Archive Quarterly

journal of the west wasn't won I.3 Fall 2024

"Modern day" Extinguishment Policy

Prime Minister Pierre Trudeau made Native title and rights disappear in the 1969 White Paper, and reappear as "claims" and "interests" in the 1973 Policy.

50 years later, it remains the basis of negotiations.

"Consultation" since *Haida* and *Taku*, 2004

Judge: The Province's approach to consultation "amounts to nothing more than an opportunity for the First Nations *to blow off steam.*"

When Native Women don't come home

What three formal Inquiries show us about a state culture that offers "impunity" to perpetrators of violence against Indigenous women.

Hunting Aboriginal Rights

How the BC *Wildlife Act* keeps regulating and harassing Native hunters in a legal void.

Alberta Prime Minister Peter Lougheed, a close partner of Prime Minister Trudeau, helped patriate the 1982 Constitution and fought for inclusion of a *notwithstanding* clause to ensure provinces could get around Charter Rights. He fought for provincial powers over natural resources, aided by the diversion of "existing Aboriginal and treaty rights" to the Comprehensive Claims Policy extinguishment process.
Photo: Canadian Press, c. 1973

On the front cover, Prime Minister Pierre Trudeau, in his magician's outfit, walks down grandstand steps to present the Grey Cup trophy, November 28, 1970.
Photo: Peter Bregg, Canadian Press

Archive Quarterly
is the journal of
"the west wasn't won"
archive project.
Visit AQ online at
www.electromagneticprint.com
Visit the growing online archive:
www.thewestwasntwon.com

This issue of AQ is brought to you by:
Society of Nkukwa ta Tmukwa
and Electromagnetic Print

With Special Thanks this issue to:
Gasper Jack Clarke Smith
Canadian Press
Nadine Spence Victor Guerin
Haida Communications
Taku River Tlingit online comms
Vancouver Library, Special Collections

EMP

Features

Hunting Aboriginal Rights

Inventing "uncertainty": Canada's Supreme Court consistently side-stepped the question of Aboriginal rights to hunt, refusing to hear legal questions put before them, and turning the constitutional question into matters of compliance the BC *Wildlife Act.* Page 6

Legacy Cases reviewed: decisions of the court don't support the level of interference by Conservation Officers today. Excerpts from decisions in the years-long trials of Francis Haines, Tsilhqot'in, "Old" Jimmie Dennis of Tahltan, and Arthur Dick of Secwepemc. Page 10

"There should have been mayhem, searches, media attention"

The Organization of American States, the regional forum of the United Nations in North and South America, sent a formal delegation to British Columbia to investigate the disproportionate disappearance and murder of Indigenous women - and the lack of investigation.

After a BC Inquiry had concluded unproductively during the IACHR's investigation, its 2014 report recommended a National Inquiry, finding that a "real and perceived impunity" exists where violence, murder, and disappearance of Indigenous women is concerned. Page 14

Origins of "modern day" extinguishment policy

Tracking the transformation of the Native title and rights identified in the 1973 *Calder* case, into the Native Claims Policy that mobilizes negotiations to achieve "extinguishment by consent." Through changing definitions and increasing funding, the Policy has not responded to advances made in courts and harsh international criticism. Page 18

20 years since "Consultation" and "accomodation"

Off reserve. Two cases of consultation and accommodation were decided together in the Supreme Court of Canada in November of 2004: *Haida* and *Taku*. Page 34
Timelines leading to litigation for those two cases. Page 36
Reflections on change over the last two decades, with President Gaagwiis of Haida. Page 39
That Day in Court: comments from Victor Guerin about the 1984 case named for his father, Chief of Musqueam, and the first definitions of the duty to consult. Page 35
Department of Justice, memo: *Re. Crown Consultation with Aboriginal Groups* Page 45
Case Overviews: since 2004, the government approach to consultation has been, "characterized by bad faith, bias, incompetence, unprofessionalism, and errors of fact, law and jurisdiction so numerous" that litigation has proliferated. Page 41

Timepiece:

In 1994, the Sovereignty Peoples Information Network explained why they wouldn't want a treaty with Canada anyway, in their response to the United Nations' survey of treaties and constructive arrangements between states and Indigenous Peoples. Page 53

The federal Office of Native Claims opened its doors in July, **1974**

Offering negotiations leading to final compensation settlements, the Policy mobilized the government's *Statement on Indian Policy*, from 1969. The famous "White Paper Policy" had prescribed "ending treaties equitably."

But since then, the landmark Native Title case, *Calder*, brought by Nisga'a, made Canada realize "I guess you had more rights than I thought" - in the words of the Prime Minister, Trudeau, in 1973.

On August 8, 1973, Indian Affairs Minister Jean Chretien presented the government's pejorative *Statement On Claims of Indian and Inuit People*, in the House of Commons:

"Many Indian groups in Canada have a relationship with the Government which is symbolized in Treaties entered into with the Crown in historic times."

This statement was "concerned with claims from groups of Indian people who have not entered into Treaty relationship, with the Crown. They find their basis in what is variously described as "Indian Title", "Aboriginal Title", "Original Title", "Native Title", or "Usufructuary Rights"...and the loss of traditional use and occupancy of lands where Indian title was never extinguished by treaty or superseded by law."

The Claims process results prescriptively in release, or "surrender," of Aboriginal rights in the settlement area and accepts compensation and/or modified rights described in the Agreement. This extinguishment policy remains intact today. *See the story, page 18.*

Boldt Decision Washington State's 50/50 resolution to the fisheries dispute.


The Seattle Times

WEDNESDAY, SEPTEMBER 5, 1973

Shots fired, 60 arrested in Indian-fishing showdown

The War on the Waters against Indigenous fisheries came to an end 50 years ago, just south of the border.

Following annual conflict and real hardship to Native families who couldn't face the intimidations of law enforcement and hostile commercial fishermen, the State finally was ordered to a solution.

That summer, Marlon Brando brought media attention with him, at the height of his Hollywood career, when he visited Puyallup fisheries as a guest of the Tribe. The usual violence had brought about a major legal case, and that summer Judge Boldt took the unprecedented step of ordering the state to share the fishery harvest evenly with Native fisheries.

In BC, in a Lillooet courtroom, another judge ordered the Department of Fisheries and Oceans to negotiate an end to the constant harassment of Native Fisheries, in 1980, in *Adolph.* Alas, program after program has failed to aim for a just settlement.

1874

When the BC "land grievances" of the "red men of the forest" were advocated by Canada's Governor-General.

In a Memorandum dated November 2nd, 1874, and approved by the Governor-General on November 4th, the Minister of the Interior wrote:

"The undersigned would respectfully recommend that the Government of the Dominion should make an earnest appeal to the Government of British Columbia if they value the peace and prosperity of their Province – if they desire that Canada as a whole should retain the high character she has earned for herself by her just and honourable treatment of the red men of the forest to reconsider in a spirit of wisdom and patriotism the land grievances of which the Indians of that Province complain apparently with good reason and take such measures as may be necessary promptly and effectually to redress them."

As quoted in the 1909 Petition of the Cowichan Tribe.

200 Years Ago Today

When the Hudson's Bay Company came to the "Indian Territory."

On November 8, 1824, the Hudson's Bay Company Governor George Simpson arrived at Fort George (now Astoria, Oregon) in "the Indian Territories" of the Pacific Northwest.

It was the first visit by HBC to the coast they would soon claim exclusively in the name of the Imperial British crown.

Simpson traveled from Hudson's Bay, a journey that took 84 days. He had just been made the second of two Governors, since HBC divided its leadership between east and west. The Company had just absorbed a trade route that the North West Company of traders was forced to relinquish in 1821. Simon Fraser, David Thompson, and Alexander McKenzie had been NWCo. men.

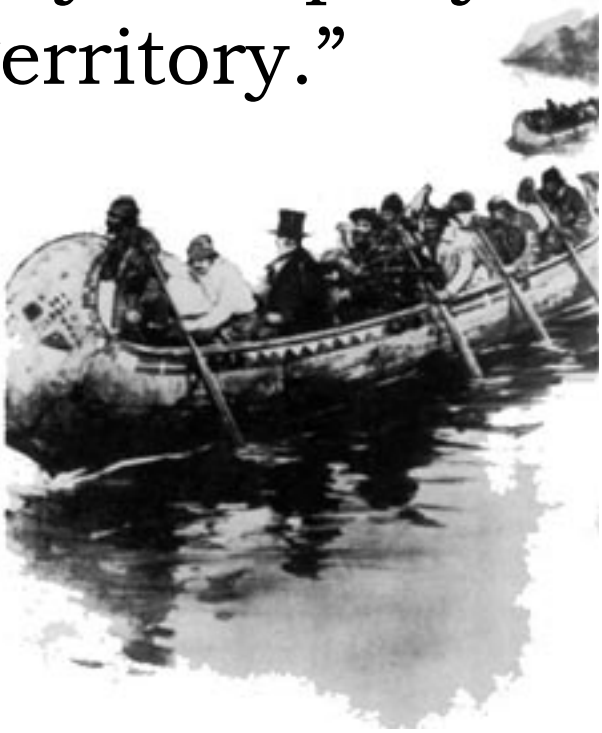
Like those 'explorers,' Simpson set out west on the river highway with some Voyageur paddlers and the essential Indian Guide.

Unlike the previous Company, he set out with a mission to test the west coast Peoples' receptiveness to Christianity; to introduce it and recommend it. Simpson noted the profit that religious conversion would bring.

It was a key part of Simpson's overall mission, which was to secure British North America in the west by making its trade competitive and profitable: resistant to America, spreading west; and to Russia, with substantial trade interests in the north.

The War of 1812 between the British and USA had demarcated a border between them along the 49th parallel, but this division had only been confirmed into the Great Plains.

Simpson's was an Imperial agenda, not just a trade mission. His work resulted in the Russia treaty at Alaska in 1825, and the Oregon Treaty with America in 1846.



Simpson, portrayed here travelling by birch bark canoe, in a felt top hat, was called, "Emperor of the North" or "the Birch Bark Emperor."

The Governor used his knowledge of the Sinixt, Ktunaxa, Sto:lo, and coastal Salishan Peoples, acquired in friendly trade agreements, as well as the mobility provided by those agreements, to drive a hard inter-colonial boundary through their countries. The Oregon Treaty of 1846 split their countries apart, on either side of today's Canada-US border, but did not involve them.

By 1858, there were more than two dozen HBC trading posts from Rocky Mountain House to Fort Rupert – many of them established before the 1821 takeover – and they were transformed into the infrastructure of Imperial government, overnight, when Queen Victoria issued Declarations establishing the Colony of Vancouver Island, and then the Colony of British Columbia.

As the first western Governor of the HBC, Simpson produced the original legacy of bad faith and betrayal: promoting the lie of a beneficent Christian mission, and negotiating commercial agreements in full recognition of the Tribes' jurisdiction, when he relied entirely on them, while at the same time perfecting the infrastructure that would purposefully overtake and dispossess them. This was the making of British Columbia.

It started 200 years ago, with the first visit of the HBC Governor to the fur trading forts of the west. It continues today: with the Christian monarch's head on every piece of Canadian currency; on the wall behind every Canadian judge; and in colonial government offices.

Hunting Aboriginal Rights

"We don't think it's necessary to hear you," said the Supreme Court of Canada, in 1965.

They left Indigenous hunters in a manufactured "legal uncertainty" against BC's *Wildlife Act* ever since.

A Líl'wat youth dances in an *Idle No More* protest of Bill C-45. *Photo: The Pique*

Ten years later, the BC Fish and Wildlife Branch commissioned a survey on Native rights, while judges acquitted or confirmed hunting and fishing charges according to their own views.

The study's main conclusion:

"The existence of Aboriginal Rights in British Columbia has been subject to inconsistent treatment by the Courts — again emphasizing the degree of uncertainty surrounding the topic."

– K. Krag, 1975, "Survey of Native Rights as they relate to Fish and Wildlife Protection in British Columbia"

This confusion and persistent harassment of Indigenous hunters was due in no small part to the Supreme Court of Canada's refusal to hear a key case on the matter, arising in Nanaimo, Snuneymuxw. In a BC court, the *White and Bob* case of Nanaimo hunters being charged for being in possession of deer, contrary to provisions of the provincial *Game [Wildlife] Act*, resulted in a clear recognition of their hunting rights – for two reasons.

In BC County Court, March 4, 1964, the judge ruled the Nanaimo people had expressly retained their right "to hunt and fish as formerly," over unoccupied areas of their own territory. They had a 110-year-old agreement with the Colony of Van-

Nadine Spence, author of the forthcoming book, "Streets of Oolichan and Sturgeon," holds a deer antler awl.

couver island to that effect - but the attendant rights had been ignored almost ever since. Their agreement was considered to be a treaty, and, as such, it excludes "provincial laws of general application" (S.87 of the *Indian Act),* from applying to them.

Further, and for the first time, the judge ruled: "I also hold that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the Proclamation of 1763, has never been abrogated or extinguished and is still in full force and effect."

The Province appealed the decision. The BC government was denied leave to appeal by the BC Court of Appeal! The Supreme Court of Canada, however, allowed the appeal directly. The question set before it was:

> Was the operation of the Game Act, in the circumstances of the charge, excluded
>
> a) by reason of the existence of a treaty within the meaning of S. 87 of the Indian Act, or
> b) by reason of aboriginal hunting rights enjoyed by the Respondents and recognized by a Royal proclamation, 1763, and otherwise?

Winning the right to appeal to the Supreme Court of Canada is no small thing.

The next Spring, however, the SCC ducked out of its job to consider the legal realities in *White and Bob*, which had every potential to create a precedent advancing Aboriginal rights to hunt - across Canada - and all the other rights that were protected from colonization in the "Indian Magna Carta," the Royal Proclamation of 1763.

The Nanaimo hunters had filed a 150-page Respondent's Factum for the SCC hearing. They defended their land title, of which "hunting is but one incident."

That is to say, they argued that their land title was the source of their hunting rights.

Along with that, they presented evidence of many, explicit, and confirming colonial and Imperial acts recognizing their title and jurisdiction, and gave overwhelming evidence of continuing, "unextinguished" rights.

And so, after having granted the Province of BC leave to appeal, the Supreme Court judges decided not to hear it.

The SCC's reasons in the *White and Bob* appeal were delivered orally by Judge Cartwright, November 10, 1965, in a unanimous decision. Here follows the *entire* report of their ruling:

> [1] Mr. Berger, Mr. Sanders and Mr. Christie, we do not find it necessary to hear you. We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a "treaty" within the meaning of that term as used in s. 87 of the *Indian Act* [R.S.C. 1952, c.149]. We therefore think that in the circumstances of the case, the operation of s. 25 of the Game Act [R.S.B.C.1960, c.160] was excluded by reason of the existence of that treaty.
>
> [2] The appeal is accordingly dismissed with costs throughout.

The court's behaviour in this case was an absolute dismissal of the urgency of the legal question which affected every Indigenous Nation now creating "a cloud on title" for the Province of BC.

The refusal to hear can only be viewed as a political action, intended to protect the unconstitutional *status quo* in BC from increased Indigenous influence, benefit, and interference. They avoided the question of whether the 1763 Proclamation applies to BC; they avoided recognition of Indigenous governance systems, which were relied on to complete the 1854 treaty; and they avoided the question of whether the *Indian Act* protects Aboriginal rights from general provincial legislation.

When the Supreme Court avoided these questions, they sentenced all indigenous hunters west of the Rocky Mountains to 20 years of hunting fines, imprisonment, and years-long court cases defending their rights.

The SCC also avoided casting any more reflected light on the ultimate issue of BC's occupation of twenty-six nations, without treaty.

Following the *White and Bob* ruling, two Squamish hunters were fined because they had no treaty. They were told they therefore had no Aboriginal right to hunt, either, in the 1968 case of *R. vs Discon and Baker* in BC County Court.

David White and Clifford Bob had argued that their hunting rights flowed from their land title. What happened next was that in 1969 the Nisga'a launched their case for a Declaration of unextinguished Aboriginal rights, specifically their Native title. They hired Thomas Berger, the same lawyer who had represented the Nanaimo hunters.

They took their case to BC 's Supreme Court, with extraordinary judicial permission to challenge the Province's claimed jurisdiction in this way.

It was in this case that BC's "legal" argument was perfected: "*if* aboriginal rights did ever exist in the Indigenous peoples, *then* those rights were extinguished by the presence of British Columbia, and Crown legislation which operated in denial of those rights." Justice Gould of the BCSC agreed with BC, and decided that Aboriginal rights no longer existed.

The Nisga'a appealed their *Calder* case to the Supreme Court of Canada where the court again avoided producing a ruling. The *Calder* case was dismissed in January 1973 on procedural grounds. They decided the case not on the question of title, but on the matter of the case being "improperly brought" before the court. The BC court's permission to proceed did not satisfy a majority of the SCC.

Hunting charges and criminal records formed a normalized fact of risk-management for hunters.

Three Matsqui people were charged for hunting for food, out of season. They were convicted and faced fines of $50 each, or five days in jail.

- As reported in the MSA News, February 7, 1972.

"Indians and lands reserved for Indians" are immune from provincial laws of general application, when it comes to matters touching on "Indianness" or the "core of Indianness" - and that includes hunting rights.

- Dick v. The Queen, 1985

Photos left and below, Smoking deer meat high in the alpine, after the traditional fashion. Photos by Gasper Jack. Above, Albert Joseph skinning a deer that will be left to cure in the shed. Photo by Kerry Coast.

It was not until 1985 that the Supreme Court of Canada clarified that matter. In *Dick v. the Queen*, Arthur Dick was finally acquitted, six years later, of the charge of hunting one deer:
provincial laws of general application cannot be applied to matters that "go to the core of Indianness," such as fishing and hunting.

This case proved what the Nanaimo hunters could have proved in 1965: Section 87 *(now s.88)* of the *Indian Act*, cannot sanction provincial laws over Native hunting and fishing, because they are not "laws of general application." Indigenous people would be disproportionately affected.

At that time, there was no presumption that BC could regulate Indigenous hunting for "conservation" or any other reason.
Courts have applied fishing cases, such as *Jack* 1979 and *Sparrow* 1990, to cobble together a legal principle that the Province of British Columbia must be the regulatory authority and license hunting, as it does fishing, for the good of conservation of the wildlife.

Lawyers for the defendant fishermen in those two cases apparently conceded the government right to regulate fisheries, in pretrial motions, without consulting their clients on the point. Unlike in *White and Bob*, they also did not consult the Qw'utsun or Musqueam national laws and jurisdictions concerning the right to regulate and license.

That issue is alive today, with the crown's courts vesting the power to regulate hunting in the BC government, under its *Wildlife Act.* Courts do not, however, hold the provincial government responsible for ensuring the conservation and sustainability of wildlife in general. As populations of elk, moose, and deer dwindle to Species At Risk status, this matter has basically replaced hunting as the subject of most urgent objection between Indigenous Peoples and the Province.

Enduring and harmful effects result from BC and Canada's denial of Indigenous jurisdictions in protecting, cultivating, and harvesting the traditional food sources which flow in "All Our Relations."

Modern references to Aboriginal rights ignore that history, making statements like "Aboriginal rights were recognized in 1982 by the Canadian constitution." That "recognition" did not stop further generations of hunters from being fined, jailed, and stripped of their deer and moose meat. Game Wardens confiscate guns and game and vehicles, forcing people into protracted court hearings, where today most often the charges are dropped without explanation the day before trial.

Harassment of hunters continues throughout the present, with the ongoing denial of Indigenous jurisdictions and the vague nature of the provincial power to infringe rights. Today, a hunting fine is upwards of $5,000.

"Aboriginal rights" have to be proven on a case-by-case basis.

No First Nation has gained a declaration of an Aboriginal right to hunt which would completely displace the provincial *Wildlife Act.* That is, with the exception of Tsilhqot'in communities, who won a court declaration of title to part of their country in 2014, including judicial recognition of the right to regulate their activities there.

The BC *Wildlife Act* allows for Status Indian hunters to take game for food, social and ceremonial purposes. However, BC regulates what kind of game can be taken: cow or bull moose; doe or buck deer; where it can be taken; and in some cases *how* it can be caught.

~

What the judges facing bald injustice did:

The "uncertainty" and inconsistency mentioned above by Krag in 1975 put BC judges in the position, by 'case precedent' or *stare decisis*, of applying the notion that Indigenous Peoples had no rights of their own.

Because the SCC made no decision in *Calder*, the leading decision in BC court rooms was now Justice Gould's 1969 ruling against the Nisga'a.

Some provincial court judges clearly resented being made into tools of a justice system that was weaponized against Indigenous Peoples. They found ways to avoid criminalizing hunters. Here are some examples.

1974, *R. v. Dennis And Dennis*
British Columbia Provincial Court, November 25

On or about March 11, 1974, at or near mile 3 of the Cassiar Road, Jimmy Dennis Jr. and Sr., father and son members of Tahltan, shot one moose for food for the family.

The Crown argued, as usual, that even if aboriginal rights did once exist in the Indian people of British Columbia, those rights were since extinguished. Judge O'Connor found that the province was not capable of interfering in the rights of Indigenous Peoples.

The judge explained his reasons thoroughly:

"I conclude that I am not bound as a matter of *stare decisis* to follow the majority of the Court of Appeal in the *Calder* case.
In the many judgments and articles dealing with the question of aboriginal rights, there has been surprisingly little written on what these rights encompass. However, it does appear certain that at the very least there is included the right of Indians to hunt for food for themselves and their dependants on unoccupied Crown lands.

"The question then arises whether or not non-treaty aboriginal hunting rights can be extinguished or restricted by the enactment of provincial legislation.

"There are two possible sources of legislative jurisdiction for the Provinces in this area.

"The first is by virtue of the jurisdiction conferred on the Provinces under the *British North America Act, 1867*, and the second by virtue of s. 88 of the *Indian Act*.

"The *B.N.A. Act, 1867* provides that the federal Government has exclusive legislative jurisdiction with respect to Indians and lands reserved for Indians.

"It is settled that federal legislation can extinguish or restrict aboriginal hunting rights without compensation in circumstances where there has been no surrender of such rights.

"I am strongly persuaded that aboriginal rights in the Province of British Columbia were not extinguished and that except where surrendered, they continue to exist.

"I find particularly compelling the argument that, subsequent to the enactment of Executive Orders, the

federal Government entered into negotiations and treaties with some native peoples in the Province, providing for the surrender of their aboriginal rights.

It only seems logical that had the federal Government intended to extinguish aboriginal rights by the enactment of the Executive Orders, no subsequent negotiations or settlements would have been necessary.

"The existence of such rights having been recognized at the time of the treaties, and compensation for their surrender having been provided in the treaties, it would be an unfortunate result to now conclude that the natives of the Province not covered by the treaties had been dispossessed of their rights and are, therefore, left in an inferior position to treaty Indians.

...The issue involved is one of great public importance with broad social, economic and cultural consequences to the native people of British Columbia.

In the meantime, I am of the view that there has been such a difference of judicial opinion in both the Supreme Court of Canada and the British Columbia Court of Appeal that the question remains open.

"It is well accepted that the Provinces have legislative jurisdiction with respect to the enactment of game laws. The *Wildlife Act* of British Columbia is general and purports to apply to all who come within the boundaries of the Province. It makes no reference to Indians other than defining an Indian.

"The legislation in so far as it purports to apply to Indians must be tested against two standards. Does it fall within the area of exclusive federal jurisdiction? If so, then the Province is not competent to enact legislation in that field. The fact that the federal Government may itself not have enacted any legislation to occupy the field, does not have the effect of transferring to the Province the legislative authority assigned to the federal Government under s. 91(24)."

I conclude that legislation which extinguishes or restricts aboriginal hunting rights of Indians is legislation relating to Indians and within the exclusive jurisdiction of Parliament.

Provincial legislation is therefore incompetent to do so. ***Acquitted.***

~

1977, *Kruger et al v. the Queen*
Supreme Court of Canada, May 31
A summary, with excerpts:

This case was decided in favour of the Province's right to regulate hunting, and to exclude non-treaty Indians in BC from hunting, except by the rules of the *Wildlife Act*.

Jacob Kruger and Robert Manuel were "non-treaty Indians" hunting outside the reservation for food in the traditional hunting area of the Penticton Indian Band, of which they were members. They had not applied for a provincial hunting license, September 1973, and they were hunting in the "closed" season.

In County Court, where the charges were first heard, they were acquitted by Judge Washington for the reason that,

> …they were entitled to enjoy the aboriginal right of Indians to hunt on unoccupied land arising from the Proclamation of 1763.

The Province appealed.

At a new trial in BC Court of Appeal, they were convicted on the charge of killing big game during the closed season, under the *Wildlife Act*. The Court accepted BC's arguments that:

"the Wildlife Act is a law of general application;

that it does not conflict with the *Indian Act*;

it does not conflict with any treaty; and therefore it applies to Indigenous people by section 88 of the Indian Act."

Kruger and Manuel appealed to the Supreme Court of Canada. The hunters argued the BC Court of Appeal had erred on three points:

1. In ruling that the Wildlife Act was a provincial law of general application, capable of applying to Indigenous hunters;
2. In ruling, in effect, that section 88 of the *Indian Act* constituted a federal incorporation-by-reference of certain provincial laws - causing them to apply to Indians; and
3. In ruling, in effect, that aboriginal hunting rights could be expropriated this way, without compensation and without explicit federal legislation

The SCC completely ruled on the first question, and decided in favour of the Province, bringing Indigenous Peoples who had no treaty and no arrangements with

the crown under the jurisdiction of provincial legislation.

The Supreme Court avoided the second and third arguments.

Just as they refused to hear the argument for Aboriginal rights under the 1763 Proclamation, in the *White and Bob* case, the court also did not consider whether Kruger and Manuel had rights that were being infringed by the provincial law of general application.

The *Kruger* case decided that Indians hunting for food had no constitutional defence to a charge under the *Wildlife Act*.

Just as they refused to hear the argument for Aboriginal rights in *White and Bob*, the Supreme Court again selected a path to preserve British Columbia from competing Indigenous interests.

The court did not consider whether the Penticton hunters in *Kruger et.al. v. The Queen* had rights that were being unlawfully violated by the provincial *Wildlife Act*.

1978, *R. v. Haines*
British Columbia Provincial Court, October 11
Summary and excerpts:

Mr. Francis Haines was a resident of the Stone Band and Tsilhqot'in national. He shot and killed one moose for food for his family. He did not get a hunting permit, which the Conservation Officers later testified were readily available. The judge discovered otherwise.

Relying on his own counsel, Judge Barnett delivered his judgment with the following reasons:

"I am going to dismiss the charge of hunting the moose out of season without a permit because I believe that your people have a right to hunt for food during all seasons.

In the Supreme Court of Canada the Judges have not said that the Indian people do not have hunting rights — what they have said is that, assuming the Indian people do have abundant hunting rights, the Province can regulate the enjoyment of those rights by requiring Indians to obtain permits. That is why, in previous cases, I fined Indians who hunted moose out of season without permits.

But, in my opinion, when the fish and wildlife conservation officers refuse to issue permits to the Indian people, it is they who are wrong, not the Indians who continue to hunt and kill only what they need for food.

The Indian people believe that their rights to hunt for food should be considered before other people are allowed to hunt for sport.

I say they are right.

Nobody ever told me in any of the earlier cases that the conservation officers had decided to stop issuing permits to the Indian people.

I now realize that for the past few years the conservation officers at Alexis Creek have deliberately ignored Indian hunting rights and the cumbersome procedure they make you go through when you do apply for a permit is really just a smoke-screen to disguise the fact that no permits are granted at all. All the Indian people knew this, and, therefore, Indian hunting did not stop. And white people said that the Indians were breaking the law.

In a recent issue of B.C. Outdoors, a sportsmen's magazine, an individual who calls himself "Traveller" said this:

> Although the average non-hunter and non-fisherman doesn't realize it, there is a major confrontation looming between Indians and well over 1 million hunters and fisherman in Manitoba, Saskatchewan, Alberta and B.C.
> The confrontation — it is closer to war in some areas — involves the Indians' silly claim that they are entitled to hunt and fish out of season.

This type of uninformed and irresponsible journalism only serves to fuel the fires of prejudice and discontent, both of which remain very much alive in 1978 in British Columbia.

… In giving evidence, Mr. Holder, a conservation officer employed by the Fish and Wildlife Branch at Alexis Creek testified that, "we don't run the moose population as a meat market" and suggested that needy Indian persons can obtain welfare payments, and, therefore, do not need to hunt.

….Hunting rights are still impor-

"A Conservation Officer at Alexis Creek testified:"we don't run the moose population as a meat market," and said Indians can get welfare, so they don't need to hunt.

The Indian people have no wish to exchange their rights for welfare cheques or to abandon their culture for ours."

- in *Haines,* 1978

tant to a great many Indian people in British Columbia. The importance is both material and cultural and the Indian people have no wish to exchange their rights for welfare cheques or to abandon what remains of their culture for ours.

These facts are not well understood by us but that is only because white North Americans have generally refused to take native cultures seriously, and British Columbians are no exception.

In the present case there is evidence to justify the conclusion that the needs of the Chilcotin people could be met if hunting for sport by resident and non-resident hunters was somewhat cur- tailed.

If conservation is the real problem in the Chilcotin, the solution is obvious.

The accused is acquitted.

1985, *Dick v. The Queen*
Supreme Court of Canada, October 31

Arthur Andrew Dick was a Secwepemc national, a member of the Alkali Lake Band. He shot one deer to feed himself and the members of his fishing party, camped towards Gustafsen Creek. He was fined $50, and he appealed.

The Supreme Court of Canada found, with respect to the hunting and fishing rights of Indigenous people, provincial game laws were *ultra vires* the province or inapplicable to Indians.

> Result: S.88 can't make provincial laws of general application affect matters that "go to the core of Indianness," such as fishing and hunting.
> Section 91(24) of the British North America Act protects "Indians and lands reserved for Indians" from provincial laws of general application when it comes to matters touching on "Indianness" or the "core of Indianness" - and that includes hunting rights.

This decision reversed the *Kruger* precedent, and forms the present day basis of the exceptions for Status Indians contained in the BC *Wildlife Act*.

The accused was acquitted.

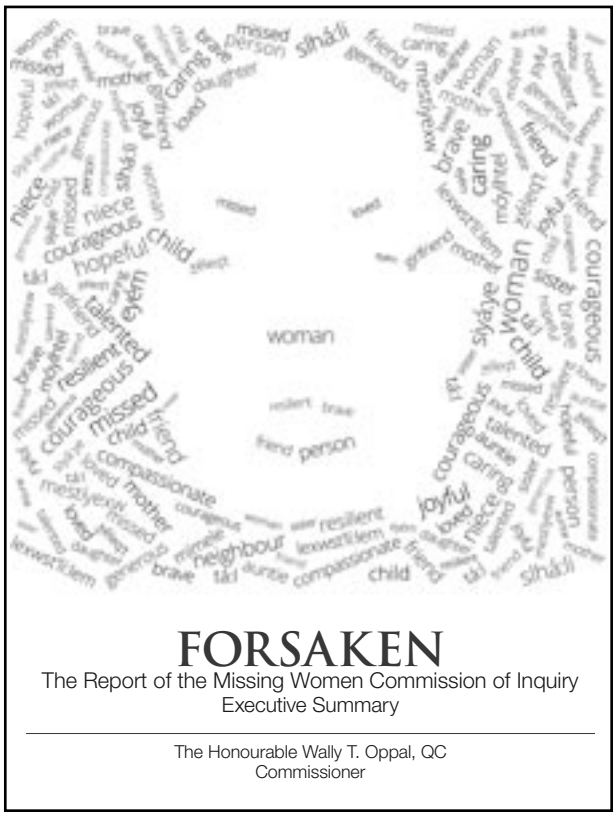
Courts have applied fishing cases, such as *Jack* 1979 and *Sparrow* 1990, to conclude that BC is the authority to regulate hunting for the purpose of conservation. Lawyers for the Native fishermen in those two cases apparently conceded the government right to regulate fisheries, in pre-trial motions, without consulting their clients, nor Qw'utsun or Musqueam law, on the point. The issue is alive today, with courts vesting the *power* in BC, but not the *accountability* to regulate for wildlife sustainability.

Aboriginal Legal Aid Today (ALA) in BC offers assistance to the many Indigenous people who are charged under the provincial *Wildlife Act*. ALA's public description of Aboriginal hunting rights is:

> Status Indians who are BC residents don't need a licence or permit to hunt animals or migratory birds, trap, or freshwater,
> *for* food, social, or ceremonial purposes;
> *and* within areas they can prove their First Nation traditionally used.
> *But* they must follow BC's conservation, public health, and public safety regulations, and any laws their First Nation may have about harvesting.

There should have been mayhem, searches, media interest and rewards.

- Maggie de Vries,
sister of murder victim Sarah de Vries
to the Missing Women Commission of Inquiry, BC.



Cover of the 2012 report of the Missing Women Commission of Inquiry, BC.

In 20 years, there has been far more call to investigate murders and disappearances of Indigenous women and girls than there has been response.

Governments and police still have not mobilized adequate investigations, and the combined response does not include a specific approach to solving the actual cases, except to create a long overdue database.

The following timeline and quotes give an overview of the settler state's knowledge of the crisis, and exposes stark inactivity.

2004

The mission to Canada by Rodolfo Stavenhagen, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, was initiated by Indigenous Peoples. He was not formally invited by the State, so his report remained unofficial. But the message that attention was lighting on a decades-long travesty involving police violence, abuse of process, and inaction in the most disturbing cases was clearly delivered, as the next year:

2005

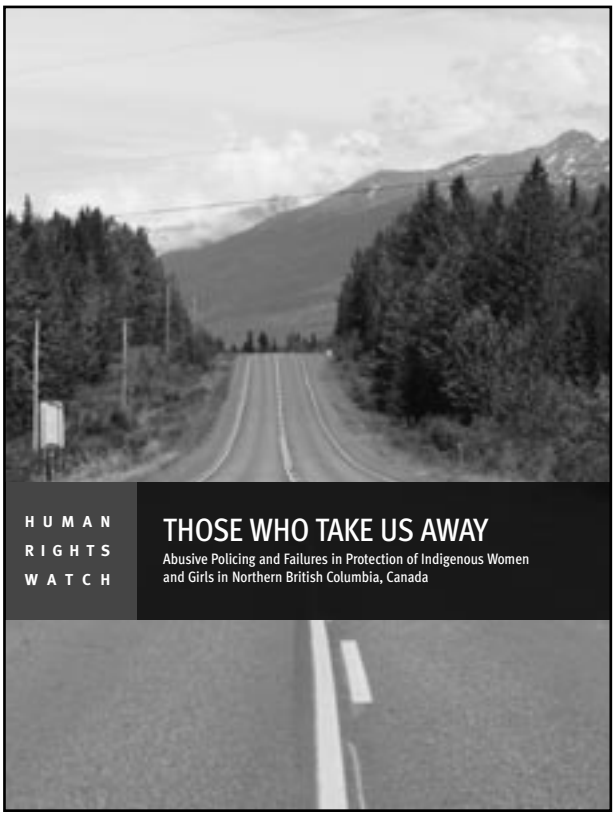
The Native Women's Association of Canada received funding to launch "Sisters in Sprit," a research campaign with families of victims.

2006

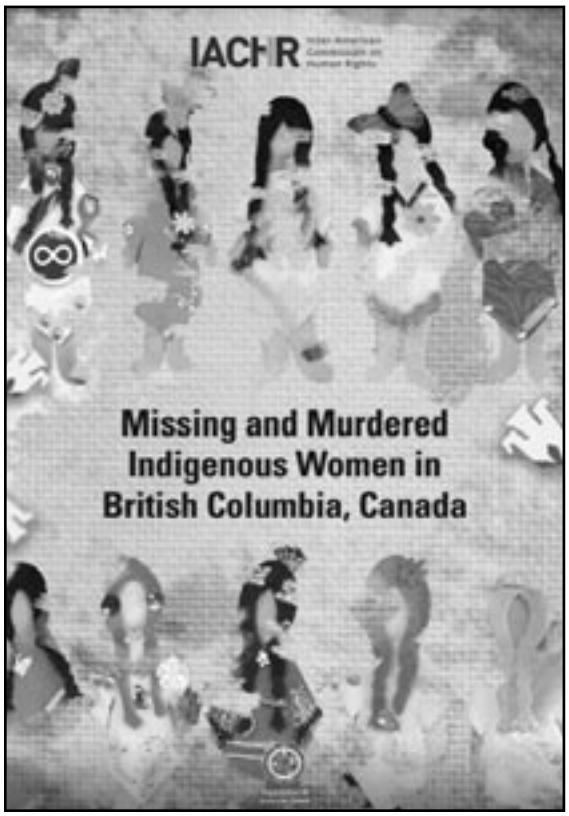
Canada's usual review the UN Human Rights Council came up, under the International Convention on Civil and Political Rights. The independent experts of the UN treaty body's conculding observations stated:

23. The Committee is concerned that Aboriginal women are far more likely to experience a violent death than other Canadian women.

While noting the State party's numerous programmes aimed at addressing the issue, the Committee regrets the lack of precise and updated statistical data on violence against Aboriginal women, and notes with concern the reported failure of police forces to recognize



Cover of the 2013 Human Rights Watch *report, Those Who Take Us Away ~ Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada*



Cover of the Inter-American Commission on Human Rights' report, 2014, on Missing and Murdered Indigenous Women in British Columbia, Canada.

and respond adequately to the specific threats faced by them.

The State party should gather accurate statistical data throughout the country on violence against Aboriginal women, fully address the root causes of this phenomenon, including the economic and social marginalization of Aboriginal women, and ensure their effective access to the justice system.

The State party should also ensure that prompt and adequate response is provided by the police in such cases, through training and regulations.

The committee requests that the State party's fifth periodic report and the present concluding observations *be published and widely disseminated in Canada, to the general public as well as to the judicial, legislative and administrative authorities*, and that the sixth periodic report be circulated for the attention of the non-governmental organizations operating in the country.

2008

Gladys Radek co-founded with Bernie Williams a non-profit organization called "Walk4Justice." The organization was created to fight for the families and all women who went missing or were murdered.

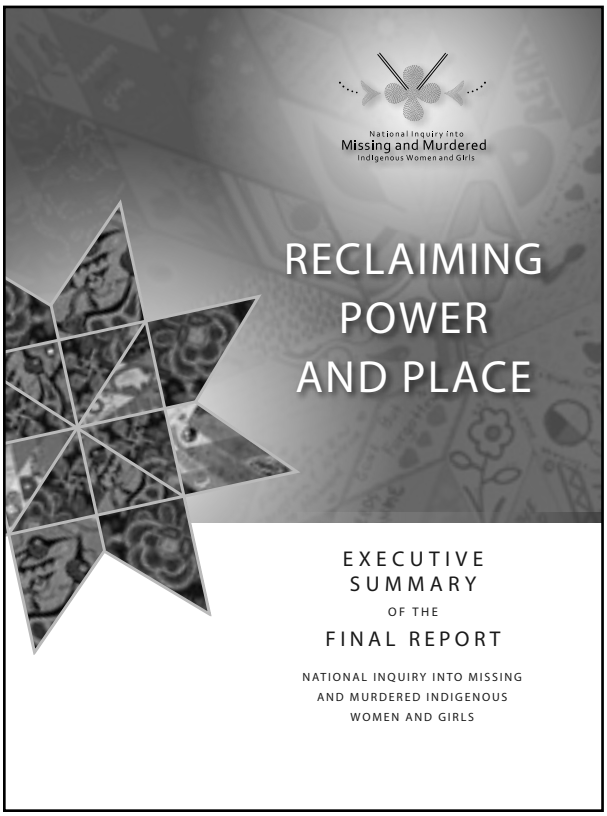
The first walk was a 4,000-kilometer march from Vancouver to Ottawa in the summer of 2008. It lasted three months, and brought isolated communities together.

2008

The United Nations Committee on the Elimination of Discrimination against Women called on the government "to examine the reasons for the failure to investigate the cases of missing and murdered aboriginal women and to take the necessary steps to remedy the deficiencies in the system."

2010

The Sacred Sisters Unity Ride "For Highway of Tears!" carried prayers and encouragement for the families of victims.



Cover of the report of the 2019 National Inquiry into Missing and Murdered Indigenous Women and Girls, Canada.

2010

BC's Lieutenant Governor established the province's Missing Women Commission of Inquiry.
Wally Oppal, QC, was Commissioner, with a mandate to:
a) inquire into and make findings of fact respecting the conduct of the investigations conducted between January 23, 1997 and February 5, 2002, by police forces in British Columbia respecting women reported missing from the Downtown Eastside of the city of Vancouver.

2010

The report of Sisters in Spirit was released by the Native Women's Association of Canada.

2011

March

The Standing Committee on the Status of Women presented, "Ending Violence Against Aboriginal Women and Girls: Empowerment, A New Beginning."

The Report included the testimonial summary of 150 witnesses across 14 communities, and found:
In 2009, Indigenous women were almost three times as likely as non- Indigenous women to self-report being the victim of a violent crime.
In 2009, most violent incidents against Indigenous women were not brought to the police or any other formal victim service.

December

The UN Committee on the Elimination of Discrimination against Women announced that it was opening an inquiry into missing and murdered indigenous women in Canada. It's recommendations of 2008 had not been acted on.

2012

BC Missing Women Commission Report, "Forsaken," says,
"The missing and murdered women were forsaken by society at large and then again by the police. The pattern of predatory violence was clear and should have been met with a swift and severe response by accountable and professional institutions, but it was not."
In 2012, statistics showed 50% of violent crimes against Indigenous individuals went unprosecuted, compared to 24% in the general population.

While the "Sisters in Sprit" program lost its funding, Canada's Minister of Justice directed $25million to a missing persons database for the general population, with no Indigenous-specific mandate.

2013

February

Human Rights Watch reports,
"...researchers were struck by the fear expressed by the women they interviewed. The women's reactions compared to those found in post-conflict or post-transition countries, where security forces have played an integral role in government abuses and enforcement of authoritarian policies."

June

Tears4Justice was established to unite victims' families and remind them that they are not alone. The three-month walk, Nova Scotia to BC, demanded a national Inquiry.

August

BC's Missing Women Commission closes its doors.

2014

The Inter American Commission on Human Rights released a 150 page report on its 2013 visit and in-

"It's been so hard for us, and there's nowhere to turn for any of us, and when we do try to find ways to make things right for us, we are always being attacked by the system, whether it's welfare system, social service system, band chief and council system, the justice system, and the worst part of that is we always had run-ins with the RCMP.

When I was five years old we had our own land. We had our own places to live. We had everything all our own, and as soon as the government chiefs came in, we started losing everything. People were getting murdered for their Indigenous names through their territory and whole families were being slaughtered by them, and I think that this - all this needs to come out to the forefront to make things right in this province, because so far, we've lived through so many police brutality meetings in this province, so many encounters with the RCMP in this province.

Like, they act as judge, jury, and executioner with us as Indigenous people of the land, and we don't have no recourse to get into the courtrooms to say our say, and we all -- I've been -- always been charged for assaulting a police officer when, in fact, it was the other way around. I get badly beaten up by an officer for standing up for either my rights, my children's rights, or my elders' rights.

Because in all the years -- I'll be 65 this year -- in all those years, I couldn't find nothing or no one to help us with our situation, and to this very day, I still don't find -- still haven't found anybody to help me with our rights, what is ours. Why are we here, why are we in the city, why are so many girls in the city and lost in the city, too, and lots have gone missing and murdered, and I've seen so many young girls from my home, which is part of the Highway of Tears area, lots of them get murdered, missing, a lot of sexual assaults going on in that territory, and I...

Public Statement by Telquaa, Helen Michell, to the National Inquiry. Vancouver, 2018

---

vestigation, *Missing and Murdered Indigenous Women in British Columbia, Canada.*

"Discrimination is the overall reason for disproportionately high incidences of violence against Indigenous Women." "Discriminatory practices and norms are embedded in Canadian law; in Canadian institutions such as the RCMP and the public education system; and mainstream culture." "...This situation in turn has perpetuated the violence; as the failure to ensure consequences for these crimes has given rise to both real and perceived impunity."

Evidence was gathered of poor report taking and follow up on reports of missing women; failure to consider and properly pursue all investigative strategies; failure to address cross-jurisdictional issues; ineffective coordination between police; and insensitive treatment of families.

The IACHR recommended a National Inquiry, further to Canada's 2013 Universal Periodic Review, in which two-thirds of state reviews concerned problems with Indigenous land title and violence against Indigenous women.

2016

Canada announces the National Inquiry into Missing and Murdered Indigenous Women and Girls, mandated to report on: Systemic causes of all forms of violence; and Institutional policies and practices implemented in response to violence experienced by Indigenous women and girls in Canada.

2019

The Inquiry concludes with its report: "The National Inquiry has come to the conclusion that violence experienced by Indigenous women, girls, and 2SLGBTQQIA people amounts to genocide based on the results of the Truth Gathering Process, which includes the Inquiry's entire body of work."

2023

The Universal Periodic Review of Canada followed up from recommendations made in 2018, 2013, and 2008. States singled out concerns about missing and murdered Indigenous women and girls, and violence against women and girls. The 2024 recommendations included, "Enhance measures to combat sexual and gender-based violence, in particular thorough investigation of cases against Indigenous women and girls"

~

Fully three years after the National Inquiry, and Canada's responses, UN member states still formally demonstrate their dissatisfaction.

Extinguishment of Aboriginal rights

has been Canada's policy since rights were recognized

The *Calder* decision of January 31, 1973 forced a change in Canada's denial of Indigenous land rights. In that case, the Nisga'a sued for judicial recognition of their Native land title, and the BC government did not convince all the judges of the Supreme Court of Canada that the crown had somehow "extinguished" that title and the rights it provides.

So began 50 years of "modern day" extinguishment and surrender agreements: defined by policy and reinforced by the courts.

"I guess you had more rights than we thought, when we did the White Paper policy," said Prime Minister Pierre Trudeau to the Nisga'a delegation that went to Ottawa some months later to remind the government of the ruling.

Queen Elizabeth II showed up to the Calgary Stampede in July to pass remark on the subject: "You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit and terms of your Treaties."

The Nisga'a announced loudly that they would pursue their land question to the World Court.

It was 1869 when Nisga'a leaders had first approached the new BC government in Victoria. After the journey of 1,000 kilometers, they were turned away without a meeting. In 1913 they hired a London law firm to present their legal case to the Privy Council of Britain; they got no hearing.

On August 8, 1973, Minister of Indian Affairs Jean Chretien presented the government's *Statement On Claims of Indian and Inuit People*, in the House of Commons:

> Many Indian groups in Canada have a relationship with the Federal Government which is symbolized in Treaties entered into by those people with the Crown in historic times.

Minister Jean Chretien, as he then was, at a ground-breaking ceremony for a multi-million dollar shopping centre to be built with the Pas Indian Band. Photo, The Indian Voice, September 1974.

"I guess you had more rights than we thought, when we did the white paper policy."

- Prime Minister Pierre Trudeau

Frank Calder, Nisga'a, the name plaintiff in the Supreme Court of Canada's January 31, 1973 Calder *decision, at a press conference in Ottawa. February 8, 1973. Photo by Chuck Mitchell, CanadianPress.*

...As the Government pledged some years ago, lawful obligations must be recognized. This remains the basis of Government policy.

The present statement is concerned with claims and proposals for the settlement of long-standing grievances. These claims come from groups of Indian people who have not entered into Treaty relationship, with the Crown.

They find their basis in what is variously described as "Indian Title", "Aboriginal Title", "Original Title", "Native Title", or "Usufructuary Rights".

In essence, these claims relate to the loss of traditional use and occupancy of lands in certain parts of Canada where Indian title was never extinguished by treaty or superseded by law.

In this *Statement*, the Government carefully substituted the word "interests" instead of "rights."

The Government sees its position in this regard as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country.

The Government has received claims from some of those native groups and is aware that corresponding claims are being prepared by others. The lands in question lie in British Columbia, Northern Quebec, the Yukon and Northwest Territories.

As a matter of interest, within three weeks of the *Calder* decision, Chief Francois Paulette and fifteen other chiefs proceeded to the Lands Offices of the Northwest Territories and registered a caveat against unpatented Crown land, claiming an interest in the lands based on Aboriginal rights, to prevent transfer of title to 400,000 square miles of land. They took this action on behalf of themselves and all the Indian people and bands of the Northwest Territories. It quickly was in court, where Judge Morrows found in favour of registering the caveat. The Attorney General of Canada brought a writ of prohibition against Judge Morrows, stopping him from proceeding on "any question as to the validity of the claim."

Chretien's 1973 *Statement* continued:

It is envisaged that by this means, agreements will be reached with groups of the Indian and Inuit people concerned and that these agreements will be enshrined in legislation, enacted by Parliament, so that they will have the finality and binding force of law. The Government is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest.

Compensation for land as the only possible outcome – not recognition of continuing land rights and the mobilization of legislation to enable Indigenous disposal of their natural wealth, on their own terms – is the point of departure from a rights-based process to an extinguishment process. This aspect of the policy continues to date, stolidly defended by government after government.

Canada's policy has, at its heart, the defense of Canadians from legal reality. Continuing in Chretien's apparently timeless words:

> for claims arising in the provinces concerned, provincial lands are involved and so are rights of Canadians living in those provinces.
>
> It is in the interest of those provinces and their residents that claims respecting land in the provinces be settled, and it is, therefore, reasonable to expect that provincial governments should be prepared to provide compensation. The Government has informed the provincial governments concerned of its position and urged them to take part in the negotiations envisaged.

British Columbia instantly refused to be involved. At a rally outside Victoria's Legislature on June 25, 1974, BC Human Resources Minister Norman Levi told the Native demonstrators that the federal government was "playing politics" with the issue of land claims. The Minister told the crowd of hundreds that the provincial government would not "interfere" with the federal government in the settlement of Indian land claims.

The Province's hot-potatoe approach to the subject was quite familiar, and Philip Paul replied to the statement without hesitation: "We are pawns of both governments, and back and forth we go. That's why we're at the stage of demonstrating."

Finally, BC attended the opening of negotiations with Canada and Nisga'a on January 12, 1976. There in New Aiyansh, BC's Minister of Labour noted the discussions "have for too long been deferred," and promised action. Eventually BC dropped the Nisga'a process, refusing to participate in any part of negotiations, except occasionally to send a consultant, until 1987. That's when the *Delgamuukw* title case began, launched by nearly the entire leadership of Gitxsan and Wet'suwet'en, following in *Calder's* tracks.

The Union of BC Indian Chiefs, with all the Indian Bands in membership except the Nisga'a, had already produced a Statement of Claim, in 1971. It called for compensation based on the loss of traditional use and occupancy of land, the return of such lands as were of key importance to the nations, and the return of enough land to live on.

It was then, and continues to be now, an extremely reasonable response to the situation, especially following the continent-wide uproar over the federal White Paper of 1969. However, the Province's position was that "there never had been any Native title, but, *if there had been*, it was extinguished by the presence of British colonists and Acts of the British Crown providing for colonial government." BC maintained that position until at least 1994, sending crown counsel into courts against Indigenous land defenders with that exact line.

The final aspect of Canada's policy, August 1973:

> In all these cases where the traditional interest in land has not been formally dealt with, the Government affirms its willingness to do so and accepts in principle that the loss and relinquishment of that interest ought to be compensated.

There is no option within Canadian policy for restoration and restitution of violated or truncated Native rights, damaged land, or wrongfully appropriated land.

Today's Canadian Encyclopedia introduces the policy this way: "wishing to clear the way for industrial development of the North and to improve the position of native peoples in Canada, the federal government announced a new policy for the settlement of native claims."

~

In July 1974, the federal Office of Native Claims opened its doors, offering negotiations leading to final compensation settlements – also known as extinguishment agreements – wherein the First Nation releases, or "surrenders," any other Aboriginal rights to the settlement area and accepts compensation and/or modified rights described in the Agreement.

Government policy makers decided unilaterally what can be negotiated, and stipulated that negotiations can only pertain to non-political aspects of land claims – not overarching economic and political matters. Native "claims" were handled as

"This understandable sense of grievance among the Indians has made it extremely difficult over the years to obtain the fruitful co-operation between them and the government..."

- Minister of Citizenship and Immigration, *and* Superintendent General of Indian Affairs, Guy Favreau

speaking to the Third Annual Conference of the National Indian Advisory Council of Canada, August 1963, Winnipeg,in respect of a proposed Indian Claims Commission.

As reported in *The Indian Record,* below, October 1963.

INDIAN RECORD

Claims Con ... to Be All Inclusive

Background Information

Says Canadians Must Show Indians Part of Family

"interests" in the area, to be balanced with the competing "interests" of non-native stakeholders.

In developing this policy, the government's actions were not legalistic. Parliament refused a request, in council, for a Supreme Court reference decision on the *Calder* case. The 1973 decision, split three-to-three on the question of continuing Native title, provided no certainty or court ordered declaratory or statutory relief. The policy was, and is, a political attempt to gain extinguishment by consent before courts increased judicial recognition of Aboriginal title and rights.

Instead of pursuing a judicial solution to their land rights, the Nisga'a explored this new political solution. The Canadian government invited only five Peoples to engage in a pilot process: Nisga'a, Sechelt, Northwest Territories, Yukon, and James Bay Cree. They all reached final settlements: Sechelt first in 1985, Nisga'a in 2000, the creation of Nunavut, and Yukon being the last in 2007 - they were the original modern day "extinguishment" agreements, the first since the "Numbered Treaties" of the late 19th century.

The mandate and scope of the Policy allows for legislative entrenchment of rights under the Final Agreements, where they are no longer "Aboriginal rights," but "the rights defined in the Agreement."

Attempting the new negotiations in good faith, however, Nisga'a leadership was clear that they would not accept extinguishment terms. They presented a declaration of their intentions which, according to *The Ottawa Journal*, "both ministers hedged on," and "asked for the same patience that has characterized the Nishga for the last 100 years."

The Nishga Declaration said on this point, that the governments "must be prepared to negotiate with the Nishgas on the basis that we, as Nishgas, are inseparable from our land, that it cannot be bought or sold in exchange for 'extinguishing title.'" Minister Buchanan, head of the Department of Indian Affairs, complemented the Nishga presentation during the ceremony and did not raise contradiction. Immediately following the ceremonial launch of negotiations, he told the reporters waiting outside that, "extinguishment of title was still the only mandate he had been given by cabinet," and, "all future land settlements …see native people surrendering their ownership of the land in exchange for some reserves, a cash payment and hunting and fishing rights."

The 1974 Policy was a mobilization to reach the ends described in the 1969 White Paper, the Statement of the Government of Canada on Indian Policy, which referred to aboriginal claims as being "so general and undefined that it is not realistic to think of them as being specific claims capable of remedy." Prime Minister Trudeau clarified in August

of 1969, "We won't recognize aboriginal claims."

The 1969 Statement described the government's approach as a bureaucratic procedure to erase all reference to "Indians" in Canadian government. The vision was that then there would be no more Indian Department, the Native Claims Policy operationalized extinguishment by settlement agreement.

~

The colonial governments veer back and forth between negotiating and litigating their claims over Indigenous Nations and the Peoples, lands, waters and futures.

In the McKenna-McBride Commission into Indian Reserves in British Columbia, 1912-14, all the Native leaders expected to address the question of land title: this was the process that was recommended to them, by Colonial Secretaries and the Privy Council, in response to their legal petitions.

The government had, at the same time, instructed the Commissioners not to discuss title. So, instead, the Commissioners gave assurances that participation in the reserve process would not prejudice future claims of land title which would, they said, ultimately be resolved in Court.

Following the government's1924 adoption of the BC Indian Reserve Commission final report, and all its details, access to courts was soon prohibited to any person who sought to "advance the claims" of any member or band of Indigenous Peoples. From 1927-51, nothing would be resolved in court.

When the prohibition on Indigenous Peoples in Canadian courts and legal proceedings was repealed, 1951, it wasn't long before the government preferred unilateral Commissions again.

It had taken a little over a decade, since 1951, for a new generation of lawyers to figure out that the Indigenous hunters and fishermen were not lying about their treaties and the solemn colonial promises made to them a hundred years before. The situation emerged so clearly that a legal secretary won eighty cases, getting *Fisheries Act* and *Game Act* charges dropped one at a time. That was Maisie Hurley, wife and secretary of lawyer Tom Hurley, whose firm represented Clifford White and David Bob of Nanaimo in 1964.

A Joint Committee of the Senate and the House of Commons made a report to Parliament, July 8, 1961, recommending an Indian Claims Commission. They had received "a number of briefs" from Native organizations in BC. They mentioned "Aboriginal title in BC" in their report to Parliament. They said, "The present annual federal grant to British Columbia Indians of $100,000 is considered by them to be an unsatisfactory interim settlement of their claims." And, "Your Committee recommends that the British Columbia Indian land question, the Oka land dispute and such other matters as the Government deems advisable, be referred to a claims commission."

That $100k was first allocated to the "Indians of BC" in 1927. It was the first federal payment of any kind in consideration of Indian land, and was installed "in lieu of treaties" following the 1926 Joint Committee hearing of the Claims of the Allied Tribes of British Columbia. It was not what they were seeking.

The prohibition on Indigenous legal access, by amendment ot the *Indian Act*, was effected then.

The Minister for Citizenship, Guy Favreau, attended a 1963 conference of the National Indian Council in Winnipeg. He was also Minister of Immigration, and Superintendent General of Indian Affairs. He described a proposed commission, which did not exist but had been the subject of an election promise uttered in some rural areas where the mainly Native population had suddenly been made voters by the 1951 amendment to the *Indian Act*. Favreau told the conference:

"I mentioned earlier that lack of confidence on the part of the Indians remains one of the serious problems affecting Indian administration.

"In analyzing the deep causes for this distrust it soon became apparent that a rankling feeling of injustice among the Indians at the lack of action with regard to the adjudication and settlement of their long outstanding claims was one of the roots of this evil.

"This understandable sense of grievance among the Indians had made it extremely difficult over the years to obtain the fruitful co-operation between them and the government…"

Favreau's press-package for the visit, describing the proposed Commission to hear claims, explained "it is difficult to get them dealt with in the courts because of technicalities." It also articulated the government's desire to "bring an end to some of these claims," and hurry it up "by establishing a cut-off date in which claims must be filed."

No further action on claims was taken until 1969, when the newly

INDIAN RECOR

Published by the Oblate Fathers

Catholic Bishops pledge support

"The Catholic Bishops of Canada have pledged themselves to cooperate with the Indian people in their efforts to obtain "fair treatment" and "an equitable settlement of treaty, land claims and other rights." *The Indian Record,* December 1969

WHEREAS the Canadian Government, on June 26, 1969, has presented a Statement on Indian Policy, which lends itself to various interpretations, and creates a state of disillusionment and unrest among the Indian people;

WHEREAS the Government proposes to invite Indian organisations "to discuss the role they might play in the implementation of the new policy, and the financial resources they may require."

WHEREAS the Indians now do not possess adequate means to establish this dialogue as equal partners:

The Catholic Bishops of Canada in plenary session:
- express their concern for, and give sincere support to proper consultation with the Indian people, over a sufficiently extended period, to allow them to evaluate the policy and its implications;
- pledge themselves to cooperate with the Indian people in their efforts to obtain fair treatment and insist that the Government of Canada, before enacting new legislation, negotiate with the Indian people an equitable settlement of treaty, land claims and other rights;
- request that the Government provide the official Indian organizations "the financial resources they may require" to enable them to do research and acquire the means necessary for a meaningful dialogue...

elected Liberal government released the Statement of the Government of Canada on Indian Policy. Because of its magnitude, it's generally simply referred to as *The* White Paper Policy. It proposed to repeal the *Indian Act*; transfer Indian reserve lands to Indigenous organizations in fee; arrive at an "equitable" end of all treaties; devolve service delivery for all Native people to the provinces; and appoint a residual "claims" Commission.

It said,

> The Government had intended to introduce legislation to establish an Indian Claims Commission to hear and determine Indian claims. Consideration of the questions raised at the consultations and the review of Indian policy have raised serious doubts as to whether a Claims Commission as proposed to Parliament in 1965 is the right way to deal with the grievances of Indians put forward as claims.

The White Paper anticipated the full assimilation of Indigenous Peoples within Canada, and their citizens to become Canadian citizens, and their land to become Canadian land, as per the original and unwavering vision of confederation.

This was not Indigenous Nations' vision. The reaction to the White Paper was categorical opposition, from coast to coast to coast.

~

In 1981, the Minister of Indian Affairs released a booklet, "In All Fairness: A Native Claims Policy." It briefly stated the scope of negotiations available for both treaty and non-treaty Nations to make their claims. The "Specific" side of

Claims allowed for compensation – in cash and alternate land parcels – for land damaged or overtaken by Canadians. The "Comprehensive" side of the Claims Policy contained all the possible outcomes for compensation for rights which could no longer be practiced.

In 1982, the same Minister released "Outstanding Business: A Native Claims Policy."

The primary, and maybe the only significant, update concerned news of increased funding to native "participants" – as they are called under the policy – in the Claims process.

But the new booklet, instantly re-packaging the previous year's publication, summarized the Policy's history in greater detail and aimed to "enunciate guidelines regarding the bases for specific claims, operation of the claims process, assessment of claims and compensation." It was the first transparent, public release of the actual details of the Policy in action.

It tracked the Policy from the 1969 Statement of the Government of Canada on Indian Policy. It reinforced the impression that the government would deal sharply with Peoples who pressed their claims through legal avenues, with a clear statement to that effect:

> Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the government is not going to refrain from negotiating specific claims with Native people on the basis of these statutes or this doctrine. However, the government does reserve the right to use these statutes or this doctrine in a court case.

The Office of Native Claims was also the only source of financing for desperately needed research and offices. For a time, it was busy. According to *Outstanding Business*,

> Between 1970 and the end of fiscal year 1981-82, a total of $16.7 million in accountable contributions had been provided by the federal government for the research and development of specific claims; most of that has been used by provincial Indian organizations on behalf of Indian bands. Approximately 250 specific claims had been presented to the Department by the end of December 1981. Twelve claims had been settled involving cash payments of some $2.3 million. Seventeen claims had been rejected and five had been suspended by the claimants. Negotiations were in progress on 73 claims and another 80 were under government review. Twelve claims had been filed in court and 55 others referred for administrative remedy (e.g. return of surrendered but unsold land).

Since the beginning of 1982 the government has concluded an agreement with the Penticton Band in British Columbia on its claim with respect to lands cut-off from its reserve in 1916. In addition to having 4,855 hectares of land returned by the provincial government, the band received $13.2 million in compensation from the federal government for lands that had been alienated for other uses and will receive a further $1 million from the provincial government for lands it is retaining for public purposes.

The Penticton example was unique, and not representative of typically smaller cash settlements for permanently alienated, or "cut-off" lands.

For reference, the total reserve lands for Penticton Indian Band are less than 19,000 hectares altogether, half the size of typical cattle ranches in Okanagan country. The total lands reserved for all Okanagan Nation communities, of which Penticton is one, is less than one of the larger cattle ranches.

Momentum left the Claims process. It was dubbed, The Buffalo Jump of the 80s.

In 1985, the federal government released "Living Treaties, Lasting Arrangements – Report of the Task Force on Comprehensive Claims." This Report, reviewing the Claims Policy again, remarked on many concerning issues. It did so in unselfconscious language, over 150 pages of the most comprehensive disclosure to date.

> There are now six groups in negotiations, with fifteen waiting to begin. Seven others have submitted claims that have not been accepted for negotiation. At the current rate of settlement it could be another 100 years before all the claims have been addressed.
>
> The complex mechanism of government tends to move slowly. Negotiations may involve several departments, and although the claims process is a priority for your department, it may not be for others. Even within your department, the issue of comprehensive claims is only one of many urgent issues demanding attention. The government, particularly those departments that are directly involved, must consider a new

> policy carefully. Time spent now to ensure the acceptance of a new policy throughout every department of the government will save years of wasted time and resources.

In the 1980s, the First Ministers Conference was supposedly in the process of making a constitutional amendment to mobilize the Section 35(1) "existing Aboriginal and treaty rights."

In spite of the *Living Treaties* review and report, no better policy has ever been made.

The 1985 Report ventured further into confirmation of the anti-legal extinguishment approach:

> Aboriginal title litigation launched by frustrated aboriginal groups is emerging throughout British Columbia, and may contribute to deteriorating relationships and hardened positions over the short term. The gravity of the situation in British Columbia for aboriginal groups has forced us to consider seriously whether the federal government should refer a question to the Supreme Court concerning the existence and extent of British Columbia's constitutional obligation.
>
> At this time, we do not think that a reference by the federal government to the Supreme Court of Canada is the best alternative. The outcome of litigation is unpredictable; thus the process creates risks for both sides. Litigation is an extreme measure, and federal provincial litigation should be pursued only when all other processes have been exhausted. The federal government has not yet done everything possible in relation to British Columbia, and, rather than commencing litigation, should focus attention upon finding creative, co-operative solutions to the impasse. Earlier, we set out three alternatives for dealing with aboriginal rights that might form a basis for renewed discussions with British Columbia. Recent initiatives by the ministers of Indian Affairs and Northern Development and of Environment and by the prime minister in response to the situation of the Haida Indians exemplify the type of committed, high-level approach to federal—provincial co-operation that should be pursued.

The Haida Nation, which submitted a Claim in 1981, abandoned this model of "co-operation" in 1995, launching its first case against the government's unilateral re-licensing of Tree Farm License 39, where one cut block encompassed 236,000 hectares. The Petition was announced by press release:

> the Province of British Columbia cannot lawfully replace or renew Tree Farm License 39 because the land that the license applies to is "encumbered" by aboriginal title. It goes on to say that the Province knows that the Haida people have asserted title to the lands in question. Yet the Province has done nothing to reconcile the interests of the Haida Nation with the Crown.

Now, 43 years and one decade-long Supreme Court of Canada case later, Haida and BC have just this year announced a Framework Agreement by which to begin discussion.

Many other nations saw the Claims Policy for what it was and launched title cases. They fared little better than the Nisga'a in 1913. In 1985, after the Nuu-chah-nulth won an injunction against logging at Meares Island as an incident of their title case, and were convinced to put their case in abeyance. This nation returned to seek judicial recognition of title when their people were repeatedly denied commercial fishing rights. The title argument was stripped from their case by the court.

Major cases were either refused hearing or stripped of their title argument, from *White and Bob* in 1965 to *Okanagan Indian Band* in 2011.

An critical landmark for the Claims Policy's genesis was revisited in 1987. The Nisga'a, floundering in unproductive negotiations, passed a motion in their General Assembly to formally request a Supreme Court of Canada reference decision on the *Calder* case question of continuing native title. They explained the difficulty they were having in negotiations when the government continually pointed out there was no legal recognition of their claims. The Attorney General and the Minister of Justice refused to mobilize a court bench to produce a reference, as they had done immediately following the 1973 SCC decision.

~

In 1991, the Report of the BC Claims Task Force recommended a "made in BC" treaty process. The scope of negotiations and the negotiating mandate was soon revealed to be indistinguishable from the Claims Policy, with a slight modification in 1993 so a First Nation was not required to 'cede and surrender' its territory *before* negotiations began. In BC, uniquely, First Nations were not required to provide any proof of claim at the outset, only

the Statement of Claim. Negotiations proceed towards a surrender of all claims, focusing mainly on the strength of claim in the 1-3% of the traditional territory that might become Treaty Lands.

The *Indian Act* requires that Indian Reserve land must be surrendered to the Crown *before* it can be leased, or in any way used constructively by the People. For instance, a Band vote to surrender 162 acres of reserve land predicated the Musqueam lease in 1958 to the Shaughnessy Golf Club; the surrender provision underscores Self Government Agreements that mobilize use of Reserve and other lands, such as in the Sechelt and West Bank agreements, where the federal government then mobilizes land leases and taxation schemes while nullifying many Aboriginal rights, such as trade and self-determination. Self Government, later defined in the ironically named Inherent Right Policy, 1995, refers to the process of a First Nation importing Canadian law and Canadian jurisdiction over themselves in a voluntary and democratic fashion, ratifying a First Nation Constitution through the *Indian Act* system of elected administration – to the end of traditional authorities – and implementing government-approved-and-funded structures of self-administration as the "only" source of the new entity's power. It is not a rights-based process, in spite of the name.

Under the BC Treaty Commission's Final Agreements – including the Nisga'a, Maa-nulth, Sliammon, and Tsawwassen – all participants release their Aboriginal rights, known or unknown, into the future; they "release and indemnify Canada, British Columbia, and *anyone else,*" for past harms; and agree that their Aboriginal rights have been replaced, as modified, by the rights in the Final Agreement. These cede, release and surrender provisions are then ratified by majority vote.

In 1995, the Royal Commission on Aboriginal Peoples identified the subversive Claims Policy in an interim report called "Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment."

Directed specifically at the offending requirement in Canada's Claims Policy, this report states,

> Federal policy is inconsistent with the fact that existing Aboriginal rights are constitutionally recognised and affirmed by s. 35(1) of the Constitution Act, 1982. Federal policy may also breach fiduciary obligations owed to Aboriginal peoples by the Federal Government.

RCAP had several suggestions, including that the federal government:

> adopt a new approach in its comprehensive claims negotiations with Aboriginal peoples, that is, one based on the concepts of co-existence and mutual recognition. Negotiations ought to be aimed at Crown recognition of Aboriginal rights with respect to land and governance over part of the claim area; ... Aboriginal rights not recognised by an agreement would not be extinguished...
>
> Aboriginal rights recognised by an agreement ought to be worded to permit their evolution in light of favourable legal developments.

To date, it is not possible to conclude an Agreement or Settlement between

"We are negotiating for packages that people will be happy with.

Who am I to say it's not a good deal?

Tsawwassen Chief Kim Baird got up in the legislature and literally did a dance, she was so happy to have a treaty.

Who am I to say she's wrong?

And we are looking at other possibilities, possibly a beefed-up treaty process, alternatives in land use planning.

As for aboriginal title, I admit it's there, I agree it's there. When someone says, 'I want to deal with title,' I say, *Let's talk.*"

- Minister Chuck Strahl
Aboriginal Affairs and Northern Development, Canada

Statements from the Minister's Open House in Lillooet, February 2009.

Denial of Native title and rights has caused irreparable harm in many cases. The Inter-American Court of Human Rights has recognized that Indigenous Peoples have "exhausted the domestic remedy" in Canada, in two recent cases. The 2014 reasons for admissibility of the IACHR, in Edmonds v. Canada*, #12-929, is shown here being delivered to Prime Minister Justin Trudeau by Pautuclasimc, James Louie, of Lil'wat.*

Indigenous Peoples, or their organizations, and government which does not release (extinguish) the Aboriginal rights in exchange for "modified rights" which are included in the Agreement.

That is, Indigenous Peoples cannot mobilize their title or rights under Canadian policies without exchanging undefined "Aboriginal rights" for the modified, or surrendered, rights which will be recognized in the Agreement, and not open to revisiting in any light.

The courts themselves have reinforced the diversion of Native land title to negotiating tables, as if negotiations under the Claims Policy are capable of addressing the issues that brought the Peoples to courts in the first place. It is hard to believe the Canadian judiciary can, in good conscience, reasonably suggest that their Petitioners will find a just resolution in the same negotiating process that they despaired of when they decided to take legal action.

Trying and failing to negotiate with government, the Gitxsan and Wet'suwet'en nations (among many) went to court to protect forests and fish from logging practices that were decimating their territory one valley at a time. They received a very damaging ruling in 1991, and were sent to negotiations before the court would allow an appeal.

Several years of negotiations, within the BC treaty process, ended in roadblocks and resumption of the litigation, at the Supreme Court of Canada.

In December 1997, the Supreme Court gave their decision in this case: *Delgamuukw*. It was not a decision, except to deny the nations the declaratory relief they had sought, dismiss their argument for jurisdiction, and, just as it had in *Calder* 1973, the court process resulted in a set of opinions about Aboriginal title – but no ruling. The Chief Justice ordered the whole matter back to trial:

> By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, section 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place".
>
> Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, to be a basic purpose of s. 35(1) – "the reconciliation of the pre-existence of aboriginal

> societies with the sovereignty of the Crown".
>
> Let us face it, we are all here to stay.

While the *Delgamuukw* case had evolved in the highest court, the province of BC was motivated to conclude 20-year-old negotiations with the Nisga'a. The talks had been stalled for more years than they were active.

Within months of *Delgamuukw,* which brought Aboriginal title slightly closer to a tangible reality with clear judicial recognition of unextinguished Native title, BC, Canada, and the Nisga'a announced their Agreement in Principle.

Unprecedented (and unrepeated) hundreds of millions of dollars were spent on new roads, schools, health care facilities, government buildings, and training, so that by the time the *Delgamuukw* decision had been studied and was going to be tested by other Nations on the ground, the first "modern day treaty" had been completed in British Columbia, under the Comprehensive Claims extinguishment policy, with the incorporation of the Nisga'a Nation.

As per the Claims Policy, Nisga'a released and indemnified "Canada, the Province of BC, and anyone else…" for past harms; they released and surrendered Aboriginal rights in favour of the rights, as modified, in the Agreement; and the "Indian Land Question" was answered by a First Nation government holding land in fee simple title under the *BC Lands Act*.

At the same time, the courts maintained that there would be no recognition of any Aboriginal right that could compete with the absolute sovereignty and discretion of the crown. The government policy makers would not shift from requiring Indigenous Peoples to cede, release, and surrender their "unproven Aboriginal rights" in order to mobilize *any rights whatsoever* in negotiated agreements.

Indigenous Peoples watched and listened attentively for change after the *Delgamuukw* decision. They could detect none. Exactly one year later, the St'at'imc Chiefs Council issued a press release alongside their seven-community roadblock of four points on provincial highways and one stretch of BC Rail. They declared,

> "The Federal Government's Comprehensive Land Claims Policy was extinguished by *Delgamuukw.*"

And,

> "Present and future negotiations regarding our Title and Rights cannot be based on "extinguishment," but must be based on Government to Government, Nation to Nation agreements which clarify the terms for co-existence. Extinguishment is not an option. Constructive agreements which clarify mutually agreed upon terms for peaceful coexistence are the only means to achieve certainty for everyone in BC and Canada."

At the opposite end of the spectrum, the British Columbia Treaty Commission released its own review of what the *Delgamuukw* decision might mean to its mandate. A tripartite review of the BCTC was initiated in April 1998, to check the new SCC decision against the modern day treaty process. It concluded:

> The key outcome of the ongoing dialogue has been unanimous agreement on the importance of the Chief Justice's superficially simple, but profound, comment in the majority judgment in *Delgamuukw.* "Let us face it, we are all here to stay."
>
> From the federal government's perspective, negotiations lead to the best solutions that meet the interests of everyone involved in treaty making.

Based on that comment by Chief Justice Lamer, the review committee said they saw no need to make change. The judicial opinions in *Delgamuukw* concerning the scope of "Aboriginal title" as a constitutional right did not alter government policy and negotiating mandates.

Final settlements under the Claims Policy are made concerning Indian Reserve lands that were cut off, and even whole village sites. An example of one final settlement was the release of two village sites and attendant reserve lands for $800,000. The sites were made impossible to access by subsequent infrastructure development, and abandoned.

Called "Cut-off Claims," this type of money-only compensation has also been made for release of railway lands; lands now under hydro facilities; and, in a few cases, reserve lands crossed by pipelines have been released with ongoing fees payed to the First Nation.

~

Ten years after *Delgamuukw*, two major international bodies became involved in Canada's violations of Indigenous Peoples' rights. The government's duplicitous strategy was exposed in Petitions to the UN Committee for the Elimination of Racial Discrimination and to the

Organization of American States, one of the seven regional forums of the United Nations.

First Nations reported their futile "negotiations" – with no mandate to even allow discussion of the most important matters of jurisdiction and self-determination – which devolved into frustrated launches of litigation; where the courts repeatedly refuse relief, but only parrot the phrase "ultimately it is by negotiation that we will achieve the reconciliation of aboriginal societies with the sovereignty of the crown."

In 2006, the UN Committee for the Elimination of all forms of Racial Discrimination released its concluding observations following Canada's periodic review under the Convention:

> The Committee, while noting that the State party has withdrawn, since 1998, the requirement for an express reference to extinguishment of Aboriginal rights and titles either in a comprehensive claim agreement or in the settlement legislation ratifying the agreement, remains concerned that the new approaches, namely the "modified rights model" and the "non-assertion model", do not differ much from the extinguishment and surrender approach. It further regrets not having received detailed information on other approaches based on recognition and coexistence of rights, which are currently under study.

In 2008,

> …the Committee recommends the State party to ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights. Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts.

In 2009, the Organization of American States' judicial wing, the Inter-American Court of Human Rights, accepted the petition of the Hunquminum Treaty Group, on the basis that they had "exhausted the domestic remedy" after fifteen years in negotiations which would never recognize or allow basic forms of internationally protected Peoples' Rights.

The Petition was admitted to the Inter-American Court, and hearings proceeded, but the process has not concluded since Canada withdrew its participation.

While these international tools are confirming for Indigenous Peoples, they require political traction with other Member States to advance the justiciable issues.

In 2007, the Glossary of treaty related terms on the BC Treaty Commission website gave the following definitions:

> certainty provisions: treaty provisions designed to clearly define the authorities, rights and responsibilities for all parties to the treaty. See also *extinguishment*.
> extinguishment: term used to describe the cessation or surrender of aboriginal rights to lands and resources in exchange for rights granted in a treaty. To date, Canada has required full or partial extinguishment to conclude treaties.

This helpful clarification has since been taken down off the site. The word "extinguishment" has been replaced by the "modified rights" language, which however retains the same meaning – just as the UN Committee observed.

The essential features of BC treaties are: lands in fee-simple title; powers of taxation by the Treaty First Nation, on Treaty lands; a fishery allocation; prescribed rights of hunting and gathering in non-treaty, traditional lands; a written Constitution; transformation of the Indian Band structure into a corporate municipal entity with powers of by-law; a quit-claim on any further Aboriginal rights; and the release and indemnification of Canada, BC, and "anyone else" in relation to past harms.

The Tsawwassen First Nation ratified the first "modern day treaty" under the BC treaty process version of the Claims Policy. The terms of the surrender were criticized by UN Committees anew, who wrote to Canada to question, "whether the negotiation processes meet the standards of fairness and transparency," "on the modification of Aboriginal titles," and "financial inducements to conclude" such agreements.

That 2007 Final Agreement included Treaty Lands less than one percent of the First Nation's claimed territory. The cash involved was approximately $20million. The crown in right of Canada, or "the government" has a well-defined fiduciary obligation to Indigenous Peoples (since the British promises which gained them entry) which means being liable for such

obscenely unfair deals as, for example, the Musqueam lease to a Vancouver Golf Club – subject of the *Guerin* decision in 1984 *and* awarded $10million in damages over 162 acres in 1977. Still, Minister for Aboriginal Affairs and Northern Development, Canada, Chuck Strahl, defended the Tsawwassen Final Agreement, saying "Chief Baird was so happy she did a dance in the Legislature. Who am I to say it's not a good deal?"

~

On June 12, 2007, Canada announced, "Justice at Last: Specific Claims Action Plan."
Crown-Indigenous Relations and Northern Affairs Canada -CIRNAC- (formerly the Department of Indian Affairs, then Aboriginal and Northern Development) provides this information as the most up-to-date incarnation of the 1974 initiative:

> The fundamental principles of the Specific Claims Policy as articulated in "Outstanding Business: A Native Claims Policy" have not changed. These principles are: an outstanding lawful obligation must be confirmed, valid claims will be compensated in accordance with legal principles and any settlement reached must represent the final resolution of the grievance.

In 2007, there were more than 900 Aboriginal land and treaty claims submitted under the Comprehensive and Specific Claims policies – the two wings of the Native Claims Policy. Infuriation with the "talk and log' status quo throughout some of these claims fuelled blockades and occupations in Ontario, even while AAND Minister Chuck Strahl announced *Justice at Last.* Politicians and Indigenous leaders commented alike that the changes would address "very few claims" that "involve money and only money."

What had changed in "Justice at Last" was "faster processing and better access to mediation." What had not changed was a very long tradition of announcing legislation first, and meeting with Indigenous leaders after. The single figure of AFN National Chief Phil Fontaine was revealed by the federal government as its "consultant" on the updates.

Four months after *Justice at Last*, on October 26, 2007, Indigenous representatives west of the Rocky Mountains got a meeting with Minister of Indian and Northern Affairs, Chuck Strahl and BC's Minister of Aboriginal Relations and Reconciliation, Michael de Jong.

The executive members of the BC region Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs – collectively having formed the First Nations Leadership Council a few years before – got this rare meeting to "commit to having future meetings" on improving policy: Comprehensive Claims Policy, Specific Claims Policy, Inherent Right of Self-Government Policy; and negotiations processes; and quality of life issues.

The *Specific Claims Tribunal Act*, 2008, came out of the Action Plan and provided a new mechanism for the Policy. The new Tribunal accepts claims which are not accepted for negotiation under "Comprehensive" or "Specific" Claims designations, or have failed to gain remedy in court, or have exceeded a certain number of decades in negotiation without resolution.

None of the decisions of the Supreme Court of Canada since then have changed the Claims Policy these negotiations are enabled by.

A recent example of a Tribunal decision is the settlement of a water-rights claim. The Indian reserve was made with no water rights or access for fresh water. After several generations, this was recently settled with a $142 million payment. The ceiling for Tribunal claims is $150 million.

~

In 2014, a declaration of Aboriginal title was made in a Canadian court for the first time.

What should have been a giant victory had, however, been hollowed out by 40 years of judicial reduction in the definition of Native title.

The "Native title" that Frank Calder and the Nisga'a went to court for in 1969 had not materialized. Instead, hundreds of court rulings later, "Aboriginal title" boils down to the right to be consulted and the right to have a Province justify its infringements of Aboriginal rights. Aboriginal title, it seems, is not a *deed* – but an Aboriginal right.

The Tsilhqot'in communities that won this case remain in negotiations with federal and provincial Managers as to how they may implement their title.

This decision, like *Delgamuukw* before it, hastened First Nations to negotiating tables, not court rooms: expecting more equitable terms or a rights-based reference for negotiations.

In 2014, the federal Liberal Party

of Canada, not in power, issued a retraction of its 1969 White Paper policy. This gesture changed nothing.

A dozen "Strategic Engagement Agreements" and "Reconciliation Agreements" and "Interim Treaty Benefits Agreements" - all resting on the 1973 Claims Policy bottom line - have been completed since 2016, west of the Rockies. No "tripartite review process" of the BC Treaty Commission mandate, or "Justice At Last," followed *Tsilhqot'in*.

First Nations continue in the process of releasing lands and rights and indemnifying the Province.

They do this in exchange for money to build schools and health centers; for postage-stamp land titles of highly significant cultural value – in exchange for release of larger land parcels; for piecemeal initiatives to mobilize economic development – where courts have frozen the Aboriginal right to development in the year 1846 and refused rights of commercial activity; and they sign off that their interests in their traditional territories have been accommodated – a term of *certain* legal significance.

For example, a 2022 claims settlement between one First Nation and BC includes the following "certainties" where the First Nations agrees to:

> a) release and discharge the Province and all Provincial Officials from all claims with respect to the Province's obligation to consult and, where appropriate, accommodate in respect of the transfer of the Parcel to the Designated Company and any Permitted Encumbrances in respect of the Parcel;
>
> b) release and discharge the Province and all Provincial Officials from all claims of infringement of its Section 35 Rights in respect of the Parcel and any applicable Permitted Encumbrances…

Beyond that, the First Nation agrees to stop litigation against the Province. They join in high level Public Relations events announcing their satisfaction with the deal. They confirm and warrant that their Band Council, or Indian Act governing structure, has the people's authority to make such decisions.

~

What defines "extinguishment," and what has happened while government policy denies Indigenous Peoples use of their title lands?

Like the RCAP said in 1995, "extinguishment" is best understood in light of its alternative: *continuing* Indigenous rights, *increased* recognition and attached value of land titles, and *a future* that unfolds from land-rich self-determination.

The Canadian people, unfortunately, have demonstrated over and over again that they will settle for nothing less than a final solution which extinguishes title and rights.

In 1992, Canadians voted down the Charlottetown Accord – a constitutional amendment to mobilize Indigenous self-government.

In 2002, British Columbians voted overwhelmingly to confirm the Comprehensive Claims Policy cap on negotiating mandates in the "modern day treaty process" – regardless of expanded judicial recognition. There was no public response at all to the 2023 *Nuchatlaht* title decision from BC Supreme Court, which regressed to finding the "postage stamp title," that Canada's Supreme Court rejected definitively in *Tsilhqot'in,* 2014.

While the Canadian voter raises no objection to the "extinguishment by agreement" policy, "reinforced by the judgments of the Court," and "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" by state-controlled procedures of "consultation and accommodation," the vast majority of First Nations occupy social, geographical, and economic positions which are constricted and impoverished and burdened by the exact historical injustices they are now required to release and indemnify the province, Canada, and *anyone else* for causing.

Without equality of arms, and hemmed in by expanding settler communities, the government's policy and inaction has secured access to vast wealth for British Columbia.

Indigenous Peoples are asked to make surrenders in the resulting circumstances of imposed duress.

~

By Kerry Coast
for Archive Quarterly.

About the Author:
Kerry has studied the Claims policy since meeting traditional Indigenous land defenders in 1994. Trapped between judges who did not allow their legal counsel to speak in court, and military threat at reoccupations, these leaders educated garssroots people at the "University of the Kitchen Table," and on the land. Since then, she has worked with many distinguished leaders on communications for self-determination.

An excerpt
from the 1969 White Paper Policy, or Statement of the Government of Canada on Indian Policy:

5. Claims and Treaties

Lawful obligations must be recognized

Many of the Indian people feel that successive governments have not dealt with them as fairly as they should. They believe that lands have been taken from them in an improper manner, or without adequate compensation, that their funds have been improperly administered, that their treaty rights have been breached. Their sense of grievance influences their relations with governments and the community and limits their participation in Canadian life.

Many Indians look upon their treaties as the source of their rights to land, to hunting and fishing privileges, and to other benefits. Some believe the treaties should be interpreted to encompass wider services and privileges, and many believe the treaties have not been honoured. Whether or not this is correct in some or many cases, the fact is the treaties affect only half the Indians of Canada. Most of the Indians of Quebec, British Columbia, and the Yukon are not parties to a treaty.

The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. As a result of the treaties, some Indians were given an initial cash payment and were promised land reserved for their exclusive use, annuities, protection of hunting, fishing and trapping privileges subject (in most cases) to regulation, a school or teachers in most instances and, in one treaty only, a medicine chest.

There were some other minor considerations, such as the annual provision of twine and ammunition.

The annuities have been paid regularly. The basic promise to set aside reserve land has been kept except in respect of the Indians of the Northwest Territories and a few bands in the northern parts of the Prairie Provinces. These Indians did not choose land when treaties were signed. The government wishes to see these obligations dealt with as soon as possible.

The right to hunt and fish for food is extended unevenly across the country and not always in relation to need. Although game and fish will become less and less important for survival as the pattern of Indian life continues to change, there are those who, at this time, still live in the traditional manner that their forefathers lived in when they entered into treaty with the government. The Government is prepared to allow such persons transitional freer hunting of migratory birds under the Migratory Birds Convention Act and Regulations.

The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline. The services that have been provided go far beyond what could have been foreseen by those who signed the treaties.

The Government and the Indian people must reach a common understanding of the future role of the treaties. Some provisions will be found to have been discharged; others will have continuing importance. Many of the provisions and practices of another century may be considered irrelevant the light of a rapidly changing society and still others may be ended by mutual agreement. Finally, once Indian lands are securely within Indian control, the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to - how they can be equitably ended.

The following documents were relied on for information in this article. Many can be found at the Archive project online, www.thewestwasntwon.com

Statement by the Government of Canada on Indian Policy, June 26, 1969.
Statement by the Government of Canada On Claims of Indian and Inuit People, August 8, 1973.
"Lands grab reversed – Indians finally win one," the Canadian Press, Yellowknife; *The Indian Voice*, September 1973.
Address on the Ceremonial Commencement of Land Claim Negotiations by The Honourable Judd Buchanan, Minister of Indian and Northern Affairs, to the Nishga Tribal Council and the Nishga People of the Nass Valley. January 12, 1976.
Address by BC's Minister of Labor, Allan Williams, on commencement of negotiations with Nisga'a. January 12, 1976, New Aiyansh.
"Patient Nishga win big battle but 107 year war isn't over," by Hugh McCullum, *The Ottawa Journal*, January 17, 1976.
"Levi booed, NDP called down for stand," by Gerard Peters, *Nesika*, Vol III. No.6, July 1974.
"Liberal assails refusal," *Times Colonist,* June 26, 1974.
Nishga Declaration, 1976
Paulette et al. v. The Queen [1977] 2 S.C.R. 628
"In All Fairness, A Native Claims Policy ~ Comprehensive Claims," Minister of Indian Affairs and Northern Development, Honourable John Munro. 1981
Presentation to the Committee of Deputy Ministers on B.C. Comprehensive Claims Including the Nishga Land Claim and Three New Claims for Review. Office of Native Claims, September 1981. E78.B9P71981c.1
"Outstanding Business: A Native Claims Policy." Minister of Indian Affairs and Northern Development, Honourable John Munro. 1982
"Living Treaties, Lasting Arrangements; Report of the Task Force to Review Comprehensive Claims Policy." 1985
British Columbia Treaty Commission Agreement, with British Columbia and the First Nations Summit, February 26, 1992.
Consensus Report on the Constitution: Final Text, Charlottetown, August 28, 1992, (Charlottetown Accord).
Inherent Right to Self-government Policy, Department of Indian and Northern Affairs, Canada, 1995.
Delgamuukw v. British Columbia (1997) 3 Section C.R. 1010
"Re: December 11, 1997, Delgamuukw Decision," St'át'imc Nation Press Statement, Lillooet Tribal Council, December 11, 1998.
"Policy: the inherent right to self-government," and "More developments in the treaty process since *Delgamuukw*," *Treaty News*, BC Treaty Commission newsletter, October 1999.
Nisga'a Final Agreement, 2000.
Report of the Chief Electoral Officer on the Treaty Negotiations Referendum, Elections B.C., September 9, 2002.
Concluding observations of the Committee On Economic, Social And Cultural Rights re. Canada, Thirty-sixth session, Geneva,"E/C.12/CAN/CO/4, E/C.12/CAN/CO/5," 22 May 2006
"Closing the Implementation Gap: Indigenous Peoples and Human Rights in Canada." A forum to follow up on the 2004 mission to Canada by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen. University of Ottawa, October 2-3, 2006.
"Federal Participation in the British Columbia Treaty Process, Indian and Northern Affairs Canada," Auditor General of Canada, November 2006.
Letter to BC Treaty Commission, Chief Commissioner Steven Point, from Robert Morales, Chair of the First Nations Summit, representing 60 treaty negotiation tables - the "First Nations Unity Protocol," Spring, 2007.
Tsawwassen Final Agreement, 2007.
"Justice at Last: Specific Claims Action Plan," Crown-Indigenous Relations and Northern Affairs Canada, 2007.
"Ottawa's attempt to clear a backlog of more than 900 aboriginal land and treaty claims," Canadian Press, Toronto, November 28, 2007.
Speaking Notes for an Address by Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-status Indians, to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on the Supplementary Estimates of DIAND, House of Commons November 29, 2007.
Letter from Chairperson for the UN Committee for the Elimination of Racial Discrimination, Fatimata-Binta Victoire Dah, to His Excellency Mr. Marius Grinius, Ambassador, Permanent Representative, Permanent Mission of Canada to the United Nations, August 15, 2008 "Canada_letter150808", and March 13, 2009 "Canada130309."
Specific Claims Tribunal Act, 2008
"Reasons for admissibility, *Hulquminem Treaty Group v. Canada*," Inter-American Court of Human Rights, Organization of American States, 2009.
Concluding observations of the Committee on the Elimination of Racial Discrimination re. Canada, 80th Session, 13 Feb – 9 March 2012. "CERD/C/CAN/CO/19-20"
Tsilhqot'in Nation v. British Columbia [2014] SCC 44 2R.C.S.
Liberal Party of Canada retracts1969 Policy Statement of the Government of Canada, 2014.
"Reconciliation Agreement," February 22, 2022, Between Her Majesty the Queen in right of the Province of British Columbia, as represented by the Minister of Indigenous Relations and Reconciliation and the Minister of Forests, Lands and Natural Resource Operations and Rural Development (the "Province") AND: Sts'ailes, on behalf of itself and its Xwelmexw te Sts'ailes, as represented by Chief and Council.

Haida and *Taku*, 2004, and

For the first time in 2002, British Columbia's courts recognized Aboriginal rights and interests in lands beyond the Indian reserves

- and the duty of government *and industry* to consult those rights holders before taking action that might affect them - *Haida Nation,* BC Supreme Court, 2002.

Council of the Haida Nation flag; the Crow and Wolf of Taku River Tlingit.

In 2004, Canada's Supreme Court confirmed this decision in part, as it concerns government, but saved industry and "innocent third parties" from a duty to consult.

Twenty years later, in 2024, the government has so consistently failed to consult and accomodate effectively and in good faith, that the judge in *West Moberly First Nation v. B.C.* called the whole procedural right, "nothing more than a chance for First Nations to blow off steam."

That is probably one of the more optimistic assessments. In *Huu-ay-aht v. BC*, 2005, the government didn't incorrectly assess the scope of interests to be consulted on; "it failed to consider them at all."

In 2023, long since BC's online mining tenure system covered every inch of soil with claims, *Gitxaala v. British Columbia (Chief Gold Commissioner)* achieved judicial notice that there's no chance to consult a First Nation before using a credit card and a laptop to secure placer mining rights across... everything.

20 years after *Haida* and *Taku*, the government does not comply with Supreme Court decisions. It didn't comply for the 20 years earlier, either.

The *Guerin* case and the duty to consult

In 1958, the Musqueam people surrendered 162 acres of their valuable Indian reserve lands in order to have the Indian Agent lease it on their behalf. The Agent, however, changed the terms of the lease in finalizing an agreement with the Shaughnessy Golf Club, including the rent, without their knowledge.

The Supreme Court of Canada (SCC) ruled, 27 years later, that the federal government, here the Indian Agent, had a duty to act in the best interests of the Musqueam people, and, in order to fulfill that duty, the government Agent had to consult with them to find out what their interests were.

The case was originally filed in 1975, a few years after Musqueam's elected Council finally got access, after repeated refusals, to the lease agreement that was made on their behalf.

The changes to the terms included a lower lease fee; a cap on rent increase when the lease would come up for renewal; and the right of the Golf Club to remove whatever structures or improvements they made to the lands.

As the SCC summarized it, "In this case the Band surrendered the land to the Crown for lease on certain specified terms. The trial judge found as a fact that such a lease was impossible to obtain. The Crown's duty at that point was to go back to the Band, consult with it, and obtain further instructions. Instead of doing that it went ahead and leased the land on unauthorized terms."

Musqueam won the first case in 1979 at Federal Court and was awarded $10 million in damages, along with the following judicial recognition:

> The Indians' interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763...

The government appealed, taking the position that the *Indian Act* forms a political obligation to Indigenous peoples generally – not a legal obligation; and that the conditions of the reserve surrender did not form a trustee relationship.

It is critical to note that the Musqueam were specifically denied legal counsel

their origins in *Guerin*, 1984

The Musqueam flag's center.

> "The purpose of the surrender requirement is to interpose the Crown between the Indians and prospective purchasers or lessees of their land so as to *prevent* them from being exploited."
>
> - *Guerin v. The Queen,* 1984

to assist with negotiating the surrender and the lease, and they were denied access to the final lease agreement for almost the full 15-year period before the lease would come up for renewal.

That is, the government controlled the transaction from start to finish, acting as the Band's advisor, agent, legal enabler, and trustee, refusing access to any other independent agent.

The Federal Court of Appeal decided in favour of the government and overturned the 1979 decision, stating "the surrender did not create a true trust and does not afford a basis for liability based on a breach of trust."

At this stage, the Musqueam people appealed to the Supreme Court of Canada, represented in the action by Chief Delbert Guerin and their elected Councillors. The SCC reinstated the Federal Court decision made by Judge Collier in 1979, including the $10 million award for loss and damage.

At least as important as the financial compensation was the judicial recognition of the federal government's fiduciary obligation to Indigenous Peoples, and the duty to consult with them when making decisions that affect their interests.

That Day In Court

with Victor Guerin

"The recognition by the court that the crown did us wrong is the most obvious thing, but, to me, the more important aspect of the decision was the comment from Justice Collier that he recognized we have Indigenous title to our lands. Not only to reserve lands, but to our territory – and that title is not something that is conferred by the crown, or by the Proclamation of 1763. It pre-exists and underlies crown title and it has been in existence since time immemorial.

"That judge awarded $10million in compensation for the lease. He lived in this area and dad would run into him sometimes. Just after the lease was renewed, sometime into the second 15-year lease, my dad saw him again. Collier said to dad that the $10m figure was a "global" figure, that he awarded on his beliefs that the Golf Club would leave the lands. If he had known that the Golf Club wouldn't leave the lands, he told my dad, he would have awarded something in the area of $180million.

"At the time the lease was initiated, Musqueam had no electricity, no running water, no trash collection. My dad, Delbert, used to have to pack water to where his grandparents lived, at about Marine Drive and Kullahun Drive. He took his buckets up to Dunbar and 41st area, about twenty city blocks away.

"People used to get their water from the wells here. But when the city started developing up the hill from us, that contaminated our well-water. We couldn't use well-water for anything but laundry after that.

"With that court case, what they talked about was making decisions to better things for the next generation, and for generations to come.

"There's a great deal of reluctance on the part of the crown to recognize indigenous title. The courts are not supposed to take a partisan viewpoint and accept any pressure from other parties but they find ways to do so without creating the appearance of bias. They find ways to cover up their bias and make it look as if they are impartial, but they really are not.

"On that subject, the Indian Agent, Anfield, was a member of the Anglican Church up the road from here; along with several members of the Board of the Shaughnessy Golf Club."

Events leading up to *Taku River Tlingit v. B.C.*

CHRONOLOGY
Created by Taku River Tlingit First Nation, 2004

June 1994: Redfern Resources Ltd. applies for a Mine Development Certificate to re-open the Tulsequah Chief Mine.

September 1995: The Taku River Tlingit Treaty negotiations begin.

July 1997: Redfern submits its final plan to the B.C. Environmental Assessment Office.

September 1997: Government officials and scientific experts from the U.S. and Canada, and members of the Taku River Tlingit First Nation are appointed to a project review committee.

1997-98: The Tlingit, Alaska, conservationists and residents on both sides of the border raise significant concerns about the potential impacts on water quality, fisheries, wildlife and communities. They call for the project to be halted until all issues are adequately addressed.

March 1998: The BC Environmental Assessment Office approves Redfern's application. Alaskan Governor Tony Knowles makes the first of several rejected requests for a project review by the International Joint Commission (IJC).

1999: The Tlingits challenge the project approval as undermining Constitutional aboriginal rights.

June 2000: The BC Supreme Court overturns the project's approval. The Province is ordered to "meaningfully" address Tlingit concerns and reconvene the Project Review Committee.

Late 2001: At BC government information sessions in Juneau, Atlin, and Whitehorse, significant concerns are raised about the future of the Taku River's rich fisheries, water quality and wildlife, and the overall sustainability of the mine project.

January 2002: The BC Appeal Court upholds the quashing of the approval, but says a review committee does not have to reconvene. The Province appeals to the Supreme Court of Canada.

June 2002: The Canadian Department of Fisheries and Oceans lists more than 100 outstanding environmental and other concerns involving the mine proposal.

December 2002: BC re-approves the Tulsequah Chief mine and road project, ignoring the clear instructions by the Appeal Court that TRTFN must first be adequately addressed.

February 2003: The Tlingits call on the federal government to uphold their rights.

November 2003: The BC First Nations Summit, and later the Council of Yukon First Nations, call on the Province to revoke its approval and ask the federal government to wait for the Supreme Court of Canada ruling before doing its own environmental screening assessment of the project.

March 2004: The Supreme Court of Canada hears case. The Canadian government ignores all requests to wait for the SCC ruling before proceeding with is environmental assessment process.

November 18, 2004: The Supreme Court is expected to release its decision, with the fate of the magnificent Taku River watershed hanging in the balance.

Events leading up to *Haida Nation v. B.C.*

Litigation BACKGROUND
released by Council of the Haida Nation, Spring 1995; November 1997; and January 2000

Spring 1995

The petition filed in BC Supreme Court says that the Province of British Columbia cannot lawfully replace or renew Tree Farm License 39 because the land that the license applies to is "encumbered" by aboriginal title. It goes on to say that the Province knows that the Haida people have asserted title to the lands in question. Yet the Province has done nothing to reconcile the interests of the Haida Nation with the Crown.

Block 6 of TFL 39 encompasses 236,000 hectares of land. Since MacMillan Bloedel and its predecessors began logging those lands in the 1950s, 80,000 hectares of old-growth forest has been clearcut. About 120,000 hectares of the remaining unlogged land in Block 6 cannot be logged due to steep and unstable terrain.

Logging on Haida Gwaii has well-documented impacts on resident salmon.

Much of the logging activity on the islands is taking place in large industrial forest tenures that were granted to forest companies without consulting or seeking the approval of the Haida Nation. The Haida people have never surrendered the lands constituting Block 6 of TFL 39 by treaty or otherwise.

In 1961, the Province granted MacMillan Bloedel TFL 39. The license gave the company long-term and exclusive logging rights to a vast area of forest that includes approximately one quarter of the traditional lands of the Haida people. The TFL was replaced in 1981. In December 1987, the Province amalgamated TFLs 39 and 7. The amalgamation was backdated to 1961 and extended for a 25-year term. In 1995, the license was renewed for another 25-year term. Despite the repeated requests of the Haida Nation, the Province did not consider Haida interests.

Last October, the Province approved the change of control of TFL 39 from MacMillan Bloedel to Weyerhauser Inc. Once again, no meaningful consultation with the Haida Nation took place with respect to the approval.

The latest license renewal could allow Weyerhauser to log up to 1.2 million cubic metres of timber per year on Haida Gwaii. The Council fears this will cause irreparable harm to traditional lands...

November 10, 1997

The Haida Nation won a decision in the BC Court of Appeal that has profound implications for BC's tree farm license system and First Nations' rights to the forests. The decision recognizes that Aboriginal title to the land includes an interest in forests and that the Aboriginal rights of the Haida may include a legal right to trees. The exclusive nature of tree farm licenses is clearly incompatible with the legal interest of Aboriginal rights.

The Court of Appeal's decision addresses whether Haida rights constitute an encumbrance under the *Forest Act*, but does not strike down TFL 39. The decision overrules an earlier decision.

~

January 13, 2000

The Council of the Haida Nation has filed a petition in BC Supreme Court challenging the province's authority to transfer a tree farm license agreement from MacMillan Bloedel to Weyerhauser... without the consultation or approval of the Haida Nation.

"...the Government still does not accept that we have a legitimate interest. That must be corrected."

In the last five years for which data is available, Weyerhauser's predecessor logged more than 4.4 million cubic metres of wood on the islands... worth $566.8 million on the Vancouver log market.

The continued logging of red cedar trees is of particular concern to the Haida nation. TFL 39 also encompasses important cultural sites including villages, camps, and cedar use areas.

"The fate of the land parallels the fate of the Haida cultural heritage," says Guujaaw, President of the Council of the Haida Nation.

Taku River Tlingit have taken independent steps to defend their laws and jurisdiction

Taking the initiative, Taku River Tlingit linked with Kaska and Tahltan in the Stikine Wholistic Working Group in 2009. The three Nations' land base is one third of BC's asserted boundaries.

"We are stronger together," they explained of the 3 Nations Society.

In 2015, the Society engaged in a reconciliation plan with BC.

More recently, Taku River Tlingit First Nation has had to take action upon failures of the Province to protect and accommodate their interests.

In a series of press releases, the First Nation has defended its jurisdiction and values, and asked for the cooperation of area residents as well as other Indigenous organizations' solidarity.

Continuing incursions of claimed crown and provincial rights have been dealt with by information notices, after meetings did not produce satisfactory results for Taku River Tlingit.

In July 2023, TRTFN announced action against Doubleview Gold Corporation for violations of Tlingit Laws.

In response to unauthorized mining activities at the Hat Property, where Doubleview harmed a culturally significant archaeological site and recklessly endangered a protected wetland through their exploration activities, Taku issued a Stop Work order.

The company was prohibited from performing any further exploration or mining activities there, pending the requirement that, "Any project proposed within our territory must comply with Taku River Tlingit law, which includes the TRTFN Mining Policy. Central to these laws is the obligation to seek and obtain Taku River Tlingit consent."

Clarifying the laws of the land, the T'akú Tslatsini Indigenous Protected and Conserved Area (TIPCA) was officially declared in January, 2023, to preserve Lingít kusteeyí - the Tlingit Way of Living - while providing opportunities for sustainable land-based practices in the Atlin-Taku region.

TRTFN communications clarify that they "welcome collaboration on projects that foster sustainable economic opportunities aligned with Taku River Tlingit cultural values, and has celebrated consent-based agreements with several responsible companies within its Territory where that collaboration is carried out meaningfully."

A month later, last year, Taku River Tlingit called for immediate action to protect vulnerable moose populations "placed at risk by the BC Government."

The government decision to license extensive hunting in the area, "came as a shock after TRTFN and BC representatives had been in discussions for several months to identify hunting restrictions given substantive scientific evidence and traditional knowledge showing the population's continued decline, with extremely low bull moose numbers and low calf productivity. "During those discussions, BC officials acknowledged conservation concerns and the negative impacts of the current hunting permissions on food, social, and ceremonial harvests."

Taku River Tlingit were led to believe that talks would result in regulatory changes. Data showed that 76% of all bull moose in the local, accessible hunting area east of Atlin were harvested by BC-licensed hunters in 2022, when 10% harvest rates are the provincial standard.

The nation made an appeal by press release to local hunters to respect their laws and conservation efforts, and, "Finally, we ask other Indigenous Nations who are also struggling to address wildlife declines in their territories to please reach out to our Nation and support us."

All this and more information is provided at www.trtfn.com

Gaagwiis, President of the Council of the Haida Nation, discusses consultation

On November 15 2024,
Haida Nation, CIRNAC and the Canada School of Public Service presented a live stream discussion, "Reflections on the 2004 Decision on the Crown's Duty to Consult." Here are excerpts:

Question: *How has this decision changed the relationship between Indigenous Peoples and the crown?*

CHN President Gaagwiis:

The ruling and decision has been primarily positive in clarifying what is the responsibility of the crown to meaningfully consult and engage and accommodate the Nations in their territory. Its not just for the benefit of the company or the government: the Nation needs to be involved in that process, needs to benefit, in terms of having a say in what happens on their lands and in terms of economic benefits. It means bringing everyone into the room in a meaningful way that is backed by the courts. If that's not happening, it can be challenged, it can be brought back to the courts, but the courts are encouraging the government to negotiate in good faith with the Nations.

…There also have been some negatives. In some instances, the title and the consultation and accommodation has been more heavily on the economic side of the issue, to the degradation of the landscapes in some territories.

We have been depressed economically over the years and dependency situations have been created where our people need jobs, we need economy. It could be viewed that there is some duress in that relationship: major developments and major projects will have long-term harm to the land.

In our case, our approach has always been that first and foremost, title and consultation and accommodation needs to look after the territory and the land *first,* and the economics are a lesser part of that which you're trying to balance. But I think it has been used to promote more business partnerships than necessarily acknowledging title and jurisdiction over landscapes.

Question: *Are there other negatives or positives? So communities have to pick economic opportunity or preservation of the land, or is there a way to better balance that?*

CHN President Gaagwiis:

It also opens up opportunity for a broader discussion of the history and some of the context of BC and Canada. Overall, that's positive: these conversations are happening where they were not happening before.

What we can see is that environmental assessment processes, investment decisions, business, government relations – it can cause division and harm to people and community and the land if it isn't done in a good way, in the right way, which essentially needs the proper time and space to work through the challenges in that area.

The *Indian Act* system is imposed on Nations who have their own political and legal structures. We're all revitalizing and rebuilding our traditional structures. The Indian Act and the Band system have some good people in it, who are trying their best to improve their communities, they're doing their part in helping their people, but as a system – as an imposed system – it has created tension and caused division between hereditary or cultural systems, our original systems, and this imposed system.

The pressure to help improve lives and jobs and economic systems, the systems that are in place,

"What we can see is that environmental assessment processes, investment decisions, business, government relations – it can cause division and harm to people and community if it isn't done in a good way, in the right way, which essentially needs the proper time and space to work through the challenges in that area."

President of the Council of the Haida Nation, Gaagwiis, 2024. Photo courtesy of Haida Communications.

impose timelines. They impose a structure with silo-ed ways of looking at things, they're not looking at the whole picture.

They are forcing people to decide what their governance *is*, while in a situation of duress because there are major decisions looming where there's a lot at stake in terms of potential economic investment in Canada. They need the time and space to create the proper structure to work through, in order for Indigenous Peoples to be ready to entertain some of these things in a good way that will be in their best interests in the long-term.

Everyone needs to be mindful of that. All the history, all the trauma, Canadian policies, the results of Indian Residential School: that stuff is alive and well and it does come up into these processes some times.

I just had a call this morning with the Impact Assessment agency, around a major LNG project here, and even in that, the impact on Haida territory includes the shipping impacts. But we're also concerned about the greenhouse effects, climate change, but in this case there's a process: it's one little box that we're looking at and it's not considering impacts over time.

The marine space needs this principle of consultation and accommodation – not just the land. That's not always familiar, nation-to-nation.

You need to see the whole big picture, and not put separate issues in silos, and have the time and space to implement consultation and accommodation in a good way.

~

An overview of consultation

as the procedural right evolved in the courts

The duty to consult is an aspect of Canada's "fiduciary duty."

Canada operates on the premise that the Crown of Britain became sovereign over all Indigenous Nations when its explorers and fur traders showed up here.

Britain made treaties with Spain, Russia, and the USA regarding the Pacific Northwest, or the "Oregon Territory" as it was also called. Those European treaties excluded all but Britain from making treaties and trading with Indigenous Peoples.

The "fiduciary duty" is one of care; trust; and fair and equitable dealing. It arises because the British crown had just isolated the Indigenous from the global free market by force of its might against other Europeans.

Having blocked or embargoed other international relations, honour would not permit the sovereign to deal sharply, to coerce a sale, nor to deny the Original Inhabitants their rights.

Agents of the crown, however, did not uphold this honour.

Today, the crown's courts suggest that two centuries of trespass can be made right by restoring the right of First Nations to first be consulted by government agents, before the government makes decisions that affect their lands, interests, and rights.

This arrangement is not consensual. The following excerpts highlight how courts have defined it.

Guerin v. The Queen
MUSQUEAM
[1984] SCC

Musqueam's Chief Delbert Guerin and Councilors sued the government after its agents leased Band reserve lands to a golf course on less favourable terms than what the people had approved.

Aboriginal interest does not amount to beneficial ownership

The Supreme Court of Canada said that Aboriginal Peoples have a "legal right to occupy and possess certain lands, the ultimate title to which is in the Crown."

In dealing with the Aboriginal interest, the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly, and to consult thier interests in order to do so, but, "Any description of Indian title which goes beyond these two features is unnecessary and potentially misleading."

the crown's fiduciary duty requires consultation

R. v. Sparrow,
MUSQUEAM
[1990] SCC

Ronald Sparrow of Musqueam was fishing with a wider net than government regulation allowed. He was charged in 1984, and convicted in a BC court of fishing with restricted gear.

He appealed, maintaining his Aboriginal right to fish for food, and that it cannot be infringed by provincial or federal legislation. However, his lawyers conceded in pre-trial motions that "conservation" takes priority over Indian food fishing, as had just been contemplated in *Jack*, 1980, SCC.

The court found a new general principle: that infringement of Aboriginal rights can be justified, if there is a valid objective.

Aboriginal rights can be infringed with "justification"

Sparrow's conviction was set aside; his appeal dismissed; and the case sent back to trial, to answer the question: could the fishing legislation be *justified* in *infringement* of potential rights, according to the new principle? He would have to be consulted.

Ryan v. Ft. St. James Forest District M'ger
GITXSAN [1994] BCCA

After winning the right to appeal the 1991 decision in *Delgamuukw,* the Gitxsan and Wet'suwet'en both agreed to negotiate with BC towards a lands management agreement - instead of going immediately to the Supreme Court of Canada. They both entered the BC treaty process.

During negotiations, BC continued to license logging in the claimed title areas. Eventually, the Gitxsan refused to continue to meet with forestry officials, to be consulted on a permit-by-permit basis, until the overall lands management process had reached a workable level of agreement. They blocked the rail line to stop logging access when talks failed.

the Province can force consultation to fulfill procedural duties required to allow logging

Gitxsan Chiefs knew that consultation would not stop the logging, and the meetings and information sharing were being conducted to create procedural justification.The judge declared the Gitxsan unreasonable and ruled in favour of logging, based on the District Manager's attempt to fulfill the fiduciary duty confirmed in *Delgamuukw* 1991: the obligation to consult.

Delgamuukw v. The Queen
GITXSAN, WET'SUWET'EN [1997] SCC

In only the second case suing for native title to reach the Supreme Court of Canada, the Gitxsan and Wet'suwet'en house Chiefs sued Canada for recognition of their jurisdiction and title over unalienated Crown land, appealing from the BC Supreme Court's damaging ruling in 1991.

The SCC's decision was elaborate: "When the Crown imposed English law ... the Aboriginal people became subject to Canadian (and provincial) legislation. *The claim to jurisdiction failed."*

The court expanded on the *Sparrow* case to explain infringing Aboriginal rights, of which title is considered one, with justification:

"...the general development of the interior of British Columbia, including agriculture, mining, forestry, hydroelectric power, as well as the development of infrastructure and the settlement of foreign populations are valid legislative objectives that, in principle, satisfy the first part of the justification analysis. Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples' interests.

"This accommodation must always be in accordance with the honour and good faith of the Crown. ...not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. .

"Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory.

...Another aspect of accommodation is fair compensation. ...the treatment of "aboriginal title" as a compensable right can be traced back to the *Royal Proclamation, 1763*."

accommodation of Aboriginal interests follows consultation, mitigating infringement.

An aspect of accommodation is fair compensation.

The highly anticipated ruling added to the theory of Aboriginal title, which also created a duty to consult, although the court did not make any finding of title, and no declaration of title.

Instead, the court identified a long list of justifiable infringements of Aboriginal title lands, when and if Aboriginal title should ever be proven.

Halfway River v. BC
BEAVER / TREATY 8
[1999] BCSC

Aboriginal peoples cannot *frustrate the consultation process* or impose "unreasonable" conditions

The Halfway River people are partners of Treaty 8. They have a treaty right to hunt on the land adjacent to their reserve, where logging plans were approved in spite of major impacts to wildlife from development already.
Among many other arguments, they said logging would impact and infringe their hunting rights under the Treaty, unjustifiably.
The Province's approach to their treaty was to take up as much land as it wished, developing it and extracting resources, to the point where the treaty rights were useless: the land and animals being destroyed.

The judge remarked, "It is also clear from the evidence that the conduct of the Ministry of Forests with regard to this matter has been characterized by bad faith, bias, incompetence, unprofessionalism, and errors of fact, law and jurisdiction so numerous that to summarize would require several pages."
However, the ruling forced compromises on the treaty rights holders.

Kitkatla Band v. BC
[2002] SCC

The village of Lax Klan, also known as Kitkatla (Gitxaala), is considered one of the oldest village sites on the coast.

In consultation, Kitkatla representatives identifed dozens of Culturally Modified Trees which should not be cut in a logging plan under discussion. The District Manager approved a plan to cut half of them, and did so.

It was in protest of that decision that this case arose, with Kitkatla Village objecting strenuously.

The judge defended the Manager's decision as procedurally correct.

BC District Managers can take decisions to infringe Aboriginal rights once consultation and, when reasonable, accommodation have occurred

Indigenous Peoples have been decades, if not a century-and-a-half, ahead of the colonial courts.

Since contact they proposed engagement, or consultation processes, for Indigenous and settler leaders to make decisions.

While that Indigenous policy priority continued throughout *their* interactions, the government has denied invitations to cooperate and finally been instructed to consult - about everything - by the crown's own courts.

Repeated invitations went unanswered, resulting in statements such as this:

A Declaration of B.C. Indian Rights
Union of BC Indian Chiefs
November 17, 1970

5. Reconciliation of injustices done by the imposition of restrictions by all forms of Federal and Provincial legislation.

6. Complete and continued consultation with us during revision of pertinent legislation, and in setting policy on all matters affecting Indians by both senior governments including revision and alteration of existing programs.

The following two cases were decided together, as they both concerned application of previously identified government duties to consult and accommodate.

Haida Nation v. British Columbia [2004] SCC

The province transferred a forestry license without consulting Haida, and over their strenuous objections. In a double-edged ruling, the SCC confirmed the BC court's proposal that the provincial crown can infringe Aboriginal rights, with justification, and consultation is one of the tests the government must meet in order to justify that infringement.

consultation is required by government when action can affect unproven Aboriginal rights

They said, "the duty to consult and accommodate, prior to proof of interests, is proportionate to the strength of the claim, and the seriousness of the potentially adverse effect upon the right or title claimed."

The government has an obligation to consult at every stage where a test to justify infringement would require effective consultation.

Taku River Tlingit v. British Columbia [2004] SCC

The People were consulting with Ministers and proponents regarding mining and access road building in their hunting grounds. Their interests were not being accommodated. They took legal action to improve their position, and the court further articulated the crown's duty, while enforcing Indigenous participation in the process which, by now, had a very bad reputation.

"The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. … the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act*, 1982, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship

Aboriginal peoples must engage in consultation and respect the results of the process
and
accommodation of Aboriginal interests will be decided in that same process
and
the Province is not duty-bound to reach agreement

with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."

The "Taku test" is described: "The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them." Accommodation happens in the development of plans, while the courts provide recourse for inadequacies in the procedure. The Court also stated that the Province was not under a duty to reach agreement with the First Nation and its failure to do so did not breach its duty of good faith consultations.

Department of Justice Canada | Ministère de la Justice Canada

Solicitor-Client Privilege
December 17, 2004

Following the decisions in *Haida* and *Taku,* Canada's Department of Justice issued this memo across government departments:

CROWN CONSULTATION WITH ABORIGINAL GROUPS
Supreme Court of Canada Decisions in *Taku* and *Haida*

On November 18, 2004 the Supreme Court of Canada ("SCC") released its decisions in the cases of *Ringstad & B.C. Minister of Environment et al v. Taku River Tlingit First Nation ("Taku"),* and *B.C. Minister of Forests v. Haida Nation et al ("Haida").* These decisions are unique in that they affect almost every department across government. Consultation with Aboriginal groups is a truly horizontal issue.

Both decisions were unanimous. Both cases involved lands subject to claims of Aboriginal rights and title. The Court ruled that the Crown has a legal duty to consult and, where indicated, to accommodate the concerns of Aboriginal groups when the Crown has knowledge of the potential existence of an Aboriginal right or title, and contemplates conduct that might adversely affect it. The duty to consult is grounded in the honour of the Crown. The scope of consultation, and if appropriate, accommodation, will vary depending on the circumstances. There is no duty on third parties, such as private industry, to consult with First Nations as to potential Aboriginal rights. The Court appears to be telling governments that reasonable good faith efforts to reconcile with Aboriginal peoples will be respected if Aboriginal peoples are appropriately engaged.

The purpose of this document is to provide you with (1) a summary of the decisions, (2) their general implications and (3) some initial guidance on how to proceed in the short term.

DECISIONS IN BRIEF

The SCC held that the Crown has a legal duty to consult and to accommodate, if indicated, when the Crown has knowledge of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it. The scope of the duty will vary depending on the circumstances. The duty applies to both the provincial and federal governments.

The duty to consult is grounded in the honour of the Crown.

The government's duty to consult with Aboriginal peoples and to accommodate their interests is grounded in the honour of the Crown which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The honour of the Crown must be interpreted generously and must be given full effect in order to promote the process of reconciliation between the Crown and Aboriginal peoples as mandated by s. 35(1) of the *Constitution Act, 1982,* which recognizes and affirms the existing rights of the Aboriginal peoples of Canada.

Solicitor-Client Privilege
December 17, 2004

When does the duty arise?

The Court held that the duty to consult arises when the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it". Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. To facilitate this determination, claimants should outline the nature and scope of their claims and the alleged infringement with clarity. Difficulties associated with the absence of proof and definition of claims should be addressed by assigning appropriate content to the duty, not by denying the existence of a duty to consult.

The scope and content of the duty will vary with the circumstances.

The content of the duty to consult varies with the circumstances. In other words, the scope of the duty will be proportionate to a preliminary assessment of the strength of a claim and the seriousness of the potential adverse effect of the planned government activity.

The SCC held that the kind of duties that the Crown may have exist on a spectrum. At one end of the spectrum, where an Aboriginal claim is relatively weak and the potential infringement is minor, the Crown's duties may be limited to giving notice, disclosing information and discussing issues with the Aboriginal group concerned. The Court notes that "a dubious or peripheral claim may attract a mere duty of notice." At the other end of the spectrum, where a strong *prima facie* case for a claim is established and the potential infringement is severe, deeper consultation may be required. The Court stated that this may entail giving an Aboriginal group the opportunity to make submissions to the decision-maker, to formally participate in the decision-making process and provide the Aboriginal group with written reasons to show how Aboriginal concerns were considered.

The focus is on the establishment of a "meaningful process of consultation" that is appropriate to the circumstances. Consequently, each situation must be approached individually and flexibly to ensure that the honour of the Crown is maintained and that reconciliation of Aboriginal and Crown interests is achieved. In all cases, the honour of the Crown requires the Crown to act in good faith to provide meaningful consultation appropriate to the circumstances. Good faith on both sides is required. Aboriginal claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions where agreement is not reached. The legal duty on government to consult does not give Aboriginal groups a veto over what can be done with land pending final proof of a claim.

It is also stated that accommodation may require governments to change proposed plans or amend government policies in order to address Aboriginal concerns raised through consultations. Accommodation is achieved through consultation and negotiation and the objective is to minimize the adverse effects of the proposed action. However, the Court clearly says that in accommodating and addressing Aboriginal concerns, it is not necessary for the parties to come to an agreement.

Solicitor-Client Privilege
December 17, 2004

The Crown cannot delegate its obligation to consult.

> The Crown may delegate procedural aspects of consultation to industry proponents of a particular development. However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

IMPLICATIONS

The decisions will have significant policy, operational and financial implications for government. It is not business as usual and departments must consider the implications within their departments and across government. More than one department may be involved in consultations with a particular Aboriginal group within their area of jurisdiction. Consequently, it will be necessary that all departments have the same information and act consistently. It will be an incredible test of communication and coordination for government. Without this consistency, the Crown cannot hope to act honourably and fulfil its legal obligation to consult. Without this consistency, an increase in litigation on consultation issues is inevitable.

> The *Taku* and *Haida* decisions make it clear that the legal duty to consult is much more than a duty just to listen to Aboriginal peoples when they are consulted. As the Court said, "responsiveness is a key requirement of both consultation and accommodation."

Some comments by the Court are instructive:

- The Court observed that the BC government's policy on consultation with First Nations, which is publicly accessible, may guard against unstructured discretion and provide a guide for decision makers.

- The Court quoted the New Zealand Ministry of Justice's Guide For Consultation with Maori as providing insight, and quoted from it, including: "Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed."

- The Court said that it is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

- The Court also said that governments may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

Departments can expect that Aboriginal groups will request more consultation on departmental initiatives and this will have financial implications for departments. Additionally, departments can expect to receive requests from Aboriginal groups to fund their participation in consultation processes. The SCC stated that it has only provided a general framework for the duty to consult and accommodate, and that the courts will be called upon to fill in the details of the duty. It is therefore anticipated that further litigation on this issue will continue, which speaks to the need for a coordinated federal approach to consultation to manage this risk.

Solicitor-Client Privilege
December 17, 2004

When does the duty arise?

The Court held that the duty to consult arises when the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it". Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. To facilitate this determination, claimants should outline the nature and scope of their claims and the alleged infringement with clarity. Difficulties associated with the absence of proof and definition of claims should be addressed by assigning appropriate content to the duty, not by denying the existence of a duty to consult.

The scope and content of the duty will vary with the circumstances.

The content of the duty to consult varies with the circumstances. In other words, the scope of the duty will be proportionate to a preliminary assessment of the strength of a claim and the seriousness of the potential adverse effect of the planned government activity.

The SCC held that the kind of duties that the Crown may have exist on a spectrum. At one end of the spectrum, where an Aboriginal claim is relatively weak and the potential infringement is minor, the Crown's duties may be limited to giving notice, disclosing information and discussing issues with the Aboriginal group concerned. The Court notes that "a dubious or peripheral claim may attract a mere duty of notice." At the other end of the spectrum, where a strong *prima facie* case for a claim is established and the potential infringement is severe, deeper consultation may be required. The Court stated that this may entail giving an Aboriginal group the opportunity to make submissions to the decision-maker, to formally participate in the decision-making process and provide the Aboriginal group with written reasons to show how Aboriginal concerns were considered.

The focus is on the establishment of a "meaningful process of consultation" that is appropriate to the circumstances. Consequently, each situation must be approached individually and flexibly to ensure that the honour of the Crown is maintained and that reconciliation of Aboriginal and Crown interests is achieved. In all cases, the honour of the Crown requires the Crown to act in good faith to provide meaningful consultation appropriate to the circumstances. Good faith on both sides is required. Aboriginal claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions where agreement is not reached. The legal duty on government to consult does not give Aboriginal groups a veto over what can be done with land pending final proof of a claim.

It is also stated that accommodation may require governments to change proposed plans or amend government policies in order to address Aboriginal concerns raised through consultations. Accommodation is achieved through consultation and negotiation and the objective is to minimize the adverse effects of the proposed action. However, the Court clearly says that in accommodating and addressing Aboriginal concerns, it is not necessary for the parties to come to an agreement.

Note that this guideline was updated in: "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult," March 2011, Department of Aboriginal Affairs and Northern Development, Canada.

Huu-ay-aht v. BC
MAA-NULTH
[2005] BCSC

Huu-ay-aht exposed, in this case, the high-jinks involved in order to receive any economic benefits from logging on its territory, under the Forest and Range Agreement (FRA) scheme (a government program launched to mitigate crown duties identified in *Haida* and *Taku*). Under the scheme, the Province requires a First Nation to agree that the requirements of consultation - a long list of decisions which authorize the infringement of title and rights - has been met. After entering into a FRA, the Ministry makes administrative decisions that affect the title and rights of the First Nation without further consultation.

the government FRA program "is not reflective of the sufficiency either of the consultation process or of the accommodation offered."

Cook v. BC *(Minister of Aboriginal Affairs and Reconciliation)*
SEMIAHMOO, TSARTLIP, TSAWOUT, PAUQUACHIN
[2007] BCSC

The petition for an injunction against the first "modern day treaty' came on the eve of the signing of the Tsawwassen Final Agreement. Chief Cook and the adjoining petitioners had very strong claims to title and rights in areas being negotiated in the Tsawwassen Final Agreement, but the judge decided:

the duty to consult would be activated by implementing the Final Agreement, not while negotiating

and, "If the results of that consultation identify infringement that requires accommodation, the Crown will have to seek acceptable forms of accommodation."

"Failing all this, the petitioners will still be able to seek the appropriate remedy from this court." The petition was dismissed.

the Agreement does not affect S. 35 rights of any Aboriginal people other than Tsawwassen

Douglas
STO:LO **[2007]** BCPC

It was found that the Department of Fisheries and Oceans had not only fulfilled their duty to consult, but also upheld their obligation to the aboriginal food fishing priority when they opened a sports fishery on Early Stuart sockeye in the Fraser River, five years earlier.

DFO had faxed and telephoned a few invitations to Cheam, to meet and consult on the subject, prior to the recreational fishery openings. Cheam had not been able to participate in the processes on the schedule DFO offered.

The ruling in this case found that the fact that DFO offered meetings fulfilled their duty to consult and accommodate. Since the Department has the privilege of managing the fishery, no notices of later management changes were necessary.

The case arose as a fishing charge against a Cheam member who went fishing at the same time as the recreational opening, contrary to the DFO's allowed dates for food, social and ceremonial fishing.

an unreturned phoncecall fulfilled the duty to consult

West Moberly v. British Columbia

TREATY 8

[2011] BCCA

Suing the province for cumulative impacts to their hunting grounds and other fishing and gathering areas, the First Nation showed that "consultation" had no effect on the District Manager's plans, and the Province's approach to "accommodation" has led to a state where there is not enough wildlife, fish, or food plants to support the people and fulfill the crown's treaty obligations.
West Moberly's rights in the resources in that area were part of Treaty 8.

the Province's approach to "consultation" is nothing more than a chance for the First Nations "to blow off steam"

Tsilhqot'in Nation v. BC

[2014] SCC

The first ever declaration of Aboriginal title on the ground was made 41 years after *Calder,* in *Tsilhqot'in*. The Tsilhqot'in established Aboriginal title in the Xeni Gwetin community's claim area.

The court undertook substantial developments in describing Aboriginal title, impacting the matters of consultation and accommodation:

provincial laws of general application apply on Aboriginal title lands.

and

Aboriginal title lands may be infringed by the Province with justification

and therefore

the question of federal / provincial jurisdiction is of no consequence

Ktunaxa Nation v. British Columbia

[2017] SCC

After consultations about development of a ski resort in the Qat'muk mountaintops, the Home of the Grizzly Spirit and central to the Ktunaxa religion, the Ktunaxa launched litigation when they saw the plan would not accommodate their need to protect the sacred area.

The decision was made and the license granted that the resort to go ahead. The court ruled, "The Minister's decision is reasonable, however, because it reflects a proportionate balancing between the Ktunaxa's s. 2(*a*) *Charter* right and the Minister's statutory objectives: to administer Crown land and dispose of it in the public interest."
The court also said:

"while claims are resolved, consultation and accommodation are the best tools for reconciliation."

William
TSILHQOT'IN
[2019] BCCA

Continuing to reject the Prosperity gold and copper mine at Fish Lake, the Xeni Gwetin community was required to continue to attend meetings of consultation.

The proposed mine, expected to produce millions of ounces of gold and copper, is in the heart OF this commuity's breadbasket; in an area that the 2007 BCSC ruling found the Tsilhqot'in people have Aboriginal rights throughout.

Aboriginal rights holders must abide consultation processes

There is no version of the proponent's mining plans which accomodates Tsilhqot'in interests. Consultations have been ongoing since at least 2007.

Gamlaxyeltxw v. BC
GITANYOW
[2020] BCCA

Gitanyow Chiefs contested the Province's right to exclude them from annual plans for moose hunting on their traditional territory.

BC concluded a modern day treaty which substantially includes Gitanyow lands, the Nisga'a Final Agreement, 2000, without discussing the shared or overlapping claims with Gitanyow - and while negotiating with Gitanyow over the same lands

In 2016, Gitanyow asked for the Nisga'a moose hunt to be reduced. Gitanyow claims of Aboriginal rights in thier *Lax'yip* are well known to the Province and Nisga'a, as the lands overlap. But the judge decided:

the Province may not abrogate the rights of modern Treaty First Nations in favour of other Aboriginal rights holders

The Minister, the Nisga'a, and the judge also decided that the moose harvest in the Nass Wildlife Area (which is also most of the Lax-'yip), would not affect any Gitanyow rights and they therefore need not be consulted.

Gitxaala v. BC
TSIMSHIAN
[2023] BCSC

In 2005, the BC Ministry of Mines started up an online registration process to facillitate thousands of placer and subsurface mineral claims. Anyone can purchase these claims without ever consulting the Indigenous title holder.

After many kinds of protest, including by a Chief who went online and bought the mineral rights to the Minister for Mines' private house, the Gitxaala and Ehattesaht Nations secured a judicial ruling that this conduct is in breach of the crown duty to consult.

The plaintiffs shored their case with the UNDRIPA, but the judge replied:

The federal *UN Declaration on the Rights of Indigenous Peoples Act* is not legally enforceable

The court has consistently ruled that government infringement of Aboriginal title and rights can be justified - after the procedural rights of consultation and accommodation have been upheld.

The courts have clarified that reaching agreement with First Nations is not necessary to fulfill the procedural duty.

The question arising appears to be, is this procedural right different than forcible assimilation?

Thomas v. Rio Tinto Alcan

SAIK'UZ, STELLAT'EN

[2024] BCCA

First Nations have been attempting to mitigate the harm caused by the Kenney Dam, ever since it was built in 1952 for the Alcan aluminum smelter. The reservoir flooded their villages and they were forced to leave with none but a few days, even hours, notice. Previously, legal action against Rio Tinto Alcan in 2010 resulted in the Supreme Court of Canada sitting on a decision that the people can't be consulted on and effect change to impacts that have already happened.

The *Thomas* case aimed at the ongoing effect that this hydropower operation has on the Nechako River, the fish, and the impact on the rights of the people who rely on them.

They won judicial recognition of their Aboriginal right to fish throughout the Nechako watershed. Only a handful of First Nations have won judicial recognition of an Aboriginal right to fish, although many have tried.

governments have a fiduciary duty to protect established Aboriginal rights by consulting

With the newly declared right to fish in the Nechake watershed, Saik'uz and Stellaten won recognition of the government's duty to consult each time the Environmental Assessment Agency engages in processes to approve a water use plan for the dam.

1994

Sovereignty Peoples Information Network

Answers a Questionnaire
Prepared for the UN Study
on Treaties and Agreements
between States and Indigenous Peoples

With UN Special Rapporteur Miguel Martinez, Seattle, September 11, 1994

Overview of Study on treaties and agreements with indigenous peoples
From "The Rights of Indigenous Peoples," United Nations Human Rights Fact Sheet No. 9, reprinted Nov. 1992:

The relations between indigenous peoples and the Governments of the countries in which they live in many cases have a legal foundation in treaties, agreements and other arrangements.

Some treaties stand the test of time, providing a basis for peoples with different backgrounds and cultures to live in harmony. Others have been disputed as unfairly negotiated or because treaty rights have been breached and obligations unfulfilled.

Many of the treaties carry a great meaning to indigenous peoples. They are seen as providing recognition of indigenous self-determination, and a guarantee of the collective rights of the peoples concerned.

For all these reasons, the Economic and Social Council in 1989 authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint Mr. Miguel Alfonso Martinez, a member of the Working Group on Indigenous Peoples, as Special Rapporteur with the task of writing a study on the potential utility of treaties, agreements and other constructive arrangements between indigenous peoples and States.

S.P.I.N. was coordinated by Lawrence Pootlass, Headchief, Nuxalk Government - House of Smayusta; William Ignace, Secwepemc; Harriet Nahanee with the Patcheedaht Nation; Lavina White, Haida; James Louie, Líl'wat; Glen Douglas, Jeanette Armstrong, and Bob Campbell with Sukinakain Nation; Pierre Kruger, Sinixt; and others.

16. What is the position of your organization with respect to the principles and norms that govern the interpretation of treaties and other instruments?

Answer: Canada has never honoured its obligations under the 1763 Proclamation and the arrangements it made as Canada to interpret S. 91(24) of the *British North America Act* 1867, and now Sec. 35 of the Canada Act toward a possible new constitution. It was done without approval or consultation with any peoples of non-treaty areas of what Canada now calls British Columbia, including those peoples whose land and rights have been intruded upon by the US/Canada international boundaries.

If Canada is acting under the principles and norms that govern the interpretation of the instruments created by Britain, then we abhor and demand they be changed.

19. What measures have indigenous peoples and organizations undertaken to resolve situations of conflict arising from treaty, or non-treaty, relations with States?

Answer: These are measures taken by our peoples and organizations to resolve situations of conflicts...

1. We continue to object to intrusions on our homelands, resources and our lives

2. We continue to practice our own governance - language, customs, spirituality - and continue to teach it.

3. We continue organizing, recognizing and upholding each other's sovereignty.

17. Would you be willing to make a new treaty today with the national Government?

Answer: No. ...our sovereignty originates from our Creator and was conveyed to us when he placed our people in our territories on this island, North America. We were given instructions under which our people have lived in good health since time immemorial. Our spirituality is a sacred trust. It is through our values that we live under the instructions of the Creator. Our values form the foundation of our survival. Therefore our first responsibility is to protect our spirituality.

Our people are a sacred trust. Countless generations to come will carry the trust of our values from one generation to the next to keep it a living thing. ...Therefore, our third responsibility is to protect our culture.

The land is a sacred trust. Our knowledge and customs are understood and practiced through our relationship to our land, and in that way it protects and ensures our survival. Therefore, the land is the living body of our spirituality. It is our mother, nourishing us in all ways, physically, spiritually, mentally and emotionally. Therefore, our fourth responsibility is to protect our land. We hold these truths to be the truth upon which we stand as one. We have never sold the title to our lands or the rights to its use or the resources on it. We have never made any agreements that gave any other nation the right to take any of our lands or resources into their possessions.

We have never lost a war with any other nation. Therefore, no other nation may claim any of our lands by conquest.

We have never consented to join or become subjects of any other nations of the world. We will never surrender our rights to carry out the aforementioned instructions and responsibilities conveyed to us by our Creator. We will never betray our children. We will never consent to extinguish or surrender our sovereignty to any other nation of the world.

Because at this time, these governments of Canada and the US have neither the capacity nor the intent to honour or respect any of our Nations in their right to be peoples with full self-determination.

We will not participate in our own genocide or termination.

---

23. Do you have any suggestions which would help define the future role of Indigenous treaties and other instruments?

Answer: Our suggestion to the Special Rapporteur is to terminate colonial government conventions, laws, practices, policies which are repugnant and which continue the oppression, aggressions, cooptation, neo-colonization and genocide of Indigenous peoples under the flags of convenience of world economic institutions such as IMF, World Bank, NAFTA, GATT, NATO, and to instate and to protect in perpetuity the absolute Indigenous sovereignty and to institute reparations for the damages incurred throughout the violations named above and invoke those applicable articles of the Principles of Nuremburg.

Additional information provided by SPIN for the Working Group survey, an excerpt from:
"A Past and Current History of Salient Points in British Columbia, Canada"

In what is now known as British Columbia, this treaty making process was never completed. James Douglas, the Governor of the Crown Colony of British Columbia had begun the treaty making process.

....In the Interior of BC, Douglas instructed reserve surveyors to lay out reserves to the extent "as they may be pointed out by the Indians themselves." The Interior Tribes did lay out large reserves besides keeping hunting and fishing and other resources on the land for themselves in those lands they were willing to surrender use of.

However ...the treaties were never formally enacted. Douglas' attempts to obtain treaties were necessary to begin the legal colonization of lands in B.C. There was a critical reason. The Civil War in the United States had created an anti-British feeling against Canada. In Southern BC, despite agreements and boundaries settled between them in the War of 1812, US merchants invaded and infringed on Britain's trade territory north of the 49th parallel because gold was discovered in the interior of British Columbia.

With fear of American takeover, in 1867, the British North America Act was passed by Britain's parliament, allowing the colonies in Canada to confederate to govern themselves and to protect their secured interests in right of the British Commonwealth. The BNA Act allowed the colonies to constitute a governing process separate from Britain's parliament, although remaining bound to it under its legislative authority. This is the constitution of Canada at this time.

Continued on back page

Introducing *Archive Quarterly*

Honouring the indomitable spirit of Indigenous Peoples, west of the Rocky Mountains.

This publication is the unexpected result of an ongoing investigation into Indigenous "roadblocks" in British Columbia.

Asking the questions, "what led up to a "stand-off" position?" and, "what has happened since then? Court case? Resolution? Conflict? Change?", the answer is that so many events contribute to the situation, amid such extensive acts of colonialism, concerning 26 distinct nations, that the result would be too long for a book; even a series of books.

That's where AQ emerges. This journal accompanies the research process as an intermittent communication; a curated cluster of materials that should be read together.

In the meantime, the collection of archival material and interviews has taken on a life of its own, both by being sought out and retrieved from forgotten places, and by being donated to the Roadblock project. The collection asks for its own rightful place, where people can access the evidence and information.

AQ is here to promote the work of keeping that history, west of the Rocky Mountains. It is also here to bring attention and support to creating a comprehensive and focused archive as will vindicate Indigenous land defenders and prevent further acts of genocide by promoting education, understanding, and memory among non-native people; and a fair future for Indigenous Peoples. And perhaps, then, an end to roadblocks.

With a clap of thunder for the people of the land; for the generosity and grace of the tireless indigenous instructors at the University of the Kitchen Table; with thanks to our supporters, and the hope you will benefit by and engage in this work,

Kerry Coast, editor.

In every issue:

Original sources *in Archival documents*
Touchstone essays *for context*
Related events *giving insight*
Quotes *for the ages*
Interviews *with the Elders*
Book reviews
Maps
Timelines
That Day in Court
Fact check
Anniversaries *to remember*
In print and digital copy: April, July, October, and January.

What can AQ do for you?

Online Collection

Digitization is an ongoing work in progress. As stored materials are retrieved and digitized, they are uploaded to www.thewestwasntwon.com where they are free to download. A subscription to that will help keep you advised on new entries and articles.

Deposit

The Archive Project is working to offer a safe repository for collections, original or copied. We can work together to preserve materials and digitize them, making them accessible to others.

Travelling Exhibits

Curated exhibits provide experiences of history in motion. A binder full of roadblock news clippings mimics a stop-motion film that transports the viewer along a somber narrative. Surround-displays of timeline pieces reveal the cyclical progress of relapsing affairs, particularly visible in a year-by-year diorama of the power struggle.

Research Assistance

The Archive is not publicly accessible - yet - but that's the goal! Meantime, contact AQ for more.

Special Issues

When today's news announces a change, or progress, it can be hard to put it in context. Providing detailed overviews, extra issues will focus on Aboriginal Title in the courts, the Non-Status Indian era, and Fisheries.

Take this QR key to follow, subscribe, reply, and find more archived resources:

In the Fall of 1994, the Sovereignty Peoples Information Network

went to Seattle to testify at a United Nations survey of treaties between Indigenous Peoples and states.

Within a year, five of their members were arrested, forcibly removed from their own land, detained, and convicted of criminal offences.

Here is part of what they said to Miguel Martinez, UN Special Rapporteur, in the Study on treaties and agreements with indigenous peoples:

Continued from page 50:

Canada is in the process of trying to construct a new constitution. In this process, it has taken the position that the "Indians" are Canadian subjects, somehow automatically, and come under the legislative will of Canada.

No treaty or arrangement or agreement or conquest supports this. The Royal Proclamation of 1763 affirms the opposite and confirms that ...western non-treaty Aboriginal Nations retain their full sovereignty and have the full statute authority of the Royal Proclamation in that.

Canada defines "Aboriginal and treaty rights" as a possibility, solely under the legislative authority of Canada, rather than co-existent separate nations having their own legislative authority.

Canada calls this process, "Self-government" and insists it is then to be negotiated away, village council by village council. It enforces its "Indian Act" through band councils, as "First Nations" rather than the Nation Groups, and thus alienates villages from each other and divides them from their total territory.

Through programs and finances, Canada maintains control of the band councils ... by curtailment of rights and distribution of assistance.

Since 1994, dozens more arrests and trials in BC have convicted Indigenous land defenders.

Top left: Ovide Mercredi and Percy Rosette at Gustafsen Lake, Secwepemc, 1995. Top Right, Chief Qwatsinas at Ista, Nuxalk, 1995. Left, Wolverine, at Gustafsen Lake, 1995.

Special Issue #1

Keep in touch for forthcoming issues! Archive Quarterly is brought to you by Electromagnetic Print. See inside for a full introduction.
Find out more about the archive project at thewestwasntwon.com

$17.63

ISBN 978-1-7387902-6-5