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Forest People: First Nations Lead the Way toward a Sustainable Future

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> I am trying to save the knowledge that the forests and this planet are alive, to give it back to you who have lost the understanding.[1]

The longest running and most important land conflict in BC history remains unresolved. The Aboriginal people living in this place when Europeans arrived in the eighteenth century never ceded, surrendered, bartered, or signed away their rights to use and occupy the land. Today First Nations are striving to regain control of the land and its resources. Having established Aboriginal rights to fish and wildlife, First Nations are now focusing their efforts on forests. Like fish and wildlife, forests were and are an integral part of Aboriginal society – culturally, economically, spiritually, and aesthetically.

From the perspective of regaining control over forests, there are really two main objectives for First Nations. First, there is a need to end the ecological and cultural destruction caused by industrial logging. This goal can be achieved by moving toward a sustainable ecosystem-based management regime. Second, there is a need to allocate forest resources to First Nations and to distribute the economic benefits of forestry activities more justly, with greater return to local communities. This second goal can be achieved through tenure reform and by changing from provincial ownership to First Nations ownership of the forests.

To regain control over forests, First Nations are using two main strategies: the negotiation of treaties and litigation that seeks recognition of their Aboriginal rights. After over a century of ducking the issue, the provincial and federal governments have agreed to participate in a modern treaty process. However, because of serious problems with the treaty process, some First Nations are using lawsuits to seek recognition of their Aboriginal rights. Both negotiation and litigation have the potential not only to advance the aspirations of First Nations but also to promote a more sustainable approach to managing BC forests.

First Nations and Forests: 10,000 Years of Sustainable Use

The cultures of First Nations[2] in British Columbia are inextricably linked

to old-growth forests and have been thus linked for at least 10,000 years.[3] Traditional use of forests by First Nations has been extensive: the existence of the Haida, the Nuu-Chah-Nulth, and other First Nations on the coast has been dependent to a large degree on the wealth of the old-growth forests. Trees were and are used to build houses, make canoes, and carve totem poles. Other objects made from raw materials provided by trees include clothing, baskets, mats, cooking "pots," masks and other ceremonial objects, rope used for fishing and hunting, storage boxes, and tools for cooking, hunting, and fishing.

Old-growth forests are also an essential source of many substances for food and medicine as well as fuel for cooking and heating. Healthy old-growth forests provide critical habitat for wildlife and fish, especially salmon, which are of great importance to First Nations both materially and spiritually. Less tangibly, old-growth forests are also important for spiritual and ceremonial values as places for "vision quests" and education. As described by ethnobotanist Nancy Turner, "Many plants were particularly important culturally, whether it be for food, material, medicine, and/or in playing some role in ceremony or religious thought. However, even the plants that might be considered unimportant by virtue of not being 'used' in some particular way were regarded as special and as living entities with their own power, their own spirit and their own ability to help those deemed to be good and respectful. In fact, everything in the Haida universe – plants, animals, water, rocks, mountains, stars, and the sun and moon – all of these were seen as sacred and important."[4]

First Nations culture continues to be defined by the land, oceans, rivers, and forests. As Turner explains, "The mountains, the waters, the plants and the animals of Haida Gwaii are all part of a magnificent system, supporting and nourishing the Haida and, in turn, respected and embraced by them as an integral part of their culture and identity."[5]

The Nuu-Chah-Nulth of Vancouver Island also reflect the widely held First Nations philosophy that all things are sacred and deserve to be treated with respect. The Nuu-Chah-Nulth phrase *hishuk ish ts'awalk* ("everything is one") embodies the concepts of sacredness and respect:[6] "Nothing is isolated from other aspects of life surrounding it and within it. This concept is the basis for the respect for nature that our people live with, and also contributed to the value system that promoted the need to be thrifty, not to be wasteful, and to be totally conscious of your actual needs in the search for foods. The idea and practices of over-exploitation are deplorable to our people. The practice is outside our realm of values."[7]

The Nuu-Chah-Nulth also have a system of hereditary land stewardship called *ḥaḥuulhi*[8] that integrates ownership, control, and management. Together, *hishuk ish ts'awalk* and *ḥaḥuulhi* form the basis for a stewardship

ethic that is most closely embodied in the modern concept of sustainable, community-based ecosystem management.

While the distinctive cultures of First Nations owe much of their history and evolution to the wealth of the forests, their future is also dependent on the continued health of old-growth forests. Without them, the language, culture, and traditional way of life may disappear. Thus, finding a path that leads to sustainability – ecological, cultural, social, and economic – is of the utmost importance to First Nations.

Examining the status of Indigenous languages on the West Coast provides a compelling illustration of the direct connection between healthy traditional Aboriginal cultures and healthy old-growth forests. According to a recent study, "44 out of 68 language groups believed to have been spoken at the time of European exploration are today extinct or spoken by fewer than ten individuals."[9] The extinct languages are mainly in California, Oregon, and Washington, while living languages are found in British Columbia and Alaska. There appears to be a direct correlation between the demise of Indigenous languages and the extent of industrial development in a watershed. The higher the percentage of industrial development, the greater the likelihood that the Indigenous language is extinct.[10]

Industrial Logging in BC Forests: A Century of Destruction

Temperate forests are the most endangered forests on Earth.[11] Coastal temperate rainforests occupy only 0.2 percent of the Earth's surface, yet they contain more biomass than any other place on Earth. British Columbia contains over half of the remaining old-growth temperate rainforest in North America and one-quarter of the world's remaining coastal temperate rainforest.

After millennia of sustainable use by First Nations, there has been an exponential increase in logging in the past 100 years, particularly since 1960. Two-thirds of British Columbia's coastal rainforest – one of the Earth's biologically richest ecosystems – have been degraded by logging or other industrial development. For example, on Vancouver Island, only 11 of 170 watersheds have not been subjected to the damage inflicted by industrial development.[12]

British Columbia manages its forests according to the philosophy of "sustained yield forest management," which is based on liquidating old-growth forests and replacing them with faster growing tree farms. Trees that would naturally live for 500 to 1,000 years are expected to be harvested every sixty to eighty years. The natural range of species will be dramatically modified. On Haida Gwaii (the Queen Charlotte Islands), western red cedar typically makes up about 30 percent of the old-growth forest prior to logging. In the second-growth tree farms, cedar is expected

to make up about 2 percent of the crop.[13] The implications for traditional Indigenous cultures are both obvious and devastating – First Nations cannot make a totem pole or a canoe from an eighty-year-old tree, particularly when it is the wrong species for carving.[14]

The unsustainable rate of logging in British Columbia is also a major concern to First Nations. According to the Ministry of Forests, the long-term sustainable rate of logging for the province is between 50 and 60 million cubic metres.[15] The current allowable annual cut is roughly 71 million cubic metres, 20 to 40 percent above the government's calculation of what is sustainable.[16] To make matters worse, most forest ecologists agree that, if ecosystem management were to replace the current industrial-logging paradigm, the sustainable rate would be considerably lower than the ministry's estimate of 50 million cubic metres.[17]

In 1994, the provincial government enacted the Forest Practices Code of British Columbia,[18] intended "to change the way forests are managed" and to make the BC logging industry more sustainable. The code has changed the way that forests are managed, but not to the degree that First Nations and the public had expected. To a large extent, the code was crippled at the outset by a policy directive that its impacts could not result in a 6 percent decrease to the allowable annual cut. Given that the provincial rate of logging is 40 percent above the government's own estimate of the sustainable rate, a 6 percent decrease in the rate of logging falls far short of achieving sustainability.

Audits conducted since the code was enacted show that clear-cutting has continued to be the harvesting method for over 90 percent of cutblocks,[19] that a large percentage of streams continue to be misclassified or are simply not protected,[20] that clear-cutting continues to predominate on steep, unstable slopes,[21] and that key wildlife protection mechanisms have not been implemented.[22] While there have been some modest improvements in forest practices, there is still a wide gulf between current practices and sustainable ecosystem management.

The demonstrable impacts of industrial logging on BC ecosystems are accumulating. The province has lost at least 142 salmon runs in this century, and another 624 are on the brink of extinction.[23] Logging is a major culprit in the decline of salmon runs. The provincial Ministry of Environment lists 75 endangered or threatened animal species, 241 endangered or threatened plant species, and another 420 vulnerable animal and plant species.[24] Logging is identified by the ministry as the third largest factor in endangering species in the province.[25] As well, the provincial government has estimated that the cost of restoring watersheds damaged by logging will be between $1 billion and $4 billion.[26]

Traditional First Nations territories contain most of the "productive forest land" in British Columbia. Thus, the brunt of the ecological impacts of

industrial logging is often borne by First Nations. For example, "forest practices in Clayoquot Sound have contributed to mass wasting of the soil, sedimentation, and reduced fish stocks."[27] First Nations throughout the province, on the coast and in the interior, have suffered great hardships, both economically and culturally, because of declining salmon populations (due in part to logging). Logging and road building also have impacts on wildlife, as described by Ditidaht Hereditary Chief Queesto: "In the early days we used to hunt elk, deer and bear right here by the San Juan River. They were all so plentiful, you could get anything you wanted. I can remember when you would see bands of wolves up along the river ... We always had plenty of game for food. Ever since logging came, there's been no more deer or wolf or elk or beaver. They've all disappeared. Maybe they've been killed off, or maybe they've just moved on to somewhere else. We don't know where the animals have gone."[28]

There is also a decided lack of protection for the cultural heritage of First Nations under the Forest Practices Code. Areas of significance to First Nations routinely continue to be logged, even when the last intact watershed in a First Nation's traditional territory is at stake.[29] As for the participation of First Nations in planning and approval processes, there has been little on-the-ground progress despite several important legal victories.[30] The Ministry of Forests continues simply to notify First Nations of planned logging and road building. In the vast majority of areas being logged, the level of knowledge at the ministry about cultural, spiritual, and ecological values is minimal, yet status quo industrial logging continues.

Government and industry treatment of culturally modified trees (CMTs) illustrates the problem. CMTs are ancient trees that provide physical evidence of First Nations use such as bark stripping, plank removal, and single-tree selection logging for canoes, totem poles, or longhouses. First Nations view CMTs as evidence of their ownership and use of the land, as living testaments to their culture, and as storehouses of traditional knowledge.[31] In contrast, the logging industry and the provincial government view CMTs as a source of aggravation. On many occasions, a logging company has simply notified the First Nation of the existence of a CMT, gotten a permit, cut down the tree, and delivered it to the First Nation![32]

In most of the province, there is no forest land set aside for traditional use by First Nations. Carvers and canoe builders must apply for "special use permits" to receive permission for traditional uses of the forests or to buy logs from logging companies.[33]

While First Nations pay the costs of industrial logging, they receive few of the benefits. British Columbia's current tenure system allocates most of the annual timber harvest to a small number of large corporations. A recent study found that "over 86% of B.C.'s public forest resource is held by 20 corporations, and 23% is controlled by just three companies."[34] As a

result, control over logging operations, including planning and forest management, is removed from local and community control.[35]

The existing tenure system makes little provision for allocating forests to First Nations for either traditional or commercial activities. A 1991 Task Force on Native Forestry found that First Nations control less than 1 percent of the provincial allowable annual harvest.[36] The Haida Nation, despite its long history of extensive use of old-growth forests, has never had a timber licence, tree farm licence, or any other form of industrial-logging tenure. Aside from allocation problems, First Nations do not benefit from the current industrial-logging regime.

Most of the timber harvested in British Columbia receives a minimal amount of processing or "value added" before being exported. According to recent statistics, "over 90% of B.C.'s forest product exports are shipped in the form of dimensional lumber, pulp, newsprint and paper."[37] The result of this high-volume, low-value-added commodity approach is that few jobs are sustained at a local level and few economic benefits accrue to First Nations. Haida Gwaii provides a compelling illustration of the lack of local benefits provided by industrial logging. In recent decades, tens of millions of cubic metres of timber have been taken from Haida Gwaii's old-growth forests. This timber has a market value worth billions of dollars, yet the Haida have always faced high unemployment rates[38] because they have no tenure and virtually all of the timber leaves the community without any processing or value being added.[39] Assuming that this scenario is typical throughout British Columbia, it appears that First Nations have borne the costs of industrial logging while reaping few of the economic benefits.

While some First Nations individuals have been employed by or continue to be employed by the logging industry, the centrality of the forests to the cultures of First Nations and the destruction of their traditional ways of life leaves many First Nations opposed to industrial logging. Even for First Nations that engage in logging ventures themselves, there is often a divergence of opinion and strong pressure to practise more responsible stewardship.[40] Many First Nations are angered by the loss of and damage to their traditional territories, and they are frustrated with the fact that economic benefits from forests continue to be removed from local communities.

In the fall of 1999, the frustrations of First Nations people reached new heights. Several First Nations in British Columbia began logging on their traditional territories (or on provincial Crown land, depending on one's perspective) without government permits. The Ministry of Forests responded by issuing stop-work orders under the authority of the Forest Practices Code. Legal proceedings were initiated, and several injunctions were issued by the BC Supreme Court to prevent further logging until the underlying legal issues are resolved.[41] Meanwhile, the two largest First

Nations organizations in the province, the First Nations Summit and the Union of BC Indian Chiefs, called for an international boycott of BC timber products.

Significant changes to the forest management regime are necessary to ensure the protection of Aboriginal culture and Aboriginal rights to the forests. A more desirable approach would be "ecosystem-based management," which emphasizes maintaining ecosystem health and the cultures of First Nations. The National Aboriginal Forestry Association has developed a set of Aboriginal Forest Land Management Guidelines.[42] This proposed management regime (1) stresses the importance of community direction and long-term enhancement of social, spiritual, environmental, and economic values; (2) respects all parts of the forest, including plants, animals, soil, air, water, and all forest users; and (3) respects the diversity of Aboriginal communities as distinct societies with their own languages, cultures, values, and customs. Ecosystem-based management is clearly more compatible with First Nations community-based management and stewardship of the environment than the current regime of industrial forestry.[43]

The European Resettlement of British Columbia

Throughout the world, Indigenous peoples have been displaced from their traditional lands – first by the colonial powers and more recently by the transnational corporations of the industrialized world. This displacement has been justified, and continues to be justified, on the principles of conquest, "discovery," or treaties with First Nations. In Canada, the story of colonization, exploitation, and cultural genocide is no different. However, in one respect, British Columbia is unique.

During the seventeenth, eighteenth, and nineteenth centuries, the British Crown concluded treaties with many, but not all, First Nations across Canada. Some First Nations in British Columbia, the Yukon, the Northwest Territories, and to a lesser extent Quebec and Alberta have either not ceded land through treaties or only recently concluded treaties with the federal and provincial governments.

British Columbia is in an anomalous legal situation with respect to First Nations in Canada because the ownership debate in most of the province remains unresolved. Only small portions of Vancouver Island and northeastern British Columbia have had treaties settled.[44]

Because treaties have not yet been concluded, and will probably not be concluded for the next two decades, First Nations hold unextinguished legal rights over a significant proportion of the land comprising British Columbia.[45] These are legal rights to the land derived from historic occupation of the land by First Nations and from the fact that they lived as self-governing peoples, with their own laws and customs prior to the arrival and settlement by Europeans. This leaves the provincial government and

natural resource industries in a precarious position while treaties unfold but presents First Nations in the province with unprecedented opportunities for change.

Decolonizing British Columbia's Forests

There are two paths available to BC First Nations in their quest for greater control over the ownership and management of the province's forests: negotiation and litigation.[46] These paths are often portrayed as mutually exclusive in that the federal and provincial governments have suggested that they will not continue negotiations with a First Nation that is advancing its legal interests through litigation. In fact, this either/or categorization is inaccurate. There are a number of First Nations in the BC treaty process that are negotiating and litigating, or have done so, at the same time. These First Nations include the Haida, Cheslatta, Gitxsan, Wet'suwet'en, Tsay Keh Dene, Gitanyow, Sechelt, Musqueam, Squamish, and Tsleil Waututh.[47]

Litigation and negotiation are intricately intertwined, with new developments in each area having profound implications in the other. For example, the Supreme Court of Canada decision in the *Delgamuukw* case has significantly strengthened the negotiating positions of First Nations in the treaty process. On the other hand, the Nisga'a Final Agreement provides a benchmark to other First Nations of the approximate parameters of a settlement reached through negotiation.[48]

Both negotiation and litigation offer First Nations the opportunity to make significant advances in regaining control over both forests and their cultures. However, each approach is also plagued by major drawbacks, as the following analysis illustrates.

Negotiation: A Sustainable Future through Treaties and Interim Measures Agreements?

First Nations in British Columbia never acquiesced in the colonial or provincial government's usurpation of their land rights. For over a century, efforts by First Nations to have outstanding questions about land ownership in the province answered were rejected. Petitions, protests, and litigation from First Nations were met with obfuscation, delay, royal commissions, white papers, legislation,[49] and discrimination by colonial, federal, and provincial governments. This history is an ongoing source of embarrassment to both British Columbia and Canada. Belatedly, the modern treaty process was kick-started by the 1973 Supreme Court of Canada decision in the *Calder* case brought by the Nisga'a Nation.[50] Twenty-five years of negotiations culminated in 1998 with the Nisga'a Final Agreement. The Nisga'a treaty negotiations are unique in that other modern treaty negotiations with BC First Nations did not begin until 1993.[51]

The Nisga'a Final Agreement

The Nisga'a Final Agreement, signed in August 1998 by leaders of the provincial government, the federal government, and the Nisga'a First Nation, transfers ownership of 2,000 square kilometres from the provincial government to the Nisga'a.[52] This area represents a relatively small fraction of the Nisga'a traditional territory. The treaty also gives the Nisga'a new self-government powers (in areas including language, culture, land use, health, and education) and a financial package worth approximately $300 million.[53] By late 1999, the provincial, federal, and Nisga'a governments had all ratified the treaty.

In the area of forestry, under the treaty the Nisga'a are given new management responsibilities and logging rights on Nisga'a lands. All logging on Nisga'a lands must meet or exceed the rules of the BC Forest Practices Code for Crown land, not the weaker rules for logging on private land.[54] However, the code, as described above, leaves much to be desired from a sustainable forestry perspective even on Crown land. The Nass River region has been abused by decades of overcutting. By the provincial government's own estimate, the rate of logging in this area has been roughly three times the sustainable rate in recent years.[55]

Despite this history of logging abuse, the treaty actually limits the ability of the Nisga'a to reduce the rate of logging to sustainable levels, at least in the short term. For the first five years of the treaty, the rate of logging on Nisga'a lands is held constant at 165,000 cubic metres.[56] For years six through nine, the decline is fixed at gradual steps down to 130,000 cubic metres.[57] These restrictions appear to have been dictated by a provincial government intent on defending the logging industry status quo. Unfortunately, the Nisga'a are effectively precluded from quickly making the necessary transition from the volume-based industrial logging of the past to the value-added, ecosystem-based community forestry that is the future.[58]

The BC Treaty Negotiation Process

In 1993, First Nations, British Columbia, and Canada established the BC Treaty Commission to oversee the modern treaty negotiation process. More than fifty First Nations are now at varying stages of the treaty process.[59] It is obvious, based on the enormous stakes, the complexity of the issues, and the Nisga'a experience, that the treaty negotiation process will take years, if not decades, for most First Nations.

It is generally acknowledged, and courts have repeatedly stated, that negotiation should be preferable to litigation in resolving outstanding questions about Aboriginal title and Aboriginal rights in British Columbia. Litigation is widely regarded as expensive, time-consuming, and unpredictable. Unfortunately, so is the treaty process.

A major shortcoming of the treaty negotiation process at present is the provincial government's policy that, for all completed treaties, the amount of land to be transferred to First Nations will not exceed 5 percent of the provincial land base.[60] When one considers that the traditional territories of First Nations cover close to 100 percent of the province, the extent of the problem becomes obvious. Perhaps some First Nations would prefer comanagement of their traditional territories rather than outright ownership of small percentages of those territories.

In anticipation of the lengthy process and the problems that all parties face in the interim while treaties are being negotiated – disappearing resources for First Nations, economic uncertainty for government and industry – the federal and provincial governments and First Nations agreed to negotiate interim measures agreements (IMAs). These IMAs were intended to alleviate First Nations concerns that there would be no resources left at the end of the negotiating process.[61] Of particular concern are old-growth forests, because the logging industry has already taken so much from traditional territories and because the current rate of logging is so far above what can be sustained in the long run.

A successful example of an IMA dealing with forests is the agreement between the Nuu-Chah-Nulth and the BC government regarding resource management in Clayoquot Sound. The IMA created a joint management regime whereby resource management is supervised by the Central Region Board – a newly created administrative body comprised equally of provincial and First Nations representatives. The IMA also requires the Nuu-Chah-Nulth to enter into a joint venture with MacMillan Bloedel, a major logging company. As a result of the IMA, the Nuu-Chah-Nulth now have a far greater role in forest management and will receive a greater proportion of the benefits of economic activity in the region. The Central Region Board has overseen implementation of the recommendations of the Clayoquot Sound Scientific Panel, resulting in significant progress toward sustainable ecosystem management of the globally renowned Clayoquot Sound area.[62]

Unfortunately, the government of British Columbia has been reluctant to negotiate IMAs with many First Nations. This reluctance has been the subject of considerable criticism, and even the arm's-length BC Treaty Commission has publicly condemned the provincial government for effectively undermining the process by refusing to negotiate IMAs.[63] Despite the BC Treaty Commission's moral suasion, the provincial government remains unrepentant in refusing to negotiate IMAs until the latter stages of the treaty process.[64]

Both treaties and IMAs offer major opportunities to First Nations in British Columbia seeking a sustainable future through greater control over forest management. The potential for reforming forest management, forest

tenures, and forest practices through treaties and IMAs to reflect the respect for nature inherent in traditional First Nations concepts of stewardship has been demonstrated, to varying degrees, by the Nisga'a Final Agreement and the Nuu-Chah-Nulth Interim Measures Agreement.

Optimism over the potential for change through negotiation must be tempered by several key factors, including the provincial government's reluctance to negotiate IMAs in good faith and in a timely manner, the length of the treaty negotiation process, and the provincial policy limiting to 5 percent the amount of provincial land available for treaty settlements. Unless these critical constraints can be addressed, litigation will continue to be an attractive option to many First Nations in British Columbia, particularly in light of the recent Supreme Court of Canada ruling in the *Delgamuukw* case.[65]

Litigation: A Sustainable Future through the Courts?

Like negotiation, litigation provides a vehicle through which First Nations can acquire greater control over the ownership and management of forests in British Columbia. Perhaps the greatest difference between negotiation and litigation is the element of risk associated with the latter. Litigation is very unpredictable and rigid, resulting in win or lose results. Uncertainty is exacerbated by the fact that the area of Aboriginal law is probably evolving more quickly than any other area of Canadian jurisprudence.[66]

However, two basic facts make litigation an attractive option for First Nations in British Columbia. First, because treaties were never negotiated, First Nations have an unextinguished legal interest in most of the lands and waters of British Columbia. Second, Aboriginal rights were entrenched in Canada's Constitution in 1982,[67] giving First Nations unprecedented legal strength in asserting and defending their rights. The Supreme Court of Canada has repeatedly held that Aboriginal rights are included in Section 35 in order to protect and reconcile the interests of First Nations with Canadian sovereignty.[68]

There is a variety of legal tools available for First Nations seeking to accomplish their cultural, ecological, and economic objectives in reforming the logging industry and achieving sustainability. The most powerful cases involve invoking Aboriginal title, which means asserting collective ownership of the land and the forests based on historic occupation and use. The other category of cases involves invoking Aboriginal rights, which are generally related to specific activities practised by a First Nation such as hunting, fishing, or medicine gathering. In the context of old-growth forests, Aboriginal rights can be claimed as a means of stopping industrial logging that will infringe upon those rights or, more proactively, as a means of using trees and other elements of old-growth forests. It may also be possible to assert a commercial Aboriginal right to old-growth

forests where First Nations can establish that trade in canoes, boxes, or other wood products was an integral part of their cultures. Finally, the forest management regime may be scrutinized in court for its infringement of Aboriginal rights and title. Each of these legal tools is discussed in turn.

Aboriginal Title

For over a century, the BC government has managed the logging industry based on the assumption that the government owns all the forests on public land. That fundamental assumption is now acknowledged to be incorrect. Recent court decisions have revealed that ownership of the forests of British Columbia is, to a large degree, unresolved because treaties were never negotiated.

The most important Aboriginal law decision in Canadian history is the *Delgamuukw* decision handed down by the Supreme Court of Canada on 11 December 1997. For the first time, the Supreme Court addressed directly the meaning of Aboriginal title. The decision clarified that Aboriginal title is a legal interest in the land itself, including the minerals beneath the land and the "fruits of the land," such as forests. *Delgamuukw* also ended long-standing speculation that the Aboriginal title held by BC First Nations had been extinguished by colonization or settlement.

According to the Supreme Court of Canada, Aboriginal title is largely comparable to ordinary property ownership. However, there are several important differences:

- Land held pursuant to Aboriginal title is communally owned, not individually owned.
- Land held pursuant to Aboriginal title can only be sold to the federal government.
- Land held pursuant to Aboriginal title is subject to an "inherent limit," meaning that such land cannot be used in a way that impairs its utility for traditional use by future generations.

The Supreme Court's characterization of Aboriginal title is based, to a large extent, on First Nations laws of land stewardship. First Nations hold land collectively, not individually. It is impossible for First Nations to "own" the land, forests, rivers, oceans, lakes, and creatures of these domains ("traditional territories"), since each has a special spirit and its own persona. First Nations "ownership" of traditional territories is more accurately described as stewardship or a hereditary responsibility to manage traditional territories in a manner that ensures availability for future generations.[69]

From a forestry perspective, one of the most interesting aspects of the Supreme Court's decision in *Delgamuukw* is the principle that land-use

activities on lands under Aboriginal title are subject to an "inherent limit,"[70] which means that lands cannot be used in a manner that destroys the special bond between Aboriginal people and those lands. The court used strip mining in a traditional hunting area and paving over a burial site as examples of destructive activities that would be prohibited by the unique nature of Aboriginal title.

The Supreme Court bases the concept of an inherent limit on the "special relationship" between First Nations and the land and resources (the fact that First Nations cultures are inextricably intertwined with the environment).[71] The rationale for incorporating inherent limits into Aboriginal title is the same as that which underlies the concept of sustainability – namely, acting in a manner that does not compromise the environment to the disadvantage of future generations. In the words of the Supreme Court, "The law of Aboriginal title does not only seek to determine the historic rights of Aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an Aboriginal community to its land over time."[72]

The Supreme Court appears to be suggesting that only sustainable activities will be allowed on Aboriginal lands. Furthermore, if First Nations are bound by this inherent limit, then it follows that other parties operating on Aboriginal lands must be similarly constrained. This regulation raises many questions, including whether clear-cutting of old-growth forests is a sustainable activity.

While the concept of an inherent limit is applauded, it should not be confined only to lands under Aboriginal title. The history of dominant society's industrial logging, resource use, and relationship with the land and the environment is remarkably different from the traditional relationship that First Nations have with the land and its resources. However, we are all dependent on the land and the environment. Regardless of race or culture, we all depend on clean air to breathe, clean water to drink, and food grown on the land. Accordingly, all of our activities should be governed by the common-sense principle of inherent limits.

The Supreme Court ruled that courts must give equal weight to oral evidence in cases involving First Nations.[73] The court also provided considerable guidance on the evidence required to prove Aboriginal title. The land in question must have been occupied prior to the British assertion of sovereignty in 1846. There must be continuity of occupation, though not necessarily unbroken continuity.[74] Occupation of the land in question must have been exclusive (although the Supreme Court acknowledged the possibility of "shared exclusivity").[75]

In *Delgamuukw*, the Supreme Court also ruled that there is an "inescapable economic aspect" to Aboriginal title.[76] This ruling is relevant

to forestry in that the government has a duty to ensure that First Nations are given an opportunity to share in the economic benefits.[77]

Yet another fundamental principle enshrined in the *Delgamuukw* decision is that both the federal and the provincial governments owe a fiduciary duty to First Nations.[78] This duty means that governments have a trust-like obligation to handle dealings with First Nations honourably. In the forestry context, the practical implication of the provincial government's fiduciary duty is that the government must consult with a First Nation prior to approving logging activity in its traditional territory. At a minimum, the Supreme Court said, the consultation must be meaningful and should substantially address the concerns of the First Nation. When Aboriginal rights are threatened, consent of the First Nation is required;[79] the Supreme Court held that an important aspect of Aboriginal title is the right to choose how lands are used. Although the precise parameters of what constitutes meaningful consultation remain to be determined, the provincial government's duty to consult clearly gives First Nations legitimate opportunities to incorporate their ecological and cultural concerns into the forest management process.

As outlined above, the existing forest tenure system in British Columbia effectively excludes First Nations. Courts are beginning to recognize that the exclusion of First Nations is problematic, as shown by the BC Court of Appeal in *MacMillan Bloedel* v. *Mullin*: "There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that."[80]

The exclusion of First Nations from the forest tenure system is difficult to reconcile with the fact that even early Canadian Aboriginal law recognized that an Aboriginal interest in land includes the forests and other resources on that land. One of the earliest decisions addressing Aboriginal rights was *St. Catherines Milling and Lumber Co.* v. *The Queen* in 1888.[81] In its decision, the court held that, upon surrender of Aboriginal rights and title in the treaty process, the rights to the timber passed from the Aboriginal people to the provincial government, not the federal government. It follows logically, then, that in the absence of a treaty the rights to the timber remain with the Aboriginal people. This hypothesis was supported by the *Calder* decision,[82] in which the Supreme Court of Canada held that Aboriginal title includes the "right to occupy the lands and to enjoy the fruits of the soil, of the forest and of the rivers and streams."

A recent BC Court of Appeal decision in a case brought by the Haida Nation provides further evidence that an Aboriginal interest in land includes the trees on that land.[83] The court ruled that Aboriginal title is a valid legal encumbrance on provincial title to the land and the forests. This decision casts doubt on the legal validity of exclusive logging licences, such as tree farm licences in British Columbia. An exclusive logging licence

simply cannot be reconciled with Aboriginal ownership of the forests.[84] This decision, along with *Delgamuukw*, casts a shadow of legal uncertainty over the entire forestry management regime in Canada.

Attempting to prove Aboriginal title through litigation is expensive and daunting though not dissimilar from the effort required to negotiate a treaty. The Gitxsan and Wet'suwet'en First Nations began preparing for the *Delgamuukw* case in the mid-1970s. The trial did not begin until the late 1980s. The 1997 *Delgamuukw* decision did not actually decide the extent of Aboriginal title held by the Gitxsan and Wet'suwet'en First Nations because the Supreme Court held that the trial judge had failed to consider adequately the oral evidence brought forward by the First Nations. The Supreme Court decision sent the two First Nations back to the beginning (trial court), albeit with a much stronger legal and evidentiary framework.[85] Chief Justice Lamer added these final words: "Ultimately it is through negotiated settlements, with good faith and give and take on both sides, reinforced by judgments of this Court, that we will achieve ... the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay."[86]

Nevertheless, for First Nations unhappy with the constraints of the treaty negotiation process, and particularly the provincial government's policy that only 5 percent of the land in the province will be returned to First Nations, going to court to assert Aboriginal title remains an attractive option. Given the principle of inherent limits, the more land found to be subject to Aboriginal title the better, from cultural and ecological perspectives.

Aboriginal Rights to Forests

For the purposes of this discussion, Aboriginal rights will be limited to rights to engage in particular activities as distinct from Aboriginal title, which is a legal interest in land.[87] Many of the Aboriginal rights cases in Canada have been concerned with hunting and fishing. Only recently have cases involving Aboriginal rights to the forests begun to emerge.[88] These cases are still embroiled at varying stages in the legal system and will not be discussed in detail here because as yet there are no definitive judicial pronouncements on this topic. The Supreme Court of Canada has never directly addressed the issue of an Aboriginal right to forests. However, it is reasonable to assume that the general principles for proving Aboriginal rights apply to establishing Aboriginal rights to the forests.

There are two distinct categories of potential Aboriginal rights relevant in the context of old-growth forests. The first category involves an Aboriginal right to forests for either traditional or commercial uses. The second category involves Aboriginal rights to a broader range of activities dependent on old-growth forests, from food and medicine gathering to ceremonial and spiritual activities such as vision quests.

Neither a traditional Aboriginal right to forests nor a First Nations commercial right to forests has been established. However, an Aboriginal right to forests or to the use of old-growth forests for a variety of traditional purposes would be based on the same principles as the Aboriginal right to fish. The Supreme Court of Canada ruled, in *Sparrow* and subsequent cases, that First Nations have an Aboriginal right to fish that is constitutionally protected.[89] The court based these decisions on evidence that fishing was and is a practice or custom integral to the distinctive culture of the particular First Nation claiming the right. The court went on to say that conservation is the top priority in fisheries management. Then, in allocating fish among various groups, Aboriginal people are to be given priority over other users because of the historic reliance of First Nations on fish, the integral role of fish in their cultures, and the constitutional status of their rights. Governments are allowed to infringe upon Aboriginal rights, but they require a valid legislative objective and must act in a manner consistent with their fiduciary duty to Aboriginal people.

The Supreme Court recently held, in the *Van der Peet* and *Gladstone* decisions, that commercial rights to use natural resources may be held by First Nations in certain circumstances. The legal test for proving a commercial Aboriginal right is the same as for proving a traditional Aboriginal right. A First Nation must prove that a practice, tradition, or custom is "integral" to its "distinctive culture."

Proving a commercial Aboriginal right to forests will not be easy. Despite extensive evidence that the Sto:lo First Nation engaged in the harvesting and trading of salmon, the Supreme Court held in *Van der Peet* that a commercial right to fish had not been established.[90] However, in *Gladstone* a Heiltsuk fisherman was able to establish successfully a commercial Aboriginal right to fish by proving that trading a seafood product known as herring spawn on kelp was an integral part of Heiltsuk culture.[91] The Supreme Court distinguished these two cases by holding that the Heiltsuk harvested herring spawn on kelp not only to meet their own needs but also to trade with other First Nations. This "excess" was an integral part of the Heiltsuk culture.

A recent decision in the controversial *Marshall* case interprets a 1760 treaty as granting the Mi'kmaq First Nation the right to earn a "moderate livelihood" from hunting, fishing, and gathering.[92] The Supreme Court of Canada overturned the conviction of Donald Marshall for selling eels, based on his treaty right to earn a living. The *Marshall* decision has limited application in British Columbia because it is based on a specific treaty, but it will no doubt be used to buttress assertions of commercial Aboriginal rights.

Among the First Nations of coastal British Columbia is abundant anthropological evidence of extensive trading of canoes, masks, headdresses, and

wooden boxes. For example, noted Haida artists Robert Davidson and Bill Reid have called Massett Inlet on Haida Gwaii the "bent-box capital of the world." The Haida were renowned for the quality of their canoes, which were traded up and down the coast.[93] Clearly, there is potential for establishing not only a traditional Aboriginal right to the forests but also a commercial Aboriginal right to the forests.[94]

Reforming Industrial Logging

Both Aboriginal title and Aboriginal rights can be used to reform industrial logging and concentrated corporate ownership. Lawsuits have been brought by First Nations to stop the logging of a specific area;[95] the granting, transfer, or renewal of a licence;[96] or the approval of a logging plan.[97] Such lawsuits rely on evidence that either Aboriginal title or Aboriginal rights, which are constitutionally protected, would be violated. As the BC Court of Appeal said in *MacMillan Bloedel* v. *Mullin*, "The proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have recently been logged."[98] Such infringements must be minimized by the government[99] and must be based on a compelling objective, such as economic development.

Three recent Supreme Court of Canada decisions (*Gladstone*, *Adams*, and *Marshall*) open the door to scrutinizing not only selected sections of resource management legislation but also the entire legislative and regulatory system. In each case, the court suggests that resource management regimes that fail to make provisions for Aboriginal rights could be struck down.[100] In *Marshall*, the court stated that "Specific criteria must be established for the exercise by the Minister of his or her discretion to grant or refuse licences in a manner that recognizes and accommodates the existence of an Aboriginal or treaty right."[101] In *Adams*, in a passage repeated in *Marshall*, the court stated that

> Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of Aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of Aboriginal rights under the *Sparrow* test.[102]

The BC Forest Act[103] makes no provision for First Nations tenure or licences.[104] The BC Forest Practices Code,[105] as discussed above, provides

little or no protection for Aboriginal rights or First Nations culture. There are no explicit criteria to guide decision makers in avoiding the infringement of Aboriginal rights. As a result, the *Gladstone, Adams,* and *Marshall* cases support broad challenges to the entire BC forest management regime.

It is remarkable that, in both Aboriginal title and Aboriginal rights cases (notably *Delgamuukw* and *Sparrow*), the Supreme Court of Canada has emphasized legal principles that prioritize sustainability and conservation. In *Delgamuukw*, the court placed an inherent limit on land held under Aboriginal title – meaning that land cannot be used in a way that interferes with the opportunities of future generations to use the land in traditional ways.[106] In *Sparrow*, the court ruled that all fisheries management decisions must place conservation ahead of any allocation of fish among would-be fishers. In *Marshall*, the court reiterated that in fisheries management "the paramount regulatory objective is conservation."[107]

This conservation-first approach applies not only to Aboriginal fisheries management but also to all Canadian fisheries management decisions.[108] Thus, the federal government's controversial ban on coho fishing in the summer of 1998 was justified by federal fisheries minister David Anderson on the basis that he had a legal (and ethical) duty to put conservation first.[109] In 1999, even broader salmon-fishing closures were ordered by the federal Department of Fisheries and Oceans in order to comply with the conservation-first mandate.

The implications of these two decisions in the context of First Nations concerns about the future of British Columbia's old-growth forests are extremely promising. One can argue persuasively that lands under Aboriginal title cannot be subjected to industrial logging because the ecological and cultural impacts would violate Aboriginal title, Aboriginal rights to the forests, and the Supreme Court's principle of inherent limits. In contrast, community-based ecosystem management would probably meet the inherent limit test. If the reasoning in *Sparrow* regarding fisheries management could be adapted to forest management, then there would be profound repercussions for industrial logging. Major changes would be necessary in order to put conservation first in forest management. For example, decisions setting the annual rate of logging above the sustainable rate or imposing a 6 percent limit on the impacts of the Forest Practices Code would likely be vulnerable to legal challenges. Similarly, decisions allowing logging to occur every sixty to eighty years and clear-cutting to occur in areas where cedar or other species important to First Nations cultures do not regenerate would be vulnerable to legal challenges.

It is intriguing that these conservation-first legal doctrines have evolved in the realm of Aboriginal law. This evolution toward law informed by First Nations worldviews and ecology may be a tremendous but largely unrecognized contribution to Canadian law from First Nations law and

culture. It would be ironic yet just if the judicial system, widely regarded as deeply conservative and antithetical to Aboriginal values, were to play a leadership role in integrating First Nations law and philosophy about stewardship into the Canadian legal and political systems.[110] While the stewardship ethic of First Nations is sometimes criticized as romantic and idealistic, the Supreme Court of Canada is clearly taking it at face value.

Conclusion

First Nations in British Columbia are forest people – their cultures are firmly rooted in the old-growth forests. For thousands of years, the First Nations in the province lived in harmony with the region's forests, depending on the wealth of the old-growth forests for material, cultural, and spiritual needs. Over the past century, that healthy relationship has been shattered by the intrusion of industrial logging – a profit-driven juggernaut that has had catastrophic ecological and cultural consequences. To paraphrase the Supreme Court of Canada, reconciling the rights of First Nations with Canadian society means that forests, which make First Nations what they truly are, cannot continue to be destroyed, thereby destroying First Nations cultures.

At the beginning of the twenty-first century, the pendulum is swinging back toward harmony or, in more modern parlance, sustainability. Traditional First Nations wisdom about stewardship is poised to play a greater role in BC forest management as change sweeps through the unsustainable logging industry. Whether through negotiation or litigation, First Nations have a tremendous opportunity to regain control over the ownership and management of forests in British Columbia.

Recognition of Aboriginal title, Aboriginal rights to forests, and traditional ecological knowledge will stimulate reform of the forest tenure system and a move away from industrial logging toward ecosystem-based community forestry. The transition will be controversial, difficult, and fiercely opposed by those with vested interests in the status quo. The changes are necessary, however, to maintain ecological and cultural integrity in British Columbia. In the long run, First Nations, local communities, forest workers, the forests, and the diversity of life will benefit as forestry becomes a sustainable activity. The new sustainable forestry will be guided by First Nations traditional philosophies of stewardship, such as *hishuk ish ts'awalk* and *ḥaḥuulhi*.

Notes

1 Paiakan, Kayapo Indian, Brazil, as cited in Julian Burger (ed.), *Gaia Atlas of First Peoples* (London: Robertson McCarta, 1990), 32.

2 We have chosen the term "First Nation" to refer to the Aboriginal people of British Columbia and Canada. It includes Indian, Inuit, and Métis peoples.

3 For example, oral history of the Haida documents when Haida people inhabited Haida Gwaii. Certain clans of the Haida Nation have the right to wear a tree as a crest since they witnessed the first tree to grow on Haida Gwaii. Archeological and scientific evidence establishes the first appearance of trees and forests about 10,000 years ago. See G. Pellatt and R.W. Mathewes, "Paleoecology of Postglacial Tree Line Fluctuations on the Queen Charlotte Islands, Canada," *Ecoscience* 1,1 (1994): 71-81.
4 N. Turner, "Plants of Haida Gwaii," 27 [unpublished typescript].
5 Ibid., 11.
6 Clayoquot Sound Scientific Panel, "First Nations' Perspectives Relating to Forest Practices Standards in Clayoquot Sound," March 1995, 6 [unpublished typescript].
7 Roy Haiyupis, "Ecosystem Sustainability: A Nuu-Chah-Nulth Perspective," 1 [unpublished typescript, 1994].
8 Clayoquot Sound Scientific Panel, 8-9.
9 Ecotrust, Pacific GIS and Conservation International, *The Rainforests of Home: An Atlas of People and Place, Part 1: Natural Forests and Native Languages of the Coastal Temperate Rainforests* (Portland, OR: Ecotrust, 1995), 8.
10 Ibid. Where over 25 percent of a watershed has been developed, there is a high likelihood that the local Indigenous language has become extinct.
11 Bryant, Dirk, Daniel Nielson, and Laura Tangley, "The Last Frontier Forests: Ecosystems and Economies on the Edge," Washington: World Resources Institute, 1997.
12 Ibid.; and Ecotrust, *Rainforests*.
13 See Council of the Haida Nation, "Special Edition: Forestry on Haida Gwaii," *Haida Laas: Journal of the Haida Nation* (1994).
14 Haida people and other First Nations of the Northwest Coast require cedar trees in excess of 500 years old for the construction of totem poles and canoes. Old-growth trees have a tighter grain and are more suitable for carving. Other ceremonial objects require straight-grained red cedar, yellow cedar, yew, or alder.
15 BC Ministry of Forests, "AAC Listing by Timber Supply Area," 1998; see www.for.gov.bc.ca.
16 Ibid.
17 For example, the Clayoquot Sound Scientific Panel recommended a 70 percent reduction in the rate of harvest, and recent AAC decisions by the chief forester have indeed reduced the AAC in the Clayoquot Sound area by 62 percent. M. Patricia Marchak et al., *Falldown: Forest Policy in British Columbia* (Vancouver: David Suzuki Foundation, 1999), 49.
18 RSBC 1994, c. 40 [hereafter the "code"].
19 See Sierra Legal Defence Fund, *The Clearcut Code* (Vancouver: Sierra Legal Defence Fund, 1996).
20 See Sierra Legal Defence Fund, *Stream Protection under the Code: The Destruction Continues* (Vancouver: Sierra Legal Defence Fund, 1997).
21 See Sierra Legal Defence Fund, *Going Downhill Fast: Landslides and the Forest Practices Code* (Vancouver: Sierra Legal Defence Fund, 1997).
22 See Sierra Legal Defence Fund, *Wildlife at Risk* (Vancouver: Sierra Legal Defence Fund, 1997).
23 Hyatt Slaney et al., "Status of Anadromous Salmon and Trout in British Columbia and Yukon," *American Fisheries Society* October 1996: 20-32.
24 Ministry of Environment, Lands and Parks, *Environmental Trends in British Columbia, 2000* (Victoria: Ministry of Environment, Lands and Parks, 2000).
25 Ibid.
26 P.A. Slaney and A.D. Martin, "The Watershed Restoration Program of British Columbia: Accelerating Natural Recovery Processes," *Water Quality Research Journal of Canada* 33,2 (1997): 325-46.
27 Clayoquot Sound Scientific Panel, "First Nations' Perspectives," 7.
28 Chief Charlie Jones, with Stephen Bosustow, *Queesto: Pacheenaht Chief by Birthright* (Nanaimo: Theytus Books, 1981), 37-38.
29 *Siska Indian Band* v. *B.C. (Minister of Forests)* [1998] 62 B.C.L.R (3d) 133 (S.C.C.); and *Siska Indian Band* v. *B.C. (Ministry of Forests)*, Vancouver Registry No. A992665, unreported decision, 22 October 1999 (S.C.C.).

30 See the decisions discussed later in this chapter: *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010; *Haida Nation et al.* v. *British Columbia (Ministry of Forests)* [1998] 1 C.N.L.R. 98 (BCCA); and *Halfway River First Nation* v. *B.C. (Ministry of Forests)* [1999] B.C.C.A. 470, unreported decision, 12 August 1999, affirming [1997] 39 B.C.L.R. (3d) 227 (S.C.C.).

31 CMTs are frequently the only source of traditional knowledge for the selection of appropriate trees for canoes and totem poles. Many First Nations elders were removed from their communities and traditional territories at an early age to live at residential schools for years at a time. The missionaries urged First Nations to cut or burn totem poles, and many were stolen or bought by museums and collectors around the world. The forces of residential schools, Christianity, assimilation, and relocation displaced the traditional knowledge of building canoes and totem poles. Only in the past thirty years have First Nations experienced a "renaissance" in canoes and totem poles.

32 Logging companies must obtain permits from the provincial Archaeology Branch to cut CMTs or other heritage sites or objects. These permits have frequently been issued to allow logging companies to engage in road building or logging while avoiding the destruction of CMTs when possible. Otherwise, they may be cut down and dated (CMTs and cultural heritage are only protected under provincial legislation if they are pre-1846). This practice may change with recent decisions such as the *Delgamuukw* decision (discussed later in this chapter) and the *Kitkatla* decision. See *Kitkatla Band* v. *The Ministry of Small Business, Tourism and Culture, the A.G.B.C., and International Forest Products Ltd.* [21 October 1998] Victoria 982223 (B.C.S.C.).

33 These special-use permits are at the sole discretion of district managers of the Ministry of Forests. In many instances, First Nations have been denied special-use permits for traditional uses because of district managers' incredibly narrow interpretation of "traditional uses." However, see the discussion below in the "Aboriginal Rights to the Forests" section regarding challenges to legislative and regulatory systems.

34 C. Burda, D. Curran, F. Gale, and M. M'Gonigle, "Forests in Trust: Reforming British Columbia's Forest Tenure System for Ecosystem and Community Health," University of Victoria Eco-Research Chair in Environmental Law and Policy, 1997, 2.

35 This "isolation from consequences" is discussed in K. Drushka, *Stumped: The Forest Industry in Transition* (Vancouver: Douglas and McIntyre, 1985).

36 Task Force on Native Forestry, "Native Forestry in B.C.: A New Approach," Victoria, 1991.

37 Burda, Curran, Gale, and M'Gonigle, "Forests in Trust," 2.

38 The Haida villages of Skidegate and Massett face average unemployment rates of 80 percent. High unemployment rates are common throughout First Nations communities in Canada, which face rates 25 to 55 percent higher than the rest of the population of Canada.

39 British Columbia Wild, *Taking It All Away: Communities on Haida Gwaii Say Enough Is Enough* (Vancouver: British Columbia Wild, 1996).

40 For a discussion of joint ventures between First Nations and forest companies, see D. Curran and M. M'Gonigle, *First Nations' Forests: Community Management as Opportunity and Imperative* (Victoria: Faculty of Law and Environmental Studies Programme, University of Victoria, 1997). The joint ventures and initiatives taken by First Nations to incorporate ecosystem-based management and nontimber values are usually rejected by the Ministry of Forests, essentially because the proposed volumes and methods reduce the operable land base and do not ensure adequate fibre flow.

41 *R.* v. *Chief Dan Wilson et al.* [1999] Vernon Registry No. 23911, unreported decision, J. Sigurdson, 12 November 1999 (S.C.C.); *R.* v. *Chief Ronnie Jules et al.* [1999] Vernon Registry No. 23911, unreported decision, J. Sigurdson, 12 November 1999 (S.C.C.); and *R.* v. *Chief Ron Derrickson et al.* [1999] Kelowna Registry No. 46440, unreported decision, Sigurdson, J., 12 November 1999 (S.C.).

42 See H. Bombay, *Aboriginal Forest-Based Ecological Knowledge in Canada* (Ottawa: Anishinabe Printing, 1996), and H. Bombay, *An Aboriginal Criterion for Sustainable Forest Management* (Ottawa: Anishinabe Printing, 1995).

43 Professor Frank Cassidy argues that "Sustainable development in British Columbia and Canada as a whole will not be achievable without the full involvement and support of

indigenous peoples. Indigenous peoples are not just one more stakeholder in the process of achieving sustainable development. They have unique collective rights which make them a central part of this process. In addition, they have much knowledge and wisdom to offer. Until the rights, practices, institutions and knowledge of indigenous peoples are fully respected, the goal of sustainable development will continue to be illusive and unachievable. The sooner this fact is recognized, the better." Frank Cassidy, "Indigenous Peoples and Sustainable Development," Centre for Sustainable Regional Development, University of Victoria, 1994, 4. See also the Brundtland Commission, which stated that "Tribal and indigenous peoples will need special attention as the forces of economic development disrupt their traditional lifestyles – lifestyles that can offer modern societies many lessons in the management of resources of complex forest, mountain and dryland ecosystems. Some are threatened with virtual extinction by insensitive development over which they have no control. Their traditional rights should be recognized and they should be given a decisive voice in formulating policies about resource development in their areas." World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), 115.

44 Fourteen treaties were concluded with the First Nations on Vancouver Island in the 1850s, constituting about 3 percent of the island's area. In 1999, Treaty 8 was extended into the northeastern portion of British Columbia. For a general history of British Columbia and the struggle for legal and political recognition of Aboriginal title in the province, see P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: UBC Press, 1990).

45 The Nisga'a Treaty took twenty-five years to negotiate; see the discussion below under the section "Negotiation: Toward a Sustainable Future through Treaties and Interim Measures Agreements?"

46 Blockades are also a path frequently taken by First Nations when all other avenues fail. In British Columbia, the extensive use of protest blockades in the 1980s led to the creation of the BC Claims Task Force, the BC Treaty Commission, and the BC Treaty Process. Until then, only the federal government negotiated with First Nations under a lengthy "comprehensive claims policy."

47 BC Treaty Commission, "1998 Annual Report," 1998. See www.bctreaty.net.

48 First Nations in British Columbia support the decision of the Nisga'a Nation from a position of respect for Nisga'a self-determination. However, the Nisga'a Treaty may not be suitable for other First Nations with different histories and needs. If provincial and federal governments are unwilling to negotiate beyond the parameters of the Nisga'a Treaty, then litigation may be the preferred approach for other First Nations.

49 In 1884, the Indian Act was amended to prohibit First Nations from holding potlatch and Sun Dance ceremonies. Potlatches define the cultural, social, and political fabric of First Nations societies in the northwest coast of British Columbia. The Indian Act was also amended in 1927 to prohibit First Nations from hiring lawyers to advance Aboriginal title and rights cases without government approval. Both of these amendments were repealed in 1951. In addition, First Nations did not obtain the provincial franchise until 1947 and the federal franchise until 1960. See, generally, Tennant, *Aboriginal Peoples*.

50 *Calder* v. *Attorney-General of British Columbia* [1973] S.C.R. 313. The Supreme Court of Canada unanimously held that Aboriginal title was a pre-existing legal right but was split as to whether Aboriginal title continued to exist in British Columbia.

51 The BC Treaty Process was designed by the BC Claims Task Force in 1990-91. The BC Treaty Commission formally began to accept statements of intentions to negotiate treaties in 1993.

52 See Nisga'a Final Agreement at www.aaf.gov.bc.ca/aaf/treaty/nisgaa.

53 Ibid.

54 Ibid., Chapter 5.

55 The annual allowable cut for the Nass Timber Supply Area is 1,150,000 cubic metres, yet the long-term harvest level is 410,000 cubic metres per year. See BC Ministry of Forests, "AAC Listing."

56 Nisga'a Final Agreement, Chapter 5.

57 Ibid.

58 From the perspective of sustainability, this is a significant flaw in the treaty. Opinions on the overall merits of the Nisga'a Final Agreement are widely divergent. To some, it represents a fraction of what the Nisga'a really deserve given their thousands of years in the Nass Valley and the indignities inflicted by European settlement. To others, the treaty is far too generous, giving the Nisga'a too much land, too much money, and too much power. While some view it as a template for future treaties, others argue that each negotiation will be different.

59 Not all First Nations in British Columbia are engaged in the treaty process. Those not in the process advocate a different process in which the province is not at the table (since only sovereign nations should negotiate treaties), have become frustrated with the unwillingness to negotiate interim measures agreements (see below) at an early stage in the process, or are engaged in litigation and have had negotiations suspended by either the provincial or the federal government.

60 Ministry of Aboriginal Affairs, "Provincial Approach to Treaty Negotiation of Lands and Resources." This position is purportedly proportionate to the First Nations population of British Columbia but is not proportionate to the amount of land currently used by First Nations or that used in 1846 (the Crown's assertion of sovereignty over British Columbia).

61 The BC Claims Task Force recommended that IMAs were not only an important indicator of sincerity and commitment of the parties to negotiate a treaty but also would protect interests prior to the beginning of negotiations. The task force recommended that parties be able to initiate IMAs at any time in the treaty process. BC Claims Task Force, "The Report of the British Columbia Claims Task Force," 28 June 1991 [unpublished typescript].

62 See note 17.

63 BC Treaty Commission, "Annual Report," 1997; see www.bctreaty.net.

64 The provincial government's position is that IMAs will not be negotiated until stage four of the process, when an agreement in principle is negotiated. Ministry of Aboriginal Affairs, "Interim Measures" [unpublished policy document].

65 *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010 (hereafter "*Delgamuukw*").

66 Aboriginal law in Canada is undefined because it is determined on a case-by-case basis. Only recently, after abolishment of the Indian Act provision prohibiting land claims litigation, have general principles been developed.

67 Constitution Act, 1982, subsection 35(1).

68 According to the Supreme Court of Canada, Section 35 arises from the fact that First Nations lived on the land in distinct societies prior to the arrival of Europeans. See *R.* v. *Van der Peet* [1996] 2 S.C.R. 407 (hereafter "*Van der Peet*"), 537-48; *R.* v. *Gladstone* [1996] 2 S.C.R. 723 (hereafter "*Gladstone*"); *R.* v. *Adams* [1996] 3 S.C.R. 101 (hereafter "*Adams*"); and *Delgamuukw*.

69 For some First Nations in Canada, the responsibility is extended to the seventh generation.

70 *Delgamuukw*, paras. 125-28.

71 The Supreme Court held that this special relationship may not be severed in such a way as to prevent future generations from holding the same relationship. *Delgamuukw*, para. 126.

72 Ibid.

73 Ibid., paras. 84-108. Until this decision, and the decision in *Van der Peet*, First Nations evidence was not given appropriate weight in court (see the Supreme Court of Canada's discussion of the BC Supreme Court's treatment of oral evidence in *Delgamuukw*). The Supreme Court's ruling in *Delgamuukw* should assist First Nations in bringing women's and spiritual uses of the forests before the courts, both of which do not currently have adequate protection in law.

74 The Supreme Court of Canada recognized that there are instances in which First Nations occupation and use were disrupted "as a result of the unwillingness of European colonizers to recognize Aboriginal title." *Delgamuukw*, paras. 152-53. Presumably, the court was referring to instances when First Nations were dispossessed of traditional territories through obvious means such as forced relocation and flooding of village sites and traditional territories or perhaps through less obvious means such as resource extraction.

75 These are instances in which First Nations shared lands with other First Nations. Until *Delgamuukw,* it was necessary for First Nations to show that they occupied and used lands to the exclusion of other First Nations. *Delgamuukw*, paras. 152-59.
76 Ibid., paras. 166, 169.
77 The Supreme Court of Canada stated that the government must demonstrate that it has accommodated the participation of First Nations in the development of resources in British Columbia through reduced licensing fees, for example. *Delgamuukw*, para. 167.
78 The concept of fiduciary duty did not originate with the *Delgamuukw* decision, but the Supreme Court offered some important clarifications of Aboriginal title in regard to lands under Aboriginal title. The concept of the Crown owing First Nations a fiduciary duty was first enunciated in *Guerin* v. *The Queen* [1984] 2 S.C.R. 335.
79 *Delgamuukw*, para. 168.
80 *MacMillan Bloedel* v. *Mullin [B.C.]* [1985] 3 W.W.R. 577 at 593 (B.C.C.A.) (hereafter *"MacMillan Bloedel"*).
81 [1888] 14 AC 46 JCPC (hereafter *"St. Catherine's Milling"*).
82 *Calder* v. *Attorney-General of British Columbia* [1973] S.C.R. 313.
83 *Haida Nation et al.* v. *British Columbia (Ministry of Forests)* [1998] 1 C.N.L.R. 98 (B.C.C.A.) (hereafter *"Haida Nation et al."*).
84 Recall that Aboriginal title is an exclusive right to the land itself and the resources of that land. It is impossible to reconcile two competing, exclusive rights to the trees on lands under Aboriginal title.
85 As the chief justice of the Supreme Court of Canada noted, "this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts." *Delgamuukw*, para. 186.
86 Ibid.
87 It is essential to know that the Supreme Court held in *Delgamuukw* that Aboriginal title is an Aboriginal right but that Aboriginal rights cover a spectrum from general rights to site-specific rights and that this spectrum ends with Aboriginal title.
88 See *R.* v. *Peter Paul* [1998] 3 C.N.L.R. 221 (N.B.C.A.); [1997] 4 C.N.L.R. 221 (N.B. Prov. Ct.); *Thomas Paul* v. *R.,* Victoria Registry No. 981858 (B.C.S.C.); *R.* v. *Chief Dan Wilson et al.* [1999] Vernon Registry No. 23911, unreported decision, J. Sigurdson, 12 November 1999 (S.C.C.); *R.* v. *Chief Ronnie Jules et al.* [1999] Vernon Registry No. 23911, unreported decision, J. Sigurdson, 12 November 1999 (S.C.C.); and *R.* v. *Chief Ron Derrickson et al.* [1999] Kelowna Registry No. 46440.
89 As noted earlier, Aboriginal rights were entrenched in Section 35 of the Constitution Act, 1982.
90 *Van der Peet.*
91 *Gladstone.*
92 *Marshall* v. *R.* [1999] File No. 26014, unreported Supreme Court of Canada decision, 17 September 1999 and 17 November 1999 (hereafter *"Marshall"*).
93 See G. Dawson, *On the Haida Indians of the Queen Charlotte Islands* (Montreal: n.p., 1880), 145-46; and A.P. Niblack, *The Coast Indians of Southern Alaska and Northern British Columbia* (Washington, DC: Smithsonian Institution, 1888), 294-96.
94 Essentially, First Nations will have to show that they used the forests beyond their own needs (no "internal limit") for the purpose of trading items such as canoes with other First Nations. They will also have to show that this trading was an integral part of their culture and "truly made the culture what it is." *Van der Peet*, para. 55.
95 *MacMillan Bloedel,* 584.
96 *Haida Nation et al.*
97 The Klahoose First Nation used a lawsuit to prevent the approval of logging plans for Forbes Bay, an area that the nation had identified as a priority in its treaty negotiations. The Ministry of Forests capitulated to the Klahoose demands before the lawsuit went to court.
98 *MacMillan Bloedel,* 584.

99 Courts have repeatedly held that the federal government owes a fiduciary duty to First Nations to handle their affairs in an honourable manner. This duty applies to the provincial governments as well.

100 In *Adams*, the court considered that in Quebec First Nations could exercise an Aboriginal right to fish for food at the discretion of the minister. The Supreme Court of Canada held that the regulatory scheme infringed on Aboriginal rights to fish. In *Gladstone*, the Supreme Court held that the entire management regime for herring spawn on kelp must be scrutinized because the regulatory scheme also infringed on Aboriginal rights. In both cases, allocation of the fishery did not take into account the existence and importance of Aboriginal rights. According to the Supreme Court, the government must take into account a number of considerations when assessing the existence and importance of Aboriginal rights: whether the government has accommodated the exercise of the Aboriginal right to participate in the fishery, the priority of Aboriginal rights holders, the extent of participation in the fishery of Aboriginal rights holders relative to their percentage of the population, whether the government has accommodated different Aboriginal rights in a particular fishery, how important the fishery is to the economic and material well-being of the First Nation in question, and the criteria taken into account by the government in, for example, allocating commercial licences among different users.
As discussed above, First Nations do not have legal access to forests for traditional uses except with special-use permits. There is no legislative provision to permit access to trees for commercial purposes, such as totem poles carved for sale. First Nations must purchase trees for these uses and for other personal and traditional (noncommercial) uses.

101 *Marshall*, para. 33.

102 *Adams*, para. 54.

103 R.S.B.C. 1996, c. 157.

104 As discussed earlier, First Nations may only obtain special-use permits, issued at the discretion of district managers of the Ministry of Forests.

105 R.S.B.C. 1996, c. 159.

106 See the discussion in the "Aboriginal Title" section regarding the inherent limit.

107 *Marshall*, paras. 29, 40.

108 In another Supreme Court of Canada decision, the court held that the conservation mandate is not only to conserve fish but also to increase the fish stocks. *See R. v. Nikal* [1996] 133 D.L.R. (4th) 658 at 692: The "need to manage the stock goes far further than simply preventing the elimination of the salmon. Management imports a duty to maintain and increase reasonably the resource."

109 It is noteworthy that the 1998 decision to ban coho fishing was made after the Neskonlith Indian Band applied to the Federal Court to implement catch-and-release regulations in the sport-fishing industry to protect the endangered Thompson River coho. *Chief Arthur Manuel et al. v. The Attorney General of Canada et al.* [22 September 1997] FCJ No. T-1497-97 (FCTD) [unpublished]. The 1999 salmon conservation measures were announced after the Neskonlith and Adams Lake Indian Bands filed another action challenging a fisheries management plan on the basis that it did not outline effective in-season management, was likely to cause the extinction of Thompson River coho, and was therefore beyond the power of the minister. *Chief Arthur Manuel et al. v. The Attorney General of Canada et al.* [1999] FCJ File No. T-1364-99. Hearing of the application has been adjourned while the parties attempt to reach a negotiated agreement for the protection of Thompson River coho.

110 For an illustrative discussion of the ways in which Aboriginal law has incorporated traditional principles of stewardship and traditional worldviews despite the strong influence of European-based laws, and the opportunity of Aboriginal law to contribute to the development of Canadian law, see J. Borrows, "With or without You: First Nations Law (in Canada)," *McGill Law Journal* 41 (1996): 629.