



FIRST NATIONS SUMMIT

Implementation of Jurisprudence Concerning Indigenous Peoples' Rights: *Experiences from the Americas - A Canadian Perspective*

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1.0 Executive Summary

While federal and provincial governments have historically denied the existence of Aboriginal peoples, title and rights, a new era of recognition was signaled by the enactment of sections 25 and 35(1) of the *Constitution Act, 1982* and establishment of the BC treaty negotiation process. Policies adopted by the federal and provincial government in response to court decisions regarding the purpose of s. 35(1) and the nature and scope of Aboriginal rights and title protected by this provision also appeared to signal a new era of recognition.

Despite this seemingly new era of recognition, there is evidence of a continued denial of the existence of Aboriginal peoples and Aboriginal and treaty rights by the federal and provincial Crown.

The provincial Crown, and to a lesser extent, the federal Crown have advanced arguments that deny the existence of Aboriginal peoples, Aboriginal title and Aboriginal rights in litigation with First Nations in British Columbia. Defences advanced by the federal and provincial Crown range from an outright denial of the existence of Aboriginal peoples, title and rights to arguments that Aboriginal title and rights have been extinguished, abandoned or expropriated.

In other cases, rather than deny the existence of Aboriginal title or rights, the Crown simply alleges that such rights or title remain unproven and puts the Aboriginal litigants in these cases to strict proof thereof.

In one case where an Aboriginal nation is seeking a declaration regarding its Aboriginal title over fee simple lands, the Crown has, not surprisingly, advanced arguments regarding the purported incompatibility of Aboriginal title with fee simple title. The Crown advanced a similar argument regarding the compatibility of Aboriginal title with Crown sovereignty in another case where an Aboriginal nation is seeking declarations regarding its Aboriginal title and rights to lands, waters and the seabed within its traditional territory.

In at least one case, the provincial Crown went so far as to suggest that an Aboriginal nation in British Columbia has been conquered, which would arguably negate the existence of a strong *prima facie* case of Aboriginal title in this case.

The identification of what constitutes a dubious or peripheral claim and a strong *prima facie* case also presents challenges for government officials when implementing provincial consultation policies. This has given rise to increased litigation regarding the adequacy of consultations between the Crown with First Nations in British Columbia. In a significant number of cases where First Nations have challenged the adequacy of consultations, the courts have ruled in favour of First Nations, ordered the parties to engage in consultations and required that such consultations be subject to ongoing judicial supervision.

Crown denials of Aboriginal title and rights are also evidenced in land and governance treaty negotiations mandates. These mandates serve as the starting point for treaty negotiations. Where there is no recognition of Aboriginal peoples, there are no rights or title requiring reconciliation. Where there is no recognition of any Aboriginal rights or title, there is nothing to reconcile in treaty negotiations. This may explain the lack of success

and progress in concluding treaties under the BC treaty negotiation process since the BC Treaty Commission first opened its doors in 1993.

2.0 Introduction

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples. Since entrenchment of s. 35(1) in the Canadian Constitution in 1982, the Supreme Court of Canada has made not less than 40 rulings on the purpose of s. 35(1) and the nature and scope of Aboriginal rights, including Aboriginal title that are constitutionally protected by s. 35(1).

The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* described the underlying purpose of s. 35 as the reconciliation of Aboriginal sovereignty with assumed Crown.¹ The Court added that treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define the Aboriginal rights guaranteed by s. 35(1).²

Since 1982, steps that have been taken to implement these landmark decisions include, but are not limited to establishment of the BC treaty Commission in 1993 and recognition of the inherent right of self-government by the federal government in its “Inherent Rights Policy” in 1995. These steps suggest there has been progress towards implementing recent jurisprudence relating to the rights of indigenous peoples in Canada by the federal and provincial governments.

While policies and processes are in place, which potentially pave the way for the recognition, reconciliation and accommodation of Aboriginal peoples, rights and title, the “constitutional promise” as described by former Chief Justice Brian Dixon of the Supreme Court of Canada, remains unfulfilled. In particular, in the 12 years since the BC Treaty Commission first opened its doors in 1993 no treaties have been concluded through the BC treaty negotiation process.

The lack of progress in concluding treaties and implementing jurisprudence concerning indigenous people’s rights can be attributed, in part, to the continued denial of the existence of Aboriginal peoples, title and rights by the federal and provincial Crown.

This continued denial of Aboriginal peoples’ title and rights is evidenced, in part, by arguments advanced by the Crown in litigation involving rights and title that are presently before the courts in British Columbia. The continued denial of the very existence of Aboriginal peoples and their Aboriginal title and rights can also be evidenced by certain positions advanced by the federal and provincial governments at treaty tables and by legal challenges regarding the adequacy of federal and provincial pre-treaty consultations with Aboriginal peoples.

The continued denial of Aboriginal peoples, title and rights in British Columbia by the federal and provincial Crown is examined in greater detail at section 6.0 of this paper.

3.0 Historic Denial of Aboriginal Title and Rights

The existence of Aboriginal peoples and their Aboriginal title and rights have been historically denied and suppressed by the federal and provincial governments in Canada and British Columbia.

The historic denial and suppression of Aboriginal rights in Canada through legislation and government policies is concisely documented by the late Chief Joe Mathias and Gary R Yabsley in a publication entitled "Conspiracy of Legislation, The Suppression of Indian Rights in Canada."³ A copy of this publication is attached to this report as Annex 1.

As noted by Mathias and Yabsley, early federal and provincial legislation, examined as a whole, "exhibits a clear pattern founded on a conscious intent to eliminate Indians and "indianness" from Canadian society."⁴ The federal *Indian Act* is foremost among the instruments used to destroy traditional institutions of Aboriginal government and abolish those cultural practices that defined Aboriginal identity. The division of powers in the *Constitution Act, 1867* together with colonial land ordinances and the establishment of Indian reserves resulted in dispossessing Aboriginal peoples of their lands.

Forest and fisheries resources have, until recently, served as the backbone of the provincial economy. Therefore, it is not surprising that Aboriginal rights to forest, marine and wildlife resources were denied and suppressed throughout the early period of Canadian history. As these resources became depleted, Aboriginal peoples found their Aboriginal rights to forest, marine and wildlife resources within their traditional lands and waters increasingly regulated by federal and provincial governments.

Early federal and provincial laws, including federal fisheries laws and provincial wildlife legislation were, for the most part, enacted without any input from Aboriginal peoples. Rather than provide for a recognition and accommodation of Aboriginal resource harvesting rights, these early federal and provincial laws not surprisingly interfered with and suppressed the traditional exercise of Aboriginal hunting, fishing and other resource rights of Aboriginal peoples.

Where Aboriginal peoples continued to exercise their Aboriginal rights as their ancestors had done for centuries, they found themselves charged with various offences under federal and provincial legislation for hunting or harvesting out of season or during closed times. In other words, federal and provincial resource legislation, which was enacted without any input from Aboriginal peoples and severely restricted Aboriginal access to and allocations of fisheries, wildlife and forest resources, effectively resulted in the criminalization of the exercise of Aboriginal rights by Aboriginal peoples.

Until the early 1970s, there were similarly no efforts to recognize or accommodate Aboriginal lands rights in British Columbia. After dispossessing Aboriginal peoples of their lands through the division of powers in the *Constitution Act, 1867*, early colonial land ordinances and the establishment of Indian reserves, no efforts were made by the federal or provincial governments to recognize and accommodate Aboriginal land rights in British Columbia. On the contrary, as noted by Mathias and Yabsley, the *Indian Act* was amended in 1927 to make it illegal for an Indian or Indian nation to retain a lawyer to advance their land claims through the courts, or to even raise money with the intention of retaining a lawyer.

The tides finally began to turn in 1973. That year, the Supreme Court made a landmark ruling on Aboriginal land rights in *Calder v. Attorney General of British Columbia*. In the *Calder* case, the Nisga'a nation, situated in northern British Columbia, sought a ruling that their Aboriginal title to their traditional territory had never been extinguished. Although the Supreme Court of Canada ruled in favour of British Columbia on a technicality, the Court split three to three on the substantive question of whether the Aboriginal title of the Nisga'a had been extinguished.

The close ruling on this question arguably forced the federal government to reconsider its refusal to recognize Aboriginal title. This view is supported by comments made by the then Prime Minister of Canada, Pierre Elliot Trudeau who remarked that the *Calder* case indicated that "perhaps" Aboriginal peoples had more legal rights than his government had considered when they formulated the 1969 White Paper on Indian Policy.⁵

The results of this decision were swift. That same year, the federal government established the Office of Native Claims to represent the Government of Canada in treaty negotiations with Aboriginal peoples where Aboriginal rights based on "traditional use and occupancy had not been extinguished."⁶

While establishment of the Office of Native Claims (the "ONC") did not result in the recognition of Aboriginal peoples' title and rights, it did put in place a process for negotiating treaties, which, once concluded, could provide for such recognition. However, while treaties were concluded in other provinces and territories through the Office of Native Claims, no treaties were concluded in British Columbia throughout the period between 1973 and establishment of the BC treaty negotiation process in 1993.

While many factors account for the lack of progress, the refusal of the provincial government to participate in treaty negotiations under the ONC process was a key factor. Lands and resources essential to the conclusion of treaties were within provincial jurisdiction under sections 92 and 109 of the *Constitution Act, 1867*. Until the late 1980s and early 1990s, the provincial government steadfastly refused to recognize, let alone accommodate Aboriginal title and rights in its legislation, policies or otherwise.

However, with the enactment of s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the existing Aboriginal rights of Aboriginal peoples, the tides again began to turn. By 1990, the provincial government together with the federal government and First Nations established the BC Task Force to recommend how the three parties could begin negotiations directed at building a new relationship among the federal and provincial Crown and Aboriginal peoples in British Columbia.

First Nations adopted both the Report of the BC Task Force and its 19 recommendations in their entirety. While federal and provincial representatives to the Task Force participated in drafting the report, the federal and provincial governments chose adopt the 19 recommendations only.

These developments culminated in the establishment of the BC treaty Commission in 1993.⁷ A copy of the BC Task Force report is attached as Annex 2.

4.0 An Overview of Recent Canadian Jurisprudence concerning Indigenous People's Rights

A key turning point in jurisprudence concerning indigenous people's rights occurred with enactment of sections 25 and 35(1) of the *Constitution Act, 1982*.

Section 25 of the *Constitution Act, 1982* provides:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35(1) of the *Constitution Act, 1982* provides:

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

Over the past 20 years since enactment of s. 35 of the *Constitution Act, 1982*, the Supreme Court of Canada has been asked to rule on questions involving Aboriginal rights and title more than 40 times. These decisions have offered significant guidance on the purpose of s. 35(1) and nature and scope of Aboriginal rights, including Aboriginal title, that are constitutionally protected by s. 35(1).

Purpose of Section 35(1)

In *R. v. Van der Peet*,⁸ the Supreme Court of Canada held that the purpose underlying s. 35(1) is the reconciliation of Crown sovereignty with the prior existence of Aboriginal societies. In particular, the Court stated:

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.⁹

In *R. v. Sparrow*¹⁰ and *Delgamuukw v. The Queen*,¹¹ the Supreme Court of Canada underscored the importance of negotiations to the process of reconciliation. In both cases, the court noted that s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place."¹²

This view was reinforced by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*¹³ where the Court elaborated on the role of treaties in achieving the reconciliation now demanded by s. 35(1). In particular, the court noted that:

... Treaties serve to reconcile the pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*...¹⁴

In recognition of the imbalance in negotiating power between the federal and provincial Crown and Aboriginal peoples, the Supreme Court of Canada offered the following guidance on the conduct required by the Crown during treaty negotiations:

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing” (*Badger*, at para. 41)...¹⁵

The Supreme Court of Canada also directed that “...[w]hile this process continues, the honour of the Crown may require it to consult and where indicated, accommodate Aboriginal interests.”¹⁶

The content and scope of the Crown’s duty to consult and accommodate is set out in various cases that are too numerous to summarize in this submission. However, an overview of the content and scope of the Crown’s duty to consult with and accommodate Aboriginal title and rights prior to the conclusion of treaties is set out at Annex 3.

Aboriginal Rights and Title

As noted previously, in the past 20 years since enactment of s. 35 of the *Constitution Act*, the Supreme Court of Canada has ruled on questions involving Aboriginal rights and title more than 40 times. As these cases are far too numerous to comment on, in this submission, we will focus on the *Sparrow* case which deals with Aboriginal fishing rights and *Delgamuukw* which is a landmark ruling on the scope and content of Aboriginal title.

The *Sparrow* decision was the first key decision after enactment of s. 35(1) to rule on the nature and scope of Aboriginal rights constitutionally protected by s. 35(1). Although s. 35(1) was enacted in 1982 and Mr. Ronald Sparrow was charged with violations of federal fisheries legislation in 1994, it took another six years for his case to work its way to the Supreme Court of Canada. In *R. v. Sparrow*,¹⁷ the Supreme Court of Canada confirmed that Mr. Sparrow’s Aboriginal fishing rights are among the Aboriginal rights protected by s. 35(1). The court further ruled that Mr. Sparrow’s right to fish for food, social and ceremonial purposes have constitutional priority over the rights of commercial and sports fishers.

Seven years later, the Supreme Court of Canada handed down a landmark decision on the nature and scope of Aboriginal title in *Delgamuukw v. The Queen*.¹⁸ In *Delgamuukw*, the hereditary chiefs of the Gitksan and Wet’suwet’en peoples asked the court to rule on their Aboriginal title and jurisdiction over 22,000 square miles of their traditional territories in northwestern British Columbia.

In *Delgamuukw*, the Court held that absent valid extinguishment or surrender, Aboriginal peoples have Aboriginal title to lands they exclusively occupied at the time of assertion of Crown sovereignty.¹⁹ In other words, for the first time in Canadian history the Supreme Court of Canada recognized the existence of Aboriginal title in British

Columbia and confirmed that unextinguished Aboriginal title is among the Aboriginal rights constitutionally protected by s. 35(1).

The Court added that while the federal government could have unilaterally extinguished Aboriginal title prior to 1982 by enacting legislation that evidenced a clear and plain intention to achieve that effect, that this was no longer possible after enactment of s. 35(1) in 1982.²⁰

See Annex 4 for a more detailed discussion of Canadian jurisprudence regarding Aboriginal title.

Aboriginal Governance Rights

While the Supreme Court of Canada has not yet made any determinative rulings on the question of whether self-government is an existing right recognized and affirmed by section 35(1), the British Columbia Supreme Court made some clear pronouncements on this question in 2000.

In *Campbell v. British Columbia*, the BC Supreme Court was asked to rule on the constitutionality of certain governance provisions of the Nisga'a treaty.²¹ In particular, the court considered the impact of the assertion of sovereignty by the British Crown, Confederation and the division of legislative powers under sections 91 and 92 on Nisga'a law-making powers.

On the question of whether Nisga'a law making powers survived the assertion of sovereignty by the British Crown and Confederation, Williamson J concluded:

... But the most salient fact, for the purposes of the question of whether a power to make and rely upon aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by aboriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision-making process, are "laws" in the Dicey constitutional sense.²²

The court then considered the effect of the division of law-making powers between the federal and provincial governments at section 91 and 92 of the *Constitution Act, 1867* on Nisga'a law making powers. On this question, the BC Supreme Court concluded that sections 91 and 92 did not exhaustively divide law-making power in Canada between the federal and provincial governments, thereby leaving room for the continued existence of aboriginal law-making power. In concluding that Nisga'a law-making powers survived the division of powers in the Constitution, Williamson J. noted:

aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division "internal" to the Crown.

Based on conclusions reached on the foregoing questions, the court concluded that Nisga'a law-making powers were in existence in 1982 and thereby protected as an existing aboriginal right under section 35(1) of the *Constitution Act, 1982*.

5.0 Implementation of Jurisprudence concerning Indigenous People's Rights by the Federal and Provincial Crown in Canada – Continued Denial of Rights and Title

As noted previously, the Supreme Court of Canada has ruled on the purpose of s. 35(1) and the nature and scope of Aboriginal rights and title protected by s. 35(1) at least 40 times since this provision was first enacted in 1982. Some of the steps taken by the federal and provincial governments to implement these decisions are outlined below.

BC Treaty Negotiation Process

As noted by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, “[t]reaties serve to reconcile the pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*”²³

In this regard, establishment of the tripartite BC treaty negotiation process arguably represents a key step taken by the federal and provincial Crown toward achieving the recognition and reconciliation now demanded by s. 35(1) of the *Constitution Act, 1982*.

Recommendation 1 of the 1991 Task Force Report commits the parties to establish a new relationship based on mutual trust, respect, and understanding – through political negotiations. Recommendation 2 guarantees that each of the parties be at liberty to introduce any issue at the negotiation tables that it views as significant to the new relationship. Recommendation 5 provides that the treaty negotiation process be open to all First Nations in British Columbia. Recommendation 16 commits the parties to negotiate interim measure agreements before or during treaty negotiations when an interest is being affected which could undermine the process.

At first glance, the nineteen recommendations of the Task Force report, including those highlighted above, would appear to provide a solid foundation for achieving recognition and reconciliation of Aboriginal rights and title in British Columbia.

However, no treaties have been concluded in British Columbia in the 12 years since the BC Treaty Commission first opened its doors. The Nisga'a treaty, which was initiated in 1998 and came into effect in 2000, is the only modern day treaty concluded in British Columbia. This treaty was concluded outside the BC treaty negotiation process.

Many factors account for the lack of progress in concluding treaties in British Columbia. We refer you to the annual reports of the BC Treaty Commission for a detailed discussion of the many obstacles to progress in the BC treaty negotiation process.²⁴

From the perspective of First Nations, the lack of treaties in British Columbia is largely attributable to the continued denial of Aboriginal rights and title by the federal and provincial Crown. Evidence in support of this view is set out at section 6.0 of this paper.

Aboriginal Fishing Strategy

In 1992, the federal government announced its “Aboriginal Fisheries Strategy,” which is a national Aboriginal fisheries policy developed to implement the 1990 *Sparrow* decision. In commenting on the effect of the *Sparrow* decision, Paul Kariya, who was Director of the Aboriginal Fisheries Branch of the federal Department of Fisheries and Oceans in 1993 stated that “[I]n short, it has required a fundamental shift in how we approach resource management and our relationship with Aboriginal communities.”²⁵

The three main objectives of the policy are to ensure that the Aboriginal right to fish for food, social and ceremonial purposes is met, to provide for a larger role in management of Aboriginal fisheries to Aboriginal communities and to avoid or minimize disruption to non-Aboriginal fishers.²⁶

The Aboriginal Fisheries Strategy (“AFS”) is implemented through the negotiation of agreements with Aboriginal peoples which provide for Aboriginal participation in enhancement of fish stocks, habitat rehabilitation to enforcement and other resource management activities.²⁷

While the Aboriginal Fishing Strategy was adopted to implement the *Sparrow* decision, which recognizes the existence of Aboriginal fishing rights for food, social and ceremonial purposes, no AFS agreement concluded to date in British Columbia or throughout Canada provides for any recognition of Aboriginal fishing rights. Furthermore, many of the terms of AFS agreements have proved to be non-negotiable.

AFS agreements also contain allocations of fisheries resources, which Aboriginal groups must agree to before they can access financial resources to facilitate their participation in management activities under the Aboriginal Fisheries Strategy. These and other factors have inevitably led to ongoing conflict and litigation between the federal government and Aboriginal peoples.

Provincial Consultation Policy

Within one year of the *Delgamuukw* decision, the provincial government unilaterally adopted Consultation Guidelines in 1998 to guide consultations with Aboriginal peoples. This policy, which was developed without any input from First Nations, was designed to provide a framework for implementation and fulfillment of the Crown’s legal duty to consult with Aboriginal peoples.

A copy of the provincial governments First Nation Consultation Policy can be found at the Ministry of Aboriginal Relations and Reconciliation webpage at www.prov.gov.bc.ca/arr/.

The consultation policy contains operational guidelines for provincial line ministries to follow in identifying Aboriginal interests that may be affected by government decisions and sets out a 4-stage consultation process for engaging in consultations with Aboriginal peoples whose interests may be affected.

However, much of the recent litigation involving Aboriginal title and rights in British Columbia is centered around the adequacy of consultations between Aboriginal peoples and the provincial Crown, particularly in respect of decisions in the forest sector. The

provincial government has recently indicated a willingness to develop a new consultation policy to implement recent court decisions in the *Haida* and *Taku* cases.²⁸

6.0 Obstacles to Implementation of Jurisprudence concerning Indigenous People's Rights –Continued Denial of Aboriginal Title and Rights

Despite steps taken by the federal and provincial Crown to implement Canadian jurisprudence concerning indigenous people's rights in Canada and British Columbia progress continues to be hampered by a continued denial of Aboriginal rights and title by federal and provincial governments.

6.1 Crown Defences in Aboriginal Rights and Title Litigation

The unwillingness of the federal and provincial Crown to recognize Aboriginal peoples, title and rights is evidenced, in part, in arguments advanced by the federal and provincial Crown in Aboriginal title and rights litigation currently before the courts in British Columbia.

There are approximately 25 cases currently before the courts in British Columbia that involve Aboriginal peoples and the federal Crown, provincial Crown, or both.²⁹ See Annex 5 for copies of the pleadings in each of these 25 cases and Annex 6 for a chart summarizing Crown defences advanced in each of these actions.

In 15 of these 25 cases Aboriginal peoples are seeking declarations regarding their Aboriginal rights or title³⁰ or have raised Aboriginal title or rights defences in response to charges for alleged violations of provincial legislation.³¹ Six of the remaining cases involve the interpretation of historic and modern treaties³² and four of the cases relate to the Indian reserve lands of the Aboriginal plaintiffs.³³

The provincial Crown is a party in all 15 cases where Aboriginal peoples are seeking declarations regarding their Aboriginal rights or title or where Aboriginal people have raised Aboriginal rights defences to charges for alleged violations of provincial legislation. The federal Crown is a party in three of the 15 cases involving Aboriginal rights and title,³⁴ all six cases involving the interpretation of historic and modern treaties³⁵ and three of the four cases involving Indian reserve lands.³⁶

This submission will focus on the 15 cases involving Aboriginal rights and title.

6.1.1 Crown Denial of Aboriginal Title

In 14 of the 15 cases³⁷ currently before the courts, Aboriginal peoples are seeking declarations regarding their Aboriginal title or have raised Aboriginal title as a defence in response to charges for alleged violations of provincial forest legislation.³⁸

In these 14 cases, the federal and provincial Crown advance various defences that deny the existence of the Aboriginal title in question, assert that such title remains unproven or allege that the Aboriginal title in question has been extinguished. These defences are summarized below:

Denial of Aboriginal Title: The provincial Crown unequivocally denies the existence of Aboriginal title in seven of the 14 cases.³⁹ In at least two of the three cases where the

federal Crown is a party in cases involving Aboriginal title, the federal Crown similarly denies the existence of the Aboriginal title in question.⁴⁰

- ***Haida v. HMQ BC:*** In the *Haida* case, the Haida Nation is seeking a declaration affirming its Aboriginal title to the Queen Charlotte Islands, also known as Haida Gwaii, including the lands and waters surrounding the islands. At paras. 4 and 16, the provincial Crown denies the existence of Aboriginal title and Haida title:
 - *Para. 4:* At para. 4, the provincial Crown denies "... that the Queen Charlotte's (QC) and surrounding waters, subsurface and air space are the territory of the Haida Nation".
 - *Para. 16:* At para. 16, the provincial Crown further denies "that there exists in law an interest in land in the province of British Columbia known as 'Haida title'." In *Haida*, the federal Crown similarly denies the existence of the plaintiff's Aboriginal title at para. 3(g) of its Statement of Defence:
 - *Para. 3(g):* "In answer to paragraphs 1 to 4 of the Statement of claim, ... Canada denies that, at any material time: ... (g) The Haida Ancestors – Contact or the Haida Ancestors – Sovereignty, or their ancestors or descendants, or the Haida Nation, held or hold aboriginal title to the Claim Area or any part thereof, as alleged or at all."
- ***Hupacasath v. Minister of Forests:*** In this case, the Hupacasath are seeking to quash a decision of the Minister of Forests to remove 70,000 ha. (the "Removed Lands") of privately held fee simple land from TFL 44. At paras. 23, 24 and 72 of its pleadings, the provincial Crown denies that the Hupacasath have Aboriginal title to the Removed Lands.
 - *Para. 23(a):* "...the Petitioners do not have aboriginal title to the Removed Lands at all, and any aboriginal rights they hold with respect to the Removed Lands are exercised at the sufferance of the private landowner."
 - *Para. 24:* "The Petitioners have asserted that they have a strong *prima facie* case for Hupacasath aboriginal rights and title to Hupacasath asserted territory including aboriginal rights and title to the Removed Lands. The Crown denies that the Petitioners have a strong *prima facie* case and says that the Petitioners have a weak case, especially with respect to any asserted claim for aboriginal rights and title on the Removed Lands..."
 - *Para 72:* "The Petitioners assert that the Hupacasath have a strong *prima facie* case but amended the Petition to abandon the application at section "E" on page 4, whereby they had sought a declaration that the Hupacasath had a strong *prima facie* case for Aboriginal rights and title... The Court must consider that this is effectively a concession that the case cannot be at the high end of the spectrum."
- ***Lax Kw'alaams v. West Fraser et al.:*** In *Lax Kw'alaams (West Fraser)*, the plaintiff is seeking an injunction against West Fraser to prevent the logging company from trespassing on lands (the "Cut Block Lands") within its traditional territory. Statements regarding the plaintiff's Aboriginal title to the Cut Block Lands are set out at paras. 11 to 15 of the Statement of Claim. The provincial Crown filed a pro forma Statement of Defence in response to the Statement of Claim. At para. 1 of the Statement of Defence, the provincial Crown "denies each and every allegation contained in the Statement of Claim and puts the Plaintiffs to the strict proof thereof."
- ***Lax Kw'alaams v. AG Canada et al.:*** Statements regarding the Aboriginal title of the plaintiffs to fishing resource sites (the "Fisheries Resource Sites") located within their traditional territory are set out at paras. 22 to 27 and 61 to 64 of the Statement of Claim. At para. 1 of the provincial Crown's Statement of Defence, the Crown

“denies each and every allegation in the Statement of Claim” except as expressly admitted. There are no admissions in the provincial Crown’s Statement of Defence in respect of paras. 22 to 27 and 61 to 64 of the plaintiff’s Statement of Claim. In other words, the provincial Crown denies the existence of the plaintiff’s Aboriginal title to the Fisheries Resource Sites.

- ***Roger William v. HMQ BC, AG Canada***: In *Roger William*, the plaintiff Tsilhqot’in Nation are seeking a declaration of aboriginal title to lands over which they hold registered trap lines and allege that the past issuance of cutting permits by the provincial government unjustifiably infringes their Aboriginal title and trapping rights. The provincial Crown denies the existence of the plaintiff’s Aboriginal title at paras. 10(b) and 31(a) of its Statement of Defence:
 - *Para 10(b)*: “In answer to paragraph 9 of the Statement of Claim, the Provincial Defendants: (b) do not admit that the Tsilhqot’in Nation as it exists today or otherwise holds, or at any time held, Aboriginal title or rights.”
 - *Para. 31(a)*: “In answer to paragraph 24 of the Statement of Claim, the Provincial Defendants: (a) do not admit that the Tsilhqot’in Nation has the Aboriginal title therein alleged.”

In *Roger William*, the federal Crown similarly denied the existence of the plaintiff’s Aboriginal title in its Amended Statement of Defence.⁴¹ At para. 1 of the Amended Statement of Defence, the federal Crown “does not admit the allegations of fact in the amended statement of claim” except as otherwise specifically admitted. There are no admissions in the federal Crown’s amended Statement of Defence in respect of statements regarding the plaintiff’s Aboriginal title. Therefore, the blanket denial at para. 1 of the federal Crown’s Amended Statement of Defence effectively amounts to a denial of the existence of the plaintiff’s Aboriginal title.

- ***HMQ BC v. Jules***⁴²: In *Jules*, the provincial Crown charged members of the Neskonlith, Adams Lake and Spallumcheen Bands, which are communities of the Secwepemc Nation, with logging in an area known as Harper Creek without authorization from the Province under the *Forest Practices Code of British Columbia*, R.S.B.C. 1996, c. 159 (the “*Forest Practices Code*”). The logging was conducted within the traditional territory of the Secwepemc Nation to provide housing for their members and was authorized by their tribal council. When the Bands would not stop logging, the Province served the Bands with Stopwork Orders and commenced Petitions for enforcement. In answer to the Petition, the Bands filed a Notice of Constitutional Question challenging the constitutionality of ss. 96 and 123 of the *Code*, based on their aboriginal title and rights to log in that area. At paras. 6 of its Reply, the provincial Crown states that “... the Secwepemc First Nation as it may exist today does not hold, and has not at any time held, Aboriginal title in or to the area claimed by the Respondents.”
- ***HMQ BC v. Wilson***⁴³: In *Wilson*, the provincial Crown charged members of the Okanagan Band with logging in an area known as Brown’s Creek without authorization from the Province under the *Forest Practices Code*. The logging was conducted within the traditional territory of the Okanagan people to provide housing for their members and was authorized by the tribal council. When members of the Okanagan Band would not stop logging, the Province served the Bands with Stopwork Orders and commenced Petitions for enforcement. In answer to the Petition, the Band filed a Notice of Constitutional Question challenging the constitutionality of ss. 96 and 123 of the *Code*, based on their aboriginal title and rights to log in that area. At paras. 6 of its Reply, the provincial Crown states that “...

the Okanagan First Nation as it may exist today does not hold, and has not at any time held, Aboriginal title in or to the area claimed by the Respondents.”

Aboriginal Title Unproven: Rather than provide an outright denial of Aboriginal title, in four of the 14 cases the provincial Crown instead asserted that the Aboriginal title in question remained unproven.⁴⁴

- ***Gwasslam et al. v. Ministry of Forests et al.:*** In *Gwasslam*, the petitioners are seeking to quash a decision of the Minister of Forests that transferred ownership of Skeena Cellulose Inc. (SCI) without any accommodation of their Aboriginal rights and title. In asserting that the Aboriginal title of the petitioners remains unproven, the provincial Crown pointed out the difficulty of making any determination regarding the substantive question of Aboriginal title in judicial review proceedings. In particular, the provincial Crown stated at paras. 61 and 62:
 - *Para. 61:* “It is submitted that this Court, on the limited evidence before it in judicial review proceedings, is really not in a position to find that the Petitioners have a strong *prima facie* claim of Aboriginal rights or title to the whole of their claimed territory in the absence of an assessment of the strength of the competing interests of other First Nations.”
 - *Para. 62:* “Furthermore, in a judicial review application for interim relief of this nature, this Court is not required to make a specific determination of either the aboriginal rights of the Petitioners, or the boundaries of any lands over which they may have aboriginal title.”
- ***Huu-ay-aht First Nation v. Minister of Forests:*** The *Huu-ay-aht* case involves a review of the provincial governments Forest and Range Agreement (“FRA”) initiative. As part of their challenge of the FRA’s population-based formula, the Huu-ay-aht are seeking a declaration that the Minister of Forests had a legally enforceable duty to accommodate their Aboriginal rights and title. At paras. 60, 61, 73, 85 and 103 of its Memorandum of Argument, the provincial Crown made the following submissions regarding the strength of the petitioners Aboriginal title:
 - *Para 60:* “Throughout the Petitioners’ materials, various assertions are set out regarding the strength of the HFN’s claim of aboriginal rights and title. The Petitioners do not seek any declaratory relief with respect to the strength of claim and accordingly the Court is not being asked to make findings of fact on this issue...”
 - *Para 61:* “The Respondents submit that these statements are merely bald assertions of unproven fact and the evidence does not support the assertions, which will be more fully argued below. As well, the scope and nature of the asserted aboriginal rights and title are not clearly set out, nor are the alleged infringements detailed (as suggested in *Haida*) except to state, as set out above, that ongoing forestry operations constitute the infringement. The Crown has not conducted an assessment of the strength of the claim and there is accordingly no basis for a review of the strength of the claim.”
 - *Para. 73:* “In addition, the calculations upon which the HFN bases its claim assume the HFN have made out a *prima facie* case with respect to title over the entire traditional territory they claim. This is simply not the case. There are significant overlaps in the territory they claim and it is therefore not possible, at this stage of the assessment of the asserted rights, to make determinations as to the percentages of the AAC that have been logged within the territory they assert. As noted at paragraph 15 of Peter Jacobsen Affidavit #1, “the baseline measure [used by the HFN in their calculations] presupposes the scope and size

of the traditional territorial claims before the actual size of those territories has been decided upon in final negotiated settlements or by the courts” ... In any event, the Petitioners have not been denied a benefit in comparison to any other comparator group, as in all cases accommodation under the FRA initiative is interim only, while full reconciliation of the asserted rights is determined in another forum, such as the treaty process.”

- *Para. 85:* “The Petitioners have not sought a declaration as to the strength of their claim, but have rather, premised their bald assertions, either, that they have made out a prima facie case to title to the entire asserted territory or that they have made out a prima facie claim to an aboriginal right to log commercially. The Respondents submit that it would be inappropriate for this Court to make such a declaration on the Petitioners’ materials and evidence adduced.”
- *Para. 103:* “... Here, the HFN have not outlined their claim with clarity and have not focused on the scope and nature of the aboriginal interests asserted. Rather, they have based their claim on bald assertions of unspecified aboriginal rights and unspecified infringements arising from general forest operations.”
- ***Squamish Nation v. Minister of Sustainable Resource Management, et al.:*** In this case, the Squamish Nation is seeking to quash a decision of Land and Water BC approving a request by a developer to expand the boundaries of a study area for a ski resort project at Brohm Ridge. Brohm Ridge is within the traditional territory of the Squamish people. At para. 5 of its Written Submissions, the provincial Crown asserts that “[t]he Squamish Nation claims aboriginal rights, and aboriginal title to Brohm Ridge, but has not yet established those rights.”
- ***Musqueam v. BC Lottery Corp. (BCLC) et al.:*** In this case, the Musqueam challenge a decision of the BC Lottery Corporation to relocate a casino operated by Great Canadian Casinos Inc. from Bridgeport Road to River Road in the City of Richmond. At paras. 80 and 102 of the Argument of the Petitioner, the Musqueam states “[t]he BCLC decisions to relocate and expand a casino on the Bridgeport lands interfere directly with Musqueam’s right to choose what use their title lands will be put...” The provincial Crown responded to this statement at para. 123 as follows:
 - *Para. 123:* This claim is based on language found in *Delgamuukw*, which deals with legal issues which arise after title is established. At bar, we are dealing with the issues that arise before title has been established, which is the *Haida* scenario.”

Extinguishment of Aboriginal Title: In one case involving the transfer of lands held in fee simple, but within the traditional territories of the Aboriginal petitioners, the provincial Crown suggested that the Aboriginal title of the petitioners may have been extinguished.⁴⁵

- ***Hupacasath v. Minister of Forests, et al.:*** The Hupacasath are seeking to quash a decision of the Minister of Forests to remove 70,000 ha. (the “Removed” Lands” or the “Railway Lands”) of privately held fee simple lands from TFL 44. At paras. 24, 36-40, 68 and 76(b), the provincial Crown suggests that the petitioner’s Aboriginal title to the Removed Lands may have been extinguished:
 - *Para. 24:* “... The Crown denies that the Petitioners have a strong *prima facie* case and says that the Petitioners have a weak case, especially with respect to any asserted claim for aboriginal rights and title on the Removed lands...” based in part on the Crown’s assertion at para. 24(b) that “any claim to aboriginal rights or title on the Removed Lands may have been explicitly extinguished but the issue is undecided.”

- *Paras 36-40*: At paras. 36 to 40, the Crown advances an argument that provincial legislation referred to as “1884 – Chapter 14 S.B.C – An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province” evidences a clear and plain intention to extinguish aboriginal title to the removed lands.
- *Para. 68*: “Based on the foregoing, the Hupacasath cannot have a strong *prima facie* claim. With respect to the Hupacasath claim to private lands that comprise the Railway Lands, the Crown submits that there is no duty whatsoever because that claim has been or may have been extinguished, and there is no duty to consult with respect to the private lands in general.”
- *Para 76(b)*: “... In the case at bar, the Crown was under no duty to consult because:... (b) aboriginal rights and title on the majority of the Removed Lands have been or may have been extinguished by the Railway Grants..”

Incompatibility of Aboriginal Title with Fee Simple Title: In *Hupacasath (MOF)*, the provincial Crown also suggests that the incompatibility of fee simple with Aboriginal title eliminates the possibility any Aboriginal title claim by the petitioners. In particular, the Crown made the following comments at paras. 24, 27-35 and 76(a) regarding the incompatibility of Aboriginal title and fee simple title:

- *Para. 24*: “... The Crown denies that the Petitioners have a strong *prima facie* case and says that the Petitioners have a weak case, especially with respect to any asserted claim for aboriginal rights and title on the Removed lands...” based in part on the Crown’s assertion at para. 24(a) that “the fundamental incompatibility of aboriginal title and fee simple title eliminates the possibility that the Petitioners have any aboriginal title claim whatsoever.”
- *Paras. 27-35*: See paras. 27-35 for a summary of the Crown’s legal argument regarding the incompatibility of Aboriginal title and fee simple title.
- *Para. 76(a)*: “... In the case at bar, the Crown was under no duty to consult because: (a) aboriginal title to the Removed Lands cannot co-exist with a right in fee simple.”

Abandonment or Expropriation of Aboriginal Title: In another case involving the transfer of lands held in fee simple within the traditional territories of the Aboriginal petitioners, the provincial Crown suggested that the Aboriginal title of the petitioners may have been abandoned or expropriated.⁴⁶

- ***Musqueam Indian Band v. Minister of Sustainable Resource Management, et al.***: The Musqueam are seeking an order to quash the sale of Crown lands (the “Golf Course Lands”) by the provincial Crown to the University of British Columbia. The Musqueam are engaged in treaty negotiations with the federal and provincial Crown and there is little land within their traditional territory available for selection and inclusion in a treaty. The Musqueam submit that by entering into treaty negotiations with the petitioners, the provincial Crown has incurred a legally enforceable obligation to refrain from disposing or otherwise alienating Crown land in the petitioners traditional territory pending conclusion of a treaty. While the provincial Crown does not deny the existence of the petitioner’s Aboriginal title, at para. 36 of its Legal Argument, the Crown suggests that the Aboriginal title of the Musqueam people may have been effectively abandoned or expropriated:
 - *Para. 36*: “The Crown has never denied the existence of the Musqueam’s *prima facie* claim to aboriginal rights and title to the Golf Course Lands and the surrounding area. ... However, while aboriginal title may have existed at the time of the declaration of British sovereignty over the lands now comprising the

Province of British Columbia, ... it does not follow that such rights or title continue to exist in the present. Such rights can be abandoned, or the land can be transformed to such an extent that these rights have essentially been expropriated. It does not follow that the claim to title or rights is invalid; rather, the remedy in such instances is one of compensation for expropriation.”

Aboriginal Title Incompatible with Crown Sovereignty: In *Haida Nation v. HMQ B.C. and AG Canada* the provincial Crown submits “that the Plaintiffs’ claim of aboriginal title is incompatible with Crown sovereignty and thus such a title claim cannot be capable of recognition at common law.”⁴⁷ Although BC doesn’t have jurisdiction over international boundaries or the waters and seabed surrounding Haida Gwaii, the provincial Crown nonetheless submits that Aboriginal title, “to the extent that it incorporates a right of exclusive use and occupation over the whole of the waters and seabed ... cannot be reconciled with the fundamental requirements of sovereignty, including sovereignty over significant marine passages, sovereign international borders and sovereignty with respect to air space.”⁴⁸

Aboriginal Peoples Conquered: At para. 75 of *Hupacasath (MOF)*, the provincial Crown goes so far as to suggest that Aboriginal peoples may have been conquered, and that this factor, among others, suggests that a *prima facie* case of Aboriginal title is non-existent:

- *Para. 75:* “In her Affidavit #2, Chief Sayers asserts that the Hupacasath have never been conquered, have never surrendered rights by treaty and such rights have never been extinguished. As may be seen by the foregoing, there are serious questions regarding the accuracy of the first and third of these assertions. Combined with the uncertainty of the boundaries created by the existence of significant overlapping claims and in the absence of more persuasive evidence, the totality of the factors suggest that the Hupacasath *prima facie* case is non-existent on the Removed Lands and at best a weak one on the Crown lands.”

The provincial Crown makes this argument, notwithstanding the statement made by the Supreme Court of Canada on this question in the *Haida*⁴⁹ case, that “...Canada’s Aboriginal peoples were here when Europeans came and were never conquered.”⁵⁰

6.1.2 Crown Denial of Aboriginal Rights

In 14 cases currently before the courts⁵¹, Aboriginal peoples are seeking declarations regarding their Aboriginal rights or have raised Aboriginal rights defences in response to charges for alleged violations of provincial forest legislation.⁵²

In at least 10 of these 14 cases, the provincial Crown advanced various defences that deny the existence of the Aboriginal rights in question, assert that such rights remain unproven, or suggest that such rights may have been abandoned or expropriated.⁵³ In at least one of the four cases where the federal Crown is a party, the federal Crown similarly advanced arguments denying the existence of the Aboriginal rights in question.⁵⁴ These defences are summarized below:

Denial of Aboriginal Rights: In six cases dating from June 8, 2004 to July 20, 2005, the provincial Crown unequivocally denies the existence of the Aboriginal rights of the Aboriginal petitioners, plaintiffs and defendants in these actions.⁵⁵

- **HMQ BC v. Jules:** In its Reply to the Statement of Defence, the provincial Crown denies the existence of the defendants Aboriginal rights to forest resources within their traditional territory:
 - *Para. 8:* “In further and alternative reply to paragraphs 3, 4, 5, 6, 7, 8, 10, 13, 14, 16, 17, 18, 19 and 25 of the Statement of Defence, the Secwepemc First Nation as it may exist today does not hold, and has not at any time held, the Aboriginal rights capable of being exercised in the Harper Lake Watersheds as claimed by the Respondents. In particular, the harvesting of trees from the Harper Lake Watersheds for cultural, community or livelihood purposes were not practices integral to the distinctive culture of the Sewepemc people at or before the Date of Contact or at or before the Date of Sovereignty, and the Minister puts the Respondents to the strict proof thereof.”
- **HMQ BC v. Wilson:** In its Reply to the Statement of Defence, the provincial Crown similarly denies the existence of the defendants Aboriginal rights to forest resources within their traditional territory:
 - *Para. 8:* : “In further and alternative reply to paragraphs 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15,16 and 22 of the Statement of Defence, the Okanagan First Nation as it may exist today does not hold, and has not at any time held, the Aboriginal rights capable of being exercised in the Browns Creek Watersheds as claimed by the Respondents. In particular, the harvesting of trees from the Harper Lake Watersheds (sic) for cultural, community or livelihood purposes were not practices integral to the distinctive culture of the Okanagan people at or before the Date of Contact or at or before the Date of Sovereignty, and the Minister puts the Respondents to the strict proof thereof.”
- **Roger William v. HMQ BC, AG Canada Court:** In *Roger William*, the Plaintiff members of the Tsilhoqot’in Nation are seeking declarations regarding their aboriginal rights to trap and "gather" on lands within their traditional territory. At para. 15, the provincial Crown admits the right of the Tsilhoqot’in to hunt for subsistence and trading purposes, but denies any commercial hunting rights or that trading in skins and pelts were integral to their distinctive culture. In particular, the Crown made the following statements regarding the Aboriginal rights of the plaintiffs at paras. 15(a), (d) and (e) of its Statement of Defence:
 - *Para. 15:* “In answer to para. 14 of the Statement of Claim, the Provincial Defendants (a) admit that before and at the date of Contact, Ancestral Tsilhqot’in Groups hunted animals for subsistence purposes and that such practice was integral to their culture at the Date of Contact; ... (d) admit that the ancestors of the members of the Xenigwet’in traded on an irregular and occasional basis some skins and pelts hunted for subsistence purposes before and at the Date of Contact, but say that such trading was not on a commercial scale; (d) do not admit that hunting or trapping animals for trading in skins and pelts was integral to the culture of the Xenigwet’in at the Date of Contact or subsequently.

In *Roger William*, the federal Crown similarly denies the existence of the plaintiff’s Aboriginal rights in its Amended Statement of Defence. At para. 1 of its Amended Statement of Defence, the federal Crown “does not admit the allegations of fact in the amended statement of claim” except as otherwise specifically admitted. The amended statement of claim contains no admissions regarding the harvesting and trading rights of the Tsilhoqot’in. Therefore, the blanket denial at para. 1 of the federal Crown’s Amended Statement of Defence effectively amounts to a denial of the existence of the plaintiff’s Aboriginal harvesting and trading rights, including the right to trade for commercial purposes.

- ***Hupacasath v. BC Hydro, et al.***: In this case, the Hupacasath claim that the provincial Crown infringed their Aboriginal rights to harvest, use, steward and manage animals and plants, routes, heritage and archaeological sites and objects on the lands (the “Ash River Lands”) within their traditional territory for food, social, ceremonial, sustenance, trade, medicinal, spiritual and technological purposes. The provincial Crown denies the existence of these Aboriginal rights at para. 6 of its Statement of Defence:
 - *Para. 6*: “In response to paragraphs 6 through 13 of the Statement of Claim, the Province denies that the Hupacasath First Nation, or its members, either before or after European contact, had any aboriginal rights with respect to the lands described in the Plaintiff’s Statement of Claim, as alleged or at all.”
- ***Lax Kw’alaams v. West Fraser et al.***: At para. 13 of their Statement of Claim, the plaintiffs say that the Cut Block Lands have been traditionally used by their people for the harvest of forest products and other cultural practices. At para. 14 of the Statement of Claim, the plaintiffs further state that the economy of the Lax Kw’alaams people included the harvesting, managing, processing, consuming and trading of forest resources and products produced from forest resources.” The provincial Crown filed a pro forma Statement of Defence in response to the Statement of Claim. At para. 1 of the Statement of Defence, the provincial Crown “denies each and every allegation contained in the Statement of Claim and puts the Plaintiffs to the strict proof thereof.” In other words, at para. 1, the provincial Crown effectively denies the statements made by the plaintiffs regarding their Aboriginal rights to harvest resources at paras. 13 and 14 of the Statement of Claim.
- ***Lax Kw’alaams v. AG Canada***: At paras 29, 32-48, 61 and 62 of their Statement of Claim, the plaintiffs make statements about their Aboriginal rights to harvest, manage, process, consume and trade fisheries resources within their traditional territory for any purpose, including commercial purposes. At para. 1 of the provincial Crown’s Statement of Defence, the Crown “denies each and every allegation in the Statement of Claim” except as expressly admitted. There are no admissions in the provincial Crown’s Statement of Defence in respect of paras. 29, 32-48, 61 and 62 of the plaintiff’s Statement of Claim. Accordingly, the blanket denial at para. 1 of the provincial Crown’s Statement of Defence applies to all statements made by the Lax Kw’alaams regarding their Aboriginal rights to harvest and use fisheries resources in their territory for commercial and other purposes.

Aboriginal Rights Unproven: In at least three cases, the provincial Crown asserts that the Aboriginal rights at issue in these cases remains unproven:⁵⁶

- ***Squamish Nation v. Minister of Sustainable Resource Management, et al.,***: At para. 5 of its Written Submissions, the provincial Crown asserts that the Aboriginal rights of the Squamish Nation at Brohm Ridge remain unproven. In particular, the provincial Crown states:
 - *Para. 5*: “The Squamish Nation claims aboriginal rights, and aboriginal title to Brohm Ridge, but has not yet established those rights.”
- ***Hupacasath v. MOF et al***: In this case the Hupacasath are seeking to quash a decision of the Minister of Forests to remove 70,000 ha. (the “Removed Lands”) of privately held fee simple land from TFL 44. At paras. 142 to 148 and 159 to 161, the provincial Crown submits that the Aboriginal rights of the Hupacasath to fish at the Somass River or to pick berries, hunt, trap, access cedar, yew, medical plants and sacred sites on the Removed Lands remain unproven:

- *Paras. 142-148:* See paras. 142 to 148 for the full argument advanced by the provincial Crown denying the petitioner’s aboriginal right to fish in the Somass River. At para. 148, the Crown states “... it is not clear that the existence of the Hupacasath’s asserted “judicially-recognized” aboriginal right to fish for food is a certainty.”
- *Para. 159:* “Apart from an asserted aboriginal right to fish for food in the Somass River and an asserted claim to aboriginal title, the Petitioners make a number of other assertions with respect to the various asserted rights to berry picking, hunting, trapping, access to cedar, yew and other species of trees and grasses, access to medicinal plants, access to the spiritual sites and protection of various habitats in support of the allegations that the Removal Decision will have an adverse effect on them. None of these allegations have been made out on the evidence.”
- ***Huu-ay-aht First Nation v. Minister of Forests:*** At issue in this case is the existence of the Aboriginal right of the petitioners to commercially harvest forest resources in their traditional territory. The Huu-ay-aht advanced this Aboriginal right in connection with its challenge to the population-based formula used by the provincial government to calculate First Nation allocations of timber resources under its Forest and Range Agreement initiative. At paras. 86 and 103 of its Memorandum of Argument, the provincial Crown asserts that the Aboriginal rights at issue in this case remain unproven:
 - *Para. 86:* “There is no evidence of an aboriginal right to log commercially presented in the HFN materials. On the basis of the evidence presented to date, it does not appear that commercial logging was an activity that was an element of a practice, custom or tradition integral to the distinctive culture of the HFN...”
 - *Para. 103:* “... Here, the HFN have not outlined their claim with clarity and have not focused on the scope and nature of the aboriginal interests asserted. Rather, they have based their claim on bald assertions of unspecified aboriginal rights and unspecified infringements arising from general forest operations.”

Aboriginal Rights Abandoned or Expropriated: In a case involving the transfer of Crown lands in an urban setting, the provincial Crown suggests that the Aboriginal rights of the petitioners on lands over such lands may have been abandoned or expropriated.⁵⁷

- ***Musqueam Indian Band v. Minister of Sustainable Resource Management, et al.:*** While the provincial Crown does not deny the existence of the petitioner’s Aboriginal rights, at para. 36 of its Legal Argument, the Crown suggests that the Aboriginal rights of the Musqueam people over the lands in question may have been effectively abandoned or expropriated:
 - *Para. 36:* “The Crown has never denied the existence of the Musqueam’s *prima facie* claim to aboriginal rights and title to the Golf Course Lands and the surrounding area. ... However, while ... aboriginal rights may have been practiced in these same lands at the time of contact, it does not follow that such rights or title continue to exist in the present. Such rights can be abandoned, or the land can be transformed to such an extent that these rights have essentially been expropriated. It does not follow that the claim to title or rights is invalid; rather, the remedy in such instances is one of compensation for expropriation.”

6.1.3 Crown Denial of Aboriginal Peoples

In Canadian jurisprudence, an early test developed by a lower courts for proving the existence of Aboriginal title required Aboriginal peoples to prove that they and their ancestors were members of an organized society.⁵⁸ This test is sometimes referred to as the “Baker Lake test”.

Consequently, an approach sometimes adopted by the provincial and federal Crown in Aboriginal title and rights litigation is to deny that Aboriginal peoples and their ancestors were members of organized societies, or to deny that the present members of an Aboriginal community are descendents of original Aboriginal societies.

Denial of Existence of Aboriginal Peoples: This approach was followed by the provincial Crown in the *Haida, Jules, Wilson* and *Roger Williams* cases and by the federal Crown in the *Haida* case. In these cases, the Crown advanced the following arguments to deny the existence of Aboriginal peoples:

- ***Haida v. HMQ BC:*** At paras. 10 and 12, the provincial Crown made the following statements regarding the social organization of the defendant Haida Nation and their ancestors:
 - *Para. 10:* “In further answer to paragraphs 9 and 10 of the Statement of Claim, British Columbia denies that prior to and since 1846, the Queen Charlotte’s has been occupied and possessed communally and exclusively by a unified, single Aboriginal group, whether known as the Haida Nation or otherwise, and puts the Plaintiffs to the strict proof thereof.
 - *Para. 12:* “In the alternative and in further answer to both paragraphs 9 and 10, and in answer to paragraph 11 of the Statement of Claim, British Columbia says that at or before the time persons of European ancestry first made contact with Aboriginal people who spoke the Haida language, these Aboriginal people lived in small autonomous family groups which were widely dispersed and were not politically unified or organized...”

The federal Crown similarly advanced arguments denying that the Haida and their ancestors are and were an organized society at paras. 17 and 18 of its Statement of Defence:

- *Para. 17:* “In further answer to paragraphs 9, 10 and 12 of the Statement of Claim, Canada denies that at any material time the Haida Ancestors – Sovereignty or their ancestors or descendants, or the Haida Nation, constituted a single, unified aboriginal collectivity, however described, which communally occupied or possessed the entire Claim Area or any part thereof, as alleged or at all.”
- *Para. 18:* “In the alternative and in further answer to paragraphs 9, 10 and 12 of the Statement of Claim, if the Haida Ancestors – Sovereignty or their ancestors or descendants did or do occupy or possess the Claim Area- Islands or any part thereof or held or hold aboriginal title to the Claim Area – Islands or any part thereof (which is denied) Canada says that occupation or possession and any title which might have been generated thereby was or is limited to small, widely separated village or resource gathering sites held by autonomous kin groups rather than the Haida Descendants or the Haida Nation as a whole, and never extended to the whole of the Claim Area.
- ***Roger William v. HMQ BC, et al.:*** At para. 9(b) and (c), the provincial Crown made the following statements regarding the social organization of the defendant Tsilhqot’in and Xeni Gwet’in peoples and their ancestors:

- *Para. 4(c)*: “In answer to paragraph 2 of the Statement of Claim, the Provincial Defendants ... (c) do not admit the existence of the “Tsilhqot’in Nation” except as a synonym for the Tsilhqot’in National Government, and otherwise deny its existence as a distinct entity...”
- *Para 5(b)(i)*: “In answer to paragraph 3 of the Statement of Claim, the Provincial Defendants: ... (b) deny that Roger William can bring this action as a representative on behalf of the members of the Tsilhqot’in Nation because: (i) the alleged Tsilhqot’in Nation has no existence other than as the corporation referred to in paragraph 4(a) above...”
- *Para. 9(b)*: “In answer to paragraph 8 of the Statement of Claim, the Provincial defendants ... (b) say that the ancestors of many of the members of the Xenigwet’in, and the ancestors of the members of the Other Tsilhqot’in First Nations ... lived in small family groups of hunters, fishers and gatherers (Hereinafter referred to as “Ancestral Tsilhqot’in Groups”) at or before the Date of Contact...”
- *Para. 9(c)*: “In answer to paragraph 8 of the Statement of Claim, the Provincial defendants ... (c) deny that the Ancestral Tsilhqot’in Groups comprised a unified, single Aboriginal group, whether known as the Tsilhqot’in Nation or otherwise, at or before the Date of Contact, or at or before the Date of Sovereignty.”
- ***HMQ BC v. Jules***: At para. 3, the provincial Crown made the following statement regarding the social organization of the ancestors of the Secwepemc people:
 - *Para. 3*: “In further and alternative reply to paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 16, 17, 18, 19 and 25 of the Statement of Defence, the persons from whom the Respondents claim to have descended did not comprise a unified, single Aboriginal group, whether known as the Secwepemc people or otherwise, at or before the date of first contact with persons of European ancestry (the “Date of Contact”), namely 1793, or at or before the time the British Crown assumed sovereignty over the lands at issue in this action (the “Date of Sovereignty”), namely 1846.”
- ***HMQ BC v. Wilson***: At para. 3, the provincial Crown made the following statement regarding the social organization of the ancestors of the Okanagan people:
 - *Para. 3*: “In further and alternative reply to paragraphs 3, 4, 5, 7, 8, 9, 10, 11, 13, 15, 16 and 22 of the Statement of Defence, the persons from whom the Respondents claim to have descended did not comprise a unified, single Aboriginal group, whether known as the Okanagan people or otherwise, at or before the date of first contact with persons of European ancestry (the “Date of Contact”), namely 1793, or at or before the time the British Crown assumed sovereignty over the lands at issue in this action (the “Date of Sovereignty”), namely 1846.”

The BC Task Force stated that “recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories and political institutions and ways of life must be the hallmark of this new relationship.”⁵⁹ Recommendation 1 commits the parties to “establish a new relationship based on mutual trust, respect and understanding through political negotiations.”

Canada, British Columbia and First Nations adopted all 19 recommendations of the 1990 BC Task Force, which was established to recommend how the three parties could begin negotiations directed at building a new relationship. This ethnocentric approach of denying the existence of Aboriginal peoples is not consistent with the new relationship

envisioned in the 1990 Task Force Report⁶⁰ and the reconciliation now demanded by s. 35(1) of the *Constitution Act, 1982*.

It is hard to imagine how the reconciliation now demanded by s. 35(1) can be achieved when the starting point for dialogue is the denial of the very existence of Aboriginal peoples, whose sovereignty must now be reconciled with assumed Crown sovereignty. First Nations should not have to prove their very existence as a starting point for negotiating a reconciliation of their sovereignty with assumed Crown sovereignty.

Denial of Continuity: As noted previously, another approach followed by the federal and provincial Crown in Aboriginal title and rights litigation is to deny that Aboriginal litigants are successors to original Aboriginal societies who used and occupied their traditional territories to the exclusion of others. Denial of continuity arguments were advanced in the *Haida*, *Roger William*, *Jules* and *Wilson* cases:

- ***Haida v. HMQ BC, et. al.:*** At para. 13, the provincial Crown stated:
 - *Para. 13:* “Further, the Aboriginal family groups living on the Queen Charlotte’s and before the time the British Crown assumed sovereignty over this territory, abandoned the sites they occupied, failed to maintain any substantial connection they may have had to these sites (other than land set apart for Indian Reserves and later created as such), and either left the Queen Charlotte’s, or consolidated at two sites, Skidegate and Masset. ...”
- ***Roger William v. HMQ BC et. al.:*** At para. 9 of its Statement of Defence, the provincial Crown stated:
 - *Para. 10:* “In answer to paragraph 9 of the Statement of Claim, the Provincial Defendants: (a) deny that the Tsilhqot’in Nation as it exists today is a continuation of or successor to all or any Ancestral Tsilhqot’in Groups that existed at or before the Date of Sovereignty or at or before the Date of Contact...”
- ***HMQ BC v. Jules:*** At para. 4 of its Reply, the provincial Crown stated:
 - *Para. 4:* “In further and alternative reply to paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 16, 17, 18, 19 and 25 of the Statement of Defence, the Secwepemc First Nation as it may exist today is not a continuation of or successor to all or any Aboriginal groups or group that existed at or before the Date of Contact or at or before the Date of Sovereignty.”
- ***HMQ BC v. Wilson:*** At para. 4 of its Reply, the provincial Crown stated:
 - *Para. 4:* “In further and alternative reply to paragraphs 3, 4, 5, 7, 8, 9, 10, 11, 13, 15, 16 and 22 of the Statement of Defence, the Okanagan First Nation as it may exist today is not a continuation of or successor to all or any Aboriginal groups or group that existed at or before the Date of Contact or at or before the Date of Sovereignty.”

Arguments advanced by the Crown that deny any continuity between present day members of Aboriginal societies and their ancestors are particularly offensive in light the history of Aboriginal peoples and the state since Confederation. Canadian laws and policies were directed at destroying the identity of Aboriginal peoples and assimilating them into mainstream society. These laws and policies resulted in dispossessing Aboriginal peoples of their lands and dispersing and reorganizing Aboriginal peoples into legal and administrative units known as Indian Bands. The federal government only abandoned assimilation as an express policy objective after the rejection of the 1969 White Paper on Indian Policy by Aboriginal peoples.

After more than 100 years of attempting to destroy Aboriginal societies and assimilate Aboriginal peoples into mainstream society, it is particularly egregious for the federal and provincial Crown to now argue that there is no continuity between historic and contemporary Aboriginal societies.

It is worth noting that in a speech to the First Nations Summit dated September 28, 2005, Premier Gordon Campbell reported as follows:

I've instructed the Attorney General and the Minister of Aboriginal Relations and Reconciliation to review our litigation strategies and to come back with a report to us as soon as possible so that when we are in court, if we are in court, we are able to argue in court in a way that is respectful to you, to First Nations, and to the history and spirit of what we are trying to do as we build this new relationship.

6.2 Crown Denial of Aboriginal Rights and Title in Treaty Negotiation Mandates

In *Delgamuukw*, the Supreme Court of Canada, for the first time in Canadian history recognized the existence of Aboriginal title in British Columbia. The Court held that absent valid extinguishment or surrender, Aboriginal peoples have Aboriginal title to lands they exclusively occupied at the time of assertion of Crown sovereignty.⁶¹

Although the Supreme Court of Canada has not ruled on the existence of Aboriginal governance rights, the British Columbia Supreme Court ruled that the Aboriginal governance rights of the Nisga'a are constitutionally protected by s. 35(1) in the *Campbell* case. This law is binding on the federal and provincial Crown in British Columbia.

These significant rulings in the *Delgamuukw* and *Campbell* cases arguably pave the way for achieving the reconciliation of Aboriginal sovereignty with assumed Crown sovereignty described in the *Haida* case and the reconciliation of the pre-existence of Aboriginal societies with Crown sovereignty referred to in *Van der Peet*.

Yet despite these pronouncements on the nature and content of Aboriginal title and governance rights protected by s. 35(1), treaty talks have not yielded results.

From the perspective of First Nations, the lack of progress in concluding treaties in British Columbia is largely attributable to a continued denial of Aboriginal rights and title by the federal and provincial Crown. This denial of rights by Canada and British Columbia is evidenced, in part, by certain federal and provincial land and governance treaty negotiation mandates.

Land Mandates

Although the Supreme Court of Canada in *Delgamuukw* held that absent valid extinguishment or surrender, Aboriginal peoples have Aboriginal title to lands they exclusively occupied at the time of assertion of Crown sovereignty⁶² this has not translated to recognition of Aboriginal title over any lands in British Columbia. While Canada and BC are willing to admit that Aboriginal title exists as a legal concept, federal and provincial negotiators continue to deny that Aboriginal title exists over any lands in this province.

In the absence of any recognition of Aboriginal title to a single square inch of lands in British Columbia, from the perspective of federal and provincial negotiators, treaty negotiations appear to be premised on a complete denial of Aboriginal title. This approach appears to be consistent with the approach taken by provincial line ministries in making determinations about the strength of Aboriginal title claims.

While 95% of the land base in British Columbia consists of Crown lands, Canada and British Columbia have taken the position that only five per cent of the lands within this province will be available for land selection by Aboriginal groups in British Columbia. This position on land quantum may simply be a bargaining position or it may reflect an implied willingness on the part of the federal and provincial Crown that Aboriginal peoples have a strong *prima facie* case to at least five per cent of the land base in British Columbia.

In the face of this complete denial of Aboriginal title over any specific lands in British Columbia, it is not surprising that little progress has been made in concluding treaties in this province over the past 12 years.

As long as federal and provincial negotiators maintain their bargaining position of refusing to recognize any Aboriginal title or rights, we are destined to remain at ground zero in the quest for reconciliation of co-existing Aboriginal and Crown titles. Without any recognition of Aboriginal title to a single square inch of land in British Columbia by the federal or provincial Crown, there would be no titles to reconcile through treaty negotiations. If this situation persists, it may take many more years and cost billions more dollars to conclude treaties in British Columbia.

Governance Mandates

In its 1995 Inherent Rights Policy, the Government of Canada “recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982” and is prepared to negotiate self-government agreements with First Nations in accordance with its inherent rights policy. In its inherent rights policy, Canada has expressed a willingness to negotiate the following types of law making powers with aboriginal people:

- matters internal to the group, integral to its distinct culture, and essential to its operation as a government or institution, such as membership, marriage, adoption, language, culture, religion, education, health, social services, property rights, land management, natural resource management, hunting, fishing and trapping and direct taxation and property taxation; and
- matters that have impacts that go beyond individual communities, such as divorce, environmental protection, fisheries co-management and migratory birds co-management.

The provincial government until recently has expressed an unwillingness to negotiate governance as part of treaty negotiations in the BC treaty negotiation process. Provincial unwillingness to negotiate governance, is clearly contrary to pronouncements made by the BC Supreme Court in the *Campbell* case where Aboriginal governance rights were clearly recognized as rights protected by s. 35(1) of the Constitution Act, 1982.

Provincial unwillingness to negotiate governance is also clearly not in keeping with the commitments made by the parties at recommendation 1 of the BC Task Force Report.

As noted previously, recommendation 2 provides that “[e]ach party be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.

After initially expressing an unwillingness to negotiate governance, British Columbia is currently revising its self-government mandates. Accordingly, we cannot be certain of the types of aboriginal law-making powers that BC is willing to negotiate with aboriginal people until this process of mandate revision is completed. Nor can we be certain that the province has truly abandoned its unwillingness to negotiate governance until its new mandates are in place.

6.5 Pre-Treaty Consultation and Accommodation

Adequacy of Consultation

The adequacy of provincial Crown consultations with Aboriginal peoples is raised in 9 of the 15 cases currently or recently before the Courts in British Columbia.⁶³ This is not surprising given the considerable discretion afforded to provincial officials to decide on the strength of Aboriginal rights and title and potential infringements of such rights.

In the *Haida* case, the Court concluded that the scope of the duty is proportional to the strength of the claim and to the seriousness of the potential infringement.⁶⁴ The Court suggested a spectrum of required consultation, which would vary according to the circumstances, depending on whether an Aboriginal group has a “dubious or peripheral claim,” or a strong *prima facie* case.⁶⁵

In particular, the Court suggested the following spectrum of required consultation:

- *Mere Notice in Case of Dubious or Peripheral Claims:* The Court pointed out the distinction between knowledge sufficient to trigger the duty to consult and the content or scope of that duty. The content may vary from a mere duty of notice in response to a “dubious or peripheral claim” to a more stringent series of duties where there is a strong *prima facie* claim. The Court stated that difficulties associated with defining the claim can be addressed by varying the content of the duty, rather than denying the existence of the claim.⁶⁶
- *Deep Consultation where Strong Prima Facie Case:* In *Haida*, the Court stated that on the other end of the spectrum, consultation would sometimes require “deep” consultation aimed at finding a satisfactory interim solution.⁶⁷ This “deep” consultation requirement is said to arise where there is a strong *prima facie* case, the risk of potential infringement and the risk of non-compensable damage are high.⁶⁸ It may require the Crown to make changes to its plans.⁶⁹

The provincial First Nations Consultation Policy provides provincial bureaucrats in line ministries with considerable discretion and limited guidance to determine what constitutes a dubious or peripheral claim or a strong *prima facie* case. It is challenging enough for the courts to make determinations regarding the strength of Aboriginal rights and title potentially affected by government decisions, let alone provincial bureaucrats in line ministries who for the most part have little or no legal training.

Furthermore, while recommendation 16 of the Task Force Report commits the parties to negotiate interim measure agreements before or during treaty negotiations when an

interest is being affected which could undermine the process, few substantial interim measure agreements have been concluded to date in British Columbia.

If Aboriginal peoples were regarded by government officials as having strong *prima facie* cases of rights and title, there would arguably be more interim protection measure arrangements in place and less litigation regarding the adequacy of consultations. Instead, the limited number of substantive interim protection measures in BC strongly suggests that government officials regard most Aboriginal rights and title claims as dubious or peripheral at best.

The foregoing factors arguably evidence a continued denial of Aboriginal rights and title by the provincial government and its line ministries.

In the absence of any process for resolving disputes between line ministries and Aboriginal groups, Aboriginal peoples have increasingly turned to the courts to protect their Aboriginal rights, pending the conclusion of treaties. This is evidenced by the volume of Aboriginal title and rights cases before the courts where the adequacy of provincial consultation is at issue. As noted previously, the adequacy of consultation is at issue in 60% of the 15 cases involving Aboriginal title and rights.

Judicial Oversight

Judgment has been rendered in 5 of the 9 cases where the adequacy of consultations was at issue.⁷⁰ In each of these 5 cases, the courts have ordered the parties to engage in consultations. Furthermore, the courts have directed that such consultations be subject to judicial supervision and oversight.

These rulings clearly evidence a need for more effective criteria for establishing what constitutes a dubious or peripheral claim and what constitutes a strong *prima facie* case. These rulings also evidence the need for the establishment of a fair, impartial and cost-effective process for resolving disputes between line ministries and Aboriginal peoples regarding what constitutes a *prima facie* case.

Otherwise, provincial line ministries can continue to ignore the Aboriginal rights and title protected by s. 35(1) and continue to make decisions that interfere with such rights and title.

7.0 Pathway to Achieving Honourable Reconciliation of Aboriginal Rights and Title with Crown Sovereignty in British Columbia

Although arguments advanced by the federal and provincial Crown in Aboriginal title and rights litigation, together with federal and provincial treaty land and governance negotiation mandates arguably evidence a continued denial of Aboriginal rights, there is again some room for optimism.

Aboriginal peoples in Canada and British Columbia have recently entered into agreements with both the federal and provincial government, which offer hope that we can move one step closer to realizing the reconciliation demanded by s. 35(1).

7.1 A New Relationship

The Government of British Columbia and First Nations recently committed to establish a New Relationship based on respect, recognition and accommodation of Aboriginal title and rights.⁷¹ As part of the New Relationship, the parties committed to establish processes and institutions for shared decision-making about land and resources and for revenue and benefit sharing. This is a relatively new initiative, which holds the prospect of providing for the recognition, affirmation and reconciliation demanded by s. 35(1) of the *Constitution Act*.

The provincial government has recently committed \$100 million dollars to this initiative and time will tell if the New Relationship provides for a mutually acceptable implementation of jurisprudence regarding Aboriginal rights and title in British Columbia.

7.2 A First Nation – Federal Crown Political Accord

On the national front, the Assembly of First Nations and the Government of Canada also recently concluded “A First Nations – Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments on May 31, 2005.”⁷²

The accord commits First Nations and the Government of Canada to establish a **Joint Steering Committee** to undertake and oversee cooperative action on policy change; the development of frameworks for the recognition and reconciliation of Constitutional, treaty and inherent rights; capacity-building opportunities for First Nations governance; and processes and legislation that will enable the development of First Nation governments.

This recent initiative also holds the prospect of providing for a mutually acceptable implementation of jurisprudence regarding Aboriginal governance rights in Canada. However, this Joint Steering Committee is not yet developed. Until the Joint Steering Committee is established, it will be difficult to fully assess the potential for this initiative to achieve the recognition and implementation of First Nations governance.

On the national front, it is also worth noting that a First Minister’s meeting on Aboriginal issues will take place on November 25, 2006 at Kelowna, British Columbia. First Nations have been provided with an opportunity to provide input and comments to the Premier and his Cabinet.

7.3 International Oversight of Implementation of Jurisprudence concerning Indigenous People’s Rights in British Columbia

There is certainly some room for optimism that the New Relationship Process and the First Nation – Federal Crown Political Accord will result in a reconciliation of Aboriginal sovereignty and the pre-existence of Aboriginal societies with assumed Crown sovereignty. However, First Nations are also mindful that this same optimism was present when the Office of Native Claims was established to resolve Aboriginal land claims in 1973 and when the BC Treaty Commission first opened its doors in 1993.

A full generation has passed since Aboriginal peoples and the federal Crown first began negotiations directed at resolving outstanding land and jurisdictional issues in 1973 and

more than a decade has passed since the BC Treaty Commission opened its doors in 1993.

To date, First Nations in the BC treaty negotiation process have collectively borrowed \$231 million dollars to finance their participation in negotiations. We cannot afford to wait another 12 to 32 years for the New Relationship or the First Nation – Federal Crown Political Accord to produce results. Nor can First Nations afford to participate in processes that will not yield results.

Despite all of our best efforts on the domestic front by the parties and facilitation efforts by the BC Treaty Commission, we have not succeeded in making significant progress in concluding treaties and implementing Canadian jurisprudence regarding the rights of indigenous peoples.

In view of what's at stake, there is clearly an urgent need for additional independent oversight of the BC treaty negotiation process, the New Relationship process, the First Nation – Federal Crown Political Accord process, consultations between the Crown and Aboriginal peoples and the process of implementing Canadian jurisprudence concerning the rights of indigenous people's.

International oversight of these initiatives may finally provide Canada, British Columbia and First Nations with the incentives and dispute resolution required to expeditiously conclude treaties and realize reconciliation demanded by s. 35(1).

8.0 Conclusions

Aboriginal rights encompass the rights of indigenous peoples to continue their traditions, customs and cultures, which involves the exercise of those rights throughout their traditional territories. While Aboriginal rights are collective rights, this in no way diminishes the status of Aboriginal rights as human rights.

Canada champions itself as a defender of human rights. Yet within it's own boundaries, it continues to deny the collective Aboriginal rights and individual human rights of Aboriginal peoples, as evidenced in positions taken by the federal and provincial Crown in Aboriginal rights and title litigation and at treaty tables. This denial of the collective and individual rights of Aboriginal peoples is also evidenced by the refusal by government officials to acknowledge any rights or title "on the ground" when carrying out its legal duties to consult with and accommodate the interests of Aboriginal peoples while treaty negotiations are ongoing.

These denials of Aboriginal peoples, title and rights enable the federal and provincial Crown to carry on with business as usual when making decisions about the use of lands and resources that impact on the rights of Aboriginal peoples. These decisions may also have an impact on the lands and resources potentially available for inclusion in a treaty. This may ultimately result in little or no unencumbered lands or resources available for inclusion in a treaty in the ten, twenty or one hundred years that it may take to conclude treaties in the face of continued denials of the very existence of Aboriginal peoples and their Aboriginal rights and title.

What is required is a reconciliation process that does not have as its starting point a requirement that Aboriginal peoples prove their very existence as well as their Aboriginal

rights and title. What is required is a reconciliation process that does not require Aboriginal peoples to resign themselves to accepting whatever crumbs the federal and provincial Crowns are willing to throw on the negotiating table in the face of continued denials of their rights and title and very existence as peoples. **What is required is respect and recognition of the existence of Aboriginal peoples, Aboriginal title and Aboriginal rights.**

¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.

² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.

³ See “Conspiracy of Legislation: The Suppression of Indian Rights in Canada” by Chief Joe Mathias and Gary R. Yabsley, 1986 for a detailed discussion of the historical denial of Aboriginal title and rights in legislation and policies enacted by the federal and provincial governments over the past 100 years.

⁴ Mathias and Yabsley, *supra*, note 1, p. 2.

⁵ Michael Asch, *Home and Native Land – Aboriginal Rights and the Canadian Constitution*, (Toronto: Methuen Publications, 1984), p. 64.

⁶ Richard C. Daniel. *A History of Native Claims Processes in Canada, 1867-1979*. (Ottawa: Research Branch, Department of Indian and Northern Affairs, February, 1980), p. 221

⁷ *The Report of the British Columbia Claims Task Force*, (June 28, 1991), p. 14.

⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507

⁹ *Van der Peet*, para. 31

¹⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

¹¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

¹² *R. v. Sparrow*, para. 53; *Delgamuukw*, para. 186

¹³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

¹⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.

¹⁵ *Haida Nation*, *supra*, para. 19.

¹⁶ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, para. 25.

¹⁷ *R. v. Sparrow*, [1990], 1 S.C.R. 1075.

¹⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

¹⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; Kent McNeil, “The Onus of Proof of Aboriginal Title,” October, 1999, p. 2.

²⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para.180; Kent McNeil, “Crown Lands or Aboriginal Lands? Hidden Constitutional Issues in *Haida Nation* and *Taku River*,” January 26-27, 2005, p. 2, footnote 8; Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 *Ottawa L. Rev.* 301; Kent McNeil, “The Onus of Proof of Aboriginal Title,” October 1999, p. 2, footnote 2; Hamar Foster, “Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* ‘Invented Law’?” (1998) 56:2 *The Advocate* 221.

²¹ *Campbell v. British Columbia*, 2000 BCSC 1123.

²² *Campbell v. British Columbia*, 2000 BCSC 1123, para. 86.

²³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.

²⁴ See www.bctreaty.net for copies of the annual reports of the BC Treaty Commission.

²⁵ Paul Kariya, Director, Aboriginal Fisheries Branch, Department of Fisheries and Oceans, “Aboriginal Fisheries Strategy – Federal Policy” prepared for Continuing Legal Education, July 1993, p. 2.

²⁶ Paul Kariya, Director, Aboriginal Fisheries Branch, Department of Fisheries and Oceans, “Aboriginal Fisheries Strategy – Federal Policy” prepared for Continuing Legal Education, July 1993, p. 1.

²⁷ Paul Kariya, Director, Aboriginal Fisheries Branch, Department of Fisheries and Oceans, “Aboriginal Fisheries Strategy – Federal Policy” prepared for Continuing Legal Education, July 1993, p. 3.

²⁸ New Relationship document among the Government of British Columbia and First Nations as represented by the First Nations Summit, the Union of BC Indian Chiefs and the office of the Vice-Chief of the Assembly of First Nations, dated April 13, 2005, p. 4.

²⁹ *Blueberry River Indian Band v. HMQ B.C. et al.* Action No. L03290, Vancouver Registry (BCSC) (“*Blueberry*”); *Chingee, Bernie et al. v. Attorney General of B.C. et al.*, Action No. L020087, Vancouver

Registry (BCSC) (“Chingee”); *Gwasslam et al. v. Ministry of Forests et al.*, Action No. L021243, Vancouver Registry, (BCSC) (“Gwasslam”); *Haida Nation v. HMQ B.C. and AG Canada*, Action No. L020662, Vancouver Registry (BCSC) (“Haida”); *HMQ B.C. v. Jules et al.*, Action No. 23914, Vernon Registry, (BCSC) (“Jules”); *HMQ BC et al. v. Wilson et al.* Action No. 23911, Vernon Registry, (BCSC) (“Wilson”); *Homalco Indian Band v. The Minister of Agriculture*, Action No. L043154, Vancouver Registry (BCSC) (“Homalco”); *Hupacasath First Nation v. HMQ B.C. and BC Hydro*, Action No. S33631, Nanaimo Registry, (BCSC) (“Hupacasath (Hydro)”); *Hupacasath v. MOF et al.*, Action No. L043095, Vancouver Registry, (BCSC) (“Hupacasath (MOF)”); *Huu-ay-aht First Nation v. Minister of Forests*, Action No. L042292, Vancouver Registry (BCSC), (“Huu-ay-aht”); *Hunt (Kwakiutl) v. HMQ Canada and HMQ et al.*, Action No. S013414, Vancouver Registry, (BCSC) (“Hunt”); *Kaska Dena Council v. HMQ BC*, Action No. L043150, Vancouver Registry (BCSC (“Kaska”); *Lax Kw’alaams Indian Band v. West Fraser et al.*, Action No. S043159, Vancouver Registry, (BCSC) (“Lax Kw’alaams (West Fraser)”); *Lax Kw’alaams et al. v AG Canada et al.*, Action No. L023106, Vancouver Registry, (BCSC) (“Lax Kw’alaams (AG Canada)”); *Morris and Olsen v. AG Alberta et al.*, Action No. 30328, (SCC on appeal from BCCA) (“Morris and Olsen”); *Musqueam Indian Band v. Minister of Sustainable Resource Management et al.*, Action No. CA031826, Vancouver Registry (BCCA) (“Musqueam (UBC)”); *Musqueam Indian Band v. BC Lottery Corporation, et al.*, Action No. L041328, Vancouver Registry (BCSC), (“Musqueam (BCLC)”); *Ross River Dena Council v. HMQ Canada et al.*, Action No. 04-A0142, Whitehorse Registry (YTSC) (“Ross River”); *Roger William et al. v HMQ et al.*, Action No. 900913, Victoria Registry, (BCSC) (“Roger William”); *Sga’nism Sim’augit (Chief Mountain) v. AG Canada et al.*, Action No. L000808, Vancouver Registry (BCSC) (“Sga’nism”); *David Crocker et al., v. HMQ Canada, HMQ B.C. and Alcan Inc.*, Action No. 18735/03, Prince George Registry (BCSC) (“Skin Tyee”); *Soowahlie First Nation v. HMQ BC et al.*, Action No. S021638, Vancouver Registry (BCSC) (“Soowahlie”); *Squamish Nation v. Minister of Sustainable Resource Management, et al.*, Action No. L032971, Vancouver Registry (BCSC) (“Squamish”); *Thomas v. HMQ B.C.*, Action No. S014755, Vancouver Registry (BCSC) (“Thomas”); *Tseshah First Nation v. HMQ Canada et al.*, Action No. 92-0916, Victoria Registry (BCSC) (“Tseshah”).

³⁰ *Haida; Roger William; Lax Kw’alaams (AG Canada); Hupacasath (Hydro); Lax Kw’alaams (West Fraser); Kaska; Hupacasath (MOF); Gwasslam; Musqueam (UBC); Squamish; Musqueam (BCLC); Homalco, Jules, Wilson, Huu-ay-aht.*

³¹ *Jules, Wilson.*

³² *Chingee, Morris and Olsen, Hunt, Thomas, Ross River, Sga’nism*

³³ *Soowahlie, Blueberry, Skin Tyee, Tseshah*

³⁴ *Haida, Lax’ Kw’alaams (AG Canada), Roger William*

³⁵ *Chingee, Hunt, Sga’nism, Morris and Olsen, Thomas, Ross River*

³⁶ *Soowahlie, Skin Tyee, Tseshah*

³⁷ *Haida; Roger William; Jules, Wilson; Lax Kw’alaams (AG Canada); Hupacasath (Hydro); Lax Kw’alaams (West Fraser); Hupacasath (MOF); Gwasslam; Musqueam (UBC); Squamish; Musqueam (BCLC); Homalco; Huu-ay-aht.*

³⁸ *Jules, Wilson*

³⁹ *Haida, Hupacasath (MOF), Musqueam (UBC), Roger William, Jules, Wilson, Lax Kw’alaams (AG Canada), and Lax Kw’alaams (West Fraser).* The pleadings in *Roger William* and *Hupacasath (MOF)* were filed on January 30, 2005 and July 12, 2005, respectively. In other words as recently as January 30, 2005 and July 12, 2005, the Crown is continuing to deny the existence of Aboriginal title in pleadings filed in Aboriginal title cases.

⁴⁰ *Haida, Roger William.* The federal Crown has not yet filed a Statement of Defence in *Lax Kw’alaams (AG Canada).*

⁴¹ Amended Statement of Defence of Attorney General of Canada, Action No. 90 0913.

⁴² See Annex 7 for a detailed analysis of the *Jules* case.

⁴³ See Annex 7 for a detailed analysis of the *Wilson* case.

⁴⁴ *Huu-ay-aht, Gwasslam, Squamish, Musqueam (BCLC),*

⁴⁵ *Hupacasath (MOF)*

⁴⁶ *Musqueam (UBC)*

⁴⁷ *Haida.* para. 25.

⁴⁸ *Haida,* para. 25.

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- ⁴⁹ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
- ⁵⁰ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, para. 25.
- ⁵¹ *Haida*; *Roger William*; *Jules, Wilson*; *Lax Kw'alaams (AG Canada)*; *Hupacasath (Hydro)*; *Lax Kw'alaams (West Fraser)*; *Hupacasath (MOF)*; *Gwasslam*; *Musqueam (UBC)*; *Squamish*; *Musqueam (BCLC)*; *Homalco*; *Huu-ay-aht*.
- ⁵² *Jules, Wilson*
- ⁵³ *Jules, Wilson, Hupacasath (Hydro), Roger William, Hupacasath (MOF), Huu-ay-aht, Squamish, Musqueam (UBC), Lax Kw'alaams (West Fraser), Lax Kw'alaams (AG Canada)*
- ⁵⁴ *Roger William*
- ⁵⁵ *Jules, Wilson, Roger William, Hupacasath (Hydro), Lax Kw'alaams (West Fraser), Lax Kw'alaams (AG Canada)*
- ⁵⁶ *Huu-ay-aht, Hupacasath (MOF), Squamish*
- ⁵⁷ *Musqueam (UBC)*
- ⁵⁸ *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 581 at pp. 557-558.
- ⁵⁹ *The Report of the British Columbia Claims Task Force Report*. (June 28, 1991), p. 7.
- ⁶⁰ *The Report of the British Columbia Claims Task Force Report*. (June 28, 1991).
- ⁶¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; Kent McNeil, "The Onus of Proof of Aboriginal Title," October, 1999, p. 2.
- ⁶² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; Kent McNeil, "The Onus of Proof of Aboriginal Title," October, 1999, p. 2.
- ⁶³ *Huu-ayaht, Squamish, Musqueam (UBC), Musqueam (BCLC), Gwasslam, Hupacasath (MOF), Roger William, Haida and Homalco*. See the chart at Annex 6 for the adequacy of consultation issues raised in each of these cases.
- ⁶⁴ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
- ⁶⁵ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
- ⁶⁶ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, para 37.
- ⁶⁷ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, para. 44.
- ⁶⁸ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
- ⁶⁹ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
- ⁷⁰ *Gwasslam, Musqueam (UBC), Squamish, Musqueam (BCLC), Homalco*.
- ⁷¹ See Annex 8 for a copy of the entire text of the New Relationship document, which was concluded by the Government of British Columbia and First Nations as represented by the First Nations Summit, the Union of BC Indian Chiefs and the office of the Vice-Chief of the Assembly of First Nations on April 13, 2005.
- ⁷² See Annex 9 for a copy of the text of the political accord between the Assembly of First Nations and the Government of Canada.