Aboriginal Title in British Columbia: *Tsilhqot'in Nation* v. *British Columbia*

Introduction

This case study focuses on the relationship between the British Columbia forest industry and First Nations' interests in land, an increasingly prevalent issue in land use and natural resource law in B.C. Lands in the Cariboo-Chilcotin region of British Columbia, defined in the decision as Tachelach'ed (Brittany Triangle) and the Trapline Territory, comprise part of the traditional territory and home of the Tsilhqot'in First Nation. Proposed forestry activities on those lands provoked action in the Supreme Court of British Columbia. Analysis of this case introduces students to the different perspectives of First Nations and the B.C. government on issues related to natural resource management, and to the relationship between Aboriginal title and British Columbia government policy. It also explores the legal effect of a landmark but non-binding decision regarding proof of Tsilhqot'in Nation Aboriginal title.

The Tsilhqot'in Nation launched legal proceedings against British Columbia in 1989 to prevent the harvesting of timber in Tachelach'ed and the Trapline Territory, the two geographical areas that comprise the claim area (the Claim Area), pursuant to timber licences that the government issued. The trial, lasting 339 trial days, proved to be one of the longest trials in Canadian history[1] and likely cost over 30 million dollars. In his decision in *Tsilhqot'in Nation* v. *British Columbia* (*Tsilhqot'in*),[2] Vickers J. provided a non-binding decision that the evidence put before him, examined through the lens that the Supreme Court of Canada (SCC) proposed in *Delgamuukw*[3] and *R.* v. *Marshall* and *R.* v. *Bernard*[4] (*Marshall*; *Bernard*) proved Aboriginal title to a significant portion of the Claim Area.[5] The SCC "lens" was grounded in the perspective

[1] Blakes, Cassels & Graydon "The *Tsilhqot'in Nation* Decision on Aboriginal Title and Right" (2008), online: Blakes, Cassels & Graydon LLP <http://www.blakes.com/english/view.asp?ID=1902> (accessed: 17 November 2008).

[2] *Tsilhqot'in Nation* v. *British Columbia*, 2007 BCSC 1700 [hereinafter *Tsilhqot'in*].

[3] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 (*e.g.*, see para. 82) [hereinafter *Delgamuukw*].

[4] *R.* v. *Marshall; R.* v. *Bernard,* 2005 SCC 73, [2005] 2 S.C.R. 220 (*e.g.*, see para. 60) [hereinafter *Marshall*; *Bernard*].

[5] Although Vickers J. opined that the Tsilhqot'in people had Aboriginal title to a significant portion of the Claim Area, he declined to make a formal declaration to that effect. Since the *ratio decidendi* (reason of deciding) of a case consists of the material facts plus the decision, the opinion of Vickers J. that Aboriginal title had been proven does not form part of the *ratio decidendi* of *Tsilhqot'in*. Rather, the opinion is *obiter dicta* (things said by the way). This distinction is of practical significance. A case is only authority for what it decides. According to the doctrine of *stare decisis* (to stand by decisions), or the law of precedent, very generally the decision of a higher court is binding authority on a lower court (Gerald L. Gall, *The Canadian Legal System*, 2nd ed. (Toronto: Carswell Legal Publications, 1983) at 220). Put another way, based on principles of fairness and the need for certainty in the law, "cases must be decided the same way when their material facts are the same" (Glanville Williams, *Learning the Law*, 9th ed. (London: Sweet & Maxwell, 1973) at 67-68); Benjamin N. Cardozo, *The Nature of the Judicial Process,* New Haven and (London: Yale University Press, 1921) at 9-50). By contrast, except for considered opinions expressed by an appellate court on a point of law, *obiter dicta* do not act as binding authority in subsequent cases and, therefore, in any subsequent cases, courts are not obliged to adopt an opinion or adhere to a rule expressed in *obiter* (*Landreville* v. *Gouin* (1884), 6 O.R. 455; *R.* v. *Sellars*, [1980] 1 S.C.R. 517). Likewise, such a decision is not binding on the parties to it. The Court was unable to make a declaration granting the Tsilhqot'in people Aboriginal title due to the manner in which the Tsilhqot'in framed their pleadings. Although it is non-

of the Tsilhqot'in people, and focused on "the cultural, economic, and legendary significance of their land use patterns."[6] The impact of this opinion on the effect of provincial legislation, Aboriginals, and third parties is unclear because it is non-binding. However, the possibility of a determinative appeal to the SCC gives rise to a potential for evolution in the law regarding the proof required to establish Aboriginal title.

Background on the Claim Area and Legal Proceedings[7]

a. The Region and the People[8]

i. The Landscape

The Chilcotin Region is located in the central interior of British Columbia, extending west from the Fraser River to the Coast Mountain Range. It encompasses the entire high elevation Chilcotin plateau. In addition to spruce pine forests, the area contains meadows, wetlands, and numerous small lakes, and the high elevation plateau rises into some of the most dramatic mountains and lakes in British Columbia. It is both the traditional territory of the Tsilhqot'in Nation and the location of the Williams Lake Timber Supply Area, which sets the stage for the dispute between the Tsilhqot'in People and the Provincial Crown.

ii. The Plaintiff

The Tsilhqot'in First Nation, with a population of approximately 3,000, is spread across communities from Fort Alexandria to Anahim Lake. The several communities include the Xeni Gwet'in, the TI'esqox (Toosey), the Tsi Del Del (Redstone), the Tletinqot-t'in (Anahim), the ?Esdilagh (Alexandria), and the Yunesit'in (Stone).

Chief Roger Williams is a member of the Tsilhqot'in First Nation and Chief of the Xeni Gwet'in community.[9] He brought the action against the Province of British Columbia in his capacity as a representative of the Tsilhqot'in Nation.

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binding, the *obiter dicta* in *Tsilhqot'in* are purposeful. Vickers J. expressed his opinion on proof of Aboriginal title with the intention, as he makes clear, of assisting the parties in reconciling and reaching a negotiated settlement. The non-binding opinion is thus a form of recommendation, which the parties are free to accept voluntarily or to reject and pursue other courses of action. However, though the decision lacks legal force because of the technicality it arguably has influence on later decisions.

[6] *Tsilhqot'in*, *supra* note 2 at para. 105.

[7] We have adapted portions of this section that focus on the decision from the Consultation and Accommodation Updates webpage of the website of Environmental-Aboriginal Guardianship through Law and Education (EAGLE): EAGLE, "Tsilhqot'in Nation v. British Columbia [also known as 'Xeni Gwet'in']," online: EAGLE Consultation and Accommodation Updates webpage <http://www.eaglelaw.org/education/pubpage/conandaccom/> (date accessed: 31 December 2008).

[8] We have drawn some of the information in this section directly from the decision (see paras. 29-37).

[9] The Xeni Gwet'in First Nations Government (formerly the Nemiah Valley Indian Band) is an Indian band created pursuant to the *Indian Act* to govern the Xeni Gwet'in reserves (among other responsibilities).

iii. The Defendant

The Tsilhqot'in Nation commenced the action against the Province of British Columbia, as the lands at issue are said to belong to the Province of B.C. pursuant to s.109 of the *Constitution Act, 1867*.[10] The Ministry of Forests and Range regulates forestry in B.C.

The Regional Manager of the Cariboo Forest District exercises powers and authority over forestry-related matters pursuant to the *Forest Act*.[11] Provisions of the *Forest Act*, the *Ministry of Forests and Range Act*,[12] and the *Forest Practices Code of British Columbia Act*[13] provide the authority to make decisions relating to the granting of forest tenures on lands in the Chilcotin Region.[14] The Claim Area is located in the Williams Lake Timber Supply Area. Over the years, the Province issued many timber licences to harvest timber in the Claim Area.

b. The Issues

This study focuses on three main issues raised in *Tsilhqot'in*:

1. Do the Tsilhqot'in people have existing Aboriginal title to the Claim Area, consistent with the criteria set out in *Delgamuukw*?
2. Are the Tsilhqot'in people entitled to a declaration of Aboriginal rights to hunt and trap throughout all or part of the Claim Area and to trade the furs, pelts and other animal products obtained from the Claim Area?
3. What is the applicability of provincial legislation to Aboriginal title lands and does the issuing of forest licences, the granting of authorizations and any forest development activity unjustifiably infringe Aboriginal rights in the Claim Area?

The analysis of these issues explores the relationship between natural resource management in the province and the interests of Aboriginal peoples in BC.

c. The Decision

This case involved a claim of Aboriginal title and rights over two large tracts of the traditional territory (the "Claim Area") of the Tsilhqot'in Nation (the "Tsilhqot'in"). The Tsilhqot'in sought court declarations regarding Tsilhqot'in rights and in relation to the issuance and use of certain forest licences. The Tsilhqot'in also sought injunctions to prevent the issuance of cutting permits in the Claim Area. Logging proposals and fundamental land use disagreements triggered the litigation.

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[10] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].
[11] R.S.B.C. 1996, c. 157 (and its predecessor *Forest Act*, R.S.B.C., 1979 c.140).
[12] R.S.B.C. 1996, c. 300.
[13] R.S.B.C. 1996, c. 159.
[14] *Tsilhqot'in*, *supra* note 2 at para. 37.

The claim for Aboriginal title failed because the Tsilhqot'in did not properly frame their claim. They had asked for a declaration of Aboriginal title over the entire Claim Area, which the court did not find. The Tsilhqot'in did not request, as an alternative claim, a declaration regarding smaller, identified portions of the Claim Area. The court agreed that title exists regarding some of those portions but declined to make the declaration because the Tsilhqot'in had not properly referred to those portions in its claim. The claims for Aboriginal rights, including the right to trade, were successful.

Issues of consultation and accommodation of Tsilhqot'in rights arose in a number of parts of the decision. The court offered important conclusions regarding consultation and accommodation obligations with respect to the Aboriginal rights it recognized *and* the Aboriginal title that it declined to officially recognize.

i. Aboriginal Title and Rights

For the first time in a Canadian case, a court found that Aboriginal title existed with respect to a significant portion of land previously considered to be under the jurisdiction of the provincial Crown. Vickers, J., accepted proof of Aboriginal title for the Tsilhqot'in to roughly 200,000 hectares (about half of the Claim Area). He relied heavily on precedent set in the *Delgamuukw* and *Marshall* and *Bernard* cases, in which the SCC held that proof of Aboriginal title requires evidence of regular use or occupancy of definite tracts of land and that evidence of occasional use is insufficient.[15] Characterization of the Tsilhqot'in as semi-nomadic people also formed part of the basis for the analysis of the evidence.

Vickers J. further concluded that the Tsilhqot'in have an Aboriginal right to hunt and trap birds and other animals for purposes of:

1. securing animals for work, transportation, food, clothing, shelter, mats, blankets, and crafts,
2. spiritual, ceremonial, and cultural uses, and
3. trade.

Vickers J. found that these rights (unlike the Aboriginal title) apply throughout the Claim Area.

(a) Aboriginal Title

In response to an invitation from the Tsilhqot'in Nation and the British Columbia government, the court offered its opinion regarding the application of Aboriginal title to smaller tracts of land inside and outside the Claim Area. The judge identified specific areas that did and did not meet the test for Aboriginal title and areas that might meet the test. He also examined the legal implications if title does exist (as an appeals court might decide).

[15] Louise Mandell, "*Tsilhqot'in Nation* v. *B.C.* – An Analysis" (Aboriginal Law: *Tsilhqot'in* v. *BC*, 18 January 2008) Vancouver: Continuing Legal Education Society of British Columbia, 2008 at 4.1.6 [hereinafter Mandell].

The judge generally decided that Aboriginal title land is not "Crown land" as defined in B.C. forestry legislation and that the provincial *Forest Act* does not apply to Aboriginal title land (see below). However, the decision to not declare the smaller portions as subject to Aboriginal title meant that those principles did not necessarily apply to lands over which Aboriginal title was asserted or claimed, rather than proven/declared.[16] In such cases, where the court has not yet found that an area is subject to Aboriginal title, provincial laws may apply to that land and "the Crown's duty to consult, if properly discharged, gives adequate protection to any alleged Aboriginal interests."[17] However, "[s]hould there be a later declaration of rights or title there is a serious risk that, without proper consultation and accommodation, these rights may be infringed."[18]

In this case, the judge found that Crown land use planning "for its own economic benefit and the economic benefit of third parties… [is] a direct infringement on any Aboriginal title."[19] He noted: "the provincial forestry guidelines failed to prevent an infringement" and "if the current provincial forestry scheme applies to Aboriginal title land, then its application to Tsilhqot'in Aboriginal title land constitutes *prima facie* infringement or denial of Tsilhqot'in Aboriginal title triggering the need for justification."[20]

When examining whether the government could justify such an infringement, the judge examined whether the infringement was consistent with the fiduciary relationship between the Tsilhqot'in people and the Crown. His examination of the relevant past Supreme Court of Canada decisions led him to explain that "the demands of the fiduciary relationship can manifest themselves in many… guises, including the duty of consultation…."[21] More specifically, the judge stated clearly that "[w]here Aboriginal title exists or is alleged to exist, there is always a duty of consultation."[22]

The judge found that "considerable effort [had] been made to engage Tsilhqot'in people in the forestry proposals and the land use planning in the Claim Area."[23] However, when he considered these efforts, he emphasized that "[t]he central question is whether all of this effort amounts to genuine consultation."[24] He looked at the *Forest Act* with respect to the Chief Forester's task in setting the Annual Allowable Cut (the "AAC") and noted that it did not mention Aboriginal title or rights. He explained that the Chief Forester thought this meant he could (and actually had no

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[16] See *Tsilhqot'in*, *supra* note 2 at para. 978. At para. 1013, he notes: "When particular lands are the subject of a declaration or a clear finding of Aboriginal rights or title, the situation has crystallized, and the definition of "Crown lands" and "Crown timber" no longer applies;" therefore, the B.C. *Forest Act* no longer applies because its provisions can only apply to "Crown lands" and "Crown timber."
[17] *Ibid.* at para. 978.
[18] *Ibid.* at para. 978.
[19] *Ibid.* at para. 1077. He added: "The infringement takes place the moment Crown officials engage in the planning process for the removal of timber from land over which the Crown does not have a present proprietary interest."
[20] *Ibid.* at para. 1081. This analysis was in case an appeal court decides that he is wrong and that provincial legislation *can* apply to Aboriginal Title lands without contravening the division of powers in the Canadian Constitution.
[21] *Ibid.* at para. 1111.
[22] *Ibid.* at para. 1114.
[23] *Ibid.* at para. 1123.
[24] *Ibid.* at para. 1123.

choice but to) ignore established or claimed Aboriginal title or rights. As a result, he ignored the potential for Tsilhqot'in Aboriginal title and the 1996 AAC did not include it as a relevant factor.

The judge concluded that the failure of the Chief Forester to consult at this strategic planning level meant that the Crown was "unable to justify their actual infringements of Aboriginal title and rights that might flow from the decision."[25] In rejecting the Crown argument that an infringement could not exist until an actual authorization to remove timber occurs, he decided:

> [A]ll of the events that lead up to the granting of a cutting permit signal the Province's intention to manage and dispose of an Aboriginal asset. These events demand consultation and, where necessary, appropriate accommodations where Aboriginal rights are claimed.[26]

The judge emphasized that none of the relevant land use and forest management plans took into account any potential Aboriginal title or rights in the Claim Area. They did not acknowledge or address any such title or rights and they ignored Tsilhqot'in efforts to convince government to acknowledge Tsilhqot'in rights and title during consultation.

What is perhaps most notably about this decision is that the judge founded his assessment of the existence of Aboriginal title in part on the idea of the "cultural security and continuity" of the Aboriginal community claiming title and referred to not only the economic component of Aboriginal title but also its essential cultural aspects.[27] His decision suggests that accommodation of Aboriginal title (claimed or proven) must also have significant economic and cultural components, enabling the Aboriginal community to ensure its ability to derive "cultural security and continuity" from the relevant lands.[28]

The "cultural security and continuity" approach to determining Aboriginal title stands in contrast with the government's proposed "postage stamp" approach,[29] which would limit title areas to small, specific tracts of land. The "cultural security and continuity" approach allows for a finding of Aboriginal title to much larger, related or interconnected areas. If this approach survives appeals of this decision,[30] it will also suggest a broader focus for consultation and accommodation obligations; *i.e.*, government will have to concern itself with the potential impacts of its decisions and actions and industry development on larger areas rather than specific identified sites that have very restricted boundaries.

This approach also implies a need for consultation and accommodation in government consideration of the cumulative impacts of government decisions/actions and industry

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[25] *Ibid.* at para. 1128. He added: "This failure might result in a later claim for damages dependant on the consequences of the decision that was made."
[26] *Ibid.* at para. 1131.
[27] See, *e.g.*, *Tsilhqot'in*, *supra* note 2 at paras. 409-410.
[28] See, *e.g.*, *Tsilhqot'in*, *supra* note 2 at paras. 416-417 and 419.
[29] This term was the Tsilhqot'in characterization of the government's theory. The judge adopted the term and used it several times in the judgment.
[30] Both levels of government and the Tsilhqot'in have given notice of the intention to appeal the decision. If they do appeal it, a further appeal to the Supreme Court of Canada seems likely.

development on larger areas and impacts on habitat and wildlife diversity in the title area. The potential need for shared or coordinated land-use planning will likely include the same broader considerations. Because environmental assessments are a primary vehicle through which government attempts to consult and accommodate, the "cultural security and continuity" approach has correspondingly important implications for the environmental assessment regimes of both provincial and federal governments.

Drawing on the *Delgamuukw*[31] decision, the judge stated:

> [T]he Crown has a duty to accommodate the participation of Tsilhqot'in people in developing the resources on their title lands. The conferral of fee simple lands for agriculture, and of leases and licences for forestry and mining must reflect the prior occupation of Aboriginal title lands.[32]

More broadly, the judge observed: "[p]rovincial policies either deny Tsilhqot'in title and rights or steer the resolution of such title into a treaty process that is unacceptable to the [Tsilhqot'in]."[33] In a context where the Crown has made no effort to address Aboriginal rights and title, a Crown statement (as found in the AAC) "to the effect that a decision is made 'without prejudice' to Aboriginal title and rights does not demonstrate that title and rights have been taken into account, acknowledged or accommodated."[34] The judge noted that the consultations that did occur with the Ministry of Forests:

> ultimately failed to reach any compromise… largely [because]… there was no accommodation for the forest management proposals made by the Xeni Gwet'in people on behalf of Tsilhqot'in people… there was simply no room to take into account the claims of Tsilhqot'in title and rights.[35]

The comments regarding title lands generally suggest that province-wide policies and consultation efforts are not enough to satisfy the consultation duty with respect to specific land areas. Consultation related to specifically claimed areas is required. As indicated above, consultation must involve the acknowledgement of Aboriginal title.

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[31] *Delgamuukw*, *supra* note 3.

[32] *Tsilhqot'in*, *supra* note 2 at para. 1112. He added the suggestion: "Economic barriers to Aboriginal uses of their lands, such as licensing fees, may be reduced."

[33] *Ibid.* at para. 1137.

[34] *Ibid.* at para. 1137. He added:

> [A]t every stage of land use planning, there were no attempts made to address or accommodate Aboriginal title claims of the Tsilhqot'in people, even though some of the provincial officials considered those claims to be well founded.

The province's 1994 Caribou-Chilcotin Land Use Plan (the "CCLUP") contained the statement. The judge commented (at para. 1135) that, despite the statement, "the CCLUP makes many detailed commitments to third party interests, and does indeed prejudice and infringe upon Tsilhqot'in Aboriginal title."

[35] *Ibid.* at para. 1139. At para. 1140 he contrasted the "good communication" with the Ministry of Lands, Parks and Housing. A consensus resulted, truly "without prejudice to the rights and title claims of Xeni Gwet'in and Tsilhqot'in people in the park area," establishing the jointly managed Ts'il?os Provincial Park.

Because he did not make a declaration of Aboriginal title, the lands are still potentially subject to provincial laws. The assertion of Aboriginal title and rights engaged the test from *Haida Nation* v. *British Columbia (Minister of Forests)*.[36] The judge decided that the claimed Tsilhqot'in title and rights fell on the high end of the scale described in the *Haida* decision. He summarized:

> [T]he failure of the Province to recognize and accommodate the claims being advanced for Aboriginal title and rights leads me to conclude that the Province has failed in its obligation to consult with the Tsilhqot'in people… [and, for these and the other reasons expressed above] the Province has failed to justify its infringement of Tsilhqot'in Aboriginal title.[37]

(b) Aboriginal Rights

The judge found that a range of Aboriginal rights existed throughout the Claim Area and that the Province had infringed them. When he examined whether the infringements were justified, he referred to his earlier discussion of provincial consultation with the Tsilhqot'in. Since the consultation "did not acknowledge Tsilhqot'in Aboriginal rights," he concluded: "it could not and did not justify the infringements of those rights."[38]

The judge also apparently linked the determination of the adequacy of the consultation (and, therefore, the justification of potential infringements of Aboriginal hunting and trapping rights) with a need for "proper assessment of the impact [of forestry activities] on the wildlife in the area."[39] This information is essential to government identification and assessment of relevant Aboriginal rights, interests, and needs, which is part of government's constitutional duty of consultation. Arguably, the relevant Aboriginal community should or must provide much of this information or at least assist in gathering it and this suggests meaningful, detailed and comprehensive government engagement of the affected Aboriginal community or as the judge termed it: "genuine consultation."[40]

Earlier, the judge generally observed

> Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act, 1982* demands that the protection of those rights is a paramount objective. The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot'in Aboriginal rights grew out of the pre-contact society of Tsilhqot'in people. This historical right is intended to survive for the benefit of future generations of

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[36] [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter "*Haida*"].
[37] *Tsilhqot'in*, *supra* note 2 at para. 1141.
[38] *Ibid.* at para. 1294.
[39] *Ibid.* at para. 1294. He explained:
> To justify harvesting activities in the Claim Area, including [silviculture] activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area.

[40] *Ibid.* at para. 1123.

> Tsilhqot'in people.[41]

Clearly, wildlife and habitat management that will "ensure a continuation" of the related hunting and trapping (and trading) Aboriginal rights requires sufficient understanding of that wildlife and habitat. The absence of a government wildlife/habitat database and a needs analysis regarding Tsilhqot'in hunting, trapping and trading rights indicates inadequate resource management and insufficient consultation and accommodation of the rights.[42]

More generally and as indicated above, consultation must involve the acknowledgement of Aboriginal rights.

(c) Fiduciary Duty/Honour of the Crown

The judge decided that he did not need to consider arguments of the Tsilhqot'in and the Province regarding the possible Crown breach of fiduciary duty. Instead, he decided that "in this case it is sufficient to go no further than a consideration of the duty to consult, grounded in the honour of the Crown."[43] He referred to several Supreme Court of Canada decisions, including the *Haida* decision and *Mikisew Cree First nation* v. *Canada (Minister of Canadian Heritage)*.[44] The *Haida* decision, he noted, involved rights that were "insufficiently specific" because they had not yet been proven. The *Mikisew* decision involved treaty rights that had not necessarily been infringed, but that had been affected in a way that engaged the honour of the Crown and the duty to consult. He found that he had the discretion in these circumstances to focus on whether the duty to consult had been met and to limit his examination to that question.

(d) Sustainability

The judge discussed the concept of sustainability in more than one part of the decision and, at one point, generally commented that, given his findings of the existence of Tsilhqot'in Aboriginal rights:

> [T]here will be a need for British Columbia to develop a new model of sustainability in the Claim Area. The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. That burden will require close consultation with Tsilhqot'in people, taking into account all of the factors that bear on their Aboriginal rights, as well as the interests of the broader British Columbia community.[45]

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[41] *Ibid.* at para. 1291.
[42] See *Tsilhqot'in*, *supra* note 2 at para. 1293. These government failures are also related to the constitutional requirement that Aboriginal rights have priority over other the resource use rights of others (as set out in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.)).
[43] *Ibid.* at para. 1304.
[44] [2005] S.C.R. 338 [hereinafter "*Mikisew*"].
[45] *Tsilhqot'in*, *supra* note 2 at para. 1103. He suggested that "cooperative joint planning mechanisms" could take into account the needs and interests of both groups.

Whether in respect to protecting Aboriginal rights and title or ensuring other aspects of sustainability, the discussion regarding the need for adequate baseline ecological data must apply equally to the development of sustainable resource use in the Province. As noted above, such data must be developed at least in significant part in consultation with the relevant Aboriginal community of the area.

(e) The Rights Holder – Who Should Be Consulted?

One of the contentious issues in the case was the question of who is the proper rights holder. The question had potential technical ramifications for the case if the wrong group applied for the declaration that they held Aboriginal rights and title and the judge decided another group actually held the rights. The controversy involved whether or not the Xeni Gwet'in First Nations Government, an *Indian Act* band (the "Xeni Gwet'in" – formerly the Nemiah Valley Indian Band), could seek such a declaration and benefit from a determination of rights that the larger Tsilhqot'in Nation properly holds as communal rights.[46] Aside from the technical impact on this case, the answer to this question could limit, or expand, the proper Aboriginal group with whom a court will expect the Crown to consult when rights or title and the related duty of consultation are at issue.

The judge found that the cases he reviewed pointed to "the larger First Nation that existed at the time of contact or sovereignty" as the relevant rights holder.[47] He found that no particular legal entity represents all Tsilhqot'in People. With some discussion as to how Tsilhqot'in People saw themselves and their membership in their community, he noted:

> Self identification may shift… to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads.[48]
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> Tsilhqot'in people make no distinction among themselves at the band level as to their individual right to harvest resources…. as between Tsilhqot'in people, any person in the group can hunt or fish anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community….[49]

The judge did suggest some distinction among the different Tsilhqot'in groups, with regard to their responsibilities if not their rights. He explained:

> In the modern Tsilhqot'in political structure, Xeni Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xeni [Nemiah Valley],

[46] Aboriginal rights, including Aboriginal title, are communal rights.
[47] *Tsilhqot'in*, *supra* note 2 at para. 445.
[48] *Ibid.* at para. 457. At para. 469, he reiterated: "Their true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences."
[49] *Ibid.* at para. 459.

> including [the relevant part of the Claim Area]. Other bands are considered to be the caretakers of the lands that surround their reserves.[50]

He also looked at historical accounts of European encounters with the ancestors of the Xeni Gwet'in and other Tsilhqot'in people. Ultimately, he concluded that the proper rights holder is "the community of Tsilhqot'in people," the "historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion."[51] Because the Xeni Gwet'in derived their identity from and were members of the larger Tsilhqot'in People, they were rights holders in common with the other Tsilhqot'in people.

This decision suggests that, although the greater Tsilhqot'in Nation holds the rights and title, the Xeni Gwet'in would be an appropriate group with whom the Crown should consult – at least with respect to the lands over which they have responsibility within the larger Tsilhqot'in territories. When larger or multiple portions of the Tsilhqot'in territories are involved, consultation with representatives of the larger community or a combination of representatives of different relevant Tsilhqot'in *Indian Act* bands may be more appropriate.

ii. Constitutional Issues

Vickers J. answered questions of jurisdiction arising from the interplay among federal, provincial, and Aboriginal laws as part of his non-binding opinion. As to the applicability of provincial legislation affecting Aboriginal Title, Vickers J concluded:

1. The Province has no jurisdiction to apply its *Forest Act* to Aboriginal title lands.[52] This "aboriginal asset" falls within the core of federal jurisdiction[53] under s. 91(24) of the Canadian Constitution ("lands and lands reserved for Indians").[54] Since provisions of the *Forest Act* that provide for the acquisition, removal, and sale of timber to third parties go to the core of "Indianness" or "Aboriginal title,"[55] the application of the B.C. *Forest Act* also infringes Aboriginal title.[56]

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[50] *Ibid.* at para. 468.
[51] *Ibid.* at para. 470. He noted that this determination applied with respect to both Aboriginal rights and title.
[52] *Ibid.* at para. 1045.
[53] Mandell, *supra* note 15 at 4.1.4.
[54] *Constitution Act, 1867*, *supra* note 10, s. 91(24).
[55] *Tsilhqot'in*, *supra* note 2 at para. 1045.
[56] *Ibid.* at paras. 1053, 1068, 1075-77, 1081. At para. 1077, Vickers J. further explained:

> If the Crown is engaged in land use planning for its own economic benefit and the economic benefit of third parties, then such activities are a direct infringement on any Aboriginal title. The rights holders do not have to wait for a decision to harvest timber before there has been an infringement. The infringement takes place the moment Crown officials engage in the planning process for the removal of timber from land over which the Crown does not have a present proprietary interest.

2. Section 88 of the *Indian Act*[57] does not apply to Aboriginal title lands so as to make provincial laws of general application applicable to such lands. Section 88 would allow provisions of the Province's *Forest Act* to apply to Aboriginal rights, because Aboriginal rights are in relation to Indians, but such provisions cannot affect Aboriginal title, which is in relation to land. Jurisdiction in respect of Aboriginal title lands falls within the exclusive federal constitutional power under s. 91(24). Hence, the federal government must be "central" to any process of reconciliation.[58]

This conclusion regarding jurisdictional authority suggests that the British Columbia government "has been violating Aboriginal title in an unconstitutional and, therefore, illegal fashion ever since it joined Canada in 1871."[59] Further, it reinforces the principle that the Province has no jurisdiction to extinguish Aboriginal title.[60]

iii. Private Lands and Third Party Rights[61]

Pursuant to the decision in *Delgamuukw*, provincial fee simple grants cannot extinguish Aboriginal title. Therefore, where a court finds existing Aboriginal title to privately held lands, that Aboriginal title should continue to exist as a burden on the fee simple and potential underlying Crown title (keeping in mind that the Crown can expropriate fee simple land).

Because the impugned provincial forestry regulation did not involve private interests, Vickers J. provided no opinion on issues concerning the implications of Aboriginal title and other Aboriginal rights for the interests of licence and rights holders. However, he did affirm that the provincial granting of such private licenses and rights also could not extinguish Aboriginal title.

The Forest Industry and its Relationship With First Nations

a. Overview

In 1871, when British Columbia joined Canada, the majority of inhabitants of the province were Aboriginal people. They had no political voice, and British Columbia considered the question of Indian land to be resolved by federal government assumption of responsibility for "Indians and lands reserved for Indians." Even after section 35(1) of the *Constitution Act*, *1982*[62] came into force, recognizing and affirming Aboriginal and treaty rights, the Province continued to deny the

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[57] R.S.C. 1985, c. I-5. Section 88 reads in part as follows:

> Subject to the terms of any treaty and any other Act of Parliament, **all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province**…. [Emphasis added]

[58] *Tsilhqot'in*, *supra* note 2 at para. 1046.

[59] *Ibid.* at para. 1047, quoting Professor Kent McNeil (Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C.L. Rev. 159 at 194).

[60] *Ibid.* at para. 997 (referencing *Delgamuukw* at paras. 172-176).

[61] We have drawn from *Tsilhqot'in*, *supra* note 2 at paras. 982 and 994-1000.

[62] *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter *Constitution Act, 1982*].

existence of Aboriginal title and declined to negotiate with First Nations.[63] Since then, in meetings with provincial and federal officials, First Nations leaders have demanded equitable relationships and recognition of the rights and unique position of Aboriginal peoples in Canada. The pattern of relations between Aboriginal and non-Aboriginal British Columbians has, since then, also changed as a result of legislation, policy, and legal decisions.

The majority of First Nations communities in Canada are located in forests and Aboriginal peoples represent a significant portion of the population in these areas. Their traditions and values are rooted in their connection with the forest ecosystems, a connection that is crucial to their way of life. However, for industry, uncertainty as to Aboriginal rights and title to land in forested regions gives rise to substantial uncertainty over the long-term stability of wood supply to mills.[64]

b. The BC Forest Industry

i. History

British Columbia is home to some of the most ecologically diverse and productive forests on Earth, a characteristic of the province that has moulded both its history and current way of life.[65] Approximately 51.74 million hectares (almost two-thirds of the land in British Columbia) are timber-productive.[66] Roughly 88.2% of this timber-productive land is publicly owned, 5.2% is privately owned, 0.2% is First Nations' land, and the federal government owns the remainder.[67] With almost 90% of B.C. productive forested land under public ownership as Crown lands, the Province has the apparent jurisdiction to manage the land base in keeping with the environmental, social, and economic interests of B.C.[68]

ii. Forest Tenure and the Chilcotin Region

For decades, the forest sector has been a foundation of B.C.'s economy,[69] with B.C.'s total timber allocation making up more than 30% of the Canadian total in 2004. In 2001, 90% of B.C. forest products were exported; valued at $14 billion annually, forest products represented more than

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[63] The British Columbia Claims Task Force, The Report of the British Columbia Claims Task Force at 6 (1991), online: BC Treaty Commission <http://www.bctreaty.net/files/pdf_documents/bc_claims_task_force_report.pdf> (date accessed: 17 November 2008) [hereinafter "The Report"].

[64] We draw information for this paragraph from the 2005 industry report, "Relationships between First Nations and the Forest Industry: The Legal and Policy Context" at 2 (J. Wilson & J. Graham (2005), online: Institute on Governance <http://www.iog.ca/publications/prov_forestry.pdf> (date accessed: 17 November 2008)) [hereinafter First Nations and Forest Industry Relationships].

[65] British Columbia, Ministry of Forests, "Timber Tenures in British Columbia," online Ministry of Forests webpage <http://www.for.gov.bc.ca/hth/timten/documents/timber-tenures-2006.pdf> (date accessed: 17 November 2008) [hereinafter Timber Tenures].

[66] First Nations and Forest Industry Relationships, *supra* note 64 at 29.

[67] Timber Tenures, *supra* note 65 at 2.

[68] *Ibid.*

[69] British Columbia, Ministry of Forests, "The State of BC's Forests – 2004" (2004), online Ministry of Forests webpage <http://www.for.gov.bc.ca/hfp/sof/2004/pdf/sof.pdf> (date accessed: 17 November 2008).

half of B.C.'s annual exports.[70] However, the capital needed to exploit this natural resource – to log and process trees – must come from the private sector.

Tenure is the mechanism by which the government raises the necessary capital. A tenure is simply a lease, license, grant, or other agreement under which the provincial government transfers the right to harvest and process timber on Crown land (or other specific rights to use public forest or range land and resources) to private companies, individuals, or communities.[71] The phrase "timber tenure system" refers to the collection of legislation, regulations, contractual agreements, permits, and government policies that define and constrain the use of public forest resources, primarily, timber.[72]

Historically, the government has pursued a range of policy objectives in part through the system of forest tenure arrangements. Initially, paralleling the development of Canada, forest tenure policy reflected unregulated exploitation. Government regulation to capture profit from the resource under a more planned economy later followed. The Government based Annual Allowable Cuts on a "quota," put in effect cut controls, established formula pricing for stumpage, and put export restrictions in place. This highly regulated forest-dependent economy then underwent early efforts to promote conservation and, finally, long-term timber management agreements and policy to support the most recent objective of sustained yield forestry.[73]

The large Chilcotin Region is prime landscape for the forest industry. Within it, forestry directly or indirectly provides more jobs than any other part of the economy.[74] Private companies that hold forest licences carry out logging in the area. In 1983, Carrier Lumber Ltd. ("Carrier") acquired a licence authorizing logging activities in the Trapline Territory of the Tsilhqot'in Nation. Under provincial legislation, Carrier subsequently submitted a Forest Development Plan ("FDP") proposing logging in the Trapline Territory. Government approval of the FDP in 1990 provided Carrier with a cutting permit for blocks in the Trapline Territory.[75] British Columbia granted forest licences permitting logging of the Trapline Territory and the Tachelach'ed to several other logging companies, which joined Carrier.

iii Regulatory Process

(a) Legislation

Regulation of forested land in the Chilcotin Region falls within the purview of the Province of B.C. pursuant to Section 92(13) of the *Constitution Act, 1867*, which vests jurisdiction over

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[70] First Nations and Forestry Industry Relationships, *supra* note 64 at 29 (citing Government of British Columbia, Ministry of Forests, "*The Forestry Revitalization Plan*" (2003), online: Ministry of Forests <http://www.for.gov.bc.ca/mof/plan/frp/pdf.htm> (date accessed: 17 November 2008)).
[71] Timber Tenures, *supra* note 65.
[72] *Ibid.*
[73] Jessica Clogg, "Tenure Reform for Ecologically and Socially Responsible Forest Use in British Columbia" c. 1 (1997), online: West Coast Environmental Law webpage <http://www.wcel.org/forestry/11655/> (date accessed: 18 November 2008).
[74] *Tsilhqot'in*, *supra* note 2 at para. 55.
[75] *Ibid.* at para. 61.

matters of "property and civil rights" in the Province. Provincial legislation, regulations, and policy establish rights, obligations, and responsibilities attached to each tenure. Each individual agreement, licence, or permit may also include additional requirements.

The *Forest Act* is the primary statute governing timber tenures granted to private companies. This Act sets out the forms of agreement under which the government can grant rights to Crown timber to other parties. It specifies particulars for each form of tenure, such as duration, rights and obligations of the holder, and manner of tenure administration.[76]

Further, forestry tenure holders must comply with provincial Acts and regulations that govern forestry practices and planning, as well as sustainable timber harvesting activities, such as logging, road building, and reforestation. The *Forest and Range Practices Act* ("FRPA"),[77] introduced in 2002 sets out restrictions to protect the environment and other forest values, such as wildlife habitat. These two statutes include approximately 40-50 regulations that also apply. Further relevant provincial statutes include the *Land Act*,[78] *Heritage Conservation Act*,[79] and the *Wildlife Act*.[80] Other levels of government may also impose requirements that B.C. tenure holders must satisfy; for example, the federal government through the *Fisheries Act*[81] and *Species at Risk Act*.[82]

(b) Application of Provincial Legislation in the Claim Area

The *Forest Act* is directed at management of timber resources and, specifically, forest resources on non-private lands. However, since provisions of the *Forest Act* apparently authorize the management, acquisition, removal, and sale of timber even on Aboriginal title lands, the *Forest Act* would "render meaningless the Aboriginal right to manage the very land" over which Aboriginal title is claimed.[83] As Vickers J. points out in *Tsilhqot'in*, the objective of the *Forest Act* is the creation of a "legislative scheme that manages solely for timber, with all other values as a constraint on that objective."[84]

The FRPA and its regulations set out restrictions on and requirements relating to activities of forest and range licensees. The government intends that these stipulations will "[maintain] high levels of protection for forest values including watersheds and wildlife habitat," and will assist the government and industry through "streamlined planning processes."[85] The provincial government introduced the FRPA under its "Forestry Revitalization Plan" to reduce the

[76] British Columbia, Ministry of Forests, "The Timber Tenure System," online: Ministry of Forests webpage <http://www.for.gov.bc.ca/HTH/timten/pub.htm> (date accessed: 17 November 2008).
[77] S.B.C. 2002, c. 69.
[78] R.S.B.C. 1996, c. 245.
[79] R.S.B.C. 1996, c. 187.
[80] R.S.B.C. 1996, c. 488.
[81] R.S.C. 1985, c. F-14.
[82] S.C. 2002, c. 29.
[83] *Tsilhqot'in*, *supra* note 2 at para. 1030.
[84] *Ibid.* at para. 1099.
[85] British Columbia, Ministry of Forests, "Forest and Range Practices Act," online: Ministry of Forests and Range webpage <http://www.for.gov.bc.ca/code/> (date accessed: 17 November 2008).

regulatory burden on a forest industry that international competition and a softwood lumber dispute with the United States has hit hard. Through the FRPA, the government transformed its forestry regulation from mandated prescriptive and specific requirements, such as appurtenancy and cut control, into a more flexible "results-based" planning.[86] The new FRPA approach requires the provincial government to "set objectives for sustaining forest values – biodiversity, cultural heritage, forage, fish, recreation, resource features, soils, timber, visual quality, water, and wildlife… [and] new objectives for localized values including visual quality, lake and stream sides, and recreation values."[87] In concert, the FRPA requires major timber licensees to submit for approval a "Forest Stewardship Plan" which explains how the licensee will address provincial government objectives.

The FRPA does not, however, mandate the actual objectives or the manner in which the provincial government will implement and measure compliance with them, leaving much of the picture very unclear. Moreover, every section of the statute dealing with setting objectives contains the extremely broad qualifier, "without unduly reducing the supply of timber from British Columbia's forests," apparently allowing government and industry to completely ignore any objectives that government does establish. As a result, the FRPA effectively imposes very little in the way of clear requirements on corporate licensees. Most significantly, from the Aboriginal perspective on sustainable forestry practices, none of the objectives sections addresses (or even mentions) Aboriginal interests, claims, or issues.

(c) Land Use Planning in the Claim Area

Pursuant to Section 4(c) of the *Ministry of Forests and Range Act*, the Province created the Tsuniah Lake Local Resource Use Plan and the Brittany Lake Forest Management Plan, in 1992 and 1993, respectively, to integrate timber supply in the Claim Area. The terms of the Cariboo-Chilcotin Land Use Plan (CCLUP),[88] established in 1994, and the related planning process confirmed those plans of 1992 and 1993. Once the district manager for a portion of the Provincial forest approves local resource use plans, the plans provide area-specific resource management objectives for integrating resource use in the area. The aims of these local resource use plans showed the government's intention to open up the Claim Area for logging.[89]

As Vickers J. explained, "the CCLUP is an expression of the highest level of provincial land use planning…. portions enacted by [the provincial] Cabinet as a higher level plan have the force of

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[86] First Nations and Forest Industry Relationships, *supra* note 64. For the most part, "results-based" approaches involve an enforcement focus on specified (though often general) end results, rather than dictated methods for reaching specific results. Such approaches usually involve a reduction in direct government oversight (*e.g.*, through government inspectors) and an increase in reliance upon industry to self-regulate, often through the mandatory involvement of independent professionals, such as professional foresters, biologists and geologists.

[87] Timber Tenures, *supra* note 65 at 11.

[88] British Columbia, Ministry of Sustainable Resource Management, "Cariboo-Chilcotin Land Use Plan Ninety-day Implementation Process Final Report" (1995) Appendix 1, at 45-59, online: Integrated Land Management Bureau Cariboo Chilcotin Land Use Plan Published Reports website <http://ilmbwww.gov.bc.ca/slrp/lrmp/williamslake/cariboo_chilcotin/news/reports.html> (date accessed: 3 February 2009).

[89] See *Tsilhqot'in*, *supra* note 2 at para. 1132.

law and establish a process for all lower level decisions."[90] Under the CCLUP, the Province determined the planned uses of the Claim Area lands based on considerations of economic objectives and third party interests. None of the three plans, however, acknowledges or addresses the potential Aboriginal title or rights in the Claim Area.[91]

iii. Forest Industry Policy concerning Aboriginals

As a matter of law, forest management practices in Canada and British Columbia must reflect the constitutionally entrenched rights of Aboriginal peoples. Court decisions, such as *Delgamuukw* and *Haida*,[92] have underscored the legal duty of governments "to consult with Aboriginal Peoples and accommodate their interests on natural resource developments that might infringe on Aboriginal and treaty rights."[93] The practical relationship between Aboriginals and government arises from "[t]he manner in which provinces or their agents incorporate these legal responsibilities in provincial frameworks or corporate policy"[94] and, in particular, the issue of management of resources and related lands. In addition, the success of First Nations' claims involving Aboriginal and treaty rights has influenced government policy.

(a) Consultation and Accommodation Policy of B.C.

Where there is *prima facie* evidence of the existence of Aboriginal rights in an area, the government must meaningfully consult with and accommodate the interests of First Nations. In *Haida*, the Supreme Court of Canada discussed the scope of consultation and accommodation required of government.

In apparent response to the *Haida* decision (at least in part), the B.C. government developed a framework for consultation and accommodation to provide guidance to the Ministry of Forests for its activities.[95] This policy was seen as a method to avoid uncertainty in land dispute areas, which "negatively affects British Columbia's investment climate."[96]

(b) The New Relationship

In March of 2005, the B.C. government and representatives of the First Nations Summit, the Union of B.C. Indian Chiefs, and the B.C. Assembly of First Nations met to develop The New Relationship provincial policy document.[97] This policy was initiated to generate "new approaches for consultation and accommodation" as well as a framework to engage Aboriginal

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[90] *Ibid.* at para. 1132.
[91] *Ibid.* at para. 1133.
[92] *Haida*, *supra* note 36.
[93] First Nations and Forest Industry Relationships, *supra* note 64 at 7.
[94] *Ibid.*
[95] See Appendices G and H.
[96] *Ibid.* at 1.
[97] British Columbia, Ministry of Aboriginal Relations and Reconciliation, "The New Relationship" (2005), online: Ministry of Aboriginal Relations and Reconciliation webpage <http://www.gov.bc.ca/arr/newrelationhip/down/new_relationship.pdf> (date accessed: 18 November 2008) [hereinafter The New Relationship].

concerns that is based on "openness, transparency, and collaboration – one that reduces uncertainty, litigation, and conflict for all British Columbians."[98] Based on the premise, "We are all here to stay,"[99] the document provides an outline for a new government relationship with Aboriginals in B.C. According to the B.C. First Nations Forestry Council, The New Relationship commits the parties to:

> A review of existing Forest and Range Agreements, the creation of new structures to address shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing; and, a review of necessary institutional, legislative, and policy changes to implement these actions items.[100]

(c) Forests and Range Opportunities Agreements

As a step forward in the New Relationship and pursuant to the "Forestry Revitalization Plan," the provincial government implemented further policy changes. The Forest and Range Opportunities Agreements ("FROs"), introduced in 2003, provide for revenue sharing and forest tenure opportunities for B.C. First Nations, as part of a reallocation of tenure. In addition, the FROs may provide access to some jobs and funding that can be used for a variety of purposes, and may promote the development of forestry business experience among Aboriginals. However, in negotiating these agreements, Aboriginal peoples must follow the accommodation policy that the Ministry of Forests and Range developed (discussed above).

(d) Federal Initiatives

The federal government has established initiatives to include Aboriginal peoples in the development of the forest sector and, particularly, in forest management practices. Two key policies are *The National Forest Strategy 2003-2008*[101] and The First Nations Forestry Program. The first policy calls for "bold institutional arrangements between governments and Aboriginal communities relating to forest management."[102] The First Nations Forestry Program,[103] a joint initiative between Natural Resources Canada (NRCan) and Indian and Northern Affairs Canada (INAC), supports the objective of improving the "economic conditions in status First Nation communities with full consideration of the principles of sustainable forest management."[104]

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[98] British Columbia, Ministry of Aboriginal Relations and Reconciliation, "The New Relationship with First Nations and Aboriginal People," online: Ministry of Aboriginal Relations and Reconciliation webpage <http://www.gov.bc.ca/arr/newrelationship/new_relationship_overview.html>.

[99] The New Relationship, *supra* note 97 at 1. See also *Delgamuukw*, *supra* note 3 at para. 186 (from which this statement originates).

[100] BC First Nations Forestry Council, "Resources," online: BC First Nations Forestry Council webpage <http://www.fnforestrycouncil.ca/resources.php> (date accessed: 18 November 2008).

[101] National Forest Strategy Coalition, "The National Forest Strategy (2003-2008)," online: National Forest Strategy Coalition webpage <http://nfsc.forest.ca/strategies/nfs5.pdf> (date accessed: 18 November 2008).

[102] *Ibid.* at 15.

[103] See online: Canada, Natural Resources Canada, First Nations Forestry Program homepage <http://cfs.nrcan.gc.ca/subsite/fnfp/home> (last modified: 19 December 2008).

[104] Canada, Natural Resources Canada, First Nations Forestry Program, "About FNPF," online: First Nations Forestry Program webpage <http://cfs.nrcan.gc.ca/subsite/fnfp/about> (last modified: 19 December 2008).

Development of sustainable forest management certification standards has also helped improve the approach that forestry companies take in their relations with Aboriginals. These standards introduce a means by which companies can be economically rewarded for activities, which demonstrate corporate social responsibility, particularly as consumers increasingly require adherence to such standards. In Canada, there are three established certification standards:[105] The Canadian Standards Association's Sustainable Forest Management standard,[106] the Forest Stewardship Council standard,[107] and the Sustainable Forest Initiative standard.[108]

iv. Implications of the Decision for the Forest Industry in the Claim Area

The *Tsilhqot'in* decision calls for a "new model of sustainability" for forestry practices in B.C.[109] Vickers J. found that "provincial foresters do practice sustainable management, [but] within a narrow definition of sustainability."[110] The objective of the Province is clearly sustainable management of timber resources with a view to sustaining the forest industry. Hence, this model of sustainability affects Aboriginal interests. Since the Tsilhqot'in decision did not include a declaration of Aboriginal title, the Provincial legislative regulation of natural resource extraction and related practices apparently continues; however, such processes must address the interests of people that government decisions affect, especially those of relevant Aboriginal peoples.

First Nations' Perspective on Rights and Title in the Claim Area

From the Aboriginal perspective, ownership of Aboriginal territory has never been surrendered or sold to the colonial authorities. Aboriginals, therefore, continue to hold title to and rights over territorial lands, which they consider the Creator to have granted to them.[111]

The Aboriginal perspective on rights and title can be distinguished from concepts of rights and title to land under the Canadian legal system. To Aboriginal peoples, rights and title are better understood as "Origin Title,"[112] an expression of the relationship between Aboriginal peoples and their traditional territories. Origin Title includes the "right of self-determination, and includes the responsibility and jurisdiction to protect, access, and use the lands, waters, and resources of [their] territories for the benefit of [their peoples]."[113]

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[105] First Nations and Forest Industry Relationships, *supra* note 64 at 16-18.
[106] This standard reflects the requirements:
1. to include, among other objectives, the meaningful participation of Aboriginals in forest management; and
2. to improve corporate organization in order to better to address Aboriginal concerns.

[107] Many Aboriginal and environmental organizations prefer this standard; though it can be quite difficult to achieve.
[108] This standard is more focused on environmental concerns than Aboriginal issues.
[109] *Tsilhqot'in*, *supra* note 2 at para. 1103.
[110] *Ibid.* at para. 1301.
[111] J. Blankinship, "Alternatives to the British Columbia Treaty Process: Community Perspectives on Aboriginal Title and Rights" at 1 (2006), online: University of Victoria, Indigenous Governance homepage <http://web.uvic.ca/igov/research/pdfs/Blankinship.Jennie_598.FINAL.pdf> (date accessed: 18 November 2008).
[112] Environmental-Aboriginal Guardianship through Law and Education (EAGLE), *Nation to Nation: The Law of Consultation and Accommodation*, looseleaf (Surrey: EAGLE, 2005) c. 1 at 4 [hereinafter *Nation to Nation*].
[113] *Ibid.*

Logging in the Chilcotin Region is of paramount interest to the Province. At the same time, to the Tsilhqot'in First Nation, the land is inseparable from their history and tradition and, as a people, the Xeni Gwet'in have "the sacred duty to protect the nen (land) of Tachelach'ed and the surrounding nen on behalf of the Tsilhqot'in people"; logging in the area threatens both their rights and their duty to protect the nen.[114] The need to protect the land and to preserve a way of life connected with that land was the motivation behind the Tsilhqot'in Nation's decision to enter into a land claim dispute with the Province.

Canadian Law on Aboriginal Title and Rights

At issue in *Tsilhqot'in* is an all-encompassing claim for Aboriginal title and rights to the Claim Area. In Canadian jurisprudence, Aboriginal title is a *sui generis* right[115] and a legal concept that has developed in Canadian courts as incorporating both Aboriginal and non-Aboriginal perspective. Although no land in British Columbia has yet been declared Aboriginal title land, virtually all land in B.C. is subject to Aboriginal claims of title.

a. How have Canadian Courts defined Aboriginal title?

For over 30 years, beginning with the decision in *Calder* and continuing up to the most recent *Tsilhqot'in* case, Canadian courts have explored the law which should govern Aboriginal title and rights. Aboriginal title arises from Aboriginal occupation of the land prior to Crown assertion of sovereignty and the historic relationship between Aboriginal people and the land.[116] It exists independent of Crown recognition:

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[114] *Tsilhqot'in*, *supra* note 2 at para. 24.

[115] *Sui generis* (a thing of its own class) is the term that the SCC has used (*Guerin* v. *R.*, [1984] 2 S.C.R. 335 at 339 (para. 93), see also 387 (paras. 100 and 104) [hereinafter *Guerin*]) to describe the unique (*Delgamuukw*, *supra* note 3 at 230 (para. 82)) common law rights and title of Aboriginal peoples to their traditional lands in Canada. Elements of a *sui generis* Aboriginal interest in land include:

1. Special historic origin. The right or interest derives from physical occupation and possession of land which pre-dates British colonization and the assertion of British sovereignty, (*Guerin* at 376) unlike "normal" proprietary interests, such as fee simple estates, which arise afterward. The *sui generis* right also derives in part from Aboriginal laws which existed prior to British occupation and sovereignty;
2. General inalienability. The interest cannot be transferred, sold, or surrendered except to the Crown (*Guerin* at 339, para. 93);
3. Right to fairness. In the event of surrender to the Crown, the Crown is under a fiduciary obligation to treat Aboriginal peoples fairly and, particularly, to deal with the land for the benefit of the surrendering Aboriginal peoples (*Guerin* at 339);
4. Communal ownership. An Aboriginal individual cannot hold the interest; instead, all peoples of an Aboriginal nation hold it collectively (*Delgamuukw*, *supra* note 3 at 241-42 (para. 115)); and
5. Restricted right to exclusive use and occupation. While a broad range of uses are permitted and uses need not be elements of "Aboriginal practices, customs, and traditions which are integral to distinctive Aboriginal cultures" of the group claiming the right (*i.e.*, the definition of an Aboriginal right), uses must "not be irreconcilable with the nature of the group's attachment to the land" (*Delgamuukw*, *supra* note 3 at 241-42 (para. 115)).

[116] *Nation to Nation*, *supra* note 112, c. 3 at 5.

> ...[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means....[117]

The decision in *Marshall* and *Bernard* confirmed the common law theory of Aboriginal title:

> [A]n aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to the land, continues to enjoy title to it.[118]

Delgamuukw is the leading SCC decision on the nature of Aboriginal title. Aboriginal title is the right to the land itself.[119] It is *sui generis* in nature; *i.e.*, it is unique in character, independent of English or French law,[120] and reflects a combination of common law rules of real property and Aboriginal perspectives on property.[121] It is a communally held exclusive right to the possession of land, including the right to decide what uses can be made of the land.[122]

b. What is the legal status of Aboriginal rights and title?

i. Before the *Constitution Act, 1982*

Prior to European occupation of North America, Aboriginal peoples occupied the land in Canada, having established their own cultures, systems of laws and government, social organizations, languages, economies, and territories.[123] Following the European occupation and assertion of sovereignty, pre-existing Aboriginal laws and interests were subsumed into the common law and left somewhat vulnerable until the enactment of s. 35(1) of the *Constitution Act, 1982*. Aboriginal rights were vulnerable in the sense that the government could unilaterally extinguish them through clear and competent federal legislation or constitutional amendment. Of course, the Aboriginal rights holders themselves could bring about the extinguishment of such rights through surrendering them to the Crown (*e.g.*, through a treaty).

ii. Section 35 of the *Constitution Act, 1982*

Section 35(1) is found in Part II of the *Constitution Act, 1982,* entitled "Rights of the Aboriginal Peoples of Canada," and provides as follows:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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[117] *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313 at 156 (para. 26) [hereinafter *Calder*].
[118] *Marshall*; *Bernard*, *supra* note 4 at para. 39 (majority decision).
[119] *Delgamuukw*, *supra* note 3 at para. 138.
[120] *Guerin*, *supra* note 115; see also J. Woodward, *Native Law*, looseleaf (Calgary: Carswell, 1994) c. 5 at para. 170 [hereinafter Woodward].
[121] *Delgamuukw*, *supra* note 3 at paras. 81*ff*.
[122] *Delgamuukw*, *supra* note 3 at para. 115.
[123] The Report, *supra* note 63 at 4.

Under s. 35(1) of the *Constitution Act, 1982*, Aboriginal and treaty rights have constitutional status and protections. Although s. 35(1) forms part of the Canadian constitution, it falls outside of the *Canadian Charter of Rights and Freedoms*[124] and, thus, the legislative override provision of s. 33 of the *Constitution Act, 1982* does not appear to apply to it.[125] As a result, federal, provincial, or territorial laws cannot extinguish Aboriginal and treaty rights. This entrenchment in the constitution represents a major development in the relationship between Aboriginal peoples and the Crown. However, it should be noted that the constitutional entrenchment did not create Aboriginal rights; such rights already existed and were recognized at common law.[126]

Despite s. 35(1) protections, the government has jurisdiction to limit or infringe Aboriginal and treaty rights for justifiable reasons.[127] The objective of any limitation must be substantial and compelling and the extent of the limitation must be consistent with the fiduciary relationship it has with Aboriginal peoples.[128] Justification for infringement of Aboriginal rights is examined in detail in Part 1 of the Compendium on Aboriginal and treaty rights.

iii. Jurisprudence

R. v. *Sparrow*[129] was the first decision in which the SCC addressed the meaning and application of "Aboriginal rights" under s. 35(1). The court interpreted the words of the section and set out what became known as the "*Sparrow* Test" for determining the extent to which Canadian legislation can limit Aboriginal rights.[130]

(a) Interpretation of Section 35

In its modification of Aboriginal rights in section 35(1), the word "existing" must be interpreted "flexibly." "Existing" Aboriginal rights refers to those rights that were not "extinguished" prior to the enactment of the *Constitution Act, 1982*.[131] The words "recognized and affirmed," which engage the government's fiduciary duty to Aboriginal peoples, also make it clear that s. 35(1) did not create Aboriginal rights but, instead, acknowledged that such rights had existed prior to the assertion of Crown sovereignty.[132]

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[124] Part 1 of the *Constitution Act, 1982*, *supra* note 62.
[125] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at para. 47 [hereinafter *Sparrow*]. However, see also paras. 61*ff.*, in which the SCC clearly agrees that s.1 of the *Constitution Act, 1982* does not apply to s. 35(1) rights and yet appears to leave open the question of whether "override" legislation that relies upon s. 33 of the *Constitution Act, 1982*, (*supra* note 61) could survive if justified under the *Sparrow* Test (see below).
[126] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at para. 28 [hereinafter *Van der Peet*] (referring to *Calder*, *supra* note 120 at 156 (para. 26)).
[127] *Sparrow*, *supra* note 129 at 1109 (paras. 61*ff.*).
[128] Woodward, *supra* note 120, c. 5 at para. 60, referencing *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*].
[129] *Sparrow*, *supra* note 129.
[130] See Compendium on Aboriginal and treaty rights [hereinafter Compendium].
[131] *Sparrow*, *supra* note 129 at paras. 23-27.
[132] *Ibid.* at paras. 55*ff.* (especially para. 62).

(b) Application of S. 35 ("The *Sparrow* Test")

The SCC in *Sparrow* set out a framework for determining the extent to which Canadian legislation can limit existing Aboriginal rights. This framework for analyzing alleged violations of Aboriginal rights and the justification for such violations under s. 35 is known as the "*Sparrow* Test" and comprises four questions:[133]

1. Is there an existing Aboriginal right?
2. Has the right been extinguished?
3. Has there been a *prima facie* infringement of the right?
4. Can the infringement be justified?

In this case narrative, we will focus only on the first question.

(c) Is There an Existing Aboriginal Right? Aboriginal Title as an Element of Aboriginal Rights

In *R.* v. *Van der Peet,* the SCC decided that, in order to qualify as 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."[134] The person or group claiming the right has the onus of proving these elements. The *Van der Peet* elaboration of the *Sparrow* Test to determine whether an Aboriginal right has been established requires a two-part analysis:

1. Characterization of the claimed right; and
2. Determination of whether the practice, tradition, or custom claimed to be an Aboriginal right was, prior to contact with Europeans, an integral part of the distinctive Aboriginal society.

a. *Characterization of the Aboriginal right claimed*

In *Delgamuukw,* the Supreme Court of Canada further developed the "characterization" element of the elaborated *Sparrow* Test. The court characterized Aboriginal rights as falling along a "spectrum"[135] of rights dependent on their degree of connection with the land. Aboriginal title falls at one extreme end of this spectrum and includes "activities that must take place on land, which confer the right to the land itself."[136]

[133] See the summary in *Gladstone*, *supra* note 128 at para. 20.
[134] *Van der Peet*, *supra* note 126 at para. 46.
[135] *Delgamuukw*, *supra* note 3 at para. 138.
[136] Woodward, *supra* note 120, c. 5 at para. 180.

b. *Proof of Aboriginal title*

A person or group who claims the existence of an Aboriginal or treaty right, including the existence of Aboriginal title, has the onus of proving the existence of such right or title. To prove Aboriginal title, the claimant must satisfy three criteria, as established in *Delgamuukw*:[137]

1. Aboriginal occupation of the land prior to the Crown's assertion of sovereignty over the subject land;
2. If present occupation is relied on as proof of pre-sovereignty occupation, there must be continuity between present and pre-sovereignty occupation; and
3. At the time of assertion of Crown sovereignty, Aboriginal occupation of the land must have been exclusive.

The court in *Delgamuukw* also held that a court must consider and accord equal weight to evidence representing both the Aboriginal and European perspectives.[138]

Since its decision in *Delgamuukw*, the SCC has apparently narrowed the scope of Aboriginal title. In 2005, during the course of the *Tsilhqot'in* trial, the SCC released its decisions in *Marshall* and *Bernard*. The main issue in those cases was whether the Mi'kmaq people have treaty rights or Aboriginal title allowing them to log commercially on Crown lands. At trial, the courts applied the *Delgamuukw* test for proof of Aboriginal title and entered convictions because the Mi'kmaq people did not establish that they held Aboriginal title to the lands they logged. The trial judges in each of *Bernard* and *Marshall* required proof of "sufficiently regular and exclusive use" of the cutting sites by the Mi'kmaq people at the time of the assertion of Crown sovereignty in order to establish Aboriginal title.[139] The Court of Appeal in each case rejected this test in favour of "a less onerous standard of incidental or proximate occupancy."[140] On further appeal, the SCC considered the test for exclusive occupation required to prove Aboriginal title. Adopting the view of the trial judges, the SCC held that proof of "sufficiently regular and exclusive use of cutting sites… at the time of assertion of sovereignty" was required to establish Aboriginal title[141] and, further, concluded:

> To say that title flows from occasional entry and use is inconsistent with … the approach to aboriginal title which this Court has consistently maintained.[142]

The British Columbia Supreme Court in the *Tsilhqot'in* case had to apply the principles set out in the *Marshall* and *Bernard* decision to the semi-nomadic circumstances of the Tsilhqot'in people. Vickers J. observed that the standard articulated in *Marshall* and *Bernard* for exclusive occupation to prove the existence of Aboriginal title was high. The claimant must demonstrate "[r]egular use or occupancy of definite tracts of land"[143] and occasional entry and use of land is

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[137] *Deglamuukw*, *supra* note 3 at para. 143.
[138] *Ibid.* at para. 148.
[139] *Marshall; Bernard*, *supra* note 4 at paras. 41 and 72.
[140] *Ibid.* at para. 41.
[141] *Ibid.* at para. 72. See also paras. 41*ff*.
[142] *Ibid.* at para. 59.
[143] *Tsilhqot'in*, *supra* note 2 at para. 583.

not sufficient to meet the test. According to Vickers J., this standard shows that "Aboriginal title is not co-extensive with any particular Aboriginal group's traditional territory."[144]

The court in *Tsilhqot'in* also considered the definition of "definite tracts of land" and the relative merits of the different perspectives of the Province and the Tsilhqot'in Nation as to the meaning of these words. In contrast to the "postage stamp" approach of the Province, the Tsilhqot'in Nation took a "cultural security and continuity" approach to the definition.[145] Vickers J. rejected the "postage stamp" approach to title that Canada and British Columbia advanced because, in his view, it reflects an "impoverished view of Aboriginal title."[146] Instead, he analyzed the evidence and addressed the issue of occupation from the perspective of the Tsilhqot'in Nation, which he described as a "semi-nomadic" group.[147] The court apparently expanded the definition of "tracts of land" to encompass "land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people."[148] This definition implies that a tract of land is not an insular location, such as a "favourite fishing hole,"[149] which reflects the Province's "postage stamp" approach to proof of Aboriginal title. Instead, the *Tsilhqot'in* decision asserts that a claimant can show proof of Aboriginal title based on regular use and occupancy of a definite tract of land using evidence that demonstrates that the land has provided "cultural security and continuity" for an Aboriginal group dating back to pre-sovereignty times.[150]

c. Nature of Evidence

One of the difficulties encountered in cases concerning Aboriginal and treaty rights is the requirement to balance different perspectives and the interests of different cultures and to translate these perspectives into admissible evidence. In weighing the evidence, courts must take into account the perspective of Aboriginal peoples,[151] introduced in terms that that work within the Canadian legal structure. In the analysis of proof of Aboriginal title issues, a court, therefore, must be "sensitive to the realities of aboriginal society… [and] take into account the context of the aboriginal society at the time of sovereignty."[152] Pursuant to *Delgamuukw*, oral histories of Aboriginal groups are admissible as evidence in the courts and "and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[153]

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[144] *Ibid.* at para. 554 (referring to *Marshall*; *Bernard*, *supra* note 4, generally).
[145] *Tsilhqot'in*, *supra* note 2 at paras. 1376 and 1378*ff.*; see also paras. 603 (referencing *R.* v. *Sappier*; *R.* v. *Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 33 [hereinafter *Sappier*; *Gray*] and 612.
[146] *Tsilhqot'in*, *supra* note 2 at para. 1376.
[147] *Ibid.* at paras. 363, 379-397, 436, 578*ff.*, 582, 610*ff.*, 624*ff.*, 646-649, 792-794, 944, 953*ff.*, 1242-1265 and 1376-1381.
[148] *Ibid.* at para. 1377.
[149] *Ibid.* at para. 1376.
[150] *Ibid.* at paras. 1376*ff.* See also 603 *ff.* (referencing *Sappier*; *Gray*, *supra* note 150 at para. 33) and 612*ff.*
[151] *Van der Peet*, *supra* note 126 at paras. 49-50; see also *Delgamuukw*, *supra* note 3 at para. 156.
[152] *Delgamuukw*, *supra* note 3 at para. 156. See also paras. 105-106.
[153] *Ibid.* at para. 87. The court added:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated…. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*R.*

Claims of Tenure Holders and Other Third Parties

By virtue of its jurisdiction under s.92 of the *Constitution Act, 1867*, the B.C. government has, pursuant to its provincial legislation, granted interests in resources and lands in the Chilcotin Region of B.C. to third parties. As Vickers J. explained, these private interests, "whether they are fee simple title, range agreements, water licences, or any other interests derived from the Province… have not extinguished and cannot extinguish Tsilhqot'in [Aboriginal] rights, including Tsilhqot'in Aboriginal title."[154] As noted above, since s. 35 of the *Constitution Act, 1982* protects Aboriginal rights from extinguishment through unilateral federal legislation, only surrender of rights by Aboriginal peoples to the federal Crown or a constitutional amendment can result in extinguishment of Aboriginal and treaty rights.

The full consequences of a declaration of Aboriginal title in the Claim Area are not clear, nor does Vickers J. address them in his *obiter dicta*. However, because of his conclusion that provincial legislation, namely the *Forest Act*, does not apply to Aboriginal title land, both the subsequent rights of tenure holders and the broader range of third party interests are at issue. In particular, if provincial legislation is inoperable on Aboriginal title lands, it might be argued that the interests of third parties granted under provincial legislation are null and void because the provincial government never had the jurisdiction to grant the interests in the first place. Of importance is the impact that such a consequence to third parties could have on the economy of B.C., so heavily dependent on natural resource extraction. A declaration of Aboriginal title to land used mainly for logging purposes would constitute a legal precedent that likely will generate far-reaching economic consequences in British Columbia.

Negotiations

Vickers J. concluded his decision in the *Tsilhqot'in* case by urging both the Tsilhqot'in Nation and the Province to negotiate a solution outside the courts. His hope was that the Province would seek an "early and honourable reconciliation with Tsilhqot'in people,"[155] rather than a postponement of resolution through the appeal process. This decision allows the parties to determine reconciliation based on the existence and implications of Aboriginal title (and the clear existence of Aboriginal rights, which he found) in the Claim Area.[156]

The court in *Sparrow* introduced the concept of reconciliation; it focuses on the development of a new relationship between federal power and federal duty as a result of the Crown's fiduciary relationship with Aboriginal peoples.[157] Further developed in, amongst others, *Van der Peet*, *Gladstone*, *Delgamuukw*, and *Haida,* the goal of reconciliation is based on the concept of a process flowing from rights that s. 35(1) of the *Constitution Act, 1982* guarantees. In the unanimous judgment in *Haida*, McLachlin C.J.C. elaborated:

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v. *Simon*, [1985] 2 S.C.R. 387 (S.C.C.) at p. 408).

[154] *Tsilhqot'in*, *supra* note 2 at para. 998; see also *Delgamuukw*, *supra* note 3.

[155] *Tsilhqot'in*, *supra* note 2 at para. 1338.

[156] *Ibid.* at paras. 1338-1382.

[157] *Ibid.* at para. 1344.

> This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.[158]

Hence, approaches to negotiation and the different perspectives of the Tsilhqot'in Nation, Canada, and British Columbia must be considered.

In "All Our Relations," a declaration of the First Nations Leadership Council[159] of British Columbia, Aboriginal leaders in British Columbia issued a victory statement following release of the decision in the *Tsilhqot'in* case in celebration of the first recognition of Aboriginal title in Canadian legal history.[160] The declaration included a statement that the Aboriginal peoples they represent will "only negotiate on the basis of a full and complete recognition of the existence of [their] title and rights throughout [their] entire lands, waters, territories, and resources."[161]

Additionally, the First Nations Leadership Council sent a letter on behalf of the First Nations of British Columbia to the Governments of Canada and British Columbia.[162] The letter formally demanded that the provincial and federal Crown:

1. Officially recognize Tsilhqot'in Aboriginal title to those areas of the Claim Area for which the Court found that the Tsilhqot'in have proven title;
2. Recognize that First Nations in British Columbia have Aboriginal title and rights throughout their entire territories; and
3. Commit to negotiations to settle the land questions in B.C. as directed by the Courts based on true recognition and reconciliation of Aboriginal title and rights.

As did the Tsilhqot'in Nation, both the B.C. government and the federal government agreed to wait four months before filing notices of appeal of the decision in *Tsilhqot'in* so that they could each have time to explore negotiations.

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[158] *Haida*, *supra* note 36 at para. 32.
[159] The First Nations Leadership Council is comprised of the political executives of the B.C. Assembly of First Nations, First Nations Summit, and the Union of B.C. Indian Chiefs.
[160] First Nations Leadership Council, News Release, re1107, "First Nations Of British Columbia Issue Declaration Affirming Aboriginal Title" (30 November 2007), online: The First Nations Summit homepage <http://www.fns.bc.ca/pdf/FNLC_NR_re1107Declaration.pdf> (date accessed: 19 November 2008).
[161] *Ibid.* at 3.
[162] *Ibid.* at 1-2.

Discussion Questions

There are three possibilities for what will come of an appeal from this decision: (1) Vickers' decision is upheld in all respects, including his not finding aboriginal title due to the failure of the Tsilqot'n to properly frame their claim; (2) aboriginal title is declared after an appeal to the Supreme Court; and (3) Vickers' opinion is reversed – the evidence does not support a finding of Aboriginal title in any part of the Claim Area.

Possibility 1: Vickers' decision is upheld

(a) Declared Aboriginal Rights

1. What should the Cariboo-Chilcotin Land Use Plan (Appendix F) look like? In particular with respect to declared Aboriginal rights, what changes would the Tsilhqot'in decision suggest are necessary?

2. What changes need to be made, if any, to the consultation and accommodation policy and consultation guidelines of the provincial Ministry of Forests and Range (Appendices G and H)?

3. How might the government modify its objectives encompassed in the provincial Forest and Range Practices Act to include initiatives to recognize proven and asserted Aboriginal rights? Will this affect government sustainable forest management practices?

(b) Aboriginal Title

(1) For the first time, a court has made a finding that Aboriginal title exists to a large tract of land. Practically speaking, where there is a strong *prima facie* case, or probability of Aboriginal title, there is a correspondingly strong probability that the Province has no property interest or jurisdiction in the subject lands. What are the potential legal and practical implications for the Crown's constitutional duty to consult and perhaps accommodate?

(2) Consider the Province's "postage stamp" approach to Aboriginal title and compare it to the Tsilhqot'in Nation's "cultural security and continuity" approach (adopted in the decision). How do the differences reflect different perspectives on Aboriginal title? How will the rejection of the "postage stamp" approach affect proposed developments and decisions that have the potential to infringe Aboriginal title?

(c) Negotiations

(1) Justice Vickers spent the last 18 pages of his reasons for judgment on the topic of reconciliation, which he believes should take place ideally outside of the adversarial legal system (as do other judges, particularly in the SCC). He expressed hope that his decision would help negotiations between the Tsilhqot'in Nation, the B.C. government, and the federal government.

a. What would be the positions of each party? (What would each of the parties hope to accomplish)?

b. Who should be at the negotiation table? Who are the proper holders of Aboriginal rights and title?

c. What about negotiations concerning the interests of third parties (e.g., holders of licences, leases, other tenures, etc.)?

(2) In areas where there is strong evidence of Aboriginal title, there is a corresponding weak foundation for provincial Crown legislative jurisdiction over the lands. As a result, there are stronger mutual incentives/benefits to reach agreements, which are part of the reconciliation or accommodation process. How would this result change the position of the parties in the reconciliation and accommodation process?

(3) On what basis does the Tsilhqot'in Nation want to negotiate with provincial and federal governments?

Possibility 2: Aboriginal title is declared after an appeal

(1) Vickers J. decided a constitutional issue left ambiguous in *Delgamuukw*, namely, the applicability of provincial land and resource laws to Aboriginal title lands. If an appeal of the Tsilhqot'in decision results in a declaration of Aboriginal title to some or all of the Claim Area, what laws will apply and who will have jurisdiction over the Claim Area? To determine this answer, it may be helpful to identify the content of the Aboriginal title.

(2) If the judge's *obiter dicta* becomes law and Aboriginal title exists in the Claim Area:
   1. What consequences flow from the finding regarding privately held lands?
   2. What would be the most beneficial position for the Tsilhqot'in Nation to take?

3. To whom will third parties with interests in the Claim Area take their concerns (provincial or federal governments)? Discuss potential legal and practical aspects.

Possibility 3: If Vickers' opinion is reversed – the evidence does not support a finding of Aboriginal title in any part of the Claim Area

Discuss the application of the test for proof of Aboriginal title developed in *R. v. Marshall* and *R. v. Bernard* in relation to the nomadic Tsilhqot'in people.

Appendix A – Forest Act
[R.S.B.C. 1996] Chapter 157

Part 1 – Definitions and interpretation

1 (1) In this Act:

"allowable annual cut" means

(a) in respect of a tree farm licence area, community forest agreement area, woodlot licence area or timber supply area, the rate of timber harvesting determined for the area under section 8, as increased or reduced under this Act, and

(b) in respect of an agreement entered into under this Act specifying an allowable annual cut, the rate of timber harvesting specified in the agreement, as increased or reduced under this Act;

…

"Crown land" has the same meaning as in the *Land Act*, but does not include land owned by an agent of the government;[163]

"Crown timber" means timber on Crown land, or timber reserved to the government;

"cultural heritage resource" means an object, a site or the location of a traditional societal practice that is of historical, cultural or archaeological significance to British Columbia, a community or an aboriginal people;

"cutting permit" means a cutting permit issued under an agreement entered into under this Act;

…

"major licence" means

(c) a timber licence,

…

"objectives set by government" means objectives set by government as defined in section 1 (1) of the *Forest and Range Practices Act*;[164]

…

"private land" means land that is not Crown land;

"private tenure" means a timber licence, or private land, in a tree farm licence area;

…

"timber supply area" means land designated as a timber supply area under section 7;

"tree farm licence area" means the area of land subject to a tree farm licence;

Wilderness areas

6 The Lieutenant Governor in Council may designate any Crown land in a Provincial forest as a wilderness area, cancel such designation or amend the boundaries of a wilderness area.

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[163] Pursuant to the *Land Act*, R.S.B.C. 1996, c. 245, the term "Crown land"… means land, whether or not it is covered by water, or an interest in land, vested in the government; [except for very specific exclusions].

[164] Pursuant to the *Forests and Range Practices Act*, S.B.C. 2002, c. 69, the term "objectives set by government" means:

(a) objectives prescribed under section 149 (1) [of that Act], or

(b) objectives established under section 93.4 of the *Land Act* by the minister responsible for the administration of the *Land Act*.

Timber supply areas

7 The minister may

(a) designate land as a timber supply area, and

(b) order the consolidation, division or abolition of timber supply areas or order their boundaries changed.

Allowable annual cut

8 (1) The chief forester must determine an allowable annual cut at least once every 5 years after the date of the last determination, for

(a) the Crown land in each timber supply area, excluding tree farm licence areas, community forest agreement areas and woodlot licence areas, and

…

(3.1) If, in respect of the allowable annual cut for a timber supply area or tree farm licence area, the chief forester considers that the allowable annual cut that was determined under subsection (1) is not likely to be changed significantly with a new determination, then, despite subsections (1) to (3), the chief forester

(a) by written order may postpone the next determination under subsection (1) to a date that is up to 10 years after the date of the relevant last determination, and

(b) must give written reasons for the postponement.

…

(5) In determining an allowable annual cut under subsection (1) the chief forester may specify portions of the allowable annual cut attributable to

(a) different types of timber and terrain in different parts of Crown land within a timber supply area or tree farm licence area, and

(b) different types of timber and terrain in different parts of private land within a tree farm licence area.

…

(8) In determining an allowable annual cut under subsection (1) the chief forester, despite anything to the contrary in an agreement listed in section 12, must consider

(a) the rate of timber production that may be sustained on the area, taking into account

(i) the composition of the forest and its expected rate of growth on the area,

(ii) the expected time that it will take the forest to become re-established on the area following denudation,

(iii) silviculture treatments to be applied to the area,

(iv) the standard of timber utilization and the allowance for decay, waste and breakage expected to be applied with respect to timber harvesting on the area,

(v) the constraints on the amount of timber produced from the area that reasonably can be expected by use of the area for purposes other than timber production, and

(vi) any other information that, in the chief forester's opinion, relates to the capability of the area to produce timber,

(b) the short and long term implications to British Columbia of alternative rates of timber harvesting from the area,

(c) [Repealed 2003-31-2.]

(d) the economic and social objectives of the government, as expressed by the minister, for the area, for the general region and for British Columbia, and
(e) abnormal infestations in and devastations of, and major salvage programs planned for, timber on the area.

…

Part 3 — Disposition of Timber by the Government

Rights to Crown timber

11 Subject to the *Land Act* and the *Park Act*, rights to harvest Crown timber must not be granted by or on behalf of the government except in accordance with this Act and the regulations.

Form of agreements

12 (1) A district manager, a regional manager or the minister may enter on behalf of the government into an agreement granting rights to harvest Crown timber in the form of a
…
(c) timber licence,

…

Rights in tree farm licences

27 If a tree farm licence expires or otherwise terminates and is not replaced under section 36, a timber licence that is then in the tree farm licence area
(a) expires one year after the expiry or termination of the tree farm licence, and
(b) may be replaced by a timber licence under section 28.

Rights not in tree farm licence

28 (1) A person who holds a timber licence that is due to expire under section 27 (a) may submit to the regional manager, within 6 months after expiry or termination of the tree farm licence, a schedule proposing a time and a sequence for the orderly harvesting of the merchantable timber that is subject to the licence.
(2) After considering a schedule proposed under subsection (1), the regional manager, in a notice served on its holder within 3 months after receiving the schedule, must offer to the holder one or more timber licences that, subject to section 74,
(a) describe the Crown land subject to the timber licence, and
(b) expire on a date specified in the timber licence by the regional manager.
…
(4) If the offer is accepted, the regional manager and the holder must enter into a timber licence.

…

Content of timber licence

30 A timber licence must
(a) describe an area of Crown land over which it is to apply,
(b) be for a term determined under this Division,

(c) grant to its holder the exclusive right during its term to harvest all merchantable timber in the area of Crown land described in it,

…

(e) provide for cutting permits with terms that do not exceed 4 years to be issued by the district manager, or a forest officer authorized by the district manager, within the limits provided in the timber licence and subject to this Act and the *Forest and Range Practices Act*, to authorize the holder of the timber licence to harvest Crown timber from specified areas of land within the area of Crown land described in the timber licence,

(f) require its holder to pay the government, in addition to other amounts payable under this Act,

(i) stumpage under Part 7, and

(ii) waste assessments for merchantable Crown timber, whether standing or felled, that could have been cut and removed under the timber licence, but at its holder's discretion, is not cut and removed, and

(g) include other terms and conditions, consistent with this Act, the *Forest and Range Practices Act*, the *Wildfire Act* and any regulations or standards made under those Acts, determined by the regional manager.

…

Definition

168 In this Part:

"agreement" means an agreement in the form of a licence, permit or agreement referred to in section 12;

"designated area" means an area of Crown land specified under section 169 (1).

Specifying Crown land as a designated area

169 (1) The Lieutenant Governor in Council, by regulation, may

(a) specify Crown land as a designated area, for a period set out in the regulation, if the Lieutenant Governor in Council believes it is in the public interest to specify the Crown land as a designated area, and

(b) repeal or amend a regulation under paragraph (a).

(2) The maximum period during which Crown land may continue as a designated area under regulations made under this section is 10 years, beginning on the day the Crown land first becomes a designated area.

What is the effect of specifying a designated area?

170 (1) In this section, **"issue"** means issue, grant, enter into or approve.

(2) If a permit, licence or plan referred to in subsection (3) relates to all or part of a designated area, the minister, by written order, may

(a) suspend in whole or in part or vary the permit, licence or plan, or

(b) direct a person who, under this Act, the *Forest and Range Practices Act* or the *Forest Practices Code of British Columbia Act*, has a discretion to issue the permit, licence or plan

(i) to not issue the permit, licence or plan, or

(ii) in whole or in part, to issue the permit, licence or plan with terms and conditions, if any, that the person considers appropriate to take into account the relationship of the permit, licence or plan to the designated area.

(3) The following are the permits, licences or plans to which subsection (2) applies:
(a) a cutting permit;
…
(4) A suspension or variation under subsection (2) (a) expires, and the permit, licence or plan that was suspended or varied is restored to its original form, when the Crown land to which the suspension or variation relates ceases to be a designated area or on an earlier expiry date, if any, ordered in writing by the minister.
…

Conditions

171 (1) The minister, by written order, may attach conditions to an agreement or to a special use permit if the agreement or special use permit relates to all or part of a designated area.
…

Allowable annual cut and allowable harvest in a designated area

173 (1) In subsections (3) to (5):
"base level allowable annual cut" means the allowable annual cut that is prescribed for the purposes of this section;
"exempt licence" means a licence described in subsection (4);
"licence" means a forest licence.
(2) The chief forester, by written order, may reduce the allowable annual cut of
(a) a timber supply area, or
(b) a tree farm licence area,
if all or part of the area is a designated area.
…
(3) If the chief forester reduces the allowable annual cut of a timber supply area under subsection (2), the minister, by written order, may do either or both of the following:
(a) proportionately reduce, by the method set out in subsection (5), the allowable annual cut authorized in all of the licences that are not exempt licences in the timber supply area;
(b) reduce the allowable annual cut authorized in a licence if all or part of the area from which timber may be harvested under the licence is a designated area.
…
(4) An exempt licence is a licence that
(a) specifies an allowable annual cut that is less than the base level allowable annual cut, or
(b) is for a term that is less than the prescribed term.
(5) A reduction in allowable annual cut imposed under subsection (3) (a) in a timber supply area must be apportioned among all the licences in that area, except exempt licences…
…

No compensation during first 4 years of designation

175.1 During and in respect of the first 4 year period in which Crown land continues as a designated area, no compensation or damages is payable by the government to the holder of

any agreement because of or arising out of the designated land status of all or any part of the Crown land to which the agreement relates.

Compensation for 5th and subsequent years of designation

175.2 (1) If Crown land specified under section 169 as a designated area continues as a designated area for more than 4 years, each holder of an agreement on whom the designated land status, of all or any part of the Crown land to which the agreement relates, has an adverse economic effect is entitled to compensation from the government in an amount determined in accordance with subsection (2).

(2) The compensation to which the holder of an agreement is entitled under subsection (1) is an amount equal to the value of the harvesting rights under the agreement that

(a) pertain to that part of the period, during which the Crown land specified under section 169 continues as a designated area, that exceeds 4 years, and

(b) are not exercisable because of the effect on the agreement of

(i) the designated land status, of all or any part of the Crown land to which the agreement relates, and

(ii) this Part or actions that, in accordance with this Part, are taken or not taken.

…

Limit on compensation

175.4 (1) In this section, **"compensation"** includes damages.

(2) The compensation payable to the holder of an agreement because of or arising out of

(a) the specification of a designated area,

(b) an order made under this Part, or

(c) either of the things specified in paragraphs (a) or (b) in combination with the other

is limited to the amount of compensation determined in relation to that agreement under sections 175.2 and 175.3.

(3) No action lies and an action or other proceeding must not be brought or continued against the government for compensation in an amount that exceeds the amount limited under this section.

…

Appendix B – Forest and Range Practices Act
[S.B.C. 2002] Chapter 69

Part 1 — Definitions and Interpretation

Definitions

1 (1) In this Act:

"agreement under the *Forest Act*" means an agreement in the form of a licence, a permit or an agreement referred to in section 12 of the *Forest Act* or a pulpwood agreement;

…

"forest practice" means a prescribed activity that is carried out by

(a) the government,

(b) a holder of an agreement under the *Forest Act*, or

(c) a person in a prescribed category of persons

on private land, subject to a tree farm licence, a community forest agreement or a woodlot licence, or on Crown forest land;

…

"objectives set by government" means

(a) objectives prescribed under section 149 (1), or

(b) objectives established under section 93.4 of the *Land Act* by the minister responsible for the administration of the *Land Act*;

…

"standard" means a standard established by the chief forester under section 169;

"wildlife" means

(a) vertebrates that are mammals, birds, reptiles or amphibians and are prescribed as wildlife under the *Wildlife Act*,

(b) fish from or in the non-tidal waters of British Columbia, including

(i) vertebrates of the order Petromyzoniformes (lampreys) or class Osteichthyes (bony fishes), or

(ii) invertebrates of the subphylum Crustacea (crustaceans) or phylum Mollusca (mollusks), and

(c) invertebrates or plants listed by the Minister of Water, Land and Air Protection as endangered, threatened or vulnerable species,

and includes the eggs and juvenile stages of these vertebrates, invertebrates and plants.

(2) Words and expressions not defined in this Act have the meaning given to them in the *Forest Act* and the *Range Act* unless the context indicates otherwise.

…

Part 2 — Forest Stewardship Plan, Site Plan and Woodlot Licence Plan

Division 1 — Forest Stewardship Plan

Forest stewardship plan required

3 (1) Before the holder of

(a) a major licence,

…

harvests timber or constructs a road on land to which the agreement or licence applies, then, subject to section 4, the holder must prepare, and obtain the minister's approval of, a forest stewardship plan that includes a forest development unit that entirely contains the area on which

(a) the timber is to be harvested, and

(b) the roads are to be constructed.

…

(4) A forest stewardship plan may apply to one or more of each of the following:

(a) holders of agreements under the *Forest Act*;

(b) agreements under the *Forest Act*;

(c) areas of land that are, or will be, subject to an agreement under the *Forest Act*.

…

Content of forest stewardship plan

5 (1) A forest stewardship plan must

(a) include a map that

(i) uses a scale and format satisfactory to the minister, and

(ii) shows the boundaries of all forest development units,

(b) specify intended results or strategies, each in relation to

(i) objectives set by government, and

(ii) other objectives that are established under this Act and that pertain to all or part of the area subject to the plan, and

(c) conform to prescribed requirements.

(1.1) The results and strategies referred to in subsection (1) (b) must be consistent to the prescribed extent with objectives set by government and with the other objectives referred to in subsection (1) (b) (ii).

(2) A forest stewardship plan must be consistent with timber harvesting rights granted by the government for any of the following to which the plan applies:

(a) the timber supply area;

…

Term of forest stewardship plan

6 (1) The term of a forest stewardship plan

(a) is the period, not exceeding 5 years, that the person submitting the plan for approval specifies at the time of submission, and

(b) begins on the date specified in writing by the minister in approving the plan.

(2) The minister by written notice given to the holder may extend the term of a forest stewardship plan, before or after it expires for an additional period not exceeding 5 years in the circumstances specified by regulation.

(3) The extended forest stewardship plan may include changes to the extent authorized by regulation.

…

Division 2 — Site Plans

Site plans for cutblocks and roads

10 (1) Except in prescribed circumstances, the holder of a forest stewardship plan must prepare a site plan in accordance with prescribed requirements for any

(a) cutblock before the start of timber harvesting on the cutblock, and

(b) road before the start of timber harvesting related to the road's construction.

(2) A site plan must

(a) identify the approximate locations of cutblocks and roads,

(b) be consistent with the forest stewardship plan, this Act and the regulations, and

(c) identify how the intended results or strategies described in the forest stewardship plan apply to the site.

(3) A site plan may apply to one or more cutblocks and roads whether within the area of one or more forest stewardship plans.

…

Division 4 — General

Approval of forest stewardship plan, woodlot licence plan or amendment

16 (1) The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5.

(1.01) A forest stewardship plan or an amendment to a forest stewardship plan conforms to section 5 if

(a) a person with prescribed qualifications certifies that it conforms to section 5 in relation to prescribed subject matter, and

(b) the minister is satisfied that it conforms to section 5 in relation to subject matter not prescribed for the purpose of paragraph (a).

…

(2) A forest stewardship plan, a woodlot licence plan or an amendment to either that is submitted to the minister for approval must be considered to have conformed to this Act, the regulations, the standards and the objectives set by government if the plan or amendment conforms to the relevant provisions of this Act, the regulations, the standards and the objectives as they were 4 months before the date of the submission of the plan or amendment to the minister.

(2.01) The Lieutenant Governor in Council, by order, may declare that a forest stewardship plan, a woodlot licence plan or an amendment to either that is submitted to the minister for approval, despite subsection (2), must immediately conform to some or all of this Act, the regulations, the standards and the objectives set by government as set out in the order.

(2.1) Except in prescribed circumstances, before approving a plan or amendment, the minister may require the holder of a proposed plan or amendment to submit information that the minister reasonably requires in order to determine if the proposed plan or amendment conforms to subsection (1) or (1.1), whichever is applicable.

(3) The minister must give written reasons for refusing to approve a forest stewardship plan, a woodlot licence plan or an amendment to either.

(4) If the minister receives information that gives the minister reason to believe that a forest stewardship plan, woodlot licence plan, or an amendment to either, did not, at the time of its approval under this section, conform, in relation to

(a) the prescribed subject matter referred to in subsection (1.01) (a) to section 5, or

…

(c) may determine whether the plan conformed, at the time of its approval, with,

(i) section 5 in relation to the subject matter mentioned in paragraph (a), or

…

(d) in the case of a plan determined under paragraph (c) to be non-conforming, may order the holder to amend the plan to so conform, by a date specified in the order.

(5) The holder of a forest stewardship plan or woodlot licence plan who receives notice of an order made under subsection (4) must comply with the order.

…

Review and comment

18 A person responsible for preparing a forest stewardship plan, a woodlot licence plan, or an amendment to either, if required by the regulations and then in accordance with the regulations, must make the plan or amendment publicly available for

(a) review, and

(b) comment

before submitting the plan or amendment to the minister for approval.

…

Part 3 — Forest Practices

Division 1 — General

Compliance with plans

21 (1) The holder of a forest stewardship plan or a woodlot licence plan must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.

(2) Despite the expiry of a forest stewardship plan or a woodlot licence plan, subsection (1) continues to apply to the holder of the expired plan if, in relation to any result, strategy or other provision of the plan that was in effect immediately before the expiry of the plan, there is no provision in another plan applicable to that holder for the same area to which the expired plan applied, that is identified as being a replacement for the result, strategy or other provision.

(3) For the purpose of the continued application of subsection (1) required by subsection (2), a forest stewardship plan or a woodlot licence plan may be amended as if unexpired.

…

Part 5 — Protection of Resources

Division 1 — General

Protection of the environment

46 (1) A person must not carry out a forest practice, a range practice or another activity that results in damage to the environment, unless in doing so

(a) the person

(i) is acting in accordance with a plan, authorization or permit under this Act,

(ii) is not required to hold a plan or permit because of an exemption under this Act and is acting in accordance with this Act, the regulations and the standards, or

(iii) [Repealed 2007-18-80.]

(iv) is acting in accordance with another enactment, and

(b) the person does not know and cannot reasonably be expected to know that, because of weather conditions or site factors, the carrying out of the forest practice, range practice or other activity may result, directly or indirectly, in damage specified by regulation.

(1.1) A person, other than a person described in subsection (1), must not engage in any activity on Crown land that results in damage to the environment, unless in doing so

(a) the person

(i) is acting in accordance with a plan, authorization or permit under this Act,

(ii) is not required to hold a plan or permit because of an exemption under this Act and is acting in accordance with this Act, the regulations and the standards, or

(iii) is acting in accordance with another enactment, and

(b) the person does not know and cannot reasonably be expected to know that, because of weather conditions or site factors, engaging in the activity may result, directly or indirectly, in damage specified by regulation.

(2) A person who contravenes subsection (1) or (1.1) must

(a) take appropriate action to prevent any further damage,

(b) promptly notify the district manager of the damage, and

(c) take any remedial measures that the minister requires under section 74.

(3) A person who discontinues a forest practice, a range practice or another activity referred to in subsection (1) or an activity referred to in subsection (1.1) may resume that practice or activity only if and when

(a) it can be resumed without contravening subsection (1) or (1.1), as the case may be, and

(b) the minister is satisfied that any remedial measures required under subsection (2) (c)

(i) have been carried out, or

(ii) will be carried out at the appropriate time.

…

Division 2 — Unauthorized Timber Harvesting, Trespass and Tree Spiking

Unauthorized timber harvesting

52 (1) A person must not cut, damage or destroy Crown timber unless authorized to do so
(a) under this Act, the *Forest Act*, an agreement under the *Forest Act*,
(b) by the minister, for silviculture, stand tending, forest health, abating a fire hazard related to wildfires or another purpose,
(b.1) under the *Wildfire Act*,
(c) under a grant of Crown land made under the *Land Act*,
(d) under the *Park Act*, or
(e) under the regulations, in the course of carrying out activities
(i) under an authorization referred in section 51 or 57, or
(ii) that are incidental to or required to carry out activities authorized or approved under this Act, the *Forest Act*, the *Range Act* or another prescribed enactment.

…

(3) A person must not remove Crown timber unless authorized to do so
(a) under the *Forest Act* or an agreement under the *Forest Act*,
(b) under a grant of Crown land made under the *Land Act*, or
(c) under the *Park Act*.

(4) If a person, at the direction of or on behalf of another person,
(a) cuts, damages or destroys Crown timber contrary to subsection (1), or
(b) removes Crown timber contrary to subsection (3),
that other person also contravenes subsection (1) or (3).

…

Objectives set by government

149 (1) The Lieutenant Governor in Council may make regulations prescribing objectives in relation to one or more of the following subjects:
(a) soils;
(b) visual quality;
(c) timber;
(d) forage and associated plant communities;
(e) water;
(f) fish;
(g) wildlife;
(h) biodiversity;
(i) recreation resources;
(j) resource features;
(k) cultural heritage resources.

(2) In case of an inconsistency between
(a) an objective set by government prescribed under this section, and
(b) an objective referred to in paragraph (b) of the definition of "objectives set by government" in section 1 (1),
the latter objective prevails to the extent of the inconsistency.

Appendix C

Delgamuukw v. *British Columbia*

[1997] 3 S.C.R. 1010

***Lamer C.J.C.* (*Cory* and *Major JJ.* concurring):**

…

81 The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Vanderpeet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by "their bridging of aboriginal and non-aboriginal cultures" (at para. 42). Accordingly, "a court must take into account the perspective of the aboriginal people claiming the right....while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each" (at paras. 49 and 50).

82 In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" (at para. 49). Both the principles laid down in *Vanderpeet* -- first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit -- must be understood against this background.

83 A concrete application of the first principle can be found in *Vanderpeet* itself, where I addressed the difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. As I reiterate below, the requirement for continuity is one component of the definition of aboriginal rights (although, as I explain below, in the case of title, the issue is continuity from sovereignty, not contact). However, given that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (at para. 62) "conclusive evidence from pre-contact times about the practices, customs and traditions of their community". Accordingly, I held that (at para. 62):

> The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. [Emphasis added.]

The same considerations apply when the time from which title is determined is sovereignty

84 This appeal requires us to apply not only the first principle in *Vanderpeet* but the second principle as well, and adapt the laws of evidence 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. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.

85 A useful and informative description of aboriginal oral history is provided by the *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1 (*Looking Forward, Looking Back*) at p. 33:

> The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human centred in the same way as in the western scientific tradition, for it does not assume that human beings are anything more than one -- and not necessarily the most important -- element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focussed on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.
>
> In the Aboriginal tradition the purposes of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige....
>
> Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are "facts enmeshed in the stories of a lifetime". They are also likely to be rooted in particular locations, making reference to particular families and communities, This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.

86 Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only "as a repository of historical knowledge for a culture" but also as an expression of "the values and mores of ... [that] culture": Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992), 30 *Alta. L. Rev.* 1276, at p. 1279. Dickson J. (as he was then) recognized as much when he stated in *R. v. Kruger* (1977), [1978] 1 S.C.R. 104 (S.C.C.) at p. 109, that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations". The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial -- the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on

through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.

87 Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.) at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.) at p. 408). This process must be undertaken on a case-by-case basis. I will take this approach in my analysis of the trial judge's findings of fact.

…

105 Although he regretted this finding, the trial judge felt bound to apply the rules of evidence because it did not appear to him (at p. 442) "that the Supreme Court of Canada has decided that the ordinary rules of evidence do not apply to this kind of case". The trial judge arrived at this conclusion, however, without the benefit of *Vanderpeet*, where I held that the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.

106 Many of the reasons relied on by the trial judge for excluding the evidence contained in the territorial affidavits are problematic because they run against this fundamental principle. The requirement that a reputation be known in the general community, for example, ignores the fact that oral histories, as noted by the Royal Commission on Aboriginal Peoples, generally relate to particular locations, and refer to particular families and communities and may, as a result, be unknown outside of that community, even to other aboriginal nations. Excluding the territorial affidavits because the claims to which they relate are disputed does not acknowledge that claims to aboriginal rights, and aboriginal title in particular, are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be no need to bring them to the courts for resolution. Casting doubt on the reliability of the territorial affidavits because land claims had been actively discussed for many years also fails to take account of the special context surrounding aboriginal claims, in two ways. First, those claims have been discussed for so long because of British Columbia's persistent refusal to acknowledge the existence of aboriginal title in that province until relatively recently, largely as a direct result of the decision of this Court in *Calder*, *supra*. It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussions of members of that community; those discussions are the very basis of that reputation. But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as being suspect, and may be held to be

inadmissible. The net effect 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 in court.

…

115 A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

…

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). 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.

…

142 The adaptation of the test laid down in Van der Peet to suit claims to title must be understood as the recognition of the first aspect of that prior presence. However, as will now become apparent, the tests for the identification of aboriginal rights to engage in particular activities and for the identification of aboriginal title share broad similarities. The major distinctions are first, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

The Test for the Proof of Aboriginal Title

143 In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The land must have been occupied prior to sovereignty

144 In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. The relevant time period for the establishment of title is, therefore, different than for the establishment of aboriginal rights to engage in specific activities. In Van der Peet, I held, at para. 60 that "[t]he time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact . . . ." This arises from the fact that in defining the central and distinctive attributes of pre-existing aboriginal societies it is necessary to look to a time prior to the arrival of Europeans. Practices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.

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. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture. I note that this is the approach has support in the academic literature: Brian Slattery, "Understanding Aboriginal Rights", supra, at p. 742; Kent McNeil, Common Law Aboriginal Title, supra, at p. 196. For these reasons, I conclude that aboriginals must establish occupation of the land from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title. McEachern C.J. found, at pp. 233-34, and the parties did not dispute on appeal, that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846. This is not to say that circumstances subsequent to sovereignty may never be relevant to title or compensation; this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty.

146 There was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim to aboriginal title. However, the parties disagreed on how that

occupancy could be proved. The respondents assert that in order to establish aboriginal title, the occupation must be the physical occupation of the land in question. The appellant Gitksan nation argue, by contrast, that aboriginal title may be established, at least in part, by reference to aboriginal law.

147 This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy. Indeed, there is precedent for doing so. In Baker Lake, supra, Mahoney J. held that to prove aboriginal title, the claimants needed both to demonstrate their "physical presence on the land they occupied" (at p. 561) and the existence "among [that group of] . . . a recognition of the claimed rights. . . . by the regime that prevailed before" (at p. 559).

148 This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by Van der Peet. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each". I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.

149 However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: Common Law Aboriginal Title, supra, at p. 73; also see Cheshire and Burn's Modern Law of Real Property, supra, at p. 28; and Megarry and Wade, The Law of Real Property, supra, at p. 1006. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, Common Law Aboriginal Title, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.

150 In Van der Peet, I drew a distinction between those practices, customs and traditions of aboriginal peoples which were "an aspect of, or took place in" the society of the aboriginal group asserting the claim and those which were "a central and significant part of the society's distinctive culture" (at para. 55). The latter stood apart because they "made the culture of the society distinctive . . . it was one of the things that truly made the society what it was" (at para.

55, emphasis in original). The same requirement operates in the determination of the proof of aboriginal title. As I said in Adams, a claim to title is made out when a group can demonstrate "that their connection with the piece of land . . . was of a central significance to their distinctive culture" (at para. 26).

151 Although this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

> If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation

152 In Van der Peet, I explained that it is the pre-contact practices, customs and traditions of aboriginal peoples which are recognized and affirmed as aboriginal rights by s. 35(1). But I also acknowledged it would be "next to impossible" (at para. 62) for an aboriginal group to provide conclusive evidence of its pre-contact practices, customs and traditions. What would suffice instead was evidence of post-contact practices, which was "directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact" (at para. 62). The same concern, and the same solution, arises with respect to the proof of occupation in claims for aboriginal title, although there is a difference in the time for determination of title. Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.

153 Needless to say, there is no need to establish "an unbroken chain of continuity" (Van der Peet, at para. 65) between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land (Côté, supra, at para. 53). In Mabo, supra, the High Court of Australia set down the requirement that there must be "substantial maintenance of the connection" between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.

154 I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land

that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.

At sovereignty, occupation must have been exclusive

155 Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. 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.

156 As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each. At common law, a premium is placed on the factual reality of occupation, as encountered by the Europeans. However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" (McNeil, Common Law Aboriginal Title, supra, at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation. Moreover, as Professor McNeil suggests, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For example, "[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group's exclusive control" (at p. 204).

157 A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.

158 In their submissions, the appellants pressed the point that requiring proof of exclusive occupation might preclude a finding of joint title, which is shared between two or more aboriginal nations. The possibility of joint title has been recognized by American courts: United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by

recognizing that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's. However, since no claim to joint title has been asserted here, I leave it to another day to work out all the complexities and implications of joint title, as well as any limits that another band's title may have on the way in which one band uses its title lands.

159 I should also reiterate that if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself. Rather, as I have suggested, they are a right to do certain things in connection with that land. If, for example, it were established that the lands near those subject to a title claim were used for hunting by a number of bands, those shared lands would not be subject to a claim for aboriginal title, as they lack the crucial element of exclusivity. However, they may be subject to site-specific aboriginal rights by all of the bands who used it. This does not entitle anyone to the land itself, but it may entitle all of the bands who hunted on the land to hunting rights. Hence, in addition to shared title, it will be possible to have shared, non-exclusive, site-specific rights. In my opinion, this accords with the general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either de facto practice or by the aboriginal system of governance. It also allows sufficient flexibility to deal with this highly complex and rapidly evolving area of the law.

(f) Infringements of Aboriginal Title: the Test of Justification

(i) Introduction

160 The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., Sparrow) and provincial (e.g., Côté) governments. However, s. 35(1) requires that those infringements satisfy the test of justification. In this section, I will review the Court's nascent jurisprudence on justification and explain how that test will apply in the context of infringements of aboriginal title.

Appendix D

R. v. Marshall; R. v. Bernard

[2005] 2 S.C.R. 220; 2005 SCC 43

The judgment of McLachlin C.J. and Major, Bastarache, Abella and Charron JJ. was delivered by

THE CHIEF JUSTICE —

Introduction

1 Can members of the Mi'kmaq people in Nova Scotia and New Brunswick engage in commercial logging on Crown lands without authorization, contrary to statutory regulation? More precisely, do they have treaty rights or aboriginal title entitling them to do so? These are the central issues on this appeal.

2 In the *Marshall* case, Stephen Frederick Marshall and 34 other Mi'kmaq Indians were charged with cutting timber on Crown lands without authorization, contrary to s. 29 of the *Crown Lands Act*, R.S.N.S. 1989, c. 114, between November 1998 and March 1999. The logging took place in five counties on mainland Nova Scotia and three counties on Cape Breton Island, in the Province of Nova Scotia. The accused admitted all the elements of the offence, except lack of authorization.

3 In the *Bernard* case, Joshua Bernard**,** a Mi'kmaq Indian, was charged with unlawful possession of 23 spruce logs he was hauling from the cutting site to the local saw mill in contravention of s. 67(1)(c) of the *Crown Lands and Forest Act*, S.N.B. 1980, c. C-38.1, as amended. Another member of the Miramichi Mi'kmaq community had cut the logs from Crown lands in the Sevogle area of the watershed region of the Northwest Miramichi River, in the Province of New Brunswick. Like the accused in *Marshall***,** Bernard argued that as a Mi'kmaq, he was not required to obtain authorization to log.

4 In both cases the trial courts entered convictions. In both cases, these convictions were upheld by the summary appeal court. And in both cases, these decisions were reversed by the Court of Appeal. In *Marshall*, the convictions were set aside and a new trial ordered. In *Bernard*, the conviction was set aside and an acquittal entered.

5 The significance of these cases transcends the charges at stake. They were used as vehicles for determining whether Mi'kmaq peoples in Nova Scotia and New Brunswick have the right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title. Many witnesses, including experts in aboriginal history and treaty interpretation, testified. The trial judges made detailed findings of fact and the Justices of the Court of Appeal wrote extensive reasons. The cases now come before us for final determination of the issues.

6 I conclude that the trial judges in each case correctly held that the respondents' treaty rights did not extend to commercial logging and correctly rejected the claim for aboriginal title in the relevant areas. I would thus allow the appeals, dismiss the cross-appeal in *Marshall* and restore the convictions.

Aboriginal Title

37 The respondents claim that they hold aboriginal title to the lands they logged and that therefore they do not need provincial authorization to log. They advance three different grounds for title: common law; the *Royal Proclamation (1763)*, R.S.C. 1985, App. II, No. 1; and *Governor Belcher's Proclamation.* I will consider each in turn.

A. *Aboriginal Title at Common Law*

38 Where title to lands formerly occupied by an aboriginal people has not been surrendered, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, give rights to continue those practices in today's world: see *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Nikal*, [1996] 1 S.C.R. 1013 . Aboriginal title, based on occupancy at the time of sovereignty, is one of these various aboriginal rights. The respondents do not assert an aboriginal right to harvest forest resources. They assert aboriginal title *simpliciter*.

39 The common law theory underlying recognition of aboriginal title holds that an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy title to it. Prior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by clear legislative act (see *Van der Peet*, at para. 125). Now that is not possible. The Crown can impinge on aboriginal title only if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1113. This process can be seen as a way of reconciling aboriginal interests with the interests of the broader community.

40 These principles were canvassed at length in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, which enunciated a test for aboriginal title based on exclusive occupation at the time of British sovereignty. Many of the details of how this principle applies to particular circumstances remain to be fully developed. In the cases now before us, issues arise as to the standard of occupation required to prove title, including the related issues of exclusivity of occupation, application of this requirement to nomadic peoples, and continuity. If title is found, issues also arise as to extinguishment, infringement and justification. Underlying all these questions are issues as to the type of evidence required, notably when and how orally transmitted evidence can be used.

B. *Standard of Occupation for Title: The Law*

41 The trial judges in each of *Bernard* and *Marshall* required proof of regular and exclusive use of the cutting sites to establish aboriginal title. The Courts of Appeal held that this test was too strict and applied a less onerous standard of incidental or proximate occupancy.

42 Cromwell J.A. in *Marshall* ((2003), 218 N.S.R. (2d) 78, 2003 NSCA 105) adopted in general terms Professor McNeil's "third category" of occupation (*Common Law Aboriginal Title* (1989)), "actual entry, and some act or acts from which an intention to occupy the land could be inferred" (para. 136). Acts of "cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon" (para. 136).

43 Daigle J.A. in *Bernard* ((2003), 262 N.B.R. (2d) 1, 2003 NBCA 55) similarly concluded that it was not necessary to prove specific acts of occupation and regular use of the logged area in order to ground aboriginal title. It was enough to show that the Mi'kmaq had used and

occupied an area near the cutting site at the confluence of the Northwest Miramichi and the Little Southwest Miramichi. This proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq (para. 119).

44 The question before us is which of these standards of occupation is appropriate to determine aboriginal title: the strict standard applied by the trial judges; the looser standard applied by the Courts of Appeal; or some other standard? Interwoven is the question of what standard of evidence suffices; Daigle J.A. criticized the trial judge for failing to give enough weight to evidence of the pattern of land use and for discounting the evidence of oral traditions.

45 Two concepts central to determining aboriginal rights must be considered before embarking on the analysis of whether the right claimed has been established. The first is the requirement that both aboriginal and European common law perspectives must be considered. The second relates to the variety of aboriginal rights that may be affirmed. Both concepts are critical to analyzing a claim for an aboriginal right, and merit preliminary consideration.

46 *Delgamuukw* requires that in analyzing a claim for aboriginal title, the Court must consider both the aboriginal perspective and the common law perspective. Only in this way can the honour of the Crown be upheld.

47 The difference between the common law and aboriginal perspectives on issues of aboriginal title is real. But it is important to understand what we mean when we say that in determining aboriginal title we must consider both the common law and the aboriginal perspective.

48 The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.

49 To determine aboriginal entitlement one looks to aboriginal practices rather than imposing a European template: "In considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'" *Delgamuukw, per* Lamer C.J., at para. 149. The application of "manner of life" was elaborated by La Forest J. who stated that:

> ... when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to

> work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. [Emphasis in original; para. 194]

50 Thus to insist that the pre-sovereignty practices correspond in some broad sense to the modern right claimed, is not to ignore the aboriginal perspective. The aboriginal perspective grounds the analysis and imbues its every step. It must be considered in evaluating the practice at issue, and a generous approach must be taken in matching it to the appropriate modern right. Absolute congruity is not required, so long as the practices engage the core idea of the modern right. But as this Court stated in *Marshall 2*, a pre-sovereignty aboriginal practice cannot be transformed into a different modern right.

51 In summary, the court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.

52 The second underlying concept -- the range of aboriginal rights -- flows from the process of reconciliation just described. Taking the aboriginal perspective into account does not mean that a particular right, like title to the land, is established. The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.

53 Different aboriginal practices correspond to different modern rights. This Court has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow: *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 26; *R. v Côté*, [1996] 3 S.C.R. 139, at paras. 35-39. It is more accurate to speak of a variety of independent aboriginal rights.

54 One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. &. C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798. The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), *per* Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para 158.

55 This review of the general principles underlying the issue of aboriginal title to land brings us to the specific requirements for title set out in *Delgamuukw*. To establish title, claimants must prove “exclusive” pre-sovereignty “occupation” of the land by their forebears: *per* Lamer C.J., at para. 143.

56 “Occupation” means “physical occupation”. This “may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular

use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw, per* Lamer C.J., at para. 149.

57 "Exclusive" occupation flows from the definition of aboriginal title as "the right to exclusive use and occupation of land": *Delgamuukw, per* Lamer C.J., at para. 155 [emphasis in original]. It is consistent with the concept of title to land at common law. Exclusive occupation means "the intention and capacity to retain exclusive control", and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent: (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title (para. 158). Non-exclusive occupation may establish aboriginal rights "short of title" (para. 159).

58 It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet, Nikal, Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.

59 The distinction between the requirements for a finding of aboriginal title and the requirements for more restricted rights, was affirmed in *Côté*, where the Court held the right to fish was an independent right (para. 38). Similarly in *Adams*, the Court held that rights short of title could exist in the absence of occupation and use of the land sufficient to support a claim of title to the land: see *Adams*, at para. 26; *Côté*, at para. 39; *Delgamuukw*, at para. 159. To say that title flows from occasional entry and use is inconsistent with these cases and the approach to aboriginal title which this Court has consistently maintained.

60 In this case the only claim is to title in the land. The issue therefore is whether the pre-sovereignty practices established on the evidence correspond to the right of title to land. These practices must be assessed from the aboriginal perspective. But, as discussed above, the right claimed also invokes the common law perspective. The question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed.

61 The common law, over the centuries, has formalized title through a complicated matrix of legal edicts and conventions. The search for aboriginal title, by contrast, takes us back to the beginnings of the notion of title. Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land. It would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.

62 Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title: *Delgamuukw*, at para. 156. They often exercised such control over their village sites and larger areas of land which they exploited for agriculture,

hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.

63 Having laid out the broad picture, it may be useful to examine more closely three issues that evoked particular discussion here -- what is meant by exclusion, or what I have referred to as exclusive control; whether nomadic and semi-nomadic peoples can ever claim title to land, as opposed to more restricted rights; and the requirement of continuity.

64 The first of these sub-issues is the concept of exclusion. The right to control the land and if necessary to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. Determining whether it was present in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.

65 It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.

66 The second sub-issue is whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways. The answer is that it depends on the evidence. As noted above, possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient “physical possession” to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples (at para. 27). On the other hand, *Delgamuukw* contemplates that “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.

67 The third sub-issue is continuity. The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group’s

connection with the land must be shown, to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw, per* Lamer C.J., at paras. 150-51.

68 Underlying all these issues is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, are respected. Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.

69 The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system? Having evaluated the evidence, the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.

70 In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.

C. *Application of the Legal Test*

71 The cases proceeded on the basis that the British had established sovereignty in the middle of the 18th century: in *Bernard* 1759 and in *Marshall* 1713 for Mainland Nova Scotia and 1763 for Cape Breton. The British took sovereignty over lands populated by the French, Acadian settlers and the Mi'kmaq.

72 The trial judge in each case applied the correct test to determine whether the respondents' claim to aboriginal title was established. In each case they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty.

73 In *Marshall*, Curran Prov. Ct. J reviewed the authorities and concluded that the line separating sufficient and insufficient occupancy for title is between irregular use of undefined

lands on the one hand and regular use of defined lands on the other. "Settlements constitute regular use of defined lands, but they are only one instance of it" (para. 141).

74 In *Bernard*, Lordon Prov. Ct. J. likewise found that occasional visits to an area did not establish title; there must be "evidence of capacity to retain exclusive control" (para. 110) over the land claimed.

75 These tests correctly reflect the jurisprudence as discussed above.

76 Holding otherwise, Cromwell J.A in *Marshall* held that this test was too strict and that it was sufficient to prove occasional entry and acts from which an intention to occupy the land could be inferred. Similarly, in *Bernard*, Daigle J.A. held that the trial judge erred in requiring proof of specific acts of occupation and regular use in order to ground aboriginal title. It was not in error to state, as Cromwell J.A. did, that acts from which intention to occupy the land could be inferred may ground a claim to common law title. However, as discussed above, this must be coupled with sufficiently regular and exclusive use in order to establish title in the common law sense.

77 Cromwell J.A. found that this additional requirement is not consistent with the semi-nomadic culture or lifestyle of the Mi'kmaq. With respect, this argument is circular. It starts with the premise that it would be unfair to deny the Mi'kmaq title. In order to avoid this result, it posits that the usual indicia of title at common law -- possession of the land in the sense of exclusive right to control -- should be diminished because the pre-sovereignty practices proved do not establish title on that test. As discussed, the task of the court is to sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams, Côté*.

D. *Assessment of the Evidence*

78 The question remains whether the trial judges, having applied essentially the right test, erred in their assessment of the evidence or application of the law to the evidence. Absent this, there is no ground for appellate intervention. As discussed, the evidence of aboriginal practices must be assessed from the aboriginal perspective. The question is whether the practices on a broad sense correspond to the right claimed.

79 Curran Prov. Ct. J. in *Marshall* reviewed the facts extensively and summarized his conclusions as follows:

> a) The Mi'kmaq of 18th century Nova Scotia could be described as "moderately nomadic" as were the Algonquins in *Côté, supra*. The Mi'kmaq, too, moved with the seasons and circumstances to follow their resources. They did not necessarily return to the same campsites each year. Nevertheless, for decades before and after 1713 local communities

on mainland Nova Scotia stayed generally in the areas where they had been.

b) On the mainland the Mi'kmaq made intensive use of bays and rivers and at least nearby hunting grounds. The evidence is just not clear about exactly where those lands were or how extensive they were. It is most unlikely all the mainland was included in those lands. There just weren't enough people for that.
c) As for Cape Breton, there simply is not enough evidence of where the Mi'kmaq were and how long they were there to conclude that they occupied any land to the extent required for aboriginal title.
d) In particular, there is no clear evidence that the Mi'kmaq of the time made any use, let alone regular use, of the cutting sites where these charges arose, either on the mainland or in Cape Breton. The [Respondents] have not satisfied me on the balance of probability that their ancestors had aboriginal title to those sites. (para. 142)

80 Applying the law to these facts, Curran Prov. Ct. J. "concluded that the Mi'kmaq of the 18th century on mainland Nova Scotia probably had Aboriginal title to lands around their local communities, but not to the cutting sites" (para. 143).

81 In *Bernard*, Lordon Prov. Ct. J. also made a thorough review of the evidence of Mi'kmaq occupation of lands at the time of sovereignty, and concluded that it did not establish title:

> Given the evidence before me, I cannot conclude that the land at the *locus in quo* was used on a regular basis for hunting and fishing. Such trips made there in 1759 would have been occasional at best. Occasional forays for hunting, fishing and gathering are not sufficient to establish Aboriginal title in the land. [para. 107]
>
> Furthermore, the evidence does not convince me that the Mi'kmaq were the only occasional visitors to the area. From the time of contact onward, the Indians welcomed Europeans.... [para. 108]
>
> ...
>
> There was no evidence of capacity to retain exclusive control and, given the vast area of land and the small population, they did not have the capacity to exercise exclusive control. In addition, according to the evidence of Chief Augustine, the Mi'kmaq had neither the intent nor the desire to exercise exclusive control, which, in my opinion, is fatal to the claim for Aboriginal title. [para. 110]

82 The Nova Scotia Court of Appeal did not criticize the findings of fact in *Marshall*, basing its reversal on the legal test. However, in *Bernard*, the New Brunswick Court of Appeal criticized aspects of Lordon Prov. Ct. J.'s approach to the facts. Daigle J.A. found that the trial judge failed to give appropriate weight to the evidence of the pattern of land use and discounted the evidence of oral traditions. Daigle J.A. emphasized that during the winter, the Mi'kmaq would break into smaller hunting groups and disperse inland, fishing and hunting in the interior. He also emphasized the proximity of the cutting sites to traditional settlement sites. However, these facts, even if overlooked by the trial judge, do not support a finding of aboriginal title on the principles discussed above. They amount only, as Daigle J.A. put it, to "compelling evidence ... that the cutting site area ... would have been within the range of seasonal use and occupation

by the Miramichi Mi'kmaq" (para. 127). Assuming the trial judge overlooked or undervalued this evidence, the evidence would have made no difference and the error was inconsequential.

83 I conclude that there is no ground to interfere with the trial judges' conclusions on the absence of common law aboriginal title.

…

109 I would allow the appeals, dismiss the cross-appeal in *Marshall* and restore the convictions. There is no order as to costs.

The following are the reasons of LeBel and Fish JJ. delivered by

LeBEL J.:--

Introduction

110 I have read the reasons of the Chief Justice. While I am in agreement with the ultimate disposition, I have concerns about various parts of them…. On the issue of aboriginal title, I take the view that given the nature of land use by aboriginal peoples -- and in particular the nomadic nature of that use by many First Nations -- in the course of their history, the approach adopted by the majority is too narrowly focused on common law concepts relating to property interests.

…

Aboriginal Title

126 Although the test for aboriginal title set out in the Chief Justice's reasons does not foreclose the possibility that semi-nomadic peoples would be able to establish aboriginal title, it may prove to be fundamentally incompatible with a nomadic or semi-nomadic lifestyle. This test might well amount to a denial that any aboriginal title could have been created by such patterns of nomadic or semi-nomadic occupation or use: nomadic life might have given rise to specific rights exercised at specific places or within identifiable territories, but never to a connection with the land itself in the absence of evidence of intensive and regular use of the land.

127 In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights. See S. Hepburn, "Feudal Tenure and Native Title: Revising an Enduring Fiction" (2005), 27 *Sydney L. Rev.* 49.

128 It is very difficult to introduce aboriginal conceptions of property and ownership into the modern property law concepts of the civil law and common law systems, according to which land is considered to be a stock in trade of the economy. Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land. The interest is proprietary in nature and is derived from inter-traditional notions of ownership: "The idea is to reconcile indigenous and non-indigenous legal traditions by paying attention to the Aboriginal perspective on the meaning of the right at stake" (J. Burrows, "Creating an Indigenous Legal Community" (2005), 50 *McGill L.J.* 153, at p. 173).

129 This Court has on many occasions explained that aboriginal title is a *sui generis* interest in land. A dimension of the *sui generis* aspect of aboriginal title that is of particular relevance to the issues on appeal is the source of such title. As with all aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*, aboriginal title arises from the prior possession of land and the prior social organisation and distinctive cultures of aboriginal peoples on that land (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 74, cited in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 141). It originates from "the prior occupation of Canada by aboriginal peoples" and from "the relationship between common law and pre-existing systems of aboriginal law", *Delgamuukw*, at para. 114. The need to reconcile this prior occupation with the assertion of Crown sovereignty was reinforced in *Delgamuukw* when Lamer C.J. stated that common law aboriginal title "cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives" (para. 112). The Court must give equal consideration to the aboriginal and common law perspectives. An analysis which seeks to reconcile aboriginal and European perspectives may not draw a distinction between nomadic and sedentary modes of use or of occupation. Both modes would suffice to create the connection between the land and the First Nations which forms the core of aboriginal title.

130 The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standards of the indigenous people before the court" (Burrows, at p. 173). In the Nova Scotia Court of Appeal, Cromwell J.A. tried to reflect on and develop the notion of occupation in order to reconcile aboriginal and common law perspectives on ownership: *R. v. Marshall* (2003), 218 N.S.R. (2d) 78, 2003 NSCA 105, at paras. 153-56. He attempted to take the different patterns of First Nations land use into consideration in order to effect a legal transposition of the native perspective and experience into the structures of the law of property. He stayed within the framework of this part of the law while remaining faithful to the tradition of flexibility of the common law, which should allow it to bridge gaps between sharply distinct cultural perspectives on the relationship of different peoples with their land.

131 At common law, the physical fact of occupation is proof of possession. This explains the common law theory underlying the recognition of aboriginal title that is set out by the Chief Justice at para. 39: "an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy title to it". If aboriginal title is a right derived from the historical occupation and possession of land by aboriginal peoples, then notions and principles of ownership cannot be framed exclusively by reference to common law concepts. The patterns and nature of aboriginal occupation of land should inform the standard necessary to prove aboriginal title. The common law notion that "physical occupation is proof of possession" remains, but the nature of the occupation is shaped by the aboriginal perspective, which includes a history of nomadic or semi-nomadic modes of occupation.

132 At the time of the assertion of British sovereignty, North America was not treated by the Crown as *res nullius*. The jurisprudence of this Court has recognized the factual and legal existence of aboriginal occupation prior to that time. In *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, Judson J. wrote that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries" (p. 328). Hall J., dissenting, also found that indigenous legal traditions pre-existed the Crown's assertion of sovereignty, and he recognized the existence of concepts of ownership that were "indigenous to their culture and capable of articulation under the common law" (p. 375).

133 The *Royal Proclamation* of 1763 is evidence of British recognition of aboriginal modes of possession of the land. As La Forest J. noted in *Delgamuukw*, the huge tracts of lands that were reserved for aboriginal groups were not limited to villages or permanent settlements (para. 200). In a similar vein, the Robinson Treaties, the Numbered Treaties, and the entire treaty system did not formally acknowledge the existence of aboriginal title, but nonetheless evince the Crown's recognition that aboriginal peoples possessed certain rights in the land even if many of them were nomadic at the time. The Crown's claim to sovereignty did not affect aboriginal rights of occupancy and possession. In *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, Chief Justice McLachlin, writing for the majority, wrote:

> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev*. 727. [para. 10]

134 Nomadic peoples and their modes of occupancy of land cannot be ignored when defining the concept of aboriginal title to land in Canada. "The natural and inevitable consequence of rejecting enlarged *terra nullius* was not just recognition of indigenous occupants, but also acceptance of the validity of their prior possession and title" (Hepburn, at p. 79). To ignore their particular relationship to the land is to adopt the view that prior to the assertion of Crown sovereignty Canada was not occupied. Such an approach is clearly unacceptable and incongruent with the Crown's recognition that aboriginal peoples were in possession of the land when the Crown asserted sovereignty. Aboriginal title reflects this fact of prior use and occupation of the land together with the relationship of aboriginal peoples to the land and the customary laws of ownership. This aboriginal interest in the land is a burden on the Crown's underlying title.

135 This qualification or burden on the Crown's title has been characterized as a usufructuary right. The concept of a community usufruct over land was first discussed by this Court in *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577. Chief Justice Ritchie used this concept as an analogy to explain the relationship between Crown and aboriginal interests in the land. The usufruct concept is useful because it is premised on a right of property that is divided between an owner and a usufructuary. A usufructuary title to all unsurrendered lands is understood to protect aboriginal peoples in the absolute use and enjoyment of their lands.

136 If this form of *dominium utile* is recognized as belonging to aboriginal peoples and the *dominium directum* is considered to be in the Crown, then it seems to follow that the test for proof of aboriginal title cannot simply reflect common law concepts of property and ownership. The nature and patterns of land use that are capable of giving rise to a claim for title are not uniform and are potentially as diverse as the aboriginal peoples that possessed the land prior to the assertion of Crown sovereignty. The fact that a tract of land was used for hunting instead of agriculture does not mean that the group did not possess the land in such a way as to acquire aboriginal title. Taking into account the aboriginal perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criterion. The group's relationship with the land is paramount. To impose rigid concepts and criteria is to ignore aboriginal social and cultural practices that may reflect the significance of the land to the group seeking title. The mere fact that the group travelled within its territory and did not cultivate the land should not take away from its title claim.

137 The standard of proof required to ground a claim must therefore reflect the patterns of occupation of the land prior to the assertion of British sovereignty. If the presence of an aboriginal group on the land at the time of the assertion of sovereignty is the source of aboriginal title and the explanation for the burden on the Crown's underlying title, then pre-sovereignty patterns of use are highly relevant to the issue of occupation.

138 As explained above, the common law principle that "occupation is proof of possession in law" supports the proposition that the claimant must demonstrate physical occupation of the land claimed. In the context of aboriginal title claims, the physical fact of sedentary and continuous occupation is only one of the sources of title. According to Lamer C.J. in *Delgamuukw*, aboriginal title affords legal protection to historical patterns of occupation in recognition of the importance of the relationship of an aboriginal community to its land (para. 126). At paragraph 128 he explained that

> one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture.

This point was reinforced in the reasons of La Forest J.:

> As already mentioned, when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. [Emphasis deleted; para. 194]

Later in his reasons, LaForest J. stated:

> As already suggested, aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy. Viewed in this light, occupancy is part of aboriginal culture.... [para. 199]

If the aboriginal perspective is to be taken into account by a court, then the occupancy requirement cannot be equated to the common law notion of possession amounting to a fee simple. On the contrary, proof of aboriginal title relates to the manner in which the aboriginal group used and occupied the land prior to the assertion of Crown sovereignty.

139 The aboriginal perspective on the occupation of their land can also be gleaned in part, but not exclusively, from pre-sovereignty systems of aboriginal law. The relevant laws consisted of elements of the practices, customs and traditions of aboriginal peoples and might include a land tenure system or laws governing land use.

140 In *Delgamuukw*, Lamer C.J. acknowledged having stated in *R. v. Adams*, [1996] 3 S.C.R. 101, that a claim to title is made out when a group can demonstrate "that their connection with the piece of land ... was of a central significance to their distinctive culture" (*Adams*, at para. 26). He concluded that this requirement, while remaining a crucial part of the test for aboriginal rights generally, is subsumed by the requirement of occupancy in the test for aboriginal title. This demonstrates that anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should therefore be proved by evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective.

141 The record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the respondents in these cases have failed to sufficiently establish their title claim. In the circumstances, I do not wish to suggest that this decision represents a final determination of the issue of aboriginal title rights in Nova Scotia or New Brunswick. A final determination should be made only where there is an adequate evidentiary foundation that fully examines the relevant legal and historical record. The evidentiary problems may reflect the particular way in which these constitutional issues were brought before the courts.

…

Disposition

145 For these reasons, I would concur with my colleague, allow the appeals, dismiss the cross-appeal in ***Marshall*** and restore the convictions.

Appendix E

Tsilhqot'in Nation v. British Columbia (Minister of Forests) 2007 BCSC 1700

RECONCILIATION

1338 Throughout the course of the trial and over the long months of preparing this judgment, my consistent hope has been that, whatever the outcome, it would ultimately lead to an early and honourable reconciliation with Tsilhqot'in people. After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.

1339 *Black's Law Dictionary*, 8th ed., defines reconciliation as: "Restoration of harmony between persons or things that had been in conflict". The relationship between Aboriginal and non-Aboriginal Canadians has a troubled history. Fuelled by the promise of s.35(1), the early part of this century has brought significant changes in government policies at both the provincial and federal levels. Thus, there is a kindling of hope and expectation that a just and honourable reconciliation with First Nations people will be achieved by this generation of Canadians.

1340 Unfortunately, the initial reluctance of governments to acknowledge the full impact of s.35(1) has placed the question of reconciliation in the courtroom -- one of our most adversarial settings. Courts struggle with the meaning of reconciliation when Aboriginal and non-Aboriginal litigants seek a determination regarding the existence and implications of Aboriginal rights. Lloyd Barber, speaking as Commissioner of the Indian Claims Commission, is quoted on this issue in *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,* vol. 1 (Ottawa: Supply and Services Canada, 1996) at p. 203, quoting *A Report: Statements and Submissions* (Ottawa: Queen's Printer, 1977) at p. 2:

> It is clear that most Indian claims are not simple issues of contractual dispute to be resolved through conventional methods of arbitration and adjudication. They are the most visible part of the much, much more complex question of the relationship between the original inhabitants of this land and the powerful cultures which moved in upon them.

1341 Courts are obliged to address this complex question in the context of their constitutional obligations. David Stack describes the nature of this obligation in "The Impact of the RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom" (1999) 62 Sask. L. Rev. 471, at para. 44 (QL):

> The courts' opportunity to advance the larger vision of justice [recognition of Aboriginal rights and self-government] comes from their constitutional obligation to interpret and enforce the Constitution, specifically s.35(1) which reads:
>
> > The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

> These words leave the courts with a wide discretion to protect, define, and recognize the rights of Aboriginals. In many cases, this gives courts the unenviable task of determining the kind of relationships that rights-bearing Aboriginals are to have with the larger non-Aboriginal society.

1342 Some authors have been critical of how Canadian courts have defined the process of reconciliation. For example, John Borrows in "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615 (QL) states at para. 64:

> Courts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians. Reconciliation should not be a front for assimilation.
>
> Reconciliation should be embraced as an approach to Aboriginal-Canadian relations that also requires Canada to accede in many areas. Yet both legislatures and courts have been pursuing a course that, by and large, asks change only of Aboriginal peoples. Canadian institutions have been employing domesticating doctrines in their response to the [Royal Commission on Aboriginal Peoples]. This approach hinders Aboriginal choice in the development of their lands and resources, rather than enhancing it.

1343 In *Sparrow* Dickson C.J.C. and La Forest J. introduced the concept of reconciliation between Aboriginal peoples of Canada and the Crown in this way:

> There is no explicit language in the provision [s.35(1)] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s.35(1). *In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.* [Emphasis added]

1344 As addressed elsewhere in these reasons for judgment, the *Sparrow* test for justification of infringement of Aboriginal rights requires the Crown to prove both a valid legislative objective and respect for the Crown's fiduciary obligations to Aboriginal peoples: *Sparrow* at pp. 1113-1115 [S.C.R.; pp. 183-84 C.N.L.R.]. In other words, the concept of reconciliation introduced in *Sparrow* focused on working out a new relationship between federal power and federal duty as a result of the Crown's fiduciary relationship with Aboriginal peoples.

1345 The Court revisited its theory of reconciliation in the *Van der Peet* trilogy: *Van der Peet, Gladstone*, and *Smokehouse*. In defining the scope of Aboriginal rights protected by s.35(1), Lamer C.J.C. re-interpreted the *Sparrow* theory of reconciliation (a means to reconcile

constitutional recognition of Aboriginal rights with federal legislative power) as a means to work out the appropriate place of Aboriginal people within the Canadian state.

1346 In *Gladstone,* Lamer C.J.C. considered what kinds of legislative objectives might be sufficiently compelling and substantial to justify infringement. After quoting from *Van der Peet*, Chief Justice Lamer stated the following in *Gladstone*, at para. 72:

> In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that their objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or -- and at the level of justification it is this purpose which may well be most relevant -- at the reconciliation of aboriginal prior occupation with the assertion of sovereignty by the Crown.

1347 This revised theory of reconciliation provided the rationale for the wide range of legislative objectives that could meet the compelling and substantial requirement laid down in *Sparrow*. Lamer C.J.C. continued at para. 73:

> Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, <u>equally</u> a necessary part of that reconciliation.

1348 The minority opinions of McLachlin J. (as she then was) in *Van der Peet* and *Gladstone* address some of the more problematic aspects of Lamer C.J.C.'s judgments in the *Van der Peet* trilogy. McLachlin J. characterized Lamer C.J.C.'s view of the purpose of s.35(1) to achieve reconciliation as incomplete. In *Van der Peet*, McLachlin J. stated at para. 230:

> ... Sec. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

McLachlin J. went on to state at para. 310:

> My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the "reconciliation" of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. The desire for reconciliation, in many cases long overdue, lay behind the adoption of s.35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s.35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise ... The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

1349 In the view of McLachlin J., reconciliation between Aboriginal and non-Aboriginal peoples could be achieved in a way that was more respectful of constitutional principles. She noted that Aboriginal and non-Aboriginal perspectives have historically been reconciled through treaties. McLachlin J. argued for reconciliation through negotiated settlements. In *Van der Peet* at para. 313, she stated:

> It is for the aboriginal peoples and other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process -- definition of the rights guaranteed by s.35(1) followed by negotiated settlements -- is the means envisaged in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.

1350 The Court is clearly concerned with developing a theory of reconciliation that accords with Canada's identity as a constitutional democracy. However, the majority's link between it's theory of reconciliation and the justification of infringements test described in *Van der Peet* and *Gladstone* would appear to effectively place Aboriginal rights under a *Charter* s.1 analysis. As McLachlin J. points out, this is contrary to the constitutional document, and arguably contrary to the objectives behind s.35(1). The result is that the interests of the broader Canadian community, as opposed to the constitutionally entrenched rights of Aboriginal peoples, are to be foremost in the consideration of the Court. In that type of analysis, reconciliation does not focus on the historical injustices suffered by Aboriginal peoples. It is reconciliation on terms imposed by the needs of the colonizer.

1351 Lisa Dufraimont, in "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 U.T. Fac. L. Rev. (QL) explains at para. 24:

> Like the broadening test for justification of infringement it informs, the discussion of reconciliation in *Gladstone* and *Delgamuukw* suggests that Aboriginal rights must give way when they conflict with public goals and interests. This idea of reconciliation is simply not a plausible articulation of the purpose of s.35(1). Governments do not recognize and affirm minority rights for the benefit of the majority. Rather, the purpose of s.35(1), as suggested in *Sparrow*, is remedial. Aboriginal rights have been constitutionalized precisely in order to promote a just settlement for Aboriginal peoples by strengthening and legitimizing their claims against the Crown.

1352 In ***Delgamuukw***, Lamer C.J.C. affirmed and applied the *Gladstone* justification test to infringements of Aboriginal title. La Forest J. and L'Heureux-Dubé J. concurring, arrived at the same result in a separate judgment. McLachlin J. concurred with Lamer C.J.C., adding that she was "also in substantial agreement with the comments of Justice La Forest". In his judgment in ***Delgamuukw***, Lamer C.J.C. expanded the list of justifiable infringements of Aboriginal title at para. 165:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of those objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). 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.

1353 McLachlin C.J.C. wrote the unanimous judgment in *Haida Nation*. At para. 20, she revisited her vision of reconciliation through negotiated settlements, stating:

> 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.

1354 McLachlin C.J.C. describes her vision of reconciliation at para. 32:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s.35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation ..." (emphasis added).

1355 Referring to the Court's earlier ideas on the role of reconciliation, she stated at para. 33:

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

1356 McLachlin C.J.C.'s concerns echo her dissent in *Van der Peet*, where she disagreed that the goal of reconciliation permits the Crown to require a judicially authorized transfer of an Aboriginal right to non-Aboriginal people without the consent of Aboriginal people, without treaty and without compensation: see *Van der Peet* at para. 310. McLachlin C.J.C.'s judgment in *Haida Nation* returns the focus to a theory of reconciliation which acknowledges the historical injustices suffered by Aboriginal peoples and places limits on the ability of the Crown to alter the content of the right claimed in the pre-proof stage. It is logical to conclude that, in the post-proof stage, the Crown's ability to alter or infringe upon an Aboriginal right would be faced with severe restrictions.

1357 In an ideal world, the process of reconciliation would take place outside the adversarial milieu of a courtroom. This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process. Despite this fact, the question remains: how can this Court participate in the process of reconciliation between Tsilhqot'in people, Canada and British Columbia in these proceedings?

1358 Gordon Christie's comments on this issue, in "Aboriginality and Normativity, Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17 No. 2 C.J.L.S. 41 at pp. 69-70, are particularly thought provoking and helpful:

> What role, in particular, should the judiciary be playing in this matter? The way forward is clear enough, if unpalatable to the judiciary. A Section One-like approach to justifying legislative interference with Aboriginal rights should never have been contemplated. The judiciary simply cannot justify this change to the law as it applies to Aboriginal peoples and their rights. Appeals to the need for the application of the rule of law are empty, as are notions that the Court requires such an approach to operate appropriately in a balanced constitutional democracy. As unpleasant as the resulting situation may be, Aboriginal rights, at this point in the process of reconciliation, must be accorded the sort of legal protection they demand -- that of 'sure and unavoidable' rights. These would be the sorts of rights which operate to protect essential Aboriginal interests -- in living according to the good ways, knowledge of which has been handed down from generation to generation.
>
> The practical outcome of this should be clear -- this would bring the governments of Canada to the negotiating table, and would give Aboriginal peoples the sort of strength they need to work out a fair accommodation, a resolution of the ills caused by centuries of colonialism. This is as it should be, for from the perspective of the theory and principles underlying the superstructure of Canadian society and Canadian law there is no other way to work out an appropriate place for Aboriginal peoples in contemporary society. For Canada to advance to maturity, for the social compact to welcome within all those currently living within Canada's geographic boundaries, Aboriginal peoples must be able to bargain their way into a fair constitutional contract. This can only be accomplished with recognition on the Canadian side of the table of the position occupied by Aboriginal peoples: they come to these negotiations in the same state they were in 500 years ago, as organized societies existing 'prior' to the assertion of Crown sovereignty, societies organized according to separate and distinct conceptions of the good and of how to lead good lives.

1359 In *Mikisew Cree* Binnie J. emphasized the importance of reconciliation at para. 1:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

1360 Courts are not accustomed to taking into account "claims, interests and ambitions" in the process of reconciliation. In the course of a trial, a court will examine an entire body of evidence in an attempt to establish the factual truth in an objective manner. In an adversarial system, claims are dealt with to produce a win/lose result. Interest negotiations, designed to take

opposing interests into account, have the potential to achieve a win/win result. Such an approach, in the context of consensual treaty negotiation, would provide the forum for a fair and just reconciliation.

1361 The inquiry into the modern expression of Aboriginal rights requires a court to look at contemporary practices and land use and then determine how this relates to pre-contact or pre-sovereignty practices. In *Marshall; Bernard,* McLachlin C.J.C. suggested that the Court look to the pre-contact practice and then translate that practice into a modern right. Through this approach, some (but not all) of an Aboriginal group's contemporary interests will be considered.

1362 The Aboriginal interests considered by the courts are necessarily confined to the pleadings. The court must also take into account the interests and needs of the broader society which are not confined to the pleadings. This is what the test of justification requires. Regrettably, the adversarial system restricts the examination of Aboriginal interests that is needed to achieve a fair and just reconciliation.

1363 Earlier in these Reasons for Judgment, I referred to an article by Professor Brian Slattery entitled "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255. In this article, Professor Slattery argues for the "Principles of Recognition and Reconciliation". He notes at p. 283 that "reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate contemporary interests."

1364 I agree entirely with the views expressed by Professor Slattery at p. 286:

> In other words, section 35 does not simply recognize a static body of aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances -- what we have called historical rights. Rather, the section recognizes a body of generative rights, which bind the Crown to take positive steps to identify aboriginal rights in a contemporary form, with the participation and consent of the Indigenous peoples concerned.

1365 Professor Slattery points out at p. 281 that reconciliation cannot be achieved by the current process of translating an historical right into one that corresponds with a modern common law right. He writes, "such a process artificially constrains and distorts the true character of aboriginal title and risks compounding the historical injustices visited on Indigenous peoples". This case serves as an example of that conclusion. I fear, as he foretold, that "[f]ar from reconciling Indigenous peoples with the Crown," the conclusions I am driven to reach seem more "likely to exacerbate existing conflicts and grievances": Slattery at p. 281.

1366 Professor Slattery further argues that historical title "provides the point of departure for any modern inquiry and a benchmark for assessing the actions of colonial governments and the scope of Indigenous dispossession": Slattery at pp. 281-282. In his view, a number of "*Principles of Reconciliation* govern the legal effect of aboriginal title in modern times." He writes that these principles:

> ... take as their starting point the historical title of the Indigenous group, ... but they also take into account a range of other factors, such as the subsequent history of the lands in question, the Indigenous group's contemporary

> interests, and the interests of third parties and the larger society. So doing, they posit that historical aboriginal title has been transformed into a *generative right,* which can be partially implemented by the courts but whose full implementation requires the recognition of modern treaties.

1367 He continues by suggesting that the actions of courts have the potential to diminish the possibility of reconciliation ever occurring. He concludes at p. 282:

> ... the successful settlement of aboriginal claims must involve the full and unstinting recognition of the historical reality of aboriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands. So, for example, to maintain that "nomadic" or "semi-nomadic" peoples had historical aboriginal title to only a fraction of the ancestral hunting territories, or to hold that aboriginal title could be extinguished simply by Crown grant, is to rub salt into open wounds. However, by the same token, the recognition of historical title, while a necessary precondition for modern reconciliation, is not in itself a sufficient basis for reconciliation, which must take into account a range of other factors. So, for example, to suggest that historical aboriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.

1368 Courts should not be placed in this invidious position merely because governments at all levels, for successive generations, have failed in the discharge of their constitutional obligations. Inevitably this decision and others like it run the risk of rubbing salt into open wounds.

1369 The narrow role this court can play in defining Tsilhqot'in Aboriginal rights in the Claim Area lies in an application of the jurisprudence to the facts of this case. I can only hope that it will assist the parties in finding a contemporary solution that will balance Tsilhqot'in interests and needs with the interests and needs of the broader society.

1370 The application of Professor Slattery's "Principles of Recognition and Reconciliation" may assist in this process. At pp. 283-284, Professor Slattery suggests that the "Principles of Recognition" should have certain basic characteristics:

> 1) They should acknowledge the historical reality that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries," as Judson J. observed in the *Calder* case. They should not draw arbitrary distinctions between "settled", "nomadic", and "semi-nomadic" peoples but accept that *all* of the Indigenous peoples in Canada had historical rights to their ancestral homelands -- the lands from which they drew their material livelihood, social identity, and spiritual nourishment -- regardless whether they had developed conceptions of "ownership," "property," of "exclusivity," and without forcing their practices into conceptual boxes derived from English or French law.

2) They should take account of the long history of relations between Indigenous peoples and the British Crown, and the body of inter-societal law that emerged from those relations.
3) They should draw inspiration from fundamental principles of international law and justice, principles that are truly universal, and not grounded simply in rules that European imperial powers formulated to suit their own convenience, such as the supposed "principle of discovery".
4) They should envisage the continuing operation of customary law within the Indigenous group concerned. At the same time, they should explain the way in which the collective title of an Indigenous group relates to the titles of other Indigenous groups and to rights held under the general land system.

1371 This is, of course, not a task for a court. However, in the context of treaty negotiation, it strikes me as a convenient starting point. Recognition that Aboriginal people have historical rights to their ancestral homelands regardless of whether they had developed conceptions of "ownership," "property," or "exclusivity" quickly moves the debate to the real question: what interests are at stake and how are they to be reconciled?

1372 Professor Slattery further describes the "Principles of Reconciliation", as follows at pp. 284-285:

1) They should acknowledge the historical rights of Indigenous peoples to their ancestral lands under Principles of Recognition, as the essential starting point for any modern settlement.
2) They should explain how historical aboriginal rights were transformed into generative rights with the passage of time, and explain the rise of third party and other societal interests.
3) They should draw a distinction in principle between the "inner core" of generative aboriginal rights that may be implemented without negotiation in modern times, and a "penumbra" or "outer layer" that needs to be articulated in treaties concluded between the Indigenous people and the Crown.
4) They should provide guidelines governing the accommodation of rights and interests held by third parties within the historical territories of Indigenous peoples.
5) They should create strong incentives for negotiated settlements to be reached within a reasonable period of time.

1373 I confess that early in this trial, perhaps in a moment of self pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered. My view at this early stage of the trial was that the real question concerned the consequences that would follow such an admission. I was assured that it was necessary to continue the course we were set upon. My view has not been altered since I first raised the issue almost five years ago.

1374 At the end of the trial, a concession concerning an Aboriginal hunting and trapping right in the Claim Area was made by both defendants. As I have already noted, that concession brings with it an admission of the presence of Tsilhqot'in people in the Claim Area for over 200 years. This leaves the central question unanswered: what are the consequences of this centuries old occupation in the short term and in the long term, for Tsilhqot'in and Xeni Gwet'in people?

1375 I have come to see the Court's role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of Tsilhqot'in Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.

1376 What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.

1377 A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.

1378 Given this basic recognition, how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the broader society? That is the challenge that lies in the immediate future for Tsilhqot'in people, Canada and British Columbia.

1379 As a consequence of colonization and government policy, Tsilhqot'in people can no longer live on the land as their forefathers did. How is a former semi-nomadic existence, one that cannot be replicated in a modern Canada, to be given "cultural security and continuity" in this twenty-first century and beyond? Governments and Tsilhqot'in people must find an accommodation that reconciles the historical Tsilhqot'in place in Canada with the place of their neighbours who come from all corners of the world.

1380 Land is a critical component in the resolution of this dispute. The Xeni Gwet'in people have found sustenance and continuity in the lands surrounding Xeni (Nemiah Valley). The various Tsilhqot'in Bands are separated by great distances and it is possible there will be competing interests amongst them that will have to be addressed.

1381 The land I have described in paragraph 959 may not address the interests of the Xeni Gwet'in and the broader Tsilhqot'in community. There will undoubtedly be a need for adjustments, dependant on the nature of the interests both considered and accommodated leading to what the parties ultimately agree upon in a fair and just resolution of all outstanding claims.

1382 Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsilhqot'in people can be achieved.

Appendix F
CARIBOO-CHILCOTIN LAND USE PLAN
Ninety-day Implementation Process
Final Report
Province of British Columbia
February 15, 1995

SECTION 1: INTRODUCTION

1.1 **Purpose**

On October 24, 1994, the British Columbia Government announced the Cariboo-Chilcotin Land Use Plan. At that time, a ninety-day process was initiated to develop technical details for the implementation of the Plan. This document reports on the implementation process for the Cariboo-Chilcotin Land Use Plan. Sections 2 through 6 provide an overview of the results of the work of the Implementation Team, while technical details are contained in the appendices. The technical details presented in this report provide a template for the long term implementation of the Land Use Plan.

This short term implementation process has been crucial for the Land Use Plan. It translates the general content and intent to more explicit implementation details and it provides direction for resolution of a number of significant issues. Implementation of the Land Use Plan is, in fact, a long term endeavour as the general elements of the Plan are applied to regional management and to sub-regional and local land use planning. This ninety-day process has been intended to confirm details of the Land Use Plan and to provide the groundwork for long term implementation.

Implementation of the Land Use Plan must continue to be "Made in the Cariboo", with Provincial legislation and regulations applied in a manner that is suited to the resources, the environment and the people of the region. This approach ensures:

- access to resources
- sustainable resource utilization
- maintenance of environmental qualities and values
- integration of resource uses and values

1.2 The Cariboo-Chilcotin Land Use Plan

The Cariboo-Chilcotin Land Use Plan resulted from the direct input of residents of the region. It fulfills the need for a regional plan to provide certainty and sustainability for the range of land and resource uses and values.

The Plan presents the overall framework for land use, conservation and economic development. The full text of the Land Use Plan is presented in Appendix 1. The following excerpts highlight the main themes:

The resource land base (80% of the region) is divided into three different Resource Development Zones, depending on intensity of use - Enhanced (40 per cent), Special (26 per cent), and Integrated (14 per cent):

1. The Enhanced Resource Development Zone includes areas where economic benefits and jobs will be increased through intensive resource management and development. In this zone, the plan challenges all local resource users and government to set targets for increased sustainable resource development. In particular, forest productivity will be maintained and enhanced through intensive reforestation, spacing, pruning, thinning, and new harvest practices.

2. The Special Resource Development Zone is being designated where significant fish, wildlife, ecosystem, back country recreation and tourism values exist. Timber harvesting, mining and grazing will take place in this zone in a manner that respects these values.

3. The Integrated Resource Management Zone includes areas that will be dedicated for sustained integrated resource use.

Protected areas in the Cariboo are being doubled to 12 per cent. Of that total, 11.75 per cent is being protected immediately and a further 0.25 per cent will be dedicated for protecting small areas containing outstanding local features. These small areas will be protected through subsequent planning at the local level.

- Seventeen new protected areas are being created under the Protected Areas Strategy.
- Logging and resource extraction will be prohibited in these areas.
- Existing grazing will continue to be permitted in the new protected areas except the Junction Sheep Range.
- A new Grazing Enhancement Program will be established to secure the long term future of the ranching sector.
- A Regional Resource Board will be established to provide local involvement in the implementation of the land-use plan, and identify impacts of land-use decisions.
- A Resources Jobs Commissioner will secure stable resource industry jobs and match workers affected by the land-use plan with new work.
- The Cariboo Economic Action Forum will help develop economic strategies and action plans to address impacts of the land-use plan.
- A Cariboo-Chilcotin Jobs Strategy will provide new job opportunities for workers in the region.

This Implementation Report is fully consistent with the content and intent of the Land Use Plan.

1.3 The 90-Day Implementation Process

As one of the commitments made in the British Columbia Government's announcement of the Land Use Plan, a three month (90-day) process was initiated to develop technical details of the Plan. An Implementation Team was assembled, chaired by Mr. John Allan, Deputy Minister. It consisted of representatives from the Resource Management Division (RMD), BC Lands, BC Environment, the Ministry of Forests, the Ministry of Small Business, Tourism and Culture, the Ministry of Energy, Mines and Petroleum Resources, the Ministry of Aboriginal Affairs and the Ministry of Agriculture, Fisheries and Food. Also, there was direct participation by a representative of the federal Department of Fisheries and Oceans.

In addition, the Cariboo Inter-Agency Management Committee (IAMC) provided an important advisory and support role.

The terms of reference for the Implementation Team included the following tasks:

1. Determine zonal targets, objectives and strategies for the three land-use zones.
2. Establish the criteria which will be used to identify appropriate sites for resource enhancement.
3. Maintain the immediate wood supply during the phase-in period for the Plan.
4. Produce operational scale maps, including minor zonal boundary clarifications.
5. Establish the standards and criteria for adjudicating development proposals within the Special Resource Development Zone.
6. Review and make recommendations on the approval of cutting permits within the Special Resource Development Zone.
7. Co-ordinate the initiation of the Range (Grazing) Enhancement Fund.
8. Prepare for the long-term implementation of the Plan, including preparation of an implementation plan and directing existing local planning processes to integrate the direction from the regional Land Use Plan into their sub-regional processes.
9. Co-ordination with the implementation of the economics, Jobs and other strategies announced by government.

To accomplish these tasks the Implementation Team instituted the following procedures:

- Production and distribution of draft operational maps to all sector groups.
- Production and circulation of workbooks for the development of stakeholder-based input on objectives, strategies and targets.
- Division of the Enhanced and Integrated zones into smaller sub-units (or polygons) for technical and discussion purposes. The Special ResourceDevelopment Zone had already been designed to consist of sixteen sub-units. This provided a total of thirty-seven sub-units for resource analysis.
- Design and application of a methodology for developing technically-sound resource targets. (Refer to Section 2.3).
- Continual consultation with stakeholders (by phone, fax, and in person), with an emphasis on the umbrella stakeholder organizations: Cariboo Communities Coalition.
- Cariboo-Chilcotin Conservation Council, Cariboo Recreation Sector, Cariboo-Chilcotin Tourism Council.
- Discussions with First Nations through representatives of the Ministry of Aboriginal Affairs.
- Beyond the direct mandate of the Implementation Team, some key stakeholder organizations requested they have a final opportunity to be briefed on the targets and other aspects of the work of the Team prior to the submission of the Team's report to Government. The Team obtained consent for this procedure, thereby necessitating further meetings with representatives of stakeholders in February.

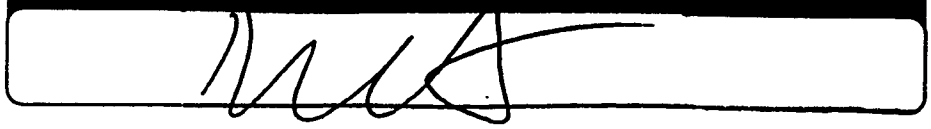
Appendices G, H, and I

Appendix G: BC Ministry of Forests Policy on Aboriginal Rights and Title

Appendix H: BC Ministry of Forests Consultations Guidelines

Appendix I: The New Relationship

BRITISH COLUMBIA
Ministry of Forests

POLICY SUBJECT		
Aboriginal Rights and Title		
EFFECTIVE	RESPONSIBLE BRANCH	NUMBER
May 14, 2003	***Aboriginal Affairs Branch***	***15.1***
APPROVED		
		

MINISTRY POLICY

Policy

Aboriginal rights, including aboriginal title, are recognized and affirmed under Section 35 of the *Constitution Act, 1982*. The effect of this recognition is that existing aboriginal rights must not be unjustifiably infringed by the forest development decisions of the Crown or its licensees. The Ministry of Forests will meet its legal obligations with respect to aboriginal rights, while maintaining a timely approval process for forest business practices.

This document is consistent, and should be used in conjunction, with the Provincial Consultation Policy (2002). The term "aboriginal interests" is used throughout this document to refer to potentially existing but unproven aboriginal rights and/or title.

Consultation Processes

To address legal obligations, forest development decisions, including range decisions, will be the subject of consultation efforts between First Nations and government. An appropriate consultation process should be employed for each type of decision under the Ministry's mandate that is capable of affecting aboriginal interests. The consultation process will include considerations on the degree to which the forestry decision impacts the landbase; and the degree to which the First Nation likely has aboriginal interests within the area under decision

Ministry staff will keep an accurate record of all consultation discussions, including efforts to address aboriginal interests. Staff will advise First Nations that consultation and addressing aboriginal interests is being carried out in fulfillment of the Crown's legal obligations in respect of asserted aboriginal rights and/or title.

Consultation processes will:

- identify First Nations potentially affected by proposed forest development decisions,
- provide them with all relevant and reasonably available information regarding proposed forest development decisions,
- request information from First Nations that will assist in the identification of, and provide the basis for claims of, aboriginal interests that may be impacted by proposed forest development decisions,
- consider the degree to which the forestry decision impacts the landbase,
- consider whether the aboriginal interests described by the First Nation will potentially be infringed by the proposed development activity or decision, and
- consider the apparent strength of aboriginal interests in relation to forest development decisions, seeking to accommodate those interests where appropriate.

Components of the Consultation Process:

1. **Identification of Relevant Aboriginal Groups**
Identify First Nation(s) that may be potentially affected by the proposed forest development decisions, including overlapping First Nations asserted territories.

2. **Information Sharing**
First Nations should receive all relevant and reasonably available information as early as possible regarding the type of decision to be made. Different ministry representatives (district, region, branch) may need to be involved in this step depending upon the type of forestry decision being made. As a practical matter, licensees will likely need to be involved in the consultation process in order to provide specific information.

For operational activities (such as forest development planning processes), information sharing may include technical and descriptive information, such as diagrams and mapping products to provide an understanding of the potential on-the-ground impact of the proposed activity. For administrative decisions (such as new or replacement tenures), information sharing may include an overview of the tenure terms/processes, explanation of the nature of the tenure and any legislated requirements, along with explanation of any conditions that may be attached to the tenure.

Sufficient explanation of the information should be provided. Staff should encourage the First Nation to raise any aboriginal interests in relation to the decision and to describe and provide evidence that shows the basis of their claim(s), if claims have been made. First Nations responses (related to aboriginal interests) from these discussions will guide the level and scope of any subsequent consultation processes.

The following forms of information should be sought from First Nations and other sources, and considered in the context of the particular situation (see the consultation guidelines for further information on these factors):

- Are the involved lands near or adjacent to a reserve or former settlement or village site?
- Is the land in areas of traditional use or archaeological sites? If a TUS was done, what does it indicate over the land in question?
- Is there any overlap with other First Nations?
- Is the First Nation asserting rights/title over the area? What is the nature of the assertion and on what information is it based?
- Is the land subject to a specific claim?
- Is the land close to known fishing, hunting, trapping, gathering or cultural sites?

Other line ministries may be contacted to determine if they have received internal advice regarding a particular First Nation. Consistency across government in responding to aboriginal interests is essential.

3. **Addressing First Nations Issues**
Where First Nations concerns of aboriginal interests are raised with regard to a forest activity or pending decision, consider the information gathered during the consultation process to date, along with possible practical adjustments or actions that may substantially address those concerns, if possible in conjunction with the licensee.

Practical adjustments or actions should not set precedents with regard to aboriginal interests (at this stage, practical solutions should not purport to recognize aboriginal rights or title, but should be put forward as a reasonable arrangement that seeks to address the asserted, but unproven, claims of aboriginal rights or title).

Also consider discussing possible practical adjustments or actions with region, Aboriginal Affairs Branch, and other relevant branch representatives. Where practical adjustments or actions are not possible, discuss with regional staff, Aboriginal Affairs Branch, and Ministry of Attorney General to determine whether any further opportunities should be offered to address the interests raised.

4. **Soundness of Claim Assessments**
Assessments regarding the soundness of an aboriginal right or title claim may be conducted in conjunction with internal advice from provincial authorities, including legal advice. Assessments may be relevant where:
   - the information provided by the First Nation is inadequate,
   - court action is likely or occurring, or
   - the information does not directly support the strength of claim being raised.

   Such assessments can serve to help determine appropriate levels of subsequent consultation and point to possible steps that seek to accommodate aboriginal interests identified during consultation.

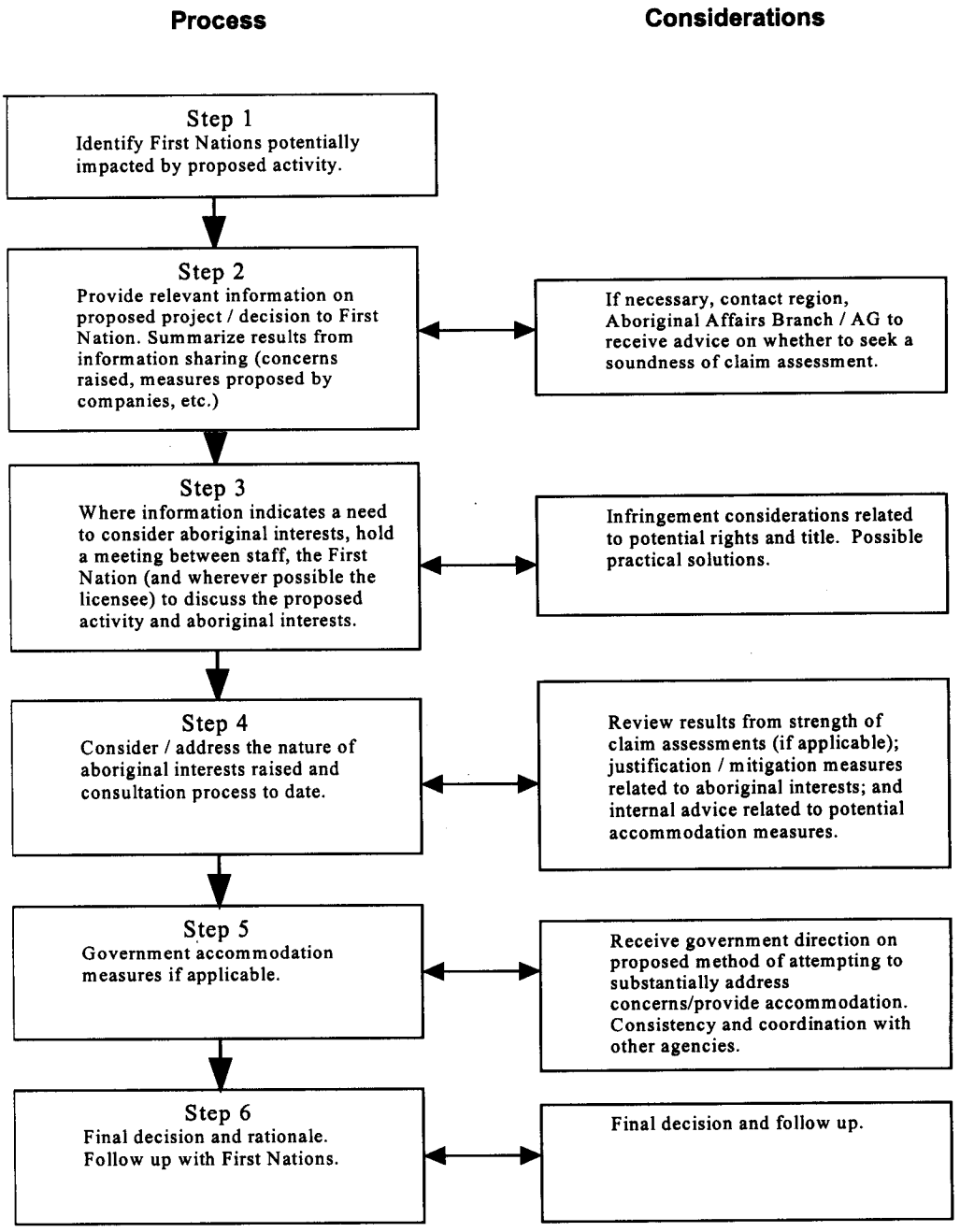
   As issues associated with considering the soundness of claim (and recommendations on accommodation measures) are governmental in scope, field staff are not responsible to make this determination independently.

5. **Accommodation**
In some cases, government may determine that specific steps are needed to seek to accommodate aboriginal interests. It is critical that proposed measures be consistent across government, in the context of the particular aboriginal group in question. Any such measures will be developed from a corporate government perspective with internal direction/approval.

6. **Decision Making**
Information related to aboriginal interests will be considered and addressed in relation to forestry decisions. Decision makers will consider relevant information brought forward during consultation processes, this policy, the Provincial Consultation Guidelines, and any relevant advice from government sources related to aboriginal interests and efforts that seek to accommodate those interests.

   As a final step in the consultation process, First Nations should be informed of forestry decisions taken, and how consideration was given to aboriginal interests identified.

Following is a chart that summarizes steps for consultation activities and considerations.



References

No applicable references.

MINISTRY OF FORESTS
CONSULTATION GUIDELINES
2003

Background and Context

This document has been drafted to provide guidance regarding Ministry of Forests consultation activities, and is consistent with the Provincial Consultation Policy (2002), and the Ministry of Forests Policy on Aboriginal Rights and Title. The term "aboriginal interests" is used throughout this document to refer to potentially existing aboriginal rights and/or title.

This document is not intended to provide a definition of aboriginal rights or title, but provides guidance and direction to Ministry of Forests staff where forest management decisions may potentially infringe aboriginal interests.

The Provincial Government and First Nations may have differing viewpoints regarding the nature, extent, and locations of aboriginal rights and/or title in British Columbia. In the absence of further definition of aboriginal rights and/or title, particularly in terms of where those interests actually exist "on the ground," the following outlines the Ministry of Forests' approach to issues concerning unproven aboriginal rights and title, in a manner that is consistent with direction from the courts.

For additional context, it is recommended that staff review the summaries of recent court decisions and overviews concerning aboriginal rights and title contained in the Provincial Consultation Policy.

The Ministry of Forests may develop consultation procedures or processes with First Nations to establish mutually acceptable and efficient processes of consultation. This document provides general direction to staff in carrying out consultations with First Nations where a formal consultation procedure or process has not been developed. Any consultation processes that are negotiated must be consistent with the Ministry of Forests Policy on Aboriginal Rights and Title, and should be reviewed through the Aboriginal Affairs Branch and Ministry of Attorney General before being finalized.

The following procedures are to assist staff in addressing aboriginal interests in statutory decisions. Flexibility exists within each step to allow staff to develop processes that are responsive to specific issues or concerns. Districts and regions may develop further processes that are consistent with this document. The Ministry of Forests will rely on working relationships between local staff and aboriginal groups to carry out consultation in a flexible, workable and efficient manner.

The following pages outline a process to determine the appropriate level and method of consultation. They provide a framework and standards for consultation, ensuring that consultation practices are consistent across the Ministry of Forests.

THE CONSULTATION PROCESS - GENERAL

Steps should be taken to consult with First Nations early in the process, prior to making forestry decisions. As consultation is a "two-way street" requiring First Nations to participate in consultation processes, forest management decisions will continue to be made in cases where a First Nation chooses not to participate in consultation processes.

During consultation processes all reasonable steps must be taken to:

- identify potentially affected aboriginal groups,
- provide them with all relevant and reasonably available information regarding the proposed forest management activity,
- request information from them which will assist in the identification of, and provide a basis for any claims of aboriginal interests, and
- consider and address that information in relation to the potential for infringement of aboriginal interests by forest decisions.

As aboriginal interests are held by collectives rather than individuals, staff should deal with appropriate representatives of aboriginal groups (usually Chief and Council, or those authorized by Chief and Council).

It is recommended that consultation begin with a description of proposed forest activities and general considerations of aboriginal interests within potentially affected areas. First Nations responses (that may be related to aboriginal interests) from these initial discussions will guide the level and scope of subsequent consultation processes.

Not all situations will require consultation beyond the initial stages of informing a First Nation of a proposed project's scope and providing an opportunity for input. However, it is important to consider statutory decisions on a case-by-case basis in order to employ an appropriate level of consultation for that situation (i.e. informing only, carrying out further research into the strength of a claim, calling for further consultation, or otherwise).

Licensee Involvement

In some instances, licensees may be required to undertake the information sharing component of consultation activities, with the role of:

- explaining proposed forest activities,
- gathering information on aboriginal interests and issues for reporting to ministry staff, and
- suggesting measures that could address aboriginal interests and concerns prior to requesting statutory decisions.

Licensee involvement in the consultation process will vary according to the type of activity.

Treaty Issues

Treaty rights are rights held by specific aboriginal groups under a particular treaty. They are also recognized and affirmed in Section 35 of the *Constitution Act, 1982*.

Treaty rights vary in scope from one treaty to the next, and also between historic and modern treaties (sometimes referred to as land claim agreements). Historic treaties (such as Treaty 8) generally serve to extinguish aboriginal title and/or rights in relation to the land, replacing them with treaty rights. Land claim agreements (such as the Nisga'a Agreement) may modify existing aboriginal rights and title to be defined treaty rights.

When dealing with treaty rights or treaty issues, staff should be aware that treaty provisions may limit the scope of applicability of this policy and may include consultation requirements in addition to those described in this policy. More specifically, the approach for consultation efforts involving a number of First Nations should be reviewed carefully when a treaty First Nation is involved, as a different method to consultation will likely be required. Staff should contact Regional Aboriginal Affairs Managers, Aboriginal Affairs Branch or Ministry of Attorney General to discuss the terms of a particular treaty.

Discussion – Prioritizing Consultation Activities
First Nations often state that they are not able to keep up with the volume of referrals sent by the Ministry of Forests, and the ministry shares this concern. Two areas of effort can help to address this concern:

1. Where possible, districts should hold discussions with First Nations on the different forms of forest management activities on which they wish to receive information and those activities if any, about which they do not wish to be consulted. These discussions will focus the efforts of consultation to areas of mutual priority.

2. **Where consultations with the First Nation reveal that the soundness of the potential claim is relatively low,** a number of factors may also be considered to evaluate the degree of further consultation that needs to be undertaken before the approval of a particular activity. These include:
   - the potential impact of the proposed forest activity on aboriginal interests;
   - the nature of the land at issue;
   - emergency measures; and
   - public safety.

Consideration of these factors in setting priorities for consultation, along with discussions with First Nations on desired areas of consultation, will enable the Ministry of Forests and First Nations to conduct more productive consultation on activities that are particularly critical to both parties.

Approaches to Consultation
A number of suggested approaches to consultation for different Ministry of Forests activity areas are provided in the following sections:
1. Operational activities (e.g. forest development plans, forest stewardship plans, range use plans)
2. AAC determinations
3. Other statutory decisions (tenure replacement, new tenures, tenure sales/transfers)

PROCESS STEPS FOR OPERATIONAL CONSULTATION

Step	Activities
1	• If not already done, districts and/or licensees identify First Nation(s) that may be potentially affected by the proposed forest activity, taking into account overlapping First Nations asserted territories. • If necessary, contact other line ministries to determine if they dealt with similar situations or have received advice from AG's / DMs Committee regarding the particular First Nation. • Notify and provide relevant information to the First Nation(s) about the proposed forest management activity. Correspondence explaining the location, nature, and extent of the proposed activity should provide aboriginal groups with an understanding of the on-the-ground impact of the proposed activity. Technical and descriptive information, such as diagrams and appropriate mapping products depicting the location of the proposed activity, should be sent or delivered to the offices of the potentially affected First Nations. Provide an opportunity for the First Nation(s) to have the information explained to them. • During this exchange between First Nations, districts and/or licensees, First Nations will have the opportunity to provide any comments and concerns that are directly related to the proposed activities, along with any explicit examples of how their aboriginal interests may be impacted by the proposed activity. Individuals engaging in consultation are to record each of the aboriginal interests brought forward by the First Nation. • First Nations who expect consultation to reflect their claim of aboriginal rights or title will need to provide information to support, or clarify the basis for, those claims. • Further meetings may be necessary to address aboriginal interests where the First Nation requires time to review the operational information.
2	• The district reviews full documentation of results from information sharing activities with the First Nation, along with any possible proposed mitigative measures. • Document and consider information such as whether the FN was settled in the area or nomadic, TUS info, AIA's, location of Indian reserves, and other information related to aboriginal interests. • Determine the necessity of further consultation in accordance with the soundness of the claim for the area in question and the likely degree of infringement. This may require discussions with headquarters staff to examine the cumulative information available regarding the First Nation in question, such as data from past consultations that provide a sense of the soundness of their potential claim. Consideration on the soundness of a claim may require advice from Aboriginal Affairs Branch and / or Ministry of Attorney General. Staff from Aboriginal Affairs Branch, the Ministry of Sustainable Resource Management, and the Aboriginal Law Group of the Ministry of Attorney General may be able to provide guidance in this regard.
3	• A meeting should be held with the relevant First Nation(s) to obtain specific information concerning the length or timeframes of use or occupation, location, kind, and importance of aboriginal interests, if any, within the operational plan area or the area that will be affected by the proposed activity, as appropriate. Consider measures that may be available to address interests and concerns raised. Where possible, initiate processes to facilitate ongoing communication between the Ministry and the First Nation (and other parties if appropriate) with respect to further decisions that will be made regarding the forest activity. • Where information is not provided by the potentially affected First Nation(s), Ministry staff should make efforts to gather information that is available on reasonable inquiry regarding the potential existence of aboriginal interests in the forest management area.

	• It is important that all reasonable efforts have been made to initiate and carry out a consultation process with the affected First Nation. If the affected First Nation refuses to participate, or will only participate on a "without prejudice" basis (which has the same effect as refusing to participate), reasonable steps should be taken to inform them of operational planning processes or decisions being made on an ongoing basis and to request their participation in them. Refusal to participate, or insistence on "without prejudice" participation, is not a reason for delaying the decision-making process. In situations where a First Nation says that consultation activities are "without prejudice", explain to the First Nation that the Crown is carrying out consultation activities in fulfillment of their legal duties associated with aboriginal rights and title. • At this stage, licensees may propose and discuss adjustments to operational plans in relation to stated aboriginal interests.
4	• Carry out internal consideration processes that will seek to address concerns raised by the First Nation(s) in respect of aboriginal interests, if any, which come to light through the consultation and information gathering processes outlined above, including the geographic location and extent of such an interest. • Situations where there is a strong claim (i.e. where there is a reasonable probability of aboriginal title or rights being present) will increase the likelihood that an infringement may occur and warrant deeper levels of consultation and activities that seek to address the potential interest. These situations may require further consultation, or further mitigative measures (adjustments to development plans), etc. • Seek to address the concerns brought forward by the First Nation during consultation; if applicable, explore possible accommodation measures with the Aboriginal Affairs Branch, Ministry of Attorney General, and/or Ministry Executive. Accommodation measures (economic/cultural) should be consistent with precedents set across government.
5	• Draft a final decision and a rationale for decision. Notify relevant parties (More discussion on this stage in the section "Considerations for the Consultation Process"--Stage 4).

SECTION II – Timber Supply Review

Overview

The Timber Supply Review consultation procedures for First Nations will ensure that First Nations have an opportunity to raise concerns and provide input on the data assumptions and the timber supply analysis. All First Nations input will be provided to the Chief Forester for consideration in the AAC determination.

The following procedures should, where possible, adhere to the TSR schedule, and to resource, policy and legal constraints of government. By working with these procedures, licensees in the case of TFLs, or the BCFS regional and/or district staff in the case of TSAs, will ensure that First Nations who have an interest in the area develop an understanding of the TSR process, thereby encouraging their meaningful participation.

Step 1 - Data/Information package

- Appoint a contact person to 1) document the actual steps undertaken for the consultation process, and 2) be the point person to answer any TSR questions prior to and during First Nations consultation. That individual should contact the TSR Regional Coordinator for available information regarding potentially interested First Nations.
- Once the data package for a TSA, or an information package for a TFL, has been drafted, the licensee (TFL) or BCFS staff (TSA) will send the First Nation(s) the following material: a letter explaining the objectives and timelines of the TSR process, a brochure detailing the legislative requirements and overall TSR process for a TSA or TFL, and the draft data/information package. The letter will indicate that First Nations are encouraged to participate and can request a timber supply review presentation or meeting, at which time the process, data and any TSR-related issues can be discussed.
- After the material has been sent out, the licensee (TFL) or BCFS staff (TSA) will follow up to determine whether the First Nation(s) wish to participate further. If further participation is requested, then discuss the options for meeting with the band or tribal council to discuss the TSR.
- If possible, the assigned timber supply analyst should attend the session(s) and provide examples of the type of information that could be included in the data/information package with respect to First Nations' issues. For example, First Nations data pertaining to culturally modified trees, traditional use areas, cultural heritage resources or other site-specific information could be included in the data/information package.

- First Nations should be provided with sufficient time (suggested 60 days) to review and provide comments on the data/information package. First Nations should be encouraged to provide comments in writing (copies to the licensee for TFLs or to BCFS for TSAs) to ensure their interests are objectively communicated to the Chief Forester.
- Determine whether there is an issue regarding strength of claim. If necessary, gather available information related to the strength of any claims of aboriginal rights / title for First Nations within the TSA area. Aboriginal Affairs Branch and Ministry of Attorney General may have to provide assistance and guidance during this consideration.
- Information related to strength of claim should be considered and addressed in the preparation of the upcoming analysis report.

Step 2 - Analysis Report

- Upon release of the analysis report for a TFL or the analysis report and public discussion paper for a TSA, licensees (TFL) or BCFS (TSA) staff will send a covering letter and copies of the analysis reports to the First Nations.
- As with the data/information package, after the material has been sent out, follow up to determine whether the First Nation(s) wish to participate further. If further participation is desired, then discuss the options, for example meeting with the band or tribal council with TSR as an agenda item.
- During this stage, if aboriginal interests warrant further consideration, offer to meet with those First Nations to discuss those interests.
- First Nations should be provided with sufficient time (suggested 60 days) to review and provide comments on the analysis report package. First Nations should be encouraged to provide comments in writing to ensure their interests are objectively communicated to the chief forester.

Step 3 -AAC determination

- Ensure that all comments and submissions are presented to the Chief Forester during the AAC determination and included in the summary of public input.
- When the rationale report and summary of public input is released, send copies to the First Nation(s).

SECTION III – Administrative Activities and Decisions

General

The following provides a suggested approach to consultation with First Nations for a number of different decisions within the Ministry of Forests' statutory authority. Ministry staff (and in some cases, licensees) will engage in consultation for a number of administrative decisions with First Nations who may have a sound claim with respect to affected areas.

A recommended approach for consultation on different tenure types and activities is provided below to address the great number of forestry activities that may be of interest to First Nations, and that may impact aboriginal interests, and to provide an effective consultation approach for each.

Cases where a First Nation may have an apparently sound claim of aboriginal rights and / or title will warrant relatively deeper levels of consultation.

Consolidating Administrative Consultation

Where possible, the ministry should take steps to consolidate consultation activities on administrative decisions at the TSA level. The process of "batching" administrative consultation activities can be conducted to reflect the nature of the impact of these activities on the landbase, and also to address the volume of referrals that would be provided to First Nations.

Batching consultation for administrative activities will provide a more holistic picture of forest development at the TSA level, and provide a more meaningful opportunity for ministry staff and First Nations to discuss forest planning. RTEB staff have identified the following tenure types that may fit into a consolidated consultation process:

- Forest licenses
- Pulpwood agreements
- Woodlots
- Timber sale licenses
- Non replaceable forest licenses

Administrative Consultation - General Process

Consultation processes will involve discussions related to the nature of the proposed activity, explain the nature of the tenure and its associated legislated requirements, along with any conditions that may be attached to the tenure. Staff should also encourage the First Nation to raise any aboriginal interests in relation to the decision and to describe and provide evidence that shows the basis of their title or rights claim, if one is made.

Suggested procedure for administrative considerations involving First Nations who may have a sound claim with respect to affected areas:

1. Consultation meetings between the interested First Nation, the relevant tenure holder and district and/or headquarters staff will be organized under existing legislated timelines. These meetings will provide:
   - an overview of administrative process and timelines,
   - the terms of the specific tenure / license,
   - subsequent planning processes to take place under the tenure,
   - abilities to address interests raised under the legislative framework, and
   - tenure holder's planned operational approach (if available).

2. First Nations are encouraged to raise, explain and discuss any aboriginal interests they may have in relation to the statutory decision and to describe and provide evidence that shows the basis of their claim(s) if one is made.

3. MOF staff will document and summarize this information.

   In situations where guidance on consultation activities and the soundness of a claim is sought, staff should:
   - Forward available information related to the factors under step 1 above, along with other information provided by the First Nation, to the Aboriginal Affairs Branch;
   - Aboriginal Affairs Branch will review and discuss information/analysis requests with the Ministry of Attorney General;
   - Advice regarding the soundness of claim analysis will be discussed between staff from the district, Aboriginal Affairs Branch and Ministry of Attorney General;
   - A recommended approach for the situation will be developed based on this consideration process.

4. Issues of proposed adjustments / accommodations in relation to aboriginal interests should be discussed with the Aboriginal Affairs Branch, Ministry of Attorney General and/or, Ministry Executive as necessary, prior to making any accommodations.

5. Any information received from the First Nation and how interests raised will be addressed or accommodated will be provided to the decision-maker exercising the statutory authority in relation to the decision.

The New Relationship

I. Statement of Vision

We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.

We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title "in its full form", including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations' historical and sacred relationship with their territories.

The historical Aboriginal-Crown relationship in British Columbia has given rise to the present socio-economic disparity between First Nations and other British Columbians. We agree to work together in this new relationship to achieve strong governments, social justice and economic self-sufficiency for First Nations which will be of benefit to all British Columbians and will lead to long-term economic viability.

II. Goals

Our shared vision includes a celebration of our diversity, and an appreciation of what we have in common. We recognize the vision of First Nations to achieve the following goals:

1. To restore, revitalize and strengthen First Nations and their communities and families to eliminate the gap in standards of living with other British Columbians, and substantially improve the circumstances of First Nations people in areas which include: education, children and families, and health, including restoration of habitats to achieve access to traditional foods and medicines;

2. To achieve First Nations self-determination through the exercise of their aboriginal title including realizing the economic component of aboriginal title, and exercising their jurisdiction over the use of the land and resources through their own structures;

3. To ensure that lands and resources are managed in accordance with First Nations laws, knowledge and values and that resource development is carried out in a sustainable manner including the primary responsibility of preserving healthy lands, resources and ecosystems for present and future generations; and

4. To revitalize and preserve First Nations cultures and languages and restore literacy and fluency in First Nation languages to ensure that no First Nation language becomes extinct.

The strategic vision of the Province for British Columbians is:

1. To make B.C. the best educated, most literate jurisdiction on the continent;

2. To lead the way in North America in healthy living and physical fitness;

3. To build the best system of support in Canada for persons with disabilities, special needs, children at risk and seniors;

4. To lead the world in sustainable environmental management, with the best air and water quality, and the best fisheries management, bar none; and

5. To create more jobs per capita than anywhere else in Canada.

This vision can only be achieved if First Nations citizens attain these goals. To achieve these strategic goals, we recognize that we must achieve First Nations economic self-sufficiency and make First Nations a strong economic partner in the province and the country through sustainable

land and resource development, through shared decision-making and shared benefits that support First Nations as distinct and healthy communities. All British Columbians will benefit from a richer understanding of First Nations culture and from economic, political and cultural partnerships with First Nations. We therefore agree to the following principles and action plan.

III. Principles to Guide the New Relationship

We will mutually develop processes and implement new institutions and structures to achieve the following:

- integrated intergovernmental structures and policies to promote co-operation, including practical and workable arrangements for land and resource decision-making and sustainable development;

- efficiencies in decision-making and institutional change;

- recognition of the need to preserve each First Nations' decision-making authority;

- financial capacity for First Nations and resourcing for the Province to develop new frameworks for shared land and resource decision-making and to engage in negotiations;

- mutually acceptable arrangements for sharing benefits, including resource revenue sharing; and

- dispute resolution processes which are mutually determined for resolving conflicts rather than adversarial approaches to resolving conflicts.

This vision statement to establish a new relationship has been written as a measure of good faith by

the parties to put into words our commitment to work together to explore these concepts and develop their full meaning.

IV. Action Plans

We agree to work together to manage change and take action on the following:

1. Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing;

2. Identify institutional, legislative and policy changes to implement this vision and these action items;

3. Develop additional protocols or accords to further the implementation of the vision, as required from time to time;

4. Identify processes to ratify agreements;

5. Establish funding and distribution structures/institutions to support First Nations' capacity development and effective participation in the processes established through these action items;

6. Establish effective procedures for consultation and accommodation;

7. Appoint a joint working group to review Forest and Range Agreements and make recommendations to the parties on options for amending those agreements, in order to make them consistent with the Vision and Principles above;

8. Identify and develop new mechanisms on a priority basis for land and resource

protection, including interim agreements;

9. Develop impartial dispute resolution processes and work towards a decrease in conflicts leading to litigation; and

10. Create an evaluation process for monitoring and measuring the achievement of this vision and these action items.

V. Management Committee and Working Groups

The parties will establish a joint management committee of senior officials to:

- develop terms of reference, priorities, and timelines for the management committee and the working groups by May 31, 2005;
- identify current issues of substantial concern, and consider short and long term steps the parties could take to facilitate their resolution;
- jointly develop policy frameworks;
- establish joint working groups and provide direction, timelines and co-ordination to further the implementation of the action items;
- identify and allocate financial and technical resources for the work of the management committee and the working groups;
- make recommendations to the parties to address problems as they arise in the implementation of the vision; and
- engage the Government of Canada.