LIST OF DELEGATES

Ian	Anderson	BC Enviornment, Lands & Parks	Victoria, BC
Kim	Baird	Tsawwassen Indian Band	Delta, B.C.
Dianna	Barton	Ministry of Agriculture, Fisheries & Food	Victoria, BC
Robin	Bassett	Attorney General - Aboriginal Law	Victoria, B.C.
Chief Darrell	Beaulieu	NWT TREATY 8 TRIBAL COUNCIL	Fort Resolution, NWT
Paul	Beauregard	Bigstone Cree Nation	Desmarais, AB
Charles	Beaver	Bigstone Cree Nation	Desmarais, AB
Marlie	Beets	Caribou Lumber Manufacturers Assoc.	Williams Lake, B.C.
Glen W.	Bell	Swinton & Company	Vancouver, B.C.
Nancy	Besharah	Ministry of Agriculture, Fisheries & Food	Victoria, BC
Lloyd	Billy	Ehattesaht Indian Band	Campbell River, B.C.
Judy	Birch	Ministry of Aboriginal Affairs	Victoria, BC
Edwin	Blewett	EB Economics	Vancouver, B.C.
Ann	Boiteau	Canadian Parks Service	Edmonton, AB
Randy	Brant	Indian & Northern Affairs Canada	Edmonton, AB
Cheryl A.	Brooks	B.C. Hydro	Vancouver, B.C.
Scott	Browning	Ministry of Aboriginal Affairs	Victoria, BC
Lorne	Brownsey	Federal Treaty Negotiating Office	Vancouver, B.C.
Jon	Buckle	Ministry of Transportation & Highways	Terrace, BC
Dick	Byl	Heather Sadler Jenkins	Prince George, B.C.
David K.	Camp	Ladner Downs	Vancouver, B.C.
Robert F.	Carpenter	B.C. Hydro & Power Authority	Vancouver, B.C.
Shaunee	Casavant	Ministry of Aboriginal Affairs	Victoria, BC
Chief Leo	Cattleman	Montana Tribal Administration	Hobbema, AB
Jean-Yves	Cayen	Canadian Parks Service	Edmonton, AB
Elaine	Church	Indian & Northern Affairs	Vancouver, BC
Monica	Cooper	Ministry of Transportation & Highways	Kamloops, BC
Frances E.	Craig	Dept of Indian Affairs	Edmonton, AB
Stuart	Culbertson	Ministry of Agriculture, Fisheries & Food	Victoria, BC
Ross R.	Dalpre	Ministry of Transportation & Highways	Kamloops, BC
Bill	Davidson	Dept. of Energy, Mines & Resources	Vancouver, B.C.
Ken	Davidson	Ministry of Aboriginal Affairs	Victoria, BC
Denis A.	de Keruzec	Department of Justice	Vancouver, B.C.
Gina	Deumari	Ministry of Aboriginal Affairs	Victoria, B.C.

Heather	Dickson	Ministry of Aboriginal Affairs	Victoria, B.C.
James L.	Dion	Long Lake Cree Nation	Bonnyville, AB
Roland	Dion	Tribal Chiefs' Ventures	St. Paul, AB
Stan	Dixon	Sechelt Indian Band	Sechelt, B.C.
Trent D.	Dixon	Sechelt Indian Band	Sechelt, B.C.
Linda	Dorricott	Nanaimo Indian Band	Nanaimo, B.C.
Roy G.	Dyce	Pacific Northern Gas Ltd.	Vancouver, B.C.
Pat	Edzerza	Tahltan Tribal Council	Dease Lake, B.C.
Ernest W.	Elliot	Cowichan Indian Band	Duncan, B.C.
Neil	Emmott	CP Rail	Vancouver, B.C.
Tom	Falconer	Price Waterhouse	Vancouver, B.C.
Gary P.	Feschuk	Sechelt Indian Band	Sechelt, B.C.
Gary	Fitzpatrick	Conflicts Resolution Institute	Vancouver, B.C.
Peggy	Frank	BC Enviornment, Lands & Parks	Victoria, BC
Sharlene	Frank	Kwakiutl District Council	Port Hardy, BC
Sandy	Fraser	Ministry of Agriculture, Fisheries & Food	Victoria, BC
Donna L.	Friesen	Alberta Natural Gas Company	Calgary, AB
Robert S.	Friesen	BC Ministry of Forests	Victoria, B.C.
Richard	Frizell	Indian & Northern Affairs	Vancouver, BC
Ron	Gabriel	CMDC / IN-SHUCK-CH COUNCILS	Mission, B.C.
Michelle	Garvock	Ministry of Transportation & Highways	Prince George, BC
Tony	Gazdik	Ministry of Transportation & Highways	Burnaby, BC
Graham	Geddes	Indian & Northern Affairs	Vancouver, BC
Martin	Glassman	Dept of Indian Affairs	Edmonton, AB
Murray D.	Glazier	Wageman Bailey	Kelowna, B.C.
J. Edward	Gouge	Lawson, Lundell, Lawson & McIntosh	Vancouver, B.C.
Donald	Graham	Royal Bank of Canada	Vancouver, B.C.
Calvin	Graigan	Sechelt Indian Band	Sechelt, B.C.
Dave	Green	Economic Dev., Small Business & Trade	Victoria, B.C.
Lynne	Gregor	Federal Treaty Negotiating Office	Vancouver, B.C.
Robert	Guenther	Ministry of Transportation & Highways	Kamloops, BC
Donald G.	Guest	Texaco Canada Petroleum Inc.	Calgary, AB
Shane	Gunster	Ministry of Aboriginal Affairs	Victoria, B.C.
Paul A.	Guthrie	Canadian Pacific Legal Services	Vancouver, B.C.
B.A.	Hackett	Ministry of Agriculture, Fisheries & Food	Victoria, BC
Bruce	Halliday	Canadian Parks Service	Edmonton, AB

Ron	Hansen	Ministry of Transportation & Highways	Burnaby, BC
E.	Hanson	Indian & Inuit Affairs	Whitehorse, Yukon
Gordon	Hanson	Gordon Hanson & Associates Consulting Inc.	Victoria, B.C.
Chief Richard	Harry	HOMALCO Indian Band	Campbell River, B.C.
Colleen	Hemphill	Kwakiutl District Council	Port Hardy, B.C.
Priscilla	Henderson	Kwakiutl District Council	Port Hardy, BC
Steve	Henderson	Ministry of Transportation & Highways	Prince George, BC
G.	Henry	Ministry of Agriculture, Fisheries & Food	Victoria, BC
Pauli-Ann	Heringer	Business Council of B.C.	Vancouver, B.C.
Cory	Herrera	Ministry of Aboriginal Affairs	Victoria, BC
Chief Fred	Holmes	Upper Nicola Indian Band	Merritt, B.C.
Ron	Hooper	Canadian Parks Service	Edmonton, AB
Neville	Hope	Ministry of Transportation & Highways	Nanaimo, BC
Theresa M.	Jeffries	Sechelt Indian Band	Sechelt, B.C.
Gilbert	Joe	Sechelt Indian Band	Sechelt, B.C.
Don	Johnson	Indian & Northern Affairs	Vancouver, BC
J.H.	Jones	Ministry of Transportation & Highways	Kamloops, BC
Jeannie	Kanakos	Federal Treaty Negotiating Office	Vancouver, B.C.
Manfred	Klein	Indian & Northern Affairs	Vancouver, BC
Mary	Koyl	Ministry of Transportation & Highways	Victoria, BC
Jan K.	Krueger	Tahltan Tribal Council	Dease Lake, B.C.
Pierre-Christian	Labeau	Government of Quebec	Quebec, Quebec
Brad H.	Lambert	Royal Bank of Canada	Vancouver, B.C.
Lynn	Langford	Ministry of Aboriginal Affairs	Victoria, B.C.
Gordon	Lee	Ermineskin Indian Band	Hobbema, AB
John	Les	District of Chilliwack	Chilliwack, BC
Steve	Letts	B.C. Attorny General, Public Gaming Branch	Victoria, BC
Armand	Loth	Tribal Chiefs' Ventures	St. Paul, AB
Eunice	Louis	Montana Tribal Administration	Hobbema, AB
Richard M.	MacIntosh	B.C. Gaming Commission	Victoria, BC
James M.	MacKenzie	Russell & DuMoulin	Vancouver, B.C.
Ardath Paxton	Mann	Ministry of Econ. Dev. Sm. Bus.& Trade	Victoria, BC
Daniel	Manuel	Upper Nicola Indian Band	Merritt, B.C.
Ian	Marshall	Placer Dome	Vancouver, B.C.
Margaret	Marshall	Indian & Northern Affairs	Vancouver, BC
Brian	Martin	Indian & Northern Affairs	Vancouver, BC

Linda	Martin	Ministry of Aboriginal Affairs	Victoria, BC
Michel	Martin	Government of Quebec	Vancouver, B.C.
Ally	McKay	Cabinet Planning Secretariat	Victoria, BC
Laurie	McNeil	Hornal Consultants Ltd.	Vancouver, B.C.
Carol	McNichol	Ministry of Transportation and Highways	Victoria, B.C.
Pat	Mercredi	Alberta Indian Agricultural Dev. Corp.	Calgary, AB
Philip	Meyer	Meyer Resources Inc	Victoria, BC
Chief Robert	Michell	Carrier Sekani Tribal Council	Prince Geroge, B.C.
G.E.	Miller	Ministry of Transportation & Highways	Kamloops, BC
Diana	Mongeau	Halalt First Nation	Chemainus, B.C.
Yvonne	Moon	Tahltan Tribal Council	Dease Lake, B.C.
Maria A.	Morellato	Blake, Cassels & Graydon	Vancouver, B.C.
Joe	Moyah	Tribal Chiefs' Ventures	St. Paul, AB
Geoffrey	Moyse	Attorney General - Aboriginal Law	Victoria, B.C.
Lionel K.	Munaweera	Indian & Northern Affairs	Vancouver, BC
D. Roy	Neuenfeldt	B.C. Rail	Vancouver, B.C.
Edwin	Newman	Heiltsuk Tribal Council	Waglisla, B.C.
Dave	Nielsen	Dept. of Energy, Mines & Resources	Vancouver, B.C.
Chief Ernie	Nooski	NADLEH WHUT'EN INDIAN BAND	Fort Fraser, B.C.
Marilyn	Norby	Tahltan Tribal Council	Dease Lake, B.C.
Brendan	O'Donnell	Canadian Park Service	Ottawa, Ont.
Patrick	O'Rourke	Office of the Premier	Victoria,
Pat	Ogawa	Skeena Cellulose Inc.	Terrace, BC
Sena	Paradis	Federal Treaty Negotiating Office	Vancouver, B.C.
Grant	Parnell	BC Ministry of Forests	Victoria, B.C.
Barry L.	Patterson	Greater Vancouver Regional District	Burnaby, B.C.
Chief Thomas	Paul	Sechelt Indian Band	Sechelt, B.C.
Walter	Paul	The Alliance Tribal Council	Delta, B.C.
Gerard	Peters	CMDC / IN-SHUCK-CH COUNCILS	Mission, B.C.
Benedict	Pierre	Sechelt Indian Band	Sechelt, B.C.
J. Ramond	Pollard	Richards Buell Sutton	Vancouver, B.C.
Dave	Porter	Ministry of Aboriginal Affairs	Victoria, B.C.
Ian	Potter	Federal Treaty Negotiating Office	Vancouver, B.C.
Carol J.	Powlett Pepper	Dept. of Justice Canada	Vancouver, B.C.
Bob	Pratt	Ministry of Transportation & Highways	Nanaimo, BC
Richard T.	Price	University of Alberta	Edmonton, AB

Randy	Prokop	BC Ministry of Forests	Victoria, B.C.
Willaim C.	Prowse	Ocean Fisheries Ltd.	Vancouver, B.C.
Henry	Quinney	Tribal Chiefs' Ventures	St. Paul, AB
L. Douglas	Rae	Rae & Company	Calgary, AB
Jonathan	Rayner	Federal Treaty Negotiating Office	Vancouver, B.C.
Michael P.	Redmond	B.C. Telephone Co.	Burnaby, B.C.
Rhoda	Reider	Okanagan Indian Band	Vernon, B.C.
James I.	Reynolds	Davis & Co.	Vancouver, B.C.
Angus E.	Robertson	BC Ministry of Forests	Victoria, B.C.
Ivan James	Royan	Underhill & Underhill	Vancouver, B.C.
Chief Albert	Saddleman	Okanagan Indian Band	Vernon, B.C.
Michael A.	Sakamoto	Indian & Northern Affairs	Vancouver, BC
John P.	Sanderson	Sanderson, Laing	Vancouver, B.C.
Fern	Schultz	Ministry of Aboriginal Affairs	Victoria, BC
Carol-Ann	Shearer	Ministry of Aboriginal Affairs	Victoria, BC
Scott	Shettell	Apollo Forest Products Ltd.	Fort St. James, BC
Ronald J.	Shulman	Berger & Nelson	Vancouver, B.C.
Pamela	Skinner	Royal Trust	Vancouver, B.C.
Jerome N.	Slavik	Ackroyd, Piasta, Roth & Day	Edmonton, AB
Chief Earl J.	Smith	Ehattesaht Indian Band	Campbell River, B.C.
Rodney	Soonias	Montana Tribal Administration	Hobbema, AB
David G.	Sparks	Johnston, Ross & Co. Ltd.	Richmond, B.C.
Lawrence	Standing ontheRoad	Montana Tribal Administration	Hobbema, AB
John	Steuernol	Royal Trust	Vancouver, B.C.
Janice G.A.E.	Switlo	Switlo & Co.	Burnaby, B.C.
Jack	Talstra	City of Terrace	Terrace, BC
Bonita J.	Thompson, Q.C.	Singleton Urquhart MacDonald	Vancouver, B.C.
Abner	Thorne	Cowichan Indian Band	Duncan, B.C.
Toni	Timmermans	Indian Affairs & Northern Dev.	Vancouver, B.C.
Ted	Tisdale	District of Chilliwack	Chilliwack, BC
Juanita	Tupper	Federal Treaty Negotiating Office	Vancouver, B.C.
Leanne L.	Turnbull	B.C. Int'l Commercial Arbitration Ctr.	Vancouver, B.C.
Linda	Vanden Berg	Vanden Berg and Associates	Victoria, BC
Peter	Vrankjovic	Indian & Northern Affairs	Vancouver, BC
Fred	walchi	Heiltsuk Tribal Council	Waglisla, B.C.
Harry	Wan	Ministry of Transportation & Highways	Nanaimo, BC

Doug	Wanamaker	Federal Treaty Negotiating Office	Vancouver, B.C.
Ken	Warren	Indian & Northern Affairs	Vancouver, BC
John	Watson	Indian & Northern Affairs	Vancouver, BC
Tom	Weegar	Kitsumkalum Band	Terrace, B.C.
Victoria	Wells	Ehattesaht Indian Band	Campbell River, B.C.
Jack	White	Federal Treaty Negotiating Office	Vancouver, B.C.
Tracey M.	White	The Alliance Tribal Council	Delta, B.C.
Gary	Whittle	NADLEH WHUT'EN INDIAN BAND	Fort Fraser, B.C.
Bill	Wilson	Kwakiutl District Council	Port Hardy, BC
C. Anthony	Wilson	Ferguson Gifford	Vancouver, B.C.
Rhoda	Witherly	City of Prince Rupert	Prince Rupert, BC
Eric J.	Woodhouse	Cook Roberts & Whittaker	Victoria, B.C.
Shelagh-Jane	Woods	Indian & Northern Affairs	Vancouver, BC
Don	Wright	Ministry of Aboriginal Affairs	Victoria, B.C.
Seymer	Young	Ministry of Transportation & Highways	Burnaby, BC
Gary	Youngman	Commission on Resources & Environment	Victoria, BC

The New Aboriginal Claims Settlement Process

These materials were prepared for a conference held in Vancouver, British Columbia on February 4 and 5, 1993.

CHAIR

L Allan Williams, Q.C., Davis & Co., Vancouver, B.C.

SPEAKERS AND FACULTY

Chief Wendy Grant, Musqueam First Nation, Vancouver, B.C.
Chief Edward John, TL'AZT'EN NATIONS, Prince George, B.C.
Chief Sophie Pierre, Kootenay Indian Area Council, Cranbrook, B.C.
Chief Alvin McKay, Nisga'a Tribal Council, New Aiyansh, B.C.
Miles Richardson, Council of the Haida Nation, Queen Charlotte, BC
The Honorable Tom Siddon, Minister of Indian Affairs, Richmond, B.C.
Maryantonett Flumian, Department of Fisheries & Oceans, Ottawa, Ont.
Doreen Mullins, Federal Treaty Negotiating Office, Vancouver, B.C.
Gay Reardon, Federal Treaty Negotiations Office, Vancouver, B.C.
Tim Koepke, Department of Indian Affairs, Whitehorse, Yukon
The Honourable Andrew Petter, Minister of Native Affairs, Victoria, B.C.
Mark Krasnick, Ministry of Aboriginal Affairs, Victoria, B.C.
John L. Howard, Q.C., MacMillan Bloedel Limited, Vancouver, B.C.
Richard Taylor, Union of BC Municipalities, Richmond, BC
T.M. (Mike) Apsey, Council of Forest Industries of British Columbia, Vancouver, B.C.
L. Paddy Greene, B.C. Fisheries Commission, Prince Rupert, B.C.
Kenneth V. Georgetti, BC Federation of Labour, Burnaby, BC
Tony Sheridan, Tony Sheridan & Associates, Victoria, BC
Bryan Williams, Q.C., Swinton & Company, Vancouver, B.C.
Harry A. Slade, Ratcliff & Co., North Vancouver, B.C.
P. Geoff Plant, Russell & DuMoulin, Vancouver, B.C.

Asia Pacific Institute

Suite 700, Harbour Centre, P.O. Box 12086
555 West Hastings St.
Vancouver, B.C., Canada V6B 4N5
Tel (604) 685-8533 Fax (604) 685-5666

PROGRAM EVALUATION

1. Overall, how did you find the program?

- ☐ Excellent
- ☐ Good
- ☐ Very Good
- ☐ Poor

2. How much did the content help you in your occupation or planning for your business?

- ☐ It helped very much
- ☐ It helped
- ☐ It helped a little
- ☐ It did not help very much

3. What additional areas should have been covered? Should any topic have been covered in greater depth?

- ☐ Basis of the Land Question
- ☐ Treaty Commission process
- ☐ Preparing a claim for negotiation
- ☐ Overlapping claims
- ☐ Interim measures
- ☐ Compensation of third parties
- ☐ Other, please specify:

_____

_____

4. As a follow-up to this conference, I would like to see a course offered on one or more of the following (please check more than one):

- ☐ Preliminary steps to preparing or responding to a claim
- ☐ Resource assessments, land use plans and environmental issues as they relate to settlement of claims
- ☐ Aboriginal fishing and water rights
- ☐ Taxation on reserves
- ☐ Litigating aboriginal claims
- ☐ Other (please specify): _____

5. I work in the area of:

- ☐ First Nation Government
- ☐ Law
- ☐ Consulting
- ☐ Non-native resource development
- ☐ Federal Government
- ☐ Provincial Government
- ☐ Other: _____

Please place any other comments you may have on the reverse side of this page.

The New Aboriginal Claims Settlement Process
February 4 &5, 1993

AGENDA

DAY ONE

8:50 Chairman's Welcome and Introduction

L. Allan Williams, Q.C.
Davis & Co.

9:00 Keynote Address by Chief Wendy Grant
Vice-Chief of the Assembly of First Nations

The New Beginning for Treaty Negotiations in B.C.

Basis of the Land Question

9:30 Aboriginal Land Rights

P. Geoffrey Plant
Russell & DuMoulin

10:10 Coffee Break

10:25 Existing Rights of Aboriginal Self-Government

Bryan Williams, Q.C.
Swinton & Company

11:05 Section 35 and the Honour of the Crown

Harry A. Slade
Ratcliff & Company

11:50 Morning Speaker Round-up

12:05 Luncheon Adjournment

1:30 Address by the Honourable Andrew Petter
Minister of Aboriginal Affairs, British Columbia

A Just and Honourable Settlement of the Land Question in British Columbia

The New Claim Settlement Process

2:00 Treaty Negotiation Process and the Role of the Treaty Commission

L. Allan Williams, Q.C.
Davis & Co.

2:25 Preparing a Claim for Negotiation

Chief Sophie M. Pierre
Ktunaxa Nation

Chief Alvin McKay
Nisga'a First Nation

Tony Sheridan
Tony Sheridan and Assoc.

3:25 Coffee Break

DAY ONE CONTINUED

3:40 Elements of the Framework Agreement

Gay C. Reardon
Chief Federal Negotiator
Nisga'a Comprehensive Claim

Chief Alvin McKay
Nisga'a Nation

4:20 Developing a Process to Adjust Overlapping Claims

Chief Edward John
Tl'azt'en Nation

Miles G. Richardson
Haida Nation

4:50 Afternoon Speaker Round-up

5:00 Conference Concludes for Day One

AGENDA

DAY TWO

8:50 Chairman's Introduction to Day Two

L. Allan Williams, Q.C.
Davis & Co.

8:55 Address by the Honourable Tom Siddon

Minister of Indian Affairs and Northern Development
Government of Canada

Disposition of Land and Resources During Negotiations

9:25 Implementing Interim Measures in British Columbia

Chief Sophie M. Pierre
Ktunaxa Nation

Doreen K. Mullins
Director, Federal Treaty Negotiaiton Office, B.C.

Mark Krasnick
Chief Claims Negotiator Aboriginal Affairs, B. C.

Tim E. Koepke
Associate Chief Federal Negotiator, Yukon

10:35 Coffee Break

Third Party Interests

11:20 Third Parties and Interim Measures

Miles G. Richardson
Haida Nation

John L. Howard, Q.C.
MacMillan Bloedel Limited

12:00 Morning Speaker Round-up

12:10 Luncheon Adjournment

1:40 Presenting Third Party Positions During Treaty Negotiations

Chief Edward John
Tl'azt'en Nation

L. Paddy Greene
B.C. Fisheries Commission

Tony Sheridan
Tony Sheridan and Assoc.

2:20 How Third Parties Can Impact the Process

Richard Taylor
Union of B. C. Municipalities

T. M.(Mike) Apsey
Council of B.C. Forest Industries

Ken Georgetti
B.C. Federation of Labour

3:30 Coffee Break

DAY TWO CONTINUED

ABORIGINAL FISHERIES STRATEGY

3:45 Compensation of Third Party Interests

MARION BEAVE

~~**Maryantonnett Flumian**~~
Assit. Deputy Minister
Dept. of Fisheries & Oceans

John L. Howard, Q.C.
MacMillan Bloedel Limited

Mark Krasnick
Chief Claims Negotiator
Aboriginal Affairs, B. C.

L. Paddy Greene
B.C. Fisheries Commission
Prince Rupert

4:45 Chairman's Closing Remarks

L. Allan Williams, Q.C.
Davis & Co.

4:50 Conference Concludes

FACULTY AND SPEAKERS

CHAIR

L. Allan Williams, Q.C., Counsel, Davis & Company, Vancouver, B.C. Minister of Labour (1975-1979); Attorney General, Province of British Columbia (1979-1983); Minister responsible for Indian Matters for the Government of B.C. (1975-1983). Mr. Williams was a member of the British Columbia Claims Task Force (1991).

Davis & Co.
2800 - 666 Burrard St.
Vancouver, B.C. V6C 2Z7
Telephone (604) 643-2984
Fax (604) 687-1612

FIRST NATIONS

Chief Wendy Grant, Vice-Chief, Assembly of First Nations and Past Elected Chief of the Musqueam First Nation.

Musqueam First Nation
6822 Salish Dr.
Vancouver, B.C. V6N 2C6
Telephone (604) 263-3206
Fax (604) 263-1455

Chief Edward John, Hereditary and Elected Chief, Tl'azt'en Nation. Chief John served as a member of the British Columbia Claims Task Force and the Task Group of the First Nations Summit, authorized to carry out the B.C. Treaty Commission Agreement..

TL'AZT'EN NATIONS
200-1460 Sixth Ave.
Prince George, B.C. V2L 3N2
Telephone (604) 562-6279
Fax (604) 562-8206

Chief Sophie Pierre, Councillor and Past Chief, St. Mary's Indian Band and Administrator, Ktunaza/Kinbasket Tribal Council. Ms Pierre is part of the BC Treaty Commission Task Force and a Co-chair of the First Nations Summit.

Kootenay Indian Area Council
SS#3, Site 15, Comp 14 Mission Rd.
Cranbrook, B.C. V1C 6H3
Telephone (604) 489-2464
Fax (604) 489-5760

Chief Alvin McKay, President, Nisga'a Tribal Council. The Nisga'a Comprehensive Land Claim commenced in 1976 and is presently the only active land claim under negotiation in British Columbia.

Nisga'a Tribal Council
New Aiyansh, B.C. V0J 1A0
Telephone (604) 633-2215
Fax (604) 633-2425

Miles G. Richardson, President, Council of the Haida Nation. Mr. Richardson represents the Haida Nation in treaty negotiations and he was a member of the British Columbia Claims Task Force (1991).

Council of the Haida Nation
P.O. Box 98
Queen Charlotte, BC V0T 1S0
Telephone (604) 559-4468
Fax (604) 559-8951

CANADA

Honourable Tom Siddon, Minister of Indian Affairs and Northern Developmen, Canada and Member of Parliament for Richmond, B.C.

Minister of Indian Affairs
301-7031 Westminster Hwy
Richmond, B.C. V6X 1A3
Telephone (Ottawa) (819) 994-7628
Fax (Ottawa) (819) 953-4941

Maryantonett Flumian, Assistant Deputy Minister, Policy and Program Planning, Department of Fisheries, Ottawa. Ms Flumian's duties include responsibility for compensation of third party interests in the west coast fishing industry resulting from resolution of aboriginal claims.

Department of Fisheries & Oceans
200 Kent St.
Ottawa, Ontario K1A 0E6
Telephone (613) 993-1808
Fax (613) 993-2194

Doreen K. Mullins, Director of Federal Treaty Negotiation Office, B.C. Branch. Ms Mullins is responsible for Government of Canada involvement in treaty negotiations in B.C.

Federal Treaty Negotiations Office
2700-650 W Georgia St.
Vancouver, B.C. V6B 4N8
Telephone (604) 775-7105
Fax (604) 775-7149

Gay Reardon, Land Claims Negotiator, Government of Canada, Vancouver, B.C. Ms Reardon is the chief Federal negotiator on the Nisga'a Comprehensive Land Claim.

Federal Treaty Negotiations Office
2700-650 W Georgia St.
Vancouver, B.C. V6B 4N8
Telephone (604) 775-7106
Fax (604) 775-7149

Tim E. Koepke, Associate Chief Federal Negotiator for the Council for Yukon Indians' Comprehensive Land Claim. Mr. Koepke has negotiated on behalf of the Government of Canada with the Aborigianl Peoples in the Yukon since 1986.

Department of Indian Affairs & Northern Development
201-2285 Second Ave.
Whitehorse, Yukon Y1A 1C9
Telephone (403)-668-6583
Fax (403)-668-7217

BRITISH COLUMBIA

Honourable Andrew Petter, Minister of Aboriginal Affairs, British Columbia and Member of the Legislative Assembly for Saanich, B.C.

Minister of Aboriginal Affairs
Parliament Buildings
Victoria, B.C. V8V 1X4
Telephone (604) 387-9891
Fax (604) 356-1124

Mark Krasnick, Chief Treaty Negotiator, Government of British Columbia. Mr. Krasnick leads the Provincial treaty negotiation teams.

Ministry of Aboriginal Affairs
5th Fl. 712 Yates St.
Victoria, B.C. V8V 1X5
Telephone (604) 387-6838
Fax (604) 387-6073

THIRD PARTIES

John L. Howard, Q.C. Senior Vice-President, Law and Corporate Affairs, MacMillan Bloedel Limited Vancouver, B.C. Mr. Howard is Chairman of the Forest Industry Task Force on Aboriginal Claims.

MacMillan Bloedel Limited
4 Fl., 925 W. Georgia St.
Vancouver, B.C. V6C 3L2
Telephone (604) 661-8393
Fax (604) 661-8507

Richard Taylor, Executive Director, Union of B.C. Municipalities. Mr. Taylor represents the UBCM's interests regarding treaty negotiations with First Nations.

Union of BC Municipalities
15 - 10551 Shellbridge Way
Richmond, BC V6X 2W9
Telephone (604) 270-8226
Fax (604) 660-2271

T.M. (Mike) Apsey, President and C.E.O., Council of Forest Industries of British Columbia. Mr. Apsey represents the forest industry interests regarding treaty negotiations with First Nations.

Council of Forest Industries
1200-555 Burrard St.
Vancouver, B.C. V7X 1S7
Telephone (604) 684-0211
Fax (604) 687-4930

L. Paddy Greene, Executive Director B.C. Fisheries Commission, Prince Rupert, B.C. Mr. Greene is a long time fisherman and represents Non-Native commercial fishing interests with regard to settlement of aboriginal claims.

B.C. Fisheries Commission
2080 Atlin Ave.
Prince Rupert, B.C. V8J 1G1
Telephone (604) 627-1274
Fax (604) 627-7279

Ken Georgetti, President, British Columbia Federation of Labour. Mr. Georgetti is responsible for the representation of B.C. labour union interests affected by settlements of aborigianl claims.

BC Federation of Labour
4279 Canada Way
Burnaby, BC V5G 1H1
Telephone (604) 430-1421
Fax (604) 430-5917

CONSULTANTS

Tony Sheridan, Principal, Tony Sheridan and Associates, Victoria, B.C. Assistant deputy minister, Aboriginal Affairs (1989-1992). Mr. Sheridan was chief provincial negotiator, Nisga'a Land Claim (1991-1992); Member, B.C. Land Claims Task Force (1991).

Tony Sheridan & Associates
2761 Sea View Rd.
Victoria, BC V8N 1K7
Telephone (604) 477-4808
Fax (604) 477-0475

Bryan Williams, Q.C., Partner and Senior Counsel, Swinton & Company, Vancouver, B.C. Mr. Williams is counsel for the Province of B.C. in the Gitksan-Wet' suwet' en case.

Swinton & Company
1000 - 840 Howe St
Vancouver, B.C. V6Z 2M1
Telephone (604) -687-2242
Fax (604) -643-1200

Harry A. Slade, Partner, Ratcliff & Co. North Vancouver, B.C. Mr. Slade acts for numerous First Nations in land claim issues.

Ratcliff & Co.
103-133 West 15th St.
North Vancouver, B.C. V7M 1R8
Telephone (604) 988-5201
Fax (604) 988-1452

P. Geoffrey Plant, Partner, Russell & DuMoulin, Vancouver, B.C. Mr. Plant was counsel for the Province of B.C. in the Gitksan-Wet' suwet' en and Meares Island land claim cases.

Russell & DuMoulin
1700-1075 W Georgia St.
Vancouver, B.C. V6E 3G2
Telephone (604) 631-3131
Fax (604) 631-3232

Basis of the Land Question

THE NEW BEGINNING FOR TREATY NEGOTIATIONS IN BRITISH COLUMBIA

VICE-CHIEF WENDY GRANT
B.C. REGION, ASSEMBLY OF FIRST NATIONS

I am pleased to be here today to speak to you about a matter very near and dear to the hearts of all First Nations people. Indeed, there is nothing more important to the First Nations of British Columbia than the resolution of the aboriginal land question in B.C.

For the next two days we will be discussing the new treaty-making process in British Columbia, but, before we go too far, we must take a moment to examine how we got to where we are today. I would like to begin with a quote from the Report of the British Columbia Claims Task Force:

> The conflict over the rights of Aboriginal peoples in British Columbia is not solely a product of our time. The dispute has its genesis in the early years of European settlement. It is a conflict that speaks to the difficulties in reconciling fundamentally differently philosophical systems. Historically, the conflict is focused on the rights to land, sea, and resources. However, the ultimate solution lies in a much wider political and legal reconciliation between aboriginal and non-aboriginal societies. Addressing the problem will require an appreciation of the historical relationship between aboriginal and non-aboriginal people, and an understanding of how this history has shaped the political and legal reality of today.

When the Europeans first arrived in what is now eastern Canada, they set upon a course to free up lands for settlement. The mechanism they used to free up the land was treaties. The policy of the British Government in connection with treaties was set out in the Royal Proclamation of 1763. This policy recognized

aboriginal title and made clear that aboriginal land ownership and authority continued under British Sovereignty. Under the Royal Proclamation, only the Crown could acquire land from First Nations and this could be done only by treaty. The treaty-making process stopped at the Rocky Mountains. For this reason, today there are virtually no treaties in British Columbia. Only a small region on southern Vancouver Island, and a strip of north eastern British Columbia are subject to treaties with the Crown. Since the early days of contact in British Columbia, aboriginal leaders have made every effort to encourage negotiations. Today, we are, hopefully, closer than we have ever been.

In the early days of contact, aboriginal people assumed they would share with the new settlers as they had shared with one another since time immemorial. However, their new neighbors had very different notions regarding land ownership and societal values in general. It did not take long for aboriginal people to realize that what this new society had in mind for them was unacceptable. While there have been many protests over the period of more that a century, violence has erupted very rarely. Most often, political protest and calls for treaties have taken place.

In 1973, following a stalemate in the Supreme Court of Canada on the issue of aboriginal title, the federal government agreed to begin the negotiation of comprehensive claims. Thus negotiations with the Nisga'a began in the early 1970's. It is now 1993, and these negotiations are still far from over. The principal reason for the delay in the negotiations was the Provincial government's unwillingness to negotiate, which was only resolved in the summer of 1990.

The provincial government on the advice of the Premier's Council on Native Affairs agreed to take its place at the negotiation table and immediately joined the negotiations underway between the Nisga'a and the Government of Canada. This was an important step forward. However, there remained at least 25 other First Nations who also wanted to begin treaty negotiations as soon as possible. In December, 1990, the federal and provincial governments agreed with a proposal put forward by First Nations to establish a tripartite Task Force – the British Columbia Claims Task Force.

The mandate of the Task Force was to recommend how the three parties could begin negotiations and what the negotiations should include. Under the former federal policy, only one claim could be negotiated at a time in British Columbia. Consequently, all other First Nations, including over 20 whose claims had been accepted for negotiation, were forced to stand in line awaiting the conclusion of the Nisga'a negotiations. Under the new process which will be overseen by the B.C. Treaty Commission several negotiations can take place simultaneously. Many of us now believe that we will actually see treaties with our own First Nations within our lifetime. For this reason, we can really speak of this process as a new beginning.

In the past, treaty-making meant an exchange of rights, the giving up of aboriginal title for a package of privileges. Having observed the problems created by the treaty-making process followed in other provinces, the First Nations of British Columbia have repeatedly objected to the policies of the federal government and the Province of British Columbia that have as their core objective the extinguishment of our aboriginal rights.

Let there be no mistake, the treaty settlement process in British Columbia is not just a large scale real estate deal by another name. The position of the First Nations of British Columbia was clearly set out by Chief Joe Mathias in his remarks to a 1990 conference called "Reaching Just Settlements". At that conference, he said:

> From the aboriginal point of view, we are talking about the rights to govern ourselves, rights to preserve and maintain our culture, rights to preserve and maintain our languages, rights to educate our young, rights to institute our own forms of government independent of white bureaucracies, rights to determine what happens on our lands and to our resources. It's self-government, it's jurisdiction, it's wealth, access to lands and resources - it's not merely a real estate deal.

We seek an accommodation within Canada and British Columbia - an accommodation between equals that recognizes our right to maintain and develop our distinctive communities, traditions and cultures. We are not interested in an accommodation based upon the extinguishment of our aboriginal rights and the assimilation of our people into Canadian society.

Today I can confidently state that many British Columbians recognize and support our struggle for social justice, economic stability and political capability. What is required is to both develop and implement a settlement process which recognizes, protects and preserves the values, aspirations and dignity of the First Nations of British Columbia.

A new and appropriate approach to treaty-making in B.C. will give the First Nations the opportunity to impart to Canada and British Columbia the legal and social foundation upon which our title is based. This new approach will also

provide a working mechanism to mutually resolve our outstanding claims in the context of the complexities of contemporary Canadian society.

For treaty-making to be effective and gain the support of the First Nations of British Columbia, it must be founded upon a new and principled approach. It is not enough for treaty-making in the last decade of the twentieth century to simply be a repetition of the old process dressed up in modern language and trappings. An effective modern treaty-making process must embody the fundamental principles of justice and honour to ensure that just and honourable settlements are reached.

No First Nation should have to enter into a process which would threaten our very existence as unique and proud peoples. No process will ever be accepted or effective unless it is founded upon respect for the unique and special cultures and traditions of the First Nations of British Columbia - the traditions of the Salish, the Haida, the Carrier and all of the other First Nations are unique and must be acknowledged as such.

As nations we have distinctive cultures, languages, and histories that are unique to each of our respective traditional territories. Each of the First Nations of British Columbia exists nowhere else in the world. Our aboriginal rights and title cannot be separated from our nationhood - as those rights and title are at the heart of our cultures and our nations.

The discussions that you will engage in over the next two days will serve to foster a better understanding of the common interest we share in defining a new relationship for Canada, B.C. and First Nations. As you know, decades of intense

legal and social unrest have created an uncertain social, political and economic environment for First Nations across Canada - particularly in British Columbia.

The just settlement of the aboriginal title question has always been a matter of survival to aboriginal peoples. At long last, both the provincial and federal governments have come to the realization that the resolution of aboriginal issues is a matter of justice and honour as well as political necessity. Both the federal government and the provincial government have, in recent months, made significant changes in their policies towards the resolution of the outstanding land question in British Columbia.

The provincial government's policy, first adopted in 1990, *"Towards Just and Honourable Settlements"* recognized that resolution of the land question was a critical political, economic and moral issue that could no longer be ignored. Prime Minister Mulroney, in his 1990 *"House Resolution with Respect to Oka"* recognized the need for "innovations" to accelerate the settlement of comprehensive claims.

Both governments have acknowledged and recognized the unique needs of the culturally distinct First Nations through their acceptance of the "Made-in-B.C." process recommended in the Report of the B.C Claims Task Force. Through participation in the development, and acceptance of the Task Force's Report, the federal government, the Government of British Columbia, and the First Nations of British Columbia came together in 1991 to lay the groundwork for a new and innovative tripartite treaty-making process.

The need for innovation in treaty resolution has long been recognized as being essential to overcome the history of unproductive and unsatisfactory treaty-making with First Nations. Dr. Lloyd Barber, then Commissioner of Indian Claims in 1975, said:

> I would suggest to you that the negotiation on land claims provide an unprecedented opportunity to get at some of the important, deeply rooted problems and differences between Indians and non-Indians, and work out a basis for a more productive and harmonious future. If the negotiations are superficial, or based on criteria which do not really reflect the needs and concerns of the people affected on both sides, they will certainly fail. This is the time for hard-thinking, frank dialogue and imaginative approaches.

To engage in a "hard-thinking, frank dialogue" of substance, the First Nations of British Columbia need to get to the table with the federal and provincial governments and engage in discussions in a timely, effective and expeditious manner. The new British Columbia Treaty Commission, by facilitating negotiations on a tripartite basis, has the potential to ensure that we can all get to the table and get started with the hard job of resolving the long outstanding land question in this province.

Once started, the treaty-making process will provide an informed and principled means to stimulate, for the first time in Canadian history, a positive approach for resolving the aboriginal title issue. The Treaty Commission is more than simply the establishment of a negotiation process for British Columbia treaties. The Treaty Commission also provides an appropriate mechanism to resolve the bottleneck and accelerate the maddeningly slow pace of treaty negotiations. The new process embodied in the Treaty Commission has the potential becoming the catalyst for creating a new and honourable relationship with aboriginal peoples throughout Canada.

As First Nations and other governments prepare for negotiations, there is a great deal of work for all to do. Each of the parties to the negotiation must consult with its constituents to determine their priorities, their concerns. Negotiation positions must be developed in regard to many issues. But, most importantly, we must begin to work towards building a new relationship. This relationship must be based on mutual trust, respect and understanding. We cannot teach one another trust and respect. Trust and respect develop over time. We can, however, begin the process of assisting one another to better understand each other at once.

While we have come to dress like you, to speak like you and in some ways live like you, our fundamental philosophy has changed very little from the days when our ancestors first met yours. The trust in the teachings of our elders remains strong.

Our philosophy has always been to look at what's best for everyone and not just for us as First Nations. For this reason, it is often very difficult for aboriginal people at a negotiating table to understand the positions put forward by other parties whose goal is simply to get the best deal they can for themselves. Another difficulty we encounter is that our use of the English language differs from yours. While we may use the same words you do, we nevertheless interpret events and actions through our own distinct understanding of societal and human interrelationships. This frequently leads to misunderstandings.

Just as we have adapted to certain European ways, we will continue to adapt to an ever-changing world. But we will never compromise on one basic principle -

we must be recognized for who we are as aboriginal people. In recognizing who we are, it is important to understand the damage we have suffered as societies. Nevertheless, we remain as committed as ever to ensuring our continued existence as aboriginal people.

In order for us to successfully accomplish the task we are about to begin, we ask that non-aboriginal people set aside some of what they have been taught in order for us to work together to develop a true and meaningful consensus based on a solid understanding, one to which everyone has contributed. To develop this consensus we will all need to rise above our petty grievances and set our sights on solutions which will bring about a better future for all our children.

The Treaty Commission has a critical role to play in the development of this consensus. The Treaty Commission, in facilitating the negotiation of treaties, is helping First Nations, Canada and British Columbia build a new relationship. This new relationship must recognize the unique place of aboriginal people and First Nations in British Columbia. The relationship calls for recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life. In the past, there has been no impartial body to which negotiating parties could turn when their negotiations get bogged down. With the Treaty Commission overseeing negotiations, the parties will now have somewhere to turn to. As well, the Treaty Commission will help arrange dispute resolution services at the request of the parties. Through its annual report to Parliament and the British Columbia Legislature, the Treaty Commission will keep the public informed about the progress in these negotiations. As we expect several

negotiations to be carried out at once, the Treaty Commission will be critical in maintaining some coordination between the various negotiations.

All First Nations and First Nations people celebrate the prospect of a new and better process for resolving our long outstanding land claims and hope for the evolution of a new and honourable relationship with Canada and British Columbia. At the same time, we must not forget the long, dark and difficult path that brought us to where we are today.

Canada, British Columbia, and First Nations of British Columbia have yet to face the greatest challenge of all - to collectively move from fine words and rhetoric to reality. We must work together to make the treaty process a functioning reality. We must actually come to the bargaining table and expeditiously work out honourable and effective agreements.

It will not be easy. Perseverance, understanding and cooperation will be required of us all. We will have to call upon our deepest reserves of desire, commitment and the common resolve to create a better legacy for our children, both aboriginal and non-aboriginal. Sustained, creative, and firm leadership will be required from Canada, British Columbia, and the First Nations.

There are no other options available to Canadians, British Columbians, and First Nations people. To fail to vigorously pursue a principled and honourable approach to the settlement of treaties in British Columbia is to retreat into those out dated attitudes and policies which diminished the dignity and self-respect of all aboriginal peoples - and in so doing, diminished the humanity and dignity of us all.

ABORIGINAL LAND RIGHTS IN BRITISH COLUMBIA

These materials were prepared by P. Geoffrey Plant, Russell & DuMoulin, Vancouver, B.C. for the Asia Pacific Institute, February 4, 1993.

TABLE OF CONTENTS

I. INTRODUCTION

This paper is intended to be an introductory outline of the law relating to aboriginal land rights in British Columbia. Its object is to introduce the non-specialist to the basic issues and concepts in this branch of the law. As will be seen, the law of aboriginal land rights is created or defined on a number of fronts: in the executive and legislative branches of government; in the constitutional arena; at the bargaining table (i.e., treaty-making); and in the courts. Courts have a two-fold importance: the judges must not only give expression to the principles of the common law (i.e., purely judge-made law) but they must also interpret and give meaning to the work of legislators, constitution framers and treaty-makers.

The importance of courts in the process of defining aboriginal rights gives rise to the problem of timing which has affected the preparation of this paper. As of this writing the leading case on the common law of aboriginal land rights in British Columbia is the trial judgment in Delgamuukw v. The Queen, [1991] 3 W.W.R. 97 (B.C.S.C.), the case concerning the Gitksan-Wet'suwet'en land and governance claim. That case has something to say on all of the issues relating to aboriginal land rights. Yet as most in this audience will know, the trial judgment in Delgamuukw has been appealed to the Court of Appeal. The appeal has been argued, but judgment has not been handed down. Of course, the judgment of the Court of Appeal itself may not be the last word on this subject: a further appeal to the Supreme Court of Canada is likely. In the meantime the law is in a sense both certain and uncertain. It is certain because for the time being the law is that pronounced by the trial court; it is uncertain because everyone waiting for the Court of Appeal's judgment knows that careful, reasoned arguments were made criticizing the trial decision and wonders whether they will or will not prevail. Thus the present attempt to state the law must, to be useful, include references to arguments concerning the law as some have said it should be.

II. THE LAW AS IT IS

The law as stated in the Delgamuukw trial judgment, which will be discussed in more detail below, may be briefly summarized. The common law recognizes aboriginal rights which derive from the long time presence of aboriginal peoples upon particular lands. These rights consist of:

> "rights to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for subsistence and ceremonial purposes."
>
> (Delgamuukw, supra, at p. 112)

As a matter of law such rights may be extinguished whenever the intention of the Crown to do so is "clear and plain". In British Columbia aboriginal land rights outside reserves were extinguished during the colonial period (1858 to 1871) because the law and policy of the colonial governments manifested the necessary clear and plain intention. Rights to reserve lands and fisheries were not extinguished. Extinguishment, accompanied by the Crown's promise that aboriginal people could continue to use unoccupied or vacant Crown land for purposes equivalent to the practices which had been protected as aboriginal rights, together with the Crown's general obligation in respect of aboriginal peoples, created a legally enforceable fiduciary obligation upon the Crown to ensure there is no arbitrary interference with aboriginal subsistence practices in traditional territories. But such practices are no longer carried on as "aboriginal rights".

Thus the outcome of the Delgamuukw trial is that there are no aboriginal land rights outside reserves in British Columbia. But as I have said, the decision has been appealed on virtually all grounds. What, then, are the principles which are part of this area of the law?

III. THE ACQUISITION OF CROWN TITLE

The historical reality is that aboriginal people are "first peoples", whose possession of the land of what is now British Columbia was an established fact at the time of European settlement. Perhaps the best known judicial expression of this reality is found in the following passage from the judgment of Judson, J. in the Nisga'a case, Calder v. A.G.B.C., [1973] S.C.R. 313 at 328:

> "... the 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 and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished."

In discussions of aboriginal land rights the first question which frequently arises is this: since aboriginal people were here before the Europeans, how is it that their original ownership has been displaced? The answer to this question involves a brief reference to the relationship between the acquisition of Crown sovereignty and the acquisition of Crown title.

The legal position is that the title of the British Crown to the land of what is now British Columbia followed by operation of law as a consequence of the assertion of British sovereignty over that land. The question of the relationship between Crown sovereignty, which is really an international law concept, and the position of aboriginal peoples within the domestic law is one which scholars and lawyers have debated[1]. It also contains within it political and moral questions, because the legal proposition is that so far as courts which derive their authority from the British Crown are concerned, the effectiveness of the assertion of British sovereignty does not depend upon the consent of the aboriginal peoples whose sovereignty has been taken away. But putting the political and moral issues to one side the legal position appears to be beyond doubt. Sovereignty may be acquired by conquest or treaty. It may also be acquired, as it was in British Columbia, by the assertion of sovereignty accompanied by European settlement. If it is acquired in this latter way then sovereignty the Crown also acquires what is called the underlying title, which is the basis of all land ownership in the newly acquired territory. In R. v. Sparrow, [1990] 1 S.C.R. 1075 the Supreme Court of Canada put the point in the following way (at p. 1103):

> "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands ... there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."

---

[1] There is a large and growing body of academic and judicial writing on this subject. Two frequently-cited Canadian works are Brian Slattery's "The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories", D.Phil.Thesis, Oxford University Faculty of Law, 1979; reprinted University of Saskatchewan Native Law Centre, 1979, and Kent McNeil's "Common Law Aboriginal Title", Oxford Clarendon Press, 1989. See also, Mabo v. The State of Queensland, High Court of Australia, 3 June 1992, and the cases cited therein.

The Crown's acquisition of the underlying title occurs by operation of law. The result is that aboriginal land interests are defined within a legal framework which presupposes that the root of title to all land is in the Crown rather than aboriginal people.

IV. ABORIGINAL RIGHTS AND EXECUTIVE ORDER THE ROYAL PROCLAMATION OF 1763

In 1763, following the Treaty of Paris which ended the Seven Years War between France and Britain, King George III issued a proclamation establishing governments in Britain's newly acquired colonies and providing for the creation of a large hunting reserve for the Indians in an area outside those colonies. By this executive act the Crown created, or at least recognized, an aboriginal interest in lands in what is now Canada. The Royal Proclamation of 1763 has been called the Indian Bill of Rights[2] and is of continuing importance as a source of aboriginal rights in central Canada. The question of its application to British Columbia has always had two dimensions: first is the question whether the lands of British Columbia were, as a matter of historical and geographical fact, within the boundaries of the hunting reserve; second is the question whether, even if the Proclamation did not at the time of its making apply to British Columbia, it should be given effect as a statement of Imperial policy to recognize aboriginal land rights which in due course became applicable to and binding upon the Crown in its dealings with aboriginal people in British Columbia.

In the Calder case the Nisga'a relied upon the Royal Proclamation in support of their claim to unextinguished aboriginal title to the Nass River basin. The Supreme Court of Canada split evenly on the question. Three judges, whose judgment was written by Hall, J., held that the Royal Proclamation did apply in British Columbia. Three other judges, led by Judson, J., decided that it did not. The question remained unresolved for two decades, until McEachern, C.J.B.C. held in Delgamuukw that Judson, J. was right - the Royal Proclamation had never applied to or had any force in British Columbia.

Chief Justice McEachern's finding has been appealed. Pending the outcome of the appeal the following observation might usefully be made. The Royal Proclamation was important to the argument in Calder because, prior to that case, it was unclear whether the common law would give effect to

---

[2] per Lord Denning, M.R., in R. v. Foreign Secretary, Ex p. Indian Association of Alberta, [1982] Q.B. 892 at 912 (C.A.)

The Crown's acquisition of the underlying title occurs by operation of law. The result is that aboriginal land interests are defined within a legal framework which presupposes that the root of title to all land is in the Crown rather than aboriginal people.

IV. ABORIGINAL RIGHTS AND EXECUTIVE ORDER THE ROYAL PROCLAMATION OF 1763

In 1763, following the Treaty of Paris which ended the Seven Years War between France and Britain, King George III issued a proclamation establishing governments in Britain's newly acquired colonies and providing for the creation of a large hunting reserve for the Indians in an area outside those colonies. By this executive act the Crown created, or at least recognized, an aboriginal interest in lands in what is now Canada. The Royal Proclamation of 1763 has been called the Indian Bill of Rights[2] and is of continuing importance as a source of aboriginal rights in central Canada. The question of its application to British Columbia has always had two dimensions: first is the question whether the lands of British Columbia were, as a matter of historical and geographical fact, within the boundaries of the hunting reserve; second is the question whether, even if the Proclamation did not at the time of its making apply to British Columbia, it should be given effect as a statement of Imperial policy to recognize aboriginal land rights which in due course became applicable to and binding upon the Crown in its dealings with aboriginal people in British Columbia.

In the Calder case the Nisga'a relied upon the Royal Proclamation in support of their claim to unextinguished aboriginal title to the Nass River basin. The Supreme Court of Canada split evenly on the question. Three judges, whose judgment was written by Hall, J., held that the Royal Proclamation did apply in British Columbia. Three other judges, led by Judson, J., decided that it did not. The question remained unresolved for two decades, until McEachern, C.J.B.C. held in Delgamuukw that Judson, J. was right - the Royal Proclamation had never applied to or had any force in British Columbia.

Chief Justice McEachern's finding has been appealed. Pending the outcome of the appeal the following observation might usefully be made. The Royal Proclamation was important to the argument in Calder because, prior to that case, it was unclear whether the common law would give effect to

---

[2] per Lord Denning, M.R., in R. v. Foreign Secretary, Ex p. Indian Association of Alberta, [1982] Q.B. 892 at 912 (C.A.)

aboriginal rights without an express recognition of such rights by the legislative or executive branches of government. Since, as will be seen below, the Court in Calder decided that the existence of aboriginal rights did not depend upon express recognition, the applicability of the Royal Proclamation is no longer critical to an assertion of aboriginal land rights in British Columbia. Its continuing prominence in land claims litigation owes perhaps more to the reliance placed upon it in arguments concerning the nature of aboriginal land rights than to the question of the existence of such rights.

V. TREATY MAKING IN BRITISH COLUMBIA

The Royal Proclamation provides an example of how aboriginal land rights may be created or expressly recognized by the executive act of the Crown as sovereign. Aboriginal land rights may also be created or recognized by express agreement between governments and aboriginal peoples. Such agreements may be styled treaties or may take some other form, such as a modern day comprehensive claim agreement. For a number of reasons treaty-making on a large scale was never practised in British Columbia. In the 1850's, during the early years of the colony of Vancouver Island, James Douglas, who was originally Chief Factor of the Hudson's Bay Company and later became governor of both Vancouver Island and British Columbia, entered into 14 agreements with Indian tribes on Vancouver Island. By the standards of nineteenth century legal documents the terms of these agreements were remarkably straightforward. In return for promises that village sites and enclosed fields would be surveyed and kept for use of the signatory tribes, whose people would be "at liberty to hunt over the unoccupied lands and to carry on our fisheries as formerly", money payments were made and the tribes agreed to surrender their lands. Although expressed to be made on behalf of the Hudson's Bay Company these agreements have consistently been upheld as treaties by the courts[3]. Thus the promises of hunting and fishing rights which Douglas made to these tribes over a century ago are still legally enforceable. The vigour of these agreements was demonstrated as recently as 1987 when the Tsawout Indian Band successfully obtained

---

[3] R. v. White and Bob (1964), 52 W.W.R. 193, 50 D.L.R. (2d) 613, affirmed 52 D.L.R. (2d) 481n (S.C.C.); R. v. Bartleman (1984), 55 B.C.L.R. 78, 12 D.L.R. (4th) 73 (C.A.); and Claxton v. Saanichton Marina Ltd. (1989), 36 B.C.L.R. (2d) 79, 57 (D.L.R.) (4th) 161 (C.A.)

a permanent injunction restraining the construction of a marina in Saanichton Bay on the ground that the proposed facility would interfere with the right of fishery promised to them by their 1852 treaty.[4]

The only other treaty area in British Columbia is that part of the province which lies east of the Rocky Mountain continental divide and falls within the boundaries of Treaty No. 8, one of the numbered treaties entered into by the government of Canada after Confederation. There are no treaties in the rest of the province. Instead a different policy was pursued, one which sought to protect aboriginal people by reserving to them their villages, agricultural lands and fishing sites, while throwing the remaining lands open for settlement by others. This policy is discussed more fully below.

Treaty rights (including rights acquired by land claims agreements) enjoy constitutional protection under s. 35(1) of the Constitution Act, 1982, which provides:

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

The fact that section 35(1) uses two terms, "aboriginal rights" and "treaty rights", suggests that they are different types of rights, so that, for example, a land right created by treaty could be a right belonging to aboriginal people but not, perhaps, an "aboriginal right" within the meaning of section 35(1). The courts have not yet had to deal with the significance, if any, of this distinction, but it should be said that even if section 35 recognizes two distinct types of rights, nothing in its wording supports a suggestion that they have different constitutional status. It should also be pointed out that treaties do not necessarily create rights: treaties can also be cast in terms which amount to a recognition of pre-existing aboriginal rights. Thus it is possible for aboriginal people to hold both treaty rights and aboriginal rights in respect of the same subject matter.

Having now dealt briefly with the Royal Proclamation and treaty rights, the next potential source of aboriginal land rights is the common law, to which I now turn.

---

[4] Claxton v. Saanichton Marina Ltd., supra.

VI. COMMON LAW ABORIGINAL TITLE

The modern legal history of common law aboriginal land rights begins with the 1973 decision of the Supreme Court of Canada in Calder v. A.G.B.C., supra. This was a case brought by the Nisga'a people of northwestern British Columbia, who sued for a declaration:

> "That the aboriginal title, otherwise known as the Indian Title, of the Plaintiffs to their ancient tribal territory... has never been lawfully extinguished."

The Nisga'a claim was dismissed on a procedural point. But the case is nonetheless profoundly important. Six of the seven justices held that "aboriginal title" was part of the common law of Canada and that its existence did not depend upon treaty, executive order or legislative enactment. Strictly speaking, the form of the declaration sought did not require the Court to define the aboriginal land interest. As we have seen, Judson, J. spoke of the Plaintiffs' "right to live on their lands as their forefathers had lived". He did not say whether this right amounted to an interest in land. Hall, J. expressly stated at p. 352 that "the exact nature and extent of the Indian right or title" did not need to be precisely defined, but referred to counsel's description of it as:

> "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada."

Hall, J. also appears to have thought that the extinguishment of aboriginal title would give rise to an entitlement to compensation.

Calder is also important because the Court was asked to find that aboriginal title had been extinguished during the colonial period (i.e., prior to the union of British Columbia with Canada in 1871). The Court split evenly on this question, thereby giving rise to a debate which remained unresolved until Delgamuukw and which will be discussed in greater detail below.

Thus Calder established that the aboriginal people of British Columbia had enjoyed land-based rights in the past, but the continued existence of such rights was uncertain. The definition of such rights also remained unclear, including such questions as whether aboriginal title would operate as a continuing burden on land or resource interests alienated to third parties.

Third party rights were considered in a 1980 Federal Court decision concerning land claimed by the Inuit in the Northwest Territories: Baker Lake v. Minister of Indian Affairs, [1980] 1 F.C. 518. The Court in this case upheld the Inuit claim of aboriginal title, but at the same time refused to enjoin mining operations in the affected lands. Although it was not necessary for the purpose of his decision, the Court also expressed the view that aboriginal title could not survive a grant of land in fee simple.

Baker Lake has been an important influence on later courts, in part because of its support for the proposition that aboriginal title is part of the common law of Canada, but more importantly for its discussion of the requirements of proof of such title. In a passage which has been frequently cited in later cases (and which appears to have been approved by the B.C. Court of Appeal in Pasco, Oregon Jack Creek Indian Band v. C.N.R. (1989), 34 B.C.L.R. (2d) 344 - but see the reasons of the Supreme Court of Canada on an application for rehearing at (1990), 103 N.R. 235) the Court held at pp. 557-558:

> "The elements which the plaintiffs must prove to establish an aboriginal title cognizable at common law are:
>
> 1. That they and their ancestors were members of an organized society.
>
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
>
> 3. That the occupation was to the exclusion of other organized societies.
>
> 4. That the occupation was an established fact at the time sovereignty was asserted by England."

The exposition of these criteria, which borrowed heavily from U.S. jurisprudence, paved the way for the large-scale land claim trials, including the Bear Island case in Ontario and Delgamuukw which followed Baker Lake. By requiring that the existence of aboriginal land rights depend upon proof of historical and sociological facts, the litigation of such cases necessarily became both complex and lengthy.

The Supreme Court of Canada next had occasion to consider the nature of aboriginal land rights in Guerin v. The Queen, [1984] 2 S.C.R. 335. In this case the Musqueam Indian band sued the federal government for breach of duty in respect of the negotiation of a surrender of reserve lands for lease to a golf club. The Court upheld the trial judge's award of $10 million in damages, holding that the federal government had breached the fiduciary duty which it owed to the Musqueam in respect of its dealings with their reserve lands. The duty had been breached by the government's improper conduct in failing to ensure that the lease to the golf club complied with the terms of the surrender.

The first important point about this case is the Court's finding that the Crown's obligations to its aboriginal subjects are legal, not merely political. Guerin establishes that the fairness of the Crown's treatment of aboriginal people can be scrutinized by the courts. Secondly, the basis for this obligation, at least so far as the majority of the Court was concerned, was the continuing aboriginal title which the Musqueam band had in its reserve lands. The majority judgment, written by Dickson, J. (as he then was), relied heavily on the doctrine of aboriginal title in support of its conclusions. In doing so, the majority further explored the nature of aboriginal land rights. Dickson, J. held such rights did not, strictly speaking, amount to the beneficial ownership of land, but neither could they be characterized as purely personal. Aboriginal title was described as being *sui generis*, a Latin phrase meaning unique, or peculiar to itself. Use of this phrase was intended to suggest the inappropriateness of defining aboriginal rights in conventional property law terms. The implication is that aboriginal land interests are not part of the ordinary law of property.

The judgment of Dickson, J. contains a passage on the relationship between reserve-based and other aboriginal land interests which has been the subject of some controversy. The passage (at pp. 378-379, with emphasis added) reads as follows:

> "The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C. 399. That principle supports the assumption implicit in Calder that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. ...
>
> "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see Attorney-General for

> Quebec v. Attorney-General for Canada, [1921] 1 A.C. 401, at pp. 410-11 (the Star Chrome case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation."

Aboriginal groups have relied on this passage to argue that Dickson, J. must have held that aboriginal title continues to exist in British Columbia with the same force in lands inside and outside reserves. (The argument, in effect, is that all of British Columbia constitutes "lands reserved for the Indians" within the meaning of s. 91(24) of the Constitution Act, 1867). In Delgamuukw, McEachern, C.J.B.C. said (at p. 354) that this passage meant simply that the duties arising upon the surrender of aboriginal land interests would be the same whether the lands were reserve lands or other lands subject to unextinguished aboriginal rights. Whether this be a correct interpretation of this passage or not, it is nonetheless difficult to accept the suggestion that Dickson, J. intended to make a binding pronouncement about the nature of aboriginal land interests in all lands in the province in a case where rights outside reserves were not at issue and neither the Province (as holder of the underlying title) nor any private land owner was before the Court to argue the point.

Significantly, no attempt was made in Guerin to set aside either the surrender or the lease to the golf club. So while the Crown was made liable for breach of its fiduciary obligation in respect of a dealing with Indian lands, the relationship between aboriginal title and third party interests was still unclear. Since the case concerned reserve land, the issue of extinguishment appears not to have been argued.

The common law was further developed when, in a case from New Brunswick decided in 1988[5] the Supreme Court of Canada held that the holder of a conventional property interest - in this case a railway company holding statutory right of way - could obtain an injunction to restrain interference with its rights by the holders of aboriginal title over the same land. The Court expressly left the extinguishment issue open. The result of the case appears to be that an otherwise valid property interest will prevail over a competing aboriginal land right even if the aboriginal right survives the grant, an issue which, the Court held, did not have to be decided.

---

[5] C.P. v. Paul, [1988] 2 S.C.R. 654

Meanwhile, as the common law of aboriginal title developed, important changes were taking place on the constitutional front which will now be reviewed.

VII. SECTION 35 AND THE CONSTITUTIONAL AFFIRMATION OF ABORIGINAL TITLE

The package of constitutional reforms which accompanied the patriation of Canada's constitution in 1982 included section 35 of the Constitution Act, 1982, subsection (1) of which will be repeated here for convenience:

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

Although the nature and extent of the aboriginal rights protected by this section was left undefined, commentators generally agreed its effect was to entrench such rights in the constitution, thereby shielding them to some extent from government interference. The apparent result was to "constitutionalize" the common law of aboriginal rights, with admittedly uncertain consequences.

The Supreme Court of Canada had its first opportunity to give content to section 35 in Sparrow v. The Queen, supra. The facts were that a member of the Musqueam Indian band was charged with fishing in violation of federally regulated net length restrictions. The evidence disclosed that he had been fishing in traditional tribal fishing grounds. In his defence he argued that the regulation imposing the net length restriction was unenforceable because he had been exercising his aboriginal fishing rights which were protected by section 35.

Sparrow was convicted at trial, but the Supreme Court of Canada set aside the conviction and ordered a new trial. In doing so the Court enunciated a blueprint for the application of section 35. Put briefly, the Court said that laws which interfere with the exercise of aboriginal rights are now subject to judicial review. If the interference cannot be justified by reference to legitimate legislative objectives which uphold the honour of the Crown in its dealings with native people, then the law can be struck down.

Since no evidence had been introduced in Sparrow's case on the issue of whether the net length restriction could be justified, a new trial was ordered. Unfortunately the new trial has never been held, but lower courts in later cases have begun to grapple with concrete situations of interference and justification. In summary, the result of these cases to date appears to be this: while Sparrow has clearly had a significant influence on the federal government's management of the fishery, its impact on the management of land-based resources potentially affected by the exercise of aboriginal rights is difficult to discern. In part this is because the extent to which the questions of interference and justification apply to the provincial government in its resource management is unclear. Subsequent cases (including cases currently before the Court of Appeal) will shed further light on these issues. For now, the important point is that while section 35 has not altered the constitutional distribution of legislative power, it has made the exercise of that power, at least on the part of the federal government, subject to criteria of judicial review intended to ensure that federal legislators pay special attention to the impact of government on the interests of aboriginal people.

VIII. DELGAMUUKW v. THE QUEEN

At this point it is necessary to say more about the landmark decision in Delgamuukw v. The Queen, supra. The Plaintiffs were the hereditary chiefs of the Gitksan and Wet'suwet'en people of north-central British Columbia. They asserted:

(i) ownership over a land area amounting to some 22,000 square miles, comprising most of the Skeena and Bulkley river systems; and

(ii) jurisdiction, or self-government, over both the claimed land and the native peoples belonging to these two groups.

They argued that from "time immemorial" down to the present day they and their ancestors had "owned and exercised jurisdiction" over the claim area. Defining their conception of ownership and jurisdiction proved difficult. However, it was clear that the claim of ownership, though not expressed as ownership in conventional property law terms, amounted to the same thing, that is, the full exclusive enjoyment of the territory and all its resources. This right was said to derive from their ancient possession and governance of the land.

As an act of grace, the Plaintiffs formally abandoned any claim of ownership to land held in fee simple by third parties as of the date the action was commenced (October 23, 1984) but this concession did not apply to lesser interests, including forest, mineral and agricultural tenures. If the Plaintiffs' claim succeeds, all such interests will become unenforceable as against the aboriginal owners of the land.

The claim of jurisdiction amounted to an assertion of full rights of self-government over all Gitksan and Wet'suwet'en people and control over use of all lands in the claim area to the exclusion of all provincial laws. Non-natives within the claim area were acknowledged by the Plaintiffs to remain subject to Provincial and Federal laws.

The trial of the case lasted three years. A vast body of evidence was adduced from hereditary chiefs and expert witnesses in an attempt to prove the history of the claimant peoples, their system of social organization and their governance of land and resources. This evidence revealed a society based strongly on rules governing kinship relations in which resource rights were asserted by chiefs as the head of kinship groups called houses which in turn were connected by a network of larger groups called clans. Chieftainship, today as in the past, is largely hereditary, and the inheritance of chieftainship rights usually takes place within a framework of rules of matrilineal succession which are validated in ceremonies in the feast hall. The trial was lengthy because the Plaintiffs' claims with respect to their use, occupation and governance of the whole of the claim area, both in the distant past and today, were contested.

The trial judge, McEachern, C.J.B.C., rejected the Plaintiffs' claims to ownership and jurisdiction. He held that the law had never given effect to such rights and that it was beyond his power to do so now. In his words, the "authorities are conclusively against the Plaintiffs' claims for sovereignty and ownership." In a passage which foreshadowed the negotiations which led to the Charlottetown Accord, the Chief Justice said at p 387:

> "The plaintiffs must understand that Canada and the provinces, as a matter of law, are sovereign, each in their own jurisdictions, which makes it impossible for aboriginal peoples unilaterally to achieve the independent or separate status some of them seek. In the language of the street, and in the contemplation of the law, the plaintiffs are subject to the same law and the same Constitution as everyone else. The Constitution can only be changed in the manner provided by the Constitution itself.

> "This is not to say that some form of self-government for aboriginal persons cannot be arranged. That, however, is possible only with the agreement of both levels of government under appropriate, lawful legislation. It cannot be achieved by litigation."

Since aboriginal rights do not consist of ownership and jurisdiction, what are they? In summary, the Chief Justice concluded:

1. Aboriginal rights arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty.

2. Aboriginal rights are communal. They include all those sustenance practices and the gathering of all those products of the land and waters which the ancestors of the Indians practised and used before exposure to European civilisation for subsistence or survival, including wood, food and clothing, and for their culture or ornamentation - in short, what their ancestors obtained from the land and waters for their aboriginal life. Aboriginal rights are not property rights.

3. Common law aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. This power reposed with the Imperial Crown during the colonial period. Upon union with Canada in 1871 the provincial government retained title to all Crown land in the province subject to the interests of the Indians.

4. Unextinguished aboriginal rights are not absolute. Crown action and aboriginal rights may in proper circumstances be reconciled. Generally speaking, aboriginal rights may be regulated by the Crown only when such regulation operates to interfere with aboriginal rights pursuant to:

   (i) legitimate Crown objectives which can honourably be justified; without

   (ii) undue interference with such rights; and

   (iii) with appropriate priority over competing, inconsistent activities.

In the view of the trial judge, the content of aboriginal rights is tied to aboriginal practices, and is thereby limited to subsistence and ceremonial activities carried on in the places where such activities were pursued for a "long, long time" before the assertion of sovereignty. For this reason aboriginal rights "do not include commercial activities, even those related to land or water resource gathering, except in compliance with the general law of the province" (p. 393). Accordingly, as commercial resource users, Indians enjoy no priority of entitlement over anyone else.

The Chief Justice's conception of the nature of aboriginal rights has been criticized by those who argue that aboriginal title is proprietary in nature, that it amounts in law to a right in land and that it includes the right to exploit resources for commercial purposes.

The correctness of these criticisms is presently before the Court of Appeal. The challenge for that Court is to extract from the wide range of judicial statements about aboriginal land rights those which are authoritative. Interestingly, few of these statements are made in cases where the definition of aboriginal land rights was directly in issue before the courts. As we have seen, Calder was not such a case. In Attorney-General Ontario v. Bear Island Foundation (1984), 15 D.L.R. (4th) 321 (Ont.H.Ct.) aff'd (1989), 58 D.L.R. (4th) 117, (Ont.C.A.), aff'd [1991] 2 S.C.R. 572, the trial judge attempted a definition but the Supreme Court of Canada decided the case on a point which did not require the Court to examine the question. The Chief Justice held in Delgamuukw that as a trial judge he was bound to follow St. Catherine's Milling Co. v. The Queen (1888), 14 App.Cas. 46 (J.C.P.C.) in which aboriginal land interests were described as "personal and usufructuary". Later cases, including Calder and Guerin, have commented on this definition, suggesting that it is too narrow, or at any rate incomplete, but the language in St. Catherine's Milling was upheld by a unanimous Supreme Court of Canada in the decision of Smith v. The Queen, [1983] 1 S.C.R. 554. There are no cases upholding claims of aboriginal ownership of non-reserve lands similar to the claims made by the Delgamuukw plaintiffs. But the law in this area is clearly developing - the Court of Appeal's decision will mark the next important stage of that development.

The Chief Justice's analysis of the nature of aboriginal rights preceded his finding on another important issue: extinguishment.

IX EXTINGUISHMENT

It has been argued by some that common law aboriginal rights could not be taken away except upon notice and by consent of the aboriginal people whose rights are affected. The law on this question is established by the Supreme Court of Canada in the Sparrow case: aboriginal rights may be unilaterally extinguished provided that the Sovereign's intention to do so is "clear and plain". There is a debate about what is meant by "clear and plain". Some have argued, relying on the language of Hall, J. in Calder, that aboriginal rights may only be extinguished by express legislation. In other words, what is required

is a statute which says "aboriginal title is hereby extinguished". Others have argued that clear and plain intention may be inferred from a course of conduct if the necessary implication of that conduct is that the right is extinguished. So, for example, if freehold title is validly granted in respect of a particular parcel, aboriginal title must have been extinguished because otherwise the holder of fee simple will not enjoy full beneficial ownership of the land. In Baker Lake, supra, at p. 565 the Court said:

> "The coexistence of an aboriginal title with the estate of the ordinary private land holder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land."

The trial judge in Delgamuukw was presented with the argument which had been accepted by Judson, J. in Calder, namely that aboriginal title in British Columbia had been extinguished during the colonial period (1858 to 1871) by the enactment of land and other legislation which was said to have manifested the requisite intention to put an end to aboriginal land rights in the colony. Responding to this argument the Chief Justice dealt first with the test for extinguishment, holding at p. 404:

> "The unanimous decision of all the judges (in Sparrow) so long after these historical events to regard intention at a time of uncertain law and understanding as the governing factor in extinguishment persuades me that intention in this context must relate not to a specific, isolated intention on the part of the historical actors, but rather to the consequences they intended. In other words, the question is not did the Crown through its officers specifically intend to extinguish aboriginal rights apart from their general intention, but rather did they plainly and clearly demonstrate an intention to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished."

Having decided upon the test which was to govern his approach to this question the Chief Justice then went on to analyse why, in his view, aboriginal land rights outside reserves were extinguished prior to 1871.

To reach this finding the Chief Justice scrutinized the legislative history of the Colony, including the extent of the powers afforded to Governor James Douglas and his successors, and the regime of land and other laws which the government introduced into the Colony.

In addition to examining the general legislation of the Colony the trial judge also examined the policy adopted by the colonial government towards aboriginal people. In his view the historical evidence demonstrated that from the beginning of the colonial period the government took positive steps to protect the interest of the aboriginal peoples of British Columbia in their occupied villages and cultivated fields, together with the right to fish in the lakes and rivers and hunt over all unoccupied Crown lands in the Colony.

The historical evidence also demonstrated that the Colony gave effect to its policy by, among other things, setting aside reserves for the use and benefit of the aboriginal peoples.

Reserve allocation gave territorial definition to the areas where the Crown had determined to protect Indian occupation. The policy of reserve allocation became the central element of the process by which the colonial legal order acknowledged and gave effect to the fact of aboriginal presence. Reserves, not treaties, were the centrepiece of colonial Indian policy in British Columbia. In keeping with Douglas' promise, non-exclusive rights of hunting and fishing were extended to the Indians, subject to the laws from time to time in force in relation to these matters.

Upon Confederation in 1871, the practice of reserve allocation was made a continuing obligation of the parties to the Terms of Union by which British Columbia became part of Canada. As part of the division of legislative powers Canada assumed constitutional responsibility for "Indians and lands reserved for Indians" and Term 13 of the Terms of Union defined British Columbia's responsibility upon this transfer of legislative power. The result was that the Indian interest in village sites and lands actually used and occupied by them continued to be protected, and is so today.

The judge held that the result of this legislative and historical process was the extinguishment of all aboriginal land rights outside reserve lands. On this point the Chief Justice concluded at pp. 404-405:

> "I find the constitutional and legal arrangements put in place in the colony were totally inconsistent with aboriginal rights the continuation of which would have prevented the Crown from the settlement and development of the colony. As the intention of the Crown must be ascertained objectively from a consideration of all the circumstances in their historical setting, I find the Crown clearly and plainly intended to, and did extinguish aboriginal rights in the colony by the arrangements it made for the development of the colony including provision for convey-

> ing titles and tenures unencumbered by any aboriginal rights and by the other arrangements it made for Indians ....
>
> "The colonial legislation must be taken to have extinguished aboriginal rights as they existed in the colony at the date of sovereignty except for Indian reserves."

Both the formulation of the test for extinguishment and its application to the facts are challenged in the appeal from the trial judgment.

On the hearing of the appeal counsel for the Province, relying upon U.S. case law, argued that extinguishment takes place whenever the Crown as sovereign exercises "complete dominion adverse to the right of occupancy".[6] If accepted, this test would mean that courts would be required to examine questions of extinguishment in the context of specific areas of land and specific Crown action, asking in each case whether the "exercise of dominion" (which could take the form of a grant of land, a mining claim, a grazing permit or other right) was so inconsistent with the particular aboriginal right or practice as to put an end to it. While the grant of land in fee simple could be seen as inconsistent with most if not all aboriginal uses[7] it is at least arguable that other authorized land uses are not inconsistent with particular aboriginal practices. For example, forest tenure may not be inconsistent with the continuation of berry or mushroom harvesting. Designation of land for park use may not be inconsistent with use of the land for aboriginal spiritual purposes.[8]

The Province's formulation of the test for extinguishment accepts that aboriginal land rights survived the colonial period and continued as a burden on Crown lands after 1871. But the Province took a further point - one not taken in Calder nor dealt with in the trial judgment - namely, that Provincial dispositions of land and resources after 1871 are capable of extinguishing aboriginal land rights, provided they satisfy the requirements of the "adverse dominion" test. This argument directly engages the question of the constitutional competence of the Province to affect aboriginal rights. The answer to this question

---

[6] U.S. v. Santa Fe Pacific Rwy. Co. (1941), 314 U.S. 339 at 347.

[7] cf. R. v. Alphonse, a case before the Court of Appeal, where aboriginal hunting rights have been invoked as a defence to an illegal hunting charge involving privately owned land.

[8] See R. v. Sioui, [1990] 1 S.C.R. 1025.

may have implications for the treaty-making process in which both the federal and provincial governments have now pledged to participate.

X. FIDUCIARY DUTY

Before leaving Delgamuukw, it is worth observing that although the Court concluded aboriginal rights outside reserves did not survive Confederation (apart from fishing rights, which the Chief Justice said he was not asked to pronounce upon) that was not an end of the case. Returning again to the historical evidence of the promises made by the Crown to the native people of British Columbia, particularly the promise that the Indians "might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony," the Chief Justice found that these promises, coupled with the unilateral act of the Crown in extinguishing aboriginal rights, imposed a fiduciary obligation on the Crown, an obligation which, according to the judgment, now lies upon the government of British Columbia.

The Chief Justice defined this obligation in the following passage (p. 417):

> "The Crown's obligation, in my judgment, is to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land.
>
> As aboriginal rights were capable of modernization, so should the obligations and benefits of this duty be flexible to meet changing conditions. Land that is conveyed away, but later returned to the Crown, becomes again usable by Indians. Crown lands that are leased or licensed, such as for clearcut logging to use an extreme example, become usable again after logging operations are completed or abandoned."

Fiduciary obligations are trust-like; they arise in circumstances where the courts have determined that good conscience requires one party to act for the benefit and interests of another with loyalty to those interests. Fiduciary relations can usually be easily understood and straightforwardly discharged. However, for a government, charged with the responsibility of accommodating a myriad of competing interests in a complex, interdependent society, the discharge of fiduciary duties owed to one group, perhaps at the expense of another, is bound to be a delicate balancing act. It is in this context,

significantly, that the Chief Justice speaks of the importance of reconciliation as a guiding principle for relations between the Crown and its native subjects.

The proposition that the federal government, which has constitutional responsibility for "Indians and lands reserved for Indians", should have a fiduciary obligation to native peoples is not new, although it did not achieve full legal recognition until the Guerin case in 1984. Delgamuukw marks the first case in which a court has imposed such an obligation upon the provincial government, although it was subsequently considered in the case of Gitludahl v. Minister of Forests, unreported, S.C.B.C. Action No. 922935, August 13, 1992.

XI. CONCLUSION

In closing, a few general observations to put the foregoing discussion in perspective. The primary source of aboriginal land rights in British Columbia is the common law, developed and shaped in the series of cases which culminates, for now, in the trial judgment in Delgamuukw. The common law will continue to develop both as Delgamuukw makes its way to the Supreme Court of Canada and as later cases arise for consideration. If the experience since Calder is a guide, none of these cases will constitute the last word on any of the issues which have been discussed in this paper. Each is as likely to raise new questions as it is to answer old ones. Each is an important part of a continuing attempt to give shape and meaning in the law to the fact of aboriginal presence on the land. However, the limits of this process are equally important, for it must be observed that practically at the same historical moment that the Court in Delgamuukw held that aboriginal land rights no longer existed in British Columbia lands outside reserves, the federal and provincial governments expressed a renewed commitment to treaty-making, a process which, if it is to be meaningful, must presuppose the survival of such rights. This curious paradox demonstrates that the courts, while important, are unlikely to have the last word in the aboriginal claims settlement process.

EXISTING RIGHTS OF ABORIGINAL SELF-GOVERNMENT

These materials were prepared by Bryan Williams, Q.C., Swinton & Company, Vancouver, B.C. for the Asia Pacific Institute, February 4, 1993.

TABLE OF CONTENTS

EXISTING RIGHTS OF ABORIGINAL SELF-GOVERNMENT

Perhaps the best way to deal with the elusive, mysterious and somewhat complex subject of the inherent right to aboriginal self-government would be to take it apart, try to understand the nature of its component parts and then put it back together. I will ask the questions most frequently asked of me and then provide my understanding of what the answer is.

At the outset, it must be clearly understood that the Native People, through their leaders, consider it a fundamental precept that within Canada there are Nations of Indians such as the Haidas and Kwakiutl whose language and culture are not only different from ours but different from one another. They consider that in negotiations with the Government of Canada and the Province of British Columbia, they must be considered as Nations and dealt with on that basis.

I. ABORIGINAL SELF-GOVERNMENT

(a) What does the phrase "aboriginal self-government" really mean? What does it encompass? What is the extent of the right?

(b) A wide range of meaning has been given to this elusive phrase by Native Leaders depending on the goals and objectives of their own situation. To the Sechelt Band, it means their model, granting self-government in the same way as a municipality has self-government. In a Northern Ontario Band their Chief, Garry Potts, has stated that they are a nation with the total sovereignty of a nation and no amount of federal or provincial legislation or constitutional law can have any effect on that aboriginal unextinguished right. The Gitksan Wet'suwet'en in their case against the Government of British Columbia argued that none of the laws of the Province of British Columbia apply to them.

Others concede that they are bound by certain provincial and federal laws (the *Criminal Code* and *Motor Vehicle Act*) but not by laws such as the *Adoption Act* - only Native law should determine who shall adopt their children and which children they shall adopt. Some argue that the *Charter of Rights and Freedoms* does not apply to their nation and that they do have special rights which non-Indians do not have, perhaps even contrary to Section 15 (equality rights). Other Nations or Bands argue the Charter does apply and

that Section 35 of the *Constitution Act* entrenches their existing aboriginal right which is recognized and affirmed, and that those rights include the existing aboriginal right to self-government.

II. INHERENT RIGHT

(a) What is the source of the aboriginal right to self-government and what is meant by inherent right?

(b) The Native Nations in Canada and particularly in British Columbia argue most forcibly that the source of their right of self-determination or self-government does not stem from any parliamentary or legislative authority or "permission from the settlers government" but rather from pre-contact aboriginal law and practices, as well as (and proven by) Treaty law established between the settler and the nation concerned – it is therefore an inherent right to govern not one deriving from any grant by the settlers – the Treaties establish this fact and show that it was government to government arrangements concluded by the British at the time of settlement.

While the provision of non-native government or governance itself may have been taken over or as the native people might argue usurped by the Government of Canada or the Government of the Province of British Columbia, the right itself has never been surrendered, it has never been extinguished and there have never been any treaties whereby any of these rights have been turned over voluntarily by the Native Nations to the Province of British Columbia, save and except Treaty 8 in the North East portion of British Columbia and the several Douglas Treaties on Vancouver Island. The significance of this conceptually is that they may agree to be bound by certain laws for common sense or self-interest reasons but need not be bound by provision of any statute including the *Indian Act* which are inconsistent with or unacceptable to that Nation's own concept of self-government.

The aboriginal nations have then on this thesis an absolute inherent right to govern themselves as they governed pre-contact with or without any modifications they wish to add.

Bill Erasmus, President of the Dene Nation, put it this way:

> "When we talk of sovereignty, the Dene have talked about it for a long time. We have talked about implementing what we feel is applicable in our situation. That's very, very simple. What we mean is that we have a home in the North, that's where we are from. It belongs to us, it's always been ours, it's our place of being, we're willing to share it and all we ask, basically, is that anything that happens in our home happens with our consent. It's a very, very fundamental question. If government would put that on paper, if they would agree to that, that it is our home, then we wouldn't have any problem. But that's what they're denying us through this process. They are denying the fact that it's our home. They are denying our history as Dene and they try to coerce us to become something else... and they continue to do so even though we have the Supreme Court of Canada's Sioui and Sparrow judgments that say otherwise."

In addition, King George III signed a Royal Proclamation in 1763 which in effect declares that England will not conquer the Indian nations but rather will make treaties (contracts) with them preserving their rights and permitting them to determine their own destiny.

As far as British Columbia is concerned the argument advanced and accepted by Chief Justice McEachern in the B.C. Supreme Court is that the Royal Proclamation does not apply to British Columbia as the language of the Proclamation clearly limits it both in time (Captain Cook hadn't yet been to Nootka) and in scope - it therefore could not and was not intended to apply to the aboriginals of B.C.

The traditional defence advanced by governments has been that if such a thing as an inherent aboriginal right to self-government did exist then it must have been impliedly extinguished over the years by the settlers as they developed their own form of government to handle both native and non-native people. It should be noted at this time that in response to that argument, native leaders point out that government can no longer pretend that such extinguishment took place since Section 35 of the *Constitution Act* entrenches the inherent right of self-government when it says:

> 35.1 The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Of course, the rejoinder by Government is that self-government is not an inherent or existing aboriginal or treaty right but a new one. It is interesting to note that all of the provincial governments throughout Canada and the federal government agreed to an entrenched right to self-government in the Charlottetown Accord (which of course, failed to pass the referendum) they agreed that the aboriginal people of Canada did have or should have a recognized inherent right to self-government.

Perhaps the strongest argument on behalf of the aboriginal people is that the Supreme Court of Canada has already ruled *in Sioui* (ceremonial rights) and in *Sparrow* (fishing rights) that those inherent aboriginal rights continue to exist to the benefit of the native people and that they are not different from the inherent right to self-government.

There has been no final judicial determination on this issue and it may not be decided by the Delgamuukw case, but it must be conceded that the Native Nations have a very strong and persuasive argument.

(c) Finally, a comment on the *Indian Act*. Even if the aboriginal peoples of Canada do not have a constitutionally entrenched or even unentrenched inherent right to self-government, they certainly have the right under the *Indian Act* to obtain self-government. This, of course, is true in theory but in practice it is my understanding that the Department of Indian Affairs and the Government of Canada have in most cases thrown so many roadblocks in the way of any native band or nation that it is a hollow right. Sechelt was able to negotiate a form of self-government which is satisfactory to them but not satisfactory to most other native groups.

The Cree negotiated some 15 years ago the James Bay Agreement but they have claimed that they were virtually starved and bulldozed into an agreement that has been anything but satisfactory from their perspective.

We know that the Dene, the Yukon and the Inuvialuit have obtained existing powers of self-government through the process of negotiation. They have done this rather than wait another 130 years for a change of attitude and ultimate recognition by the governments of Canada as to their self-government rights.

III. PRE-CONTACT GOVERNMENTS

(a) What kind of government system did aboriginal people have pre-contact, if that factor be relevant at all in 1993, either as a form of government or a basis therefore in the future?

(b) I do not profess to be an expert in this area, but I understand some 30-odd nations in British Columbia each had a slightly different system and so each must be treated as a separate nation and recognized as such. For example, the Gitksan, part of the Tsimshian Nation and the Wet'suwet'en, part of the Athapaskan Nation, would have potlatches including a hierarchy of chiefs and Elders where the boundaries to one's lands would be orally communicated to all present as witnesses – their land title system. The society was matriarchal and the chief's nephew (wife's brother's son) would often be first choice to inherit his hereditary chiefdom.

Decisions most frequently were made on a consensus basis but their democracy, if it could be characterized as that, was quite different from our own elective parliamentary system.

Their justice system, the position of women, respect for their elders, and respect for ancestors differ significantly from our culture and therefore differentiate their governance system.

This raises the issue that those who want to return to pre-contact government may not be permitted to do so within their own nations or bands if the leadership is considered oppressive and women's rights, for example, fail to be recognized – we saw something of that in the Charlottetown negotiations.

IV. IMPORTANCE OF SELF-GOVERNMENT TO ABORIGINAL PEOPLE

(a) Why is self-government in this day and age such an important feature for native people – why can't they simply accept our system now?

(b) I believe the native people see their culture under our governance as an "endangered species" and the land which they claim as "endangered spaces".

(c) They have historically been and to a large extent still are a land-based society. They enjoy to some extent a collective right to their lands. For that reason, their

land and their governance must go hand-in-hand and one cannot be negotiated without the other.

(d) Our system simply has not worked for native people. It has not afforded them much quality of life and has left them as victims of our justice system.

(e) They also see that without being in control of their own destiny they will never regain their dignity, their self-esteem and their right to self-determination.

(f) Without self-government they will have no control over resources, and must stand by and watch deforestation in their areas, the killing off of animals and birds important to their culture and the regulation of resources for others.

V. NEGOTIATED SELF-GOVERNMENT

(a) Where to from here? Can we get there from here?

(b) The answer to the latter questions is "yes", and it is yes whether there is a constitutional entrenchment of the right or not.

Whether a new constitutional accord (Charlottetown II) comes into being or not, the native people still contend that they have that right under constitutional provision Section 35. I would go further and say that even if they don't, there is nothing that can stop the Federal Government, the Provincial Government and the various nations of aboriginal people if the will be there from negotiating a treaty or agreement which will provide something satisfactory for all concerned.

(c) It is my humble submission that the leaders of Canada and British Columbia and the leaders of the native nations should put their rigid positions behind them and irrespective of judgments, reported legal rights and other tomes, say "*Let's make a deal for the 21st century -- let's settle once and for all what governance rights we will allow each other to maintain*". Of course, some native nations will want to start from the pre-contact inherent rights theory and government will want to start from the position in the McEachern judgment within the framework of the existing Canadian and British Columbia legal structure. Unfortunately, those postures have not solved anything. We are a peaceful, democratic country and the aboriginal people have generally behaved in a peaceful and democratic way, why not then adopt a new slogan, "*Let's make a deal*".

(i) The first point to be recognized in sitting down to make a deal is that it would be impossible to negotiate land claim settlements without at the same time negotiating the governance in respective of those lands and accordingly both the right to aboriginal title and right to self-government must be done hand-in-hand, perhaps it could be done through the Treaty Commission (I cannot speak definitively on that subject).

(ii) These governance rights must be negotiated like the land rights nation by nation – it simply isn't possible to do it otherwise.

(iii) The Government of British Columbia's position in the B.C. Court of Appeal in the Delgamuukw case differed from the trial judgment - we argued that native people do have aboriginal rights to land, that they have not been extinguished save and except by Crown grant or other instrument totally inconsistent with aboriginal title and that they do have a limited form of self-government in respect of those lands, the extent of such self-government to be negotiated.

(iv) In concluding a self-government agreement it would be imperative that once negotiated, such agreement receive the endorsement of the entire Nation, not just the Chief and Band Council, and that as part of such negotiation there be some form of constitution so as to ensure that problems do not develop permitting power to rest with a small minority or discriminate against minority groups.

VI. CONCLUSION

It is indeed a regrettable state of affairs that some 130-odd years after Confederation the Government of Canada and of British Columbia have still not settled this pressing issue and that the people of our Province have been led into such a misunderstanding. I do not fear what will happen under a negotiated self-government regime with the nations of aboriginal people in this Province. I do not fear the balkanization of British Columbia as I believe the provisions in those agreements in the best interests of both will ensure that that doesn't happen. I do not fear or worry about the loss of land and resources since all we will be doing is sharing that land and those resources as we should have been doing for many years past again, in the long run for the good of all.

THE HONOUR OF THE CROWN: THE CONSTITUTION ACT, 1867, SECTION 35, AND TREATIES

These materials were prepared by Harry A. Slade, Ratcliff & Company, North Vancouver, B.C. for the Asia Pacific Institute, February 4, 1993.

TABLE OF CONTENTS

THE HONOUR OF THE CROWN: THE CONSTITUTION ACT, 1867, SECTION 35, AND TREATIES

I. INTRODUCTION

The obligations of the Crown arise out of the historic relationship between the Crown and the aboriginal nations in possession of land at the time of assertion of British sovereignty. There are two central characteristics of the Indian interest which, together, establish the foundation for the Crown's honourable obligations. The aboriginal nations had an interest in their tribal lands which was not affected by the assertion of British sovereignty, and the aboriginal interest could be ceded only to the Crown.

These characteristics are central to the principle that the Crown is honour-bound to deal fairly with aboriginal peoples. They give rise to a fiduciary duty to act in the Indian interest, in order that a fair accommodation may be achieved between the aboriginal interest, and the objectives of the colonizing Nation.

Until the introduction of Section 35 into the Constitution Act, 1867, the existence of the Crown's honourable obligations to aboriginal peoples had to give way to Parliamentary supremacy. Courts lacked the power to interfere with Parliament when it enacted legislation that interfered with or extinguished aboriginal interests, even if such legislation went contrary to the Crown's honourable obligations. This was fundamentally altered by the recognition and affirmation of aboriginal and Treaty rights, provided for in Section 35 of the Constitution Act, 1867. Legislation which interferes with aboriginal rights may now be held ineffective, unless justified by the need to protect the resources which are the subject of the exercise of an aboriginal right.

There is another important feature marking the relationship between the Crown and aboriginal nations both at and subsequent to the assertion of British sovereignty. That is

the fact that treaties were the instruments by which alliances were formed between the colonizer and the aboriginal nations, and by which areas of potential conflict were addressed and resolved. Treaties cleared the way for European settlement of vast parts of North America. Treaties were the primary means by which the reconciliation of colonial objectives and the aboriginal interest, which survived the assertion of British sovereignty, were achieved.

It is a notorious fact that the colony of British Columbia departed from the practice of treating with the aboriginal occupants, and pursued a policy of defining aboriginal land rights, through the establishment of reserves, without reference to the inherent rights of the aboriginal peoples based on aboriginal title. The allotment of reserves did not resolve the question of broader based aboriginal land and resource rights beyond the reserves. Now, over 200 years since Captain Vancouver sailed into Burrard Inlet, Canada and British Columbia have joined in a commitment with First Nations to a process of treaty-making. All have accepted the recommendations in the Report of the British Columbia Claims Task Force made in June, 1991 (Schedule "A"), and have signed an agreement to establish a treaty commission (Schedule "B").

The pursuit of treaties after hundreds of years of colonization presents a unique challenge. Settlement of the land has occurred, and extensive private interests have been established in accordance with Canadian laws in areas which are subject to claims of aboriginal title. An economy based largely on resource use draws on the land traditionally occupied by the aboriginal nations, land which is, in many cases, used today for aboriginal subsistence purposes. Expressions of concern are heard from persons who believe that their interests may be harmed by the definition of aboriginal interests in land and resources through treaty-making.

The political will of governments to act on controversial issues depends upon the existence of a base of public support for those actions. If treaty-making involves the

confirmation of aboriginal self-government, and rights to the use of lands and resources by First Nations, difficult questions may arise over impacts on existing economic interests. In a time of recession or slow economic growth, governments may face political difficulty in staying the course. If the motive force behind treaty-making in this post-colonization and post-industrial era is short term political expediency the process is at risk of becoming another victim of the cooling of economic growth in Canada.

The pursuit of treaties is, however, as much a matter of obligation as it is of choice. The honour of the Crown, which has its source in the historical relationship between the Crown and the aboriginal nations, requires that the Crown pursue treaties as a means of reconciling colonial objectives with the interests of the aboriginal occupants. There are unresolved questions around the extent to which the honour of the Crown will be determined to be an enforceable obligation, and the nature of the specific obligations that will be found to exist. The fact that the pursuit of treaties is a matter of tradition and convention in Canada does, however, imply a legal obligation to take all reasonable steps to conclude treaties.

If treaty-making is to succeed, there will be allocations of resources which are presently relied upon as the economic base for all residents of British Columbia. In some cases, this may result in change in the way that resources are utilized. This need not be contrary to the long term interests of those who have a stake in the forest, fishing, mining, and other industries. Industry can adapt to changes in the status quo that will emerge through the process of negotiation toward the consensus that must be achieved if modern treaties are to become a reality. The greater risk to the public interest lies in the failure to resolve uncertainty around the legal and political consequences of the existence of undefined aboriginal interests.

II. THE HONOUR OF THE CROWN

A. ABORIGINAL TITLE AFTER THE ASSERTION OF BRITISH SOVEREIGNTY

The Crown's obligation to act honourably in relation to the interests of aboriginal peoples has its source in the historic relationship between those peoples and the Crown as it related to aboriginal territories.

The interest of the Aboriginal communities in the land was not extinguished by discovery; discovery did, however, result in the vesting of the radical title to the land in the Crown. Thus, the First Nations were constrained by law to deal only with the Crown in relation to their Aboriginal lands

Johnson v. M'Intosh, (1823), 5 L. ED. 681 (U.S.S.C.) at pages 688 - 89:

> "This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.
>
> In the establishment of these relationships, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by

> the original fundamental principle that discovery gave exclusive title to those who made it."

Worcester v. Georgia (1832), 315 U.S. 515 (U.S.S.C.) at page 516:

> "The principle...gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil, and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous right of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell."

The principles stated by Chief Justice Marshall of the United States Supreme Court have been applied in Canada. It was stated by Dickson, Chief Justice, in Guerin v. The Queen (1984), 13 D.L.R. (4th) 321 (S.C.C.) at pages 334, 336 and 340:

> "The principal of discovery which justified these claims [to sovereignty by various European nations] gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected." [Dickson, C.J. then quoted the above passages from the Worcester and Johnson cases]. (p.336)

B. INALIENABILITY AND THE NATURE OF ABORIGINAL TITLE

It is important, in a discussion of the Crown's obligation to pursue treaty-making in a post-colonization context, to consider the nature of aboriginal title.

Early cases described aboriginal title as being personal or usufructuary in nature. This implies that aboriginal title would be lost if not continuously exercised. It is apparent that the settlement of this province has displaced aboriginal peoples in the exercise of their possession of land and the use of their traditional resources. Has this resulted in the loss of aboriginal title?

The decision of the Supreme Court of Canada in Canadian Pacific Ltd. v. Paul (1988), 53 D.L.R. (4th) 487 (S.C.C.), suggests that the Indian interest is proprietary, not personal. There, the Court said at page 504 that:

> "...we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown. That this was to [sic] was recognized as early as 1921 in A.-G. Que. v. A.-G. Can. (1920), 56 D.L.R. 373 at p.377, [1921] 1 A.C. 401 (P.C.) at p.408, where Duff J., speaking for the Privy Council, said, 'that the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown'. This feature of inalienability was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions."

Unlike a personal interest, a proprietary interest would not be lost through lack of use.

The above passage is also informative in a definition of the Crown's obligations. It speaks to the role assumed by the Crown as a guardian of the Indian interest.

C. THE PROTECTIVE ROLE OF THE CROWN

1. The Honour of the Crown; Fiduciary Duty

The inalienability of the Indian interest to all but the Crown is a consequence of the radical title of the Crown established upon discovery. This limited the powers of the aboriginal nations, in respect of dispositions of their land, and established the foundation for a common law obligation in the Crown to stand as a guardian of the Indian interest in land. This obligation was accepted and made the subject of a specific policy, as revealed by the Royal Proclamation of 1763, which provides:

> "...And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds."

This policy did not create, but recognized, the Crown's honourable obligations.

The relationship between the Crown and First Nations gave rise, in Canadian law, to the notion of the "honour of the Crown" in the relationship between the First Nations and Canadian governments. The Crown's honour was engaged in the approach to the definition of aboriginal rights confirmed by treaties:

> "We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the

> reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty." (The Queen v. George, [1966] S.C.R. 267 at page 279)

> "The principles to be applied to be the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned. Mr. Justice Cartwright emphasised this in his dissenting reasons in R v. George...." (R v. Taylor and Williams (1981), 34 O.R. (2d) 360 (C.A.) at page 367:

The requirement that the Crown deal honourably with the interests of aboriginal peoples is not limited to situations where aboriginal rights are the subject matter of treaty promises. In Guerin, supra, the Supreme Court of Canada found that the historic relationship between Aboriginal peoples and the Crown gives rise to an enforceable fiduciary duty binding on the latter, a duty which bound the Crown in exercising statutory powers under the Indian Act.

> "...the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon

> the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown...
>
> The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians." [emphasis added] (p.334)

The Supreme Court of Canada applied the fiduciary obligation articulated in Guerin, supra, to the entire relationship between the Crown and aboriginal peoples in R. v. Sparrow (1990), 70 D.L.R. (4th) 385. The above finding in Guerin was referred to by Dickson C.J.C. and La Forest J., at page 408:

> "In Guerin, supra, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the band at the surrender meeting. This court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, Guerin, together with R. v. Taylor and Williams (1981), 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (C.A.), ground a general guiding principle for s.35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginal is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."(emphasis added)

2. The Enforcement of the Crown's Fiduciary Duty

As the common law was revealed in Canada, specific principles emerged which gave limited effect to the guiding principle of the honour of the Crown.

(a) **Rules of Statutory Construction**

The principle that the Crown is honour-bound to protect Aboriginal interests is reflected in the rules of statutory construction applied by courts in the U.S. and Canada when construing treaties and statutes relating to Indians.

R. v. White and Bob, supra, at pages 651-52:

> "...In my opinion the word ["Treaty"] as used in the section should, for the reasons already stated herein, be given its widest meaning in favour of the Indians. See also s.15 of the Interpretation Act, R.S.C. 1952, c. 158 and Worcester v. State of Georgia (1832), 8 Law Ed. 512 at p.579: 'the language used in treaties with the Indians should never be construed to their prejudice.'"

R. v. Taylor and Williams, supra, at page 367:

> "Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible."

Nowegijick v. The Queen (1983), 144 D.L.R. (3d) 193 (S.C.C.) at page 198:

> "It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in the favour of the Indian. If the statute contains language

> which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption."

Mitchell v. Peguis Indian Band, supra, at page 64:

> "As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them."

This principle of statutory construction gave way to the operation of the doctrine of Parliamentary Supremacy. Parliament could legislate to regulate the exercise of aboriginal rights, even if such legislation denied the enjoyment of the right. (the Queen v. George, supra)

(b) **Extinguishment of Aboriginal Rights; Clear and Plain Intent**

The notion honour of the Crown may also underlie the principle that aboriginal title could only be extinguished by actions of the Crown which manifest a clear and plain intent to do so:

The Lipan Apache Tribe v. The United States (1967), 180 Ct. Cl. 487 - per Davis J. at 492:

> "...the actual act (or acts) of extinguishment [of Indian title] must be plain and unambiguous. In the absence of a 'clear and plain indication' in the public records that the sovereign

'intended to extinguish all of the [claimants] rights' in their property, Indian title continues...".

Calder v. A.G.B.C. (1973), 34 D.L.R. (3d) 145 (S.C.C.) - per Hall J. at 210:

"It would, accordingly [per statement in Lipan Apache, cited supra], appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent [Crown] and that intention must be 'clear and plain'. There is no such proof in the case at bar; no legislation to that effect."

R. v. Sparrow, supra, per curiam, at 401:

"But Hall J. in that case [Calder] stated (at p.210) that 'the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'. The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right." (emphasis added)

(c) **The Constitution Act, 1867, S.35**

In 1982, the Constitution was amended to include Section 35, which provides as follows:

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

> (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

The introduction of Section 35 marked a significant change to the powers of Parliament to interfere with the exercise of aboriginal and treaty rights. In Sparrow, supra, the Supreme Court of Canada found that Section 35 gives constitutional force to the Crown's fiduciary duty.

The Sparrow case was concerned with Aboriginal fishing rights. The Court found a fiduciary duty to protect Aboriginal access to the fishery as a first priority among users. Legislation which interferes with the exercise of the Aboriginal right, and which is not justified by conservation requirements, may be held unenforceable.

> "In our opinion, Guerin, together with R. v. Taylor and Williams [supra], ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship." (p.408)

> The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established." (p. 414)
>
> "If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource of a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation." (p. 417-18)

The full extent to which the honour of the Crown, manifested as a legally enforceable fiduciary duty, bears on the freedom of Canadian governments to act in relation to Aboriginal persons and their communal interests is as yet undetermined.

The power of Parliament to unilaterally extinguish aboriginal rights has, in all likelihood, been lost with the constitutional affirmation of existing aboriginal rights in S.35.

Existing aboriginal rights are not, however, absolute. Federal legislative power to legislate with respect to Indians pursuant to Section 91(24) of the

Constitution Act, 1867, continues. There is, however, a restraint on the exercise of sovereign power:

> "...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." (R. v. Sparrow, supra, page 409)

The justificatory test created by the Court in Sparrow provides for the following:

1. A determination whether legislation affecting aboriginal rights is enacted according to a valid objective. The preservation of a resource to which aboriginal peoples have access as a matter of right would be a valid objective. The preferential allocation of the resource to persons who do not have a constitutionally protected right would not.

2. The requirement that "the way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples". (page 410).

3. An emphasis on the importance of context. The Court found that "in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case." (page 410).

In Sparrow, the Court was concerned with the application of the regulation of aboriginal fishing. A specific requirement of the justificatory test, in that context, was that there be consultation with aboriginal peoples affected by the regulation of fishing, and that any regulation which may be justified by the need for conservation be designed to have a minimal effect on aboriginal fishing.

D. THE HONOUR OF THE CROWN AND TREATY-MAKING

1. Treaty Making: The British Columbia Anomaly

The history of the Crown practices and policies that mark the relationship between the Crown and Canada's aboriginal peoples reveals that treaty-making is the means by which colonial objectives and aboriginal interests are reconciled. Treaties were the means by which the cession of the Indian interest was obtained to clear the way for settlement. Treaty-making advanced with European settlement as it progressed from Eastern to Western Canada. The treaties left intact any aboriginal rights which were not specifically extinguished. They also contained express assurances of certain benefits, and the right to continue hunting and fishing as formerly.

The treaty-making process, as originally instituted, ceased with Treaty 8, which cleared the way for gold miners passing through Indian territory in the North-East corner of British Columbia and for the settlers that followed in their wake. The colony of British Columbia refused to make treaty throughout the rest of the Province, and left the present legacy of uncertainty around the existence and effect of aboriginal rights and title.

The lack of treaties in most of British Columbia was not a major practical impediment to the settlement of the land. The relative number of Indians to non-Indians diminished as

a result of disease within Indian communities, and the influx of settlers. Through the operation of Provincial laws and a federal bureaucracy Indian people were contained on reserves. Laws made by Parliament and the Legislature limited access to traditional resources. If aboriginal title and rights continued to exist, they were invisible to most non-Indians including legislators.

2. Treaties and Existing Aboriginal Rights

If there is a legally enforceable obligation to pursue treaty-making, it must be dependent upon the continued existence of aboriginal title or rights. The obligation would arise where aboriginal title or rights are subject to continuous interference due to actions over which the Crown may exercise control.

A central issue in the appeal of the decision of the British Columbia Supreme Court in Delgamuukw v. B.C. [1991] 3 W.W.R. 97 is whether all aboriginal interests (except fishing rights and rights to reserves) have been extinguished. No party to that appeal has argued in support of the general extinguishment of aboriginal interests, despite the conclusion of the trial judge that general extinguishment had occurred prior to British Columbia joining Confederation. While it is open to the Court of Appeal to uphold the basis for the decision of the trial judge dismissing the action, that seems unlikely as three Justices of the Supreme Court held in Calder v. The Queen, supra, that there had been no pre-Confederation extinguishment of aboriginal title, on the application of the "clear and plain intention" test, and the legal test for extinguishment was later held by the Supreme Court, in Sparrow, to require a clear and plain intention.

If aboriginal interests have not been generally extinguished, the determination whether governmental regulations or the exercise of private interests interfere with aboriginal

interests will require a definition of the nature and scope of such interests. Those issues are also before the Court of Appeal in Delgamuukw.

3. The Obligation to Pursue Treaties

The Courts have not yet been asked to rule on whether the practice of treating with aboriginal peoples is obligatory, or a condition of valid interference with existing aboriginal rights. It is, however, settled law that the Crown owes a fiduciary duty to aboriginal peoples; a duty which arises in consequence of the inalienability of aboriginal title to all but the Crown.

It would be curious, indeed, if the duty which is founded upon the existence of an interest alienable to only the Crown did not impose upon the Crown an honourable obligation to seek, in good faith, the cession of land by treaty, prior to the entry upon the land of persons claiming the right to do so as subjects of the sovereign.

It would be more curious yet if the "recognition and affirmation" of aboriginal rights provided for in Section 35(1), which has been described as "a solemn commitment that must be given meaningful content" (R. v. Sparrow, supra, page 408), and which incorporates the fiduciary relationship which has its source in "the sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown..." (Sparrow, supra, page 408) does not result in the Crown being legally bound to pursue treaties as a condition of any new or continued interference with aboriginal interests by the exercise of Crown powers or rights granted by the Crown.

Even absent a specific legal obligation on the Crown to negotiate treaties, the limits placed by S.35 on the power of the Crown to extinguish aboriginal rights may leave treaty making as the only practical means by which governments objectives can be reconciled with aboriginal interests.

E. SECTION 35 AND TREATY MAKING TODAY

1. Treaties in a Modern Context

In Sparrow, the Court emphasized the "importance of context and a case-by-case approach to Section 35(1)." The context in which the question around the existence of an obligation on the Crown to pursue treaties arises, today, in a post-colonization and post-industrialization era.

There seems little likelihood that Courts will, in one fell swoop, establish remedies for the interference of aboriginal interests that freeze the ability of governments to act across the broad range of activities that are controlled by governments in this complex, interdependent, twentieth century society (Sparrow, supra, p.410). Neither does it seem likely that Courts will retreat from giving effect to Section 35(1) as a "solemn commitment that must be given meaningful content" (Sparrow, supra, page 408). The duty consequent upon the honour of the Crown will continue to inform the limits on the exercise of power by Canadian governments. The precise manner in which the courts fashion remedies where there is found to be an on-going failure to give effect to the honour of the Crown, remains to be seen.

The continued allocation of private rights to utilize land and resources has, over a long period, eroded the ability of aboriginal persons to sustain their traditional economies. The continued granting of such rights threatens to extinguish, in fact if not in law, the ability to exercise any aboriginal rights. Where an existing Indian right is threatened, Courts may and will intervene to prevent the exercise of Crown granted rights (Saanichton Marina Ltd. v. Claxton (1987), 18 B.C.L.R. (2d) 217 (B.C.S.C.)

If there is a lesson for governments in the result from the Saanichton and Sparrow cases, it must surely be that the better opportunity to conclude mutually beneficial agreements

occurs prior to the definition of constitutionally protected aboriginal rights. Once such rights are defined, the options for a negotiated definition of aboriginal rights is diminished.

2. The Justificatory Test and Treaty Making

Treaties are the convention for the broad based reconciliation of Crown objectives, and the exercise of Crown powers, with existing aboriginal rights. In the context of an age of dependence of all Canadians on the economic use of natural resources, Treaties are now pursued with the First Nations within British Columbia. Justification of the continued diminution of opportunities to exercise aboriginal rights may depend upon proof of a bona fide effort to conclude treaties on reasonable terms, terms which reflect well upon the honour of the Crown in Canada. Absent treaties, the ability of Canadian governments to condone or permit continued interference with aboriginal rights will remain in doubt. The existence of doubt is not in the public interest.

3. The Opportunity Now Presented to First Nations

The First Nations within British Columbia have, through their participation in the Task Force, and the creation of the Treaty Commission, stated their desire to pursue modern treaties. The initial onus to show good faith, by doing all things reasonably necessary to enable First Nations to negotiate treaties with the Crown, lies with the federal and provincial governments.

Assuming the governments discharge their duties reasonably, and in good faith, it is in the interest of the members of all First Nations that their governments reciprocate. In the context of a twentieth-century society, dependent upon the land and its resources for sustenance in the international economy, not even constitutionally protected aboriginal

rights will be found to be absolute. This has been plainly stated by the Supreme Court of Canada in Sparrow.

The powers of the Crown to interfere with the exercise of aboriginal rights, if those powers are to be defined as a matter of law, will continue to depend upon the Crown's ability to justify such interference. If Canadian governments manifest their sincerity in the pursuit of treaty-making, that fact will likely go to the question of justification, particularly in any future case in which a First Nation seeks broad-based relief against incremental erosion of aboriginal rights as a result of actions taken pursuant to the authority of the Crown.

F. TREATY-MAKING AS A PRACTICAL EXPEDIENT

It is apparent that treaty making is in the interests of all persons in British Columbia, whether aboriginal or not. It is not likely that issues arising between the Aboriginal and non-aboriginal communities could ever be fully resolved through litigation. As Dickson C.J. said in Kruger and Manuel v. The Queen (1977), 75 D.L.R. (3d) 434 (S.C.C.) at page 437:

> "Claims of aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis."

The public pronouncements of the stakeholders in the traditional fishing industry are informative on the impact of the Supreme Court's decision in Sparrow. The price of going to the wall on a legal issue is that one side or the other has its future options limited by the result. The question for this complex society is whether it wants to

achieve the resolution of aboriginal claims issues through negotiation, compromise, and consensus, or whether it wishes to run the legal risks inherent in a case-by-case definition of constitutionally protected rights, or the political risks inherent in the failure to address legitimate and deeply felt grievances.

In MacMillan Bloedel Limited v. Mullin: Martin v. B.C. (1985) 61 B.C.L.R. 145 (B.C.C.A.) the Court stated that:

> "The fact that there is an issue between the Indians and the province based upon aboriginal claims should not come as a surprise to anyone. Those claims have been advanced by the Indians for many years....I think if fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations". (pages 172-73)

The process of negotiation toward treaty making can deal with the full range of issues. It is only in negotiation that the concerns and objectives of the protagonists can be exposed in a way that, through mutual compromise, a solution may be found.

G. THE ROLES OF THE FEDERAL AND PROVINCIAL GOVERNMENTS

1. Federal and Provincial Responsibilities

Under the Constitution Act, 1867, the primary duties and powers in relation to Aboriginal peoples are in Parliament.

R. v. White and Bob (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) - per Norris J.A. at 638:

> "In Ontario Mining Co. v. Seybold (1900), 31 O.R. 386, Chancellor Boyd emphasizes the importance of uniformity of

> administration of Indian affairs and points out that the Proclamation of 1763 has been carried forward into s.91(24) of the B.N.A. Act, 1867, and that the provisions in favour of the Indians are to be construed broadly in their favour. At p.395 he said (referring to St. Catherine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46):
>
> > 'As to the power of the Dominion in the case of Indians and lands reserved for Indians (section 91(24)), it is decided that this was a bestowment of the exclusive power of legislation in order to ensure uniformity of administration as to all such lands and Indian affairs generally by one central authority, ...'(p.59).

Mitchell v. Peguis Indian Band, [1990] 3 C.N.L.R. 46 (S.C.C.) at page 83:

> "...since 1867, the Crown's role has been played as a matter of the federal division of powers, by Her Majesty in right of Canada, with the Indian Act representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples."

This is not to suggest that the entire burden of treaty-making must fall to Canada. It is the interest of the Province that is put at risk by the uncertainty surrounding the outcome of aboriginal rights questions. Aboriginal rights, even if defined minimally as subsistence rights, may be affected by the utilization of natural resources. To the extent that aboriginal interests are protected, the ability of the Province to draw on its natural resources may be at risk.

To the extent that the Province has the power to grant tenures which, when exercised, may interfere with the exercise of aboriginal rights, the Province may well have

corresponding obligations. This is suggested by the dissenting opinion of Dickson, Chief Justice, in Mitchell v. Peguis Band [1990] 3 C.N.L.R. 46 at 76:

> "...It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying Nowegijick is an appreciation of societal responsibility, and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation."

2. The Public Interest

As a matter of law, treaties can only be made between the Crown and First Nations. As noted above, the Crown is also bound by fiduciary duties to Aboriginal peoples, duties which are not yet fully defined in the law.

As a practical matter, Canadian governments must also represent the National and Provincial interest in pursuing negotiations that may result in binding commitments that affect all Canadians.

There is no necessary conflict between the role of governments in, on the one hand, giving effect to the honour of the Crown by pursuing treaty making, and, on the other, representing the public interest. The resolution of the Indian land question is clearly in the public interest.

It would be naive to think that the need of the political parties forming governments to get re-elected would have no bearing on the progress and outcome of treaty negotiations. Emphasis must, therefore, be placed on the positive consequences for the entire community of a resolution of issues around Aboriginal rights and title. The clear advantage to all stakeholders is that treaties will produce a measure of certainty that

does not presently exist. That certainly will, in turn, enable governments, including Aboriginal governments, to act within the scope of their respective jurisdictions, with confidence that their laws will be upheld. That certainty will also be salutory in resolving questions around rights to the use of land and resources.

H. THE CHALLENGE OF TREATY MAKING IN A POST-COLONIZATION ERA

The following positions are available to, but hopefully will not be taken by, the protagonists in land rights and title issues:

1. on the part of First Nations, that all non-Aboriginal land use cease, and Aboriginal peoples become subject to Aboriginal governance only, and

2. on the part of governments, that all Aboriginal interests have been extinguished, or that the existence of Aboriginal interests does not diminish governmental powers or prerogatives.

Commitments to a process of negotiation toward treaty making assumes that untenable positions would not be taken. In the context of negotiation, an untenable position is one that the opposite side could not possibly accept.

The pursuit of a negotiated resolution requires the identification of the objectives of all parties. The First Nations objectives may often be seen to be the achievement of self-governance within their territories, and access to land and resources within traditional territories. The primary governmental objective in negotiations must surely be to achieve a definition of the scope of Aboriginal self-governance, and rights to land and resources. These objectives are plainly reconcilable.

To the extent that the consensual resolution of issues around Aboriginal rights and title involves the re-allocation of governmental powers, land, money, and other resources, all parties must face the reality that there is but a single pool of resources. Where treaty making has the effect of re-allocating resources away from current users, issues will arise. Those issues may become public, and impair the advancement of the treaty making process. This obvious fact should be taken into account by all parties to the negotiations when determining the means by which their stated objectives may be achieved.

A topical example is the forest industry. If the First Nations objective was to secure control over logging practices within its traditional territory, one means of achieving that objective would be the termination, or transfer to the First Nation, of all forest tenures. This, obviously, would affect many interests, and thus be controversial and difficult or impossible to achieve. Reasonable objectives might, however, be achieved by establishing a regulatory regime that ensures effective Aboriginal input into decisions of where, when and how to log in territory which remains subject to aboriginal title, or is used in the exercise of aboriginal rights. Agreements may also establish the means by which benefits might accrue to First Nations as a result of forest utilization. The same would apply in respect of other resource extraction, industrial, and commercial activities.

III. CONCLUSION

The establishment of the Treaty Commission, with the participation of the federal and provincial governments, is an important first step toward the discharge by the Crown of Her duty to conclude treaties with the First Nations of British Columbia. The existence of undefined aboriginal rights in the context of a complex, interdependent society dictates the need for certainty in the definition of aboriginal rights and the consequent limits on the exercise of power by governments. It is in the interest of all Canadians to meet this challenge.

These materials were prepared by Harry A. Slade of the firm of Ratcliff & Company, Barristers and Solicitors, #103 - 133 West 15th Street, North Vancouver, British Columbia, V7M 1R8. They are reproduced for use by the Asia Pacific Institute in its conference on The New Aboriginal Claims Settlement Process, with the permission of the author.

British Columbia Claims Task Force Report

APPENDIX 6

RECOMMENDATIONS OF THE BRITISH COLUMBIA CLAIMS TASK FORCE

The Task Force recommends that:

1. **The First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding—through political negotiations.**

2. **Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.**

3. **A British Columbia Treaty Commission be established by agreement among the First Nations, Canada, and British Columbia to facilitate the process of negotiations.**

4. **The Commission consist of a full-time chairperson and four commissioners—of whom two are appointed by the First Nations, and one each by the federal and provincial governments.**

5. **A six-stage process be followed in negotiating treaties.**

6. **The treaty negotiation process be open to all First Nations in British Columbia.**

7. **The organization of First Nations for the negotiations is a decision to be made by each First Nation.**

8. **First Nations resolve issues related to overlapping traditional territories among themselves.**

9. **Federal and provincial governments start negotiations as soon as First Nations are ready.**

10. **Non-aboriginal interests be represented at the negotiating table by the federal and provincial governments.**

11. **The First Nation, Canadian, and British Columbian negotiating teams be sufficiently funded to meet the requirements of the negotiations.**

12. **The commission be responsible for allocating funds to the First Nations.**

13. **The parties develop ratification procedures which are confirmed in the Framework Agreement and in the Agreement in Principle.**

14. **The commission provide advice and assistance in dispute resolution as agreed by the parties.**

15. **The parties select skilled negotiators and provide them with a clear mandate, and training as required.**

16. **The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.**

17. **Canada, British Columbia, and the First Nations jointly undertake public education and information programs.**

18. **The parties in each negotiation jointly undertake a public information program.**

19. **British Columbia, Canada, and the First Nations request the First Nations Education Secretariat, and various educational organizations in British Columbia, to prepare resource materials for use in the schools and by the public.**

14. The commission provide advice and assistance in dispute resolution as agreed by the parties.

15. The parties select skilled negotiators and provide them with a clear mandate, and training as required.

16. The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.

17. Canada, British Columbia, and the First Nations jointly undertake public education and information programs.

18. The parties in each negotiation jointly undertake a public information program.

19. British Columbia, Canada, and the First Nations request the First Nations Education Secretariat, and various educational organizations in British Columbia, to prepare resource materials for use in the schools and by the public.

SCHEDULE "B"

TREATY COMMISSION

AGREEMENT

Adopted:
First Nations Summit
4 March 1992
(Motion #1.2)

26 February 1992

AGREEMENT

BETWEEN:

THE FIRST NATIONS SUMMIT (the "Summit")

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ("Canada") as represented by the Minister of Indian Affairs and Northern Development

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA ("British Columbia") as represented by the Minister of Aboriginal Affairs

W H E R E A S:

A. The Summit, Canada and British Columbia (the "Principals") intend to participate in a process leading towards the negotiation of treaties;

B. The Principals support the recommendation of the British Columbia Claims Task Force (the "Task Force") to establish a Commission to facilitate the process of treaty negotiations in British Columbia;

C. The Minister of Aboriginal Affairs of British Columbia is authorized to enter into this Agreement on behalf of British Columbia by Order in Council _____;

D. The Minister of Indian Affairs and Northern Development is authorized to enter into this Agreement on behalf of Canada pursuant to section 4 of the *Department of Indian Affairs and Northern Development Act*; and

E. The Summit is authorized to enter into this Agreement by resolution dated _____.

THE PRINCIPALS AGREE AS FOLLOWS:

1.0 Definitions

1.1 For the purposes of this Agreement and the recitals:

"Commission" means the British Columbia Treaty Commission.

"First Nation" means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.

"Member" means the Chief Commissioner or any of the Commissioners.

"Parties" means the parties to the negotiation of a treaty.

"Summit" means First Nations in British Columbia which have agreed to participate in the process provided for in this Agreement to facilitate the negotiation of treaties between First Nations, Canada and British Columbia.

2.0 ESTABLISHMENT OF THE COMMISSION

2.1 The Principals shall establish the Commission as follows:

(a) Canada shall introduce legislation to Parliament to establish the Commission as a legal entity to carry out the purposes of this Agreement;

(b) The Minister of Aboriginal Affairs shall introduce legislation to the British Columbia Legislature to establish the Commission as a legal entity to carry out the purposes of this Agreement;

(c) Until legislation is enacted, the Commission shall be established by Orders in Council made by the Lieutenant Governor in Council of British Columbia and the Governor in Council of Canada;

(d) The Summit shall establish the Commission by resolution.

3.0 ROLE OF THE COMMISSION

3.1 The role of the Commission is to facilitate the negotiation of treaties and, where the Parties agree, other related agreements in British Columbia.

4.0 MEMBERSHIP

4.1 The Commission shall consist of four Commissioners and a Chief Commissioner.

4.2 The Summit, British Columbia and Canada shall nominate two, one and one Commissioners respectively.

4.3 The Principals together shall nominate a Chief Commissioner who shall be the full-time Chief Executive Officer of the Commission and chair its meetings.

4.4 All nominees shall be appointed by the Lieutenant Governor in Council of British Columbia, the Governor in Council of Canada and the Summit.

4.5 Members shall be appointed :

(a) in the case of Commissioners, for a two year term;

(b) in the case of the Chief Commissioner, for a three year term; and

(c) in the case of replacements, for the unexpired term of the Member being replaced.

4.6 A Principal may remove for cause a Commissioner whom it has nominated.

4.7 The Principals may remove the Chief Commissioner for cause.

4.8 A Principal shall nominate within 60 days a replacement for a Commissioner it nominated who dies, resigns or is removed.

4.9 If the Chief Commissioner dies, resigns or is removed, the Principals shall nominate a new Chief Commissioner within 60 days.

4.10 Until a new Chief Commissioner is appointed pursuant to 4.9, the Commissioners may designate by unanimous agreement one of them as acting Chief Commissioner.

4.11 A Member may be renominated at the end of his or her term of office.

5.0 FUNDING FOR THE OPERATIONS OF THE COMMISSION

5.1 During the first five years of the Commission's operations, Canada and British Columbia shall share the operating costs of the Commission as they may agree. Thereafter, or sooner if the Principals agree, these costs shall be shared as the Principals then agree.

5.2 Canada's share of the costs of the Commission shall be subject to annual appropriations by Parliament and approval by the federal Treasury Board; and those of British Columbia shall be subject to annual appropriations by the Legislature and approval by the provincial Treasury Board.

5.3 The Principals providing funds for the Commission's operations shall enter into a funding agreement with the Chief Commissioner to establish financial

administration requirements for the Commission and to provide for remuneration of the Members.

6.0 LOCATION OF THE COMMISSION

6.1 The office of the Commission shall be located in British Columbia.

7.0 DUTIES OF THE COMMISSION

7.1 The Commission shall:

(a) Receive statements of intent to negotiate from First Nations which identify the following:

(i) the First Nation and the aboriginal people it represents;

(ii) the general geographic area of the First Nation's traditional territory within British Columbia;

(iii) a formal contact for communication.

(b) Receive and consider any requirement for negotiation funding submitted by a First Nation.

(c) Forward the statement of intent to Canada and British Columbia, and acknowledge its receipt to the First Nation.

(d) Convene an initial meeting of the three Parties within 45 days of the Commission's receipt of the Statement of Intent.

(e) Allocate funds which have been provided to enable First Nations to participate in negotiations, in accordance with criteria agreed to by the Principals.

(f) Assess the readiness of the Parties to commence negotiation of a framework agreement in accordance with the following criteria:

(i) Each Party has:

A. appointed a negotiator;

B. given the negotiator a comprehensive and clear mandate;

C. sufficient resources to carry out the procedure;

D. adopted a ratification procedure; and

E. identified the substantive and procedural matters to be negotiated.

(ii) In the case of a First Nation:

A. has identified and begun to address any overlapping territorial issues with neighbouring First Nations;

(iii) In the case of Canada and British Columbia respectively:

A. has obtained background information on the communities, people and interests likely to be affected by negotiations;

B. has established mechanisms for consultation with non-aboriginal interests.

(g) Encourage timely negotiations following the six stage process outlined in the Report of the Task Force or such other process as the Parties may agree by assisting the Parties to establish a schedule and by monitoring their progress in meeting deadlines.

(h) Assist Parties to obtain dispute resolution services at the request of all the Parties.

(i) Maintain a public record of the status of negotiations.

(j) Develop an information base on negotiations to assist the Parties.

(k) Prepare and submit an annual budget for review and approval by the Principals.

(l) Not commit nor purport to commit Canada, British Columbia or the Summit to expenditures of funds except as provided in a funding agreement.

(m) At least annually, submit a report to Parliament, the British Columbia Legislature and the Summit on:

(i) the progress of negotiations;

(ii) the operations of the Commission; and

(iii) any other matter the Commission deems appropriate.

(n) Manage and disburse operating funds in accordance with an approved annual budget, the applicable funding agreement and any applicable laws.

(o) Maintain proper records including those required for any auditing procedures of the Principals and provide access to and copies of such records to a Principal on request.

8.0 POWERS OF THE COMMISSION

8.1 The Commission may:

(a) adopt bylaws and procedures consistent with this Agreement;

(b) determine the times and places of its meetings;

(c) meet by tele-conference;

(d) do such other things as are necessary to perform its duties.

8.2 The Chief Commissioner may for the purposes of the Commission:

(a) lease premises and engage the services of advisors, officers and staff as may be required to carry out the duties of the Commission; and

(b) enter into service agreements with Commissioners as required.

9.0 DECISIONS OF THE COMMISSION

9.1 The Chief Commissioner and one Commissioner nominated by each Principal shall comprise a quorum.

9.2 Decisions of the Commission shall be made by agreement of at least one Commissioner nominated by each Principal.

10.0 PROTECTION OF MEMBERS OF THE COMMISSION

10.1 The Principals shall not make any claim against the Commission, a Member, or any person holding an office or appointment under the Commission, for anything done or reported or said in the course of the exercise or intended exercise of his or her official functions, unless the matter arose from wilful misconduct or gross negligence.

10.2 The Principals shall indemnify in proportion to their funding obligations a Member against all claims, damages and penalties that are made against or incurred by a Member in the performance of his or her duties pursuant to this Agreement, except where the claim, damages or penalties arose from the Member's wilful misconduct or gross negligence.

11.0 TERM

11.1 The Principals shall terminate the Commission upon completion of the Commission's duties under this Agreement or where the Commission is no longer performing its duties.

11.2 This Agreement shall remain in effect until otherwise agreed by the Principals or until the Commission is terminated in accordance with 11.1 whichever occurs earlier.

12.0 REVIEW

12.1 The Principals shall review the effectiveness of the Commission at least once every three years following its establishment.

13.0 INTERPRETATION

13.1 The Commission may refer to the Report of the Task Force dated June 28, 1991 to provide the context for this Agreement and as an aid to its interpretation, but in the event of inconsistency between the Report and this Agreement, this Agreement shall prevail.

IN WITNESS WHEREOF the parties have executed this Agreement the _____ day of _____, 1992.

SIGNED on behalf of THE FIRST NATIONS SUMMIT by the following authorized representatives: Chief Edward John, Chief Joe Mathias, Sophie Pierre, Miles G. Richardson and Tom Sampson, in the presence of:

_____
Witness

_____
Address

_____

_____
(as to all signatures)

_____
CHIEF EDWARD JOHN

_____
CHIEF JOE MATHIAS

_____
SOPHIE PIERRE

_____
MILES G. RICHARDSON

_____
TOM SAMPSON

SIGNED on behalf of HER MAJESTY THE QUEEN IN RIGHT OF CANADA, by the Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, in the presence of:

_____
Witness

_____
Address

_____

_____
HON. TOM SIDDON

SIGNED on behalf of HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, by the Honourable Andrew Petter, Minister of Aboriginal Affairs, in the presence of:

_____
Witness

_____
Address

_____

_____
HON. ANDREW PETTER