenly jump from five per cent of traditional territory to more like 50 per cent is likely bravado. For example, Vickers chose to ignore archaeological evidence of non-Tsihlqot'in aboriginal settlement in the region.

No one in government is disputing aboriginal title to land any more, but they recognize that the land was shared from semi-nomadic times.

You can't legislate respect either, but we can all learn it.

'We've been at that treaty table, and it cost us dearly. It cost us six war chiefs in 1864.'

Tsilhqot'in representative Joe Alphonse was referring last week to a betrayal by white men that is still memorialized by his people.

'The Chilcotin war of 1864 was triggered by the arrival of Alfred Waddington and his men, who were intent on building a road from Bute Inlet through the Tsilhqot'in territories to the Cariboo goldfields,' Cariboo South MLA Charlie Wyse reminded the legislature. And when the fighting was over, the six war chiefs went to Quesnel for what they thought were peace talks. Instead, they were arrested, tried for murder and hanged.

> ["New Governors arrive in 1864, Frederick Seymour for the Colony of British Columbia and Arthur Edward Kennedy for the Colony of Vancouver Island.
>
> Judge Begbie sentences Chilcotin chiefs at the mouth of the Quesnel River to be hanged. The chiefs were falsely led to believe that their appearance was for purposes of signing a peace treaty; they had relied on Magistrate Cox's promise of immunity.
>
> During my first official visit to Quesnel as Department of Justice counsel to assist in negotiations underway with the Department of Indian Affairs and Northern Development, during a break I was walking along the side of the river, on the side opposite the band hall. As I paused to admire the view of the river, I was told casually, as a "point of interest", that I was standing on the graves of the Chilcotin chiefs. When I inquired as to why they would be buried under the portion of the parking lot on which I stood, I was given a shrug and told "I guess because they're an embarrassment". Not being familiar with the history of these chiefs at the time, I presumed that of course the Chilcotin would be aware of where their chiefs were buried; I assumed that the embarrassment must be on the part of the Chilcotin rather than the government. I now know differently."
>
> Switlo, *Gustafsen Lake: Under Siege*, 1997 at page 34
>
> "Ceremony To Honour Hung Chilcotin Chiefs in 1864.Oct.26, 1999"
> http://www.youtube.com/watch?v=UdNY-wwSLBU]

There are many shameful moments in our history. Indeed, it was only a year ago that the B.C. government paid compensation for the theft of the land on which the B.C. legislature stands. It had been set aside as a reserve that was later simply struck from official maps.

But to compare one of the few outbursts of armed conflict in B.C.'s history to today's treaty talks is to nurture an old grievance too long.

David Vickers was a politician before he was a judge. In 1984 he lost a nail-biter of an NDP leadership race, when Bob Skelly came from behind on the fifth ballot.

Vickers came full circle in his judgment on the Tsilhqot'in case. He writes:

'I have come to see the Court's role as one step in the process of reconciliation … It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so than an honourable settlement with the Tsilhqot'in people can be achieved.' "

Tom Fletcher, "Dividing up B.C. by treaty or trial," Williams Lake Tribune, November 30, 2007

*Consider what is being sought. McDade asks for the ability to introduce evidence* ***"to establish"*** *aboriginal title* (item 3(a) of Exhibit C21-2). That ought to have been the end of it but time and location constraints precluded me from providing a full response at that time of submission of Exhibit C21-2 at the Oral Hearing on November 20, 2007, which is now herein provided. CSTC, to sound the broken record, has no standing to do so in a court and ought not to be allowed to do so here.

And that sure was some funding the CSTC was getting:

**"CSTC Treaty Negotiations Funding**

Funding is designated in 2 parts:

Loan funding for CSTC is currently at $14,582,000

Contribution funding is currently at $3,645,586

- Total loan and contribution funding is $18,227,929

| Year | BCTC Funding | Cost per meeting |
|---|---|---|
| 2001 | $1,552,330 | (10 meetings) $155,233 |
| 2002 | $2,271,260 | (3 meetings) $757,086 |
| 2003 | $1,323,000 | (1 meetings) $1,323,000 |
| 2004 | $1,477,525 | (5 meetings) $295,505 |
| 2005 | $1,525,870 | (1 meetings) $1,528,870 |
| 2006 | $1,797,390 | (2 meetings) $898,695 |

Options for Resolution
- Abandon BCTC negotiations;
- Negotiate within the BCTC process;
- Pressure Canada to alter their policy framework;
- Direct Action;
- Litigation;

Abandon BCTC Treaty Negotiations
- Continue accepting existing government program funding;
- Negotiate economic Consultation and Accommodation benefits agreements with 3rd parties and other levels of government;
-Title & Rights are neither extinguished nor compromised;

Direct Action
- Blockading roads; forest access routes, railways and other transportation corridors;
-Confrontation with 3rd parties and others. May or may not result in accelerated negotiations with governments.
-The offensive strategy generally turns to a defensive strategy via the Canadian judicial system.

Litigation Option
- Filing an action on the assertion of CSTC's Aboriginal title & rights in the Canadian judicial legal system:
Expensive and high risk. Decisions at this level are left to a third party (judges) to decide in favour of the defendant or the plaintiff. Decisions are narrow and subject to the government's even narrower policy interpretations. Most title and rights decisions are really not decisions in the truest sense; rather they are limp parameters or guidelines."

http://www.cstc.bc.ca/cstc/76/treaty+forum+2007

Seems the CSTC/David Luggi has been experimenting with a new option through the BCUC but the above demonstrates there are other options and the Supreme Court of British Columbia in *Cook, supra* says there is a better option.

The whole of the November 30, 2007 *Cook, supra* decision is very helpful I submit to the Commission Panel and I encourage it be read and considered in full for its analogy to the present motion (but for having no standing issues) and the analysis and summaries of law, copy is provided herewith. It is a case on consultation and accommodation in the matter of a territorial overlap issue (it is trite to remind that use of terminology "First Nations" therein is likely since the lawyers use the terminology, parties are defined for purposes of the BC Treaty Process as "First Nations, and this is an issue involving the land claim negotiations):

> "[5] The petitioners argue that their First Nations have overlapping claims to aboriginal title and/or rights with the TFN [Tsawwassen First Nation] and that the honour of the Crown requires the Crown to consult with the petitioners and to accommodate their interests prior to signing the TFNFA [Tsawwassen First Nation Final Agreement] with the TFN."

> "[29] Are the petitioners correct in contending that the historical use of prerogative writs has been expanded to allow the courts to force by mandamus a Minister to perform his constitutional duties?"

This appears to mirror what Mr. McDade is seeking, saying that the Commission Panel must perform constitutional duties by rejecting the 2007 EPA unless subject to consultation or force amendment to the 2007 EPA to allow for time for consultation (potential interference in business/economic interests):

> "4. The Commission should exercise its powers pursuant to s. 71(3) to declare the contract unenforceable unless and until the duty of aboriginal consultation has been met with the CSTC Bands, and until downstream environmental impacts have been corrected. …"
> (CSTC Submission of December 10, 2007)

Historical and analysis of prerogative remedies (paras. 18 – 49) are informative to the Commission Panel as the motion brought could be construed as being an indirect way to effect an order of prohibition, certiorari or mandamus by arguing that the 2007 Agreement ought not be accepted for filing (a far lesser matter than what was sought in *Cook, supra* of preventing initialing of the final land claim settlement agreement) on the alleged basis of no consultation. Indeed, Mr. McDade argued in writing on November 30, 2007 (Submissions on Phase 2 Reconsideration Schedule) that he could not present final argument without first being heard and his motion decided, all of which depending on presentation of evidence which he alleged he was refused permission to provide. This is not agreed with and specifically denied:

> "To date, the Commission under the Scoping Order that is the subject of reconsideration, has prevented any evidence aside from "the narrow scope of physical changes to the flow that are new" arising under the EPA - which is a very minor part of the impacts that are relevant to the duty of consultation and accommodation. The Commission has refused to allow the CSTC to call evidence on that point," (November 30, 2007 Submissions on Phase 2 Reconsideration Motion)

The burden is on the CSTC at time of filing of the motion to provide evidence to meet the burden of proof of the motion it carries. It was outside of the existing scope of the Oral Hearing to allow for cross-examination on that which CSTC hoped to have the scope of the Hearing reconsidered. Until such time as the scope is in fact reconsidered and opened to allow for what CSTC seeks to have it opened up for, it cannot attempt to cross-examine on that. If allowed, the reconsideration would have been moot and no scope of hearing for a BCUC process could expect to be honoured, thereby threatening the processes of the BCUC.

> "Conclusions on Prerogative Remedies
>
> [50] From this review of the authorities, I conclude the following:
>
> · The JRPA is procedural not substantive legislation. Thus the availability of the remedies of prohibition, certiorari, and mandamus are made available not pursuant to the statute, but only where they are otherwise available at common law;
>
> · Prohibition and mandamus are not available to enforce private law rights even where the Crown is exercising these rights;
>
> · Historically, prerogative remedies were only available to force a government delegate to conduct himself within the confines of a statutorily conferred power; and
>
> · There is some authority for the proposition that the scope of prerogative writs has been expanded somewhat to enable their use to restrain government power exercised by bodies created pursuant to its prerogative power, where the public decision maker owes a duty of fairness to, and the decision affects, the rights of individuals.

[51] Applying these principles to this case, it may be helpful to first consider the source of the government's power in negotiating and reaching the stage of initialling (sic) the TFNFA."

Since the BCUC is under the lietenant governor (see exhibit C12- one I put in re consultation) then could be said the following is of assistance: Powers of the Crown, paras. 52-66.

"Conclusions as to Applicability of Prerogative Writs

[67] What is at issue here is not the specific power of appointment of the Lieutenant Governor in Council, but rather the duty of the Crown acting honourably to consult and accommodate the petitioners' asserted aboriginal rights and title interests. As Southin J.A. said this duty is "upstream" of the act of ratification and signing of the TFNFA.

[68] I conclude that when the Minister engaged in negotiations leading finally to the signing of the TFNFA Act, he was exercising either his prerogative powers or his natural person powers. These powers precede the enactment of the TFNFA Act and are not dependent on the statutory power to sign the TFNFA delegated under the TFNFA Act.

[69] The prerogative remedies, to which the pragmatic and functional analysis (see Pushpanathan v. Canada (Minister of Employment and Immigration), [1998] 1 S.C.R. 1222, 11 Admin. L.R. (3d) 130) would apply, do not easily lend themselves to a judicial review under the JRPA of the Minister's conduct in negotiating a treaty with an aboriginal group.

[70] The statutory enactment circumscribes the JRPA analysis. Did the delegated person comply with the statute when he exercised his decision making power? Such an analytical paradigm does not apply here.

[71] *The petitioners' appropriate remedy is to commence an action to seek a declaration concerning the Crown's responsibility to consult and accommodate, and, if necessary, interim relief. Such a remedy affords all interested parties the opportunity to participate fully in the action.* Although Canada and the TFN participated as interveners at the hearing of this action and even though their interests are vitally affected, they did not have the full spectrum of participatory rights in the litigation.

[72] I conclude that this Court does not have jurisdiction pursuant to the JRPA to grant the remedies sought herein." [emphasis added]

Likewise, the Crown and other parties are not here in this Hearing. Even if the CSTC had standing to run it, which it does not, the BCUC is not the place to run aboriginal title litigation. The BCUC I submit does not have the jurisdiction to do as Mr. McDade seeks. And if Mr. McDade wishes to challenge the BCUC processes, suggesting a run like Jack Woodward's, he cannot do so before the BCUC. That is a matter to be taken up with the provincial government, with the Crown in right of the province. And I doubt that the public purse will be widened so generously as it was for Jack.

Certainly the BCUC should not be placed in the position of having to fund participants in a Hearing which, if permitted to engage in submission of evidence "to establish" aboriginal title, would be expected to run 300 – 400 hearing days. The BCUC is not on any level equipped to deal with that, jurisdictionally, operationally, budgetary, logistically, and that would grind all other BCUC processes to a halt, which harms the public.

BCUC is not an adversarial forum like the courts. It is quasi-judicial but it must engage a balance of interests so as to decide whether to accept the 2007 EPA for filing. It is not here to determine legal matters between opponents. In engaging in its full responsibilities to protect the public interest, it is not in the public interest to engage in any fact finding as to existence of aboriginal title, and accepting the submitted assertion of aboriginal title is a finding of fact. This, again, is not the BC Treaty Commission and in the BC Treaty Commission, the assertion is accepted solely for purposes of deciding whether the "First Nation" can be a party to negotiations. If the Commission Panel were to make that finding of fact, based on assertion, which as aforesaid it cannot do, then the Commission Panel's finding of fact of aboriginal title would be a finding of fact for all purposes, and that would be a neat trick; expect the flood gates to open wide before the BCUC:

"Findings of fact conclusive

> 79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts."
>
> …
>
> "Pending litigation
>
> 81 The fact that a suit, prosecution or other proceeding in a court involving questions of fact is pending does not deprive the commission of jurisdiction to hear and determine the same questions of fact."
>
> *Utilities Commission Act*, RSBC 1996, c. 473

Reference is also made to the list of specific claims filed re: British Columbia under the specific claims policy,

http://www.ainc-inac.gc.ca/ps/clm/pisr_e.pdf

which is another avenue regarding any issues outstanding relating to the development of Kemano, which I have reviewed. I see no specific claim filed that might be in relation to anything asserted herein re: this motion. There may be problems with *laches* in appearing in court or proof for purposes of the federal specific claims policy, which might suggest why experimentation with the BCUC is occurring. It may as well simply be that minds have not been turned to the implications of what is sought. But as said, in those cases, either before the court, or by way of specific claims, the party would *not* be a society, would not be the CSTC. Settlement or awarded moneys would thus not flow to the CSTC.

The doctrine of aboriginal rights is clear: the duty to consult is on the Crown, not BC Hydro, not Alcan. If that doctrine is to be expanded to include a duty to consult on BC Hydro, as a Crown corporation, this is not the proper forum, and as said, to get there to assessing consultation and accommodation, the Commission Panel is asked to accept assertion of aboriginal title. The BCUC cannot act on the basis of what Mr. McDade or David Luggi would like the law to become. The BCUC is confined to its present jurisdiction and law and the evidence and facts before it in this specific matter pertaining to the 2007 EPA.

This is not the BC Treaty Process. It is not sufficient for McDade to provide assertions. The BCUC is bound by the legal burden of proof as a quasi-judicial body and cannot act outside of that just because the CSTC once was permitted and did pursue negotiations under the BC Treaty Process. That does not relieve the Commission Panel and the Commission Panel is severely cautioned, with all due respect. (See April 28, 2006 letter to the Governor General "Re: Threatening the Peace by Your Governments," attached herewith). Even considering the more flexible approach to evidence permitted the BCUC, the burden of proof in this motion has not been met.

The courts require proof in the legal sense on aboriginal title and the Tsilhqot'in case required proof and Vickers, J. spoke to that – after 339 days of testimony – but that was specific to that subject area.

> "The Supreme Court of Canada's Delgamuukw decision was expected to have significant, if undetermined, repercussions on the future negotiation and settlement of comprehensive land claims based on Aboriginal title, land use policy and *Aboriginal title* litigation in those regions of the country where traditional *Aboriginal lands* have not been ceded by treaty. These include not only most of British Columbia, but also, for example, parts of Quebec and Atlantic Canada.
>
> Delgamuukw continues to represent a momentous affirmation of the existence and constitutionally protected status of Aboriginal title in Canada. It seems important, however, to underscore the fact that the Court did not rule on the merits of the Gitxsan and Wet'suwet'en *Aboriginal title claim*. The effects of its decision are therefore more directive than conclusive. Delgamuukw provided government, Aboriginal claimants, and the lower courts with comprehensive new guidelines for the future settlement or litigation of the Gitxsan and Wet'suwet'en and other *comprehensive land claims*.
>
> In practical terms, the various parties' responses to the Delgamuukw decision remain to be fully played out in terms of policy developments, negotiation processes and the frequency of recourse to the judicial system. Given the history of land claim negotiations, the fact that the Court recommended that ongoing land claim disputes be resolved through negotiation offers no assurance that its guidelines will in fact facilitate the negotiation process or preclude litigation in relation to individual claims. On the other hand, the Delgamuukw ruling provided a compelling impulse to the parties to *reaffirm the treaty process through negotiation*.
>
> In short, *the Delgamuukw decision established an unprecedented theoretical framework that represents the basis for developing the law of Aboriginal title in Canada, rather than the culmination of the law's development.* The law of Aboriginal title will continue to evolve as principles of the Delgamuukw framework are implemented."
>
> "Aboriginal Title: the Supreme Court of Canada Decision in Delgamuukw v. British Columbia," prepared by: Mary C. Hurley, Law and Government Division, January 1998, Revised February 2000, Library of Parliament

(Notice the use above of various terms in the above, which mean different legal things.)

Now same is said of Vickers, J. in the Tsilhqot'in decision: another theoretical basis and *obiter dicta*. And there are efforts underway as the result to try to change the land claims policy in the BC Treaty Process and thus in other land claims processes – said to be "unique" because they occur in other provinces and each province is "unique" –
to make it more palatable to "First Nations."

> "Embarrassingly, and sadly predictably, the Province's initial response to the decision has been the dinosaur of denial. The Province's wish to dismiss the judgment as a non-binding opinion is unwise and unhelpful. After the Supreme Court of Canada decisions in Delgamuukw (1997) and Haida (2004), the Province insisted that nothing had changed."
>
> "UBCIC Open Letter to BC Government: Xeni Gwet'in Must Be Acted Upon"
> Press Release, December 4, 2007, Grand Chief Stewart Phillip, Union of BC Indian Chiefs.

> "There is no doubt the BC Supreme Court judgment by Justice Vickers in Tsilhqo'tin v. British Columbia will have an impact on the treaty negotiations but the extent of that impact remains unclear and its implications may not be known for some time. Justice Vickers said the court was ill equipped to effect a reconciliation of competing interests and encouraged the parties to negotiate."
>
> British Columbia Treaty Commission, "Says Treaty Commission in 14th Annual Report: Breakthroughs underline diverging views," New Release, Tuesday, December 4, 2007

It is not appropriate for the BCUC ever and certainly not in this particular environment to try to make its own policy as invited to do so. And allowing for CSTC to try to do this through the BCUC – mindful of hundreds of days of trial in two cases circumvented by a Commission Panel finding of face based on assertion of aboriginal title – is not in the public interest whatsoever. Even if it were, which is denied, with the greatest of respect, the BCUC is not equipped to make policy in this extremely specialized and complex area.

My clients and I and many Indigenous nations, including in the subject area, do not accept that mere bare Crown assertion of sovereignty is enough to terminate Indigenous ownership ("Indigenous title" as described above and in Exhibit C12-2). That is the reality, that is the evidence, and that is not justiciable by the BCUC nor is there any question of fact to be found by the BCUC to the contrary (Exhibit C12-2) as invited in this motion to entertain.

As way of background:

Harris, Kenneth (& Arthur McDames). *Visitors Who Never Left: The Origin of the People of Damelahamid* (UBC Press, 1974). Translated and arranged with Frances M.P. Robinson. Chief Kenneth B. Harris, *Visitors Who Never Left. the Origin of the People of Damelahamid*, UBC Press, 1974, ISBN-13: 9780774800341 ISBN: 0774800348 (Out of print. Hereditary Chief Kenneth Harris (translator) inherited the hereditary chief name Hagbegwatku, 'first-born of the nation,' from his uncle Hereditary Chief Arthur McDames "who recorded the tapes from which these translations have been made." Creation story and how Indigenous peoples came to populate "northwest and west central British Columbia," Damelahamid, after the flood.)

Hereditary chiefs have put the Crown, the provincial and federal governments, and the BC Treaty Commission on notice regarding their land, Damelahamid, (May 2, 2006, Guldimaliaxhw/Meh Dega Hoda sa). I know, because I counseled and drafted it, which is consistent with and serves to reaffirm that which is described under "Indigenous title" above, and I have an original signed copy in safe keeping. It is thus not readily accessible to me to meet the present timeframes nor would I be comfortable in the least in putting that document specifically to the BCUC in any manner as the BCUC is no place for any appearances of placement of that performed and exercised by and under Indigenous law.

The Cheslatta are within Damelahamid (though of course it is far more complicated than merely saying that and so this is limited to only that necessary to make the point in this motion and I do not speak before the BCUC for the Cheslatta and so this is not to offend their Indigenous law) and continue to see themselves as Indigenous nation, not mere domestic ethnic minority, "Cheslatta Carrier Nation" says the letterhead, and I put on the record that there was no basis to entertain a BC society given evidence by Indigenous nations (Exhibit B2-17; T4: Page 560, Lines 3 – 13 inclusive; T8: Page 1459, Line 14 to Page 1460, Line 22 inclusive). Note that David Luggi incorrectly called the Cheslatta Carrier Nation the "Carrier First Nation" in his letter (Exhibit 21-1).

Wet'suwet'en are wholly within Damelahamid. CSTC says it provides programs and services to and lobbies for Wet'suwet'en (Exhibit C21-1). An entity that is incorporated and define by Her Majesty's government, a society, cannot be the government of an Indigenous nation. By definition, if that is so, the Indigenous nation is no more.

That is *not* the case for the area the CSTC services as a tribal council. Services can be provided to Indigenous peoples by entities created under Her Majesty's governments without need to destroy the Indigenous nations and indeed, in law, that could never be achieved. The people hold that power, and the Indigenous law provides that the hereditary chiefs serve to ensure that never happens.

The CSTC provide no evidence to the contrary. The evidence is, Indigenous nations. That means, owners, need permissions, and that means the doctrine of aboriginal rights has no application in this area and the BCUC has no basis nor authority whatsoever to recognize that is does and therefore no basis upon which to open up the scope in this particular matter, in this particular area.

That does not impair the BCUC in any future matters before it where there are no Indigenous nations.

> "ABSTRACT
>
> This study reviews cultural heritage resources within the Bulkley TSA, which is located in west-central British Columbia. The Wet'suwet'en, Gitxsan and the Nat'oot'en First Nations traditionally and presently lived in the TSA. Although they differed linguistically, intercultural dynamics had a broad scope that resulted from the use of a similar social structure, which had integral connections to their environment. This similar social structure was composed of a matrilineal kinship society, exogamous Clans divided into Houses, with crests, poles, oral histories, and a land system of territories, all of which were managed through a public forum called the feast. Archaeological and traditional use sites primarily relate to these people. The Heritage Conservation Act, the Forest Practices Code of British Columbia Act and the Delgamuukw legal decision, and in turn, *the policies emerging from these* legal keynotes, require consideration of cultural heritage resources. The Forest Act defines a cultural heritage resource as, "an object, site or location of a traditional societal practice, that is of historical, cultural or archaeological significance to the Province, a community or an aboriginal people".
>
> An ethnographic overview of Gitxsan, Nat'oot'en and Wet'suwet'en cultures is discussed with the purpose of providing an introduction to their past cultural patterns and the nature of their adaptation to the environment of the area. Local indigenous peoples subsistence activities were tightly interwoven with the social structure, the local landscapes, and the broader regional environment. Without care and attention, starvation could be close at hand. Detailed knowledge and understanding of the environment, the characteristics of each resource, and the seasonal variation in abundance and availability, were necessary to the aboriginals for making decisions about what, where, and when different resources were to be harvested.
>
> Intercultural relations were extensive, with inter-marriage between the three groups prevalent, resulting in the forging of kinship ties and alliances, promoting trading occurrences and privileges, allowing technology transfer, facilitating cultural enrichment, and enhancing economic stability. Trading was pervasive, utilizing an extensive trail network that connected the coastal areas with the Pacific slope. Five of these major "grease" trails traversed to three hubs of trade; Wud'at, Moricetown Canyon, and McDonell Lake, which were all seasonal villages. The Gitxsan, Wet'suwet'en, and Nat'oot'en economy and trade reflects their adaptation to their geographic territories. Over time these stone, bone and antler technologists developed systems of access, tenure, and resource management. … (page i)
> …

"Wet'suwet'en society is matrilineal based and recognizes five crest groupings (Pdeek) called Clans, which are exogamous. Through this matrilineal descent, every Wet'suwet'en is a member of a House or Clan. These Clans are Laksilyu or Small Frog Clan; Gilserhyu or Big Frog clan; Laksamshu or Fireweed Clan; Tsayu or Beaver Clan; and Gitdumden or Wolf Clan. These Clans are correlative with crest groups of other neighboring people, allowing one to identify kin and potential marriage partners, while both extending and accepting support among the Haisla, Gitxsan, Nat'oot'en, Tsimshian,
Nisga'a and others.

Within the Clan are smaller groupings of people known as the House or Yax, which consists of people related through lineage, with a high chief. … The head chief of the House was supported by these kinsmen and the common people in a compatible and mutually advantageous and beneficial framework of support (Naziel 1997). The House had its own distinctive oral histories or kungax, crests and songs, which functioned as representations of historical events, with the *ultimate purpose of defining and confirming ownership of the House territory*. While Wet'suwet'en society is matrilineal based, the father Clan plays an important role in providing ongoing general societal support (Mills 1997). The father Clan is defined as the Clan of one's father. *An element of Wet'suwet'en law* states that people must marry outside of their own Clan; consequently, if they do not, they will not have father Clan support. The father Clan assists in many ways, particularly at the time of a death, and their responsibilities are generally to ensure that kin are cared for and have the support needed for a healthy life.

The Clan and the Houses were the clearly defined organization of the Wet'suwet'en. House chiefs had authority over their territories, and over House members and issues that extended no further than their House; governance and resolution of conflict or stress between House groups or Clans were carried out through the feast. (page 21)
…
NAT'OOT'EN
INTRODUCTION
The Nat'oot'en are the people of Nat'oo or Babine Lake and consider that their traditional homeland territories encompass the Babine Lake drainage. The Nat'oot'en as they refer to themselves, speak Babine-Wet'suwet'en, also referred to as Northwest Carrier, a distinct dialect from that of the carriers to the south and southeast of them (Rigsby & Kari 1987). They share this language in common with their neighbors the Wet'suwet'en in the Bulkley drainage. This language is part of the large Na-Dene or Athabaskan language group.

In terms of traditional Nat'oot'en cultural knowledge, relatively little is known, particularly in relation to their neighbors, the Gitxsan, Wet'suwet'en, Sekanni, the Stuart and Fraser Lake people. (page 27)"

"The Past into the Present Cultural Heritage Resources Review of the Bulkley Timber Supply Area," prepared for: Ministry of Forests, Bulkley-Cassiar Forest District, Prepared by: Ken Rabnett, Suskwa Research March 2000.

Notwithstanding the tendency to speak of such things in the past tense,

"… museums, history books and movies largely depict Indian life from antiquity to the 19th century. Images of Indians living in pueblos and planting maize, or as headdress-wearing warriors, were frequently cited. To most non-Indians we interviewed, American Indians' history has decisively ended, much as the Roman Empire ended." (page 10)

> "Summing up what he saw as the mission of an Indian museum, one man said, 'Tell the story of American Indians truthfully and honestly, and tell that story in both the historical and contemporary concepts … They survived everything that happened to them – they survived." (page 24)
>
> "When asked what non-Indians should learn about Indians, one Indian, in a particularly poignant moment, said to the moderator, 'Maybe you should just tell them that we still exist.' " (page 24)
>
> "Walking a Mile: A First Step Toward Mutual Understanding," *supra*.

They remain in the present and my extensive time and experience in the area suggests the intention to remain in the future and certainly no single letter from a single man nor indeed eight of them, can serve to suggest anything to the contrary. The Indigenous nations of the subject area have not become legal "first nations" and there is no treaty that serves to terminate their sovereignty, including governance and economic sovereignty, acknowledging and as has been said before, only subject to any existing *de facto* relationship with the Crown.

> "[94] On May 23, 2003, the SFN wrote to British Columbia and Canada stating that it was concerned about treaty negotiations with the TFN that affected the SFN rights and traditional territory and specifically requested British Columbia and Canada to directly engage with the SFN to resolve these issues."
>
> *Cook, supra*.

There is no evidence that the CSTC have sent any letter to anyone about concerns with the 2007 EPA.

And there was plenty of opportunity, including as set out in (Exhibit B1-18; T6: Page 1153, Line 9 to Page 1154, Line 13 inclusive).

> "[120] I have reached the conclusion that the TFN made numerous efforts to engage the SFN in discussion about potential overlaps between their traditional territories, but the SFN declined to enter into any dialogue on the question directly with the TFN."
>
> *Cook, supra*.

It sends the wrong incentive and message to condone ignoring of opportunities to speak sooner. The Commission Panel made the correct order in that regard of awarding intervenor status on conditions as its jurisdiction enables (Exhibit A-22; Section 14(c) and section 33(1) *Administrative Tribunals Act*, SBC 2004 c. 45 ).

> "The Issues
>
> [131] The issue raised by these petitions, *assuming there is no procedural impediment*, is whether ratification of the TFNFA by the designated Minister fetters the Crown's ability to honour its constitutional obligations to the petitioners. The petitioners argue that the Minister ought to have consulted with them with respect to their overlapping claims prior to concluding negotiations over the TFNFA. They argue that the Minister is committed to implementing the TFNFA without any significant change and thus will have no ability to consult and accommodate their aboriginal interests after the ratification of the TFNFA.

> [132] British Columbia acknowledges its duty to consult with other aboriginal groups that have overlapping claims and, where infringement is demonstrated, to accommodate the infringed interest. British Columbia says that the Non-Derogation provision in the TFNFA preserves the aboriginal interests of the petitioners. The provision acknowledges the Province's obligation to consult about any potential infringement.
>
> [133] The TFN argues that it repeatedly invited the petitioners to discuss resolution of any overlapping claim issues as the TFN progressed through the treaty negotiation process, but the petitioners were unresponsive. The TFN argues that the TFNFA does not infringe the aboriginal interest of the petitioners.
>
> [134] Canada supports the position of British Columbia and the TFN." [emphasis added]
>
> *Cook, supra.*

There is no infringement demonstrated by the 2007 EPA, no inference, no *prima facie*. This is not an inquiry or lawsuit in respect of the construction of Kemano. There is nothing provided in support of the motion that gives rise to any *prima facie* evidence of infringement of any aboriginal title should aboriginal title be proven to exist, and as almost obnoxiously said, this is not the place to be proving aboriginal title. All that is provided is an assertion, in the form of a map that was submitted for purposes of the BC Treaty Process, which shows that labeled clearly thereon and is available on-line at the BC Treaty Commission's website.

Consider any one person writing a letter and attaching one of the many maps found there, appearing before the BCUC, so as to get a finding of fact of aboriginal title binding in all courts, thus for all purposes. The BCUC is invited to invite chaos.

> "[149] Counsel for the Sencot'en Alliance petitioners was candid in telling me that he had no evidence and indeed no idea how the TFNFA would adversely affect his client's aboriginal or Douglas Treaty rights.
>
> [150] Mr. Grant, for the SFN petitioners, when asked to identify specific areas of infringement, described broad general concerns that impacted almost every substantive area of the TFNFA.
>
> [151] I have concluded it would be inappropriate, at this time, for me to make findings of fact as to the strength of the petitioners' aboriginal claims. There is conflicting evidence concerning the historical record of the TFN use of Boundary Bay. Historical use of Boundary Bay is just one example of an issue of a dispute that I cannot resolve on the affidavit evidence before me. The best I could conclude is that the petitioners have demonstrated credible claims about their asserted traditional territories.
>
> [152] Unlike the chambers judge in Haida, I am not able to determine that the petitioners have strong prima facie claims or otherwise. I have not had the benefit of appropriate testing of the conflicting affidavits tendered by the parties.
>
> [153] It is not, therefore, possible on the basis of the affidavit evidence to reach more specific conclusions as to potential infringement of the petitioners' aboriginal rights or title by the TFNFA. There is no obvious case of immediate or irreparable harm to those rights. The petitioners argue that they cannot be more specific about the potential infringement until they have had an opportunity to consult with the Crown and understand the implications of the

TFNFA.

[154] The burden of the evidence relied upon by the TFN is that there is no infringement and that the petitioners cannot demonstrate any irreparable harm or indeed any harm at all.

[155] The burden of the evidence and submissions of the petitioners is that it is obvious certain rights have been granted to the TFN in traditional territory of both petitioners. They say that if the TFNFA is ratified the 'ship will have left the dock' and they will have no ability to seek accommodation from the Crown if a fuller analysis of the TFNFA demonstrates a strong prima facie case that their rights have been infringed."

*Cook, supra.*

Sounds very similar to the present circumstances.

"[179] Adapting these principles to this case, I conclude that the Crown at least had the obligation to notify the petitioners of a potential infringement when the Agreement-in-Principle was concluded. At the Agreement-in-Principle stage, the Crown's duty to consult, in the absence of any obvious infringement, must be considered to be at the low end of the spectrum. In this case, the Crown's duty to consult was satisfied by mere notice to the petitioners of the Agreement-in-Principle provisions. …

…

[181] I conclude the Sencot'en Alliance, through its association with the SFN, and because of the public nature of the treaty process, would have similarly received notice of the Agreement-in-Principle. I conclude that this was sufficient notice at the Agreement-in-Principle stage. This notice, combined with the Crown's reliance on the TFN to try and negotiate any problems arising from the overlapping claims directly with the petitioners, is sufficient consultation at this stage."

*Cook, supra*.

Even if duty to consult as submitted by McDade, by the Crown or by BC Hydro as a Crown Corporation, which is not hereby concurred with as is obvious from the whole of our submissions including herein stated, then I submit that that consultation would have been at the low end of the spectrum and was satisfied by mere public notice and that the proof in that is that the Haisla Hereditary Chiefs were able to respond to that notice (though as said are not viewing anything as a matter of consultation and accommodation under the sec. 35 *Constitution Act, 1982* doctrine of aboriginal rights).

If an acceptance of the 2007 EPA for filing occurs and if thereafter there arises a Crown duty to consult, the following is helpful:

"[198] Even if I had concluded that the Crown ought to have engaged in a greater level of consultation prior to the initialing (sic) of the agreement, I would still not suspend the implementation of the TFNFA, or any portion of it, at this time.

[199] As already noted the implementation of the TFNFA will be phased in over a period of ten years from the effective date, which according to Ms. Beedle is not expected to be earlier than January 1, 2009. *There is no obvious infringement* that would require a court to issue an immediate order of prohibition, prohibiting the Minister, designated by the TFNFA Act, from signing the TFNFA in order to protect the asserted claims of the petitioners. At the moment *I*

*am not persuaded that there is evidence that the subject matter of their claims will be irretrievably harmed* unless an immediate order of prohibition is made, particularly having regard to the non-derogation clauses contained in the TFNFA.

[200] I therefore conclude that the Minister has not breached his constitutional duties to the petitioners. It is therefore, unnecessary for me to further consider application of the JRPA."[emphasis added]

*Cook, supra*.

Perhaps this is a good place to turn to the Supreme Court of Canada decision, *Delgamu'ukw v. British Columbia*, [1997] 3 S.C.R. 1010 http://scc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.html

"(d) Aboriginal Title under s. 35(1) of the Constitution Act, 1982

133 Aboriginal title at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (emphasis added). On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., Calder, supra), s. 35(1) has constitutionalized it in its full form.

134 I expressed this understanding of the relationship between common law aboriginal rights, including aboriginal title, and the aboriginal rights protected by s. 35(1) in Van der Peet. While explaining the purposes behind s. 35(1), I stated that "it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law" (at para. 28). Through the enactment of s. 35(1), "a pre-existing legal doctrine was elevated to constitutional status" (at para. 29), or in other words, s. 35(1) had achieved "the constitutionalization of those rights" (at para. 29).

135 Finally, this view of the effect of s. 35(1) on common law aboriginal title is supported by numerous commentators: Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 McGill L.J. 382, at pp. 447-48; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255, at pp. 256-57; James O'Reilly, "La Loi constitutionnelle de 1982, droit des autochtones" (1984), 25 C. de D. 125, at p. 137; William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II -- Section 35: The Substantive Guarantee", supra, at pp. 220-21; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314, at p. 329; Douglas Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada", in Gérald-A. Beaudoin and Ed Ratushny, eds., The Canadian Charter of Rights and Freedoms (2nd ed. 1989), 707, at pp. 731-32; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", supra, at p. 254; Brian Slattery, Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title, supra, at p. 45.

136 I hasten to add that the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1). As I said in Côté, supra, at para. 52:

'Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.'

I relied on this proposition in Côté to defeat the argument that the possible absence of aboriginal rights under French colonial law was a bar to the existence of aboriginal rights under s. 35(1) within the historic boundaries of New France. But it also follows that the existence of a particular aboriginal right at common law is not a sine qua non for the proof of an aboriginal right that is recognized and affirmed by s. 35(1). Indeed, none of the decisions of this Court handed down under s. 35(1) in which the existence of an aboriginal right has been demonstrated has relied on the existence of that right at common law. The existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).

137 The acknowledgement that s. 35(1) has accorded constitutional status to common law aboriginal title raises a further question — the relationship of aboriginal title to the "aboriginal rights" protected by s. 35(1). I addressed that question in Adams, supra, where the Court had been presented with two radically different conceptions of this relationship. The first conceived of aboriginal rights as being "inherently based in aboriginal title to the land" (at para. 25), or as fragments of a broader claim to aboriginal title. By implication, aboriginal rights must rest either in a claim to title or the unextinguished remnants of title. Taken to its logical extreme, this suggests that aboriginal title is merely the sum of a set of individual aboriginal rights, and that it therefore has no independent content. However, I rejected this position for another — that aboriginal title is "simply one manifestation of a broader-based conception of aboriginal rights" (at para. 25). Thus, although aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land "was of a central significance to their distinctive culture" (at para. 26).

138 The picture which emerges from Adams is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. I put the point this way in Adams, at para. 30:

'Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. [Emphasis added.]'

At the other end of the spectrum, there is aboriginal title itself. As Adams makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.

139 Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in Adams, this may occur in the case of nomadic peoples who varied "the location of their settlements with the season and changing circumstances" (at para. 27). The fact that aboriginal peoples were non-sedentary, however (at para. 27) does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.

e) Proof of Aboriginal Title

(i) Introduction

140 In addition to differing in the degree of connection with the land, aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities. As I said in Van der Peet (at para. 46):

'[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [Emphasis added.]'

Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). *Those activities are parasitic on the underlying title.*" [emphasis added]

*Delgamuukw, supra*.

[I do not agree with anything that would suggest that Indigenous nations are parasites on their own land and just offer this is further insight as to why I advocate that the doctrine of aboriginal rights whether under the common law as flowing from the doctrine of discovery or as since constitutionalized through section 35 of the *Constitution Act, 1982* wherein I say Lamer, J. had no ability to read in to section 35 that which does not exist therein, namely, an test for justification equivalent to the section 1 *Charter* justification test, as being *casus omissus*, Lamer could only interpret, not supply something that is not there – section 35 is specifically outside of the *Charter*. Had there been intention or the legal reality to treat Indigenous people as if just another mere minority, then they would have lumped section 35 into the *Charter* and thereby made "aboriginal rights" subject

to the justification test. That is *not* what Her Majesty signed into being in 1982 and She could be taken to be have been comforted at that time by the earlier said by Lord Denning on January 28, 1982:

> "There is nothing so far as I can seem to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown … *No Parliament should do anything to lessen the worth of these guarantees*. They should be honoured by the Crown in respect of Canada 'so long as the sun rises and the river flows.' That promise must never be broken. [Lord Denning, 1981]. [emphasis added]
>
> *Regina v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta,* [1982] QB 892; [1982] 2 All ER 118

Nor should any court, nor any judge or justice, nor the BCUC, nor any Commission Panel member do anything to lessen. And the *obiter* that is *Delgamu'ukw* must be measured to that standard that Denning honourably reminds of.]

> "145 On the other hand, in the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.
> …
> "161 The test of justification has two parts, which I shall consider in turn. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. … legitimate government objectives also include "the pursuit of economic and regional fairness … By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (Adams, supra) would fail this aspect of the test of justification. …
> …
> 165 …In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis." [emphasis added]
>
> *Delgamuukw, supra*.

Mr. McDade in bringing on this motion by the CSTC is saying that their aboriginal title was created at the time of assertion of sovereignty by the Crown (about 1846), yet the tribal council did not exist until 1979 (most were set up in the 1970s and 1980s). So apart from all that already set out above herein, the CSTC cannot be asserting aboriginal title. And there is no evidence as to whether they can do so for the people of any of the Indigenous nations of the subject area here, in this BCUC Hearing. There was a time the CSTC asserted as a "First Nation" for purposes of the BC Treaty process as defined by the BC treaty Commission Agreement and implementing legislation, but that cannot be assumed to be assertion for all purposes in all matters and there is no evidence to satisfied that CSTC has met the burden of proof as to whom and for what purposes given the constraints of a tribal council for delivery of programs and services and the fact of one letter by one man on CSTC letterhead.

The Statement of Intent submitted by the CSTC to the BC Treaty Commission has been in public domain for years on the BC Treaty Commission website:

> "1. What is the First Nation Called?
> Carrier Sekani Tribal Council
>
> 2. How is the First Nation established?
> Other
>
> Please Describe:
> The Carrier Sekani Tribal Council is registered as a non-profit society under the Provincial Societies Act.
>
> Is there an attachment?
> No
>
> 3. Who are the aboriginal people represented by the First Nation?
> The traditional territories are divided between the different tribes who make up the Carrier and Sekani:
>
> Sustut'enne (Sekani): Takla, Bear, Thutade Lakes
> Tl'azt'en (Carrier): Stuart, Cunningham, Trembleur Lakes
> Wetsut'en (Carrier): Burns, Broman and Francois Lakes
> K'oo Dene (Carrier): Stuart Lake, Fort St. James
> Sai K'uz whet'en (Carrier): Nechako River, Vanderhoof
> Na dle t'en (Carrier): Fraser and Francois Lake, Stellaquo"

The CSTC is self-defining as a "First Nation" for purposes of the BC Treaty process and the Statement of Intent the CSTC submitted clearly sets out the existence of Indigenous nations – "tribes who make up the Carrier and Sekani." The number of tribes (six) is to be noted does *not* correspond and are not the same legal thing as the Indian bands David Luggi refers to, numbering eight, and Mr. McDade refers to:

> "MR. McDADE: Mr. Chair, Commissioners. I represent the Carrier Sekani Tribal Council. The Carrie (sic) Sekani Tribal Council consists of eight bands in the central interior, Burns Lake, Nak'azdll, Nadleh Whut'en, Saik'uz, Stellat'en, Takla, and Tl'azt'en *Indian Bands* …" [emphasis added] (T3: Page 296, Lines 5 – 9 inclusive).

I understand that there are approximately 22 Indian Bands recognized by the Department of Indian Affairs that are Carrier or Sekani communities. CSTC has Indian Act chiefs from only eight Indian bands.

I understand there to be six Carrier dialectsm that have been called: Babine, Cheslatta, Nakazd'li, Saik'uz, Lheidli-T'enneh and Wit'suwit'en. Carrier governance system is commonly called the "bah'lats." There are four primary clans: Bear, Caribou, Frog, and Beaver, each with hereditary chief, each with sub-clans, represented in the bah'lats by hereditary chiefs holding rank as wing chiefs. Bear or Likh ji bu clan has sub-clans the Black, Grizzly, Fox, Crow and Timberwolf clans. Caribou or Gilhanten clan has sub-clans the Mountain, Geese, Mask and Flag clans. Frog or Jihl tse yu clan has sub-clans the Marten, Thunderbird, Beads, and Ribbon clans. Beaver or Likh sta Mis yu clan has sub-clans the Grouse, Owl, Moose and Sun clans.

Similar to the Haisla Hereditary structure, whether a person has breached Carrier law as determined by the clan hereditary chief, the hereditary chief then consults the hereditary wing chief(s) to determine the appropriate remedy. The "whip man" (often of the father clan,) is responsible for carrying out the law and implementing the decided remedy.

Formal business in the bah'lats is conducted in the feast hall or house, where clan members witness. Witnesses commit to memory the transaction details and hereditary chiefs recount in oral histories the transactions at future feasts where the transactions become relevant to the business then being conducted.

A very important aspect of Carrier law is the sanctioning of actions, business plans, and transactions, called Chus, the law of the eagle feather plumes. Prime Carrier Indigenous laws that govern conduct are respect, responsibility, obligation, compassion, balance, wisdom, caring, sharing and love.

> "The Takulli were first visited by Mackenzie, who, in 1793, traversed their country on his way from lake Athabaska to the Pacific. In 1805 the first trading post was established among them. … The practice of wearing wooden labrets was obtained from the Chimmesyan, while from the coast tribes they adopted the custom of burning the dead. A widow was obliged to remain upon the funeral pyre of her husband till the flames reached her own body; she then collected the ashes of the dead, placed them in a basket, which she was obliged to carry with her during three years of servitude in the family of her deceased husband, at the end of which time a feast was held, when she was released from thraldom, and permitted to remarry if she desired. From this custom the tribe came to be called Carriers. … They have a society composed of hereditary 'nobelmen' or landowners, and a lower class who hunt with, or for, these; … all title and property rights descending through the mother. Each band or clan has a well-defined hunting ground, which is seldom encroached on by others of the tribe. … Hale … and McDonald … divided them into 11 clans, as follows: Babine (Natoatin and Hwosotenne), Naskotin, Natliatin, Mikozliautin, Ntshaautin, Nulaautin, Tatshiautin, Tautin, Thetliotin, Tsatsuatin (Tanotenne) and Tsilkotin. The Tsilkotin are a distinct group, as determined by Morrice … who gives 9 septs of the Takulli: I, *Southern Carriers*: 1, Ltautenne (Tautin); 2, Nazkutenne (Naskotin) 3, Tanotenne; 4, Nutcatenna (Ntshaautin); 5, Natlotenne (Natliatin). II, *Northern Carriers* 6, Nakraztlitenne (Nikozliautin); 7, Tlaztenne (Tatshiautin). III *Babines*: 8, Nitutinni (Nataotin); 9, Hwotsotenne."
>
> Handbook of Indians of Canada, (republish from the Handbook of American Indians, 1906), published as an Appendix to the Tenth Report of the Geographic Board of Canada in 1912, Reprinted under the direction of James White, F.R.G.S., Secretary, Commission of Conservation, page 445 – 447. (I will have this rare book with me on December 18, 2007 should there be a desire to confirm the above)

I have had minimal contact with Sekani and thus can only rely on the following:

> "Sekani ('dwellers on the rocks'). A group of Athapascan tribes living in the valleys of upper Peace river and its tributaries and on the west slope of the Rocky mountains, British Columbia. Morice says they were formerly united into one large tribe, but on account of their nomadic habits have gradually separated into smaller distinct tribes having no affiliation with one an other. … Their complete isolation in the Rocky mountains and their reputation for merciless and cold-blooded savagery cause them to be dreaded by other tribes. … They are entirely nomadic, following the moose, Caribou, hear, lynx, rabbits, marmots, and beaver, on which they subsist. *They eat no fish and look on fishing as an unmanly occupation.* Their society is founded on father-right. They have no chiefs, but accept the council of the oldest and most influential in each band as regards hunting, camping, and traveling (Morice, Notes on W. Dènès, 28, 1893). … They are absolutely honest. A trader may go on a trapping expedition, leaving his store unlocked without fear of anything being stolen. Natives may enter and help themselves to powder and shot or any other articles they require out of his stock, but every time they leave the exact equivalent in furs (Morice).
>
> Morice (Trans. Can. Inst., 28, 1893) divides the Sekani into 9 tribes, each being composed of a number of bands having traditional hunting grounds the limits of which, unlike those of their neighbors, are but vaguely defined. It is not uncommon for them to trespass on the territory of one another without molestation, an unusual custom among the tribes of the north west. The tribes are as follows:
>
> (1) Yutsutkenne,
> (2) Tsekehneaz,
> (3) Totatkenne,
> (4) Tsatkeliie (Tsattine),
> (5) Tsetautkenne,
> (6) Sarsi,
> (7) Saschutkenne,
> (8) Otzenne,
> (9) Tselone." [emphasis added]
>
> Handbook of Indians of Canada, (republish from the Handbook of American Indians, 1906), published as an Appendix to the Tenth Report of the Geographic Board of Canada in 1912, Reprinted under the direction of James White, F.R.G.S., Secretary, Commission of Conservation, page 413 – 414.

Given the continued existence of the Declaration, the submissions of the Haisla Hereditary Chief throughout this BCUC Hearing can be said to equally apply to the Carrier and Sekani Indigenous nations though there is no attempt by saying hereby that there is any authority under their Indigenous laws for us to speak for them.

I bring to the Commission Panel's attention another case that is helpful:

> "On Thursday, September 18, 2003, Madam Justice Gerow of the Supreme Court of British Columbia gave her decision in *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422. The case was a judicial review of decision by different Provincial Crown ministries to permit the construction of a $15 million dryland fish hatchery by Omega Salmon Group Ltd. at Ocean Falls, B.C.

Madam Justice Gerow held that the Heiltsuk Tribal Council had not demonstrated a prima facie case that the hatchery would infringe any aboriginal rights the Heiltsuk might have in the area, and that she would not, therefore, exercise her discretion to quash the permits. Although an order was made that the Crown owed a duty of consultation regarding the licences, that was a result of an admission by the Crown rather and not a conclusion drawn from the evidence."

Cached case brief of *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422 (http://www.courts.gov.bc.ca/jdb-txt/sc/03/14/2003bcsc1422.htm) by Fasken Martineau as retrieved on retrieved on 2 Aug 2007 03:22:39 GMT

[1] The petitioners apply pursuant to Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, to set aside the decisions of the Minister of Sustainable Resource Management (the Minister), the Deputy Comptroller of Water Rights, the Regional Water Manager (Cariboo Region) and Land and Water British Columbia (LWBC)(collectively, the decision makers) with respect to:

· Conditional water licence 116890 for Martin Lake dated December 19, 2001 (the Martin Lake water licence 2001) and the replacement licence no. 117538 dated August 29, 2002 (the Martin Lake water licence 2002);

· A licence of occupation to operate a commercial fish hatchery, dated January 15, 2002 (the hatchery licence of occupation);

· A licence of occupation for a salt water intake pipe, effluent pipe and general dock, dated October 1, 2002 (the dock and pipe licence of occupation); and

· Conditional water licence 116629 for Link River, dated November 18, 2002 (the Link River water licence).

(collectively, the licences)

…

[9] Both the petitioners and Omega object to portions of the affidavit material which has been filed. I agree with both the petitioners and Omega that many statements in the affidavits are irrelevant or inadmissible hearsay, opinion or argument. I am not going to deal with each objection raised, however I have disregarded the statements which are objectionable. In reaching my conclusions, I have relied on direct evidence and the oral histories contained in the affidavit material.

[10] The issues to be determined are:

· Have the Heiltsuk established a prima facie claim of aboriginal title or rights in respect of the lands and waters covered by the licences?

· Have the Heiltsuk established a prima facie infringement of the aboriginal title or rights which they claim?

· Was a duty of consultation and accommodation owed to the Heiltsuk by the decisions makers before they made their decisions to issue the licences and, if so, did they fulfill those duties?

· Was a duty of consultation and accommodation owed by Omega to the Heiltsuk and, if so, did Omega fulfill its duty?

· Is this an appropriate case for the court to exercise judicial review?

· If there were breaches of duty by the decisions makers or Omega what are the appropriate remedies?

…

[68] Because aboriginal rights are not absolute and do not exist in a vacuum, *claimants must assert both a right and the infringement of the right*. Cheslatta Carrier Nation v. British Columbia, 2000 BCCA 539, ¶ 18 and 19, Delgamuukw, ¶ 160, 162 and 165.

…

(i) Have the Heiltsuk established a prima facie infringement of their right to non exclusive use of the land?

[73] The Heiltsuk argue that this case falls within the cases referred to in *Delgamuukw* which may require the full consent of the aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (¶ 168) They argue that the Province's actions authorize aquaculture over Heiltsuk title through the regulation of farmed fish and therefore the Province should have obtained the consent of the Heiltsuk.

[74] I do not agree that the issuance of the licences in question is analogous to the type of situation contemplated in *Delgamuukw* which would require the full consent of the aboriginal nation. There is no evidence that the Province by issuing the four licences is impacting the right of the Heiltsuk to hunt or fish in the area.

[75] There is no evidence that the Heiltsuk will not be able to locate a village there because of the licences of occupation. The hatchery in issue is a land based facility. The licences of occupation over the .08 square kilometres are for 10 years. Most of the land on which the hatchery is located is filled land created prior to the construction of the pulp mill. The site was a contaminated industrial site which has required significant expenditure by Omega to clean up. There is evidence that Omega has removed 700 tons of industrial debris from the site and plans to continue a process of remediation of the site in co-operation with LWBC.

[76] The Heiltsuk have not established that the issuances of the licences have resulted in a prima facie infringement to their right to non exclusive use of the land.

[77] There is a large area adjacent to the pulp mill site where the town of Ocean Falls was located which had a population of 4,000 people that could be used as a village site. The total population has declined to less than 100 since the closure of the pulp mill 20 years ago.

[78] *The diversion of water is not new. The original licence to divert water from Martin Lake was issued 70 years ago* and there was sufficient water and electricity to service the town of Ocean Falls.

[79] *There is no evidence that the issuance of the licences allowing construction and operation of the hatchery will impact the Heiltsuk's ability to pursue their negotiations with the Province regarding their claim of aboriginal title* or locate a village there in the event they decide to do so.

[80] As well, there is no evidence that the licences will prevent the Heiltsuk from establishing a wild salmon enhancement facility in the future.

…

[84] There is no evidence that the construction and operation of the hatchery pursuant to the licences will impact the Heiltsuk's ability to negotiate or establish the right to self govern in the area in the future. There is no evidence that the construction and operation of the hatchery either has or will cause irreparable harm whereby the Heiltsuk will not be able to utilize the land as they choose in the future.

…

[86] Accordingly, I find that the Heiltsuk have not discharged their burden of establishing a prima facie infringement of their aboriginal rights to non-exclusive use of the land.

[87] In Nikal the Supreme Court of Canada, … The Court held that the government must ultimately be able to balance competing interests.

…

[90] There is evidence from Omega's expert that the construction of the facility will not impact the marine habitat in the area and that the discharge from the hatchery during operation will not pose a threat to marine life.

[91] The Minister of Fisheries and Oceans confirmed on August 16, 2002 that "a harmful alteration, disruption, or destruction (HADD) of fish habitat will not occur as a result of the construction and operation of this facility as proposed." The Regional Waste Manager, pursuant to the Waste Management Act, R.S.B.C. 1996, c. 482 and regulations confirmed on April 29, 2002 that the hatchery was a regulated site under the Land-Based Fin Fish Waste Control Regulation, B.C. Regulation. 68/94. Neither the Federal Minister of Fisheries nor the Provincial Minister of Water, Land and Air Protection are parties to this petition.

[92] Omega's expert report was provided to the Heiltsuk and he was in attendance at a meeting with the Heiltsuk in May 2002 in Bella Bella to provide information.

[93] The Heiltsuk presented no evidence that the effluent or construction will impact the marine environment in an adverse way thereby impacting the Heiltsuk's fishing rights in the area. …

…

[95] In my view, the Heiltsuk's concern about potential escape of salmon from fish farms outside Heiltsuk claimed territory is not an issue before the Court. The issues before me are whether the decision makers erred in granting the four licences to Omega, not whether fish farms, aquatic or land based, should exist in B.C.

[96] The Heiltsuk also argue that the diversion of water could possibly infringe their fishing rights in the area. The original Martin Lake water licence was granted over 70 years and there is no evidence that the diversion of water allowed by it has infringed the Heiltsuk's asserted right to fish in the area. There is no evidence that the water diverted pursuant to the Link River water licence infringes the fishing rights in the area. The water, although diverted through the hatchery, eventually flows into Cousins Inlet and as a result there is no impact on the volume of water in the Inlet.

[97] On the evidence before me, I find that the Heiltsuk have not discharged their burden of establishing a prima facie infringement of the aboriginal right to fish in the area of Ocean Falls. It needs to be noted that in the Heiltsuk case, there was affidavit evidence provided. Here, we have no sworn evidence and have had no ability to even test the contents of the letter signed by Chief Luggi. This is not even an issuing of licences before the BCUC as was the case in the Heiltsuk.

…

[99] In light of the Crown's concession that it has the duty to consult with the Heiltsuk regarding issuance of the licences, I am granting the order sought by the Heiltsuk that the Crown has a duty to consult with the Heiltsuk regarding the licences.

…

[114] No authority has been provided to me to support the proposition that the right to consultation carries with it a right to veto a use of the land. On the contrary, the Supreme Court of Canada has recognized that the general economic development of the Province, the protection of the environment or endangered species, as well as building infrastructure and settlement of foreign populations may justify the infringement of aboriginal title. The government is expected to consider the interests of all Canadians including the aboriginal people when considering claims that are unique to the aboriginal people. …

…

[121] In *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 (S.C.), Mackenzie J., as he then was, dismissed an application by a First Nation to quash the Minister's consent to the transfer of a tree licence. The Court assumed, without deciding, that the Minister had acted in breach of a duty to consult, but exercised its discretion to deny the petitioners their remedy under the *Judicial Review Procedure Act*. Mackenzie J. held that although the Band had lost the opportunity to consult before the Minister gave his consent, the consent was for the transfer of an existing tenure and no additional interests were alienated which could prejudice the Band's aboriginal claims. (p. 65)"[ emphasis added]

There have been no such admissions or concessions by Alcan or BC Hydro in this Hearing, the evidence is quite the contrary. There is no transfer or issue of licence in issue. I refer the Commission Panel to the whole of my submissions as contained in T8 as well as the submissions therein of BC Hydro and Alcan, particularly as found at the reply of Mr. Bursey beginning at T8, page 1483, line 24 and ending at page 1479, line 24.

> "2. **EVIDENCE**: The CSTC desires to submit evidence for the Phase 2 reconsideration in respect of the full impacts of the 2007 CPA on down stream water flows, fish and First Nations. To date, the Commission under the Scoping Order that is the subject of reconsideration, has prevented any evidence aside from 'the narrow scope of physical changes to the flow that are new' arising under the EPA - which is a very minor part of the impacts that are relevant to the duty of consultation and accommodation. The Commission has refused to allow the CSTC to call evidence on that point, and refused to allow cross-examination of Alcan. If the Scoping Order is to be reconsidered, that evidence is relevant. The Ruling of Nov. 29 dealt only with very narrowly limited impacts.

> It is suggested that the Commission can either provide time to hear that evidence, or, for the purposes only of the motion for reconsideration, accept an assertion from CSTC counsel as to the nature of that evidence. If the evidence itself is required to be called, time will be required in the schedule."
>
> BCUC Hearing Document 11-30 - Carrier Sekani Tribal Council - Submission Response to L-95-07 dated November 30, 2007, "Submissions on Phase 2 reconsideration Schedule"

It is trite to say that until the scope is amended evidence is constrained to being within scope. The burden of proof is that CSTC has to provide sufficient evidence upon application to open the scope so as to give rise to support opening up the scope. If scope is opened up, then, as the Commission Panel says, there would be a further evidentiary component to the Hearing. So the conduct and the decisions of the Commission Panel have all been proper in this Hearing and there has been nothing inherently unfair or biased in the treatment of the CSTC by the Commission Panel.

> "If the Scoping Order is amended as requested by CSTC, then the evidentiary record will need to be reopened and an opportunity for argument will be provided."
>
> Letter No. L-96-07 dated November 30, 2007.

It is not enough to say, "expect changes or impacts" – the burden of proof means having to establish sufficient *prima facie* case of actual changes and impacts to justify reconsideration and an order to open up scope.

CSTC was given until the end of Friday Nov 23, 2007 to get in whatever they needed to get in (T5, Page 822, Line 25 to Page 823, Line 1 inclusive) and as submitted on November 27, 2009, CSTC did not meet the burden of proof then (T8: Page 1457 Line 26 to Page 1459, Line 10, inclusive) and Mr. Bursey following me went into great detail in T8 on that same point. And there is nothing provided herewith the motion to do so now.

Mere bare assertions do not meet the burden of proof (just like it does not effect a change in ownership to the Crown from the Indigenous Nations). CSTC was given every reasonable opportunity to provided evidence. There is only one untested letter. No affidavits. Nothing submitted that serves as evidence. There is nothing filed with this motion except for a map, which was produced for the BC Treaty Process and "is for illustrative purposes only" therein (see page 17 of Motion to Reconsider).

Perhaps an adverse inference arises that David Luggi or others did not want to be cross-examined by me? It's reasonable, and reasonable to inference because the result would not have helped the assertions made in regards to this motion. There was much that goes to that that was put on the record. I certainly never waived any right to cross-examine. David Luggi and no one else from the CSTC appeared before the Commission Panel to provide evidence.

There were submissions previously before the BCUC that contain a reference to a cases decided by Mr. Justice Burnyeat in turn quoting Wigmore on Evidence, 3rd Edition, regarding adverse inference, available at the BCUC resource library:

"… Wigmore on Evidence, the 3rd Edition:

'Ö The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate it as the most natural inference that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions, and they are also open always to explanation by circumstances, which makes some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.' "

G-70-05 - BCTC VITR Application May 31, 2006 - Volume 42 Proceedings at Hearing BCTC-VITR/Sea Breeze – VIC May 31, 2006 Volume 42 Page: 7843 Line 1 – Page: 7844 Line 23

Section 5 (c) and (d) of the Motion and Written Submission Doc. 12-4 – this cannot be some fishing expedition – either the burden of proof is met in the motion or it is not.

There is no such thing as being allowed to assert something without any evidence so as to be allowed to open the scope and thus allow for fishing in the Hearing to get evidence for purposes of the motion – that is circular nonsense and definitely not good law. A better place to go fishing is through discovery in litigation (provided not an abuse of process) or research through specific claims. Not here.

The evidence by BC Hydro and Alcan is clear. There are findings of fact as the result.

The following is not intended to in any way summarize the above and past submissions incorporated by reference herein *but to emphasize*:

1. There is no standing for the CSTC to make this motion given the October 30, 2007 letter conveying the decision of the Commission Panel (Exhibit A-22) that allows for intervenor on conditions, found in one paragraph and not two, thus normal paragraph interpretation supports the submissions already made (T8) and hereby reaffirmed that the Commission Panel's statement regarding the scope forms part of the conditions:

   > "par·a·graph (pr-grf) n. A distinct division of written or printed matter that begins on a new, usually indented line, consists of one or more sentences, and typically deals with a single thought or topic or quotes one speaker's continuous words." (The Free Dictionary)
   >
   > "par·a·graph: a subdivision of a written composition that consists of one or more sentences, deals with one point …" (Merriam-Webster)

   and does not support Mr. McDade's submissions and thus to bring this motion negates the agreement by CSTC and results in no continuing status as an intervenor, thus rendering this application moot. The Commission Panel acted completely within its jurisdiction to allow the CSTC to intervene on that conditional basis as set out in the first paragraph of Exhibit A-22:

   > "33 (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that
   >
   > (a) the person can make a valuable contribution or bring a valuable perspective to the application, and

(b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention.

(2) The tribunal may limit the participation of an intervener in one or more of the following ways:

(a) in relation to cross examination of witnesses;

(b) in relation to the right to lead evidence;

(c) to one or more issues raised in the application;

(d) to written submissions;

(e) to time limited oral submissions." [emphasis added]

*Administrative Tribunals Act*, SBC 2004, c. 45

I submit that to allow standing on this motion and thereby to allow it to proceed notwithstanding the Commission Panel's decision should there be some discretionary power in the Commission Panel to do so in these circumstances, which is not hereby admitted, results in unjustifiable prejudice to the parties. I submit that the parties have already been subject to additional costs without any demonstration of any benefit, significant or otherwise so far by the intervenor CSTC. I submit that allowing the motion to succeed will severely prejudice the Haisla Hereditary Chiefs **(T get reference**

I submit that the Commission Panel has afforded the CSTC every reasonable opportunity to provided evidence and the CSTC has failed to available itself of those opportunities. We also acted to try to ensure time was made available within the time ordered (T get ref) regarding cross-examination. This is considered a great sacrifice by the Haisla Hereditary Chiefs who felt it only proper to formally introduce themselves to the Commission Panel and say, for example that which I could not write in terms of protocol as to who they are in the witness panel background statement, especially as would be said in Haisla, and that thus prejudice has already occurred to the Haisla Hereditary Chiefs by the reconsideration application made by the CSTC since inception, without any resulting countervailing benefit from their participation.

2. There is no standing demonstrated by evidence that the CSTC, a British Columbia society, is able to assert aboriginal title in any forum in representative capacity other than as asserted by them, which is submitted is completely insufficient particularly given the very serious consequences of the submissions that accept the doctrine of aboriginal rights and given the Declaration and the fact of continuing Indigenous nations and the fact of their mandate to continue in the BC Treaty Process having been withdrawn, by their own admissions on-line. No standing to assert aboriginal title. The CSTC is governed by the laws of the province of British Columbia, not by Indigenous laws. It's a lobby group and service provider.

3. The burden of proof is not met.

4. There is no evidence to support any reasonable expectation of impact on aboriginal rights as the result of the acceptance for filing of the 2007 EPA, should that occur.

5. There is no jurisdiction in the BCUC to accept mere assertions. The BCUC is a quasi-judicial body bound by the rules of evidence. It is *not* the BC Treaty Commission and is *not* like it, as it does not have a comparable legislative foundation, where assertions suffice.

6. It is not in the public interest and not in its authorities for the BCUC to attempt to make any policy regarding aboriginal title.

7. The BCUC must be able to balance the interests of various components of the public so as to address the public interest as it is required and is not a general court for adversaries to have decided matters between them, such as the existence of aboriginal title.

8. The CSTC should take it elsewhere, more appropriate, if ever mandated to do so. This is not a reasonable option or appropriate forum to try and test cases on aboriginal rights and title.

9. The CSTC asserts (but does not prove *prima facie*) impacts on aboriginal right(s) from the construction of Kemano, *not* impacts from the 2007 EPA.

10. The specific claims process remains available, as others have already settled, or the courts however *laches* may apply and justification of infringement through application of the doctrine of aboriginal rights may well be found given present *obiter*. Vickers recommends negotation. BC Hydro and Alcan would not be and are not presently parties in litigation or negotiations pertaining to any parties seeking application of the doctrine of aboriginal rights.

11. Even if preservation of white sturgeon is important, the history of at least the Sekani says that fish were not important to them at the time aboriginal title would be established/crystallized as at time of assertion of Crown sovereignty, continuing into the turn of the century, and so would not qualify as an aboriginal right. Though the Carrier did fish, we have no evidence specific to the white sturgeon and the 1987 Settlement Agreement (Exhibit C21-5) addresses salmon needs and the oolichan protocol is being followed and none of those measures are changed by the 2007 EPA.

12. The BCUC is not an appropriate forum to lobby for changes to the 1987 Settlement Agreement (Exhibit C21-5) or to lobby for the protection of white sturgeon or any other species.

13. There is a "meaningful economic dimension to the 2007 EPA (Adams at para 58), a significant economic component (Delgamu'ukw at para 161), indeed the whole thing is a matter of significant economics I submit by virtue of the fact of this Hearing. I submit that all of the evidence supports that. Alcan says it needs the 2007 EPA if it is to move further toward modernization of their smelter in the subject area. Many are concerned about the economic implications of the 2007 EPA and have suggested incentives in the 2007 EPA to sell power instead of smeltering (if that is the proper was to reference it) yet the evidence does not seem to support this and is a matter for argument in the main.

14. And even if going back to the construction of Kemano, which facility allows Alcan to produce power, the Supreme Court of Canada has already suggested that it would find the infringements justifiable and thus lawful. There is nothing preventing the CSTC apart from needing a mandate to do so, from starting up an action to find out what the court would ultimately decide.

15. Nothing to suggest that the Commission Panel does not intend to engage fully in its duties, no

allegation of bias, and so this motion, if it were actually before the Commission Panel (standing issues), would be, in any event, premature, just like in the *Cook, supra*.

16. And there is nothing to support an exercise of discretion to refer to court:

"43 (1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

(2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.

…

(4) The stated case under subsection (2) or (3) *must*

(a) be prepared by the tribunal,

(b) be in writing,

(c) be filed with the court registry, and

(d) *include a statement of the facts and relevant evidence*.

(5) Subject to the direction of the court, the tribunal *must*

(a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,

(b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and

(c) decide the application in accordance with the opinion." [emphasis added]

*Administrative Tribunals Act*, SBC 2004, c. 45

There is nothing for the Commission Panel to write up. Not an appropriate question to form the basis of a stated case as has been requested by Mr. McDade (T ge ref because submit there is no standing here, there is no constitutional question, there is no evidence to support or trigger the need as the cases show it will fail – no where near a prima facie case made out. So disagree with Mr. McDade that the Commission Panel can refer a stated case. The Commission Panel is unable to comply with section 43(d) of the ATA. It would be an abuse of the court's time and an affront to the administration of justice to so proceed. It would amount to a de facto veto, not permitted at any time by law under the doctrine of aboriginal rights. (T ref re adjournment application by McDade) and see if case reference

17. There was no notice of this application given to the Attorney General of Canada and the Attorney General of British Columbia or the previous "stage 1" in accordance with section 8, *Constitutional Question Act*, RSBC 1996, c. 68. Mr. McDade, Q.C. asserted this is a constitutional question raised but then did not act consistent with that assertion. Aboriginal law, his field, is all about constitutional questions. He must be taken to know this requirement well.

> "And because of that potential as to whether what we are doing here sufficiently triggers as a matter of jurisdictional or other constitutional kinds of questions, I think it's important for me to point out that we still have Exhibit A2-2, which is the panel's decision or letter of October 30th, 2007 in paragraph 1, which I'd like to read."(T8: Page 1455, Lines 16 – 22 inclusive)
>
> Well, I clearly did not think we had engaged a constitutional question and I still do not think we have. And it seems that Mr. McDade, Q.C. also does not appear to think that he did so, either then or now.

Mr. McDade complained that,

> "The Commission ruled that it wished to limit the argument that day to 'the narrower issue' of 'physical impacts' from new water flows arising under the 2007 EPA (rather than existing impacts which would be affected by the 2007 EPA - which is the argument that CSTC wishes to make)."

There are no existing impacts on the Nechako that would be affected by the 2007 EPA. The evidence and findings of fact make that clear.

There remains a significant issue of impact to the 2007 EPA (addressed by our Final Argument filed on December 10, 2007). It is not an issue of impact from the 2007 EPA to which this motion goes.

Mr. McDade would have the BCUC make an attempt to do that which the Supreme Court of British Columbia and the Supreme Court of Canada have yet to do, and I would say, cannot do where Indigenous nations do not submit to the doctrine of aboriginal rights and thus accept assertion of Crown sovereignty terminates theirs.

> " … many non-Indians agreed with the Philadephian who linked 1492 not only with America's 'discovery,' but with the time 'when we started to kill them.' " (page 9)
>
> "Walking a Mile: A First Step Toward Mutual Understanding," *supra*.

To submit would be to endorse,

> "… museums, history books and movies largely depict Indian life from antiquity to the 19th century. Images of Indians living in pueblos and planting maize, or as headdress-wearing warriors, were frequently cited. To most non-Indians we interviewed, American Indians' history has decisively ended, much as the Roman Empire ended." (page 10)

None have and none do so hereby this response to the motion brought.

But what the BCUC can do is make sure the 2007 EPA is properly equipped to survive and endure given the whole of the public circumstances, to which what is set out herein and in our Final Argument filed on December 10, 2007.

The motion tries to get the BCUC to establish policy (whether that was appreciated or not). And that is very different from the BCUC running its own processes. Matters between Indigenous nations and Crown and Indigenous nations and corporate parties are not justiciable in BCUC but it is in the public interest in this Hearing to consider the potential impacts of those outstanding matters ***on*** the agreement and ensure the agreement is sufficiently stable in light of those matters and the changing atmosphere of resolution between and among all those entities. It is in public interest that if BC Hydro getting the deal, the 2007 EPA, that is able to be certain it

will remain the deal notwithstanding what happens out there. Those issues are argued in the main and the Commission Panel has done nothing to prevent those issues from being argued and has indicated no reason to suggest it will not consider any arguments on those issues from being considered by the Commission Panel.

Without detracting from any of the above, especially the standing issues, they have had their day in court though ought not to have, with the greatest of respect, but given the absence of BCUC precedent to my knowledge, may prove useful to clear the air on the issues. Certainly that is what is attempted by my assistance.

The motion should be dismissed on all accounts, not the least of which is it is moot in any event. Let this properly be the end of it.

And that is all I have to say.

Janice G.A.E. Switlo

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April 28, 2006

Her Excellency the Right Honourable Michaëlle Jean
Governor General of Canada
Rideau Hall
1 Sussex Drive
Ottawa, ON K1A 0A1

Via facsimile: (613) 998-8760 (to follow with original)

Your Excellency, Hah Thah Loo,

Re: Threatening the Peace by Your Governments

In reviewing the history of the Haudenosaunee Six Nations Confederacy matters now consuming your governments' attention that have been shared from many sources but without purporting to be expert on the matters nor yet formally acquainted with the Confederacy Chiefs though we have a mutual friend, we, the Hereditary Chiefs and Elders of the Tahltan Nation, cannot help but recognize the pattern that continues to be perpetuated today, in Tahltan country.

It appears that your governments failed in 1841 to obtain the necessary authorities from the Haudenosaunee Six Nations Confederacy decision-makers and failed to follow their established protocols, relying instead particularly on the directions of an opportunist person who appears to have unilaterally felt it more expedient to ignore same in order to quickly capitalize on perceived urgent economic circumstances.

This is no different from what your government is engaging in in Tahltan country today with two Indian Act elected chief councillors, Jerry Asp and Maria Quock, and the Chair of a society under the jurisdiction of your provincial government of British Columbia, Curtis Rattray. Such actions, explained in detail by our friend on April 9, 2006 (courtesy copy enclosed), which even worse allegedly risks harm to the investing public through misrepresentations that state the Tahltan support certain mining and other developments within Tahltan country, which is not true, especially as represented by NovaGold Resources pertaining to its Galore Creek copper and gold mine and Coast Mountain Power Corp., guarantees to deliver the same results that have continued to haunt in the case of the Haudenosaunee Six Nations Confederacy.

To have your governments engage in intense and sensitive negotiations with the Haudenosaunee Six Nations Confederacy to resolve the inappropriate and offensive actions dating back to the 1800s that did not give rise to any certainty for Canadians and investors who today are being severely affected but yet at the same time have your government facilitate and endorse the same inappropriate, offensive, and quite frankly reckless and dangerous action, is unconscionable. The Honour of the Crown is thereby tarnished. Your provincial government appears to not care to protect the Honour of the Crown and thereby threatens the peace and jeopardizes the future of a relationship between Her Majesty and Tahltan that with all due respect, Canadians need and look to Her Majesty to secure.

We regret that it is necessary to hereby formally demand that Her Majesty see to Her protectorate duties, cause Her governments to cease and desist from the aforesaid actions that threaten the peace and advise that we now must make formal complaint to the Ontario Securities Commission, which is mandated to "provide protection to investors from unfair, improper and fraudulent practices" and to "foster fair and efficient capital markets and confidence in their integrity" as your government of British Columbia is now allegedly complicit in the alleged wrongdoings through the supporting of the activities of Jerry Asp, having him open the floor to the Toronto Stock Exchange (TSX) on April 20, 2006 with Your council member Minister Neufeld: 'We get huge advertising value out of opening the TSX,' said British Columbia Energy and Mines Minister Richard Neufeld from the exchange, adding the next stop is likely New York) and formal complaint to the U.S. Securities and Exchange Commission whose mission "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation": "As more and more first-time investors turn to the markets to help secure their futures, pay for homes, and send children to college, our investor protection mission is more compelling than ever."

This should not have been necessary. We are shocked by your government's behaviour, as should the international community.

Govern yourself accordingly.

Dax Digadina Tia,

Robert Jackson, Meh Dega Hoda Sa  Ron Jackson, Meh Dega Hoda Sa

cc. The Honourable Iona Campagnolo, Lieutenant Governor of British Columbia
Via facsimile: 250.387.2077 (without enclosure, to follow with original copy)

Mr. David Wilson, Chair, Ontario Securities Commission, Via facsimile: 416.593.8241
(without enclosure, to follow with original copy)

Mr. Christopher Cox, Chairman, U.S. Securities and Exchange Commission,
Via email: chairmanoffice@sec.gov (without enclosure, to follow with original copy)

Janice G.A.E. Switlo Via email: janice@switlo.com

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: ***Cook v. The Minister of Aboriginal Relations and Reconciliation,*** 2007 BCSC 1722

Date: 20071129
Docket: S074496
Registry: Vancouver

**In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 196, c. 241**

Between:
Willard Cook, Chief Councillor, Kevin Cook and Joanne Charles, Councillors, Suing on their own behalf and on behalf of all of the Members of the Semiahmoo First Nation, the Semiahmoo First Nation Council and the Semiahmoo First Nation

Petitioners

And

The Minister of Aboriginal Relations and Reconciliation

Respondent

- and -

Docket: S074887
Registry: Vancouver

**In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 196, c. 241**

Between:
Chief Allan Claxton on his own behalf and on behalf of the members of the Tsawout First Nation; and the Tsawout First Nation;

Chief Chris Tom on his own behalf and on behalf of the members of the Tsartlip First Nation; and the Tsartlip First Nation;

Chief Bruce Underwood, on his own behalf and on behalf of the members of the Pauquachin First Nation; and the Pauquachin First Nation

Petitioners

And

The Minister of Aboriginal Relations and Reconciliation

Respondent

Before: The Honourable Madam Justice Garson

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Cook Petitioners: | P.R. Grant<br>J. Huberman<br>M.L. Ross |
| Counsel for the Claxton Petitioners: | C.G. Devlin<br>J.W. Gailus |
| Counsel for the Respondent, The Minister of Aboriginal Relations and Reconciliation: | L.J. Mrozinski<br>P.E. Yearwood |
| Counsel for the Intervenor, Tsawwassen First Nation: | T. Dion<br>J.J.M. Arvay, Q.C. |
| Counsel for the Intervenor, Attorney General of Canada: | J. Chow<br>H. A. Frankson<br>M.L.I. Lafond (on November 9, 2007) |
| Date and Place of Hearing: | September 17 to 20 and November 9, 2007<br>Vancouver, B.C. |

## Introduction

[1] On July 25, 2007, after about fourteen years of negotiation, the Tsawwassen First Nation (the "TFN"), Canada and British Columbia initialled a treaty, titled "The Tsawwassen First Nation Final Agreement" (the "TFNFA"). Ratification of the TFNFA requires:

(1) a majority vote by members of the TFN;

(2) enactment of provincial settlement legislation by British Columbia and the signing of the TFNFA by the Minister authorized to do so by the Provincial Cabinet; and

(3) by Canada, the coming into force of federal settlement legislation and the signing of the TFNFA by a Minister authorized by the Federal Cabinet to do so.

[2] These two petitions, by agreement, were set down to be heard together because they seek the same relief relating to the TFNFA.

[3] In the Cook petition, members of the Semiahmoo First Nation (the "SFN") seek, among other things, an order in the nature of prohibition to prevent the Provincial Minister from signing the TFNFA until consultations with the SFN have been completed.

[4] The Claxton petitioners, the Chiefs and members of the Tsawout First Nation, the Tsartlip First Nation and the Pauquachin First Nation seek the same remedy on behalf of the First Nations referred to in the proceeding as the Sencot'en Alliance. Below I note from the affidavit of Mr. Pelkey that the SFN is generally considered part of the Sencot'en Alliance.

[5] The petitioners argue that their First Nations have overlapping claims to aboriginal title and/or rights with the TFN and that the honour of the Crown requires the Crown to consult with the petitioners and to accommodate their interests prior to signing the TFNFA with the TFN.

[6] Neither Canada nor the TFN were named as a respondent in these petitions, but both appeared as interveners at the hearing of the petitions.

[7] The respondent Minister opposes the petitioners' applications on both procedural and substantive grounds. According to the Minister, the procedural defect in the petitions is based on the fact that the petitioners bring these applications pursuant to the ***Judicial Review Procedure Act,*** R.S.B.C.1996, c. 241 (the "***JRPA***"). The Minister says that an application for judicial review, under the ***JRPA***, must relate to the exercise or purported exercise of a statutory power. He argues that in this case, although legislation authorizing a Minister to sign the TFNFA is about to be enacted, the Crown's duties that are impugned in this petition do not flow from the statute, but rather from the constitutional obligations of the Crown to aboriginal people. While those obligations are not immune from judicial scrutiny, according to the Minister, that scrutiny cannot be in the form of judicial review of administrative actions under the ***JRPA***, which only applies to the exercise of delegated power exercised pursuant to a statute. The Minister argues that the impugned conduct of the Minister, in failing to consult with the petitioners prior to initialling the TFNFA, is not the exercise of any statutory power, but either the exercise of the Minister's prerogative powers or natural person powers. It follows, the Minister argues, that the Court has no jurisdiction to grant the remedies sought and, therefore, the petition should be dismissed for want of jurisdiction.

[8] The petitioners argue that the remedies they seek under the ***JRPA*** are not limited to specific statutory powers.

[9] The petitioners contend that s. 2(2)(a) of the ***JRPA*** does not specify that the granting of relief in the nature of *mandamus*, prohibition, or *certiorari* is only available in respect to the proposed or purported exercise of a statutory power. They rely on ***Mohr v. CJA Vancouver, New Westminster and Fraser Valley District Council of Carpenters*** (1988), 32 B.C.L.R. (2d) 104, 33 Admin. L.R. 154 [***Mohr*** cited to B.C.L.R.], where Southin J.A. stated that s. 2(2)(a) of the ***JRPA*** is not limited to statutory powers.

[10] The petitioners argue that the Court's jurisdiction under the ***JRPA*** is not confined to conduct specifically governed by a statutory power. The petitioners argue that *mandamus* may be available even though one cannot point to a specific legal duty imposed on an individual *persona designata*.

[11] The petitioners say that in the present case, they have identified both the Crown official and a specific duty. The Crown official is, of course, the respondent Minister. The petitioners have identified the duty as a constitutional imperative, namely the duty to consult as described in ***Haida Nation v. British Columbia (Minister of Forests),*** 2004 SCC 73, [2004] 3 S.C.R. 511.

[12] The petitioners are at pains to point out that they do not seek an order restraining the government from enacting the settlement legislation contemplated by the TFNFA. Rather, they seek an order prohibiting the Minister from signing the TFNFA and an order of *mandamus* compelling the Minister to consult with the First Nations having overlapping claims prior to the ratification of the TFNFA.

[13] The Minister also opposes the petition on substantive grounds. The Minister contends that, although the honour of the Crown requires it to consult with First Nations whose aboriginal rights and title may be infringed by the actions of the Crown, this does not mean that the Crown must consult and accommodate every potential overlapping claim before agreeing to terms of a treaty. To do so would mean the Crown could never finalize any treaty. The Minister relies on the non-derogation provisions in the TFNFA as proof that the TFNFA will not infringe the petitioners' rights and title. The Minister acknowledges an obligation to consult and accommodate the interests of the petitioners as to any potential impact that the TFNFA may have on them, but argues that the petitioners do not, in effect, have a "veto" over the TFNFA process that has resulted in the initialling of the TFNFA.

[14] The petitioners say that the honour of the Crown requires the Crown to consult with them, and if necessary, accommodate their claimed aboriginal interests <u>before</u> the Crown takes steps that may infringe those interests. In other words, the petitioners say the Crown may not ratify the TFNFA unless and until it has consulted with, and, where necessary, accommodated the petitioners' aboriginal interests in the subject matter of the TFNFA. The petitioners both point to the obvious fact that they are neighbours of the TFN and that their territorial claims for both title and rights overlap with those granted to the TFN in the TFNFA.

[15] I have concluded that the petitions should be dismissed on both the procedural and substantive grounds for reasons that follow.

## <u>The Petitions</u>

[16] The petition of the SFN was filed on June 29, 2007. It claims the following relief:

A. Relief in the nature of *mandamus* directing the respondent Minister to engage in meaningful consultation with the Petitioners with respect to the potential infringement of the TFNFA on the aboriginal rights and title of the Petitioners;

B. An order in the nature of *mandamus* ordering the respondent Minister to:

> 1. identify, in consultation with the Petitioners, the Petitioners aboriginal rights which have been and are currently exercised within the Semiahmoo territory which is impacted by the TFNFA;

2. identify those portions of the asserted Tsawwassen SOI Territory marked in map J-1 of the TFNFA where the Petitioners have a good case for aboriginal title;

3. assess the potential effects of the TFNFA, including the significance of these effects on the Petitioners' aboriginal rights and title; and

4. accommodate the Petitioners' aboriginal rights and aboriginal title prior to signing the TFNFA;

C. Relief in the nature of prohibition prohibiting the respondent Minister from signing the TFNFA until after consultation with the Petitioners; and

D. Relief in the nature of prohibition to prevent the respondent Minister from giving effect to the TFNFA under s. 11 of c. 24 until consultation with the Petitioners has been completed.

[17] The petition of the Sencot'en Alliance was filed on July 23, 2007, and later amended The pertinent claims for relief are as follows:

A. A declaration that the respondent Minister has constitutional duty to consult with the Petitioners in good faith with respect to potential infringements of the Petitioners' aboriginal rights and title and treaty rights.

B. A declaration that the respondent Minister has breached his constitutional duty of consultation by not engaging in any consultation with the Petitioners prior to initialling the TFNFA.

C. Relief in the nature of *mandamus* directing the respondent Minister to engage in meaningful consultation with the Petitioners with respect to the potential infringement of the TFNFA on the aboriginal rights and title of the Petitioners;

D. An order in the nature of *mandamus* ordering the respondent Minister to:

1. identify, in consultation with the Petitioners, the Petitioners' aboriginal and Douglas Treaty rights, the exercise of which is impacted by the TFNFA;

2. identify, in consultation with the Petitioners, those portions of the asserted Tsawwassen territory marked in map J-1 of the TFNFA where the Petitioners have a good cause for aboriginal title and rights;

3. asses the effect on the Petitioners' aboriginal and Douglas Treaty rights as a result of the finalization of the TFNFA; and

4. accommodate the Petitioners' aboriginal and Douglas Treaty rights prior to signing the TFNFA;

E. Relief in the nature of prohibition prohibiting the respondent Minister from signing the TFNFA until after the respondent Minister has engaged in meaningful consultation and accommodation with the Petitioners; and

F. Relief in the nature of prohibition to prevent the respondent Minister from giving effect to the TFNFA under s. 11 of c. 24 until meaningful consultation an accommodation with the Petitioners has been completed.

## PROCEDURAL OBJECTION

### *Judicial Review Procedure Act*

[18] The parties' submissions as to the applicability of the ***JRPA*** centered on the definition of statutory power and the language of s. 2(2). I reproduce the relevant sections as follows:

1. In this Act: …

> **"statutory power of decision"** means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
>
> (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
>
> and includes the powers of the Provincial Court;
>
> **"statutory power"** means a power or right conferred by an enactment
>
> (a) to make a regulation, rule, bylaw or order,
>
> (b) to exercise a statutory power of decision,
>
> (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
>
> (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
>
> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

2.(1) An application for judicial review is an originating application and must be brought by petition.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

> (a) relief in the nature of *mandamus*, prohibition or *certiorari*;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

### The Provincial Settlement Legislation

[19] The object of the petitioners' claims for relief is Bill 40 – the ***Tsawwassen First Nation Final Agreement Act*** (the ***"TFNFA Act"***). Bill 40 received third reading on November 7, 2007. It is not yet in force. Section 4 provides:

The Lieutenant Governor in Council may authorize a member of the Executive Council to sign the TFNFA.

[20] The petitioners ask this Court to exercise its jurisdiction under the ***JRPA*** to prohibit the Minister appointed under s. 4 from signing the TFNFA.

**Historical View of Prerogative Remedies**

[21] In order to understand the Crown's procedural objection, I find it helpful to examine, briefly, the historical use of the prerogative writs of *mandamus*, prohibition and *certiorari*.

[22] Although the ***JRPA*** is now the standard procedure for challenging illegal government action, it does not constitute a new substantive remedy: David Jones & Anne de Villars, *Principles of Administrative Law*, 4th ed. (Scarborough, ON: Thomson Canada Limited, 2004) at page 576. Jones and de Villars note at page 576 that prerogative remedies have an ancient history and have been the primary vehicle through which the Superior Courts review the legality of government actions. They continue at pages 576 to 577:

The "prerogative" nature of the remedies derives from the fact that they were issued by the Crown to control the actions of its servants taken in its name. In time, the Crown delegated these remedies to the superior courts. Royal writs were used to compel the administrators to come before the courts to justify their actions. Traditionally, the proper nomenclature for a prerogative remedy was "*R. v. Delegate*; Ex-parte Applicant".

[internal citations omitted]

[23] Jones and de Villars describe the procedure of a *R. v. Delegate* application. In the first stage of the procedure, the applicant applied for the writ without notice. The writ was accompanied by an affidavit indicating the applicant's knowledge, information or belief about the invalidity of the delegate's decision. The delegate was thus required to come to court to justify his actions. A second stage of the procedure involved an application at which the Court determined the issue of illegality. If illegality was demonstrated, the Court would generally issue an order for the appropriate prerogative remedy.

[24] At page 582-4, Jones and de Villars note the following relevant points:

(a) "it is now quite clear that both *certiorari* and prohibition are available to control purely administrative actions [as opposed to quasi judicial act conduct]."

(b) "*certiorari* and prohibition are now used exclusively to control the exercise of statutory authority and are confined to the public law field.";

(c) "judicial and administrative decisions are fully within the sphere of *certiorari* and prohibition, legislative decisions are still not.";

(d) "*certiorari* and <u>prohibition lie only against public bodies whose authority is derived from statute.";</u>

(e) "*certiorari* and <u>prohibition do not lie to enforce contractual or other private law rights, perhaps even where there is a "public law" "back-drop to these rights."</u>

[<u>e</u>mphasis added]

[25] At pages 585-588, Jones and de Villars explain the prerogative writ of *mandamus*. An order of *mandamus* compels the performance of a statutory duty owed

to an applicant. *Mandamus* is used where the statutory delegate refuses to exercise power he is compelled to use. In legal theory, an order of *mandamus* is a royal command to perform a public duty; failure to obey is contempt of court. Like *certiorari* and prohibition, *mandamus* is a discretionary remedy that may be refused by the Court even though the applicant has otherwise made out his case.

[26] At page 587, Jones and de Villars write:

*mandamus* does not lie against the Crown or its agents. This reflects the general rule that none of the prerogative remedies is available against the Crown, because in theory the court cannot treat the monarch as both applicant and respondent in the same action at the same time, nor could it commit itself in contempt for disobedience. On the other hand, the number of people entitled to this immunity is quite restricted. In particular, it does not apply to the Queen, the Lieutenant Governor, cabinet ministers or public servants when they are exercising a power conferred by statute, for then they are *persona designata*.

[internal citations omitted]

[27] At footnote 68, the authors say:

but the Crown must be distinguished from the Governor (alone or in Council), the Cabinet, a Minister, or any other public servant to whom the legislature has delegated a statutory duty. In the later case, *mandamus* will lie.

[28] The Crown's position on this application is rooted in the historical analysis of the availability of the prerogative writs. That is, a prerogative writ is only available where there is a specific statutorily delegated authority to a *persona designata* that such a remedy will lie. The petitioners, on the other hand, say that the traditional use of prerogative writs has been expanded to confer jurisdiction on the courts under the ***JRPA*** to supervise constitutional duties that, as alleged in this case, a Minister has refused to perform.

## Analysis of Recent Case Law

[29] Are the petitioners correct in contending that the historical use of prerogative writs has been expanded to allow the courts to force by *mandamus* a Minister to perform his constitutional duties?

[30] I turn to the case law relied upon by the petitioners for the proposition that s. 2(2)(a) of the ***JRPA*** has been interpreted to permit a court to grant orders of *mandamus* or prohibition even where the act complained of does not rest on a statutory power.

[31] In ***Culhane v. British Columbia (Attorney General)*** (1980), 18 B.C.L.R. 239, 108 D.L.R. (3d) 648 (B.C.C.A.) [***Culhane*** cited to D.L.R.], the plaintiff, Ms. Culhane, sought to compel the warden of a prison to permit her to visit prisoners. She was said by the Court to be a member of a prisoners' rights group and the warden opined that her visits created unrest and disobedience among the inmates of the prison. Her appeal from the lower court refusal to grant a writ of *mandamus* or *certiorari* was dismissed. There were three sets of reasons: Taggart J.A. and Craig J.A. wrote concurring reasons and Lambert J.A. wrote dissenting reasons. Taggart J.A. and Craig J.A. agreed that the prison warden was exercising a statutory power of decision when he refused her entry into the prison because he was acting under the authority of the Lieutenant Governor in Council. Since the warden was exercising a statutory power of decision, Taggart J.A.

agreed with Craig J.A. that the case could be disposed of under s. 2(2)(b) of the ***JRPA***. Taggart J.A. expressed the following view at 651:

Being of that view it is unnecessary for me to deal with the argument of the appellant that relief in the nature of *mandamus* or *certiorari* to quash could also be granted under the provisions of s. 2(2)(a) of the *Act*. On this aspect of the matter it is my opinion that even if relief of that nature could be granted under s. 2(2)(a), as to which I express no opinion, it is preferable having regard to the considerable modifications made in the prayer for relief to deal with the matter by way of s. 2(2)(b). The only other comment I have on the *Judicial Review Procedure Act* is that I think relief may in appropriate circumstances be granted under s. 2(2)(a) even where the action complained of does not rest on a statutory power of decision. I think s. 2(2) is so drawn that subparagraph (a) is quite independent of subparagraph (b) and *vice versa*; nor in my view do other provisions of the *Act* militate against that conclusion.

[32] The petitioners rely on these reasons of Taggart J.A. to argue that the language of s. 2(2)(a) of the ***JRPA***, which does not include the words, "in the exercise of a statutory power," must be given its ordinary meaning.

[33] In his reasons in dissent Lambert J.A. explained why the words "in relation to the exercise ….or purposed or purported exercise, of a statutory power" were left out of s. 2(2)(a). He explained that the ***JRPA*** is a procedural act only, one which does not, at least on its enactment, change the law of *mandamus*, prohibition or *certiorari*. The common law of those prerogative writs included the requirement that they be granted in respect to a statutory power and it was therefore unnecessary to repeat language such as "in the exercise of a statutory power" in s. 2(2)(a). On the contrary, proceedings for a declaration or injunction were not restricted to prerogative writs and are remedies available in private law as well as public law. Because the ***JRPA*** is a procedural statute granting remedies in the public law context, it was necessary to include the qualifying language in s. 2(2)(b). He adds, however, at 664:

That does not mean, of course, that the substantive law either does or does not require that the remedy of setting aside the decision of a public officer should only be granted where the decision is made under a power derived specifically or generally from a statute. It means only that the substantive law must govern that question and not the definitions in the *Judicial Review Procedure Act* which were inserted for other purposes.

[34] The petitioners rely also on the decision of ***Mohr***. Mohr was a union member who was charged with breaching the constitution of his union. He was found guilty of that breach by members of the union who formed a tribunal. The tribunal was not a statutory body. He, nevertheless, applied under the ***JRPA*** for an order in the nature of *certiorari* or declaratory relief. The Court of Appeal confirmed the lower court decision that the remedies granted under the ***JRPA*** were limited to those situations where the complaint concerned a statutory power, and there was nothing statutory about the respondent union's constitution. He could not therefore get relief in the nature of a prerogative remedy. Southin J.A., without any difficulty, dismissed the appeal (at 107) because:

It is clear that on the second branch of s. 2, declaratory relief is limited to those situations where the complaint concerns a statutory power. There is certainly nothing statutory about the constitution of the respondent union. As to the first branch of s. 2, it simply is inapplicable to the appellant's claim.

[35] However, in *obiter,* Southin J.A. referred to the historical use of the prerogative writs (at 108):

Paragraph (a) [s. 2(2)(a) of the *JRPA*] refers to some of the writs that were commonly known as prerogative writs. Those writs were an exercise by the court on behalf of the Sovereign of the Sovereign's right and duty to compel public officers to do their duty and obey the law.

Paragraph (a) is not limited to statutory powers. There is at least one public officer, the Attorney General, who has a public duty, albeit not founded in statute, which can be enforced under the *Act*: see *Air Canada v. Attorney General of British Columbia*, [1986] 2 S.C.R. 539, 8 B.C.L.R. (2d) 273.

[36] The petitioners cling to this statement by Southin J.A. for the proposition that it is not necessary to identify any precise statutory power.

[37] Ms. Mrozinski, for the Minister, argues that ***Air Canada v. Attorney General of British Columbia***, [1986] 2 S.C.R. 539, 8 B.C.L.R. (2d) 273 is not authority for the proposition cited by Southin J.A.

[38] In ***Air Canada***, Air Canada had issued a writ against Her Majesty the Queen in the Right of the Province of British Columbia and the Attorney General of British Columbia seeking a declaration that the ***Gasoline Tax Act***, R.S.B.C. 1979, c. 152, did not and does not apply to Air Canada, and for other relief.

[39] The action was brought by Air Canada pursuant to the provisions of the ***Crown Proceeding Act***, R.S.B.C. 1979, c. 86. Air Canada sought a fiat from the Crown, permitting it to sue the Crown. The Executive Council, on the advice of the Attorney General, recommended to the Lieutenant Governor that the grant of fiat be refused. Pursuant to that advice, the grant of fiat was refused. Air Canada then applied to the Supreme Court of British Columbia, pursuant to the ***JRPA***, for an order in the nature of *mandamus* compelling the Attorney General to consider the petition of right and then advise the Lieutenant Governor whether to grant his fiat.

[40] In ***Air Canada***, La Forest J. of the Supreme Court of Canada allowed the appeal for the reasons of the British Columbia Court of Appeal in the judgment of Anderson J.A. (see 47 B.C.L.R. 341, 150 D.L.R. (3d) 653, cited to D.L.R., for reasons of the B.C.C.A.).

[41] I do not think that the ***Air Canada*** case can be cited for the petitioners' proposition that it is not necessary to identify any precise statutory power. Anderson J.A. decided that the case involved a constitutional issue which was not frivolous and that it was open to the Court to direct the Attorney General to advise the Lieutenant Governor to issue his fiat to enable Air Canada to bring its action to declare the particular tax at issue unconstitutional. At 685, Anderson J.A. stated:

I conclude that s. 2(e) of the ***Attorney General Act*** entrusts the Attorney-General with the sole power and duty of advising the Lieutenant-Governor whether or not to issue his fiat. There is no scope for the involvement of the Executive Council and no substance to the procedural argument cited earlier…for the above reasons I would allow the appeal and direct the Attorney-General to grant his fiat.

[42] I do not understand ***Air Canada*** to be authority for the proposition that s. 2(2)(a) of the ***JRPA*** operates independently of a statutory enactment, because Anderson J.A. was specifically referring to a statutory enactment at issue.

[43] In my view, Southin J.A. cannot be taken to have intended to say, based on the authority of ***Air Canada***, that s. 2(2)(a) of the ***JRPA*** is disconnected from any statutory enactment.

[44] The petitioners also rely on ***Vander Zalm v. British Columbia (Acting Commissioner of Conflict of Interest)*** (1991), 56 B.C.L.R. (2d) 37, 80 D.L.R. (4th) 291 [***Vander Zalm*** cited to D.L.R.]. The petitioner was the Premier of British Columbia. He participated in certain land transactions which became the subject of much public comment and controversy. Mr. Hughes was the conflict of interest commissioner, but the ***Members' Conflict of Interest Act***, R.S.B.C. 1990, c. 54, was not yet in force when the events that were being investigated occurred. Accordingly, no investigation could proceed under the statutory authority. However, Mr. Vander Zalm and the leader of the opposition agreed that Mr. Hughes would conduct an investigation. The results of the investigation were not favourable to Mr. Vander Zalm who applied under the ***JRPA*** for various orders setting aside the findings of the Hughes report. It was common ground between the parties that Mr. Hughes was not exercising a statutory authority. Esson C.J. (as he then was) concluded at 297, "that Mr. Hughes exercised no jurisdiction which would make his findings subject to judicial review. Such power as he had was conferred upon him by the agreement between him and Mr. Vander Zalm." Consequently, the petition was dismissed.

[45] The petitioners, however, rely on some of the dicta in the ***Vander Zalm*** case. In particular, at 297, Esson C.J. cited ***R. v. Panel on Take Overs and Mergers'***; ex-parte Datafin PLC & another, [1987] Q.B. 815, [1987] 1 All E.R. 564 at 583 (C.A.) as follows:

I do not agree that the source of the power is the sole test whether a body is subject to judicial review, […] Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: …

But in between these extremes there is an area in which it is helpful to look not just at the source of power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may […] be sufficient to bring the body within the reach of judicial review.

[46] This dicta would seem to support the proposition that there are certain functions of government not specifically authorized by statute that are within the reach of judicial review. The petitioners say that the Crown's constitutional imperative to consult with aboriginal peoples is one such example.

[47] The decision in ***McDonald v. Anishinabek Police Service*** (2006), 276 D.L.R. (4th) 460, 55 Admin. L.R. (4th) 47 (O.N. S.C.J. D.C.), includes a helpful review of the necessity or otherwise of the statutory power as a prerequisite to relief in the nature of *mandamus*, prohibition or *certiorari* in the Ontario equivalent of s. 2(2)(a) of our ***JRPA***.

[48] In ***McDonald***, the justices conclude that where the order sought is in the nature of *mandamus*, prohibition or *certiorari*, the exercise of a statutory power was not required. Starting at para. 53, the Court held:

While early interpretations of s. 2(1)1 of the *JRPA* may have read in the requirement of a "statutory power" as a prerequisite to relief in the nature of *mandamus*, prohibition or *certiorari*, subsequent cases have rejected this interpretation. Rather, the prerogative writs are available where a public decision-maker owes a duty of fairness.

Further, to read the requirement of a "statutory power" into s. 2(1)1 of the *JRPA* would have the absurd result of either abolishing the common law right to judicial review of decisions not made pursuant to a statutory power or requiring applicants to commence

such proceedings in the Superior Court contrary to the scheme in the *JRPA* of allocating applications for Judicial Review to the Divisional Court.

Thus, in our view, the availability of the prerogative writs is not circumscribed by the *JRPA* and the Divisional Court's jurisdiction to issue such relief is determined by the scope of the prerogative writs at common law.

…

The seminal decision on the court's supervisory jurisdiction over a board or body not constituted under statute is *R. v. Criminal Injuries Compensation Board*, *Ex p. Lain.* In this case, review was sought of a decision of a board established, not by statute, but pursuant to the prerogative powers of the executive branch of government. Lord Parker C.J. was of the view that *certiorari* applies to every body of a public, as opposed to private, character that has a duty to act judicially. Diplock L.J. held that the court's supervisory jurisdiction was not dependent on the source of the tribunal's authority, except where the source was a private agreement of the parties. Where novel tribunals are established by acts of government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics upon which the subjection of inferior tribunals to the supervisory jurisdiction of the High Court is based.

Ashworth J. was of the view that the board had sufficient public or official character to negate the notion that the board was a private or domestic tribunal, as the board was established by the executive after debates in Parliament and the board was funded by the government. Ashworth J. continued to state that:

> [i]t is a truism to say that the law has to adjust itself to meet changing circumstances and although a tribunal, constituted as the board, has not been the subject of consideration or decision by this court in relation to an order of *certiorari*, I do not think that this court should shrink from entertaining this application merely because the board had no statutory origin. It cannot be suggested that the board had unlawfully usurped jurisdiction: it acts with lawful authority, albeit such authority is derived from the executive and not from an Act of Parliament.

The panel concluded that the scope of judicial review was not limited to boards or bodies constituted under statute and extends to bodies established by the exercise of prerogative power.

Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown". It consists of "the powers and privileges accorded by the common law to the Crown".

The court's jurisdiction to review decisions made pursuant to prerogative powers was affirmed by the *House of Lords in Council of Civil Service Unions v. Minister for the Civil Service*, where the House emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source, and the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals.

Similarly, in *Black v. Canada (Prime Minister)*, Laskin J.A. stated that the expanding scope of judicial review made it no longer tenable to insulate the exercise of a prerogative power from judicial review merely because the power was not a statutory

power. Laskin J.A. affirmed the test set out by the *House of Lords in Council of Civil Service Unions v. Minister for the Civil Service, supra*, and held that:

> the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.

Thus, the prerogative writs are not limited in their application to boards or tribunals constituted under statute and may be applied to bodies constituted pursuant to prerogative powers, if the decision in question affects the rights or legitimate expectations of an individual.

[internal citations omitted]

[49] In ***Martineau v. Matsqui Institution (No. 2)***, [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385 [***Martineau*** cited to S.C.R.], Dickson J. held at 622, "In my opinion, *certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person." He determined that the prerogative writs were available to permit the Court to intervene regardless of whether the function of the tribunal or government power in question was judicial or quasi-judicial. He held at 622 that "Even though the function is analytically administrative, courts may intervene in a suitable case." At 628 he wrote:

*Certiorari* is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.

[emphasis added]

**Conclusions on Prerogative Remedies**

[50] From this review of the authorities, I conclude the following:

- The ***JRPA*** is procedural not substantive legislation. Thus the availability of the remedies of prohibition, *certiorari*, and *mandamus* are made available not pursuant to the statute, but only where they are otherwise available at common law;
- Prohibition and *mandamus* are not available to enforce private law rights even where the Crown is exercising these rights;
- Historically, prerogative remedies were only available to force a government delegate to conduct himself within the confines of a statutorily conferred power; and
- There is some authority for the proposition that the scope of prerogative writs has been expanded somewhat to enable their use to restrain government power exercised by bodies created pursuant to its prerogative power, where the public decision maker owes a duty of fairness to, and the decision affects, the rights of individuals.

[51] Applying these principles to this case, it may be helpful to first consider the source of the government's power in negotiating and reaching the stage of initialling the TFNFA.

**Powers of the Crown**

[52] The powers of the Crown are derived from two sources, statutes and common law: see Hogg & Monohan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell 2000). Statutory powers of the Crown are those defined or created by an Act of Parliament. Crown prerogative is described as "the residue of discretionary or arbitrary authority which at any given time is left in the hands of the Crown." At page 16, Hogg and Monohan write that "the traditional view is that the term 'prerogative' should be confined to powers or privileges that are unique to the Crown." In this view, powers and privileges enjoyed equally with private persons are not, strictly speaking, part of the prerogative. For example, the Crown has the power to acquire and dispose of property and to enter into contracts. These powers have traditionally not been regarded as true prerogative powers because they are possessed by everyone.

[53] The power of the Crown to negotiate treaties with aboriginal groups is closer to the prerogative powers of the Crown than that of a private person because, in negotiating and concluding treaties, the Crown is fulfilling its constitutional duties to aboriginal peoples pursuant to s. 35 of the ***Constitution Act***, 1982, being schedule B to the ***Canada Act 1982*** (U.K.), 1982, c. 11. On this point, the Minister contends that by exercising only the powers of a private person, the Crown is contracting with another legal entity. I disagree. The power of the Crown to enter into treaties may be its natural person power to contract, but the basis for doing so is its constitutional imperative to take steps to "[reconcile] … the pre-existence of aboriginal societies with the sovereignty of the Crown": ***Haida*** at para. 17. As MacLachlin C.J.C. wrote at para. 20 of ***Haida***, "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of aboriginal claims."

[54] However, the prerogative remedies are designed to supervise the exercise of authority affecting an individual, particularly where the exercise of that authority has been done unfairly. The authority is generally construed to be that exercised by a tribunal or body acting in a decision making capacity. This is the view expressed by Southin J.A. in ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)***, 2005 BCCA 128, 251 D.L.R. (4th) 717. In ***Musqueam***, the petitioner, the Musqueam First Nation, brought a petition for judicial review of the Minister's decision to proceed with the sale of land to the University of British Columbia pending determination of the Musqueam's claim of aboriginal title to the lands in issue. Southin J.A. granted the injunction and ancillary relief but, in doing so, explained that judicial review was not the appropriate remedy. At paras. 16 to 19, after posing the question "How should such a claim be raised?", she stated:

The *Judicial Review Procedure Act*, invoked below, is inapt to the claims asserted here because the appellant does not assert that the transaction in issue is not authorized by statute. To put it another way, no administrative grounds are asserted. I addressed this point of the scope of the *Judicial Review Procedure Act* in my judgment in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59, rev'd. 2004 SCC 74, at pages 28-30 (B.C.L.R.), and I shall not repeat what I there said.

These cases arising from aboriginal land claims address themselves, in substance, not to whether powers conferred by an enactment are lawfully exercised, but to an overarching constitutional imperative.

During argument in *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*, supra, Mackenzie J.A. felicitously described a claim of an aboriginal right as "upstream" of the certificate of indefeasible title.

I consider these claims of failure to consult and accommodate also to be upstream not only of the certificate of indefeasible title but also of the statutes under which the ministerial power has been exercised.

[55] And at para. 21 she said:

I do not overlook what was said in *Haida* about the inutility in land claims cases of injunctions. But, as I understand the reasons of the Chief Justice of Canada, she is addressing interlocutory injunctions in a proceeding to establish aboriginal title, whereas I am addressing injunctions both interlocutory and permanent in aid of a right to be consulted and accommodated, a related but different right unknown either to law or to equity before the judgment in *Delgamuukw*.

[56] In this case, counsel for the Minister argues that this case ought to be brought in the context of a declaratory action seeking a declaration that the Crown has a duty to consult and, if necessary, accommodate, and that in such an action, an injunction would be an effective remedy. Mr. Grant, counsel for the Cook petitioners, says that he doubts injunctive relief would be granted largely because of the irreparable harm and balance of convenience test for an interlocutory injunction: see ***RJR-MacDonald Inc. v. Canada***, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[57] Mr. Devlin, counsel for Sencot'en Alliance, and Mr. Grant rely also on the fact that ***Haida***, and many other "consultation" cases, were brought under the ***JRPA***. Counsel for the petitioners say that I should be persuaded by the fact that, in those cases, no procedural objection was made to the use of prerogative writs.

[58] These cases are discussed in ***Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)***, 2005 BCSC 697, 33 Admin. L.R. (4th) 123. Dillon J. responding to a similar argument at paras. 93 through 104, noted that most cases involved a delegated decision-making process under a specific statutory enactment, usually a forestry act. She wrote at paras. 98 and 104:

Most of the cases on this subject have been commenced by petition (*Haida, Squamish Nation, Musqueam, and Gitanyow First Nation v. British Columbia (Minister of Forests*), 2004 BCSC 1734 (B.C. S.C.). In most of these cases, the 'decision' that led to the duty to consult was the original breach of Crown duty in issuance of the forestry licence in the first place.

…

In conclusion, declaratory relief has been granted by this court in several cases involving First Nations disputes concerning the duty to consult. In regards to forestry decisions, declaratory relief stems from the initial decisions to issue timber licences. In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the Forest Act, which enable the province to make specific agreements with First Nations regarding forest tenure. The FRA is the vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations. This approach has been approved by the Supreme Court of

Canada in *Haida* when it spoke of review of governmental action affecting the duty to consult. The petitioners are entitled to seek the declaratory relief under the *JRPA* that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN.

[59] The cases noted by Dillon J. involved the performance of a specific statutory power, which makes them distinguishable from the case before me. For example, the ***Haida*** case turned on decisions by the Minister of Forests to grant Tree Farm Licenses under the ***Forest Act***, R.S.B.C. 1996, c. 157. In ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74, 245 D.L.R. (4th) 193, the judicial review was grounded in decisions to allow a mine to re-open under the ***Environmental Assessment Act***, R.S.B.C. 1996, c. 119.

[60] I have, so far, primarily addressed the question of whether the Crown's conduct in negotiating and signing a treaty is reviewable under the ***JRPA***. But the petitioners also argue that s. 4 of the ***TFNFA Act*** is a statutory enactment that would engage the Court's judicial review jurisdiction. Upon receiving Royal Assent, s. 4 of the ***TFNFA Act*** comes into force. Section 4 states that, "the Lieutenant Governor in Council may authorize a member of the Executive Council to sign the TFNFA."

[61] Section 27(1) of the ***Interpretation Act***, R.S.B.C. 1996, c. 238, defines the "Lieutenant Governor in Council" as "… the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council."

[62] Section 27(1) of the ***Interpretation Act*** defines the "Executive Council" as "… the Executive appointed under the ***Constitution Act***."

[63] Section 9(1) of the ***Constitution Act***, R.S.B.C. 1996, c. 66, states that "The Executive Council is composed of the persons the Lieutenant Governor appoints, including the Premier of British Columbia, who is president of the Executive Counsel."

[64] The statutory power at issue under s. 4 is simply the power to appoint a person to do that which the legislature has already directed he do – sign the ***TFNFA Act***. This is not a statutory power of decision making. As observed by counsel for the Minister, this case is not about the way in which the statutory power to appoint a Minister to sign the ***TFNFA Act*** may or may not be exercised. I agree with this submission.

[65] The petitioners also rely on certain Orders in Council to ground their argument that the respondent Minister, and not the Crown, is not only the proper respondent, but that his authority to negotiate treaties is conferred by a statutory enactment. The petitioners say at paras. 11 to 13 in their written submissions:

The jurisdiction and legal authority of the Minister to negotiate the TFNFA derives from two enactments:

> (a) Schedule A to the Order in Council No. 565, dated June 5, 2001, which transferred "the duties, powers and functions of the Minister of Aboriginal Affairs and the Minister of Aboriginal Affairs respecting negotiations…and treated settlements…to the Attorney General and Minister Responsible for Treaty Negotiations."
>
> (b) Appendix A (p.4) of the Order in Council No. 450, dated June 16, 2005, which transferred "the duties, powers and functions of the Attorney General and Minister Responsible for Treaty Negotiations respecting negotiations…treaty

> settlement…to the Minister of Aboriginal Relations and Reconciliation.

Being charged with public duty of treaty negotiations, the Minister had the responsibility to ensure that such negotiations and settlements proceeded in a constitutional fashion. In other words, the Minister must perform his duties in a constitutional manner.

Such public duties, pursuant to valid enactments are reviewable by this Court pursuant to the *Judicial Review Procedure Act*.

[66] These enactments must be considered in the context of the general structure of the executive of government. These Orders in Council are like many others – they describe the portfolios of a Minister. The ***Constitution Act*** requires a government on taking office to appoint an executive and define their portfolios. It does not follow that everything every Minister does in the performance of his ministerial duties is an exercise of a statutory power and reviewable under the ***JRPA***.

## Conclusions as to Applicability of Prerogative Writs

[67] What is at issue here is not the specific power of appointment of the Lieutenant Governor in Council, but rather the duty of the Crown acting honourably to consult and accommodate the petitioners' asserted aboriginal rights and title interests. As Southin J.A. said this duty is "upstream" of the act of ratification and signing of the TFNFA.

[68] I conclude that when the Minister engaged in negotiations leading finally to the signing of the ***TFNFA Act***, he was exercising either his prerogative powers or his natural person powers. These powers precede the enactment of the ***TFNFA Act*** and are not dependent on the statutory power to sign the TFNFA delegated under the ***TFNFA Act***.

[69] The prerogative remedies, to which the pragmatic and functional analysis (see ***Pushpanathan v. Canada (Minister of Employment and Immigration)***, [1998] 1 S.C.R. 1222, 11 Admin. L.R. (3d) 130) would apply, do not easily lend themselves to a judicial review under the ***JRPA*** of the Minister's conduct in negotiating a treaty with an aboriginal group.

[70] The statutory enactment circumscribes the ***JRPA*** analysis. Did the delegated person comply with the statute when he exercised his decision making power? Such an analytical paradigm does not apply here.

[71] The petitioners' appropriate remedy is to commence an action to seek a declaration concerning the Crown's responsibility to consult and accommodate, and, if necessary, interim relief. Such a remedy affords all interested parties the opportunity to participate fully in the action. Although Canada and the TFN participated as interveners at the hearing of this action and even though their interests are vitally affected, they did not have the full spectrum of participatory rights in the litigation.

[72] I conclude that this Court does not have jurisdiction pursuant to the ***JRPA*** to grant the remedies sought herein.

## Conversion to a Declaration

[73] Before turning to the merits of this case, I will consider if it is appropriate to convert these ***JRPA*** petitions to actions.

[74] There is authority for the proposition that in the course of a chambers application under R. 52(11)(d) of the ***Supreme Court Rules***, B.C. Reg. 221/90, the Court can convert a petition to an action and treat the matter as an interlocutory injunction in the context of an application for a declaration (see ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, 2001 BCCA 647, 208 D.L.R. (4th) 301; ***Sherar v. Samson's Poultry Farm (1973) Ltd.*** (1979), 15 B.C.L.R. 283, 12 C.P.C. 315 (B.C.S.C.)). Although at first blush this seems an attractive resolution to the procedural defect in these proceedings, I am not prepared to hear this matter as if it were now converted, because the Attorney General for Canada and the TFN are not parties in the existing action. If they were full parties, they would have been in a position to tender affidavit evidence. Although the TFN did tender affidavit evidence, Canada did not, perceiving that its role as an intervener precluded it from doing so. In particular, Canada says it would have filed affidavits or called evidence dealing with the question of the non-derogation clause in the TFNFA. The TFN says it would have sought orders permitting it to cross-examine on the affidavits. Consequently, although the parties may apply to convert this petition to an action in the future, it would not be in the interest of justice for me to treat it as such at this stage.

[75] As indicated above, I would also dismiss the petition on the substantive ground. I therefore turn now to the question of whether the Minister breached his constitutional duties and if so, what remedy would be appropriate to redress that harm.

## DUTY TO CONSULT AND ACCOMODATE

### Negotiation of TFNFA

[76] The circumstances leading to the initialling of the TFNFA are not in dispute.

[77] In September, 1992, Canada, British Columbia, and the First Nations Summit agreed to a treaty process for resolving disputes over aboriginal rights and title in British Columbia. The process was based upon recommendations made by the British Columbia Claims Task Force (composed of representatives from British Columbia First Nations peoples, Canada, and the Province). That task force recommended at point no. 8 that "First Nations resolve issues related to overlapping traditional territories among themselves."

[78] The treaty process is voluntary and open to all First Nations in the Province. A "First Nation" for the purpose of treaty negotiations under this process may be a band established under the ***Indian Act***, R.S.C. 1985, c. I-5, a traditional tribal organization according to a hereditary system, or a tribal council which may be a political alliance of bands or tribes.

[79] There are 195 ***Indian Act*** "bands" eligible for enrolment in the BC Treaty process. As of May 22, 2007, 108 bands were participating in treaty negotiations in the Province, representing approximately 55% of the eligible bands in the Province.

[80] The petitioners Tsawout, Tsartlip, and Pauquachin First Nations and the petitioners SFN are not in treaty negotiations.

[81] There are six stages to treaty negotiations under the BC Treaty process, they are as follows:

STAGE 1: Submission of Statement of Intent to Negotiate a Treaty

STAGE 2: Preparation for Negotiations

STAGE 3: Negotiation of Framework Agreement

STAGE 4: Negotiation of Agreement-in-Principle

STAGE 5: Negotiation to Finalize a Treaty

STAGE 6: Implementation of the Treaty

[82] The treaty negotiation process does not require a First Nation to prove, in the legal sense, its aboriginal rights and title. The process is based on the assertion of the existence of aboriginal rights and title by the negotiating First Nation. This assertion is used by the Province for the purpose of identifying the interest or areas which the First Nation wishes to negotiate. There is no evaluation or assessment of whether the asserted claims are sufficient to meet the legal criteria for the proof of aboriginal rights and title.

[83] For the purpose of the treaty negotiation process, neither Canada nor British Columbia accepts or denies any First Nation's assertion of aboriginal rights or title.

[84] Under the British Columbia Treaty Process, the First Nations are allocated negotiation support funding.

[85] According to the affidavit of Bronwen Beedle, Chief Negotiator employed by the Ministry of Aboriginal Relations and Reconciliation and responsible for the TFN Treaty Table, at the outset of the treaty process, the parties determined that the most respectful way to address the resolution of overlap issues between First Nations was to ensure these issues were addressed internally between the First Nations first.

[86] Ms. Beedle acknowledges, and at the hearing counsel acknowledged that, where overlap concerns are not resolved between First Nations, the Province has a duty to consult with First Nations whose asserted aboriginal rights and/or title claims might be adversely impacted by the implementation or the operation of a treaty agreement.

[87] Ms. Beedle deposed that, during the course of negotiations under the British Columbia Treaty Process,:

The Province has taken the view that the time to engage in these consultations is after the First Nations themselves have had an opportunity to try to resolve these disputes internally, and after a Final Agreement has been initiated thereby ensuring that the consultations have utility.

[88] Ms. Beedle also deposed that there are 53 Indian Bands and one other aboriginal group whose claimed traditional territory overlaps with that of the TFN. (Since the commencement of these petitions, a third similar petition was filed by Chief (Richard) Harvey Alphonse on behalf of the Cowichan Tribes in Action Vancouver S076136. The petition was not heard because the overlap issues were settled through negotiations between the Cowichan and the TFN.)

[89] Treaty negotiations with the TFN commenced on December 16, 1993. The parties signed a framework agreement on August 2, 1997.

[90] On March 15, 2004, the TFN, British Columbia and Canada signed an Agreement-in-Principle (stage 4). The Final Agreement (stage 5) was initialled on December 8, 2006.

[91] On July 25, 2007, the TFN voted in favour of ratifying the TFNFA.

[92] Ms. Beedle describes the process for ratification of the TFNFA:

The process for ratification of the Final Agreement is governed by Chapter 24 of the TFA. Now that the TFN has voted in favour of ratifying the TFA, the Province will take steps to introduce a settlement bill into the Legislature for the purpose of giving effect to the TFA. Assuming the settlement bill is passed as an Act of the Legislature, the federal government would then seek Cabinet approval of the TFA. Assuming the federal Cabinet approves the TFA, and all other obligations have been met, all three parties to the agreement, the Province, Canada and the TFN, would then sign the TFA. Assuming the TFA is signed by all three parties, the federal government would then introduce a settlement bill in Parliament for the purpose of giving effect to the TFA. Assuming the federal bill is introduced and passed as an Act of Parliament, the parties will then negotiate the effective date of the Treaty. At present, I estimate that the effective date for the TFA will be no sooner than January 1, 2009.

## The SFN and the Sencot'en Alliance Consultation Efforts over the TFNFA

[93] I will now chronicle the efforts made by the SFN and the Sencot'en Alliance to consult with the Crown concerning the possible overlap of claims as between the traditional territories asserted by these petitioners, and those asserted by the TFN.

[94] On May 23, 2003, the SFN wrote to British Columbia and Canada stating that it was concerned about treaty negotiations with the TFN that affected the SFN rights and traditional territory and specifically requested British Columbia and Canada to directly engage with the SFN to resolve these issues.

[95] On August 6, 2003, the SFN's legal counsel wrote to British Columbia and Canada expressing concern about the progress of the Tsawwassen treaty negotiations. The SFN was concerned that treaty negotiations had reached the Agreement-in-Principle stage and would adversely impact the SFN claimed traditional territory. In response to the August 6, 2003, letter, the Treaty Negotiation Office responded by advising the SFN that the Province did not require that shared territory ("overlap") issues be resolved at the time a non-binding Agreement-in-Principle is signed. The Treaty Negotiation Office indicated it hoped that direct discussions between the TFN and its neighbours would be productive and satisfactory, but acknowledged the serious nature of the issues raised.

[96] By letter dated October 7, 2003, the federal Minister of Indian Affairs and Northern Development also responded to the August 6, 2003, letter. The Minister advised the SFN that "Canada continues to support the recommendation of the British Columbia Task Force that First Nations resolve shared territory issues among themselves."

[97] In 2006 and 2007, the SFN and the Sencot'en Alliance requested meetings with Canada, British Columbia and the BC Treaty Commission to discuss their concerns about how their rights were being ignored and adversely impacted by the Tsawwassen Treaty Negotiations and Agreements. They also requested funding to effectively engage in consultations.

[98] Neither government consulted with the SFN or the Sencot'en Alliance prior to the December 8, 2006, initialling of the TFNFA.

[99] On January 2, 2007, Canada and British Columbia jointly wrote to the Sencot'en Alliance stating, among other things,:

The purpose of this letter is to begin a process of consultation with you with respect to the initialled TFNFA. In particular, the governments of Canada and British Columbia seek your views on how the TFNFA may adversely affect Sencot'en Alliance First Nation claims to aboriginal rights or title…As a next step, we would like to arrange a meeting in early 2007…We propose that the Chief Negotiators for Canada and British Columbia would provide an overview of key provisions in the final agreement and invite your views on any potential impacts…

[100] A similar letter was sent to the SFN.

[101] On January 16, 2007, Eric Pelkey of the Sencot'en Alliance responded to the aforesaid offer as follows:

We have received a letter from Mr. Tim Koepke, Chief Federal Negotiator for the Tsawwassen Treaty suggesting that he will organize a meeting. This is not acceptable to us, since we are interested only ensuring that this treaty not be signed off by your two governments until our issues are resolved…We request a meeting with the Governments of Canada and British Columbia, Tsawwassen First Nation and Mr. Steven Point, of the BC Treaty Commission to discuss these matters...

[102] On January 29, 2007, Mr. Point wrote back to the Sencot'en Alliance indicating that he would convene such a meeting. The meeting was convened on March 16, 2007. Ms. Beedle deposes in her affidavit that the purpose of the meeting was to discuss overlap issues arising from the proposed TFNFA, but that Eric Pelkey declined to hear the overview presentation indicating that the Sencot'en Alliance needed funding to prepare for consultations. Canada and the Province agreed to receive and review a budget proposal to support their consultation requirements. Minutes of the March 16, 2007, meeting disclose that representatives of the SFN and the Sencot'en Alliance were in attendance as well as the TFN, Canada Treaty Negotiators, British Columbia Negotiators and British Columbia Treaty Commissioners. Mr. Pelkey, on behalf of the Sencot'en Alliance, explained the Sencot'en Alliance history and that the TFN core areas did not extend into Sencot'en Alliance territory with the possible exception of the some shared sites. He expressed concern about lack of consultation by government and infringement of the Sencot'en Douglas Treaty rights (which I will discuss below). Representatives of the SFN indicated that they did not oppose the TFNFA as long as there was no infringement of their rights. The TFN indicated that it had no intention of affecting the Sencot'en Alliance rights. Canada and British Columbia proposed to outline how the TFNFA addressed potential infringements and to give an overview presentation, but the SFN and the Sencot'en Alliance representatives declined to hear the government's presentation, indicating that they needed time to address questions with their communities and to seek legal advice and also that they needed resources for consultation. They were invited to provide a budget for consultation to the Treaty Commission.

[103] On March 23, 2007, Eric Pelkey requested funding for consultation in the amount of $83,500.

[104] On May 9, 2007, the Treaty Negotiation Office indicated that they would fund the Sencot'en Alliance and the SFN $15,000 each to undertake consultation activities for assessing areas of potential overlap between the TFNFA and the petitioners asserted aboriginal claims.

[105] On May 29, 2007, another meeting was convened between the Sencot'en Alliance, the SFN and the treaty negotiators. Canada and the Province tried to make the overview presentation again, but the SFN and the Sencot'en Alliance declined to receive

the presentation. Ms. Beedle is reported to have apologized for the delay in funding; indicated that there were changes at the very end of the negotiation process that would have been premature to consult about until the end and indicated "yes we should have consulted sooner." She is reported to have said that the presentation is a consultation tool and some of their questions would be answered in the presentation "and that the non-derogation [provisions in the TFNFA] help to protect their interest in the Gulf Islands." Mr. Pelkey of the Sencot'en Alliance indicated that they needed funding for an independent legal review of the impact of the proposed treaty and the funding and the time that were provided were insufficient. Canada and the Chief Federal Negotiator wrote Mr. Pelkey on July 9, 2007, suggesting the third consultation meeting take place in July, and acknowledging that the SFN had filed the within petition on June 29, 2007.

[106] On July 11, 2007, Mr. Pelkey of the Sencot'en Alliance set out their position. The following is the full text of this letter:

Dear Ms. Beedle and Mr. Koepke:

I saw your joint letter Tuesday, since it was received late on Monday afternoon.

Sencot'en C'A,I, Newel has been actively seeking discussions with the two governments around the possible infringements of Sencot'en rights by the Tsawwassen Treaty for a number of years. However in order for there to be effective discussions, Sencot'en must have access to unbiased information and advice so that Sencot'en leaders, members and communities can make a fair assessment of the impacts on Sencot'en existing rights, or the treaty proposed.

So far there have been no "consultation" meetings between either government and the Sencot'en C'A,I, Newel. If you recall, at our first meeting with yourselves, Tsawwassen and the Treaty Commission on March 16th, 2007, we specifically declined to have any discussion at all about the Tsawwassen Final Agreement, since we had no ability to review the document with any understanding of the context and detail which produced it, nor did we have any independent legal advice so that we could begin assessing the Tsawwassen Final Agreement.

In March you expressed concern that we had refused to listen to your presentation on the TFA. As we stated at the time, we needed the resources so that we could undertake our own review, before we listened to your views on the document. We still have that concern.

We attended the May 29th 2007 meeting and received at that meeting slightly less money than the small legal budget for a first review of the Tsawwassen Final Agreement which had been part of our much larger funding request in March. There are no resources for the Sencot'en C'A,I, Newel to interact with the lawyer we wanted to hire, or to hold Sencot'en C'A,I Newel meetings, or to undertake any of the fundamental background work so that we could do any assessment at all of what this Treaty might mean in relation to our interests.

We came in May, specifically to ask some questions about where our opportunity was for appropriate discussions with both governments, leading to accommodation of our interests. We had expected a response that reflected the government's legal responsibility to engage in consultation leading to accommodation.

At that meeting both of you made it clear that one of the important options for accommodation, was not available to us. Specifically there appeared to be no ability for

your two governments to change the terms of the Tsawwassen Final Agreement to accommodate our rights prior to the ratification vote.

Instead, all that you appeared to want to discuss was the “non-derogation” clause. Both governments seemed to think that using these phrases somehow protected our interests. We did ask questions about what it meant, but did not hear the answers we expected from government.

We understand that the purpose of “consultation” is to avoid infringements of all the elements in our bundle of rights; to accommodate them wherever possible, and to mitigate whatever impacts there might prove to be.

As it was described to us by you in our meeting, it appears that these “non-derogation” clauses mean we have to go to court to establish our existing Section 35 rights. We thought that recent Court rulings meant we didn’t have to do that any more. We think that is not lawful to force any First Nations to go to court to prove our Constitutionally Protected rights, BEFORE the governments are willing to identify, accommodate, and possibly mitigate that infringement.

Sencot’en C’A,I, Newel has been asking for the discussions which would lead to a consultation process to begin since 2005. Sencot’en C’A,I, Newel will meet with the Crown provided that all accommodation measures are on the table and that the meeting will be more than just an opportunity to blow off steam. Such accommodation measures must include consideration of amendments to the Final Agreement prior to ratification.

Sincerely yours

Eric Pelkey, Coordinator, Sencot’en C’A,I, Newel.

[107] On August 2, 2007, British Columbia wrote to the Sencot’en Alliance stating:

I want to emphasize firstly that our position is not that the Sencot’en must prove their rights and title claims in court before the Crown is obliged to consult with respect to potential infringements that might arise out of the Tsawwassen Treaty. However, it is important to bear in mind that the non-derogation clause in the Tsawwassen Treaty completely protects these rights, once proven, from any adverse impact arising from the operation of the Treaty.

[108] The letter also stated that:

In a preliminary review of the ethno historic evidence related to the rights and title claims of the Semiahmoo and the Sencot’en, it does not appear to us that the Tsawwassen Final Agreement will have any appreciable affect on these claims.

[109] No further consultation has taken place.

[110] Mr. Pelkey describes the Crown’s position in the following way:

- The Crown has been aware of the Sencot’en concerns for some time and decided to delay consultation;
- The Crown believed that to consult before the details were “firm” would not be useful; and
- The rights under the TFNFA are not exclusive rights that could adversely affect the rights of the Sencot’en First Nation members.

[111] This is a fair statement of the Crown’s position, including at this hearing.

[112] Mr. Pelkey expresses concerns that the TFNFA will make it more difficult for members of the Sencot’en Alliance to hunt and fish in their traditional territories.

**Tsawwassen Evidence Concerning its Efforts to Negotiate Overlaps and Petitioners Response**

**Semiahmoo**

[113] The TFN filed its territorial claim in the British Columbia Treaty process in 1993. Ms. Beedle deposes that:

The TFN treat negotiation completed Stage 2 (declared ready for negotiations) in October, 1995, and the parties signed a Framework Agreement (Stage 3) on August 2, 1997. On the question of overlaps, the Framework Agreement states that the TFN "will make best efforts to resolve overlaps with First Nations who claim to have an overlap."
[114] The TFN contacted other aboriginal groups with whom it might have shared overlapping territorial claims.

[115] The TFN says in its written submissions as follows:

As early as the spring of 1995, TFN have attempted to engage with the Petitioners about the treaty. TFN first wrote to SFN in April 1995 to specifically request if TFN's Statement of Intent boundary appeared to overlap with SFN's asserted traditional territory. TFN invited them to provide information. SFN was unresponsive. From 1995 to 2007, TFN wrote SFN at least 13 times about the Treaty or to meet with them. The record is clear that TFN efforts to engage with SFN were generally met with silence. Moreover, what little correspondence was generated by or on behalf of SFN about the treaty was either copied to TFN or it was obtained by TFN from secondary sources. With the exception of one reply letter from SFN dated July 17, 1999, TFN has never received a written letter directly from SFN about the Treaty.

[116] This paragraph is based largely on the evidence of Chief Kimberly Baird.

[117] In written submissions, the TFN argue that there would be no irreparable harm to the petitioners were the TFNFA to be ratified by the Crown.

[118] Chief Cook disputes the affidavit evidence of Chief Baird about attempts to meet. However, I find the affidavit evidence of Chief Baird persuasive. Chief Cook does not specifically respond in his affidavits to the detailed assertions about the TFN's efforts to meet with the SFN. I accept Chief Baird's evidence about the TFN efforts to negotiate overlap or shared territory agreements with the SFN.

[119] Chief Cook appears to take the position that he will not meet with the TFN unless they commit to the possibility of changing the TFNFA.

[120] I have reached the conclusion that the TFN made numerous efforts to engage the SFN in discussion about potential overlaps between their traditional territories, but the SFN declined to enter into any dialogue on the question directly with the TFN.

**Sencot'en**

[121] Chief Baird deposes that the Sencot'en Alliance did not respond to the TFN efforts to address overlapping claims. Her first indication of an expressed overlap issue with the SFN was when she received (from, as she says, "secondary sources") a copy of the Sencot'en Alliance "Territorial Declaration" in 2006. I infer from her affidavits that

prior thereto she was not aware of potentially overlapping claims of the Sencot'en Alliance.

[122] The Sencot'en Alliance and the TFN began directly communicating about overlap issues in January 2007. The first meeting, which involved representatives from the Sencot'en Alliance, the TFN, the Province, Canada and the BC Treaty Commission, was held on March 16, 2007. The minutes of the meeting show that the Sencot'en representatives indicated that they thought they should work out shared territory arrangements amongst the First Nations, as they would have traditionally. A second meeting, the "Cultural Event", was held on June 28, 2007.

[123] Chief Baird described the June 28, 2007, meeting (the "Cultural Event") with the SFN, the Sencot'en Alliance, and The Honourable Steven Point, Chief Treaty Commissioner. The meeting primarily addressed harvesting and resource sharing, which she thought was the primary concern of the Sencot'en Alliance. Chief Baird said the meeting closed with a commitment to further meetings concerning overlap and shared territory issues. But on June 29, 2007, this petition was filed. The petitioners say that they were informed by Canada and British Columbia on May 29, 2007, that there would not be substantive changes to the TFNFA unless all three parties to the TFNFA agreed to a change.

[124] The explanation for the petitioners' reticence is that it is the Crown's responsibility to negotiate with them, and that responsibility cannot be delegated. Chief Cook explains his position in his affidavit (paras. 9 to 13 and 16):

In further response to paragraph 23 the Minister has refused to confirm that he will not complete the ratification by the Province or sign the Final Agreement until the consultation process with Semiahmoo has been completed. That is the reason it has been necessary for us to come to the courts to protect our rights for proper consultation and accommodation.

In answer to paragraph 29 of the Beedle Affidavit, Semiahmoo and Sencot'en were aware of what the "Overview Presentation" was intended to be, as a result of discussions with other First Nations with whom Canada and British Columbia had met. The "Overview Presentation" is a standard Powerpoint presentation given by Canada and the Province to explain the non-derogation clause.

Because this was a standard presentation which would be given to any First Nation interested in the Tsawwassen agreement, we were concerned that it was neither intended to nor did it address the specific impacts on Semiahmoo. Furthermore, prior to meaningful consultation, we had to have the resources to conduct an independent review of the Final Agreement.

In answer to paragraph 36 of the Beedle Affidavit and Exhibit 'Z" to the Beedle Affidavit, the very problem raised by the Minister in his response is that the non-derogation provisions in the Tsawwassen treaty will only protect those rights that have been proven in a court of law. The refusal of the Crown representatives to recognize that accommodation may require changes to the final agreement prior to ratification has necessitated the Semiahmoo to bring this action to protect our rights to proper consultation in accordance with the mandate of the Supreme Court of Canada in the *Haida* decision.

Furthermore, as of June 28, 2007 when the Tsawwassen were directly asked if they would agree to changes to the Final Agreement in order to address the consultation issue, they refused to reply.

…

In further answer to the Beedle Affidavit and in particular Exhibit "Z", the author of the letter is the Chief Negotiator for the Province who has been immersed in Tsawwassen negotiations and therefore has a vested interest in ensuring finalization and ratification of the Tsawwassen treaty. The Minister has not appointed a neutral representative who could objectively assess the strength of claim of Semiahmoo and the potential impact of this treaty on Semiahmoo. Furthermore, the Minister through his representative Ms. Beedle has pre-judged the Provincial and Federal Crown "will always be able to meet their obligations and consult and accommodate any adverse impacts on the asserted rights of the Semiahmoo and Sencot'en" which effectively precludes any meaningful consultation as the Crown's representatives have effectively decided that there will be no necessity for any modification or change to the Tsawwassen Final Agreement as the impacts will be minimal and all impacts can be addressed.

[125] From this background it is clear that the Crown relied on the policy articulated in the British Columbia Claims Task Force that overlapping claims of aboriginal groups should first be negotiated between these groups. It is equally clear that the petitioners, unlike most other aboriginal groups with potentially overlapping claims with the TFN, chose not to enter into any discussions with the TFN. The petitioners do not recognize any obligation on their part to negotiate with the TFN. They say the Crown's honour obliges the Crown to negotiate with the petitioners.

## The TFNFA

[126] The pertinent provisions of the TFNFA, for the purposes of these reasons for judgment, are the non-derogation provisions, the ratification provisions, the minor changes before signing provision, and the implementation provisions. These provisions are set out in the Appendix to this judgment.

[127] The non-derogation provision provides that nothing in the agreement affects the aboriginal rights of aboriginal groups who are not a party to the TFNFA.

[128] The ratification provisions require ratification by the TFN, British Columbia, and Canada. The Province and Canada must enact settlement legislation in order to ratify the TFNFA.

[129] The minor changes before signing clause permits the parties to make only minor changes to the TFNFA before it is signed.

[130] The implementation provisions provide for a ten-year implementation period. The effective date of the TFNFA, from which date the implementation provisions begins to run is, according to Ms. Beedle, left open for negotiation. She expects the effective date to be no sooner than January 1, 2009.

## The Issues

[131] The issue raised by these petitions, assuming there is no procedural impediment, is whether ratification of the TFNFA by the designated Minister fetters the Crown's ability to honour its constitutional obligations to the petitioners. The petitioners argue that the Minister ought to have consulted with them with respect to their overlapping claims prior to concluding negotiations over the TFNFA. They argue that the Minister is committed to implementing the TFNFA without any significant change and

thus will have no ability to consult and accommodate their aboriginal interests after the ratification of the TFNFA.

[132] British Columbia acknowledges its duty to consult with other aboriginal groups that have overlapping claims and, where infringement is demonstrated, to accommodate the infringed interest. British Columbia says that the Non-Derogation provision in the TFNFA preserves the aboriginal interests of the petitioners. The provision acknowledges the Province's obligation to consult about any potential infringement.

[133] The TFN argues that it repeatedly invited the petitioners to discuss resolution of any overlapping claim issues as the TFN progressed through the treaty negotiation process, but the petitioners were unresponsive. The TFN argues that the TFNFA does not infringe the aboriginal interest of the petitioners.

[134] Canada supports the position of British Columbia and the TFN.

## ANALYSIS

### The Nature of the Alleged Infringement on the Aboriginal Claims of the Semiahmoo Petitioners

[135] The SFN claims in its petition that its traditional territories have been demarcated through extensive archaeological and ethnographic studies. The SFN claims that its traditional territory includes much of Boundary Bay. So does the TFN.

[136] At paras 37 to 38 of the SFN petition, it is alleged that the TFNFA grants rights to what is defined as "Other Tsawwassen Lands". It is alleged that these Other Tsawwassen Lands fall within the SFN traditional territory. The aerial photo map annexed to the Liesch affidavit filed by British Columbia identifies and locates these lands within the SFN traditional territory. It is a very, very small fraction of the total claimed traditional territory. Chief Baird's response to this asserted infringement is that these lands will be under the jurisdiction of the Corporation of Delta, and that it is not clear how the TFNFA will impact the SFN's claimed aboriginal rights in respect to this parcel of land.

[137] At paras. 39 to 40 of their petition, the SFN alleges that the TFNFA will transfer to the TFN, in fee simple, several parcels of land that are within the SFN traditional territory. Chief Baird deposes at para. 143 of her first affidavit:

The Sencot'en refer to their "absolute" aboriginal title and their rights to their core territory in the June 21, 2006, Sencot'en Territorial Declaration. Otherwise, neither the SFN nor the Sencot'en petitioners make clear whether they claim rights and title to their asserted territory.

[138] At paras. 41 to 45 of the petition, the SFN complains that the TFNFA grants the TFN extensive fishing rights in Boundary Bay. The SFN claims that Boundary Bay is within its traditional territory. Chief Baird responds to these paragraphs of the petition at paras. 163 to 176 of her first affidavit and para. 7 of her second affidavit. She points out that the TFNFA includes both a commercial fishery and an aboriginal food, social and ceremonial fishery. She highlights some key components of the complex fishery regime, some of which will not operate under the TFNFA, but rather under a non-treaty side agreement. She highlights the fact that the commercial fishery is an abundance based fishery and that it will be governed by a Joint Fisheries Committee. She says that the TFN does not gain a priority over other users, including the SFN, under the TFNFA.

[139] At paras. 46 to 48 of the petition, the SFN complains that the TFNFA purports to grant to the TFN the right to harvest wildlife in an area that is within the SFN's traditional territory. Chief Baird says the wildlife harvesting rights granted are limited because the TFN reserve is within a heavily urbanized area. Chief Baird notes that the TFN agreed that its hunting in Burns Bog would be in compliance with the Burns Bog Management Agreement, which prohibits hunting in Burns Bog except in accordance with laws of general application. Chief Baird also notes that the TFN right to harvest wildlife under the TFNFA is non-exclusive and therefore does not limit or preclude other First Nations from also harvesting wildlife.

[140] At paras. 49 to 50 of the petition, the SFN complains that the TFNFA grants to the TFN the right to harvest migratory birds in an area that is in part of the SFN traditional territory. Chief Baird says that the rights granted under the TFNFA are subject to conservation, public health and public safety measures and are non-exclusive and therefore do not limit or preclude other First Nations from also harvesting migratory birds.

[141] At paras. 51 to 53 of the petition, the SFN complains that the TFNFA grants to the TFN the right to gather plants in an area that is within the SFN traditional territory. The SFN also complains that the TFNFA grants to the TFN rights of ownership of trees and other forest resources that lie within the SFN's traditional territory. Chief Baird notes the geographic limitations to this right given the urban nature of the TFN claimed territory. She also notes that the right is non-exclusive, thus not limiting the same rights of other First Nations.

[142] At paras. 54 to 55 of the petition, the SFN complains that the TFNFA grants to the TFN the right to harvest renewable resources in National Parks and National Marine Conservation Areas that are located in the SFN traditional territory. Chief Baird again notes that the right is non-exclusive and does not limit other First Nations from harvesting renewable resources.

[143] At para. 56 of the petition, the SFN complains that the TFNFA grants to the TFN the right to make agreements related to preserving cultural resources in territory that the SFN says falls within its own traditional territory, and is on Crown land. The SFN alleges that these provisions give priority to the TFN over these cultural sites. Chief Baird notes that the TFNFA does not grant a priority to the TFN but rather it simply provides for the TFN's participation. She notes that the cultural resource rights are permissive and non-exclusive. She also notes that:

Pursuant to the TFNFA (Chapter 14, clause 27), where there are competing claims to archaeological human or associated burial objects, the TFN must provide Canada or British Columbia with written confirmation that the claim has been resolved before the transfer proceeds.

**The Nature of the Alleged Infringement on the Aboriginal Claims of the Sencot'en Alliance**

[144] The Sencot'en Alliance asserts claims to aboriginal title and rights over a territory including, but not limited to, the islands in the Strait of Georgia. They assert that they have exclusively used and occupied the Saanich Peninsula, all of the Southern Gulf Islands, Point Roberts, Boundary Bay, and the Lower Fraser River, in the Strait of Georgia, since time immemorial.

[145] The affidavit of Eric Pelkey, Coordinator of the Sencot'en Alliance Steering Committee, notes that the TFN Statement of Intent, was filed in 1993, giving notice of the TFN's intent to negotiate a treaty, including a description of the territory. The Statement of Intent was posted on a public website associated with the Treaty Commission, and thus was entered into the public domain.

[146] The Sencot'en Alliance point out that the TFN has no reserves on the Southern Gulf Islands, whereas six reserves were set aside for the Sencot'en Alliance on the Southern Gulf Islands by the Joint Reserve Commission in 1877. Linda Vander Berg indicates in her affidavit that the Joint Reserve Committee did not encounter overlapping land use issues in allotting the Saanich reserves. This, the Sencot'en Alliance says, is evidence of the superior strength of the Sencot'en Alliance's claim to those islands, compared to the assertion of the TFN to the same territory.

[147] The Sencot'en Alliance objects to the TFNFA grant of aboriginal rights to the asserted Sencot'en Alliance territory. They say that the TFN have been granted rights in territory that from time immemorial has been recognized as core undisputed territory belonging to the Sencot'en Alliance. They say that the TFN should not have been granted aboriginal rights under the TFNFA on the Southern Gulf Islands.

[148] The Sencot'en Alliance also rely on their Douglas Treaty rights. The North Saanich First Nations (part of the Sencot'en Alliance) signed the Douglas Treaty in 1852. It provides, "…it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."

[149] Counsel for the Sencot'en Alliance petitioners was candid in telling me that he had no evidence and indeed no idea how the TFNFA would adversely affect his client's aboriginal or Douglas Treaty rights.

[150] Mr. Grant, for the SFN petitioners, when asked to identify specific areas of infringement, described broad general concerns that impacted almost every substantive area of the TFNFA.

[151] I have concluded it would be inappropriate, at this time, for me to make findings of fact as to the strength of the petitioners' aboriginal claims. There is conflicting evidence concerning the historical record of the TFN use of Boundary Bay. Historical use of Boundary Bay is just one example of an issue of a dispute that I cannot resolve on the affidavit evidence before me. The best I could conclude is that the petitioners have demonstrated credible claims about their asserted traditional territories.

[152] Unlike the chambers judge in ***Haida***, I am not able to determine that the petitioners have strong *prima facie* claims or otherwise. I have not had the benefit of appropriate testing of the conflicting affidavits tendered by the parties.

[153] It is not, therefore, possible on the basis of the affidavit evidence to reach more specific conclusions as to potential infringement of the petitioners' aboriginal rights or

title by the TFNFA. There is no obvious case of immediate or irreparable harm to those rights. The petitioners argue that they cannot be more specific about the potential infringement until they have had an opportunity to consult with the Crown and understand the implications of the TFNFA.

[154] The burden of the evidence relied upon by the TFN is that there is no infringement and that the petitioners cannot demonstrate any irreparable harm or indeed any harm at all.

[155] The burden of the evidence and submissions of the petitioners is that it is obvious certain rights have been granted to the TFN in traditional territory of both petitioners. They say that if the TFNFA is ratified the "ship will have left the dock" and they will have no ability to seek accommodation from the Crown if a fuller analysis of the TFNFA demonstrates a strong *prima facie* case that their rights have been infringed.

## **The *Haida* Decision**

[156] I now turn to a consideration of the ***Haida*** decision, the Supreme Court of Canada authority relied on by all parties. The ***Haida*** case explains the duty to consult.

[157] The facts in ***Haida*** presented a far less complicated scenario than is before me. As noted by MacLachlin C.J.C. and as found by the chambers judge, the Haida Nation had a strong *prima facie* claim to the Haida Gwaii islands. There was no competing claim by another First Nation. The Crown held legal title to the lands claimed by Haida Gwaii and had granted Weyerhaeuser the right to harvest the forests in certain parts of those lands. The Haida people asserted a claim to title to the land on which the right to harvest the forest had been granted by the Crown to Weyerhaeuser.

[158] At para. 7, MacLachlin C.J.C. noted:

The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

[159] The Court held that the Crown, not Weyerhaeuser, had a duty to consult with and accommodate the interests of the Haida people before transferring the license.

[160] The judgment in ***Haida*** holds that the honour of the Crown may require the Crown to consult and accommodate where its actions may infringe aboriginal rights and title claimed but not yet proven: see ***Haida*** at para. 27.

[161] Also ***Haida*** holds that all or nothing injunctive relief is not necessarily the appropriate remedy because the balancing of convenience tests may work against petitioners unfairly. ***Haida*** is not authority for the proposition that the Crown is relieved of its duty to consult and accommodate when the object of the alleged infringement is a treaty with another aboriginal group.

[162] I agree with the petitioners that the Crown cannot run roughshod over one group's potential and claimed aboriginal rights in favour of reaching a treaty with another (see ***Haida*** at para. 27).

[163] As to when the duty to consult arises, MacLachlin C.J.C. said at para. 35:

But, when precisely does a duty to consult arise? The foundation of the duty is the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

[164] At para. 20, MacLachlin C.J.C. described the obligations of the Crown to attempt to negotiate treaties:

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

[165] And at paras. 26 and 27, she explained the obligations of the Crown to consult and accommodate even before aboriginal claims were legally proven:

Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[166] Although the honour of the Crown cannot be delegated (see ***Haida*** at para 53), it is not dishonourable for the Crown to encourage aboriginal groups to consult and reach agreement in respect to overlapping claims. The Crown may set up regulatory schemes to address procedural requirements of consultation (see ***Haida*** at para. 51), and may delegate procedural aspects to third parties.

**<u>Other Overlap Cases</u>**

[167] It may be helpful to review other judgments of this Court concerning overlap claims.

[168] In ***Chief Allan Apsassin et al v. Attorney General (Canada) et al***, 2007 BCSC 492, [2007] B.C.J. No. 726 (QL), the petitioner sought an interlocutory injunction to prevent the Lheidli T'enneh Final Agreement from coming into force as a treaty. R.D. Wilson J. held at paras. 27, 32 and 35 as follows:

Substantively, the nugget of the plaintiffs' assertion of irreparable harm, is that if the ratification process is not stopped now, accommodation opportunities available, prior to ratification, will disappear, after ratification. The plaintiffs will lose the opportunity to be consulted about the potential effect of the Lheidli T'enneh final agreement on existing Treaty No. 8 rights, while accommodation measures such as changes to that final agreement are still possible. Once the ratification process starts, say the plaintiffs, all such measures are precluded.

…

The present case is not a case of the permanent alteration of geography by road construction; or the clear cutting of a forest, as in *Haida*. I am not persuaded that refusal of an interlocutory injunction at this stage, in this case, will deny the plaintiffs their remedy.

…

Accordingly, I do not accept the plaintiffs' propositions referred to above. In my view, the plaintiffs' negotiating position does not change. If the plaintiffs are successful at the trial of their action, then the defendants will find that they have accomplished a nullity. The overlap issue will be open, without any predetermined notions impeding a consultative process, and, if appropriate or indicated, accommodation.

[169] R.D. Wilson J. held as follows at paras. 36-38:

Comparative harm is the factor which I find tips the balance of convenience in favour of refusing the relief sought by the plaintiffs. In my view, neither party will suffer irreparable harm by any decision I may make. I find the plaintiffs' arguments on this aspect of the application compelling, but I do not find them to be dispositive.

Given the recommendations in the report of the British Columbia Claims Task Force of 28 June 1991, and the policies and procedures of the B.C. Treaty Commission of 11 April 1997, addressing the problem of overlapping claims, it is astonishing that this matter has been allowed to come this far without resolution. But it has. And considerable resources have been expended along the way.

I acknowledge that the relief sought by the plaintiffs is limited only to those provisions of the final agreement which touch and concern Treaty No. 8 territory, but I think that any interference with the process at this stage, may attract an undesirable, adverse, result of unduly complicating the Lheidli T'enneh ratification process. Accordingly, the Lheidli T'enneh would be harmed more if the injunction were granted than the plaintiffs will if the injunction is refused.

[170] In ***Tseshaht First Nation v. Huu-ay-aht First Nation***, 2007 BCSC 1141, [2007] B.C.J. No. 1691 (QL), Meiklem J. declined an application for an interlocutory *quia timet* injunction to restrain the defendant from carrying out a ratification vote in respect of a Final Agreement reached under the BC Treaty Process. The petition was brought on the grounds that the Final Agreement was alleged to be inconsistent with a previous agreement between the plaintiff, the defendants and a third party regarding overlapping

claims. The injunction was sought until the Final Agreement could be amended to be consistent with the overlap agreement. This case is somewhat distinguishable from the case before me because Meiklem J. was able to determine on the evidence before him that the petitioners had a very weak case. However, he did consider a non-derogation clause with identical language to that contained in the TFNFA. He held at para. 25:

In my assessment of the Final Agreement, the defendant is correct in arguing that the non-derogation provisions of the Final Agreement are a complete answer to the suggestion that the Tseshaht's aboriginal title and rights to the western half of Tzartus Island will be severely infringed. In any event, the Tseshaht's claim to aboriginal right and title to the western half of the Island does not arise from the WOA but rather from traditional use; the Huu-ay-aht's overlapping claim to aboriginal right and title to the whole of the Island arises in the same manner. The Final Agreement does not materially alter the status quo in respect of the resource management rights and opportunities of the Huu-ay-aht on the western half of the Island. The Final Agreement does not confer authority over resources to the Huu-ay-aht and they are provided only with an opportunity to make recommendations and offer input to federal and provincial decision-making bodies. If anything, this is less empowering over resource management vis a vis the plaintiff than the provisions of the WOA.

**Application of the Law to this Case**

[171] The authorities to which I have referred suggest that the following questions must be asked and answered in this case, in order to determine if the Minister should be prohibited from signing and thus implementing the TFNFA assuming the remedy was available:

- Does or did the Crown have knowledge of the potential infringement sufficient to trigger its constitutional obligation to consult with the petitioners prior to finalizing the terms of the TFNFA?
- If the answer is yes, when did that duty to consult arise?
- If the duty to consult arose before the TFNFA was initialled, are there any factors present in this case that would justify the Crown's failure to consult prior to initialling the TFNFA? Or, put another way, does the fact that the terms of the proposed TFNFA, and thus any potential infringement, are uncertain through the years of its negotiation suggest that no duty to consult arises until the TFNFA is initialled?
- If there is a duty to consult prior to initialling the TFNFA, what is the content of that duty?
- If the Crown has breached its duty to consult, what is the appropriate remedy? Specifically should implementation of the TFNFA be suspended? How can the court determine the strength of the claim and the seriousness of the infringement before the petitioners have identified the infringement which they cannot do until consultation has occurred?

[172] As I have already said, it is not possible at this time to make a preliminary assessment of the strength of the petitioners' claims to aboriginal title and rights, and therefore to identify the infringement. In ***Haida***, by comparison, the Haida people had a strong title and rights claim to all of Haida Gwaii. In ***Haida***, the scope of the alleged infringement, the logging of the cedar, was easily defined.

[173] Similarly in ***Dene Tha' First Nation v. Canada (Minister of Environment)***, 2006 FC 1354, [2007] 1 C.N.L.R. 1, Phelan J. found that the course of the proposed MacKenzie Valley Pipeline ran right through territory of the Dene Tha' as defined by Treaty 8, although not through a reserve, and thus the potential infringement was easily defined.

[174] The Crown's constitutional obligation to consult is tied not only to knowledge of the asserted aboriginal claims of the petitioners, but also to knowledge that the Crown's activities may infringe those claims.

[175] The petitioners seem to argue that the duty to consult arises as soon as the Crown has knowledge of potentially overlapping territory between an aboriginal group with whom it is negotiating a treaty and another aboriginal group.

[176] I agree with the petitioners that the Crown has for many years had notice of the petitioners' asserted aboriginal territorial claims.

[177] But I do not agree this means that the honour of the Crown requires the Crown to suspend its treaty negotiations at every point that a proposed term of the treaty may impact another aboriginal group. While negotiations are ongoing, the Crown is uncertain about infringement. If there is a duty to consult during negotiations, what would be the content of the Crown's duty to consult with the aboriginal group claiming overlapping territory during the course of treaty negotiations?

[178] In ***Haida***, MacLachlin C.J.C. did address the problem of consulting when the actual rights were unknown, although in a different context. However she suggested that the duty to consult varies with the strength of the claim. At paras. 36 to 38 she stated:

This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest [page 531] pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

[179] Adapting these principles to this case, I conclude that the Crown at least had the obligation to notify the petitioners of a potential infringement when the Agreement-in-Principle was concluded. At the Agreement-in-Principle stage, the Crown's duty to consult, in the absence of any obvious infringement, must be considered to be at the low end of the spectrum. In this case, the Crown's duty to consult was satisfied by mere notice to the petitioners of the Agreement-in-Principle provisions. The SFN were sent notice of the draft Agreement in-Principle on September 8, 2003, in a letter from the TFN. That letter, copied to the Treaty Commission, invited the SFN to engage in discussions about "shared territory." The letter enclosed the draft Agreement-in-Principle. On October 7, 2003, the Minister of Indian Affairs and Northern Development sent a letter to the SFN indicating that the SFN could view the draft Agreement-in-Principle on the BC Treaty Commission's website. Although I have not found evidence that the finalized Agreement-in-Principle was actually sent to the SFN, I conclude that there was sufficient information given to the SFN to satisfy the Crown's duty to give notice of the Agreement-in-Principle.

[180] I infer the Sencot'en Alliance received similar notice of the Agreement-in-Principle. I have two reasons for this assumption. First, the Sencot'en Alliance are associated with the SFN. In Mr. Pelkey's affidavit, he indicated that the "Sencot'en Alliance is composed of the Petitioner First Nations [the Tsawout, the Tsartlip and the Pauquachin] and the Semiahmoo First Nation." Mr. Pelkey is the Coordinator of the Sencot'en Alliance Steering Committee, which is composed of two political representatives from each member First Nation. Second, as mentioned earlier, the treaty process was public and documented for all to see on the Internet.

[181] I conclude the Sencot'en Alliance, through its association with the SFN, and because of the public nature of the treaty process, would have similarly received notice of the Agreement-in-Principle. I conclude that this was sufficient notice at the Agreement-in-Principle stage. This notice, combined with the Crown's reliance on the TFN to try and negotiate any problems arising from the overlapping claims directly with the petitioners, is sufficient consultation at this stage.

[182] The next question concerns the duty to consult now that the TFNFA has been initialled.

[183] The petitioners contend that meaningful consultation is impossible if the TFNFA is ratified and signed before the consultation has taken place. The petitioners cite ***Dene Tha'***, for this proposition. The Dene Tha' were not included in the regulatory and environmental review process for approval of the MacKenzie Valley pipeline, even though the planned route of the pipeline travelled through their traditional territory. On an application for judicial review to halt the hearings, the Federal Court agreed that the Crown had breached its duty to consult and allowed the application, with a remedies hearing to follow.

[184] At para. 130, Phelan J. discussed the inutility of consultations occurring after the alleged infringement had taken place.

The difficulty posed by this case is that to some extent "the ship has left the dock". How does one consult with respect to a process which is already operating? The prospect of starting afresh is daunting and could be ordered if necessary. The necessity of doing so in order to fashion a just remedy is not immediately obvious. However, it is also not immediately obvious how consultation could lead to a meaningful result.

[185] In this case the Crown adhered to the policy decision recommended in the British Columbia Claims Task Force report, which recommended that First Nation's resolve overlapping territorial claims among themselves. The Crown's refusal to consult before the TFNFA was initialled was a source of intense and understandable frustration to the petitioners, as is demonstrated by the correspondence and affidavits referred to above. However, I have concluded below, that Crown had no constitutional duty to suspend negotiations with the TFN in favour of consultation with the petitioners before the TFNFA was initialled. Ms. Mrozinski urged me to consider the impossibility of ever concluding a treaty if every overlap had to be concluded before the TFNFA was finalized. She described the spectre of an endless ping pong of negotiations between, in this case, the TFN, British Columbia, and Canada, with side negotiations with every other aboriginal group with potentially overlapping claims (of whom there were over 50) at every point at which the main negotiations might impact their interests. I agree with this submission.

[186] Where the aboriginal claim of the other aboriginal group is a strong *prima facie* case and the government's proposed decision may irretrievably affect the claim, the government may be required to take steps to avoid that harm and to minimize the infringement. That was the case in ***Dene Tha'***. But here, at the moment, I do not find there is persuasive evidence that the TFNFA causes irreparable harm to the petitioners, and, more importantly, I am satisfied that there is time for the petitioners, British Columbia and Canada to engage in consultation before the TFNFA is implemented (see implementation clauses in Chapter 25 of the TFNFA). In that consultation process, the petitioners will be able identify, with the clarity that they have so far been unable to articulate, any infringement on their title and rights claims. It is not for this Court, on the type of conflicting evidence tendered here, to draw those conclusions for them. The other factor of importance is that the non-derogation clause confirms that the TFNFA does not affect the aboriginal rights or title of any other aboriginal group.

[187] The petitioners say that there is no point to such consultation because of two clauses in the TFNFA. First, the Minister is bound by the agreement to implement the TFNFA without change (see clause 10 of Chapter 24). Second, the non-derogation provision, in clause 48 of Chapter 2, only assists the petitioners if a court has finally determined that the petitioners' rights under s. 35 are adversely affected by a provision of the TFNFA. In other words, the petitioners say that while their title and rights claim may take years to proceed through the complex process of litigating aboriginal rights and title in the courts, the subject matter of their aboriginal rights may be lost owing to the exercise by the TFN of conflicting rights granted to TFN in the meantime.

[188] The Minister's position is that it can and will consult with the petitioners, and if the result of that consultation is that the petitioners do identify an infringement, then their claims can be accommodated.

[189] If, as a result of the consultation, the petitioners develop a strong *prima facie* case that their interests are infringed, what can the Minister do to accommodate them?

The petitioners say it will be too late. The Crown says that there are many forms of accommodation and that the Crown can and will accommodate the petitioners if consultation reveals infringement.

[190] Examples of accommodation agreements the TFN has reached with other First Nations with potentially overlapping claims is described by Chief Baird at para. 62 of her first affidavit:

TFN has reached resolution of overlap or shared territory issues with all but three of the STFN's ["Shared Territory First Nations"], including SFN and Sencot'en ("Un-resolved STFN"). Where TFN has achieved resolution, it has been accomplished either in-principle, or conclusively by way of letter or agreement. Where we have resolved overlap or shared territory issues, we have not been asked, nor have we determined, that an amendment to the TFNFA was required.

[191] These types of overlap agreements demonstrate that it is possible to accommodate conflicting interests without jeopardizing the treaty. I recognize that it is the Crown who holds the obligation to consult and accommodate, but these directly negotiated accommodation agreements do demonstrate there are broad options available to the Crown to accommodate potential or actual infringement.

[192] I would not want these reasons for judgment to be taken as suggesting that the Crown need not examine overlapping claims of other aboriginal groups during the treaty negotiation process. Indeed, there may be some situations where the alleged infringement and the contemplated terms of a treaty are such that the claims of the overlapping group cannot be put off until the treaty is initialled. That is not the case here.

[193] As R.D. Wilson J. said in ***Chief Allan Apsassin*** at para. 35

If the plaintiffs are successful at the trial of their action, then the defendants will find that they have accomplished a nullity. The overlap issue will be open, without any predetermined notions impeding a consultative process, and, if appropriate or indicated, accommodation.

[194] I conclude that the petitioners are not in a disadvantaged position now compared to before the TFNFA was initialled. The TFNFA is not yet implemented. The Minister agrees that now that the final terms are known, the Crown must consult with the petitioners. The content of that consultation is the responsibility of the Crown, but I would expect it to at least take the form of providing assistance, financial and otherwise, to enable the petitioners to understand this complex agreement and then to compare it to their own asserted claims to aboriginal rights and title.

[195] If the results of that consultation identify infringement that requires accommodation, the Crown will have to seek acceptable forms of accommodation. Failing all this, and assuming the petitioners can identify infringement of their rights or title, they will still be able to seek the appropriate remedy from this Court.

[196] Moreover, given that implementation will be phased in over a ten year period, expected to run from January 2009, and unlike the situation in ***Dene Tha'***, the petitioners will have adequate time to take whatever steps they consider appropriate if parts of the TFNFA infringe their claims. I am not persuaded that there is an immediate impact on the asserted rights or title that would require this Court to step in and suspend the TFNFA.

[197] To answer the questions posed above, even if the duty to consult arose before the initialling of the TFNFA, the Crown is justified in postponing consultation, other than

mere notice, until the final terms of the agreement were known. In other words, I conclude that the Crown obligations in this case could be discharged in different degrees at different stages of the treaty process. At the Agreement-in-Principle stage or earlier, the Crown's responsibilities were not as onerous as the responsibilities became at the final treaty stage. The final treaty stage having been reached, the Crown now has a responsibility to engage in deeper consultation, particularly given the complexity of the TFNFA. That consultation also requires co-operation from the petitioners. I do not think that the petitioners can unilaterally impose conditions on the Crown, such as a commitment to amend the TFNFA, before consultation begins.

[198] Even if I had concluded that the Crown ought to have engaged in a greater level of consultation prior to the initialling of the agreement, I would still not suspend the implementation of the TFNFA, or any portion of it, at this time.

[199] As already noted the implementation of the TFNFA will be phased in over a period of ten years from the effective date, which according to Ms. Beedle is not expected to be earlier than January 1, 2009. There is no obvious infringement that would require a court to issue an immediate order of prohibition, prohibiting the Minister, designated by the ***TFNFA Act***, from signing the TFNFA in order to protect the asserted claims of the petitioners. At the moment I am not persuaded that there is evidence that the subject matter of their claims will be irretrievably harmed unless an immediate order of prohibition is made, particularly having regard to the non-derogation clauses contained in the TFNFA.

[200] I therefore conclude that the Minister has not breached his constitutional duties to the petitioners. It is therefore, unnecessary for me to further consider application of the ***JRPA***.

[201] The preferable result would be for the petitioners to fully engage in negotiations directly with the TFN, and, if necessary, to set up a mechanism for resolving any overlapping claims, as was done by the Cowichan.

## Disposition

[202] The petitions are dismissed, although such order is not to be construed as limiting the petitioners, or any of them, from seeking other remedies in the future, if they consider it advisable, as they proceed through the consultation process.

[203] There shall be no order as to costs.

The Honourable Madam Justice Garson

## APPENDIX

## EXCERPTS OF THE TSAWWASSEN FIRST NATIONS FINAL AGREEMENT

[1] In Chapter 2 titled “General Provisions” paras 47 to 49 deal with “**OTHER ABORIGINAL PEOPLE**” those provisions provide as follows:

Nothing in this Agreement affects, recognizes or provides any rights under section 35 of the *Constitution Act*, *1982* for any aboriginal people other than Tsawwassen First Nation.

48. If a superior court of a province, the Federal Court of Canada or the Supreme Court of Canada finally determines that any aboriginal people, other than Tsawwassen First Nation, have rights under section 35 of the *Constitution Act*, *1982* that are adversely affected by a provision of this Agreement:

> a. the provision will operate and have effect to the extent that it does not adversely affect those rights; and
>
> b. if the provision cannot operate and have effect in a way that it does not adversely affect those rights, the Parties will make best efforts to amend this Agreement to remedy or replace the provision.

49. If Canada or British Columbia enters into a treaty or a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act*, *1982* with any other aboriginal people and that treaty or land claims agreement adversely affects the Section 35 Rights of Tsawwassen First Nation as set out in this Agreement:

> a. Canada or British Columbia, as the case may be, will provide Tsawwassen First Nation with additional or replacement rights or other appropriate remedies;
>
> b. at the request of Tsawwassen First Nation, the Parties will negotiate and attempt to reach agreement on the provision of those additional or replacement rights or other appropriate remedies; and
>
> c. if the Parties are unable to reach agreement on the provision of the additional or replacement rights or other appropriate remedies, the provision of those additional or replacement rights or remedies will be resolved in accordance with the Dispute Resolution chapter.

[2] Chapter 24 governs ratification of the Tsawwassen First Nations Final Agreement, those provisions are as follows:

**RATIFICATION OF THE FINAL AGREEMENT**

**GENERAL**

1. This Agreement will be submitted to the Parties for ratification after it has been initialled by the chief negotiators for the Parties.

**RATIFICATION BY TSAWWASSEN FIRST NATION**

2. Ratification of this Agreement by Tsawwassen First Nation requires:

> a. that Tsawwassen Individuals have a reasonable opportunity to review this Agreement;
>
> b. a vote, by way of a secret ballot, conducted by the ratification committee as set out in clauses 3, 4, 5 and 9;

c. that a majority of those individuals who are eligible to vote under clauses 4 and 5 vote in favour of this Agreement;

d. ratification of the Tsawwassen Constitution through the process set out in clause 3; and

e. that this Agreement be signed by the authorized representative of Tsawwassen First Nation.

**RATIFICATION OF THE TSAWWASSEN CONSTITUTION**

3. Ratification of the Tsawwassen Constitution by Tsawwassen First Nation requires:

a. that Tsawwassen Individuals have a reasonable opportunity to review the Tsawwassen Constitution;

b. a vote, by way of a secret ballot; and

c. that a majority of those individuals who are eligible to vote under clauses 4 and 5 vote in favour of the Tsawwassen Constitution.

**ELIGIBLE VOTERS**

4. An individual is eligible to vote if the individual is:

a. a Tsawwassen Member; and

b. at least 18 years of age on the last scheduled day of voting in the vote referred to in clause 2.

5. A Tsawwassen Individual, who is not yet a Tsawwassen Member and whose name is therefore not included on the official voters list, is eligible to vote if that individual:

a. provides the voting officer with a completed enrolment application form or evidence satisfactory to the voting officer that the individual has submitted an enrolment application form to the enrolment committee;

b. provides evidence satisfactory to the voting officer that the individual meets the requirement set out in subclause 4.b; and

c. declares in writing that they meet the eligibility criteria set out in the Eligibility and Enrolment chapter.

6. The ballot of an individual described in clause 5 counts in determining the outcome of the ratification vote only if the ratification committee determines that the individual is a Tsawwassen Individual and was at least 18 years of age on the last scheduled day of voting.

**RATIFICATION COMMITTEE**

7. The Parties will establish a ratification committee, consisting of one representative appointed by each Party, to be responsible for the ratification process set out in this chapter.

8. Canada and British Columbia will provide to Tsawwassen First Nation an agreed amount of funding for the ratification committee to carry out the functions referred to in clause 9.

9. Conduct of the ratification vote requires that the ratification committee:

a. establish and publish its procedures;

b. set its time limits;

c. take reasonable steps to provide Tsawwassen Individuals the opportunity to review this Agreement;

d. prepare and post a preliminary list, at least 60 days before the first day of voting, of individuals who are eligible to vote, based upon the information provided by the enrolment committee;

e. at least 21 days before the first day of voting, prepare and post an official voters list, consisting of the names of individuals whose names were provided by the enrolment committee and who are determined by the ratification committee as eligible to vote;

f. approve the form and content of the ballot;

g. authorize and provide general direction to voting officers;

h. conduct the vote on the day or days determined by the ratification committee;

i. update the official voters list by:

i. at any time before the end of voting, adding to the official voters list the names of individuals who are eligible to vote under this chapter;

ii. adding to the official voters list the name of each individual who votes in accordance with clause 5 and whose vote counts in accordance with clause 6;

iii. removing from the official voters list the name of each individual who died on or before the last day of voting without having voted; and

iv. removing from the official voters list the name of each individual who did not vote and for whom is provided, within seven days of the last scheduled day of voting, certification by a qualified medical practitioner that the individual was physically or mentally incapacitated to the point that they could not have voted on the dates set for voting;

j. after updating the official voters list in accordance with subclause 9.1, establish a final voters list;

k. count the vote; and

l. report the final results to the Parties.

**MINOR CHANGES BEFORE SIGNING**

10. Before the Parties sign this Agreement, the chief negotiators for the Parties may agree to make minor changes to this Agreement.

**RATIFICATION BY BRITISH COLUMBIA**

11. Ratification of this Agreement by British Columbia requires:

a. that this Agreement be signed by a Minister authorized by the provincial Cabinet to do so; and

b. the coming into force of Provincial Settlement Legislation.

12. British Columbia will Consult with Tsawwassen First Nation in respect of the development of the Provincial Settlement Legislation.

**RATIFICATION BY CANADA**

13. Ratification of this Agreement by Canada requires:

a. that this Agreement be signed by a Minister authorized by the federal Cabinet to do so; and

b. the coming into force of Federal Settlement Legislation.

14. Canada will Consult with Tsawwassen First Nation in respect of the development of the Federal Settlement Legislation.

[3] Chapter 25 concerns implementation of the Tsawwassen First Nations Final Agreement, those provisions are as follows:

**CHAPTER 25**

**IMPLEMENTATION**

**GENERAL**

1. The implementation plan for this Agreement takes effect on the Effective Date and has a term of 10 years, unless renewed or extended by the Parties on the recommendation of the implementation committee.

**IMPLEMENTATION PLAN**

2. The implementation plan:

a. identifies its purposes;

b. identifies the obligations of the Parties;

c. identifies the activities to be undertaken to fulfill those obligations and the responsible Party;

d. identifies the timelines, including when activities will be completed;

e. specifies how the implementation plan may be amended;

f. specifies how the implementation plan may be renewed or extended; and

g. addresses other matters as the Parties may agree.

3. Without limiting clause 58 of the General Provisions chapter, the implementation plan:

a. does not create legal obligations;

b. does not alter any rights or obligations set out in this Agreement;

c. does not preclude any Party from asserting that rights or obligations exist under this Agreement even though they are not referred to in the implementation plan; and

d. is not to be used to interpret this Agreement.

**IMPLEMENTATION COMMITTEE**

4. On the Effective Date, the Parties will establish an implementation committee for a 10 year term that may be renewed or extended if the Parties agree.

5. The implementation committee consists of one member appointed by each Party, and additional representatives may participate in meetings to support or assist a member. The Parties will each appoint their first member of the implementation committee on the Effective Date.

6. The implementation committee will:

a. provide a forum for the Parties to discuss the implementation of this Agreement;

b. establish its own procedures and operating guidelines;

c. monitor and oversee the operation of the implementation plan;

d. review implementation progress;

e. assist in resolution of any implementation problems;

f. recommend revisions to the implementation plan;

g. develop a communications strategy in respect of the implementation and content of this Agreement;

h. provide for the preparation of annual reports on the implementation of this Agreement;

i. before the expiry of the implementation plan, advise the Parties on further implementation measures required and recommend whether the implementation plan should be renewed or extended; and

j. undertake other activities as the Parties may agree.

http://www.courts.gov.bc.ca/jdb-txt/sc/03/14/2003bcsc1422.htm

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:
Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management), 2003 BCSC 1422

Date: 20030918
Docket: 03 0746
Registry: Victoria

Between:

Heiltsuk Tribal Council and Heiltsuk Hemas Society,
on their own behalf and on behalf of all other members
of the Heiltsuk Nation

Petitioners

And

Her Majesty the Queen in Right of British Columbia
as represented by the Minister of Sustainable Resource
Management, Land and Water British Columbia Inc.,
The Deputy Comptroller of Water Rights, The Regional
Water Manager (Cariboo Region) and Omega Salmon Group Ltd.

Respondents

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for Petitioners
E.P. Murphy and A. McCue

Counsel for Respondent, Minister of Sustainable Resource Management and Land and Water British Columbia Inc.
K.E. Gillese and E.K. Christie

Counsel for Respondent, Omega Salmon Group Ltd.
C.F. Willms and K.G. O'Callaghan

Date and Place of Hearing:

June 16-20, 2003 and June 23-26, 2003 Victoria, B.C.

[1] The petitioners apply pursuant to Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, to set aside the decisions of the Minister of Sustainable Resource Management (the Minister), the Deputy Comptroller of Water Rights, the Regional Water Manager (Cariboo Region) and Land and Water British Columbia (LWBC)(collectively, the decision makers) with respect to:

· Conditional water licence 116890 for Martin Lake dated December 19, 2001 (the Martin Lake water licence 2001) and the replacement licence no. 117538 dated August 29, 2002 (the Martin Lake water licence 2002);

· A licence of occupation to operate a commercial fish hatchery, dated January 15, 2002 (the hatchery licence of occupation);

· A licence of occupation for a salt water intake pipe, effluent pipe and general dock, dated October 1, 2002 (the dock and pipe licence of occupation); and

· Conditional water licence 116629 for Link River, dated November 18, 2002 (the Link River water licence).

(collectively, the licences)

[2] The licences were issued to Omega Salmon Group Ltd. (Omega) and, together with other licences issued to it, allow Omega to operate a land based fish hatchery in Ocean Falls, B.C.

[3] The Heiltsuk claim aboriginal rights and title to a large area of land encompassing approximately 33,735 square kilometres. The land being claimed includes the 8.83 hectares or .08 square kilometres granted to Omega under the hatchery licence of occupation and the dock and pipe licence of occupation.

[4] The land is described in the two licences as:

That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Industrial Licence:

Those unalienated and unencumbered portions of District Lots 31 and 104; together with unsurveyed foreshore or land covered by water being part of the bed of Link River, all within Range 3 Coast District, containing 5.88 hectares more or less,

Except for those parts of the land that, on the January 15, 2002 Date, consisted of highways (as defined in the Highway Act) and land covered by water;

And

That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Utility Licence:

That part of District Lot 847, together with unsurveyed foreshore or land covered by water being part of the bed of Cousins Inlet, Range 3, Cost District, containing 2.95 hectares, more or less,

Except for those parts of the land that, on October 1, 2002, consisted of highways (as defined by the Highway Act).

(hereinafter the "land")

[5] Much of the land impacted by the hatchery licence of occupation and the dock and pipe licence of occupation is filled land created prior to the construction of a pulp mill which was operated in Ocean Falls in the 1900s.

[6] The Heiltsuk also claim aboriginal title and rights to the water in their claimed territory and as a result take the position that they were owed a duty of consultation prior to the issuance of both the Martin Lake water licences and the Link Lake water licence.

[7] The Martin Lake water licence 2002 allows Omega to divert up to 100 cubic feet per second of water from Martin Lake to Link Lake. The Link Lake water licence authorizes the diversion of up to 200 cubic feet per second of water from the Link River to the hatchery. The water which is diverted will pass through the hatchery and then be discharged to Cousins Inlet. If not diverted the water will spill over the existing dam into Cousins Inlet.

[8] The Heiltsuk are seeking the following orders and declarations:

· A declaration that the decision makers had a duty to consult with and accommodate the Heiltsuk's interests and concerns before issuing the licences and that the decision makers breached their duties.

· A declaration that Omega had a duty to consult with and accommodate the interests and concerns of the Heiltsuk and that Omega breached that duty.

· A declaration that the licences issued by the decision makers are of no force and effect and an order quashing and setting aside the licences.

· An order in the nature of a prohibition barring the issuance of any approvals, permits or other authorizations relating to the proposed Atlantic salmon hatchery development;

· An interim or interlocutory injunction prohibiting Omega from operating

the hatchery until either a final disposition of the proceedings or order of the court.

[9] Both the petitioners and Omega object to portions of the affidavit material which has been filed. I agree with both the petitioners and Omega that many statements in the affidavits are irrelevant or inadmissible hearsay, opinion or argument. I am not going to deal with each objection raised, however I have disregarded the statements which are objectionable. In reaching my conclusions, I have relied on direct evidence and the oral histories contained in the affidavit material.

[10] The issues to be determined are:

· Have the Heiltsuk established a prima facie claim of aboriginal title or rights in respect of the lands and waters covered by the licences?

· Have the Heiltsuk established a prima facie infringement of the aboriginal title or rights which they claim?

· Was a duty of consultation and accommodation owed to the Heiltsuk by the decisions makers before they made their decisions to issue the licences and, if so, did they fulfill those duties?

· Was a duty of consultation and accommodation owed by Omega to the Heiltsuk and, if so, did Omega fulfill its duty?

· Is this an appropriate case for the court to exercise judicial review?

· If there were breaches of duty by the decisions makers or Omega what are the appropriate remedies?

CHRONOLOGY REGARDING ISSUANCE OF LICENCES

[11] Omega began the application process in September 2001.

[12] The Heiltsuk became aware of a proposed salmon hatchery to be located at Ocean Falls in November 2001. Following the meeting at which they were advised by LWBC of the proposed salmon hatchery the Heiltsuk met with Omega in November 2001.

[13] On December 17, 2001 Mr. Williams, the Aquaculture Manager at LWBC, sent an email to the Heiltsuk in response to an inquiry from the Heiltsuk as to why there had been no referral regarding the proposed Omega hatchery. He advised the Heiltsuk that Omega had applied for a licence of occupation to construct a fish hatchery on the old industrial lands in Ocean Falls. He further advised that the Province was not sending out any referrals as the land was Crown granted in the past and had been developed. As well, the land was mainly filled foreshore and that, following the Aboriginal Consultation Guidelines, referrals

were not required. However, Mr. Williams was aware that the Heiltsuk had at that point had one meeting and another planned with Omega. Omega had been told to document any feedback from the Heiltsuk in the meetings and provide it to LWBC. Mr. Williams further advised that the Martin Lake water licence 2001 was being assigned to Omega.

[14] An Aboriginal Interest Assessment Report was prepared December 19, 2001 by LWBC and a copy was provided to the Heiltsuk.

[15] The Martin Lake water licence 2001 was issued to Omega on December 19, 2001. The licence had originally been granted to Pacific Mills Ltd., who ran a pulp and paper mill on the site, in 1929. The Martin Lake water licence 2002 was issued to Omega on August 29, 2002 relocating the diversion. At the time the Martin Lake water licence 2002 was issued a report was prepared which stated that no referral was required as this was a minor modification to an existing licence.

[16] A letter was sent to Heiltsuk by LWBC regarding the decision not to consult on December 24, 2001 with an invitation to discuss the Aboriginal Interest Assessment report. The letter explained why a referral had not been made and advised the Heiltsuk that they would be kept apprised as the review process continued.

[17] The explanations given as to why the Province did not feel it was necessary to refer the issue to the Heiltsuk were:

· The site had been privately owned for nearly 80 years;

· The core areas of the town and millsite had been extensively disturbed and developed;

· The nature of the land use over that time effectively precluded the exercise of any aboriginal traditional uses;

· A significant portion of the application area was filled foreshore, i.e. land which did not exist prior to the development of the mill and town;

· There were extensive areas of relatively undisturbed vacant Crown land in the area surrounding Ocean Falls;

· Impacts which occurred were at the time of the original development of the site and any aboriginal issues associated with past activity on the land could not be resolved through consultation about the current land use proposal.

[18] Heiltsuk representatives visited another hatchery with Omega in December 2001. Following the meeting Omega advised the Heiltsuk that it wanted to continue an ongoing dialog with the Heiltsuk people.

[19] On January 7, 2001 a letter was sent by the Heiltsuk to LWBC expressing disappointment that there would be no referral and requesting that the Province reconsider its position.

[20] The Heiltsuk attended an open house at Bella Bella with Omega on January 9, 2002 where the Heiltsuk expressed their concerns. The Heiltsuk advised that they did not consider the meeting to be consultation.

[21] On January 11, 2002 Omega sent a letter to Heiltsuk expressing a willingness to work with the Heiltsuk and enter into a partnership with the Heiltsuk.

[22] On January 16, 2002 LWBC sent a letter to the Heiltsuk expressing that although there had been no referral, staff had communicated with members of the Heiltsuk regarding the proposed project and an information package was sent. LWBC advised the Heiltsuk it had requested Omega meet with the Heiltsuk, and understood that Omega had expressed a willingness to enter into a commercial arrangement with the Heiltsuk. LWBC made an offer to assist the Heiltsuk in preparing an application for other lands in the vicinity which could be utilized for the Heiltsuk proposed salmon enhancement facility and in exploring potential opportunities to maximize the benefits from the Omega hatchery. As well, the Heiltsuk were advised that the provincial agencies responsible would ensure that the hatchery was in compliance with all regulatory requirements relating to the Heiltsuk's concerns about the potential for the introduction of diseases or chemical effluent into the marine environment and the escape of Atlantic salmon.

[23] Memos were sent by Omega to the Heiltsuk providing information on January 15 and 16, 2002 which responded to concerns expressed by the Heiltsuk.

[24] The hatchery licence of occupation was issued to Omega on January 15, 2002.

[25] LWBC sent a referral package to the Heiltsuk on April 10, 2002 with respect to the dock and pipe licence of occupation.

[26] On May 7, 2002 the Heiltsuk sent a letter expressing concerns regarding effluent, clean up of the contaminated site and Atlantic salmon escapes. As well, the Heiltsuk expressed concern that the dock and pipe licence of occupation and project as a whole would impact the Heiltsuk's ability to site a village and a wild salmon enhancement facility in Ocean Falls.

[27] A meeting was held on May 30, 2002 between representatives of the Heiltsuk, Omega and the Province where details of the project were discussed and the time line for approvals and construction of the project was provided to the Heiltsuk.

[28] Omega sent a follow up letter and information package to the Heiltsuk on June 11, 2002 addressing concerns raised by the Heiltsuk.

[29] Omega sent a letter and video to the Heiltsuk showing various underwater and foreshore video clips from Omega's habitat survey on June 21, 2002 in response to some of the questions raised by the Heiltsuk.

[30] The Dock and Pipe licence of occupation was issued to Omega on October 1, 2002.

[31] A referral package was sent by LWBC to the Heiltsuk on August 28, 2002 regarding the Link River water licence.

[32] The Heiltsuk responded to the referral on October 15, 2002 outlining their aboriginal claims to Ocean Falls.

[33] A Report for Water Act decision was prepared November 15, 2002.

[34] On November 18, 2002 a letter was sent to the Heiltsuk attaching a copy of the Link River water licence issued to Omega on November 18, 2002.

DUTY OF CONSULTATION

[35] In the cases dealing with the issue of consultation the courts have considered the factual context, including:

· whether there is a general right to occupy lands or whether there is a right to engage in an activity;

· whether there is or has been an infringement; and

· if there is or has been an infringement, whether there is any justification for the infringement.

[36] It is in the final stage of the analysis, i.e., whether there is any justification for the infringement, that the courts have considered whether the Crown has met its fiduciary and constitutional duty of consultation and whether there has been an attempt to accommodate the First Nations. R. v. Sparrow, [1990] 1 S.C.R. 1075, ¶ 64 – 72 and ¶ 81 – 82, R. v. Adams, [1996] 3 S.C.R. 101, ¶ 46 and 51 – 52.

[37] In Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, Lamer C.J. discussed the issue of consultation in the context of the justification of an infringement of aboriginal title and stated at ¶ 168:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary

duty at common law: Guerin. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal rights.

[38] In Haida Nation v. British Columbia (Minister of Forests) 2002 BCCA 147 (Haida No. 1), Lambert J.A. recognized a three stage analysis in determining whether the Crown has breached its duty to consult consisting of:

1. consideration of whether aboriginal title or rights have been established on a balance of probabilities and a decision regarding the nature and scope of the title and rights;

2. determination of whether the particular title or rights have been infringed by a specific action; and

3. a consideration of whether the Crown has discharged its onus to show justification, including whether it has fulfilled its obligation to consult.

(¶ 46)

[39] Lambert J.A. acknowledged that although both the consultation and the infringement are likely to precede the determination of the aboriginal rights and title, that when determining if there has been a breach of duty the Court must first look at whether the First Nation has proved the title and then whether there has been an infringement of the right. Once those elements are established the onus shifts to the Crown to establish that there was justification for the infringement both before and at the time the infringement occurred. (¶ 46)

[40] In Haida No. 1 the Court of Appeal held that due to the circumstances surrounding the Minister's consent to the transfer of tenure from MacMillan Bloedel to Weyerhaeuser, the Minister had a legally enforceable duty to consult with respect to the transfer. The main issue in Haida No. 1 was whether any consultation had taken place in the face of a good prima facie case of infringement of aboriginal rights to red cedar.

[41] In TransCanada Pipelines Ltd. v. Beardmore (Township) (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), the Court held that it was only after a First Nation has established an infringement of an existing aboriginal or treaty right that the duty of the Crown to consult with the First Nation was a factor for the Court to

consider in the justificatory phase of the proceeding. Borins J.A. stated at ¶ 120:

As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the Constitution Act, 1982. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

[42] In Taku River Tlingit First Nation v. Tulsequah Chief Mine Project 2002 BCCA 59, it was argued that aboriginal right or title had to be established before there was duty to consult with the aboriginal peoples. In rejecting the argument, Rowles J.A. held that while the onus of proving a prima facie infringement of an aboriginal right or title is on the group challenging the legislation (or in this case the decisions of the statutory decision makers), it did not follow that until there was court ruling the right did not exist. (¶ 183)

[43] In Taku, the court accepted as findings of fact that the proposed road would impose serious impacts on the resources used by the Tinglit, that the Tinglits were not adequately prepared to handle the predicted impacts and that there was no plausible mitigation or compensation possible. The project had not been commenced and it was found that the proposed road would have a profound impact on the Tinglit's aboriginal way of life and their ability to sustain it. The Tinglit's were willing to participate in the environmental review process to have their needs accommodated but the project approval certificate had been issued without their concerns being met. (¶ 132 and 202)

[44] In the circumstances, the court felt it was appropriate to dismiss the appeal of the order quashing the certificate and remit the matter to the Ministers to consider afresh the issuance of the project approval certificate. In her dissent, Southin J.A. referred to the fact that the right to be consulted is not a right of veto and was of the view that to remit the matter back to the Ministers would prolong the agony for both the proponent of the project and the Tinglit. (¶ 100 and 101)

[45] Although the Court in Haida No. 1 agreed that the requirement to consult could arise prior to the aboriginal right or title having been established in court proceedings, and that the Crown and Weyerhaeuser were in breach of an enforceable duty to consult and to seek accommodation with the Haida, it did not necessarily follow that the replacement of the licence was invalid. The Court was not prepared to make a finding regarding the validity, invalidity or partial validity of the transfer of the licence but was of the view that it was a matter that could be more readily determined after the extent of the infringement of title and rights had been determined. (¶ 58 and 59)

[46] Lambert J.A. stated that the courts have considerable discretion in shaping the appropriate remedy in a judicial review proceeding before the final

determination of the title and rights of the aboriginal people and that the aim of the remedy should be to protect the parties pending the final determination of the nature and scope of title and rights. At the time of the final determination of rights and title the issues of the nature and extent of the infringement and the issue of justification could be dealt with. (¶ 53 and 54)

HAVE THE HEILTSUK ESTABLISHED A PRIMA FACIE CLAIM OF ABORIGINAL TITLE OR RIGHTS IN RESPECT OF THE LANDS AND WATERS COVERED BY THE LICENCE?

[47] The Heiltsuk advance claims based on aboriginal rights and title that have not yet been judicially determined. I am of the view that in interim proceedings of this type, I am not in a position to do more than make preliminary general assessments of the strength of the prima facie claims and potential infringement.

[48] I agree with Tysoe J.'s comment in Gitxsan and other First Nations v. British Columbia (Minister of Forests), 2002 BCSC 1701 that the Court should avoid making detailed evidentiary findings on affidavit material unless it is essential to do so. Critical findings of admissibility or assessing the weight to be given to oral histories should be left to the trial judge responsible for making the final determinations of the claims of rights or title. (¶ 70)

[49] The Heiltsuk's evidence is that they have been engaged in treaty negotiations with the Province regarding their land claim since 1981 when they filed a Statement of Comprehensive Aboriginal Rights Claim. In 1993, the Heiltsuk filed a Statement of Intent with the B.C. Treaty Commission and were accepted into treaty negotiations with the Provincial and Federal government. Throughout that time, the Heiltsuk have continuously asserted title over the land, including the area described in the licences.

[50] As well, the Heiltsuk have established an aboriginal right to harvest herring spawn on kelp. R. v. Gladstone, [1996] 2 S.C.R. 723.

[51] The Heiltsuk argue that based on the affidavit material they have a strong or good prima facie claim of aboriginal rights or title with respect to their territory including Ocean Falls.

[52] Given that I am of the view it is not appropriate for me to assess the weight to be given to the oral history or make findings of admissibility on the basis of the affidavit material, I have accepted the evidence contained in the oral histories at face value for the purpose of determining if the Heiltsuk have a prima facie claim of aboriginal rights and title to Ocean Falls.

[53] The evidence contained in the affidavit material regarding the oral history is that one of the main winter villages of the Heiltsuk was located at Ocean Falls. The Heiltsuk moved away around the time the pulp mill was constructed in 1909. Approximately 300 - 400 Heiltsuk lived in Ocean Falls prior

to industrialization in the early 1900s. The area was a good village site in the winter because it was sheltered from the winds and open waters of the outer coast. Link Lake provided fresh water and Cousins Inlet provided seafood including halibut, ling cod, rock cod, spring salmon, crabs, prawns and herring. The evidence is that the Heiltsuk were forced to relocate from the area when the pulp mill was built.

[54] Although the Heiltsuk assert that the village of Tuxvnaq or Duxwana'ka was located in Ocean Falls prior to the establishment of the pulp mill, there is also evidence that in the early 1900s there may have only been one First Nations individual living at Ocean Falls. The survey map prepared at the time of the original Crown grant in 1901 shows one Indian house near the tide flats with an Indian trail leading to it.

[55] There is little direct evidence and no documentary evidence of a forced relocation of the Heiltsuk at the time the pulp mill was constructed. There is no evidence in support of a forced relocation in the Bella Bella story, a book which was referred to by both the Heiltsuk and the Crown. As well, there has been no mention of a forced relocation in the materials filed by the Heiltsuk in the treaty negotiations.

[56] "... [C]laims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim." Mitchell v. M.R.N., [2001] S.C.R. 911 at ¶ 51.

[57] Chief Justice McLachlin was clear that Mitchell did not impose upon aboriginal claimants the requirement of producing indisputable or conclusive evidence from pre-contact times. However, she observed that there was a "distinction between sensitively applying evidentiary principles and straining those principles beyond reason". In Gladstone, for example, the recognition of an aboriginal right to engage in trading herring roe on kelp was based on an indisputable historical and anthropological record corroborated by written documentation. The Court in Gladstone concluded that there was clear evidence from which it could be inferred that the Heiltsuk were involved in trading herring roe on kelp prior to contact. (¶ 52)

[58] I am of the view that there is insufficient evidence before me to make a finding that the Heiltsuk were forcibly removed from Ocean Falls and I decline to make any finding in that regard.

[59] There is evidence that another First Nation, the Nuxalk Nation, asserts that Ocean Falls, including the land impacted by the licences, is within its territorial boundaries. The Nuxalk have put the Heiltsuk, Omega and the Crown on notice of their claim. The Nuxalk oppose the construction of the hatchery and have advised both Omega and the Crown that they will not permit salmon aquaculture in their territory.

[60] Although the petitioners argue that I should ignore the claims of the Nuxalk, I am of the view that making any findings regarding the Heiltsuk claim of rights and title which could potentially impact the overlapping claim of the Nuxalk in this proceeding is inappropriate.

[61] As set out in Delmaguukw, there are a number of criteria that must be satisfied by the group asserting aboriginal title including exclusive occupancy at the time of sovereignty:

Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

(¶ 155)

[62] Although Lamer C.J. recognizes the possibility of a finding of joint title shared between two or more aboriginal nations, which would involve the right to exclude others except with whom possession is shared, no claim to joint title has been asserted by the Heiltsuk and the Nuxalk are not represented on this application. It is not possible therefore to assess the relative strengths of the two competing claims to the land or what impact the two claims have on each other.

[63] Based on the evidence before me of the overlapping claims, the only conclusion I have been able to reach is that both Heiltsuk and Nuxalk assert aboriginal title over the land, but I am unable to determine whether either has a good prima facie case of aboriginal title.

[64] However, the oral history of the Heiltsuk, which I accept at face value for the purpose of this application, is that the area of Ocean Falls was used as a winter village and the Heiltsuk have fished in the area. I find, therefore, that the Heiltsuk have a strong prima facie case of aboriginal rights to fish in the area and to non-exclusive use of the land. The Heiltsuk's prima facie claim for aboriginal rights does not require exclusivity.

HAVE THE HEILTSUK SHOWN AN INFRINGEMENT OF AN ABORIGINAL RIGHT?

[65] The Heiltsuk take the position that the licences infringe their claims for aboriginal rights to the land impacted by the licences.

[66] In Gladstone, the Court refers to the Sparrow test for determining whether the government has infringed aboriginal rights which involves:

· asking whether the legislation, or in this case the decisions to grant the licences, has the effect of interfering with an existing aboriginal right; and

· determining whether the interference was unreasonable, imposed undue hardship, or denied the right to the holders of their preferred means of exercising the right.

[67] Even if the answer to one of the questions is no, that does not prevent the court from finding that a right has been infringed, rather it will be a factor for the court to consider in determining whether there has been a prima facie infringement. The onus of proving a prima facie infringement of rights lies on the Heiltsuk, i.e., the challengers of the decisions. Gladstone, ¶ 39 and 43.

[68] Because aboriginal rights are not absolute and do not exist in a vacuum, claimants must assert both a right and the infringement of the right. Cheslatta Carrier Nation v. British Columbia, 2000 BCCA 539, ¶ 18 and 19, Delgamuukw, ¶ 160, 162 and 165.

[69] In Cheslatta, the Court of Appeal referred to R. v. Nikal [1996], 1 S.C.R. 1013 for the proposition that aboriginal rights are like all other rights recognized by our legal system. The rights which are exercised by either a group or individual involve the balancing of those rights with the recognized interests of others. Any declaration regarding an aboriginal right would not be absolute in that it may be subject to infringement or restriction by government where such infringement is not unreasonable and can be justified. (¶ 18 and 19)

[70] The Heiltsuk have raised concerns that the issuances of the licences adversely affect their fishing rights and their non exclusive use of the land.

[71] They say the prima facie infringements regarding their right to the use of the land are:

· the hatchery licence of occupation allowing Omega to operate a hatchery is not their chosen use of the land;

· that it will prevent them from utilizing the area as a village site in the future;

· that the diversion of water will result in an inadequate amount of water for the future village;

· the hatchery will impact the availability of electricity to service a village; and

· the Heiltsuk do not support Atlantic salmon aquaculture, and take the position that their right to self government is irreparably harmed by the imposition of the hatchery in a territory over which they have asserted a claim.

[72] The Heiltsuk say the prima facie infringements regarding their fishing rights are:

· That the discharge from the factory into Cousins Inlet will cause pollution and disease thereby impacting the Heiltsuk fishing rights in the area;

· The construction of the facility has potentially caused pollution as a result of hazardous wastes, in particular asbestos, which was disturbed during construction; and

· The fish reared in the hatchery may escape from the hatchery, or alternatively, from fish farms outside Heiltsuk claimed waters and enter Heiltsuk claimed waters thereby impacting their fishing rights.

(i) Have the Heiltsuk established a prima facie infringement of their right to non exclusive use of the land?

[73] The Heiltsuk argue that this case falls within the cases referred to in Delgamuukw which may require the full consent of the aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (¶ 168) They argue that the Province's actions authorize aquaculture over Heiltsuk title through the regulation of farmed fish and therefore the Province should have obtained the consent of the Heiltsuk.

[74] I do not agree that the issuance of the licences in question is analogous to the type of situation contemplated in Delgamuukw which would require the full consent of the aboriginal nation. There is no evidence that the Province by issuing the four licences is impacting the right of the Heiltsuk to hunt or fish in the area.

[75] There is no evidence that the Heiltsuk will not be able to locate a village there because of the licences of occupation. The hatchery in issue is a land based facility. The licences of occupation over the .08 square kilometres are for 10 years. Most of the land on which the hatchery is located is filled land created prior to the construction of the pulp mill. The site was a contaminated industrial site which has required significant expenditure by Omega to clean up. There is evidence that Omega has removed 700 tons of industrial debris from the site and plans to continue a process of remediation of the site in co-operation with LWBC.

[76] The Heiltsuk have not established that the issuances of the licences have resulted in a prima facie infringement to their right to non exclusive use of the land.

[77] There is a large area adjacent to the pulp mill site where the town of Ocean Falls was located which had a population of 4,000 people that could be used as a village site. The total population has declined to less than 100 since the closure of the pulp mill 20 years ago.

[78] The diversion of water is not new. The original licence to divert water from Martin Lake was issued 70 years ago and there was sufficient water and electricity to service the town of Ocean Falls.

[79] There is no evidence that the issuance of the licences allowing construction and operation of the hatchery will impact the Heiltsuk's ability to pursue their negotiations with the Province regarding their claim of aboriginal title or locate a village there in the event they decide to do so.

[80] As well, there is no evidence that the licences will prevent the Heiltsuk from establishing a wild salmon enhancement facility in the future.

[81] With respect to the Heiltsuk's assertion about self government, there is no evidence to support their position that the hatchery will cause irreparable harm. On the contrary, the evidence is that Omega has cleaned up industrial waste from the site and is committed to continuing rehabilitation of a contaminated site. The licences are of fixed duration.

[82] The right to self govern is, in my view, inextricably bound up in the Heiltsuk's aboriginal claim to title and their right to use the land for their preferred use, i.e., the Heiltsuk want to decide what the land will be used for and the ability to veto uses of the land which do not accord with their philosophy. The Heiltsuk's complaint in this regard is that they are opposed to Atlantic salmon aquaculture and do not want any Atlantic salmon aquaculture in their territory.

[83] The necessary factual basis on which to determine whether the claim for self government has been made out is lacking. As set out above, the Nuxalk Nation is also claiming title to the same area and is not before me on this application. A determination regarding the Heiltsuk's right to self govern in the area would by necessity impact the Nuxalk.

[84] There is no evidence that the construction and operation of the hatchery pursuant to the licences will impact the Heiltsuk's ability to negotiate or establish the right to self govern in the area in the future. There is no evidence that the construction and operation of the hatchery either has or will cause irreparable harm whereby the Heiltsuk will not be able to utilize the land as they choose in the future.

[85] It is not within the ambit of this application to deal with the many difficult issues which would have to be addressed in order to make a determination of the Heiltsuk's right to self government beyond the finding that, in my view, there is no evidence to support the Heiltsuk argument that their asserted right to self govern, i.e., the right of the Heiltsuk to make decisions as to the use of the land in the event that they establish their aboriginal title in the future, has been infringed by the issuance of the licences.

[86] Accordingly, I find that the Heiltsuk have not discharged their burden of

establishing a prima facie infringement of their aboriginal rights to non-exclusive use of the land.

(ii) Have the Heiltsuk established a prima facie infringement or their aboriginal right to fish?

[87] In Nikal the Supreme Court of Canada, in the course of finding that the bare requirement for a licence did not constitute an infringement of aboriginal fishing rights, rejected the proposition that any government action which affects or interferes with the exercise of aboriginal rights constitutes a prima facie infringement of the right. The Court held that the government must ultimately be able to balance competing interests. (¶ 91-94)

[88] In Gladstone, Lamer C.J. sets out that the threshold requirement for infringement and states that legislation infringes an aboriginal right when it "clearly impinges" upon the rights. (¶ 53 and 151) An infringement has been defined "as any real interference with or diminuation of the right." Mikisew Cree First Nation v. Canada, 2001 FCT 1426 at ¶ 104.

[89] The Heiltsuk argue that their right to fish could be infringed by discharge of deleterious substances or disease into the marine environment during the construction or operation of the hatchery, the diversion of water and the potential impact of escaped Atlantic salmon on the wild native stock.

[90] There is evidence from Omega's expert that the construction of the facility will not impact the marine habitat in the area and that the discharge from the hatchery during operation will not pose a threat to marine life.

[91] The Minister of Fisheries and Oceans confirmed on August 16, 2002 that "a harmful alteration, disruption, or destruction (HADD) of fish habitat will not occur as a result of the construction and operation of this facility as proposed." The Regional Waste Manager, pursuant to the Waste Management Act, R.S.B.C. 1996, c. 482 and regulations confirmed on April 29, 2002 that the hatchery was a regulated site under the Land-Based Fin Fish Waste Control Regulation, B.C. Regulation. 68/94. Neither the Federal Minister of Fisheries nor the Provincial Minister of Water, Land and Air Protection are parties to this petition.

[92] Omega's expert report was provided to the Heiltsuk and he was in attendance at a meeting with the Heiltsuk in May 2002 in Bella Bella to provide information.

[93] The Heiltsuk presented no evidence that the effluent or construction will impact the marine environment in an adverse way thereby impacting the Heiltsuk's fishing rights in the area. Although they have presented evidence that asbestos may have been present on the site, the Heiltsuk have presented no evidence that any asbestos or other deleterious substances leached into the marine environment during construction of the hatchery.

[94] The Heiltsuk have expressed concern regarding the possibility of escape of smolts from the hatchery which could adversely impact the wild Pacific salmon in the area. Omega explained that the discharge pipe will have a triple screening system, as required by Provincial and Federal regulations, in order to prevent the escape of fish from its tanks. The likelihood of escapes from a land based facility is remote. The screening criteria and requirements to prevent smolts being introduced into the ocean are governed by the terms of the aquaculture licensing tenure, not by the licences in issue in this application. A federal permit is required for the transporting of smolts. The evidence is that the smolts will be removed by boat from the area.

[95] In my view, the Heiltsuk's concern about potential escape of salmon from fish farms outside Heiltsuk claimed territory is not an issue before the Court. The issues before me are whether the decision makers erred in granting the four licences to Omega, not whether fish farms, aquatic or land based, should exist in B.C.

[96] The Heiltsuk also argue that the diversion of water could possibly infringe their fishing rights in the area. The original Martin Lake water licence was granted over 70 years and there is no evidence that the diversion of water allowed by it has infringed the Heiltsuk's asserted right to fish in the area. There is no evidence that the water diverted pursuant to the Link River water licence infringes the fishing rights in the area. The water, although diverted through the hatchery, eventually flows into Cousins Inlet and as a result there is no impact on the volume of water in the Inlet.

[97] On the evidence before me, I find that the Heiltsuk have not discharged their burden of establishing a prima facie infringement of the aboriginal right to fish in the area of Ocean Falls.

IS THERE A DUTY TO CONSULT AND, IF SO, HAS THERE BEEN CONSULTATION?

[98] The Crown has acknowledged that it has a duty to consult with the Heiltsuk regarding any licences it issues to Omega. This is a change of position from when the initial licence, the Martin Lake water licence 2001, was granted to Omega at which time the Crown took the position that it did not need to consult with the Heiltsuk.

[99] In light of the Crown's concession that it has the duty to consult with the Heiltsuk regarding issuance of the licences, I am granting the order sought by the Heiltsuk that the Crown has a duty to consult with the Heiltsuk regarding the licences.

[100] The Heiltsuk also take the position that Omega owes them a duty of consultation. While not making a formal concession that it owes a duty to consult to the Heiltsuk, Omega has been clear from the commencement of the project that it is willing to consult with the Heiltsuk and says that it has made attempts to do

so.

[101] As set out by Lamer C.J. in Delgamuukw, the duty to consult can range from a duty to discuss important decisions that will be taken in respect of lands held pursuant to aboriginal title to a requirement for the full consent of the aboriginal nation depending on the circumstances. Consultation must be in good faith and with the intention to substantially address the concerns of the aboriginal people whose lands are in issue. (¶ 168)

[102] The Crown may rely on consultation which it knows is taking place between aboriginal groups and third parties. In Kelly Lake Cree Nation v. Ministry of Energy and Mines et al., also known as Calliou, [1999] 3 C.N.L.R. 126, (B.C.S.C.), Mr. Justice Taylor dealt with the issue:

[154] There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing....It is my view that a consideration of the question of consultation must be taken into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications, but also the consultations between First Nations people and Amoco that were known to the government to have occurred. The process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.

[103] The Heiltsuk take the position they have not been consulted at all with respect to the issuance of the licences and that any meetings held between the Heiltsuk and the Province or between Heiltsuk and Omega do not constitute consultation.

[104] In Ryan et al. v. Fort St. James Forest District (District Manager), Smithers Registry, No. 7855 (BCSC) aff'd (1994), 40 B.C.A.C. 91, Macdonald J. dealt with the issue of whether the Gitksan could argue that there had not been adequate consultation when they had refused to participate in the process:

¶ 23 I accept that the Gitksan are entitled to be consulted in respect of such activities. They do not need the doctrine of legitimate expectations to support that right, because the Forest Act itself and the fiduciary obligations toward Native Indians discussed in Delgamuukw, establish that right beyond question. However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.

. . .

¶ 26 I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it. It was the failure of the Petitioners to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute.

[105] A similar finding was made in Halfway River First Nation v. BC (Ministry of Forests), 1999 BCCA 470. On a review of the consultation which took place in that case, Mr. Justice Finch held:

There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see Ryan et al v. Fort St. James Forest District (District Manager) (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

(¶ 161)

[106] Here the evidence is that Omega attempted to meet with and consult with the Heiltsuk:

· Omega met with the Heiltsuk in Bella Bella concerning the proposed hatchery in October 2001 just after it had commenced the application process for the licences.

· Omega met with the Heiltsuk in Campbell River in December 2001.

· Omega requested a meeting with the Heiltsuk in January 2002 and met with them in Bella Bella on January 9, 2002.

· Omega provided information to the Heiltsuk in January 2002 following the meeting in response to questions and concerns raised by the Heiltsuk.

· Omega met with the Heiltsuk in Bella Bella on May 30, 2002 and provided additional information following the meeting.

[107] During the various meetings and correspondence with Omega and the

Crown the Heiltsuk have taken the position that they have zero tolerance to Atlantic salmon aquaculture and do not want the hatchery in their claimed territory, i.e., they have asserted a right to veto all Atlantic salmon aquaculture operations in their claimed territory.

[108] The Heiltsuk have remained firm in their position that they are opposed to any type of Atlantic salmon aquaculture in the territory over which they are asserting a claim. I find on the evidence that prior to the petition the Heiltsuk have been unwilling to enter into consultation regarding any type of accommodation concerning the hatchery. This is apparent both from the position they have taken throughout the meetings where they have clearly indicated that they do not consider the meetings to be consultation and from correspondence between counsel in which the Heiltsuk have continued to express the view that no consultation has taken place.

[109] The Heiltsuk have never advised the Crown or Omega of any terms upon which they would be willing to withdraw their opposition to the hatchery. Rather, they have maintained their position of zero tolerance for Atlantic fish farming in their claimed territory, including this hatchery site. It is apparent on the evidence that the Heiltsuk do not want a hatchery on the site; i.e., they want a veto with respect to what use the land can be put.

[110] In oral submissions, counsel for the Heiltsuk attempted to characterize the "zero tolerance" of the Heiltsuk as "zero tolerance to law breaking" in that Heiltsuk law prohibits any activities that damage the environment and the Heiltsuk are of the view that the hatchery has the potential to damage the environment.

[111] However, the Heiltsuk clearly advised the Crown and Omega at the various meetings and in correspondence that the Heiltsuk had zero tolerance for fish farms and this hatchery. They told Omega in January 2002 that they did not want the hatchery in Ocean Falls. As of January 2003, their stated position that the proposed hatchery was not welcome in Heiltsuk territory had not changed and they advised Omega and the Crown that they were opposed to the hatchery and wanted it removed.

[112] The conduct of the Heiltsuk both in stating their position as one of zero tolerance to Atlantic salmon aquaculture and in attending meetings at which they stated they did not consider the meeting to be consultation indicates, in my view, an unwillingness to avail themselves of the consultation process.

[113] On all of the evidence, it is clear that the Heiltsuk seek a veto over Omega's operations. They "want it removed". While saying they want to consult, their position has reflected an unwillingness to consult.

[114] No authority has been provided to me to support the proposition that the right to consultation carries with it a right to veto a use of the land. On the contrary, the Supreme Court of Canada has recognized that the general economic

development of the Province, the protection of the environment or endangered species, as well as building infrastructure and settlement of foreign populations may justify the infringement of aboriginal title. The government is expected to consider the interests of all Canadians including the aboriginal people when considering claims that are unique to the aboriginal people. It is in the end a balancing of competing rights by the government. Any accommodation must be done in good faith and honour. When dealing with generalized claims over vast areas, the court held that accommodation was much broader than a simple matter of determining whether licences had been fairly allocated. (Delgamuukw, ¶ 165, 202, 203)

[115] Although the Crown took the position that consultation was not required regarding the initial two licences, the evidence is that the Crown changed its position and attempted to consult with the Heiltsuk prior to the issuance of the dock and pipe licence of occupation and the Link Lake water licence. There is evidence that there are ongoing opportunities for consultation and accommodation with respect to the hatchery.

[116] Additionally, the evidence is that Omega has made and is making ongoing efforts to provide information to the Heiltsuk about the impact of discharge from the hatchery on the marine environment and to consult in relation to the procedures that are in place to prevent escapes from the hatchery. Omega has expressed a willingness to work with the Heiltsuk to create jobs and establish a wild salmon enhancement facility in the area.

[117] The Heiltsuk have not disclosed their position about the terms they would find acceptable to withdraw their objection to the issuance of the licences to Omega. They have not suggested any terms that should be added to the licences or identified any specific impacts the licences have had on their rights.

[118] In the circumstances, I find that the duty of the Crown to consult was adequately discharged by the Crown and Omega. The process has been frustrated by the Heiltsuk's failure "to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute". Ryan, at ¶ 6, 24 and 26.

WHETHER THIS IS AN APPROPRIATE CASE TO EXERCISE JUDICIAL REVIEW AND, IS SO, WHAT ARE THE APPROPRIATE REMEDIES?

[119] The Heiltsuk are seeking to have the licences quashed.

[120] Relief under s. 8(1) of the Judicial Review Act is discretionary.

[121] In Klahoose First Nation v. British Columbia (Minister of Forests) (1995), 13 B.C.L.R. (3d) 59 (S.C.), Mackenzie J., as he then was, dismissed an application by a First Nation to quash the Minister's consent to the transfer of a tree licence. The Court assumed, without deciding, that the Minister had acted in breach of a duty to consult, but exercised its discretion to deny the petitioners

their remedy under the Judicial Review Procedure Act. Mackenzie J. held that although the Band had lost the opportunity to consult before the Minister gave his consent, the consent was for the transfer of an existing tenure and no additional interests were alienated which could prejudice the Band's aboriginal claims. (p. 65)

[122] In this case, not only is there no evidence that the Heiltsuk's aboriginal claims are prejudiced by the issuance of the licences, but the fact that the Heiltsuk have zero tolerance for Atlantic salmon aquaculture within their claimed territory must also be considered.

[123] Although the Heiltsuk speak to their willingness to consult in regard to the licences which provide the tenures necessary for Omega to operate the hatchery this must be questioned in light of their consistently stated position to the Crown and Omega.

[124] Section 11 of the Judicial Review Procedure Act provides that an application for judicial review is not barred by the passage of time unless: "(b) the court considers that substantial prejudice and hardship will result to any other person affected by reason of delay."

[125] The Heiltsuk were advised that Omega's plans for construction and operation of the facility were progressing. In addition, information was provided to them about the amount of the planned investment and the timelines for completion of the project. It is clear from the Heiltsuk's evidence that they were aware of the issuance of the hatchery licence of occupation and the lack of consultation as early as mid December 2001. At that time, no significant investment had been made by Omega.

[126] The Heiltsuk chose neither to bring the petition at the time nor to apply for an injunction prior to construction of the facility commencing in late 2002. Rather, they waited 13 months after they were aware that the Crown had determined that no consultation about the initial licences was required. The evidence is that as of March 2003 Omega had invested $9.5 million in cleaning up the site and building the facility. Further losses will be incurred if the facility cannot be operated.

[127] Given my findings that the Heiltsuk have not established that there has been a prima facie infringement of their aboriginal rights and that the Crown and Omega have attempted to consult with the Heiltsuk, it is my view this is not an appropriate case to exercise my discretion to either quash the licences or make a prohibition order barring issuance of approvals or licences relating to the hatchery.

[128] I suggest that the parties continue to consult to determine whether the hatchery may adversely affect the Heiltsuk's rights and, if so, seek a workable accommodation with the Heiltsuk through negotiation. Given the expressed desire of Omega to continue to seek agreements with the Heiltsuk, I find that it is

not necessary at this time to make an order in that regard.

CONCLUSION

[129] The following orders and declarations are made:

· The decision makers had in December 2001 and continue to have a duty to consult with the Heiltsuk in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Heiltsuk and the short and long term objectives of the Crown and Omega with respect to the licences;

· The decision makers are to provide the Heiltsuk with all relevant information reasonably requested by them;

· The parties are at liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation;

· The relief in the petition to quash the licences and for a prohibition order is adjourned generally;

· The balance of the relief sought in the petition regarding the decision makers, including the application for a declaration that the decision makers breached their duty to consult and accommodate the Heiltsuk interests and concerns is dismissed.

· The application regarding a declaration that Omega had a duty to consult and seek accommodation with the Heiltsuk is adjourned generally.

· The balance of the relief sought in the petition with respect to Omega, including,, that it was in breach of its duty to consult, is dismissed.

· As well the application for an interim or interlocutory injunction is dismissed.

[130] Given the divided success on the petition, I order that each party bear its own costs.

“L.B. Gerow, J.”
The Honourable Madam Justice L.B. Gerow

# THE PAST INTO THE PRESENT

## CULTURAL HERITAGE RESOURCES REVIEW

**of the**

## BULKLEY TIMBER SUPPLY AREA

Prepared for: Ministry of Forests

Bulkley-Cassiar Forest District

Prepared by: Ken Rabnett

Suskwa Research March 2000

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# ABSTRACT

This study reviews cultural heritage resources within the Bulkley TSA, which is located in west-central British Columbia. The Wet'suwet'en, Gitxsan and the Nat'oot'en First Nations traditionally and presently lived in the TSA. Although they differed linguistically, intercultural dynamics had a broad scope that resulted from the use of a similar social structure, which had integral connections to their environment. This similar social structure was composed of a matrilineal kinship society, exogamous Clans divided into Houses, with crests, poles, oral histories, and a land system of territories, all of which were managed through a public forum called the feast. Archaeological and traditional use sites primarily relate to these people. The *Heritage Conservation Act*, the *Forest Practices Code of British Columbia Act* and the *Delgamuukw* legal decision, and in turn, the policies emerging from these legal keynotes, require consideration of cultural heritage resources. The *Forest Act* defines a cultural heritage resource as, "an object, site or location of a traditional societal practice, that is of historical, cultural or archaeological significance to the Province, a community or an aboriginal people".

An ethnographic overview of Gitxsan, Nat'oot'en and Wet'suwet'en cultures is discussed with the purpose of providing an introduction to their past cultural patterns and the nature of their adaptation to the environment of the area. Local indigenous peoples subsistence activities were tightly interwoven with the social structure, the local landscapes, and the broader regional environment. Without care and attention, starvation could be close at hand. Detailed knowledge and understanding of the environment, the characteristics of each resource, and the seasonal variation in abundance and availability, were necessary to the aboriginals for making decisions about what, where, and when different resources were to be harvested.

Intercultural relations were extensive, with inter-marriage between the three groups prevalent, resulting in the forging of kinship ties and alliances, promoting trading occurrences and privileges, allowing technology transfer, facilitating cultural enrichment, and enhancing economic stability. Trading was pervasive, utilizing an extensive trail network that connected the coastal areas with the Pacific slope. Five of these major "grease" trails traversed to three hubs of trade; Wud'at, Moricetown Canyon, and McDonell Lake, which were all seasonal villages. The Gitxsan, Wet'suwet'en, and Nat'oot'en economy and trade reflects their adaptation to their geographic territories. Over time these stone, bone and antler technologists developed systems of access, tenure, and resource management. A strong and adaptive semi-nomadic economy, pre-occupied with food gathering, was based around the summer salmon food fishery with dispersal into smaller family groups during the rest of the year to fish, hunt and gather on the House territories. These two modes of subsistence delineated the three aboriginal cultures, both in terms of survival, socially, and geopolitically.

Previous archaeological and traditional use studies within the TSA, as well as pertinent adjacent studies are reviewed in an annotated manner. A general examination of prior archaeological survey coverage shows that less than one percent of the TSA landbase has received systematic intensive surveys. The total area surveyed, with judgmental types included, is incalculable due to vague or missing information. Over ninety percent of the recorded archaeological sites are clustered on the Bulkley River and Babine Lake, which is in marked contrast to the aboriginal view of the landscape, and does not reflect land and resource use patterns. Recorded archaeological site types are principally represented by cache pits, surface lithic scatter, and villages or seasonal home places. An extensive trail system and culturally modified trees (CMTs) are presently unrecorded as archaeological sites, however many have been located on the landbase.

Central to the cultural heritage consultation process, is open dialogue of forest development on traditional territories. First Nations concerns vary; generally they see the current process as slightly demeaning to their culture. There is a widespread feeling that despite consultation communications, cultural heritage resources are receiving minimal respect and consideration. Clear solutions are often difficult to see when only the current situation is viewed. However, their perspective recognizes that communication and the relationship between the First Nation communities and those making land and resource decisions must change. Their participation in researching, identifying, and interpreting the significance of their own culture, then sharing their traditional knowledge in a relevant and meaningful method that serves their needs, the B.C. Government needs, and the forest industry needs, one and at the same time could help to build and strengthen working relationships.

In regards to strategic planning, it is suggested that a collaborative process between the Ministry and First Nations within the TSA. This would be designed whereby traditional knowledge possessed by the elders, and also including past documented information such as ethnographic, commissioned evidence, as well as the court transcripts resulting from Delgamuukw, be systematically formatted to ensure its application. Further suggestions include establishing funding for training First Nations members to participate in proposed Archaeological Inventory Studies. Cultural heritage and forestry are at a decisive point in our local history; clear solutions that all people can live with, will build strong and healthy communities.

ACKNOWLEDGMENTS

Credit is due to all the people who informally shared their perspectives and thoughtful comments concerning cultural heritage, forestry, and the relationship between them. Thank you AHP and ASG for reviewing and editorial suggestions.

# INTRODUCTION

## GENERAL

The following study is prepared for the Ministry of Forests, Bulkley/Cassiar Forest District, and applies to the Bulkley TSA. Three general themes outline this project: the first presents background summary information on the study area; the second presents an ethnographic overview. This is followed by a review of current known archaeological and traditional use resources. First Nations concerns, and recommendations for complementing management of cultural heritage resources complete the report..

First Nations with territories encompassed by the study area include the Wet'suwet'en in the central and southerly portion, the Gitxsan in the northern and southwesterly areas, the Nat'oot'en in the central and northeasterly portion, and the Tsimshian in the southwest corner.

Though presented as part of the cultural heritage review, the material barely scratches the surface of the deep, complex, inter-related cultures of the First Peoples of the upper Skeena River drainage area. Hopefully this study will provide an aid to the understanding of cultural factors, and an impetus for further research, especially of traditional use activities on the landscape.

## SCOPE AND OBJECTIVES

This review of cultural heritage resources within and in appropriate areas adjacent to the Bulkley TSA was guided by the following objectives:

1. Conduct a review of known archaeological resources, traditional use studies and sites, and ethnographic references within and in appropriate areas adjacent to the study area.

2. Compile a report outlining the above.

Additionally, it is important to emphasize that this project is not an archaeological overview assessment that defines areas of relative archaeological potential using predictive modelling techniques. Nor is it an archaeological inventory study and does not constitute a Traditional Use Study.

## CULTURAL HERITAGE RESOURCES CONTEXT

Archaeology is the scientific study that is concerned with the recovery and interpretation of material remains of peoples' past. The techniques are principally concerned with non-literary evidence for peoples' social and cultural development. Over the years, scientific findings and excavations have followed the realization that often as much can be learned from the surroundings in which objects are found, as can be learned from the objects themselves. Essential techniques include surface survey methodology, and subsurface stratigraphy, based on the principle of sequential deposits in which the uppermost layer is the latest formed, and typology, which is the study of changes in artifact form.

New archaeological discoveries cannot be fully understood without reference to previous archaeological research, not only in the study area, but throughout Gitxsan, Wet'suwet'en and Nat'oot'en cultural area. Although present Native populations may not know exactly the spatial and temporal features of their prehistorical heritage as related to the concept of archaeology, they do possess an acute awareness of their past and pride in their cultural heritage. The nature of archaeology in trying to reconstruct and understand prehistoric ways of life by studying their preserved remains in relation to time, space, cultural forms and processes can be somewhat limiting. Identifying real people and communities in the past is difficult and tends toward abstract expression, resulting in categorized features that are ordered in temporal and spatial terms; yet the relationship of these to actual people is essentially unknown and intangible. It is essential to recognize and respect their humanity, their distinctive and diverse cultures, and their connection to place; this was their home.

Consideration of cultural heritage resources (CHR) are mandated in British Columbia, in particular for forest development activities, by two Acts of legislation, the *Heritage Conservation Act (1996 RSBC, Chap. 187)* and the *Forest Practices Code of British Columbia Act.* This legal frame is further grounded by the *1993 Delgamuukw* legal decision. Policy emerging from these three legal keynotes informs the Operational Planning Regulations, the Protocol Agreement on CHR Management (1996), the Ministry of Forests Protection of Aboriginal Rights (1997) policy, and to a lesser extent, the Memorandum of Agreement on Heritage Trails (1995). Procedures created from those legal keynotes also inform the CMT Management Procedures and Archaeological Resource Management in general. A cultural heritage resource is defined in the *Forest Act, Section l (l),* as "an object, site or location of a traditional societal practice that is of historical, cultural or archaeological significance to the Province, a community or an aboriginal people".

An archaeological site is defined as any locality that exhibits physical evidence of the past activities of a person or group of people for which the application of scientific methods of inquiry (e.g. survey, excavation, data analysis, etc.) is the main source of information. The key distinctions that set archaeological sites apart from other heritage sites are the presence of physical cultural remains and the application of archaeological

techniques of inquiry. Prehistoric and historic are two types of sites, with an archaeological site older than European contact (usually considered to be A.D. 1800 in British Columbia) classed as a prehistoric site; such sites are exclusively aboriginal. Any site younger than European contact is classed as a historic archaeological site, and can be either aboriginal or Euro-Canadian in origin. A general rule of thumb employed by archaeologists working in B.C., is that when recording sites, the remains should be older than approximately 1945. Any site older than 1846 is automatically protected under the *Heritage Conservation Act* and cannot be disturbed or altered without a permit (Carlson & Mitchell 1997).

Traditional use sites are geographically defined areas or places at which aboriginal people lived and/or conducted traditional activities such as fishing, hunting, gathering, and those of a ceremonial or spiritual nature. Rather than material remains being the defining characteristic (as in the case of archaeological sites), it is the activities, and most importantly, the living memory of the activities carried out at the place, that are the defining features of traditional use sites,. The place may be or not be currently used at the present time, and there may be no physical evidence of the activity at the site. However, there is a direct and demonstrable connection between the living aboriginal people of the area, the traditional activities, and the place. The cultural significance is derived from the role the activity plays in a community's historically rooted beliefs, customs and practices (Carlson & Mitchell 1997).

Traditional use sites are generally more relevant to assessing aboriginal rights in an area than are archaeological sites, because aboriginal rights are usually expressed as the right to conduct a traditional activity in a particular way. There can often be an overlap between an archaeological site and a traditional use site. A place where there are material remains of past human use, and where there is oral or historical documentation of traditional use could be classed as either an archaeological site or a traditional use site, or both. Traditional Use Studies (TUS) conducted by First Nations provide the best means to document these important cultural heritage resources.

# STUDY AREA BACKGROUND

## PALEOENVIRONMENT

The study area came into existence when island arc systems formed into the Stikine Terrane and accreted onto the North American landmass, about 180 million years ago (ma). Over time, throughout the Jurassic and early Cretaceous, the Stikine Terrane was a series of volcanic islands and shallow seas. Active volcanoes to the west accumulated thick sediments in the Nilkitkwa Trough situated along Babine Lake and extending northwards (Tipper and Richards, 1976). During the upper Jurassic, 157-140 ma, the Bowser Basin, with its southern shoreline south of Smithers, accumulated thick sediment deposits. This island-rimmed basin centered in the upper Nass Valley ended its sedimentation deposition, then uplifted. This was succeeded by volcanic activity of the Skeena Group, 100+ ma, which laid down lava flows, tuff, and breccia. Lowland areas with peaty remains accumulated to form the coal beds west of Telkwa, and the Lake Kathlyn deposit. Volcanic and plutonic activity, both intrusive and extrusive, generally continued to 50 ma, forming the Bulkley, Newman, Ootsa and Endako stocks (Wojdak 2000).

In more recent times, cycles of cooling and warming resulted in periods of glacial advance and intervening interglacial periods during the Pleistocene Epoch. There were numerous advances and recessions of glaciers. However, most of the surficial landforms that we see today are legacies of the last glaciation, the Fraser Glaciation. There are a few deposits of pre-Fraser age. A crew working at the Granisle mine site in 1971, just out of the study area on the east shore of Babine Lake, found the remains of a large mammoth. Subsequent study indicated that the mammoth had died there approximately 35,000 years ago, and pollen associated with the bones suggested that the vegetation in the Babine Lake area, now well forested, was at that time similar to present shrub tundra just beyond the tree line in northern Canada (Harrington et al, 1974).

## ICE AGE AND DEGLACIATION

The coastal mountain systems were the principal source areas of the Pleistocene glaciers. At the time of thegreatest advances, ice from the Coast Mountains coalesced to form an ice sheet flowing to the Rocky Mountains in the east, northwards into the southern Yukon, and southward into Washington State. These events occurred several times. During the Fraser Glaciation, which lasted from 25,000 to 10,000 years ago (ka). The peak of that Fraser glaciation, about 15 ka ago, saw ice covering the area of interest

to a maximum thickness of 2500m over the Stikine and Interior Plateau (Clague 1989). At such times, it probably closely resembled the present day Greenland Ice Sheet. At this juncture, it is known that past archaeological traces would have been deeply buried by drift or eradicated, and the area would have been devoid of plants, wildlife and man.

About 12,000 years ago, the world-wide climate warmed and the ice started to melt and waste from the top down. The resulting glacial retreat created large lakes dammed behind masses of decaying ice and drift. Loose glacial till and debris avalanched off mountainsides; and debris laden streams and rivers ran along the edges of remaining valley glaciers, depositing the discontinuous kame terraces seen today.

Deglaciation also initiated a process of glacial deposit redistribution by means of fluvial and mass wasting that continued well into the Holocene (10 ka to the present). It is assumed that as the valley bottom ice wasted, catastrophic events occurred and recurred as rivers downcut and the unstable terraces and unconsolidated ice-dammed sediment slid downslope. It probable that flora, even trees, were being established on the mountainsides, while ice shaded in the valleys slowly melted away. The climate of the study area was warmer and drier from approximately 10,000 BP to 7,000 BP, with mountain glaciers disappearing or being greatly reduced in size.

## HOLOCENE FLORA AND FAUNA

Studies of lake and bog sediments reveal the relative history of the landscape. There is only one completed study with respect to vegetation and climatic history that is close to the Bulkley TSA; it is located at Seeley Lake, on Highway 16 south of Hazelton, and adjacent to the study area. One of the objectives of this pollen core and plant macrofossil investigation was to compare the analyzed data to archaeological and ethnographic information. Analysis of the first zone (ca. 9200-6150 BP) concurred with early Holocene drier conditions that have been documented in southern British Columbia (Hebda, 1982; Mathewes and King, 1990). Gottesfeld et al (1991) concluded that a likely reconstruction was a mixed forest of extensive seral stands of aspen, paper birch, lodgepole pine and riparian alder, interspersed with stands of spruce and fir. The abundance of seral species suggests that fires were probably common. Analysis of the second zone (ca. 6150-4700 BP) suggested a trend to wetter climate with hemlock present, although the abundance of seral species indicates continued periodic forest disturbance. A cooling trend after about 6000 BP is consistent with evidence to the south, of neoglacial activity in the mountains and rising lake levels (Mathewes & King 1990). The third zone (ca. 4700-2200 BP) is described as continued cool and wet conditions due to higher hemlock values, although a reduction in forest disturbance factors may also have played a role. The fourth zone (ca. 2200 BP to present) is characterized by increases in lodgepole pine and the appearance of red cedar, which

steadily increases to the present. These results correspond with cooler and wetter late Holocene climates as documented in southern B.C. (Gottesfeld et al, 1991).

The Seeley Lake pollen core is important, as it is the only dated core that permits environmental reconstruction in this region. It establishes that the glacial ice was melted and forests established in this shaded location by 9400 BP. The climatic trends postulate that the xerothermic interval between 10,000-6,000 BP was warmer and drier, followed by cooler and wetter conditions until 4700 BP. Hebda (1982) concluded that after 4.5 ka, conditions changed relatively little until the present. Brief intervals of climatic deterioration occurred with alpine glaciers probably advancing slightly between 6 ka and 5 ka, and between 3.3 ka and 1.9 ka. In most local areas, glaciers achieved their maximum Holocene extant between about 1500 and 1850 AD during the Little Ice Age, (Clague 1989).

. Vegetation changes in the study area following the Fraser deglaciation are attributable in part to climatic change and in part to different rates of plant migration and plant succession. It is surmised that plant communities adapted to cold and dry conditions rapidly established and then slowly shifted to forests as the climate ameliorated. Early forest stands, most likely pine and/or aspen, located at higher elevations and/or on moist north aspect slopes, moved downslope and into the mid-elevations and valley bottoms. As moister conditions commenced in the late Holocene, wetlands expanded and the landscape took on an appearance much like it is today.

Wildlife dispersed into the deglaciated area over the past ten millennia from the northern refugium in Alaska and western Yukon and/or from the southern refugium in what is now the United States. The process of post-glacial appearance of wildlife was essentially a new start, in a new environment, and was a complex interplay of population processes with environment. Generally, there were climatic and successional changes to habitat, with population centers, reproduction factors, and predators all linking together in a constantly fluctuating equilibrium that determined dispersal (Pielou 1991).

The past wildlife species assemblages of the study area are not well known. A few records are available as oral histories and corroborative accounts of early explorers for the cooler period, the Little Ice Age (1500 to 1850 AD). The first explorers, Mackenzie in 1793, and Fraser in 1806, appeared when the neoglacial climate of the Little Ice Age prevailed. They all mention beaver, marmot, caribou, black and grizzly bears as being common. Harmon (Lamb 1957), on the occasion of his first visit to Babine Lake in 1812 reports seeing caribou and "several of the sheep that are numerous in the mountains." He also reports "a few moose, black bear, beaver, otter, lynxes, fishers, martens, minks, wolverines, foxes, badgers, polecats, hares, and wolves." Black in 1824 (Rich 1955) recorded caribou, mountain goat and marmot on his Findlay-Toodoogone and Turnagain exploration.

Caribou was the large mammal most often mentioned by early explorations in the study area, and apparently were the most common in both numbers and distribution.

Former cariboo populations in the Nechako Plateau and Babine Range, which encompass much of the study area, were extirpated by 1920. Population declines of cariboo could be responses to climatic warming or to immigrant settlement impacts centered in the Bulkley Valley.

The history of moose is of particular interest in the context of the study area, in that its dispersal occurred in relatively recent memory. Emmons (1911, cited in Allbright 1984) writes that Tahltans reported moose were common in the Telegraph Creek-Dease Lake area prior to 1800, but greatly declined between 1800-1880. Moose were uncommon or absent in the Bulkley TSA before about 1920. The dramatic and conspicuous dispersal into this area of moose after 1920 is well documented; why or what prevented them from appearing before this is not well understood.

Mule deer were apparently uncommon in the Bulkley TSA until the early decades of this century, when they begin a northward expansion into the areas where they are now present on a discontinuous basis. The ability of mountain goats to subsist in areas of high precipitation, as well as the near Ice Age conditions of alpine winters, suggests that in many parts of the study area they may have long been the only ungulates. Horetzky (1874) and Dawson (1881) both report seeing sheep and caribou. Sheep appear to have disappeared from the study area just prior to or in the same period as the caribou. Mackenzie mentions elk, and Harmon also describes elk, both with no specific localities, while Morice (1906) states that the oldest aboriginals claim to have seen or heard of elk, and that Yezih (elk in Carrier) did exist within reach of their arrows, as when they first saw a horse they called it a domestic elk (yezih-lhi: elk-dog), a name it has retained to this day.

In many ways, one cannot discuss the native culture of the study area without talking about fish, which is a cultural root. Salmon was the most important food that was procured, processed, and stored. In the archaeological record, salmon bones are found at the Spences Bridge site on the Thompson River dated to 7500 BP. While at the Glenrose site salmon bones have been dated 6000-7000 BP (Fladmark 1986). Allbright's 1985 excavations at the GgSt2 site in Moricetown, which included fish bone artifacts, indicated continuous occupation for about 6000 years up to the present (Allbright 1987). It is assumed that since salmon were available on the Bulkley mainstem, they were available on the Babine system as well. It is quite probable that the availability of this important food resource, obtainable and storable once processed, led to dense populations and the complex aboriginal cultures of this area.

## PREHISTORIC DISTURBANCE

Prehistorically, fire was the most widespread form of landscape disturbance and it had a fundamental influence on the composition of vegetation and forest types in the study area. The natural fire regime varies greatly due to climatic, topographic, moisture, vegetation and seasonal factors, which in turn determine periodicity, intensity, extent and magnitude.

Native burning was practiced in the study area prehistorically, as it was generally practiced across North America, in order to manage plant communities and wildlife populations (Gottesfeld 1994). Horetzky (1874) and Dawson (1881) both noted the lack of forests, and the presence of lightly wooded sections, and grass, wild peas, vetches, wild roses, and berries in the area. Poudrier (1893), and Gauvreau (1891), on their track and township surveys in the area of interest in 1891 and 1892, clearly noted and characterized the soils, agricultural potential, landscape flora and general natural history. The majority of the valley bottoms and lower uplands were burnt and resulted in prairie, open meadows, or berry patches. At Moricetown, Poudrier reports, "The abundance of berries of different kinds, and the proximity of the mountains, where caribou, mountain goat and bears are plentiful, render the spot one of the most desirable homes for the Indians." (Poudrier 1893). In the summary general description of the Bulkley Valley survey of Townships 1-9, Poudrier states, "About one-fourth of the whole valley, which averages from five to ten miles in width, consists of prairie and open land." (Poudrier 1893). These comments, as well as others, noting burnt areas, lightly wooded deciduous forest stands, and berry patches, in the mid Skeena and mid Nass, through the Bear Lake, Takla and Stuart Lake country, to Forts McLeod and Grahame, corroborate Dawson's evidence. Euro-Canadian influence on the vegetation of this region probably was probably not significant until the 1880's or later.

The utilization of fire was an effective tool to enhance the production of a variety of foodstuffs, including nutritious herbs, berries, shrubs, and of course browsing animals. Maximizing berry production by creating ideal habitat, created a major trade item in the aboriginal economy, and local berries with a high sugar to acid ration were regularly traded to coastal peoples.

Changes due to the paleoclimate and other prehistoric modifiers over the landscape had moderate effect on prehistoric land use. During the recent neoglacial, subalpine parklands, avalanche slopes, alpine tundra (particularly talus slopes), wet meadows and fens all generally changed in terms of habitat, resulting in different human use patterns and locations. The primary periodic disturbance processes of fire, insect outbreaks, disease epidemics, windthrow and erosion, affecting the flora and fauna, resulted in multiple pathways of ecosystem and habitat change – most likely similar to that which occurs at the present.

The aboriginal cultures adapted to these environmental changes and others. For example, when the Bulkley River slide in 1820 resulted in the non-appearance of salmon at Moricetown Canyon, the Wet'suwet'en initiated a fishery at Hagwilget Canyon, and also traded with the Nat'oot'en.

## PHYSICAL SETTING

The Bulkley TSA, located in west-central British Columbia, contains two physiographic land types, the Hazelton Mountains and the Nechako Plateau. The Bulkley Range and the Babine Range are separated by the western edges of the Nechako Plateau which fingers into valleys between the mountains and passes by transition along a generalized line at the 1350 m contour. The valleys are generally wide, and floored by thick deposits of glacial drift. The mountains have large areas of bedrock with a thin veneer of colluvium and glacial till.

Soils in the valleys are relatively good, but quality decreases rapidly moving up the slopes, which are forested. These forests are dominated by 56% balsam (subalpine fir), with approximately equal amounts of lodgepole pine and spruce. Deciduous stands are dominated by cottonwood on alluvial fans, floodplains and lower slope break seepage areas. Aspen stands are dominant at the upland hardwood sites, typically with smaller amounts of birch and willow. The Bulkley TSA includes six biogeoclimatic zones: Sub-Boreal Spruce (40%), Engelmann Spruce-Subalpine Fir (34%), Interior Cedar-Hemlock (6%), Alpine Tundra (16%), Coastal Western Hemlock (2%), and Mountain Hemlock (2%).

### Sub-Boreal Spruce (SBS)

This zone lies between the interior Douglas-fir forests to the south and the boreal forests to the north, and occurs primarily on gently rolling plateaus. It covers most of the interior portion below elevations of approximately 1,000 meters. Although the climate is severe, forest productivity is moderately good because the winters are shorter and the growing season longer than in boreal areas. Hybrid Engelmann-white spruce, lodgepole pine and subalpine fir are the dominant tree species. These areas are located primarily along the Bulkley River Valley and along the Babine River and Babine Lake. Most of the settlements and agricultural land occur within this zone.

### Engelmann Spruce-Subalpine Fir (ESSF)

This zone occurs from approximately 1000 to 1500 meters elevation throughout much of the interior. The climate is severe, with short, cool growing seasons and long,

cold winters. The landscape at the upper elevations is open parkland with trees clumped and interspersed with meadow, heath and grassland. Engelmann spruce, subalpine fir, and lodgepole pine are the dominant species. These areas are located in all mountainous portions of the Bulkley TSA

Interior Cedar-Hemlock (ICH)

This zone occurs at lower to middle elevations in areas of wet climate within the interior of the province. It is located mainly in the western portion of the TSA around Moricetown, as well as the Kitsegeukla and Bulkley Valleys below Moricetown and surrounding mountain slopes, including the face of Hudson Bay Mountain. Winters are cool and wet and summers are generally warm and dry. This zone is the most productive in the interior. Western hemlock is the characteristic species, but spruce and subalpine fir are also common.

Alpine Tundra (AT)

This zone is found on high mountains, and is essentially a treeless region characterized by a harsh climate. Long, cold winters and a short, cool growing season create conditions too severe for the growth of most woody plants, except in dwarf form. This zone is dominated by dwarf shrubs, herbs, mosses and lichens. It has high recreational appeal, and can provide important range for caribou and mountain goats.

Coastal Western Hemlock (CWH)

The northern latitude rainforests comprising this zone occurs at low elevations in coastal areas. Western hemlock and amabalis fir are dominant tree species. Although predominantly maritime, the climate is significantly influenced by continental weather patterns. This zone can be found on the leeward slopes of the Coast Mountain Range in the southwestern section of the Bulkley TSA.

Mountain Hemlock (MH)

This zone occurs at subalpine elevations in the Coast Mountains. Mountain hemlock, amabilis fir and subalpine fir are the dominant tree species. Upper elevations of the zone consist of clumped trees interspersed with heath, wet meadows and bogs. The climate is very snowy with a short, cloudy growing season, and cool, but not extremely cold temperatures. Small pockets of this zone can be found in the mountains of the Telkwa Pass and Copper River areas in the southwestern corner of the Bulkley TSA.

For a more complete discussion of fish, wildlife, mineral, agriculture and community resources within the Bulkley TSA, view the Bulkley LRMP (BVCRB/IPT 1998).

# ETHNOGRAPHIC BACKGROUND

The purpose of this ethnographic section is to provide an introduction to the Wet'suwet'en, Nat'oot'en, and Gitxsan past cultural patterns and the nature of their adaptation to the environment, the Bulkley TSA, which is the study area of interest. This section is founded primarily on the reasoning that knowledge of prehistoric and to an extent, historic subsistence patterns, and in turn, cultural heritage site formation processes is crucial to understanding and interpreting both archaeological remains and traditional use sites. Due to unfortunate project timeline limitations, the reconstructed seasonal subsistence patterns are simplistic, and generally lack specific information useful in an archaeological context when investigating cultural heritage material substance on the ground. Nonetheless, the material presented stands as a basic understanding, and can be complimented with further information at a later date.

## COMMON SUBSISTENCE THEMES

The Wet'suwet'en, Nat'oot'en, and Gitxsan all lived in the Bulkley TSA. Although they differed linguistically, intercultural dynamics had a broad scope that resulted from the use of the same basic social structure, which had integral connections to the similar environment they inhabited. This shared social structure was composed of a matrilineal kinship society, exogamous clans divided into houses, with crests, poles, oral histories, and a land tenure system of territories, which were managed through a public forum process called the feast. All these separate aboriginal groups possessed distinctive characteristics and complexities that are important to note, but the social structure cut across major linguistic and cultural divisions.

Traditional basic subsistence requirements were food, shelter and clothing. Background subsistence themes that all the native groups had to consider were the quality and quantity of the resources fulfilling the above requirements, the seasonality and resource availability, and their own technological efficiency (Allbright 1984). The primary goal was food that provided energy and adequate levels of nutrition to maintain the people's health and growth. Gottesfeld examined the role of Wet'suwet'en plant foods (1991) and nutrition (1995) respectively and provides further comprehensive discussion. The people also required hides and furs for clothing, robes and bedding, which for the most part were procured from the animals also used for food. Many tools and implements were obtained from food animals, including bone, antler, teeth, horn and sinew. Shelters in the summer salmon fishery villages were plank-walled houses; seasonal camp shelters were most often double or single lean-to's, built from poles, bark and boughs. In fulfilling these basic needs of food and raw materials, the amount of effort

expended and weather exposure by all three groups were generally similar. Food storage and trade were maintained and provided security against seasonal or periodic longer-term fluctuations in resource abundance, or ecological disturbance or stress.

Factors affecting the quality of subsistence foods included the size, weight, tastiness, and caloric yield, as well as the kind and quantity of raw material the resource could provide (Allbright 1984). Fat content is one of the most important and desirable properties of any food resource in the study area. Fat and hence overall weight may vary seasonally, with hibernating bears and groundhogs putting on layers of fat to last through the winter. Ungulate females have the highest fat content in the spring before calving, while males are fattest just before rutting. Fish have their greatest fat content before spawning. Oolichan grease was traded at or from the coast into the study area in prodigious amounts to supplement fat requirements that were not locally available. The drying of large quantities of berries seasonally, when they were available, extended the supply of important vitamins over the winter months (Gottesfeld 1995). The local weather was very important in determining whether or not proper drying was possible.

The environmental setting defines the kind of flora and fauna that are available for subsistence harvesting, with these resources unevenly distributed in space and time. Seasonality is the singular factor contributing to the patterning of subsistence activities and settlement locations of the aboriginal peoples within the study area. Seasonality strongly influences the structure of the resource base in terms of its temporal and spatial distribution, abundance, and diversity. Strategic fishing, hunting and gathering were emphasized in order to procure large amounts of food at specific times and locations when resources were most abundant, with the minimum amount of energy output(Allbright 1984). To cope with winter insecurity and to ensure themselves from the risk of, or states leading to starvation, the Nat'oot'en, Wet'suwet'en, and Gitxsan preserved and stored large quantities of food.

Strategic food harvesting required the development and application of complex technologies, which utilized natural materials. Oswalt (1976) in his analysis of food getting technology notes that sub-arctic environments [includes this TSA] have the most complex technologies, with particular emphasis on the use of a wide variety of complex tended and untended facilities including fences, weirs, traps, snares and nets. Morice (1893) provides clear understanding of the nature and use of many technologies related to the study area. Food production becomes more efficient when tools, implements and facilities are manufactured and prepared in advance of procurement activities, or within the warmth of a seasonal shelter.

In summary, the local indigenous peoples subsistence activities were tightly interwoven with the social structure, the local landscapes, and the broader regional environment. Without care and attention, starvation could be close at hand. Detailed knowledge and understanding of the environment, the characteristics of each resource, and the seasonal variation in abundance and availability, were necessary to the

aboriginals for making decisions about what, where, and when different resources were to be harvested.

## INTERCULTURAL RELATIONS

Intercultural relations between the Wet'suwet'en, Gitxsan, and Nat'oot'en were extensive as noted above. Inter-marriage between the three groups and adjacent groups was prevalent, resulting in the forging of kinship ties and alliances, promoting trading occurrences and privileges, allowing technology transfer, facilitating cultural enrichment, and enhancing economic stability. These dynamics allowed a thriving trade network to operate, with abundant resources from one place being exchanged for localized resources from another area. Trading was pervasive, particularly when groups came together at summer fishing villages, major fall and winter camps, and at "trading fair" sites. McDonell Lake, Moricetown Canyon, Skeena Forks (Mission Flats), Kisgegas and Wud'at were hubs of trade with major through trails, while intra-territorial trails radiated to outlying areas. In times of local scarcity or resource stress, the trade network played an important function in alleviating food shortages. Relations were not always peaceful, with repeated trespass or lack of respect leading to retaliation of raids. According to oral narratives, Haida were leading raiding parties, with up to 600 men in twelve canoes, up the Skeena River with the focus of procuring slaves, well before the maritime trade was established. In the 18$^{th}$ century when Russian trade goods, particularly iron manufactured items, started to appear in the Skeena drainage, control of trade was an underlying source of conflict (MacDonald 1984).

An extensive trail network of predominantly overland foot trails connected the coastal areas with the interior Pacific slope. The major trails traversing into and out of TSA, and starting in the west were:

- The Copper River trail heading from Kitselas Canyon upstream on the Copper R. with routes going to McDonell Lake and thence to the Moricetown Canyon area, with a route also heading through the Telkwa River valley and thence to the Tyee Lake area.

- The trail that forked off the Skeena mainstem trail, then headed upstream on the Kitsegukla River, and then past the lake with forks downstream on Trout Creek, and also to McDonell Lake.

- From Gitanmaax, a trail headed upstream north on the Bulkley River, crossing the bridged Suskwa River near the bottom of the canyon, and continued to the bridged Moricetown Canyon, then continued upstream on the Bulkley R. to Tyee Lake and on through to the Morice River country. From Moricetown Canyon, a major branch trail headed overland easterly to Sunnyside (Tsak) on Babine Lake.

- From the Suskwa River bridge, the trail forked easterly, heading upstream north of the Suskwa River and through the Pass, then heading downstream on the Tsezakwa to Wud'at on Nilkitkwa Lake. From here, canoes were often used to travel upstream to villages on Babine Lake and points beyond. From Wud'at the trail forked with a trail leading easterly to Takla Lake, and the other major branch heading northerly upstream on the Nilkitkwa River, then through Kotsine Pass, then downstream on Condit Creek to the Driftwood River, with the nearby forks leading to Bear Lake and points beyond.

- From Gitanmaax, a trail traversed upstream paralleling the Skeena River to Kisgegas, then headed northeasterly cutting across the Shelagyote and Nilkitkwa drainages to meet the Kotsine Pass trail close to Condit Creek.

These major trails that included both summer and winter routes took advantage of the topography and generally followed easy grades. These trails provided routes for trade goods, but passage of long-distance trade items often did not flow through, rather items passed from Gitxsan to Nat'oot'en or Wet'sueten, who then might further trade these goods with eastern Carriers, Sekannis or other groups. Westward directed traded goods followed the same pattern. Intersecting the major trails were dozens of branch trails accessing lateral valleys, the high country, lakes or particular interest areas. As an integral part of the cultures, trails connected all cultural heritage sites.

Distribution of Trade Items:

Coast to Interior: Smoked oolichan and grease, smoked shellfish, herring roe on Kelp, seaweed, yew wood items, copper, canoes, dentalia and abalone shells.

Interior to Coast: Dried salmon, dried berries, dried meats, hides and furs, copper. jet, amber, nephrite items, flint, and arrowheads.

## ORAL HISTORIES

Gitxsan, Wet'suwet'en and Nat'oot'en oral histories, also called oral narratives or oral traditions, can be described as the peoples' own statements of their history through the oral tradition. These oral histories are a separate form, differentiated from the moralistic myths or stories that are told to teach about greed, love, humour and other aspects of life, an example being the Gitxsan's Wiighet, also known as the "Great Man", or Raven stories, with Wiighet being a raven-human character who is wily and foolish (Harris 1995).

To be appreciated, the oral narratives need to be considered within the multi-dimensional context of the aboriginal culture. The oral histories trace the origins of rights to ancient territories, the course of migrations to new territories and any subsequent major changes in the territories or fortune of the House, and therefore are considered to be owned property. Accurate and public rendition of these histories is the basis of Gitxsan, Wet'suwet'en and Nat'oot'en property law. The people know their history and origins from their oral traditions (Rush et al 1996).

## THE WET'SUWET'EN

## INTRODUCTION

The Wet'suwet'en are the "people of the lower drainage," meaning lower than the Babine Lake drainage people, the Nat'oot'en. The Wet'suwet'en consider that their homeland territories generally encompass the western upper portion of the Nechako River watershed and nearly all of the Bulkley River drainage, except the tributaries draining into the Bulkley west of Kwun and Porphry Creeks, which are considered Gitxsan. Within the Bulkley TSA, the area of interest, all of the Bulkley drainage is defined by Wet'suwet'en interests.

The Wet'suwet'en form a part of the Athabaskan or Na-Dene language group, which consists of some forty closely related languages, primarily of western and northern North America. The Wet'suwet'en, as they refer to themselves, speak Babine-Wet'suwet'en, also referred to as Northwest Carrier, a distinct dialect from that of the Carriers to the south and east of them.. This particular dialect, which some linguists propose as a separate language, is understood and spoken by the Nat'oot'en of Babine Lake (Kari 1975).

It is believed that the Wet'suwet'en ancestors moved into their present territories from the proto-Athabaskan heartland, the area situated around the present day central Yukon Territories and Alaska (Rigsby & Kari 1987). One Wet'suwet'en story portrays the shaping and the creation of the land, and begins with Estace. Estace steals water from the old man who guards it, and while running away with the water some of it spills out, forming the lakes that fashion the landscape today (Mills 1997). The kungax, one specific form of Wet'suwet'en oral history, recounts that the first established village, Dizkle, was shared with the Gitxsan, Talhtan, Sekanni, and other Carrier people. This village was located upstream of the Bulkley Canyon and the Bulkley- Suskwa confluence, in the area known today as Mosquito Flats. Here, where the salmon rested after the sixteen kilometers of swift Bulkley Canyon currents, there were houses on both sides of the river. The large left bank cluster of houses was called Hahwilamax, " the place where people throw away turnips;" the right bank side was called Kwatso (Jenness 1943). A driftwood dam or weir across the river that incorporated fish traps brought the people together each year to harvest the migrating salmon. The village of Dizkle was abandoned when two squirrels crossed the dam, which was taken as an omen of impending disaster, causing the people to flee, and in turn, establish their separate villages (Jenness 1943).

Other kungax recount that the villages of Dizkle and the Gitxsan ancestral home, Temlaham were founded at the same time. They were in a sense sister cities, borrowing elements of the other, and starting to create the close ties that traditionally existed between them. When the people dispersed from Dizkle, the Gitxsans moved down the Skeena River, the Nat'oot'en moved to Babine Lake, and the Wet'suwet'en traveled to and stayed at Trout Creek, called Siy'gehtiy, and after a time established them selves at

Moricetown Canyon, also called Kyah Wiget. Notwithstanding the kungax, dating of archaeological deposits at the traditional summer village site of Moricetown Canyon indicates continuous use going back 6,000 years before present (Allbright 1987). The Wet'suwet'en believe that their ancestors were on the territories since time began.

## WET'SUWET'EN SOCIAL ORGANIZATION

Wet'suwet'en society is matrilineal based and recognizes five crest groupings (Pdeek) called Clans, which are exogamous. Through this matrilineal descent, every Wet'suwet'en is a member of a House or Clan. These Clans are Laksilyu or Small Frog Clan; Gilserhyu or Big Frog clan; Laksamshu or Fireweed Clan; Tsayu or Beaver Clan; and Gitdumden or Wolf Clan. These Clans are correlative with crest groups of other neighboring people, allowing one to identify kin and potential marriage partners, while both extending and accepting support among the Haisla, Gitxsan, Nat'oot'en, Tsimshian, Nisga'a and others.

Within the Clan are smaller groupings of people known as the House or Yax, which consists of people related through lineage, with a high chief. For example, the group of Fireweed Houses would compose the Fireweed Clan, within which there is no single chief. There are a number of subsidiary chiefs, all of whom hold a hereditary title, with the titles belonging to the House. The head chief of the House was supported by these kinsmen and the common people in a compatible and mutually advantageous and beneficial framework of support (Naziel 1997). The House had its own distinctive oral histories or kungax, crests and songs, which functioned as representations of historical events, with the ultimate purpose of defining and confirming ownership of the House territory. While Wet'suwet'en society is matrilineal based, the father Clan plays an important role in providing ongoing general societal support (Mills 1997). The father Clan is defined as the Clan of one's father. An element of Wet'suwet'en law states that people must marry outside of their own Clan; consequently, if they do not, they will not have father Clan support. The father Clan assists in many ways, particularly at the time of a death, and their responsibilities are generally to ensure that kin are cared for and have the support needed for a healthy life.

The Clan and the Houses were the clearly defined organization of the Wet'suwet'en. House chiefs had authority over their territories, and over House members and issues that extended no further than their House; governance and resolution of conflict or stress between House groups or Clans were carried out through the feast. The elements and principles of these social tenets were sufficiently adaptive to provide for contraction and expansion of Houses and Clans on a singular basis such as adoption, or on a broader base as the society underwent change. By way of example, in 1862-63, when the smallpox epidemic significantly depopulated the Tsayu, the surviving members incorporated themselves into the Laksamshu. Jenness (1943) cited the Twisted House or

Ya'hostiz as splitting off from the Sun House or Sayax when the members became quite numerous.

## WET'SUWET'EN CLANS AND HOUSES IN THE BULKLEY TSA

### LAKSILYU OR SMALL FROG CLAN

| | | |
|---|---|---|
| Tsekalkaiyax or House on Top of a Flat Rock: | | Reiseter and Trout Cr. |
| Territory: Ut'akhgit | Wahtah Keg't | Moricetown. |
| Kwanbeahyax or House Beside the Fire | | |
| Territory: Coos Tl'aat Ben | Wahtah Kwut | Round Lake |
| Keel Winiits | Wahtah Kwut | McDonell Lake, Serb Cr. |
| Ginehklaiyax or House of Many Eyes | | |
| Territory: Dee'el Kwe | Hagwilnegh | Telkwa R. |

### LAKSAMSHU OR FIREWEED CLAN

| | | |
|---|---|---|
| Sayax or Sun House | | |
| Territory: Cees Ng'heen | Smogelgem | Harold Price Cc. |

### Gilserhyu or Frog Clan

| | | |
|---|---|---|
| Ya'tsowitan or Thin House | | |
| Territory: Xaaz Kwe | Goohlaht/Caspit | Blunt Cr. |

### Gitdumden or Wolf Clan

| | | |
|---|---|---|
| Kyas Yas or Grizzly House | Woos | Upper Harold Price Cr. |
| Territory: Zeel Tats'eliiyh Kwe | | |
| Too Coot | Gyolget | Smithers, Tyee Lk. |

(Mills & Overstall 1996, Naziel 1997)

## THE FEAST

Wet'suwet'en traditionally used the feast hall for all significant social transactions, it being the central institution of Wet'suwet'en society. The feast was structured by a major tenet of law, dinii biits wa aden, or the way the feast works (Naziel 1997).

Essentially, the feast allowed the House or Clan as the case might be, to settle its affairs and publicly present its history, territory boundaries and succession to titles for confirmation by the people assembled. Traditional typical feasts included funeral feasts, smoke feasts, headstone feasts, coming out feast, birth feasts, adoption feasts, marriage and divorce feasts, and pole raising feasts. The feast validated all these social status changes as well as decisions regarding ownership, access rights, or prerogatives concerning territories. Mills (1997) presents a detailed and clear description of Wet'suwet'en feasts in her locally available publication.

## WET'SUWET'EN ECONOMY AND TRADE

The nature of the Wet'suwet'en subsistence economy reflects their adaptation to their geographic territories and the environments thereon. Over time these stone, bone and antler technologists developed systems of access, tenure and resource management. A strong and adaptive semi-nomadic economy, preoccupied with food gathering, was based around the summer salmon fishery with dispersal into smaller family groups during the rest of the year to fish, hunt and gather on the House territories. These two modes of subsistence delineated Wet'suwet'en culture, both in terms of survival and socio-politically.

The salmon fishery at Moricetown Canyon, and between 1822 and 1859, at Hagwilget Canyon, formed the principle foundation of the traditional economy. The abundant and predictable salmon runs, provided the opportunity for the people to harvest and preserve a high quality staple food in a few months of intensive effort. In June, the majority of house groups would head back and congregate in Moricetown Canyon to prepare fishing gear, and firewood and generally get ready for the salmon fishery.

The first salmon, the spring or chinook, reached the Canyon in late June marking the start of the fishery, and was the occasion for celebration and thanksgiving with the First Salmon Ceremony, in which the salmon were ritually prepared to ensure and herald an abundant harvest. At both Moricetown and Hagwilget Canyons, springs were readily caught in season, due to being concentrated by the strong currents. Following the spring salmon came the sockeye run, primarily composed of the Nanika River stocks, which are the principal Bulkley River stocks. The sockeye were the desired fish owing to their high fat content and were fished heavily until the pink salmon showed up, by which time sockeye needs were usually met. Pinks are much less desirable, and if sockeye were still needed, they would be fished in the deeper and swifter waters that the pinks avoided. The peak of the pink salmon marked the end of the sockeye and signaled the beginning of berry picking and high country hunting. Coho and steelhead would reach the Canyon in mid to late August and be harvested both there and in the many smaller tributary streams on the territories. The coho were especially useful to the people who didn't go to the Canyon but stayed out at their villages or camps on the territories (Morrell 1985).

Salmon fishing and processing were conducted as a cooperative House endeavor, with the number of fish caught limited by processing capacity and the many chores that it entailed. All fishing sites were considered property of the Clan, with particular sites being more or less delegated to individual chiefs or sub-chiefs within the House. It was the responsibility of the chiefs to oversee the processing and distribution of the fish, so that all members of the House received sufficient amounts, even if they could not provide for themselves directly because of age, disability, or other circumstances. Fundamental conservation elements were practiced: waste was forbidden; processing capacity was limited by smokehouse infrastructure, particularly the amount of space available on the lower poles, and by the predominate use of live capture traps that allowed fishers to selectively harvest the desired salmon.

Salmon were eaten fresh during the summer, but the major directed fishing effort was focused on the preserving of salmon for use during the rest of the year. The salmon was split and hard-dried over slow, smoky fires in smokehouses, then stored in bark-lined excavated storage pits and covered over with the excavated dirt. These pits, often called cache pits, were usually located on drier soil types, and close to the village, winter camps or other home places.

Salmon and steelhead were traditionally caught primarily with large woven basket traps, and with long handled dip nets. These baskets and/or lashed wooden strip traps were ingeniously made and incorporated delivery chutes that moved the trapped fish to a waiting fisher who transferred it to the shore. Trap sizes varied, with larger ones being lowered and raised with strong poles. Oral histories describe weirs being used, though anecdotal evidence or locations are not known. Gaff and set net fisheries did not occur until the early 1900s and 1890s respectively. The various traps and dip net gear used depended on site location, fish quantities needed, the number of people available to fish the gear, and processing capacity. Gaffs and spears were utilized in shallow, clear tributary streams where fish were readily visible (Morrell 1985).

For the Wet'suwet'en, the summer salmon fish season was one of busyness and hard work, but it was also the only time the majority of the people were together, and so it was also a season of social celebration, feasting, ceremonies and trading among themselves and with their neighbors, both close and from afar. The Wet'suwet'en were traders, with trading being an important part of their lives and economy. Each year the Tsimshian, who had trade prerogatives on the Skeena River, would come up from the coast, with Nisga'a, Tsetsaut, and Nat'oot'en peoples also making an appearance, and they would congregate at the Bulkley and Skeena Rivers confluence to participate in an annual trading fair. It was a time of enjoyment, of renewing friendships, fighting, falling in love, gambling and doing business in dried salmon, furs of many types, berries, copper, obsidian, smoked oolichan and grease, coastal sea foods and other items that were critical or enhanced a subsistence way of life. Amidst this multitude of people and great sociability, ideas and technologies were shared and news passed along.

With salmon, the mainstay of the Wet'suwet'en people, harvested, processed and stored, the House groups turned their attention to berries, an important link in their sustenance chain, as they were an essential carbohydrate resource. The families dispersed out to their territories to pick berries, gather roots, and hunt in the high country. Major gathering and hunting fall and winter seasonal camps were returned to each year, with permanent shelters consisting of either a single, or more commonly, a double lean-to with a fire in the center. These shelters were made of bark, poles, and boughs, and were banked with dirt. Implements or tools, including berry drying racks and poles, as well as fish drying needs, boxes, bags and other items of available resource exploitation, would be left at the camp or home place. These camps were periodically moved to facilitate firewood needs, though food sources were pertinent to location positioning as well.

Once berry baskets, boxes, drying racks and poles, along with firewood were sorted out and organized, women took over the berry picking and processing activities. Formidable amounts of huckleberries, and to a lesser extent, blueberries, were picked and processed by crushing, then boiling, then drying the berry mush on low racks over a slow fire. The dried berries were then rolled up and stored in bent boxes. Many other types of berries, including soapberries, cranberries and saskatoons were harvested as well. For a thorough discussion on berries, and other subsistence foods and processing methods, see Gottesfeld (1991). Other preserving methods included air drying the uncooked berries as well as preserving them in oolichan oil.

Coincident with berry harvesting activities, the men and older boys would go up to the high country to hunt goat, sheep, bear, caribou, and to snare groundhogs (marmots), an important food and fur animal; its great abundance and the ease with which it could be taken made it into a principal resource in life for the people. The meat and the fat, which the marmots store for their prolonged hibernation time, were highly prized, with the skins being made into blankets, robes, clothing, and moccasins. The blankets were desired by the coast peoples, and were an advantageous trade item. Goats and sheep were eaten fresh and dried, with their inner cavity fat being rendered and stored for winter use. Bears, with their high fat content in the fall and their predictable behavior of competing with humans for the same resources, were a desired food resource. The skin was utilized with the fur or tanned for bedding, clothing, bags and packs. The claws, teeth and bones served for ceremonial accoutrements and for various scrapers and tools.

Harvesting of roots would occur at the same time as berries and hunting, the principal roots being the fern root (diyi'n), and wild rice (c'inkalh) (Gottesfeld 1991). The majority of the fall season food was cached for winter around the berry camp, if convenient, or at the winter village home places. Gathering firewood, making and repairing snowshoes, and winter gear took the people into the wintertime and the long cold months.

Typical winter villages were located in forested valleys beside or close to lakes where firewood was plentiful. The House's winter villages were called "winter lake house" (xiixt bun yax), or fish lake house (klok bun yax), with the people fishing for trout

and whitefish (Mills 1997). There was hunting of rabbits, caribou and if bears dens were found, bears as well. Rabbits were easy to take with snares; caribou were hunted and snared, and were important not only for their meat, but also for their hides, sinew, antlers and bones. Winter was also the time to teach the young and pass on Wet'suwet'en traditions, with elders telling stories and teaching life skills so the young could grow up to be productive members of the group. In late winter-early spring when the snow settled down, families moved to various lake villages to fish the small but concentrated runs of trout, steelhead, and some whitefish through the ice; steelhead was also fished under the river ice.

Grouse, rabbit and beaver were hunted in the early spring, followed by migrating waterfowl, while bear and the first greens were taken on the early- producing sunnier side hills. Pine, spruce and hemlock cambium (inner bark) was harvested and considered an important spring staple food. Springtime sap movement allowed the bark to slip easier than other times, so the majority of bark needed was harvested then. Cedar bark, if available, was used for mats, ropes, lashings, and a myriad of other uses. Willow, osier, birch and maple, if available, were utilized for lashings, baskets and other woven products (Gottesfeld 1991). Poles, saplings and trees were often harvested in the spring for future building or wood projects, for instance, snowshoes, bows, spears, traps, and shelters. Materials were gathered for lean-to restoration, especially bark and boughs for the roof and walls. If berry patches were in need of production maintenance by fire, they were most often burned in the spring, as were areas that needed to be kept relatively clear of brush on an annual basis. As the summer came on, the families started to head back, with many meeting in Aldermere, before continuing to Moricetown Canyon, or Hagwilget Canyon as the case might have been, and prepared themselves for the fishing season, and the yearly cycle would begin again.

## NAT'OOT'EN

## INTRODUCTION

The Nat'oot'en are the people of Nat'oo or Babine Lake and consider that their traditional homeland territories encompass the Babine Lake drainage. The Nat'oot'en as they refer to themselves, speak Babine-Wet'suwet'en, also referred to as Northwest Carrier, a distinct dialect from that of the carriers to the south and southeast of them (Rigsby & Kari 1987). They share this language in common with their neighbors the Wet'suwet'en in the Bulkley drainage. This language is part of the large Na-Dene or Athabaskan language group.

In terms of traditional Nat'oot'en cultural knowledge, relatively little is known, particularly in relation to their neighbors, the Gitxsan, Wet'suwet'en, Sekanni, the Stuart and Fraser Lake people. Daniel Harmon was stationed in New Caledonia from 1810 to 1819, and his journal, (Lamb 1957) describes being the first white man to visit the Nat'oot'en, and along with other fur traders, provides brief but invaluable observations, despite cultural misconceptions. Anthropological or ethnographic endeavors have been scant, with only two studies touching directly on the Nat'oot'en: Hackler (1958) spent a summer conducting fieldwork that focused on social and economic change, while Kobrinsky spent close to a year in the area, with his thesis focusing on the argument against ancient matrilineality amongst the Nat'oot'en. Father Morice's prolific and voluminous writings appear the most specific in dealing with Carrier social and material culture appearing at or adjacent to Stuart Lake. Jenness (1943) spent the winter of 1924-25 in the Bulkley Valley with the Wet'suwet'en, and touched lightly on the Nat'oot'en. Various other anthropologists, such as Goldman (1941), Steward (1960), and Duff (1951), emphasized social organization and potlatch-rank variations of neighboring people to the southeast of the Nat'oot'en.

It is believed that Nat'oot'en ancestors moved into their present thousands of years ago from the Athabaskan heartland, which is situated around the present day central Yukon Territory and Alaska. These ancestors were stone and bone-antler technologists who developed their adaptable culture to utilize and reflect the Babine Lake environment and also to provide intercultural social and trade relationships with their contiguous neighbors. The Nat'oot'en referred to their neighbors as the "Gitneh," or Gitxsan who lived at Gitanmaax and Kisgegas, and used territories to the west; "Kootenee," people of Stuart and Trembleur Lakes; "Titneh," people of Bear Lake; "Nutseeni," people of the area from Stellako to Prince George; and" Wet'suwet'en," people of the Bulkley Valley (Hackler 1958).

In early 1812, when Harmon first visited Babine Lake, he wrote "At the five villages we visited we might have seen two thousands Souls, who are well made and appeared healthy ….." (Lamb 1957). Hudson's Bay Company reports from the early 1920s, indicate only the following four villages: Nass-chick, described as the principal village and presumed to be the present day Sunnyside (I.R. 19); Nah-tell-cuss, the present day Old Fort or Nedo'ats; Tachy, the smallest and situated at the south end of the lake; and Wu'dat, located at the outflow end of Nilkitkwa Lake (HBCA B 11/e/2 fol 2,3,4,).

## NAT'OOT'EN SOCIAL ORGANIZATION

Nat'oot'en society traditionally recognized five crest groupings called Clans; these were exogamous and concomitant with matrilineal descent. These Clans were the Laksamasyu or Grouse Clan; Kwanpe'hwotenne /Granton ("people of the fireside") or the Caribou Clan: Gilserhu or the Frog Clan: Laxibu /Gitumden or the Bear Clan: and the Tsayu or Beaver Clan (Jenness 1943, Hackler 1958). Although matrilineal descent through the mothers' House conferred upon children the rights and responsibilities that went with it, the father Clan also played an important role as well, particularly in caring for the dead and arranging the last rites, providing for the carving and placement of poles, and generally ensuring that their kin were provided with support enabling a healthy life. This support also involved providing certain rights of access to the fathers' territory.

These clans correspond with the crest groups of Nat'oot'een neighboring peoples, allowing one to identify kin, facilitate trade opportunities, select potential marriage partners and pursue other supportive relationships among the Nutseeni, Gitxsan, Wet'suwet'en, Tsetsaut, Kootenee, or others.

| Nat'oot'en Clans | Wet'suwet'en Clans | Gitxsan Clans |
|---|---|---|
| Laksamasyu | Likh Ts'amisyu | Giskaast |
| Kwanpe'hwotenne/Granton | Liksilyu | |
| Gilseryu | Gilseryu | Lax Seel |
| Laxibu/ Gitumden | Gitimenyu | Lax Gibuu |
| Tsayu | Tsayu | Lax Skiik |

Correlation of Nat'oot'en, Wet'suwet'en and Gitxsan Clans

Houses or Yax were smaller groupings of people within the Clans that consisted of people related through lineage with a high chief, as well as a number of subsidiary chiefs, all of whom held hereditary titles that belonged to the House. These hereditary titles, also called names, were often thought of as the souls of the House, which lasted forever; therefore, the person was given to the name. The House chiefs were supported by their kinsmen and common people in a compatible and mutually advantageous framework of sustenance and subsistence support. The House had its own distinctive oral histories or narratives (chahdedah), crests and songs, which functioned as representations of historical events, with the purpose of defining and confirming boundaries and ownership of the House territory. Traditionally the House was literally a plank-walled House, with members living under one roof and the chief providing moral leadership. The House controlled its own territories for use by its members for food, trade and ceremonial purposes according to a land tenure system, with House solidarity maintained through daily activities. House territories had known boundaries with named geographical, physical and historical features, as Harmon, the first trader in the area, observed in 1812:

> The people of every village have a certain extent of country, which they consider their own, and in which they may hunt and fish; but they may not transcend these bounds without purchasing the privilege of those who claim the lands. Mountains and rivers serve them as boundaries, and they are not often broken over. (Harmon 1958).

The traditional spatial structure of House territories is not known, and contemporarily there appears to be internal disagreement as to hereditary and trapline territories. Current Nat'oot'en territories defined by the Lake Babine Nation within the Bulkley TSA include Ag Wisa (Grouse Clan), G'eeyekh (Grouse Clan). Dswisim'tsik (Grouse Clan), Dene Tso G'ees (Caribou Clan), A Deel Gi Toyh, AnTles, and Net Seel Hye.

## NAT'OOT'EN FEAST

In traditional Nat'oot'en society, the feast, also called the potlatch, served as the weave that held together the social, political and territorial fabric and accordingly was a public forum for witnessing and ratifying various Nat'oot'en social changes. These social changes embraced the succession of hereditary names, be the names chiefly or not, with the transfer of territories and rights, if applicable, to the new successor. In addition, the feast validated other changes in social status including adoption, marriage or divorce, decisions regarding ownership or access to territories, as well as the resolution of stressful or disputable situations. Holding a feast allowed a House or Clan to settle its affairs and publicly present its history, territory boundaries and succession to title for confirmation by those present.

At the feast, various patterns of seating were arranged by Clan, the seating being defined by who was the host House or Clan, which also served the food and distributed material gifts. Food served was derived from the territories of the host and announced along with its association to the relevant territory belonging to the Clan and House. The distribution of food and gifts was made in thanks for having witnessed whatever transactions took place (Hackler 1958). Morice described the relationship between feasting and territory:

> "….one can gather from Harmon the fact that the whole western country was sharply divided into distinct hunting grounds, and will easily surmise how very valuable they were to people who practiced potlatching, with its attendant features of dressed skin, fur and food distributions, the plots on which resources were found and on which nobody could legally encroach". (Morice cited in Ray 1985)

## NAT'OOT'EN SUBSISTENCE ECONOMY AND TRADE

Even though exact aboriginal subsistence specifics cannot be known, the general pattern is reconstructed here from various sources. Nat'oot'en subsistence economy reflected their adaptation to Babine Lake, the surrounding Nechako Plateau that passes by transition to the mountainous Babine Range in the west, and the southern Bait Range in the east. A strong and adaptive semi-nomadic life was preoccupied with food gathering that based itself on the summer salmon fishery in Nilkitkwa Lake, with dispersal into family or House groups in the fall to hunt, gather and fish on the territories. Winter was spent either in the villages or out on the territory, or both, with dispersal again in the spring to home places on the territories. This pattern ensured subsistence needs, along with defining Nat'oot'en culture in terms of survival, as well as social and political structure (McClellan &Denniston 1981).

In early to mid June, the majority of Nat'oot'en people would travel down Babine Lake and then to Nilkitkwa Lake, where they would start preparations for the salmon fishery. The Takla Lake people, Tatl'aht'een, also came over to Nilkitkwa Lake, to renew kinship ties and likewise prepare for the fishery, which involved repairing or building anew smokehouses, canoes, drying poles and associated processing fixtures, acquiring firewood, and renewing the weirs and basket traps. This was a time of social enjoyment, catching up on news, gambling, and acquiring trading necessities or items that enhanced the subsistence way of life.

The Tatl'aht'een would travel on the well-used trail that went west from mid Takla Lake crossing the presently named Beaverdale and Dust Creeks, then heading past Friday and Haul Lakes to the outlet of Babine Lake. Another route described to Hackler (1958), by Pius Whess is:

> That many Takla Lake Indians came to Babine Lake to fish, then returned by canoe to Old Fort and then up the northeast arm toward Morrison Lake. About seven miles up the arm the canoes would be left at the mouth of a creek and the journey would continue on foot across a pass to Hautete Creek and down to Natowite Lake. The travelers continued down the Sakeniche River by foot to the northwest arm of Takla Lake where canoes had been left. From there the families would scatter to winter homes at the tip of the northwest arm, at the tip of the main body of water near Bulkley House, and at points along Takla Lake". (Hackler 1958).

The salmon fishery at Nilkitkwa Lake formed the principal foundation of the traditional economy. The very abundant and predictable sockeye salmon stocks provided the Nat'oot'en with opportunity to harvest and preserve a major amount of high quality food in a relatively short time of intensive effort. Salmon species in the encompassed Nat'oot'en territory of the Babine system included all five species of salmon, steelhead, kokanee, cutthroat trout, dolly varden, lake trout, lake and mountain whitefish, as well as rainbow trout (DFO 1991).

In early to mid July, the first salmon, the spring or Chinook (giys), arrived at Wud'at, with this event marking the beginning of the summer salmon fishery, and in turn bringing celebration and thanksgiving. The spring salmon were eaten fresh, the white fleshed springs being preferred, and also smoked. Following the springs, the sockeye salmon (tatowx) normally reached Babine Lake in early August (Kobrinsky 1973).

The sockeye returning to spawn in Babine Lake and its tributaries constitute approximately 90% of the Skeena River sockeye returns (Takagi & Smith 1973). The Babine sockeye are composed of two major runs, with the early run occurring between mid-July and mid-August, and the later run coming through from late August into late September. During each yearly cycle, as many as 1, 700,000 salmon enter the Babine system., Prior to the development of the sockeye spawning channels escapements were lower but still in excess of 500,000 (Gottesfeld, pers. com. 2000).

These two sockeye runs were the major focus as they provided the majority of high-quality dried fish to sustain the Nat'oot'en over the year, and also to produce a trade item. Following the passage of the bulk of the sockeye, coho (dedzex) appeared and were available well into the autumn, providing both fresh and dried fish. Pink salmon also appeared in September, though they were not as valued or desired as the other species. Salmon represented the single most substantial element of Nat'oot'en diet (Kobrinsky 1977).

Salmon fishing was conducted as a cooperative clan endeavor with the fish caught in weirs across Nilkitkwa Lake and the upper Babine River. On the Babine River below Nilkitkwa Lake, the Tsayu or Beaver Clan operated a weir. Upstream from the Tsayu and close to the lake outlet, the Laksamasyu harvested fish from their weir. Further south, at the inlet to Nilkitkwa Lake and slightly upstream of Smokehouse Island in the shallower water, the Gilserhu owned a weir that didn't quite span the entire width of the river, as did the other three. The fourth weir, operated by the Laksamasyu was positioned at the

outlet of Babine Lake, in the river section near the present day hatchery site (Hackler 1958). Kobrinsky (1973) describes: "large weirs spanning the Fulton River near its confluence with Babine Lake, and served the village at that site," though no other reference is made to it. Weir construction was noted by the fisheries officer Helgerson, when he went to eradicate them in 1906:

> The barricades were constructed of a immense quantity of material, and on scientific principles; I will endeavor to describe them. There were posts driven into the bed of the river, which is 200 feet wide, and from two to four feet deep, and running swiftly at the intervals of 6 or 8 feet.
>
> Then sloping braces well bedded into the bottom and then fastened to the top of the posts, then strong stringers all the way on top and bottom, in front of posts, then panels beautifully made of slats woven together with bark set in front of all, these were set firmly into the bottom, and reaching four feet above the water. This made a magnificent fence which not a single fish could get through.
>
> On the upper side of the dam were placed 12 big traps or fish bins. Opposite holes made in the panels for fish to enter the traps, prepared with slides to open and shut, and if the traps did not have a sufficient quantity of fish in them, when the women wanted more fish on the bank, the men would take their canoe poles, wade out in a line and strike the water, making a noise that could fill the traps in a moment, then shut down the slides, take a canoe on each side of bin, raise the false bottom, by some contrivance so as to elevate the fish, then load up canoes with gaff hooks" ( Dept. of Marine and Fisheries 1906).

Though the above is recorded in the historic past, prehistoric construction and fishing methods are assumed to be the same. The men were responsible for trapping and killing the salmon, while the women cleaned and smoked the fish, with the smoke drying taking approximately two weeks from the time the fish were hung on the lower poles to when they were hard-dried. Salmon harvesting was limited by the processing capacity in the smokehouses. The smokehouses were operated on a House basis, with families taking on all the chores, and the chief overseeing production and distribution of the dried fish, ensuring that all members of the House received sufficient amounts, along with allowances for trading needs. This dried salmon was stored in bark-lined storage or cache pits, which were located close to villages, winter camps or other seasonal home places.

With the salmon harvested and preserved, families dispersed to camps or home places on their House territories along the shore and islands to pick berries, gather roots, and hunt and snare in the mountains. These seasonal camps were usually on or close to the shoreline or islands of Babine Lake, giving easy access by canoe on the water, or on the ice (Mohs 1976). Once back at their seasonal camps or villages, the people would turn their attention to the gathering and processing of berries, the most important source of carbohydrates available, as well as a popular item of trade. Berries were picked, crushed, and boiled in bark boilers, which according to Morice, consisted of an incorporated drain that allowed the berry juice to drain off, thus promoting drying when the cooked berry mush were spread on leaf- covered willow racks, then either smoke or air dried (Morice 1893). Other berry processing methods involved drying uncooked berries and preserving berries with rendered fat or grease in a container such as a basket

or cleaned animal stomach. Huckleberries were highly desired, though soapberries, cranberries, blueberries, and saskatoons were also relished.

The harvesting and processing of berries was most often completed by the women, children and older people, while the men went off to the upper mountain country to hunt and snare sheep (spey), goat (tay yix), marmot (ditney), caribou (wiciyx), and black bear (Kobrinsky 1973). Hunting methods employed snares, spears, deadfalls, along with bows and arrows. The flesh of the above animals was used fresh and also dried, with the fat stored for the winter. Skins were utilized with the fur or tanned for bedding, clothing, bags and packs. The claws, teeth and bones served for ceremonial trappings and various scrapers and tools. Root harvesting occurred at the same time as berries and hunting, with the spiny wood fern root bulb being important, but relatively little is known on this subject. Gathering firewood, and making and repairing snowshoes and other winter gear took the people into the wintertime, when they either stayed on their territory or in the winter village.

Winter subsistence needs consisted for the most part, of foods that were preserved and stored, but steelhead, along with char, trout, and whitefish were fished under the ice. Bears were taken if the winter dens could be located, and rabbits were easy to snare if plentiful. Once the lake ice set up, travel to visit and feast at neighboring villages was that much easier. The slower winter pace also included trapping, which involved trail and trap maintenance and plenty of travel. This was also the time to teach the young and pass on Nat'oot'en traditions, with the elders telling the oral narratives (chahdedah) and teaching life skills, so the young could grow up as healthy Nat'oot'en individuals.

As winter passed into spring, the people, if not on the territories already, headed out to their seasonal camps, villages or home places and hunted for grouse, rabbit, and migrating waterfowl as they came through. Fishing under the ice and at stream inlets into the lake provided a certain amount of food, nevertheless this was the roughest time of the year, especially if their stocks of dried or preserved foods ran out, and famine resulted (Jenness 1943). In warm early springs, the sap of the pine flowed earlier, and the sweet cambium or inner bark was harvested and eaten, this being considered a staple springtime food. A few families would head to the Nass estuary to participate in the oolichan fishery and trade. The majority of the bark needed for mats, ropes, lashings, and baskets was harvested or gathered, and included willow, osier, birch and maple. Poles, saplings, trees, and shrub stems were harvested and set aside to be used when needed for snowshoes, bows, spears, traps and shelters. Materials were acquired for renewing or building smokehouses, houses, and lean-tos, particularly bark and boughs, which were used for roofs and walls. As summer came on, there were greens to gather and bears to hunt, and the families would start to prepare for the fishing season, with the yearly cycle beginning again.

## THE GITXSAN

## INTRODUCTION

The Gitxsan name means " People of Xsan" – "People of the Skeena River." The Gitxsan consider that their homeland territories encompass generally the entire drainage of the Skeena River upstream of Legate Creek, and much of the Upper Nass, though excluding the major portion of the Bulkley River drainage and Babine Lake. Within the Bulkley TSA, the area of interest, Gitxsan territories are defined as the mid and upper portions of the Nilkitkwa River watershed, the northwestern portion of the Zymoetz River drainage within the TSA, and the upper portion of the Gitsegukla drainage within the TSA. The Gitxsan interests in the north (Nilkitkwa R.) are the Wii Tax territory held by Miluulak, and the Miinhl Gwogood territory (Mt. Horetzky) held by Wii Gyet. The Zymoetz River territories are Wii Tax (McDonell Lake) held by Duubisxw, Zsansisnak (Red Canyon Cr.) held by Haakasxw, Luu Skaiyansit (upper Kitsegeukla River) held by Guxsan, and Zsu Gwin Yookhl (upper Mulwain Cr.) held by Saksum Higookx.

The Gitxsan are one of the four peoples who speak dialects of the Tsimshian language, the others being the Coast Tsimshian, the Southern Tsimshian, and the Nisga'a. They are an inland group with a classic Northwest Coast culture adaptation with territories that are essentially riverine and montane as they cover the majority of the southern Skeena Mountains, while spanning the Coast-Interior Transition zone. The valley bottom was utilized for hunting, fishing, gathering and homeplaces, while the mid-slopes were for hunting and gathering especially berries and roots, with the subalpine area providing large and small animal hunting opportunities.

The Gitxsan believe that their ancestors have lived on the territories since time immemorial. Origins of the Gitxsan are recounted in many adaawk or oral narratives, some of which were documented by Barbeau and Beynon from the 1920s to the 1950s, and were investigated by Marsden (1987) for the Delgamuukw court case. Marsden noted that there were two general groups of early peoples entering the Skeena area; one group came from the headwaters of the Nass, Skeena and Spatsizi area and gradually moved south, while the other group moved up the Skeena and Stikine Rivers from the coast. She places the migrations in the early post-glacial, based on descriptions of a relatively treeless land, and the presence of large lakes in the Skeena valley. One adaawk tells of the Frog/Raven group coming from the Blackwater or Damdochax area with the Wolf/Eagle group also coming out of the north. The origin of the Fireweeds (Gisk'aast) seems to have taken place on the Nass River. In an early war precipitated by infidelity, a Raven group exterminated the other group (unnamed), except for one young woman in puberty seclusion with her grandmother. This young woman was rescued by a son of the Sky God, to whom she bore four sons and two daughters. The children bearing the power of their supernatural grandfather, returned to earth to avenge their kin. They made war upon the Ravens and other peoples, amassing wealth and power before founding and settling Temlaham and entering an extended period of peace.

This Gitxsan ancestral home of Temlaham is referred to in the oral histories as a populous locality with discrete village centers spread out for several miles. Of the many adaawk concerning Temlaham, a significant story is told of the Mountain Goats of Temlaham, which revolves around the revenge of the goats upon the people for disrespect and over hunting with the rampage of Medeek, a supernatural grizzly bear who lives in Seeley Lake (MacDonald & Cove 1989, Gottesfeld et al 1991). This oral history was identified as a landslide that occurred at Seeley Lake, and carbon-dated to 3,500 years ago (Mathewes 1987, Gottesfeld & Gottesfeld 1986). Prior to the Medeek rampage, a widespread flood occurred which is said to be responsible for a minor dispersal of some peoples from Temlaham. The village was abandoned at a later point due to a severe and prolonged winter, again, said to be caused by irresponsible behavior and supernatural retribution (Harris 1974). This last dispersal from Temlaham resulted in the founding of the villages of Gitsegukla and Kispiox, with other people going to Gitwangax, Gitanyow, Kyah Wiget and Kitselas.

The villages of the Gitxsan heading upstream on the Skeena are Gitwangax at the Kitwanga River confluence, Gitsegukla at the Gitsegukla River confluence, Gitanmaax at the Bulkley forks, Sikedakh (Glen Vowell), Kispiox at the Kispiox River confluence, Kisgegas or Kisgaga'as on the Babine River a few miles above the confluence, and Kuldo, approximately 20 miles upstream on the Skeena past the Babine forks.

The Houses of Duubisxw and Guxsan are traditionally from Gitsegukla, which means " people of Segukla Mountain." Segukla, which is an Athabaskan word meaning "sharp pointed," is located on Guxsan territory and in English is called The Nipples (Sampare et al 1979). The House of Haakasxw, Lax Seel or Frog Clan, and the House of Sakxum Higookx, Lax Skiik or Eagle Clan, are from Gitwangax, which means "the place of rabbits." Miluulak, the House territory that principally covers the mid and upper Nilkitkwa drainage in the northern portion of the TSA, was centered in Kisgegas, a canyon location. Kisgegas, which means the "place of small white gulls," provides access to optimum salmon fishing, many northern territories, and a fortifiable defensive area. It is important to be clear that although all the villages mentioned are out of the Bulkley TSA, the territories described are within the TSA. It is generally thought that the subsistence wealth or economics were territorially based, other than the mainstem salmon fishery.

**Gitxsan Houses and Clans in Bulkley TSA.**

| House | Territory | Location | Village |
|---|---|---|---|
| Giskaast or Fireweed Clan | | | |
| Guxsan | Dam Giist territory | Upper Gitsegukla | Gitwangax |
| Wii Gyet | Miinhl Gwogood | Upper Mt. Horetzky | Kuldo/Kispiox |
| Lax Seel or Frog Clan | | | |
| Haakasxw | Xsansisnak | Red Canyon Creek | Gitwangax |
| Duubisxw | Wii Tax | Mulwain Cr. McDonell | Gitsegukla |
| Miluulak | Wii Tax | Nilkitkwa River | Kisgegas |
| Lax Skiik or Eagle Clan | | | |
| Saksum Higookx | Xsu Gwin Yookhl | Upper Mulwain Creek | Gitwangax |

## GITXSAN SOCIAL ORGANIZATION

Gitxsan society is matrilineal based and is distinguished by four crest groupings (Pdeek), usually called Clans, which are exogamous. The Gitxsan Clans are Giskaast (Fireweed), Lax Gibuu (Wolf), Lax Skiik (Eagle), and Lax Seel/Ganeda (Frog). These Clans are correlative with crest groups of other neighboring peoples, allowing one to identify kin and potential marriage partners, along with extending and receiving support among the Haisla, Tsimshian, Nisga'a, Wet'suwet'en, Nat'oot'en and others. Within the Clan are smaller groupings of people known as the House or Wilp, which consists of people related through lineage, with a high chief or Sim'oogit whose name is the House name and who carried the power of the House, called daxgyet. All Gitxsan are a member of a Clan and House. Hereditary titles, more often called names, are a cardinal feature of a House, and were often thought of as a spirit or vital force of the House, ancient and lasting forever; and accordingly, the person was given to the name (Seguin 1984).

The House is the central social unit of Gitxsan society whose members would live in a plank-walled house under one roof. Every House belongs to a single village but owns a territory or series of territories that include fishing sites, and berry and hunting grounds and provide sustenance and subsistence needs for the House members. Authority, and a range of responsibilities in relation to the House and its territory, were exercised by the head chief. The House has its own particular and distinctive oral histories, also called adaawk, crests and songs, which function as representations of historical events with the ultimate purpose of defining and confirming ownership of the House territory.

A group of related Houses form a "side" or wilnadahl, which serves many functions both on the territory and in the village.. Traditionally, these functions included subsistence activities as well as domestic arrangements such as childcare and putting up a

feast. The wilnadahl are related by histories portraying migrations, divisions, and mergers of Houses, which are often reflected in crests. The father's side had lifelong responsibilities that included important roles in the feast, in carving poles, and in caring for the dead. The members of one's father's House as well as related Houses of his Clan, made up the Wilksi'witx. House chiefs had authority over their own members, though governance and resolution of conflict or stress between House groups or Clans was worked out in the feast hall (Harris 1988).

## THE FEAST

Gitxsans traditionally used the feast hall for all significant social transactions, the most important transaction being the funeral feast, with the transfer of names, territory and accompanying responsibilities. The feast is a complex cultural institution, which is at the core of their social and land tenure system. These latter two elements are applied with interwoven layers of responsibility and legal, socio-economic and shamanistic dynamics, while being recognized by the greater community at one and the same time.

Traditional and contemporary feasts include: funeral, smoke, cleansing, shame, first kill, settlement, headstone, pole raising, coming out, marriage, divorce, adoption, and naming. The host House presents its crests and history, which reflects its affiliation with and its relationship to the territory, again basically defining its ownership. This relationship between feasting and territories is further applied through the distribution of food and material goods, followed by validation of the host House announcements, such as the succession of a person filling a hereditary title, or an explicitly expressed territory boundary. The Gitxsan believe that this system of reciprocity and witnessing, with its kinship, ceremonial, political and economic facets, has been practiced since time immemorial. For a comprehensive view of a Gitxsan feast, William Beynon's recently published field notes are unsurpassed at documenting a feast (Anderson & Halpin 2000).

## GITXSAN SUBSISTENCE & TRADE

Traditionally the nature of Gitxsan subsistence economy reflected their adaptation to their particular territories, the seasonal availability of food resources, notably the Skeena River salmon fishery, and a comprehensive trade network. Access, tenure and resource management systems were embedded in the social, economic and political interwoven systems that managed their lives. A strong and adaptive semi-sedentary economy was preoccupied during the spring, summer and fall primarily with food harvesting, processing and storing. For the majority of the people, the winter was mainly spent in the village; however, trapping, and traveling to and participating at feasts and other social events also occurred.

In early spring, around the beginning to middle of March, many of the people would leave their winter homes and walk to the mouth of the Nass River to participate in the oolichan fishery and trade for grease and other coastal resources. This arduous trip would be made on "grease trails," and then downstream fifty miles on the ice of the Nass. The Nass estuary oolichan fishery was one of the richest on the coast, with Haida, Tsimshian, Tlingit, and Gitxsan coming a long way to participate and trade with the Nisga'a.

Oolichan are an anadromous smelt, extremely rich in oil and are highly important for their food value, and to a lesser extent, their trade value. The fish were caught by nets or rakes under the ice and hauled ashore where they were eaten fresh or smoke dried, though the majority of oolichans were fermented and then pressed for their oil (grease). The Gitxsans packed the traded oil into bent boxes they had brought with them, and either packed the boxes home, often in relay fashion, or stored the grease and returned in the summer with freighting canoes to deliver the grease home via the Skeena River. This sizable effort- acquiring the oolichan grease and bringing it back home to the village-was usually finished by late April.

Collison (1941) in The Oolachan Fishery describes the grease trail as follows:

> We picked it up at the head of canoe navigation on the Nass and followed it for 20 miles to the junction of the Cranberry River with the Nass……This trail has a long and interesting history, for over it Indians from the far interior have traveled for centuries. I regret that I did not take more careful stock of it. It was narrow, like most trails, but had this distinction, that it was deeply furrowed from frequent use by many people in the long ago.

The grease trail ran southward some sixty kilometers past Kitwancool Lake, down the Kitwanga River, reaching the Skeena River downstream of Gitsegukla. Charles Horetzky (1874) used the trail in January and left detailed descriptions of it and the traffic he encountered on it. Horetzky describes:

> meeting more than a hundred Kitsigeuhle Indians returning from a great feast a at Kitwancole…….they were , without a single exception, not only the men, but also the women and children, laden with large cedar boxes, of the size and shape of tea-chests, which were filled with the rendered grease of the candle fish caught in the Nass waters.

Once on the Skeena, the trail forked, heading both upstream to Gitanmaax, and downstream to Gitwangax, Kitselas Canyon, then to Tsimshian and Haisla points beyond. From the forks, the trail crossed the Skeena and went to Gitsegukla village, then up the Gitsegukla valley, crossing the height of land in Guxsan territory, down Trout Creek to

the Bulkley and thence to Moricetown. A trail for the young and frisky went over the pass north of the Nipples, then down John Brown Creek to end at Moricetown.

The Copper River trail was traditionally used extensively, most likely as an easterly continuation of the route coming from the Nass down the Kitsumkalum River to Kitselas Canyon. In more recent times, the trail was kept in reasonably good shape to the 1950s, as evidenced by the message tree located at the Milk Creek camp. A B.C. Forest Service survey crew in October 1953, described it as "Good trail to Telkwa—6" fresh" (pers. obs.). This trail that left Kitselas and headed upstream on the Copper River, then forked up Limonite Creek, then went through the Telkwa Pass, and then down the Copper River to Tyee Lake. At the Copper-Limonite fork, the trail continued upstream on the Copper into Haakasxw's territory with a fork upstream into Red Gash or Red Canyon Creek. The trail continued through Duubisxw territory alongside the Copper with a fork up Mulwain Creek, until reaching McDonell Lake, a winter village or home place. The village at the Copper-Serb confluence was a trading hub with Coast Tsimshian and the Kitselas people coming to trade with the Gitxsans and Wet'suwet'ens. Historically, when the snow had settled in the spring, Hudson's Bay Company traders, met with the Wet'suwet'en and Gitxsan people coming in from the territories with their fur trapping yields. When all the trading was said and done, the Wet'suwet'en would be hired to pack the furs out to the HBC's post. Loring's (1906) map also shows trails forking off the Copper River trail and going up both Passby and Silvern Creeks, striking for Trout Creek and Toboggan Lake respectively.

After catching their breaths from the oolichan fishing and travel effort epic, it is presumed that the people of Guxsan and Saksum Higookx fished the steelhead in the Kitwanga River as well as sites on the Kitsegukla River near the village. Since there were strong steelhead stocks and good fishing sites on Haakasxw and Duubisxw territories along the Copper River, these were presumably fished as well.

Spring subsistence activities on the territories included refreshing the single or double lean to structures used, with bark, pole, or bough coverings, as well as preparing the needed firewood. Harvesting was relatively easier in the spring, as sap movement caused the bark to slip. Cedar bark was harvested for mats, hats, clothing, baskets, and shelter construction materials. Willow, osier, birch and maple barks were gathered for lashings, withes, or baskets. The Gitxsans utilized a wide range of materials in their basket making, with cedar, birch and maple being most distinctive. The unique weave of the maple baskets, with their durability, and strength, gave them a much higher value than those of other material (Gottesfeld 1991). Berry patches or portions of them were burned as needed by the berry matrons, usually shortly after snowmelt. A variety of medicinal inner and outer barks, as well as leaves and blossoms, were harvested as the spring –summer season progressed.

Food gathering chores included fishing for fresh steelhead and trout and hunting or snaring beaver, rabbit, caribou and bear. This was the time to harvest principally hemlock cambium, although on the lower alluvial terraces pine cambium when available was

harvested and eaten fresh. In the Nilkitkwa country, spruce cambium was also used. The hemlock cambium, which is sweet, juicy and nutritious, was boiled for a long time or pit roasted for two plus days, then thoroughly pounded and rack-dried like berries. This inner bark-cake stored well and was traded to their interior neighbors.

Ax, the spiny wood fern root bulb, was dug in the spring on all the territories of interest. This important root had considerable food value, stored well, and was pit roasted overnight or all day. K'awts, the lupine root, was also extensively harvested in the spring and pit roasted. Both these roots were eaten with grease. Cow parsnip were eaten in quantity in the spring, though only one certain part of the plant, harvested at the right time, was considered fit (People of K'san 1980).

The first salmon, the spring or Chinook, reach Gitwangax and Gitsegukla in late June or early July, and correspondingly, ten to fourteen days later at Kisgegas Canyon. This marks the beginning of the major summer salmon fishery and was the occasion for celebration and thanksgiving. Following the spring salmon come the sockeye, though traditionally the fish of this first run, which are headed for the lower or southern Babine Lake tributaries, are smaller and lower in quality or fat content and not heavily fished. The second run, which is primarily headed for Fulton River, is fished heavily until pink salmon become abundant in early to mid August (Morrell 1985). Pinks are much less desirable and if sockeye are still desired, fishing will continue in the deeper and swifter reaches that pinks avoid. More often than not, sockeye needs are met by this time. Coho and steelhead reach the Gitsegukla area in mid to late August and provide high quality fresh fish on many of the tributaries including the Copper and Babine Rivers, with coho only in the Shelagyote and Nilkitkwa systems.

Salmon were eaten fresh during the summer; however, the major directed effort and focus was the preserving of salmon for use during the rest of the year. The salmon was split and hard-dried over slow, smoky fires in smokehouses, then stored in bark-lined excavated cache pits and covered over with dirt. These cache pits were usually located on drier soil types, and close to village, winter camps, or other homeplaces. This intense processing activity hopefully produced enough dried salmon for annual food and trading needs, and acted as a conservation measure, in that the number of fish caught was essentially limited by the processing capacity. These dried salmon made up the greater part of the Gitxsan diet, with quantities being traded both to coast and interior peoples (People of K'san 1980).

Traditionally, salmon and steelhead were harvested with a variety of selected gear that depended on site conditions, the fish quantity that was needed, the number of workers available to fish the gear, and processing capacity. At Gitwangax, Gitsegukla and Kisgegas anecdotal information describes weirs or fish fences across the rivers that directed the fish into traps close to the riverbank, or fish were captured out of basket traps and selectively harvested (Morrell 1985). The fish weir placements are known on the Babine, but on the Skeena identification is problematic due to the floods of 1914, 1936, and the blasting of rocky outcrops in the late 1800s to facilitate the passage of

sternwheelers (Septer & Schwab 1995, Sampare et al 1979). At Kisgegas Canyon, large woven basket traps were fished at strategic locations where fish were concentrated by the strong currents, resulting in a proportionately larger catch of Chinook. Smaller basket traps and the bana, a closable bag–type dip net were also utilized there. Gaffs and spears were used in shallow, clear tributary streams where fish were easily visible (Morrell 1985).

With salmon, the mainstay of the Gitxsan people, caught, processed and stored, the House groups turned their attention to berries, another vital link in their sustenance chain, these being the most important carbohydrate. Huckleberries, also called sim maa'y, meaning "the true berry," were the all-around favorite for drying, while soapberries, blueberries, cranberries, and saskatoons were all picked and processed in quantity. The people proceeded out to their territorial home places, and then out to their berry grounds where, if distant, they had main berry camps. Berry baskets, boxes, berry drying racks and poles were left at the camps, and once they were setup, the women took over the berry picking and processing activity. Massive amounts of huckleberries, and to a lesser extent, blueberries were picked, and processed by crushing, followed then by boiling, then drying the berry mush on low racks over slow fires. The dried berries were rolled up and stored in bent boxes. Other preserving methods included air drying the uncooked berries, and preserving them in oolichan grease. For a thorough discussion on berries, see Gathering What the Great Nature Provided (People of K'san 1980).

Concurrent with the berry activity, the men and older boys often went to the high country to hunt goat, sheep, bear, and caribou and to snare groundhogs (marmots). The groundhog was economically the most important animal found in the territory; its great abundance and the ease with which it could be taken made it one of the principal factors in the life of the people. The meat and the fat, which was stored for hibernation, were both relished, with the skins being made into robes, caps, leggings, moccasins, other clothes, and blankets. The blankets were much desired by the coast peoples and heavily traded for coastal resource items (Collison 1941). The groundhogs were usually snared, though smoke, deadfalls were also used. Goats were a high status food, especially the inner cavity fat, which was made into cakes. The meat was eaten fresh or smoked, with the hides used for bedding and general purposes, and the horns used for spoons, snowshoe brakes, and other tools. When taken, all parts of the caribou were utilized with the meat eaten fresh or dried. The hide, when tanned, was often used for ceremonial clothing and mats; used as rawhide, it was turned into bags, packs, lacings, and rope. Sinew was nearly used universally for thread. Bears were sometimes taken in or around the berry patches and were processed at the camp, the flesh being eaten fresh and also dried. The skin was utilized both with the fur and tanned for bedding, clothing bags and packs The claws, teeth and bones served for ceremonial rigging and for various scrapers. Typically, the berries, meat and other resources needed to be packed down to the village or winter home place, and preparations for winter were undertaken. Gathering firewood, maintaining trap trails, making or repairing snowshoes and winter gear, as well as gathering the last of the medicinal and edible roots, took the people into winter.

If the people were still in the village when winter was well on its way, the men or whole families would head for the territory villages or homeplaces and be engaged in snaring and trapping fur bearing animals. Rabbit constituted an important part of the wintertime, supplying fresh food and pelts that were second in importance to groundhog. The pelts were cut into strips and made into clothing, particularly children's, and bedding. Rabbits were plentiful and easy to take with a snare and tossing pole, which was usually a bent sapling that tossed the snared rabbit into the air and out of predators' reach. Black bears would be taken if their dens were located. All the Gitxsan territories in the TSA experience relatively heavy snowfalls, and trails needed to be kept open for domestic purposes, mainly the supply of firewood and water, as well as for traveling purposes. Often caribou were herded into deep snow areas such as gullies and ambushed if possible. If hunting and trapping were successful, the winter was a busy time with the processing of furs, and to an extent, the meat. By late February, with the snow starting to settle, the people were readying themselves for the arduous trip to the Nass estuary for oolichan, and the yearly cycle would begin again.

# CULTURAL HERITAGE RESOURCE ASSESSMENT

## PREVIOUS ARCHAEOLOGICAL INVESTIGATIONS

The following discussion of archaeologically based research, surveys and excavations is presented in chronological order. Archaeological endeavours that fall out of the study area are included where the information is deemed significantly relevant.

MULDOE, JOHNNY, 1898

Johnny Muldoe found a cache of thirty-five carved stone clubs at an old village site in Hagwilget Canyon. A.W. Vowell, Superintendent of Indian Affairs, happened to be in Hazelton, persuaded Johnny to part with the clubs, and took them to Victoria (Duff 1962).

SMITH, H.I., CA. 1913-1927 BULKLEY VALLEY

Harlan I. Smith initiated active archaeological work in the study area sometime after 1911, when he became chief archaeologist for the National Museum in Ottawa. Unfortunately Smith left no summary reports of his field notes; he was involved in various expeditions in 1913, 1915, 1925, 1926 and 1927. Although the majority of Smith's work was located on the lower and mid Skeena river (Prince Rupert, Tyee, Kitselas, Kitwanga, Kitsegukla, Hagwilget, Hazelton, Kispiox), he also did investigations at Moricetown, southeast of the mouth of Lake Kathlyn (Chicken Lake), near Telkwa, the west bank of Bulkley River, as well as Fort Fraser and Stoney Creek. The details of his investigations in the study area are not well known.

BORDEN, C.E., 1951 NECHAKO RESERVOIR

Dr. Carl Borden conducted a survey in 1951 of sites on Wet'suwet'en traditional territories that were soon to be flooded by the construction of the Kenney Dam. This constituted the first major salvage project in B.C., with 51 sites being recorded. These shoreline inclusive sites of Takla, Ootsa, Eutsuk, Skins and Whitesail Lakes were composed of campsites, a rock shelter, travel camps, berry drying locations, cache pit sites, house pit sites and cambium harvest stripped trees (CMTs). Borden concluded that the Salish lived farther north and were pushed to the south by Carriers (1953).

B. C. LEGISLATURE, 1960

In 1960, at the urging of concerned public, the Provincial Government passed the *Archaeological and Historic Sites Protection Act* and established the Archaeological Sites Advisory Board.

MACDONALD, G., 1966-1971 HAGWILGET CANYON

The scope of the North Coast Prehistory Project included the Skeena River Survey in 1966, under the direction of George MacDonald of the National Museum of Canada. There is not a survey summary report though aspects are documented in Skeena River Prehistory (Inglis and MacDonald 1979). The focus of this project was to outline the development pattern of Northwest Coast cultures, with the intent that the mid Skeena and Bulkley Rivers investigations would furnish details of cultural exchanged between the coast and interior. Preliminary field reconnaissance and review pointed to the river canyons as being principal sites of long-term occupation. An exploratory excavation, GhSv2, a 2.8m deep pit, yielded some 60 artifacts and a single C14 (carbon) date of 3,1430 BP was obtained from a hearth situated 1.8m below the surface. This excavation assisted in developing a regional cultural sequence. (MacDonald 1971).

TURNBULL, C., 1966 MORICETOWN CANYON; BABINE & NILKITKWA LAKES

In 1966, Moricetown Canyon was examined as part of MacDonald's mid Skeena and Bulkley Rivers surveys. Christopher Turnbull carried out a limited surface collection at GgSt1, the present site of the parking lot and public facilities on Highway 16. Turnbull noted features such as trails, old and current, smokehouse locations (11), cache pits, fish trap basket locations, modern gaffing spots, and old grave sites. He carried out three test excavations on two river terrace levels, and designated these GgSt 2, 3, 4. Cultural deposits were found to be extensive and varied from 45cm to 120cm in depth. Surface collecting was also carried out at GgSt2 and 4. Turnbull's report contained no artifact descriptions, though he documented the recovery of projectile points and 158 tools, and took samples for future carbon dating.

Turnbull also reported on a brief trip to Babine and Nilkitkwa Lakes, where he noted ethnographic information concerning the three fish weirs and basket traps (10-20) placed along each fence. He also noted the extensive smoke house locations and cache pits above both Babine river shorelines, where the present DFO fence and camp are located. Turnbull surface collected chipping detritus around the DFO camp as well as a

knife, some ground stone, chipping detritus and scrapers on the east shore in the Fort Babine schoolhouse area. (Turnbull 1966).

ALLAIRE, L., 1968 KITSELAS CANYON

Working under the auspices of the North coast Prehistory Project, Allaire undertook excavations at the Gitaus village site in Kitselas Canyon. Lithic material recovered included 1,320 artifacts and 1,455 boulder spalls. A carbon sample was dated at 3680 BP. The archaeological evidence was interpreted to include two cultural phases. The earliest, the Gitaus Phase, was thought to be from 4,300 BP to 3,600 BP., and showed a culture that had cobble tools and spalls, as well as groundstone tools and artifacts.

The Skeena Phase was believed to follow within the time frame of 3,600 BP to 3,200 BP, and showed strong affinities with Interior cultural assemblages. The cultural development sequences were hypothesized to have been locally developed by coastal and interior influences. (Allaire 1979).

AMES, K.M.1970 HAGWILGET CANYON PERMIT NO., 1970-13

Excavations were conducted in 1970, at Hagwilget Canyon, by Ames and five volunteers. The site GhSv2 was excavated in three blocks positioned on H.I. Smith's 1915 photographs. Recovered were a wide assortment of 150 artifacts, including flaked and ground lithic, points/knives, bifaces, scrapers, adzes, cobbles and bone barbs, a drill and a point. Also documented were floral and faunal remains, birch bark baskets, storage pits, rock-lined pits and rock hearths. Three occupational zones were recognized, ending between 4,000 BP and 3,500 BP (Ames 1979). The dates were based on MacDonald's 1966 C14 samples. This excavation assisted in developing a regional cultural sequence. (Ames 1979).

MOHS, G., 1974-1976 BABINE LAKE SHORELINES

PERMIT NO. 1974-1, 1975-4, 1976-5

This project was conducted under the auspices of the Archaeological Sites Advisory Board (ASAB) with a systematic foot survey covering Babine Lake shorelines. This energetic three-year survey recorded a total of 225 sites of which 44 are in the Bulkley TSA. The lakeshore was not generally surveyed beyond 50-100m inland due to time constraints and the shoreline length. Site density and features increased through the

northern portion of the lake, and on to the Babine River. (Mohs 1974, Mohs 1975, Mohs and Mohs 1976).

PIKE, J., 1974 TELKWA RIVER & PASS PERMIT NO. 1974-1

This reconnaissance survey by the ASAB carried out for B.C. Hydro and Power Authority (BCHPA) conducted judgmental surveys for proposed transmission rights-of-ways (ROW) that included Glenannan to Houston and Houston to Skeena substations. The latter ROW follows the Zymoetz (Copper) and Telkwa Rivers, going through Telkwa Pass. The aboriginal trail which goes from Telkwa through the Pass was recorded as archaeological site GdSv1, with the cabin south of Top Lake (Telkwa Pass) being recorded as GdSw1. Pike noted it was a Native who had told Paul thistle of the trail, with the first night's campsite at Pine Creek. Pike also recorded GdSu1, a log cabin located on Lot 5810 between Jonas and Cumming Creeks. He recommended that the trail be systematically surveyed and particular attention be focussed at the major creeks on the trail and right-of-way, including Jonas, Winfield, Sinclair, Tsai and Milk Creeks. No other sites were located in the TSA. (Pike et al 1974).

THISTLE, P., 1974 BULKLEY VALLEY

There is no known documentation as to Paul Thistle's research or survey, though he did record at least six archaeological sites in the Quick-Telkwa-Smithers area. GdSr1, GdSr2, GeSs4, GeSs6 are historical sites and GeSs2, GeSs4, GeSs5 are prehistoric sites or both. With R. Mitchell, Thistle also recorded GgSt5, a prehistoric burial site at Moricetown Canyon.

SCOTT, O. & A. BATES, 1975 PERMIT NO. 1975-7

Scott and Bates conducted a reconnaissance survey on proposed power transmission line right-of-ways on behalf of the BCHPA for the ASAB. The focus on this survey in the study area was to assess the Telkwa Pass area and the Bulkley River crossing. This report is fairly vague though several creek crossings in the Telkwa Pass area were surveyed by helicopter. It is not known why the previous year's survey recommendations (Pike et al 1974) were not taken into account. They survey had negative results as far as archaeological finds in the study area. (Scott & Bates 1975).

RAFFERTY, P., 1975 BULKLEY VALLEY PERMIT NO. 1975-4

This extensive archaeological reconnaissance research project was conducted by the ASAB in the western portions of the Nechako Drainage. Within the Bulkley District, judgmental surveying was carried out on the Bulkley mainstem adjacent terraces and lowlands, from the eastern District boundary to the Telkwa River confluence. When surveying the riverbanks, Rafferty and King paralleled the banks 100m apart and did not sample the subsurface, though four archaeological sites were recorded. GdSr6 is on Lot 5, south of the Bulkley River on the first terrace below the CNR tracks, and consists of three cache pits and two house platforms. GdSr7 is close to Quick (Lot 4), on the south bank, below the tracks, and is composed of one cache pit, 3m x 3m x 0.8m. GdSr8 is located on Lot 1144, four miles south-east of Telkwa on the south bank of the Bulkley River, on the second terrace up, and west of the tracks. The site is composed of a trail, two circular house depressions, 5m x 1.5m deep, 6m x 1.5m deep and two cache pits, 4m x 1m, 2m x 0.8m. GeSs11 is located three miles south-east of Telkwa on the north bank of the river, with Lot 4263, on the first terrace, and contains two symmetrical house depressions, 4m x 4m x 0.75m deep and 4m x 4m x0.8m deep, with a clustering of rocks in the centre. Recommended work included completion of the Bulkley mainstem survey. (Rafferty 1975).

WINRAM, P. & J. WILLIAMS 1976 BABINE LAKE ROAD PERMIT NO. 1976-7

The 1976 extensive survey was administered by the ASAB and carried out on behalf of the B.C. Dept. of Highways to examine all ongoing or pending highway construction projects for possible conflicts to heritage sites. The area covered the south coast, Caribou and northern B.C.; the only area investigated in the study area concerned five miles of straightening at Mile 23 on the Babine Lake road, and no conflicts were reported. Referred and recommended areas to be covered in following years included Highway 16, Smithers to Telkwa, and Highway 16, Smithers Arterial-Smithers to Kathlyn Creek. (Winram & Williams 1976).

WINRAM, P. & L. THOMAS, 1977 SMITHERS LANDING PERMIT NO. 1977-17

This Northwest Regional Survey investigation was carried out under the auspices of the Heritage Conservation Branch. Government ministry land referrals were judgmentally surveyed. GgSp7, recorded by Mohs in 1974, with 47 cache pits, and located approximately 1.75 km north of Smithers landing, was resurveyed. Winram and Thomas reported that this site would conflict with a proposed Provincial Park

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KIMBLE, K., 1978 BULKLEY RIVER; LAKE BABINE ROAD; HUDSON'S BAY MOUNTAIN ROAD PERMIT NO. 1978-7

This 1978 survey, carried out as the Skeena Regional Archaeological Impact Study, investigated a number of government land referrals that were judgmentally surveyed and resulted in the location or revisiting of 33 sites. Within the study area, Kimble continued downstream on the Bulkley River from the Telkwa river confluence where Rafferty left off in 1975. The banks of the river were parallel surveyed by a two-person crew 75m apart. It is not clear or known how far downstream she surveyed, or the total number of sites recorded. The sites Kimble did record include:

- GeSs 12
- GeSs 13
- GeSs 14
- GeSs 15
- GeSs 16
- GeSs 17
- GeSs 18
- GfSt 1
- GfSt 2
- GfSt 3

Kimble also surveyed a 14-mile stretch of the Babine Lake Road from Chapman Lake bridge to the Smithers Landing cutoff, as well as Hudson Bay Mountain road from the Seymour Lake Road to Prairie Road. These judgmental surveys produced negative results. (Kimble 1978).

WRIGHT, M.J., 1979 BABINE LAKE ROAD; TELKWA HI-ROAD

PERMIT NO. 1979-6

This survey constituted the 1979 Skeena Impact Assessment conducted on behalf of the Heritage Conservation Branch and involved evaluations of referrals from the Land Management Branch, Highways Branch and Forestry Branch. Judgmental survey techniques were augmented by systematic or random subsurface test pitting. There were two projects of interest within the study area: the resurfacing of the Babine Lake Road, with assessment through unnecessary, and improvements to the Telkwa Hi-Road between Seeley Corner and Snake Road; a visual examination concluded there were no apparent conflicts. (Wright 1979).

IRVINE, S. 1980 BABINE LAKE ROAD PERMIT NO. 1980-7

As part of the ongoing Skeena Heritage Impact Assessment project, Irvine surveyed government referrals with a combination of purposive systematic and judgmental methods, supplemented with test-pitting on a random basis. Upgrading of a section on Babine Lake road resulted in no apparent conflicts (location unknown). This was the only surveyed locale in the study area; accordingly, though, there was a recommendation that the recreational subdivision leases on the east shore of Nilkitkwa Lake be given a high priority for further archaeological examination. (Irvine 1980).

COUPLAND, G., 1981-1983 KITSELAS CANYON PERMIT NO. 1983-19

In 1981, Gary Coupland and George MacDonald conducted a site survey and mapped the Gitsaex site located in Kitselas Canyon and found extensive village remains. In 1982, Coupland returned and undertook a survey and excavation at the Paul Mason site, which continued in 1983. Coupland summarized his findings and published "Prehistoric Cultural Change at Kitselas Canyon" (Coupland 1988), which integrated his findings with the cultural sequence established by Allaire at the Gitaus site. Coupland postulated five cultural phases of the Skeena River dating from 5,000 B.P. to 1500 B.P. and generally suggested marked Coastal influences, both seasonally and year round. Though out of the study area, the Kitselas Canyon sites provide significant information that can be applied to comparative analysis, including dates, as well as prehistoric change, particularly origin and cultural development relevant to native oral narratives. (Coupland 1988).

BUSSEY, J. 1981 PRINCE GEORGE TO TELKWA

Bussey conducted a Stage I Heritage Resource Overview Assessment on behalf of BCHPA, concerning the proposed Williston Sub to Telkwa Sub 500 kv transmission line right-of-way in 1981. This overview employed a document search, a helicopter overview and three days of preliminary field reconnaissance. As the Telkwa Substation is not known to be in the TSA, no activity occurred; the overview report has low-moderate significance in relation to its ethnographic and historical discussion (Bussey 1981).

IAN HAYWARD & ASSOCIATES, 1982 STIKINE/ISKUT TO PRINCE GEORGE

The Heritage Resources Overview study, conducted as a component of the Stikine/Iskut Preliminary Environmental Impact Assessment, was prepared for B.C. Hydro as the Stage I Heritage Overview Assessment required by B.C. Heritage Conservation Branch. The overview is important to the study area because the high quality of research, on a vast regional level, considers archaeology, ethnography, history, and impact assessment. (Ian Hayward & Associates, Ltd. 1982).

WARNER, J. 1983 TELKWA RIVER

This Stage 1 Heritage Resources overview of the Telkwa Project was prepared for Crows Nest Resources Ltd., which proposed the construction of an open pit coal mine and associated infrastructure. The location is south-west of Telkwa centred from Goathorn Creek easterly towards the Bulkley River. Warner noted that mine sites, plant sites, waste sites, and an office with related facilities would be located by the mining area, though new access roads, a rail spur and a transmission line would also be required. Warner showed that there are no known and/or recorded sites or prior archaeological surveys in the study area and recommended general potential areas to be examined in the Stage II. (Warner 1983).

WARNER, J., 1984 TELKWA RIVER PERMIT NO. 1984-35

This Stage II of the impact assessment process was applied to the Telkwa Project noted above; studies were prioritized and focussed on the high, medium and low areas. Four historic sites were recorded: GdSs1, a mining camp for Bulkley Valley Collieries #3 mine (1949-1956); GdSs2, a mining camp for Bulkley Valley Collieries #1 mine (1929-1937); GdSS3, site of Bulkley Valley Collieries #2 mine (1938-1958); and GdSs4, a historic site of indeterminate purpose or function. The recording, mapping and photographing of GdSs3 was recommended if threatened by development. (Warner 1984).

MURDOCH, R., 1984 MORICETOWN CANYON

In 1984, Ruth Murdoch conducted archaeological and ethnohistorical research on behalf of the Moricetown Indian Band, with the purpose of documenting areas of historical and prehistorical significance at Moricetown Canyon. The project involved

using archival photographs, physical "on-the-ground' evidence, and interviewing elders to locate, identify and map sites in the canyon. The project did not include excavation, though recommendations were to be provided for future archaeological and related work; project results could be displayed and interpreted for a proposed on-site museum.

This interesting and clear report reviewed prior archaeological investigations and documented surface collecting that Murdoch completed on two roads bulldozed by the Department of Fisheries and Oceans in 1983. The two roads yielded 141 lithic artifacts; GgSt6, a menstrual lodge, and GgSt7, a six-cache pit cluster side, were also recorded. Taped interviews with elders, who were often presented with archival photographs, were conducted in the canyon, and site locations were mapped. Murdoch concluded that deep archaeological deposits are present in Moricetown Canyon and have the potential of providing important new information regarding the prehistoric lifeways of peoples in the area, and of their cultural affiliations with Interior groups further to the south and east. She concluded with comprehensive recommendations concerning future development in the canyon, and specifically suggested that interviews with elders by continued and that the carbon samples obtained by Turnbull in 1966, which are in storage at the Archaeological Survey of Canada (National Museum of Man), be dated to enable to cultural sequence.

SIMONSEN, B.O., 1984 I.R.9 (TSAK)

PERMIT NO. 1984-17

This Heritage Resource Impact Assessment (HRIA) study was conducted on behalf of B.C. Hydro to assess a 35 km subsegment for the proposed Topley Landing to Takla Lake (via Fort Babine) 20 kv transmission line. The subsegment portion examined included the area between Topley Landing and Smithers Land, which is basically out of the TSA, and from Smithers Landing to what is locally known as Pete's Lake (adjacent to 24 km on the 4000 road). Judgmental surface and subsurface methods were utilized with negative heritage resource results; it is believed that six areas were examined in the TSA, though the report is vague. (Simonsen 1984).

WILSON, I.R., 1985 TELKWA RIVER

PERMIT NO. 1985-25

This Heritage Resource Inventory and Impact Assessment of Five Proposed Pacific Northern Gas (PNG) Pipeline Loops, located from Telkwa to Prince George, included the Telkwa Loop in the TSA. This 8 km segment of right-of-way is located on the south side of the Telkwa River approximately between Pine Creek confluence and Goathorn Creek. The survey method was composed of foot travel and judgmental shovel test pits on the

10m wide right-of-way and resulted in no new sites and no further studies recommended. (Wilson 1985).

ALLBRIGHT, S., 1985 MORICETOWN CANYON

Allbright undertook a significant excavation at GgSt2, located on the upper terrace at the eastern side of Moricetown Canyon. This excavation provided expert witness to the Archaeological Evidence of Gitxsan and Wet'suwet'en History in relation to the Delga Muukw v. A.G. court case.

Examination of two backhoe trenches resulting from campground facility upgrading indicated the presence of cultural deposits across the terrace. The excavation of GgSt2 revealed three undisturbed cultural layers; though these were quite distinct, the layers appeared to change gradually from one to the next, suggesting continuous occupation. The summary of features at GgSt2-1985 excavations included three hearths, three pit features, seven ash deposits, eighteen post moulds, one bone tool, and 960 lithic artifacts; the latter consisted of 158 tools comprised of ground, chipped bifacial, unifacial, retouched flakes, cores and cobbles. Obsidian flakes and artifacts, when analyzed by x-ray, indicated they originated from both Mt. Edziza to the north and Mt. Anahim in the Chilcotin.

Eight charcoal samples were submitted for radiocarbon analysis and confirmed interpretation of site stratigraphy, with the oldest dates of 4700 and 5660 B.P. coming from post mould features. These suggested occupation and permanent settlement at Moricetown Canyon by 5600 B.P. Allbright concluded that the stratigraphy, artifact assemblages, featural remains and C14 dates from excavation indicate continuous occupation of a major fishing settlement at Moricetown Canyon from about 6,000 years ago to the present. The presence of obsidian indicates participation in inter-regional trade networks during earlier times (Allbright 1987).

ALLBRIGHT, S., 1985 HAGWILGET CANYON

Allbright also conducted surveys in 1985 at GhSv2 in Hagwilget Canyon and at GhSv85-A, located 1.25 km upstream on the Bulkley River from Hagwilget (Tse Kya). Site GhSv2 in Hagwilget Canyon was first recorded as a site by G. MacDonald in 1966; it underwent further research in 1970 by Ames, when it was partly re-examined, and seemed to corroborate carbon dates obtained from the ggSt2 artifacts at Moricetown Canyon. Leaf-shaped points found by Ames (1979 Plate 3b) appeared to be contemporaneous with, or older than, remains dated at 5600 B.P. from the GgSt2 site at

Moricetown. X-ray analysis of obsidian flakes indicated a Mt. Edziza source. Allbright concluded that diagnostic artifacts and assemblages, together with featural remains and site stratigraphy, indicated continuous occupation at Hagwilget Canyon from 6000 B.P. up to recent times. (Allbright 1987).

GOTTESFELD ET AL, 1986 SKEENA RIVER – HAZELTON

The research that Gottesfeld, Mathewes and Gottesfeld conducted provides the only regional post glacial climate and vegetation history specifically available to the study area; as well, their pollen core sequence helps to reconstruct paleoenvironmental conditions. Gottesfeld also documented and C14 dated a large debris flow that descended Chicago Creek to the Skeena river across from T'emlax'aamit village. This event is recounted in Gitxsan oral histories as the Seeley Lake and Medeek narratives. It is postulated that the geomorphologic and palynologic evidence correlates with the occupation of T'emlax'aamit and confirms the oral history narratives. (Gottesfeld et al 1991).

SKINNER, M., 1987 MORICETOWN
PERMIT NO. 1987-2

This salvage excavation from GgSt6 was conducted under the auspices of the Heritage Conservation Branch. Human skeletal remains were found above Highway 16 near Moricetown, and represent an incomplete skeleton from a middle-aged native female. The bones were not recent and were not observed in site.

WILSON, I.E. 1990 TELKWA RIVER
PERMIT NO. 1990-11

Wilson conducted a Heritage resource Inventory and Impact Assessment for Crows Nest Resources, related to the Telkwa Coal Project. Previous field studies (Warner 1983, 1984) examined areas to the south of the Telkwa River, this study addressed several new proposed facilities north of the Telkwa River. One new site, GdSs5, was located that is east of Goathorn Creek and south of the Telkwa river. This prehistoric site is composed of three large obsidian bifaces and a possible green chert cobble, as well as pieces of basalt shatter. The site itself is of a rare type, being presumably an artifact cache, with medium to high scientific significance, and is one of the few prehistoric sites known in the area. Wilson noted that Native people still use the area for hunting and berries, with berries particularly sought after in the area north of the Telkwa River. Wilson recommended that no further work north of the Telkwa River is warranted, though

additional monitoring of development occurring around GdSs5 is advised. (Wilson 1990).

ELDRIDGE & ZACHARIAS, 1990 OWEN CREEK, HIGHWAY 16 PERMIT NO. 1989-55

Millennia Research conducted an Archaeological Impact Assessment on behalf of the Ministry of Transportation and Highways and the Archaeology Branch for two highway realignments near Hazelton, B.C. The first realignment was the 9 km Carnaby to Kitsegukla project, which is out of the study area. The second project involved the 1.25 km realignment that was already completed at Owen Creek. No heritage sites were found there, though construction prior to the survey may have disturbed or destroyed small sites. It was recommended Highways provide more lead-in time for effective heritage impact assessment. (Eldridge & Zacharias 1990).

ELDRIDGE ET AL, 1994 MOF, KALUM DISTRICT

Overview Mapping of Archaeological Resource Potential in the Kalum South Resource Management Planning Area was conducted by Eldridge, Mackie and Coates. This AOA study has some bearing on the Bulkley TSA as both districts share the common boundary in the south-west. The location of the "grease trail" through the Copper River, Telkwa Pass, and Telkwa River, as well as inter-cultural relationships, are significant and should be considered. (Eldridge et al, 1994).

ELDRIDGE ET AL 1995 MOF, BULKLEY/KISPIOX DISTRICTS

Overview Mapping of Archaeological Resource Potential in the Bulkley and Kispiox LRMP Areas. This study is the 1995 Archaeological Overview Assessment that was conducted as a component of the Bulkley LRMP process. It includes summaries of the ethnographic resources and previous archaeological work within the TSA, as well as presenting an archaeological predictive potential model for continuous application across the TSA (Eldridge et al, 1995).

BROLLY ET AL, 1995 MOF, FORT ST. JAMES DISTRICT

This report, Archaeological Overview of the Fort St. James LRMP Subregion, is included in this review as it provides an extensive bibliography and discussion of cultural

heritage of the overall cultural region within which the Bulkley TSA lies. Though the Fort St. James – Bulkley TSA boundary is short in length, Gitxsan land interests overlay both TSAs. (Brolly et al 1995).

MUIR, R.J. & J.C. FRANCK, 1996 BULKLEY TSA

This report, An Evaluation of Archaeological Overviews and Reviews Conducted in British Columbia 1993-1996, presented the results of evaluations, of which the Bulkley/Kispiox 1995 AOA is included. The review results indicated specific areas of concern that are: coverage, background research, methodology, and effectiveness. These four concerns were broken down and the Bulkley AOA was rated and discussed with recommendations for future work. (Muir & Franck 1996).

CARLSON, A. & L. MITCHELL, 1997 MOF, FORT ST. JAMES NORTH

This report, Cultural Heritage Review of a Portion of the Fort Saint James Forest District, B.C., reviewed the Cultural Heritage Resources in the northwest portion of the FSJ District, which abuts the Bulkley TSA. The study was solely literature/documentary-based and presents relevant archaeology, ethnography and history. It also presented 29 maps with documented trails, references and a summary of cultural heritage information shown on the maps. (Carlson & Mitchell 1997).

MILLS & OVERSTALL, 199 WET'SUWET'EN TERRITORY

This report contains the anthropological summary and historical Data Forms that accompanied the Wet'suwet'en Cultural Heritage Resource Information Study (CHRIS), and is titled "The Whole Family Lived There Like a Town." The purpose of this report was to provide context for the maps and to show how the mapped information reflects the culture temporally over the landscape. The first part of the report summarized major elements of Wet'suwet'en society, while the second part provided historical information for some 70 'homeplaces'. The second part is particularly relevant owing to the archaeological site correlations that can be made. This CHRIS report is the first stage of what later became the Wet'suwet'en Traditional Use Study (TUS) (Mills & Overstall, 1996).

NAZIEL, W., 1997 WET'SUWET'EN TERRITORY

This Wet'suwet'en Traditional Use Study Report is the final report and documented the history of research, cultural and linguistic background, research methodology, results, evaluation, problems encountered and recommendations. Of particular interest are the 174 sensitive sites that were mapped and were stored in the WCHID database. This TUS is important in managing all cultural heritage resources within the Wet'suwet'en territories. (Naziel 1997)

FRANCK ET AL, 1997 BULKLEY TSA

This report, Archaeological Data Gap Analysis of Nine LRMP Sub-Regions Within British Columbia, assessed the available archaeological survey data in respect to nine LRMP sub-regions, of which the Bulkley TSA is one. The study was intended to determine whether sufficient archaeological survey data exists to begin detailed predictive archaeological site potential modelling at 1:20,000 scale. Results and recommendations were presented. (Franck et al, 1997).

USE WITH CAUTION: A cautionary note goes with this study; baseline data used in this report is not reliable. Uncertainties relate to:

- The biogeoclimatic zone measurements of hectares and percent of TSA landbase are inaccurate
- The areas assigned (hectares) to previous intensive archaeological surveys are inaccurate
- The total of hectares of non-intensive judgmental surveys is inaccurate
- The elevations of surveys conducted in the TSA are inaccurate

This unreliable data clearly skewed the analysis of results the authors presented.

HEWER, T., 1998 MORICE FOREST DISTRICT

This report, Archaeological Inventory and Overview Assessment Refinement, was prepared for MOF, Morice Forest District. This AOA refinement utilized data from the analysis of previously recorded sites and surveys, interviews conducted with Nedo'ats

(Old Fort) community members, and an intensive archaeological inventory study program. The final overview model established a four-zoned potential rating system, with high, medium and low archaeological potential zones, and additionally a CMT potential zone. The report concluded by making recommendations regarding the need for AIAs in the four potential zones. This report is of consequence to the Bulkley TSA due to the district boundary that occurs across the Wet'suwet'en and Nat'oot'en interests.(Hewer 1998).

CANUEL, N., 1999 FSJ DISTRICT

An Inventory of Prehistoric and Historic Trailways Within the Fort St. James District: this study by Canuel presented a summary of the trail inventory which includes: methodology, accuracy of information, accuracy of location, mapping and database products. The 113 trailways were mapped on 1:50,000 NTS sheets, with the trails crossing into the Bulkley TSA clearly shown. (Canuel 1999).

LINDBERG & MOYER, 1999 KISPIOX FOREST DISTRICT

Model Refinement and Overview Mapping of the Kispiox Forest District: this research updated and refined the existing Kispiox AOA, with this model using a larger number of cultural, ecological, geographical, and geological variables, with output maps that show a larger range of possible limitations to potential. The report noted the lack of intensive archaeological surveys, which reduced confidence in model accuracy. Another limitation expressed was the amount and general quality of ethnographic information used for modelling. Recommendations addressing data gaps and model limitations suggested further research and data accumulation. This study is very relevant to archaeological resources in the Bulkley TSA. (Lindberg & Moyer 1999).

ANFOSSI ET AL, 1999 KISGEGAS-BABINE RIVER PERMIT NO. 1998-093

This study documented an archaeological inventory and impact assessment of various development areas in the Kispiox TSA on the behalf of Skeena Cellulose Inc. Of interest to this Bulkley TSA effort is that a study component described the Atna Pass Trail and the proposed Shedin Mainline, located north of Kisgegas. This traditional aboriginal trail, known as the Atna Pass Trail, extends from Kisgegas to Bear Lake, with the majority of the trail crossing through the Bulkley TSA. CMTs were encountered where the proposed road right-of-way followed a portion of the Atna pass Trail, and subsequently, the road was realigned away from the trail, with one crossing intersecting

the trail at Atna Creek. Three CMT sites were identified and recorded as GkSu1, GkSv7, and GkSv9. The sites total 5.8 km in linear trail length and are each 50m wide, as the extensive boundaries fall outside the study area and the work was focused on the road. Impact management recommendations were to collect stem rounds from 10%-20% of CMTs within the right of way.

## AOA PREDICTIVE POTENTIAL MODEL

As part of the recent Bulkley LRMP process, an Overview Mapping of Archaeological Resource Potential (AOA) in the Bulkley and Kispiox LRMP Areas was completed in 1995 by Millennia Research (Eldridge et al, 1995). That study was conducted at the 1:250,000 scale using a broad range of geographic and biological predictive variables. The model was well conceived and acceptable for the LRMP format and presented a useful summary of sub-regional archaeology and ethnography. This summarized information in turn increased awareness and appreciation of cultural heritage and traditional use knowledge and further facilitated management of cultural resources.

A major component of the above AOA endeavour involved modelling and mapping of potential archaeological resources throughout the district. Results of this mapping raised concerns among Ministry and forest industry representatives, as well as some archaeologists and interested forestry observers. Primary concerns centred on the appropriateness of the scale of mapping, the vague assessment variables and their criteria, and also model effectiveness when applied to management and operational decisions. Due to the coarse scale utilized, this study is not suitable for assessing the archaeological potential of specific development areas, and thus it is of limited value (without ground truthing) in the archaeological impact assessment process.

Archaeological predictive potential models using GIS computer applications are complex: variables, typologies, and predictive criteria need to be well defined. Predictive models are basically derived from three sources of data: known archaeological sites and their distributions, hypothesized human settlement and subsistence behavior, and specific historic and ethnographic information. In model development, the use of recorded sites and their distributions is an inductive process, whereby potential site locations are examined in relation to the biogeographical characteristics they have in common, and are then defined on the basis of key locational attributes. Models developed with this inductive theme can possibly be correct in terms of site occurrence and site density probabilities. However, these models need large and controlled samples of known archaeological sites with specific accompanying biophysical attributes.

It appears that at the present most archaeological site models are developed deductively, based on hypothesized human settlement and use of landscape resources. In these deductively based models, assumptions and influences are commonly based on

hypothesized human tendencies and the needs for shelter, fresh water and food. Successful models can be developed, though they can also be problematic in that they can be extremely prone to incorporating the personal and/or cultural biases of the modeller. Deductive models require considerable ground truthing to ensure that such biases have not resulted in inappropriate assumptions. This concept applies not only to predictive models, but also to archaeological fieldwork. For example, is the large, medium-deep depression located on the first river terrace a medium-size roasting pit, a large cache pit or a small habitation site depression: Different archaeologists record the site differently; when model development or site type analysis occurs, confusion is possible.

The following is taken from the AOA document (Eldridge et al, 1995) and describes the mapping methodology.

> Archaeological resource potential was assessed on the basis of a model of site density and distribution. This model was derived from previous archaeological site locations, ethnographic land use patterns and their expected archaeological correlates, and general knowledge of probable areas for site locations extrapolated from other parts of the pacific Northwest. The model was then applied to the study area, using a large number of social and environmental variables. These variables provided data including the presence of known archaeological sites (Dataset II), terrain and land form types, the presence of known ethnographic sites, ethnographically documented use of particular environmental zones, modern wildlife and aquatic values, forest cover, and paleo-environmental and geomorphologic changes in the study area. Most of the variables were compiled onto a 1:50,000 topographic map prior to polygon creation and potential rating.

In general most of the data required for this model does not exist or does in rudimentary fashion. For example, ethnographic site maps were not available for the Bulkley TSA in 1995, and documentation of ethnographic use of environmental zones is nearly completely lacking. While the forty-two extremely detailed landform/terrain categories are potentially useful, at present only a small portion of the study area has had surficial geology mapping. The accessibility variable, is left undefined and unexplained. The relationship between the predictive model presented in the text and the database scoring system (increase, neutral, decrease) is unclear. Arising from these vague variables and relationships, two problems become apparent. The lack of precisely defined predictor criteria makes it difficult for additional information to be added to the database, or even to be sure that the criteria were uniformly applied throughout the study area. Accordingly, the model is not well suited to GIS applications. The AOA was a useful tool for the purpose, which it was created for: broad level planning and visualization for the LRMP process. It is unlikely to be useful for forest development planning.

## SURVEY COVERAGE

The purpose of reviewing archaeological survey coverage in the Bulkley TSA is to ascertain what kinds of surveys have been completed and where they have been located. With compilation, then through evaluation, past areas surveyed will be known, and predictive information could be generated that will indicate probable patterning of cultural heritage resources at an appropriate management scale.

The first major information gap that was evaluated involved the types of archaeological survey coverage across the study area. Two general types of archaeological surveys have been previously employed in the Bulkley TSA, systematic intensive and judgmental types, the difference relating to methodological approaches. Systematic intensive surveys are currently used in the impact assessment process and involve surface and subsurface inspection. Surface inspection includes a foot traverse along linear transects spaced at systematic intervals across the survey area, and inspection of any cultural or natural exposures (road-cuts, cutbanks, tree throws). Complimenting this, subsurface testing is undertaken, and depending on the survey strategy, applied either systematically or randomly across the survey area. This testing is accomplished with a shovel or probe, usually to a parent C horizon with the backdirt screened (6mm) or trowel sorted. Project reports should clearly describe the survey location, methodology, sampling, and site inventory record. Five systematic intensive surveys to date have been applied on the study area and comprise less than 1% of the landbase.

On the other hand, judgmental type surveys are characterized by the lack of reporting of specific locations and/or methodology. Past survey findings often lacked descriptions and subsurface testing was not included. These survey types represent 76% of surveys completed within the TSA to date. The percentage of survey coverage in relation to TSA landbase is incalculable due to vague or missing information. A number of factors are summarized which have affected the relatively small, vague inventory of recorded archaeological sites. These include the purpose of surveys and research projects, methods used to locate sites, visibility of differing site types, season in which fieldwork is carried out, and the vegetation or ground cover in the survey areas.

The majority of recorded archaeological sites are located along major waterways, principally the Bulkley River, and the west shore of Babine Lake. The Bulkley River sites, which are clustered in the vicinity of the prehistorically occupied villages or semi-permanent home places of Moricetown and the Bulkley-Telkwa Rivers confluence, indicate that these have been important population centres utilizing salmon as a staple resource. The density of sites on Babine Lake and Nilkitkwa Lake indicate much the same. These recorded sites reflect only certain portions of the traditional seasonal round and landscape use. A preliminary evaluation of previous survey areal coverage suggests that the vast majority of surveys were adjacent to major waterways. However there are many unrecorded sites and trail linkages documented in the Wet'suwet'en Traditional Use Study, ethnographic reports, local historical literature, and maps. These suggest that the traditional use was not restricted to the areas covered by those surveys. Further to the

above, the bulk of previous archaeological research in the study area was conducted within the SBS biogeoclimatic zone, although a few sites exist in the ICH adjacent to the Bulkley mainstem and Moricetown Canyon

In summarizing the archaeological survey coverage information gaps, the following key points are emphasized:

1. Only a small area has been systematically and intensively surveyed, 0.93% of the TSA landbase.

2. The total TSA landbase that has been archaeologically surveyed is incalculable due to vague or missing information.

3. Over 90% of recorded archaeological sites are clustered on the Bulkley River, the Babine and Nilkitkwa Lakes.

4. The majority of recorded sites, other than the Moricetown Canyon sites, are in the SBS. Clearly more research is needed in other biogeoclimatic zones.

5. The recorded site distribution is in marked contrast to the Native view of the landscape and does not reflect traditional land and resource use patterns.

## CULTURAL HERITAGE RESOURCE SITE TYPES

Site types are fundamental to this review discussion as they are a component of the interpretative framework, and as such, site types are defined as a grouping of common characteristics or functions of an archaeological and/or traditional use site. The pertinent questions relevant to this deliberation are: What kinds of sites have been documented? Where are they located? What is their significance?

Site type terminology can be somewhat confusing dependent on the presenter; therefore, this discussion will use the B.C. Site Description system. This system uses hierarchical classifiers, which denote type, subtype and descriptors. The following example taken from the Archaeological Branch (1995) shows habitation site delineations.

| TYPE | SUBTYPE | DESCRIPTOR |
|---|---|---|
| Habitation | Rock shelter, | Rectangular, |
| | Cave, | Circular, |
| | Refuge, | Plank house, housepit, , sweat lodge, menstrual lodge, smokehouse. |
| | Platform, | |
| | Depression. | |

The three most frequently occurring recorded archaeological site types in the study area are subsistence feature types represented by cache pits, cultural material types showing surface lithic scatter, and habitation types featuring villages and seasonal campsites. Subsistence features principally represented by cache pits are most commonly located along salmon bearing rivers including the Bulkley, Telkwa, and Copper as well as in the proximity of inlets and outlets of larger lakes such as McDonell, Dennis, Babine and Nilkitkwa. Cultural depressions of indeterminate function or purpose are also found adjacent to salmon bearing waterways, though they are also infrequently isolated. To date, the majority of cultural material representing surface lithic scatter are typically located along river terraces, lakeshores and wetland margins, though possible locations could occur in many areas of the landscape. Habitation sites comprised of villages, home places, seasonal campsites and other shelters are located alongside the larger rivers, principally at canyons and confluences, or by any fish-bearing lakes below tree line, particularly at inlets and outlets. Six major recorded village sites or semi-permanent home places are included in the study area; these are Moricetown Canyon, Telkwa-Bulkley Rivers confluence, Jonas Flats, Sunnyside, Fort Babine and the DFO camp location adjacent to the fish fence on Babine River. However, anecdotal information also includes Mooseskin Johnny Lake, McDonell Lake, and McQuarrie Lake as village or homeplace sites.

The remaining variety of prehistoric recorded archaeological sites in the TSA, which total less than 10%, include human burials, an earthworks site and trails. Eleven historic sites include the remains of mining activity, a bridge, a trail, a church, several cabins and a burial.

An extensive trail system, both intra-territorial and extraterritorial connected the study area with the adjacent regions. The major trail routes, often called ‘grease trails’, trended east-west connecting the western Rocky Mountain slopes with the Pacific coast.

Branch or subsidiary trail diverged away providing access to home places and resource use on the territories. These trails provide excellent information about the patterning of cultural heritage relationships. Given the oral traditions, traditional use, and ethnographic evidence, a great deal of the landscape is thought to have been used to some extent for one purpose or another. As a result trails indicate potential areas where a relatively greater number of sites could be located, though, in any event, they indicate linkage between sites. In turn, spatially dispersed recorded sites and traditional use sites had trail connections. While being a cultural heritage resource in their own right, it appears that trails are sometimes, though not often, recorded as archaeological sites. The rationale for this is unknown.

Culturally Modified Trees (CMTs) were first recorded in the Interior in the 1950s. Almost all the surveys till recently in the study area did not include CMTs as sites or site components, since CMTs were not recognized as significant cultural features. The recent expansion in CMT identification and recording is primarily due to growth in the forest industry-related archaeological studies, with an understanding and recognition of CMTs as cultural resources. Currently, foresters are making an effort to manage for CMTs.

A CMT is defined as a tree that has been modified by Native people as part of their traditional use of the forest. The CMT site type inventory is gradually forming and is represented by two distinctive types: trail affiliated CMTs and cambium stripping harvest area CMTs. With the TSA, rated trail type CMTs are composed of blazed trees, cambium stripped pine and hemlock trees, kindling trees, pitch collection trees, message trees, trapset trees, and sawn, chopped or delimbed trees. Large cambium stripped harvest CMT areas tend to be in the proximity of habitation or home-place sites, though smaller areas (20-50 CMTs) were located adjacent to particular trails. Pine is the most common cambium stripped tree throughout the TSA, though hemlock was noted in the northern portion. First Nations refer to spruce being utilized as well in this locality, but no recent observations have been made.

CMTs noted during surveys conducted in the TSA exhibited primarily post 1846 dates. These CMTs were apparent throughout all four potential zones (high, medium, low, unknown) as mapped for the 1995 AOA. This is consistent with investigations in the Morice District, where Hewer describes a high percentage of CMTs situated in areas of low potential (Hewer, 1998). In the Kispiox District, CMTs are commonly being located in mapped zones of low and unknown potential (Anfossi et al, 1999). Presently there are no known CMT recorded sites in the TSA, even though they are quite common over widespread areas of the TSA.

The Canadian Heritage Information Network (CHIN) was used to review archaeological sites in the TSA. Uncertainties appear in the baseline data due to the brevity of presented information, the approximate 34% discrepancy error of 250m or less in site location (Eldridge et al, 1995), and the conflicting total number of sites in the TSA. This site type information gap requires the available original hard copy site survey forms that were not forthcoming from Archaeological Branch. The desired critical data

includes specific locations, associated site location micro-environmental landform, cultural features found and quantity, investigator, and comments. This prescribed assembly of cultural heritage baseline data will provide reference, at-a-glance information, and a means to interpret or evaluate the data, particularly in relation to site variables, site locations or density, and significance.

## FIRST NATIONS CONCERNS

The original Archaeological Overview Assessment (Eldridge et al, 1995) was a minor component of the Bulkley LRMP and encompassed First Nations did not feel that participation in those processes was appropriate. This was partly due to First Nations' concerns that consultation would prejudice aboriginal rights and treaty negotiations, partly due to lack of funding for responding realistically to the planning process, and partly due to conceptual differences in regard to lands and resources planning.

Subsequently, communication mechanisms were instituted through treaty negotiations, as well as the various *Forest Practice Code* policies concerning consultation and recognition of cultural heritage resources, and other efforts that moved communication issues forward. Consultation between the Ministry, industry representatives, and First Nations has become routine, both formally and informally, and infrastructure to deal with the process has grown on all sides, however, First Nations still lack necessary capacity.

Central to the cultural heritage consultation process is open dialogue of forest development on traditional territories; with the majority of these territories having seen or soon seeing significant forest development. There is a widespread feeling that despite consultation communications, cultural heritage resources are receiving minimal respect and consideration. Over the course of this project, various First Nation surveyors and others often stated their informal perspectives concerning their cultural heritage and forestry developments; when all was said and done, four general themes were visible. Discussion often revolved around the lack of general funding, training and capacity to manage the resources on their territories in relation to forest development activities. They perceive the Ministry of Forests, the forest industry companies, and archaeology industry as well-funded, whereas the natives get to participate in a minor consultation role. They see it as a negative drain, as well as demeaning to their culture.

First Nations also question why archaeologists are brought into the country to provide interpretation and values such as the significance to their local traditional culture. The archaeological process of using impersonal dissection of traditional use activities on the land is insensitive and seen as degrading to their culture and themselves as First

Peoples, who over the last thirty years have put energetic effort into describing their culture in terms that western culture thinking people might understand.

Another theme relating to cultural perspective is their questioning of how the Ministry of Forests can be administering the logging and other forest development activities, on the one hand, while at the same time administering the potential or real impacts to First Peoples' traditional cultural activities on the land. In this regard, they see a conflict of interest. A specific example discussed was the logging development around McDonell Lake, which is generally known to have been a center of cultural activity.

Another concern relates to employment opportunities, the lack of funding, and their ancient cultural history. The challenge they see is to increase awareness and also to increase their involvement in developing their own inventory, then sharing their traditional knowledge in a relevant and meaningful method that serves their needs, as well as the forest industry as a whole. From their perspective, this would provide a working relationship of equals, and not a sense of being on a lower step of a hierarchical we-they relationship. Nevertheless, a clear solution to this was seen as altering communication and the relationship between the Native communities and those making land and resources decisions.

There is also general misunderstanding regarding potential and known archaeological sites in relation to traditional use sites – that is to say, traditional use sites may have higher value and significance than archaeological sites. These thoughts are often interwoven with economic uncertainties, connections with the place, and quality of life issues relating to development of their territories.

Traditional use sites represent both a conceptual and tangible value in cultural traditions. Conceptually, they denote or symbolize a connection between people and place on an intangible level, though they also represent tangible traditional activity. Although these sites often lack the physical evidence of remains that define archaeological sites, they typify geographical areas used by themselves or ancestors for culturally significant activity (Carlson & Mitchell, 1997). Depending upon the presence of physical remains, a traditional site may or may not be an archaeological site. This distinction is very sensitive to many First Nations.

It generally does not appear that many traditional use sites, either from recent memories or oral traditions, and ethnographically referenced areas have been surveyed, investigated or recorded in the TSA. This approach, known as ethnoarchaeology, involves survey and investigation of site areas known to have been used through oral histories, local native residents, or ethnographic literature. Allbright reports that in areas where researchers have focused on examining this information, evidence of earlier occupation or use is almost always found and recorded (Allbright, 1987).

The Wet'suwet'en have completed a Traditional Use Study (TUS) project with the database and map presenting valuable archaeological and cultural information. The on-

going Wet'suwet'en participation with the Landscape Unit Planning (LUP) process has also documented invaluable traditional knowledge related to land use and cultural heritage. Wet'suwet'en surveyors and elders are also involved in forestry operational planning consultations, which are accommodated through a protocol agreement.

The Gitxsan with territories in the northern and south-westerly portions of the TSA have been and are involved in the ongoing consultation process. A Gitxsan TUS project, organized on a watershed basis, is nearing completion, though the general status at this time is unknown. They have been involved in GPSing trails, traditional sites and features that exist on their territories in the northern area of the TSA.

The Nat'oot'en in the eastern and northern portion of the TSA have participated in both formal and informal traditional use site consultations, both in the field and through meetings. Though a Traditional Use Study has not yet been funded, some Nat'oot'en Clan members were trained in GPS work and participated recently in the documentation of trails, traditional use areas, and other heritage features.

First Nations information data gaps are varied in the TSA. As noted above, Wet'suwet'en information is available; however, sensitive data is not readily available as it remains in the WCHID database. Both Gitxsan, and Nat'oot'en traditional use information is currently limited in terms of availability and applicability. This situation is difficult to manage for when timely cultural heritage information is needed for both forest sector planners and First Nation consultants.

## CULTURAL HERITAGE RESOURCES SUMMARY

In reviewing the previous archaeological investigations, it was noted that twenty surveys, 1995 overview, and the Wet'suwet'en TUS have been conducted in the TSA, while a number of refined overviews and pertinent studies are adjacent to the study area. Effectively constraining the 1995 AOA potential model is the lack of precise criteria or predictor variables and the problematic uniform application of the model in the study area. The model foundation is fragile and it is not user friendly in computer based GIS applications. Archaeological survey coverage in the TSA is small and skewed, with the majority of sites clustered on the Bulkley River and on the shorelines of Babine and Nilkitkwa Lakes, reflecting a portion of the cultural geography. Survey information, particularly concerning site types, is weak overall. Limited traditional use study and site information are available, while ethnographic information needs to be extracted from the literature.

In summarizing First Nations concerns, the prevalent feeling is that despite the current consultation mechanism, cultural heritage receives minimal consideration and respect. Informal thoughts include the Ministry being in conflict with administration and implementation of both timber development and cultural heritage conservation on the same landbase at the same time. Archaeologists are imported with no sense of traditional cultural realities. The lack of general funding, training and capacity hamper First Peoples realistic participation in the AIA process. Overriding though, and connected to all specific concerns from their cultural perspective, is that their participation could be worked in a hand to hand approach, with their involvement directed to a positive meaningful management structure, rather than being in a culturally subsumed position that is a continuation of the status that has been applied to them since Europeans came and resettled their lands.

## RECOMMENDATIONS

Is the information and process in place to adequately manage cultural heritage resources in the TSA, given the existing legislation, higher level plans and consultation protocols? This is the primary question considered, and the following recommendations are directed to complement the management of cultural heritage resources in the TSA. Application of these answers focus on both the strategic and operational levels.

In regards to the strategic level of planning, it is suggested that the Ministry of Forests and First Nations in the TSA develop a collaborative process, whereby traditional knowledge, particularly that possessed by the elders, be documented and formatted to facilitate its application to forest management planning. This process could also include past information previously documented such as ethnographic facts, commissioned evidence and the court transcripts that resulted from Delgamuukw. This effort, by no means small, could include an information acquisition and compilation stage, followed by a tracking system to allow alterations and project longevity, and a mappable product. Design of the project could be enhanced if the Ministry and First Nations are clear as to the questions that will be answered before entering into this venture. An example would be, that while the forest sector and First Nations appreciate the past, often dramatically different values are placed on it, sometimes leading to confounding situations. Given the situation of the tragedies of epidemics, the environmental modifications, and the assimilation processes that have occurred locally, and accordingly, disrupted the succession of traditional knowledge, and also in light of the archaeological and traditional use sites already lost, First Nations perspectives considering the significance of sites, could be important.

The first operational recommendation is that the current known cultural heritage resources be compiled in a data base format that is easily evaluated and can interface

between both aboriginal culture and the timber harvesting land base. Archaeological inventory surveys need to be funded and directed to prioritized forest development planning status areas, thereby providing certainty and timely approvals. It is suggested that funding be provided for cultural heritage survey training that focuses on First Nation members, allowing them to investigate their own culture. Cultural heritage and forestry are at a decisive point in history; clear solutions that all people can live with, will build strong and healthy communities.

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**Background Paper** **BP-459E**

# ABORIGINAL TITLE: THE SUPREME COURT OF CANADA DECISION IN *DELGAMUUKW* v. *BRITISH COLUMBIA*

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# ABORIGINAL TITLE: THE SUPREME COURT OF CANADA DECISION IN *DELGAMUUKW* v. *BRITISH COLUMBIA*

## INTRODUCTION

In December 1997, the Supreme Court of Canada issued a groundbreaking ruling containing its first definitive statement on the content of Aboriginal title in Canada. The decision in *Delgamuukw* v. *British Columbia*[1] also describes the scope of protection afforded Aboriginal title under subsection 35(1) of the *Constitution Act, 1982*; defines how Aboriginal title may be proved; and outlines the justification test for infringements of Aboriginal title.

This paper provides a summary review of selected noteworthy findings in the Supreme Court decision on Aboriginal title. The review is preceded by background information on common law Aboriginal title and the constitutionalization of Aboriginal rights by subsection 35(1) of the *Constitution Act, 1982*, concepts that meet in the *Delgamuukw* ruling. The prior judgments of the British Columbia courts are also briefly canvassed.

## BACKGROUND

### A. Pre-*Delgamuukw* Definitions of Aboriginal Title

British and Canadian courts have sought to define the nature of the legal interest in the land of Canada's Aboriginal peoples for many years. Under now long-established general principles developed in the case law, the Aboriginal interest in land may be surrendered or alienated only to the federal Crown, at which point it passes to the provincial Crown (assuming surrender outside the territories) as an unencumbered Crown title.

Of more immediate relevance, the courts had, by the 1970s, begun to acknowledge the existence of Aboriginal legal rights in the land other than those provided for by treaty or statute. In particular, the 1973 decision of the Supreme Court of Canada (the Court) in

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(1) [1997] 3 S.C.R. 1010.

*Calder* v. *The Attorney General of British Columbia*[2] ruled that "Indian title"[3] was a legal right, independent of any form of enactment, and rooted in Aboriginal peoples' historic "occupation, possession and use" of traditional territories. As such, title existed at the time of first contact with Europeans, whether or not it was recognized by them.

Although some subsequent case law provided a certain amount of guidance as to how the existence of this common law Aboriginal title might be established,[4] it was less than fully informative as to the scope or content of title. In the 1984 case *Guerin* v. *The Queen*,[5] four members of the Court described it as a unique interest in land "best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered." In its 1988 decision in *Canadian Pacific Ltd.* v. *Paul*,[6] the Court affirmed that its analysis of Aboriginal title to that point led to the "inescapable conclusion ... that the Indian interest in land is truly *sui generis* [the only one of its kind]. It is more than the right to enjoyment and occupancy, although, ... it is difficult to describe what more in traditional property law terminology."

### B. Section 35 Interpretation

The constitutionalization of Aboriginal rights by subsection 35(1) of the *Constitution Act, 1982* created a new legal framework for addressing longstanding Aboriginal claims, including claims to Aboriginal title. Because the provision recognizes and affirms, but does not define, the "existing Aboriginal and treaty rights" of the Aboriginal peoples of Canada, the task of determining the nature and scope of these rights has fallen to the courts.[7]

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(2) [1973] S.C.R. 313.

(3) It is only relatively recently that the courts ceased using the term "Indian" - appearing in subsection 91(24) of the *Constitution Act, 1867* and the *Indian Act* - as both subject and descriptor, in favour of the more inclusive "Aboriginal people(s)" and "Aboriginal." The term "Aboriginal" refers to the original inhabitants of a territory. Section 35 of the *Constitution Act, 1982*, defines the "Aboriginal peoples of Canada" to include Indian, Inuit and Métis.

(4) See, in particular, the Federal Court of Canada (Trial Division) decision in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, which set out cumulative criteria relating to Aboriginal title: [1980] 1 F.C. 518, additional reasons at [1981] 1 F.C. 266.

(5) [1984] 2 S.C.R. 335.

(6) [1988] 2 S.C.R. 654.

(7) Parliamentary Research Branch publications providing a more comprehensive review of Aboriginal rights issues are *Aboriginal Rights* by Jane May Allain, Current Issue Review 89-11E, *Aboriginal Fishing Rights: Supreme Court Decisions* by Jane May Allain, Background Paper 428E, October 1996.

The Court's section 35 Aboriginal rights decisions prior to *Delgamuukw* largely involved Aboriginal fishing rights. General interpretive principles stated in the Court's groundbreaking 1990 decision, *Sparrow* v. *R.*,[8] and refined in subsequent rulings through 1996[9] include the following:

- The purposes of subsection 35(1) are to recognize the prior occupation of North America by Aboriginal peoples, and to reconcile that prior presence with the assertion of Crown sovereignty;
- In subsection 35(1), the term "existing" refers to rights that were "unextinguished" in 1982, *i.e.*, not terminated or abolished;
- Subsection 35(1) rights may limit the application of federal and provincial law to Aboriginal peoples, but are not immune from government regulation;
- The Crown must justify any proven legislative infringement of an existing Aboriginal right;
- Aboriginal rights may be defined as flowing from practices, traditions and customs that were central to North American Aboriginal societies prior to contact with Europeans;
- In order to be recognized as Aboriginal rights, such practices and traditions must — even if evolved into modern form — have been integral to the distinctive Aboriginal culture;
- Subsection 35(1) protection of Aboriginal rights is not conditional on the existence of Aboriginal title or on post-contact recognition of those rights by colonial powers;
- Aboriginal title is a distinct species of Aboriginal right;
- Self-government claims are subject to the same analytical framework as other Aboriginal rights claims;[10]
- Aboriginal rights cases are to be adjudicated by the application of principles to facts specific to each case rather than on a general basis;

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(8) [1990] 1 S.C.R. 1075.

(9) These include, notably, the "trilogy" of B.C. commercial fishing rights decisions (*R.* v. *Van der Peet*, [1996] 2 S.C.R. 507; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723) as well as Quebec fishing rights cases (*R.* v. *Côté*, [1996] 3 S.C.R. 139, *R.* v. *Adams*, [1996] 3 S.C.R. 101).

(10) See *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821, a case raising self-government issues in relation to high-stakes gambling.

- Courts should approach the rules of evidence in Aboriginal rights matters, and interpret the evidence presented, conscious of the special nature of Aboriginal claims and of the evidentiary difficulties associated with proving a right or rights originating when there were no written records.

As outlined below, the land issues raised in the *Delgamuukw* case provided an opportunity for the Court to apply and adapt these principles to Aboriginal title as a "distinct species" of constitutional Aboriginal right.

## PRIOR PROCEEDINGS

### A. The Claim

In 1984, 35 Gitxsan and 13 Wet'suwet'en Hereditary Chiefs instituted proceedings against the Province of British Columbia. They claimed, both individually and on behalf of their respective Houses, ownership (unextinguished Aboriginal title) and resulting jurisdiction (entitlement to govern by Aboriginal laws) over separate portions of territory in northwest British Columbia totalling 58,000 square kilometres. The plaintiffs acknowledged the underlying title of the Crown to these lands, but asserted that their claims constituted a burden upon that title. Alternatively, the plaintiffs claimed unspecified Aboriginal rights to use the territory. Compensation for lost lands and resources was also sought.

The province counter-claimed, arguing that the plaintiffs had no right or interest in the land, and that their claim for compensation ought to be against the federal government.

### B. The British Columbia Courts

#### 1. Decision at Trial

In March 1991, Chief Justice McEachern of the Supreme Court of British Columbia issued a sweeping and highly controversial ruling[11] dismissing the plaintiffs' claims to Aboriginal title, self-government and Aboriginal rights in the territories at issue. Reduced to its essence, the 400-page decision:

- considered the concept of title as interchangeable with that of Aboriginal rights, and characterized the latter as limited to those "arising from ancient occupation or use of land, to

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(11) (1991), 79 D.L.R. (4th) 185.

hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them";

- held that prior to the *Constitution Act, 1982*, Aboriginal rights existed at the pleasure of the Crown and could be extinguished at will provided the intention to do so was clear;

- found that Aboriginal rights (title) had been extinguished in the claimed, unceded territory at issue by pre-Confederation enactments intended to convey unburdened title to settlers and thus inconsistent with subsisting Aboriginal title;

- gave little weight to the plaintiffs' evidence in the form of oral history of attachment to the land;

- held that title to the land became vested in the Imperial Crown upon its assertion of sovereignty over the mainland colony of British Columbia in the early or mid 19th Century, and indicated that, in any event, the plaintiffs' post-contact ancestors had not exercised jurisdiction over the territory even before that assertion;

- ruled that since its entry into Confederation in 1871, the Province of British Columbia had title to the soil of the province, the right to dispose of Crown lands unburdened by Aboriginal title, and the right to govern the province within the terms of section 92 of the *Constitution Act, 1867*;

- acknowledged that the provincial Crown did have a fiduciary obligation to permit the plaintiffs, subject to the general law of the province, to use unoccupied Crown lands for subsistence purposes until such time as they were put to another purpose, and not to limit such use arbitrarily;

- dismissed the province's counterclaim.[12]

Under Chief Justice McEachern's reasoning, the Aboriginal title and Aboriginal right of self-government claimed by the plaintiffs had been erased over a century previously, and as such were precluded from qualifying as "existing" rights under subsection 35(1) of the *Constitution Act, 1982.* His ruling was seen by many as seriously at odds with Supreme Court of Canada rulings dealing with constitutional Aboriginal and treaty rights, and was also criticized for its apparent bias in both tone and analytic approach.[13]

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(12) The action against the federal Crown, which had been joined as a defendant for procedural reasons, was also dismissed.

(13) For a more exhaustive review of the reasons for decision of the B.C. Supreme Court, see the Parliamentary Research Branch publication prepared by Wendy Moss and entitled *B.C. Aboriginal Title Case (Delgamuukw* v. *The Queen)*, Background Paper 258E, May 1991.

### 2. Decision on Appeal

The scope of the trial court's negative findings was somewhat attenuated by the June 1993 decision of the British Columbia Court of Appeal.[14] In it, the five members of the appellate panel were unanimous in rejecting McEachern J.'s finding of "blanket extinguishment" of all the plaintiffs' Aboriginal rights by colonial or provincial enactments,[15] but differed as to the merits of other elements of his decision.

In the end, a 3-2 majority of the Court of Appeal allowed the appeal only on the above point, issuing a declaration that the Gitxsan and Wet'suwet'en "have unextinguished non-exclusive aboriginal rights, other than a right of ownership or a property right," which were protected by the common law and, since 1982, by subsection 35(1) of the *Constitution Act, 1982,* in a large portion of the area claimed. The precise scope, content and consequences of these rights of use and occupation were not defined by the majority, which referred those issues back to the trial judge for determination, while recommending that the parties resolve their differences through consultation and negotiation. All other aspects of the plaintiffs' claim were dismissed. In the view of the dissenting justices, on the other hand, the plaintiffs' Aboriginal rights to Aboriginal title or to land and their rights of self-government had not been extinguished by the assertion of either British or Canadian sovereignty. They, too, urged settlement of outstanding issues by negotiation and political accommodation.

## C. The Treaty Process

In March 1994, the Gitxsan and Wet'suwet'en and the Province of British Columbia were granted leave to appeal and cross-appeal the decision of the British Columbia Court of Appeal to the Supreme Court of Canada. The parties then requested and obtained an adjournment of proceedings to enable them to seek a negotiated treaty settlement. In February 1996, the Province of British Columbia suspended negotiations with the Gitxsan owing to "fundamental differences ... over aboriginal rights." The province's Minister of Aboriginal Affairs considered there was "little chance of progress in negotiating ... with the Gitxsan without

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(14) (1993), 104 D.L.R. (4th) 470.

(15) It is worth noting that the blanket extinguishment argument advanced before the trial judge on behalf of the Social Credit administration was abandoned on appeal by the newly elected government of the New Democratic Party.

further direction from the Supreme Court of Canada."[16] Subsequent to this breakdown, litigation was resumed. Despite some progress in their negotiations with the province to that point, the Wet'suwet'en remained parties to the proceedings.

## *DELGAMUUKW* v. *BRITISH COLUMBIA*

The Court heard arguments in the case on 16 and 17 June 1997 and released its decision on 11 December 1997. Although the six members of the Court taking part in the judgment[17] were unanimous in their conclusions, distinct sets of reasons issued by Lamer C.J. (Cory, McLachlin and Major JJ. concurring) and La Forest J. (L'Heureux-Dubé J. concurring, with McLachlin J. in substantial agreement) differed somewhat as to the appropriate methodology to be used for proving Aboriginal title. Only the former set of reasons is considered below.

### A. Preliminary Issues Requiring New Trial (par. 73-108)[18]

Lamer C.J. considered that the Court was precluded from dealing with the merits of the Gitxsan and Wet'suwet'en claims for two reasons. First, the individual claims originally brought by each House had been amalgamated into two communal claims, but had not been formally amended. Because this procedural defect was prejudicial to the province's rights as a litigant, the correct remedy was a new trial.

Second, a new trial was necessary so that the complex and voluminous factual evidence in the case could be assessed in accordance with principles having specific application to Aboriginal claims such as those of the Gitxsan and Wet'suwet'en.[19] In essence, these

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(16) Ministry of Aboriginal Affairs, *News Release*, "Province Suspends Treaty Negotiations with Gitxsan [*sic*]," 1 February 1996, available *via* ministry web site at http://www.aaf.gov.bc.ca/aaf/news/1996/fe0196nr.htm.

(17) Sopinka J. heard arguments in the case but did not take part in the judgment.

(18) Par. 1 through 72 introduce the claim, provide a summary historical overview of the Gitxsan and Wet'suwet'en people, and review the judgments of the B.C. courts.

(19) See heading "Section 35 Interpretation" (p. 2).

principles require trial courts to adapt the rules of evidence in light of difficulties of proof intrinsic to the adjudication of Aboriginal claims,

> so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past ... [and which] play a crucial role in the litigation of aboriginal rights (par. 84).

Lamer C.J. found that the trial judge's treatment of the various forms of oral history presented by the plaintiffs to prove traditional occupation and use of the territories claimed had failed to satisfy these principles which, as he noted, had been formulated subsequent to the trial decision.[20]

### B. Aboriginal Title in Canada (par. 109-139)

The Chief Justice disagreed with both parties' characterization of Aboriginal title, that of the Gitxsan and Wet'suwet'en for being too broad, that of the province for being too narrow. In his view, the content of Aboriginal title "lies somewhere in between" (par. 111).

#### 1. Features of Aboriginal Title (par. 112-115)

Lamer C.J. identified the *sui generis* [*i.e.*, unique] nature of Aboriginal title as the unifying principle underlying its various dimensions. These are:

- inalienability, in that lands held pursuant to Aboriginal title may be transferred or surrendered only to the Crown: this does not mean, however, that Aboriginal title "is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests" (par. 113);

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(20) For instance, the implications of the trial judge's failure to give one form of oral history any independent weight, or of casting doubt on its authenticity, would be that such histories "would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the [Court's] express instruction to the contrary" (par. 98). Similarly, his expectation that a second form would furnish conclusive or precise evidence of pre-contact Aboriginal activities would "be almost an impossible burden to meet" (par. 101). Finally, the effect of the trial judge's rationale for excluding a third form of evidence based on oral history "may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history" (par. 106).

- source, in that Aboriginal title arises from (1) occupation of Canada by Aboriginal peoples prior to the *Royal Proclamation of 1763*: under common law principles, the physical fact of occupation is proof of possession in law; and (2) the relationship between common law and pre-existing systems of Aboriginal law;

- communal nature, in that Aboriginal title is a collective right to land held by all members of an Aboriginal nation.

These features cannot be explained fully under either common law rules of real property, or property rules of Aboriginal legal systems.

### 2. Content of Aboriginal Title (par. 116-132)

#### a. Includes right to exclusive use/occupation of the land for various purposes (par. 116-124)

The Chief Justice cited three grounds for rejecting the province's restriction of Aboriginal title to the right to use the land only for activities arising from practices or traditions that were integral to the distinctive culture of the group claiming title. First, the Canadian case law in the field made it clear that Aboriginal title is not limited to such uses. Second, legal principles governing the Aboriginal interest in reserve lands and in lands held pursuant to Aboriginal title are the same and, under the *Indian Act*, the uses and benefits to which reserve lands can be put are very broad, and in no way confined as suggested. Third, the *Indian Oil and Gas Act* providing for oil and gas exploration on surrendered reserve lands presumes that the Aboriginal interest in land includes mineral rights, which are themselves included in Aboriginal title. Lands held pursuant to Aboriginal title should be capable of the same forms of non-traditional exploitation.

#### b. Land use must be compatible with the nature of attachment to the land (par. 125-132)

Lamer C.J. described limits on the content of Aboriginal title as reflecting its *sui generis* nature. In relation to prior occupation as the source of Aboriginal title, the applicable law seeks both to determine historic rights and "to afford legal protection to prior occupation in the present day" in "recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time" (par. 126). Since continuity of relationship also applies to the future, lands subject to Aboriginal title cannot be put to uses that are "irreconcilable with the nature of the occupation of that land and the relationship that the

particular group has had with the land which together have given rise to aboriginal title in the first place" (par. 128). For example, a group successfully claiming Aboriginal title to land that was occupied as a hunting ground may not use the land in such a way as to destroy its value for hunting.

In the Chief Justice's view, these considerations are also relevant to the inalienability of lands held pursuant to Aboriginal title, in that alienation would terminate both entitlement to occupy the land and any special relationship with it. Inalienability suggests that the lands in question are more than a commodity. Rather, they hold inherent value for the community with Aboriginal title and cannot be put to uses by that community that would destroy that value.

Significantly, Lamer C.J. emphasized that this general limitation on the use of lands does not restrict land use to traditional activities, since this would amount to a "legal straitjacket" on those having a "legitimate legal claim to the land." That is, a full range of uses of the land may be undertaken, subject to the "overarching limit" arising from the special nature of the Aboriginal title in the land in question (par.132).

The Chief Justice also noted that nothing in this approach precludes the surrender to the Crown of lands held pursuant to Aboriginal title; in fact, such lands must be surrendered and converted into non-title lands if Aboriginal peoples wish to use them in a manner incompatible with their title.

### 3. Aboriginal Title and Section 35 (par. 133-139)

*Delgamuukw* confirmed that common law Aboriginal title, recognized as a common law Aboriginal right prior to 1982, was "constitutionalized ... in its full form" by section 35 of the *Constitution Act, 1982* (par. 133).[21]

Lamer C.J. reiterated the Court's previous findings describing Aboriginal title as distinct from other Aboriginal rights under subsection 35(1) "because it arises where the connection of a group with a piece of land was of a central significance to their distinctive culture" (par. 137). The degree of connection with the land is pivotal in determining the scope of constitutional Aboriginal rights claimed. At one end of the spectrum of rights are those practices or traditions integral to a distinctive Aboriginal culture, but where the use and occupation of land

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(21) The Chief Justice further noted that constitutionalization of common law Aboriginal rights does not signify that these rights exhaust the content of subsection 35(1) (par. 136).

on which the activities occur do not support a claim of Aboriginal title. In the middle, such traditional activities may be intimately related to a specific piece of land, so that a group is able to demonstrate a "site-specific" right to engage in those activities, but not to establish title to that land. Both forms of activity are protected by subsection 35(1). Finally,

> At the other end of the spectrum, there is aboriginal title itself. ... [A]boriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. ... What aboriginal title confers is the right to the land itself. (par. 138) (emphasis added)

### C. Proof of Aboriginal Title (par. 140-159)

The Chief Justice noted that assessment of Aboriginal title claims required adaptation of the Court's existing "test" for Aboriginal rights claims relating to activities on the land. Aboriginal title, on the other hand, is a right to the land, which may itself be used for activities that, being "parasitic on the underlying title," need not be individually protected by subsection 35(1) (par. 140). Both tests, however, shared broad similarities.

#### 1. The land must have been occupied prior to sovereignty (par. 144-151)

##### a. Applicable Time Frame (par. 144-145)

Lamer J. concluded that the period prior to contact, used in adjudicating Aboriginal rights claims to engage in activities, is an inappropriate time frame in Aboriginal title cases:

- Because Aboriginal title is a burden on the Crown's underlying title, which was gained only upon the Crown's assertion of sovereignty, it follows that Aboriginal title crystallized at that time;
- Under the common law, the act of occupation or possession suffices to ground Aboriginal title without proof that the land was integral to Aboriginal society prior to contact;
- The date of sovereignty can be established with greater certainty than the date of contact;

Later circumstances may be relevant to title, for instance in cases of dispossession of traditional lands occurring after sovereignty.

**b. Occupancy (par. 146-151)**

To Lamer C.J., both the common law and the Aboriginal perspective on land, including but not limited to Aboriginal legal systems, are relevant for purposes of establishing occupancy. With respect to the former, the fact of physical occupation proves legal possession of the land, which in turn grounds title to it. Such occupation can be established in many ways, including construction, cultivation and resource exploitation; when assessing whether occupation is sufficient to ground title, factors such as the size, manner of life, resources and technological capacity of the claiming group should be considered. Furthermore, since the requirement of pre-sovereignty occupation is sufficient to establish the central significance of the land to the culture of the claiming group, the test for Aboriginal title need not explicitly include the latter element.

**2. In certain cases, there must be continuity between present and pre-sovereignty occupation (par. 152-154)**

In recognition of the potential scarcity of conclusive evidence of pre-sovereignty occupation, the Chief Justice stipulated that a group claiming Aboriginal title may prove such occupation through evidence of present occupation, supplemented by evidence of continuity. The claiming group need not establish "an unbroken chain of continuity," but rather "substantial maintenance of (their) connection" with the land (par. 153). Provided this substantial connection has been maintained, a claim to Aboriginal title need not be precluded by alterations in the nature of the occupation between sovereignty and the present.

**3. Occupation must have been exclusive at sovereignty (par. 155-159)**

Lamer C.J. noted that this requirement, like occupation, is proved with reference to both common law and Aboriginal perspectives. Thus, notwithstanding the common law principle of exclusivity linked to fee simple ownership, the test for exclusive occupation in Aboriginal title claims must consider the context of the Aboriginal society in question at sovereignty. In this light, exclusive occupation can be demonstrated, depending on the circumstances, even if other Aboriginal groups were present on or frequented the lands claimed. In addition, the exclusivity requirement need not preclude the possibility of joint title shared between two or more Aboriginal nations, for instance where more than one group shared a

particular piece of land, recognizing each other's entitlement to the exclusion of others. Moreover, evidence of non-exclusive occupation may still establish shared, site-specific Aboriginal rights short of title, for example on lands adjacent to those subject to a title claim and shared for hunting by a number of groups.

## D. Justification of Infringements of Aboriginal Title (par. 160-169)

### 1. General Principles (par. 160-164)

#### a. The infringement must further a compelling/substantial legislative objective (par. 161)

The Chief Justice reiterated his view that substantial legislative objectives are those directed at the purposes underlying the constitutionalization of Aboriginal rights, *i.e.*, recognition of Aboriginal peoples' prior occupation of North America, and reconciliation of that occupation with the Crown's assertion of sovereignty. The latter purpose is particularly relevant at the justification stage: because Aboriginal societies are part of a broader community over which the Crown is sovereign, limitations on Aboriginal rights will sometimes be justified in the pursuit of objectives of importance to the community as a whole, and are a necessary part of the reconciliation of Aboriginal societies with the broader community.

#### b. The infringement must be consistent with the fiduciary relationship (par. 162-164)

The nature of the Crown's fiduciary duty toward Aboriginal peoples depends, in Lamer C.J.'s view, on the legal and factual context at issue. While that duty may sometimes demand that Aboriginal interests be given priority, in other contexts it may involve further questions such as whether the infringement is minimal, whether fair compensation is available, and whether the Aboriginal group has been consulted. The degree of scrutiny of infringing measures required by the fiduciary duty will also vary depending on the nature of the Aboriginal right at issue.

## 2. Application to Aboriginal Title (par. 165-169)

### a. A broad range of legislative objectives may justify infringement (par. 165)

Lamer C.J. held that most of these objectives relate to reconciling Aboriginal peoples' prior occupation with the assertion of Crown sovereignty, and thus, to the situation of Aboriginal societies within the broader Canadian community:

> (T)he development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. (par. 165)

The question of whether an infringing measure is related to such objectives will require assessment on a case by case basis.

### b. The nature of the fiduciary duty is determined by the nature of the title (par. 166-169)

The Chief Justice pinpointed three aspects of Aboriginal title as relevant in this respect. First, the right to exclusive occupation and use of the land influences the degree of scrutiny of infringing actions. For instance, a fiduciary duty requiring that Aboriginal title be given priority does not entail an absolute requirement, but rather a government demonstration that the process of resource allocation and the actual allocation reflect the prior interest of the holders of Aboriginal title. Examples of such a demonstration include accommodating Aboriginal participation in resource development, conferral of fee simple or resource exploitation authorizations that reflect prior occupation, reduction of economic barriers to Aboriginal uses of their lands, and so forth. This issue may involve an assessment of the various interests at stake in the resources; difficulties in determining the value of the Aboriginal interest in the land may also be expected.

Second, the fact that Aboriginal title includes the right to choose the uses of land suggests that the fiduciary relationship may be satisfied by involving Aboriginal titleholders in decisions respecting their lands. While the Crown always has a duty of consultation, the nature and scope of that duty vary with the circumstances. Lamer C.J. stressed that even in rare cases

of minor infringement, "when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation" (par. 168).

Third, as a result of the "inescapably economic aspect" of Aboriginal title, fair compensation will ordinarily be required to fulfil the Crown's fiduciary duty when Aboriginal title is infringed. The amount of compensation will vary according to the nature of the Aboriginal title in question, the severity of the infringement, and the extent to which Aboriginal interests are accommodated.

### E. Right of Self-Government (par. 170-71)

The Chief Justice observed that the need for a new trial precluded the Court from dealing with this aspect of the plaintiffs' claim. Furthermore, under the Court's previous case law, self-government claims "cannot be framed in excessively general terms" as had been done in the present case (par. 170).

### F. British Columbia's Cross-Appeal (par. 172-183)

Lamer C.J. rejected the province's claim that it had enjoyed the power to extinguish Aboriginal rights, including Aboriginal title, from the time it joined Confederation in 1871 until the entrenchment of subsection 35(1) in the Constitution. His reasons include findings that:

- Subsection 91(24) of the *Constitution Act, 1867* gave the federal government exclusive legislative authority in relation to "Indians, and Lands reserved for Indians," which encompasses the jurisdiction to legislate in relation to Aboriginal title, including its extinguishment;

- Subsection 91(24) also protects a "core of Indianness" that falls within the scope of federal jurisdiction and encompasses the whole range of Aboriginal rights protected by subsection 35(1): laws purporting to extinguish those rights are thus beyond the provinces' legislative authority;

- Although, under the terms of section 109 of the *Constitution Act, 1867*, underlying title to lands in the province vested with the provincial Crown, the provision makes provincial

ownership subject to "any Interest other than that of the Province" in those lands: Aboriginal title is such an interest;

- Provincial laws of general application, *i.e.*, which do not single out Indians for special treatment, do apply to Indians and Indian lands, but may not have the effect of extinguishing Aboriginal rights, in part because such laws would be unable to satisfy the "clear and plain intent" standard for the extinguishment of rights without exceeding the province's jurisdiction;

- Section 88 of the *Indian Act* incorporates by reference provincial laws of general application which would not otherwise apply to Indians, but does not allow these laws to extinguish Aboriginal rights: not only does the provision not contain the required "clear and plain intent," but its explicit reference to treaty rights suggests a clear absence of intention to undermine Aboriginal rights.

### G. Conclusion and Disposition (par. 184-186)

Lamer C.J. allowed the appeal in part, dismissed the province's cross-appeal, and ordered a new trial. He explicitly did not encourage a resumption of litigation, however, advising the parties to settle their dispute through negotiations instead. In the Chief Justice's view, "[t]hose negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith." Negotiated settlements "with good faith and give and take on all sides" would, he concluded, achieve the reconciliation purpose of subsection 35(1) (par. 186).

## COMMENTARY

The Supreme Court of Canada's *Delgamuukw* decision was expected to have significant, if undetermined, repercussions on the future negotiation and settlement of comprehensive land claims based on Aboriginal title, land use policy and Aboriginal title litigation in those regions of the country where traditional Aboriginal lands have not been ceded by treaty. These include not only most of British Columbia, but also, for example, parts of Quebec and Atlantic Canada.

*Delgamuukw* continues to represent a momentous affirmation of the existence and constitutionally protected status of Aboriginal title in Canada. It seems important, however, to underscore the fact that the Court did not rule on the merits of the Gitxsan and Wet'suwet'en

Aboriginal title claim. The effects of its decision are therefore more directive than conclusive. *Delgamuukw* provided government, Aboriginal claimants, and the lower courts with comprehensive new guidelines for the future settlement or litigation of the Gitxsan and Wet'suwet'en and other comprehensive land claims.

In practical terms, the various parties' responses to the *Delgamuukw* decision remain to be fully played out in terms of policy developments, negotiation processes and the frequency of recourse to the judicial system. Given the history of land claim negotiations, the fact that the Court recommended that ongoing land claim disputes be resolved through negotiation offers no assurance that its guidelines will in fact facilitate the negotiation process or preclude litigation in relation to individual claims. On the other hand, the *Delgamuukw* ruling provided a compelling impulse to the parties to reaffirm the treaty process through negotiation.

In short, the *Delgamuukw* decision established an unprecedented theoretical framework that represents the basis for developing the law of Aboriginal title in Canada, rather than the culmination of the law's development. The law of Aboriginal title will continue to evolve as principles of the *Delgamuukw* framework are implemented.

## CHRONOLOGY OF DEVELOPMENTS

The concluding portion of this document lists some noteworthy post-December 1997 developments that are related, directly or indirectly, to the Supreme Court of Canada's *Delgamuukw* ruling.

January 1998

- The British Columbia Treaty Commission (BCTC)[22] urged federal and provincial governments and First Nations to "work together to re-invigorate the treaty process or face

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(22) In B.C., the treaty-making process and governing principles for negotiations were set out in the BC Claims Task Force Report of 1991 and incorporated in the tripartite Treaty Commission Agreement of 1992. In accordance with the terms of the Agreement, federal and provincial statutes were enacted to establish the British Columbia Treaty Commission. The BCTC is responsible for facilitating treaty negotiations in the province, not including the recently concluded Nisga'a negotiations. It accepts First Nations into the treaty making process; assesses when the parties are ready to start negotiations; allocates funding, primarily in the form of loans, to First Nations; monitors and reports on the progress of negotiations; identifies problems and offers advice; and assists the parties in resolving disputes. Two of the BCTC's five Commissioners are appointed by the First Nations Summit, while

the likelihood of increased economic uncertainty through litigation and renewed confrontation." The then Chief Commissioner characterized the *Delgamuukw* decision as "already having a major impact on the B.C. treaty process" in which approximately 50 B.C. First Nations were engaged. He acknowledged both that "[n]ew mandates and approaches, given the complexity of issues facing [the parties], won't happen overnight," and that *Delgamuukw* could be seen by First Nations as "strengthening their positions and lowering the traditional barriers to litigation as an alternative to negotiation."[23]

February 1998

- The BCTC noted that the two levels of government and the First Nations Summit, the Aboriginal party to the creation of the BCTC regime, had agreed to collaborate in identifying changes to the treaty process that might be required by the *Delgamuukw* ruling. In its view, all parties involved recognized that "the Supreme Court left many questions unanswered which are best answered through negotiations. A court may declare aboriginal title to a specific area, but there will still be a need to negotiate jurisdiction and to reconcile aboriginal and non-aboriginal interests."[24]

March 1998

- The federal Minister of Indian Affairs and Northern Development, the B.C. Minister of Aboriginal Affairs and the Grand Chief of the First Nations Summit Task Group announced the anticipated joint review of the B.C. treaty process in light of the *Delgamuukw* ruling, with the principal objective identified as "finding ways to expedite the reconciliation of the interests of Canada, British Columbia and First Nations." The parties also agreed on the need to engage third parties and business leaders in a broader dialogue about the Supreme Court ruling. A senior-level committee was mandated to meet over a two-month period to

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Canada and British Columbia each appoints one. The Chief Commissioner is appointed by agreement among the parties. The present Chief Commissioner, Miles Richardson, began a three-year term in November 1998.

(23) British Columbia Treaty Commission, *News Release*, "Treaty Commission Urges Changes to Safeguard Treaty Process," Vancouver, 28 January 1998. The text of this and other BCTC documents are available online at http://www.bctreaty.net/.

(24) British Columbia Treaty Commission, *Newsletters*, "Supreme Court Decision Underlines Need for Negotiation," Vancouver, February 1998.

examine the decision's impact on the treaty process and to "improve the treaty process to achieve the agreements necessary for economic and social stability in B.C."[25]

- The Confederacy of Nations of the Assembly of First Nations (AFN) adopted resolutions calling, in part, for implementation of *Delgamuukw* principles through reform of federal comprehensive land claims policies, and for the replacement of "offensive" federal laws and policies by measures consistent with the Court's directions in *Delgamuukw*.[26]

April 1998

- The treaty process review commenced, with senior officials for Canada, B.C. and First Nations meeting in two three-day sessions, during which working groups were established on specific issues. Issuing from this round, the participants agreed to recommend an Action Plan to their Principals for review. Topics addressed in this plan included Aboriginal title, accelerated negotiations on certain treaty components, capacity-building, and certainty.[27]

May 1998

- Participants in the annual Business at the Summit forum of First Nations and non-Aboriginal businesspeople acknowledged that the *Delgamuukw* decision had increased uncertainty about investing in B.C. They also, however, saw the ruling as supportive of developing partnerships between Aboriginal and non-Aboriginal communities.[28]

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(25) Government of Canada, Government of British Columbia, First Nations Summit, *News Release*, "Canada, British Columbia and First Nations Agree to a Joint Review of the B.C. Treaty Process," Vancouver, 13 March 1998.

(26) Resolutions 2/98 and 3/98 of 11 March 1998, affirmed in June 1998 by AFN General Assembly Resolution 34/98. All AFN resolutions are available online at http://www.afn.ca/eng_main.htm

(27) Department of Indian Affairs and Northern Development (DIAND), *Backgrounder*, "Increased Federal Government Support for British Columbia Treaty Negotiations," 7 July 1998. The text of this and other documents issued by DIAND are available online at http://www.inac.gc.ca.

(28) Federal Treaty Negotiation Office, "Business Opportunities Abound in Post-*Delgamuukw* Environment," *Treaty News*, June 1998, available online at http://www.inac.gc.ca/pubs/treaty/june98/index.html.

June 1998

- The Leader of the Opposition called on the federal government to enact legislation to end uncertainty resulting from the *Delgamuukw* decision, and establish rules on Aboriginal title.(29)
- In its annual report, the BCTC named the *Delgamuukw* decision as the defining event of 1997-98, and identified some matters that were under discussion in the tripartite review, such as recognition that land, resource and cash issues should be addressed earlier in the treaty process, and the need to improve the current-six stage process. In addition, the BCTC stated that overlapping claims and the implications of *Delgamuukw* for consultation processes and interim measures were also outstanding issues requiring the parties' attention:

> *Delgamuukw* has escalated First Nations' demands for a role in dealings by government over lands and resources within their territories. There are too many First Nations in the process for that to be achieved through treaties alone. Other means must be found. *Delgamuukw* suggests consultation processes become negotiation processes so that interim measures and economic development agreements become treaty building blocks.

The BCTC urged the parties to re-establish the tripartite review process, which was described as being at a standstill owing to B.C.'s decision to engage Canada and the First Nations Summit Task Group in bilateral talks. It further noted that, while nearly all First Nations in the B.C. treaty process preferred negotiation, they also "expect government mandates and approaches to change in response to *Delgamuukw*."(30)

July 1998

- In what was described as the first court case to deal with B.C. land claim issues since *Delgamuukw*, the British Columbia Court of Appeal upheld the denial of an interlocutory injunction to the Kitkatla Band, which had sought to prevent logging on land to which they claim title, pending a trial on the title question. In making its decision, the Court took the position that nothing in the *Delgamuukw* ruling had changed the law relating to injunctions. Of central importance to the Kitkatla Band's case was the scope of the provincial Crown's

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(29) Office of the Leader of the Opposition, *News Release*, "Time to Legislate an End to Delgamuukw Uncertainty," Ottawa, 8 June 1998.

(30) British Columbia Treaty Commission, *Annual Report 1998*, "Challenges - Delgamuukw Decision Defining Event of 1997," Vancouver, June 1998.

obligation to consult in cases where Aboriginal title is asserted but not yet established. The B.C. courts recognized this as a serious issue.(31)

- In keeping with the parties' recognition of the need to address issues related to First Nations' capacity, the federal government announced the formation of a thirteen-person Capacity Panel with representation from Aboriginal communities (interior and coastal), the resource sector, the BCTC and other fields.(32) The role of the Panel is described as

> [looking] at existing programs and, through consultation with industry and First Nation communities, [identifying] capacity enhancement needs. Based on this information, the panel will: (1) make recommendations on how current programs might be readjusted to better fit the needs; (2) ... identify areas where there are gaps between current programs and capacity enhancement needs; (3) ... identify joint opportunities to enhance First Nation capacity to negotiate and implement treaties and manage land and resources; and, (4) ... assess funding requirements for additional capacity initiatives.(33)

The Panel was expected to present its recommendations to the Minister of Indian Affairs and Northern Development by the end of 1998. The federal government indicated that, over the next three to five years, resources would be made available to support initiatives recommended by the Panel; basic financial support to assist First Nation capacity-building would be approximately $3 million per year.(34)

September 1998

- In an Accord Between the Province of British Columbia and The Hereditary Chiefs Of The Wet'suwet'en People, the parties agreed to address issues raised by the *Delgamuukw* ruling and to "reinvigorate" treaty discussions. The agreement includes commitments to work together in resource planning and development and economic development; focus on economic development as a priority for two existing bilateral working groups studying lands and resources and human services; collaborate on job training and development initiatives;

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(31) *Kitkatla Band* v. *British Columbia (Minister of Forests)*, [1999] 2 C.N.L.R. 170. See text under June 1999 heading and associated footnote.

(32) Department of Indian Affairs and Northern Development, *News Release*, "Canada Demonstrates Commitment to Revitalizing Treaty Process," Vancouver, 7 July 1998.

(33) *Backgrounder*, note 27.

(34) *Ibid.*

possibly involve local government and industry in bilateral discussions; and ensure that Canada's fiduciary obligations with respect to activities resulting from the Accord are fulfilled.(35)

- A Reconciliation Agreement Between Her Majesty In Right Of British Columbia And The Hereditary Chiefs Of The Gitxsan was also signed to enable the parties to deal with issues related to the *Delgamuukw* decision. The Agreement provides for three levels of discussion: between B.C. and the Gitxsan on issues such as wildlife and habitat management, forestry, mining and economic development; between Canada and the Gitxsan in areas such as fisheries, capacity-building and compensation; and among B.C., Canada and the Gitxsan on trilateral matters, subject to Canada's agreement to resume treaty discussions on the basis of the Gitxsan framework agreement reached in July 1995 before negotiations were suspended.(36)
- The B.C. government released operational guidelines designed to assist provincial ministries and agencies, particularly in the land and resource sectors, to meet the *Delgamuukw* requirement for consultation of First Nations on proposed Crown land activities that might infringe Aboriginal title. The process does not involve a determination of the existence of Aboriginal title, which must be proved by First Nations. In announcing these guidelines, the provincial Minister of Aboriginal Affairs commented that "[t]his is not the province's comprehensive response to *Delgamuukw*. We will continue to discuss consultation requirements ... with First Nations organizations and the federal government."(37)

October 1998

- The BCTC reported the parties' agreement to continue the tripartite review process on issues including Aboriginal title and certainty, the role of the BCTC, consultation, negotiation financing for First Nations and interim measures. On the last issue, the BCTC reiterated its

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(35) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Agreement Reinvigorates Treaty Discussions with Wet'suwet'en," Smithers, B.C., 14 September 1998. The text of this and other documents issued by the provincial Ministry are available online at http://www.aaf.gov.bc.ca/aaf/.

(36) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Agreement Renews Treaty Discussions with Gitxsan First Nation," Hazelton, B.C., 15 September 1998.

(37) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Province Releases First Nations Consultation Guidelines for Government Staff," Victoria, 29 September 1998. See *Consultation Guidelines* at Ministry website under *Delgamuukw* heading.

view of the importance of negotiated interim measures agreements as a means of balancing interests pending the conclusion of treaty negotiations, and listed recent agreements. The BCTC also commented on challenges associated with negotiating such agreements on land and resource issues, and the parties' recognition of "the importance of coming to arrangements to deal with [these matters] where they are key to the negotiation of treaties."(38)

- The BCTC also noted that both the Nisga'a Final Agreement and the *Delgamuukw* decision signal the importance of resolving overlapping land claims and reported that a number of First Nations had concluded agreements on boundaries or agreed on a process for resolving overlaps, with other agreements pending. In addition, a 1997 First Nations Summit protocol to assist First Nations to resolve overlaps was being studied, while the parties agreed to include the overlap issue in their tripartite review. The BCTC proposed that agreements in principle be signed only if key guidelines in the area of overlapping claims were followed.(39)
- BCTC Commissioners indicated that no B.C. First Nations had officially left the treaty process since the *Delgamuukw* decision, although several were pursuing litigation concurrently.(40)

December 1998

- Based in part on *Delgamuukw*'s affirmation of the economic aspect of Aboriginal title and its assertion that "fair compensation [would] ordinarily be required" for infringements of title, the AFN Confederacy of Nations adopted a resolution calling on the federal and provincial governments to "adopt new treaty mandates that explicitly recognize that they will negotiate fair compensation for past and present infringements of Aboriginal title as a substantive issue in the B.C. treaty process."(41)

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(38) British Columbia Treaty Commission, *Newsletter*, "Interim Measures Keep Peace," Vancouver, October 1998.

(39) *Ibid.*, "Overlap Agreements A Must in Treaty Negotiations."

(40) *Ibid.*, "Commissioners Respond to Questions About Treaty Process."

(41) Resolution 72/98 of 9 December 1998.

January 1999

- The Post-*Delgamuukw* Capacity Panel formed in July 1998 submitted its Final Report to the Minister of Indian Affairs and Northern Development.(42) Focusing on means to expedite negotiations in substantive areas, as well as to address the need for capacity building, the Panel recommended, *inter alia*, that governments offer settlements of land, resources and cash more quickly, where the parties agree; that the parties undertake additional analysis of issues such as the staged implementation of treaty benefits, the usefulness of interim measures, and the sharing of benefits flowing from business arrangements; and that the parties study the possibility of reaching agreements on land, resources, cash and aspects of governance, and deferring other, less pressing issues. In a further key proposal, the Panel recommended the "establishment of a 7 - 9 member, First Nation majority, stand-alone committee to review and recommend proposals for capacity building initiatives, and the utilization of an existing delivery system to maximize efficiencies and minimize administrative costs."(43) The Panel declined to outline criteria for the evaluation of proposals for capacity initiatives, because of its view that such criteria would more appropriately be developed by the proposed committee.

February 1999

- In the context of a conference on "*Delgamuukw*: One Year After," the AFN British Columbia Regional Vice-Chief claimed that the Court's decision had not changed the federal and provincial approach to treaty negotiations. In his view, "[i]t's time for aboriginal people to get organized around *Delgamuukw* and around the fact of our title and then the governments will be compelled to deal with us in a meaningful way." Professor Frank Cassidy, who chaired the conference, was also quoted as stating that federal and provincial governments were using treaty negotiations to undercut *Delgamuukw*.(44)

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(42) The *Post-Delgamuukw Capacity Panel Final Report* is available online *via* the DIAND website.

(43) *Ibid.*, Executive Summary.

(44) Ian Dutton, "B.C. Ignoring Court, Natives Say: Negotiators Don't Recognize Title Despite Delgamuukw, Leader Charges," Victoria *Times Colonist*, 19 February 1999, p. A3.

- Following a joint meeting to discuss outstanding issues associated with the *Delgamuukw* decision, DIAND and the AFN "agreed that the *Delgamuukw* policy review process would be ongoing and inclusive."(45)

March 1999

- The British Columbia Supreme Court ruled on the question of whether the Crown's "moral" obligation to negotiate treaties in good faith, affirmed by the Chief Justice in *Delgamuukw*, was also a legal obligation. The case against Canada and B.C. by the Gitanyow First Nation,(46) which had been engaged in treaty negotiations since 1993, had been initiated in the context of the imminent conclusion of the Nisga'a Final Agreement, which recognizes as Nisga'a territory portions of the territory in the Nass watershed that are claimed by the Gitanyow.(47) The Court held that, while the federal and provincial Crowns were not under an obligation to enter into treaty negotiations with the Gitanyow, as they had done so their fiduciary obligations toward Aboriginal peoples resulted in "a duty to negotiate in good faith" that was binding on all Crown representatives.(48) The Gitanyow case raised the overlap issue that affects many claims in British Columbia, as underscored by the BCTC. In deciding a preliminary procedural matter in the case, the Supreme Court judge noted that "myriad Court applications seem inevitable unless the treaty negotiation process deals with overlapping claims." In his view, "if the parties fail to deal with [this] conspicuous problem, they may well face Court imposed settlements which are less likely to be acceptable to them than negotiated settlements."

April 1999

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(45) "Delgamuukw National Process," *Backgrounder*, undated, available online *via* the AFN web site under "Links."

(46) The Gitanyow are culturally Gitxsan.

(47) The Gitanyow sought declarations (1) that in undertaking to negotiate a treaty with the Gitanyow, and in proceeding with those treaty negotiations, the federal and provincial Crowns are obliged to negotiate in good faith and to make every reasonable effort to conclude and sign a treaty with the Gitanyow, and (2) that for the federal and provincial Crowns to conclude a treaty with the Nisga'a "or to allow the designation for any purpose related to the Nisga'a Treaty over lands and resources in respect of which Gitanyow, Canada and British Columbia are involved in a treaty process until treaty negotiations with the Gitanyow are concluded" would be contrary to the Crown's duty to negotiate in good faith, significantly undermine the Gitanyow claim to "overlapping" territory in the Nass Valley and nullify the Gitanyow treaty process. The Gitxsan and Tahltan First Nations also claim territory in the Nass watershed.

(48) *Gitanyow First Nation* v. *Canada*, [1999] 3 C.N.L.R. 89, par. 70-75.

- Canada and British Columbia appealed the Gitnayow ruling on the basis, *inter alia*, that subjecting the treaty process to court supervision could turn negotiations into an avenue for litigation.
- The federal Minister of Indian Affairs announced a three-year, $15-million investment to finance initiatives for enhancing the capacity of British Columbia First Nations to take part in land and resource management negotiations and consultations. British Columbia also committed $2 million for the 1999-2000 fiscal year. In keeping with the recommendation of the Post-*Delgamuukw* Capacity Panel, a nine-person Capacity Initiative Council (CIC) was also formed. Composed of a majority of First Nations representatives, together with representatives from business and the labour sector, the CIC is to assess project proposals and recommend funding allocations, based on guidelines it establishes for defining the criteria and conditions that determine eligibility for funding. Any B.C. First Nation with an unresolved land claim may respond to the CIC's call for proposals, whether or not it is involved in the BCTC process. Capacity enhancement proposals to be considered for funding may pertain to individuals, institutions, or businesses.(49)
- Canada, British Columbia and the Sechelt Indian Band signed the first Agreement-in-Principle (AIP) to be reached under the BCTC process.(50)

May 1999

- At a Fraser Institute conference on "The *Delgamuukw* case: Aboriginal Land Claims and Canada's Regions," academics, politicians and Aboriginal leaders expressed a range of opinion on the present and potential impacts of the Court's ruling.(51) For example, while participants generally agreed that British Columbia remained the region most directly affected by the decision, the possibility that it might enable non-B.C. First Nations to re-negotiate existing land surrender treaties was also raised. The ruling was variously characterized as "an invaluable lever" for Quebec's Aboriginal communities, as having created an unworkable regime for reconciling economic development and Aboriginal rights

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(49) Department of Indian Affairs and Northern Development, *News Release*, "Canada Invests $15 Million to Enhance First Nations' Capacity to Participate in Land and Resource Negotiations and Consultations," Vancouver, 15 April 1999; *Backgrounder*, "British Columbia Capacity Initiative," 15 April 1999; Federal Treaty Negotiation Office, "$15 million invested in B.C. Capacity Initiative," *Treaty News*, June 1999, available online at http://www.inac.gc.ca/pubs/treaty/june99/invest.html.

(50) A summary of the Sechelt AIP is available online *via* the DIAND or provincial Ministry website.

(51) Conference information may be found at http://www.fraserinstitute.ca/.

in British Columbia, as a victory for Aboriginal people, and as a "recipe for bureaucratic paralysis." Other views advanced included a proposal that federal legislation be enacted that would "come very close" to extinguishing Aboriginal title, as long as compensation was provided. It was also argued that *Delgamuukw* had not destroyed British Columbia's ability to govern, since the decision enables governments to infringe Aboriginal title.(52)

June 1999

- The Gitanyow and the federal and provincial governments agreed to resume active treaty negotiations on an accelerated basis and to place in abeyance the second question raised by the Gitanyow case against the federal and provincial Crowns: whether the signing of the Nisga'a Final Agreement was contrary to the Crown's duty to negotiate in good faith with the Gitanyow in light of their overlapping claim.(53)
- Lack of consultation with the affected Klahoose First Nation led to the withdrawal of a Sunshine Coast forestry development plan by the British Columbia Ministry of Forests and International Forest Products Ltd., and to their agreement not to log the area in question for a minimum five-year period. The Ministry further agreed to consult the Klahoose on future forestry management decisions. Acknowledging that the Ministry is responsible for ensuring that Aboriginal peoples are consulted on development issues involving their traditional territories, a forestry official noted that First Nations have varying expectations with respect to the *Delgamuukw* consultation requirement, and that it is not simple for the Ministry to ensure that all its legal obligations are met.(54)

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(52) Peter O'Neil, "Delgamuukw Decision 'to Have Wide Fallout' on Native Claims: The Ruling on a B.C. Aboriginal Land Action Is Strengthening Rights Elsewhere, Experts Say," *Vancouver Sun*, 27 May 1999, p. A4; "Delgamuukw Decision 'an Unworkable Regime': A B.C. Liberal MLA Says the Ruling Has Created a Flawed System in Trying to Reconcile Aboriginal Rights and Economic Projects," *Vancouver Sun*, 28 May 1999, p. A6.

(53) Subsequent developments are outlined under November 1999.

(54) The scope of the *Delgamuukw* consultation requirement has been and continues to be raised in numerous court cases; see, for example, *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [1999] 1 C.N.L.R. 72 (B.C.S.C.), in which the Court found the duty to consult had not been met, reversed on other grounds in *Kitkatla Band* v. *British Columbia (Small Business, Tourism and Culture)*, File Nos. VO3364 and V03385, 19 January 2000 (B.C.C.A.); *Chief Councillor Alice Munro* v. *British Columbia (Minister of Forests) et al.*, File No. A981672, 9 July 1998 (B.C.S.C.); *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, File Nos. CA023526 and CA023539, 12 August 1999 (B.C.C.A.), affirming [1997] 4 C.N.L.R 45 (B.C.S.C.).

- The BCTC Annual Report, noting that the full impact of *Delgamuukw* is not yet known, commented that "[o]ne result of the decision is enough uncertainty on all sides to make treaty negotiations a more attractive option than litigation." In this respect, it reported that recommendations developed through the tripartite review process were under consideration, and described the focus of the review as being

> to find ways to accelerate negotiations around land, resources, cash and the financial components of treaties. First Nations who are borrowing large sums of money to finance their treaty talks have become frustrated. As negotiations drag on, they see the resources in their territories being depleted or alienated and they fear there will be little left with which to meet their treaty expectations. They are seeking assurance that treaties will leave them better off than they are now. *Delgamuukw* and its confirmation of aboriginal title heightened First Nations' expectations that their concerns would be addressed. Resolving issues around land and resources sooner rather than later will restore confidence in the treaty process.

The BCTC further observed that *Delgamuukw* made it clear that a single cash payment to individual Aboriginal people is not an option for resolving treaty issues, because Aboriginal title is held by groups, not individuals. Therefore governments must settle claims with First Nations that hold title, rather than with First Nation members.(55)

- The Report commented that a "statement of mutual recognition" might satisfy, at least in part, *Delgamuukw*'s clear directive that treaty negotiations must reconcile Aboriginal title with Crown title, and noted that a joint statement by Canada, British Columbia and the First Nations Summit was expected. The BCTC again stressed that the need for effective interim measures underscored in *Delgamuukw* "has become more pressing."(56) It predicted that an anticipated interim measure cost-sharing agreement between the provincial and federal governments would "ease the way to treaties" for First Nations, and protect their interests pending the conclusion of treaties.(57)

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(55) British Columbia Treaty Commission, *Annual Report 1999,* "The Legal and Political Landscape after Delgamuukw," Vancouver, June 1999.

(56) *Ibid.*

(57) British Columbia Treaty Commission, *News Release*, "Several Treaties with First Nations within Reach, Says Treaty Commission Annual Report Card," Vancouver, 24 June 1999.

- The BCTC underscored First Nations' need for "adequate funding to negotiate on an equal footing with Canada and British Columbia," and further observed that "[t]he increase in First Nations in Stage 4 [37 B.C. First Nations were then in AIP negotiations] and the shrinking total budget, has resulted in significantly decreased allocations." Forecasting that $38.4 million would be required to support First Nations' negotiations during the 2000-01 fiscal year, the BCTC said it had "informed Canada and BC that, without more funding, many First Nation treaty offices and research efforts will falter. Even those First Nations nearing completion of agreements in principle or otherwise making progress in negotiations will find it difficult if not impossible to sustain the pace of negotiations."(58)
- The survey of B.C. First Nations in the BCTC process indicated that negotiations with the Wet'suwet'en Nation were proceeding, while the Gitxsan had not yet resumed tripartite negotiations.(59)
- Reactions to the BCTC's Annual Report were mixed. Leaders of the First Nations Summit welcomed the Report's findings related to the need for increased funding to support negotiation and improved interim measures, and requested a meeting with the federal Minister of Indian Affairs and the provincial Minister of Aboriginal Affairs to discuss these issues.(60) The President of the Union of B.C. Indian Chiefs reportedly stated that 45% of the province's Aboriginal people disagree with the treaty process, which he described as leading to extinguishment of title and greater economic uncertainty for First Nations. In his view, the *Delgamuukw* ruling clearly recognized the existence of Aboriginal peoples' legal interest in and title to B.C. land and resources.(61)

July 1999

- The Capacity Initiative Council established in April 1999 approved 74 of 167 applications for funding in fiscal year 1999-2000. The successful proposals, which are eligible for

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(58) British Columbia Treaty Commission, *Annual Report 1999*, "Negotiation Funding Inadequate."

(59) *Ibid.*, "First Nations in Stage 4."

(60) "First Nations Summit Urges Governments to Implement Recommendations Contained within the 1999 BC Treaty Commission Annual Report," Canada News-Wire, Vancouver, 25 June 1999.

(61) "Smooth Road Expected for Aboriginal Treaties," *Regina Leader-Post*, 25 June 1999, p. C9. The positions of the UBCIC on Aboriginal Title and Rights and related issues are available online at: http://www.ubcic.bc.ca/publications.htm

funding at the same levels over the following fiscal year, were allocated various amounts up to $75,000, with a total commitment of $5 million. The moneys were to be distributed monthly as of October 1999, contingent upon the recipients' meeting accountability requirements through regular reports. Many of the approved projects fall under the heading of land and resource management, and are designed to build capacity for post-treaty management, as well as to enable First Nations to deal better with current consultation matters.(62)

- The AFN General Assembly resolved to initiate the "*Delgamuukw* Implementation Process" to "review the 1986 federal Comprehensive Claims policy with a view to developing an alternative approach which is based on recognition of Aboriginal title consistent with the *Delgamuukw* decision." The resolution was based, in part, on the AFN's view that the "Government of Canada refuses to change the Comprehensive Claims policy to recognize Aboriginal title in conformity with the *Delgamuukw* case," but rather "continues to use the AFN/DIAND National *Delgamuukw* Review as an excuse for not changing its Comprehensive Claims policy," As a result, the review "has become prejudicial for those First Nations who assert Aboriginal title and who want the *Delgamuukw* decision implemented."(63)

September 1999

- A B.C. Chiefs' Report, released concurrently with a meeting of the First Nations Summit, called on Aboriginal leaders to begin considering alternatives to the B.C. treaty process in light of disagreement between Aboriginal and government parties on issues of compensation and Aboriginal title.(64)
- Following unsuccessful negotiations to obtain a provincial logging permit, members of the Westbank First Nation carried out unlicensed logging on Crown lands to which it claims title in south-central British Columbia. This initiative was seen by some as the tip of the iceberg

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(62) Federal Treaty Negotiation Office, "First Nations Receive Funds to Improve Lands and Resources Capacity," *Treaty News*, November 1999, available online at http://www.inac.gc.ca/pubs/treaty/nov99/funds.html

(63) Resolution 5/99, 22 July 1999.

(64) Kim Pemberton, "Immediate Benefits Planned for Natives," *Vancouver Sun*, 16 September 1999, p. A10.

of Aboriginal dissatisfaction with the province's perceived failure to address the implications of the *Delgamuukw* decision.(65) In an unprecedented alliance, both the Union of British Columbia Indian Chiefs and the First Nations Summit endorsed Westbank logging activities,(66) as did numerous other local, regional and national Aboriginal groups.(67) First Nations in various parts of the province declared intentions to follow the Westbank example; some, citing *Delgamuukw*, did so. The province petitioned the British Columbia Supreme Court for orders directing Westbank loggers to comply with a stop-work order issued by the Minister of Forests but, on 28 September, the Court ruled that a court would first have to deal with conflicting issues of Aboriginal and Crown title. At the Court's request, the Westbank First Nation voluntarily ceased logging activity. The province sought leave to appeal the ruling.(68)

- The B. C. Cabinet approved "Treaty-Related Measures" to "revitalize the existing B.C. treaty process and ensure [Canada] contributes its fair share to making treaty negotiations work." It called on the federal government to follow suit and finalize cost-sharing arrangements. Government documentation suggested that "Treaty-Related Measures" might advance the

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(65) For example, it was also reported that the Gitxsan, likening their situation to that of the Westbank, planned to go to court to argue their right to cut timber, based on *Delgamuukw* principles. In March 1999, the Forest Appeals Board had ruled, in relation to a 1995 charge of trespassing on Crown land to log and a substantial fine, that the Forests Ministry had failed to take into account the rights of the Gitxsan: "Gitxsan to Court in Dispute on Logging," *Vancouver Province*, 10 September 1999, p. A29.

(66) "First Nations Summit Passes Unanimous Resolution in Support of Westbank First Nation," Canada News-Wire, 15 September 1999.

(67) Prominent among these was the Carrier Sekani Tribal Council, whose Chiefs were engaged in seeking to prevent major forestry companies from transferring into their traditional territory in the absence of interim forestry measures that would protect their interests prior to an eventual treaty settlement. In their view, *Delgamuukw* confirmed their title to the forest resource, and "they will not sit by while their members remain unemployed and they go into debt negotiating for empty lands": Carrier Sekani Tribal Council, *News Release*, "CSTC Supports Westbank First Nation's Title to Their Forests," Prince George, 29 September 1999.

(68) Chuck Poulsen, "Both Sides in Logging Dispute Hope for Solution," *Kelowna Daily Courier*, 22 September 1999; "Court Weighs Logging Dispute," *Brantford Expositor*, 24 September 1999, p. A9; Kim Pemberton, "Court Turns Down Victoria Bid to Stop Westbank Logging," *Vancouver Sun*, 28 September 1999, p. A4; Suzanne Fournier, "Westbank Nation Logs Key Victory: Judge Refuses to Halt Timber Cutting on Land in Dispute," *Vancouver Province,* 28 September 1999, p. A11; "Westbank Band Scores Court Victory," *Victoria Times Colonist*, 28 September 1999, p. A1; Kim Pemberton, "Province Appeals Logging-Ban Ruling: A Judge Refuses to Grant a Request to Force an End to Cutting, but the Westbank Band Stops Voluntarily," *Vancouver Sun*, 29 September 1999, p. B8.

treaty process more effectively than the interim measures policy for which the province had assumed the full cost. It described the measures as "designed to help expedite treaty negotiations. They also help the province meet its legal obligations arising from *Delgamuukw* and related court cases, resolve conflicts over land and resource use, and facilitate economic development. They could also include land and resource protection."(69) At least some B.C. Aboriginal leaders viewed the announced measures as unlikely to renew the treaty process.(70)

October 1999

- B.C. Interior First Nations leaders planned to travel to the United States and Europe to argue for a boycott of B.C. forest products that are, they allege, illegally taken from Aboriginal lands. A Council of Forest Industries spokesperson acknowledged that such a boycott threatened the industry.(71)
- The First Nations Summit convened an extraordinary special assembly to address B.C. First Nations' disappointment with treaty negotiations and perceived lack of commitment to the treaty process on the part of both levels of government. Grand Chief Edward John described the negotiation process as at a "crossroads." In his view, "[t]he governments continue to come to the ... table with unilateral preconditions that are clearly unacceptable ... and it flies in the face of the principles of good faith negotiations."(72)
- At the special assembly, the B.C. Minister of Aboriginal Affairs announced that treaty-related measures would include:

    - a commitment to table agreement-in-principle offers expeditiously;
    - a provincial contribution of $20 million towards a Treaty-Related Measures fund, cost-shared 50-50 with the federal government;

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(69) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Cabinet Approves Measures to Revitalize Treaty Negotiations," Victoria, 29 September 1999.

(70) Suzanne Fournier, "B.C. Resources Overture Brushed Off by Natives," *Vancouver Province*, 1 October 1999, p. A44.

(71) "B.C. Chiefs Seek Lumber Boycott Abroad: Leaders of Three Interior Bands Are Going to Washington, New York and Geneva in a Bid Launch an International Campaign against the Purchase of B.C. Wood...," *Vancouver Sun*, 21 October 1999, p. B7.

(72) British Columbia Treaty Commission, *Newsletter*, "Changes to Treaty Process May Spur Negotiations," Vancouver, November 1999.

- a willingness to resume discussions with the First Nations Summit on the issue of achieving certainty through treaty settlements;
- a commitment to listen to First Nations views on revenue sharing, co-management and compensation; and
- an invitation to First Nations and the forest industry to discuss the establishment of a First Nations steering committee on access to timber.(73)

Addressing the issue of compensation, the Minister acknowledged First Nations' belief that treaties "are intended as settlements of past claims," and stated the province's willingness to discuss the issue with the other parties to negotiations.(74)

- Following the assembly, the First Nations Summit remained critical of both levels of government, citing the issue of compensation(75) and the ongoing alienation of traditional lands and resources. The BCTC Chief Commissioner remarked that the First Nations in attendance had not voted to suspend the treaty process, suggesting that they were not prepared to leave a process it had taken so long to obtain. He noted that "[a]fter *Delgamuukw*, the parties agreed to make changes to invigorate the treaty process. Those changes will affect treaty negotiations in the coming months and test the political will of the parties. It is too early to tell if those changes will be sufficient to bring about agreements."(76)

November 1999

- The British Columbia Supreme Court granted the petition of the Minister of Forests for interlocutory relief to prevent a number of First Nations from continuing to log on Crown land, pending determination of their claim to Aboriginal title and a right to log.(77) In a related case, the Court ordered that the dispute between the provincial Ministry of Forests and the Westbank First Nation be sent to trial on an expedited basis rather than being dealt

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(73) Government of British Columbia, Ministry of Aboriginal Affairs, *News Release*, "Treaty Measures Offer Resource Opportunities for First Nations," North Vancouver, 29 October 1999.

(74) Honourable Dale Lovick, Speech to First Nations Summit, North Vancouver, 29 October 1999.

(75) The First Nations Summit has identified compensation as a key issue in treaty negotiations, and has cited governments' lack of willingness to discuss it as a negotiation item as one of the reasons underlying the lack of progress in the treaty process: see British Columbia Treaty Commission, *Newsletter*, "Compensation a Key Issue in Negotiations," Vancouver, November 1999.

(76) British Columbia Treaty Commission, *Newsletter*, note 72.

(77) *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, [1999] B.C.J. No. 2545 (Q.L.), 12 November 1999.

with by way of summary hearing. In the judge's view, a trial was necessary owing to the complexity of issues of accommodation and justification described in *Delgamuukw* that also arose in this case. Furthermore, "[t]he question of the [First Nation's] title is not uncontested. It is clear ... that the [Crown] is not prepared ... to concede that the [First Nation has] title or rights over the area claimed and will challenge such claims."(78)

- The BCTC reported that the federal and provincial governments had agreed to the following statement on Aboriginal and Crown title:

> The parties agree to the negotiation of treaties respecting the following principles:
>
> 1. The parties recognize that Aboriginal title exists as a right protected under section 35 of the *Constitution Act, 1982*.
> 2. Where Aboriginal title exists in British Columbia, it is a legal interest in the land and is a burden on Crown title.
> 3. Aboriginal title must be understood from both the common law and Aboriginal perspective.
> 4. As acknowledged by the Supreme Court of Canada, Aboriginal people derive their Aboriginal title from their historic occupation, use and possession of their tribal lands.
> 5. The parties agree that it is in their best interest that Aboriginal and Crown interests be reconciled through honourable, respectful and good faith negotiations.(79)

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(78) *British Columbia (Minister of Forests)* v. *Westbank First Nation*, File No. 46440, 12 November 1999.

(79) British Columbia Treaty Commission, "The Treaty Commission's Role in the Review," *After Delgamuukw: The Legal and Political Landscape*, Vancouver, November 1999.

# BRITISH COLUMBIA TREATY COMMISSION AGREEMENT

# AGREEMENT

*Between*

## THE FIRST NATIONS SUMMIT
(THE "SUMMIT")

*And*

## HER MAJESTY THE QUEEN IN RIGHT OF CANADA
("CANADA")
as represented by the Prime Minister of Canada
and the Minister of Indian Affairs and Northern Development

*And*

## HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
("BRITISH COLUMBIA")
as represented by the
Premier of British Columbia and the Minister of Aboriginal Affairs

# AGREEMENT

Between:

THE FIRST NATIONS SUMMIT (the "Summit")

And:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ("Canada") as represented by the Prime Minister of Canada and the Minister of Indian Affairs and Northern Development

And:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA ("British Columbia") as represented by the Premier of British Columbia and the Minister of Aboriginal Affairs.

WHEREAS:

A. The Summit, Canada and British Columbia (the "Principals") intend to participate in a process leading towards the negotiation of treaties;

B. The Principals support the recommendation of the British Columbia Claims Task Force (the "Task Force") to establish a Commission to facilitate the process of treaty negotiations in British Columbia;

C. The Premier of British Columbia is prepared to enter into this Agreement on behalf of British Columbia; the Minister of Aboriginal Affairs has been authorized to enter into this Agreement on behalf of British Columbia by Order in Council No. 623 approved and ordered April 23, 1992;

D. The Prime Minister and the Minister of Indian Affairs and Northern Development are prepared to enter into this Agreement on behalf of Canada; and

E. The Summit is authorized to enter into this Agreement by resolution dated May 15, 1992.

THE PRINCIPALS AGREE AS FOLLOWS:

## 1.0 DEFINITIONS

1.1 For the purposes of this Agreement and the recitals:

"Commission" means the British Columbia Treaty Commission.

"First Nation" means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.

"Member" means the Chief Commissioner or any of the Commissioners.

"Parties" means the parties to the negotiation of a treaty.

"Summit" means First Nations in British Columbia which have agreed to participate in the process provided for in this Agreement to facilitate the negotiation of treaties between First Nations, Canada and British Columbia.

## 2.0 ESTABLISHMENT OF THE COMMISSION

2.1 The Principals shall establish the Commission as follows:

(a) Canada shall introduce legislation to Parliament to establish the Commission as a legal entity to carry out the purposes of this Agreement;

(b) The Minister of Aboriginal Affairs shall introduce legislation to the British Columbia Legislature to establish the Commission as a legal entity to carry out the purposes of this Agreement;

(c) Until legislation is enacted, the Chief Commissioner and Commissioners shall be appointed by Orders in Council made by the Lieutenant Governor in Council of British Columbia and the Governor in Council of Canada; and

(d) The Summit shall establish the Commission by resolution.

## 3.0 ROLE OF THE COMMISSION

3.1 The role of the Commission is to facilitate the negotiation of treaties and, where the Parties agree, other related agreements in British Columbia.

## 4.0 MEMBERSHIP

4.1 The Commission shall consist of four Commissioners and a Chief Commissioner.

4.2 The Summit, British Columbia and Canada shall nominate two, one and one Commissioners respectively.

4.3 The Principals together shall nominate a Chief Commissioner who shall be the full-time Chief Executive Officer of the Commission and chair its meetings.

4.4 All nominees shall be appointed by the Lieutenant Governor in Council of British Columbia, the Governor in Council of Canada and the Summit.

4.5 Members shall be appointed:

(a) in the case of Commissioners, for a two year term;

(b) in the case of the Chief Commissioner, for a three year term; and

(c) in the case of replacements, for the unexpired term of the Member being replaced.

4.6 A Principal shall nominate within 60 days a replacement for a Commissioner it nominated who dies, resigns or is removed.

4.7 If the Chief Commissioner dies, resigns or is removed, the Principals shall nominate a new Chief Commissioner within 60 days.

4.8 Until a new Chief Commissioner is appointed pursuant to 4.7, the Commissioners may designate by unanimous agreement one of them as acting Chief Commissioner.

4.9 A Member may be renominated at the end of his or her term of office.

## 5.0 FUNDING FOR THE OPERATIONS OF THE COMMISSION

5.1 During the first five years of the Commission's operations, Canada and British Columbia shall share the operating costs of the Commission as they may agree. Thereafter, or sooner if the Principals agree, these costs shall be shared as the Principals then agree.

5.2 Canada's share of the costs of the Commission shall be subject to annual appropriations by Parliament and approval by the federal Treasury Board; and that of British Columbia shall be subject to annual appropriations by the Legislature and approval by the provincial Treasury Board.

5.3 The Principals providing funds for the Commission's operations shall enter into a funding agreement with the Chief Commissioner to establish financial administration requirements for the Commission and to provide for remuneration of the Members.

## 6.0 LOCATION OF THE COMMISSION

6.1 The office of the Commission shall be located in British Columbia.

## 7.0 DUTIES OF THE COMMISSION

7.1 The Commission shall:

(a) Receive statements of intent to negotiate from First Nations which identify the following:

(i) the First Nation and the aboriginal people it represents;

(ii) the general geographic area of the First Nation's traditional territory within British Columbia; and

(iii) a formal contact for communication.

(b) Receive and consider any requirement for negotiation funding submitted by a First Nation.

(c) Forward the statement of intent to Canada and British Columbia, and acknowledge its receipt to the First Nation.

(d) Convene an initial meeting of the three Parties within 45 days of the Commission's receipt of the statement of intent.

(e) Allocate funds which have been provided to enable First Nations to participate in negotiations, in accordance with criteria agreed to by the Principals.

(f) Assess the readiness of the Parties to commence negotiation of a framework agreement in accordance with the following criteria:

(i) Each Party has:

A. appointed a negotiator;

B. confirmed that it has given the negotiator a comprehensive and clear mandate;

C. sufficient resources to carry out the procedure;

D. adopted a ratification procedure; and

E. identified the substantive and procedural matters to be negotiated.

(ii) In the case of a First Nation:

A. has identified and begun to address any overlapping territorial issues with neighbouring First Nations.

(iii) In the case of Canada and British Columbia respectively:

A. has obtained background information on the communities, people and interests likely to be affected by negotiations; and

B. has established mechanisms for consultation with non-aboriginal interests.

(g) Encourage timely negotiations following the six stage process outlined in the Report of the Task Force or such other process as the Parties may agree by assisting the Parties to establish a schedule and by monitoring their progress in meeting deadlines.

(h) Assist Parties to obtain dispute resolution services at the request of all the Parties.

(i) Maintain a public record of the status of negotiations.

(j) Develop an information base on negotiations to assist the Parties.

(k) Prepare and submit an annual budget for review and approval by the Principals.

(l) Not commit nor purport to commit Canada, British Columbia or the Summit to expenditures of funds except as provided in a funding agreement.

(m) At least annually, submit a report to the Principals on

(i) the progress of negotiations;

(ii) the operations of the Commission; and

(iii) any other matter the Commission deems appropriate

which shall be tabled in Parliament by the Minister of Indian Affairs and Northern Development and in the British Columbia Legislature by the Minister of Aboriginal Affairs.

(n) Manage and disburse operating funds in accordance with an approved annual budget, the applicable funding agreement and any applicable laws.

(o) Maintain proper records including those required for any auditing procedures of the Principals and provide access to and copies of such records to a Principal on request.

## 8.0 POWERS OF THE COMMISSION

8.1 The Commission may:

(a) adopt bylaws and procedures consistent with this Agreement;

(b) determine the times and places of its meetings;

(c) meet by tele-conference; and

(d) do such other things as are necessary to perform its duties.

8.2 The Chief Commissioner may for the purposes of the Commission:

(a) lease premises and engage the services of advisors, officers and staff as may be required to carry out the duties of the Commission; and

(b) enter into service agreements with Commissioners as required.

## 9.0 DECISIONS OF THE COMMISSION

9.1 The Chief Commissioner and one Commissioner nominated by each Principal shall comprise a quorum.

9.2 Decisions of the Commission shall be made by agreement of at least one Commissioner nominated by each Principal.

## 10.0 PROTECTION OF MEMBERS OF THE COMMISSION

10.1 The Principals shall not make any claim against the Commission, a Member, or any person holding an office or appointment under the Commission, for anything done or reported or said in the course of the exercise or intended exercise of his or her official functions, unless the matter arose from wilful misconduct or gross negligence.

10.2 The Principals shall indemnify in proportion to their funding obligations a Member against all claims, damages and penalties that are made against or incurred by a Member in the performance of his or her duties pursuant to this Agreement, except where the claim, damages or penalties arose from the Member's wilful misconduct or gross negligence.

## 11.0 TERM

11.1 The Principals shall terminate the Commission upon completion of the Commission's duties under this Agreement or where the Commission is no longer performing its duties.

11.2 This Agreement shall remain in effect until otherwise agreed by the Principals or until the Commission is terminated in accordance with 11.1 whichever occurs earlier.

## 12.0 REVIEW

12.1 The Principals shall review the effectiveness of the Commission at least once every three years following its establishment.

## 13.0 INTERPRETATION

13.1 The Commission may refer to the Report of the Task Force dated June 28, 1991 to provide the context for this Agreement and as an aid to its interpretation, but in the event of inconsistency between the Report and this Agreement, this Agreement shall prevail.

In witness whereof the Principals have executed this Agreement

the 21st day of September, 1992.

SIGNED on behalf of THE FIRST NATIONS SUMMIT by the following authorized representatives: Chief Edward John, Chief Joe Mathias, Sophie Pierre, Miles G. Richardson and Tom Sampson, in the presence of:

Witness

Address

(as to all signatures)

Chief Edward John

Chief Joe Mathias

Sophie Pierre

Miles G. Richardson

Tom Sampson

SIGNED on behalf of HER MAJESTY THE QUEEN IN RIGHT OF CANADA, by the Right Honourable Brian Mulroney, Prime Minister of Canada and by the Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, in the presence of:

Witness

Address

(as to both signatures)

The Prime Minister

The Minister of Indian Affairs and Northern Development

SIGNED on behalf of HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, by the Honourable Michael Harcourt, Premier of British Columbia and by the Honourable Andrew Petter, Minister of Aboriginal Affairs, in the presence of:

Witness

Address

(as to both signatures)

The Premier of British Columbia

The Minister of Aboriginal Affairs