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Andrea Holly Kennedy

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**DEEPER THAN MERE CONSULTATION:
NEGOTIATING LAND AND RESOURCE MANAGEMENT
IN BRITISH COLUMBIA, POST-*DELGAMUUKW***

by

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REQUIREMENTS FOR THE DEGREE OF

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Abstract

First Nations in Canada are seeking new land management relations that fully include and accommodate their Aboriginal rights, any outstanding Aboriginal title, and other interests. Various Canadian judicial decisions have stated that, at a minimum, consultation with First Nations is required when Aboriginal rights may be impacted by land-use activities. This research involved applying case study to identify critical elements that lead to something deeper than mere consultation, as called for in the 1997 Supreme Court of Canada *Delgamuukw* decision. This thesis describes six land management cases from four First Nations communities in British Columbia. The cases involve natural resources including fish, minerals, parks and energy and took place in the decade following the *Delgamuukw* decision. While the cases were some of the best examples of land-related negotiations from around the province, the cases highlight the distance that the Crown and non-Indigenous people need to go to achieve meaningful involvement of First Nations in land management.

Through the analysis of interviews, emergent themes were identified and developed into normative principles for meaningful negotiation with First Nations. The major themes identified in the cases included the recognition of Aboriginal rights, a commitment to building trust and relationships, power sharing, and a respect for cultural differences. These cases also demonstrated the need to carefully consider

adequate resources, space, place and timing that are inclusive of the First Nations' individual situations and perspectives. Moreover, the research shows that there is difficulty asserting and meeting ontological needs when basic needs such as employment, housing and social welfare are yet to be met within the community.

Fundamental principles that ought to be followed when embarking on land-management negotiations with Indigenous peoples in British Columbia, particularly First Nations with unresolved title issues include: recognizing rights and title, embarking on negotiation, enabling power rebalance, emphasizing strong relationships and trust, having respect for First Nations' ontology, achieving meaningful accommodation, and ensuring community involvement and support. Ultimately, decision-making will involve compromises on both sides. In order for these compromises to be balanced between parties, the often unequal power and resources of the two parties will need to be redressed.

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Glossary

This brief glossary is intended to assist the reader with the various terms used in Canada when referring to Indigenous peoples, communities, and issues. A complete glossary is not within the scope of this work.

Aboriginal title

Aboriginal title is a unique property right that stems from Indigenous peoples' prior and long-term occupancy and use of the land before European colonization. Court decisions continue to further define Aboriginal title in Canada.

A number of court decisions from the Supreme Court of Canada have also made references to Aboriginal title. These court decisions have made important distinctions between Aboriginal title and other forms of individual property ownership. The most important decision on Aboriginal title is the 1997 *Delgamuukw* decision from the Supreme Court of Canada. In that case, the Court said that:

- Aboriginal title is a communal right;
- Aboriginal title, like other types of Aboriginal rights, is protected under s.35 of the *Constitution Act, 1982*;
- Aboriginal title lands can only be surrendered to the federal Crown;
- Aboriginal title lands must not be put to a use which is irreconcilable with the nature of the group's attachment to the land; and,
- In order for the Crown to justify an infringement of Aboriginal title, it must demonstrate a compelling and substantive legislative objective, it must have consulted with the Aboriginal group prior to acting and, in some cases, compensation may be required (Indian and Northern Affairs 2007c, n.p.)

See Section 2.1.6 of this dissertation for a discussion of the term Aboriginal title as it is used in Canada.

Aboriginal Rights

Aboriginal rights are those rights held communally by Indigenous people. In Canada, these rights are legally protected in Section 35 of the *Constitution Act, 1982* and are often

described in treaties. Historic treaties signed in some parts of Canada often refer to the right to hunt, fish, and trap in a Nation's traditional territory.

For example, in 1990 the Supreme Court of Canada concluded in the *Sparrow* decision that the Musqueam Indian Band had an existing Aboriginal right to fish. This is just one example of an Aboriginal right. So far, Canadian law has confirmed that Aboriginal rights:

- exist in law;
- may range from rights not intimately tied to a specific area of land, to site-specific rights, to Aboriginal title, which is a right to exclusive use and occupancy of land;
- are site, fact and group-specific; and,
- are not absolute and may be justifiably infringed by the Crown (Indian and Northern Affairs 2007c, n.p.).

See *Section 35* in this Glossary. Also see *Rights*.

Band

The term Indian Band or simply Band has been used to describe a community or group of Indigenous peoples in Canada. Many bands have renamed their affiliations over the last twenty years due to the rise in the term First Nation (e.g., the Cheam First Nation). Yet a band still refers to "an organizational structure defined in the *Indian Act* which represents a particular group of Indians as defined under the *Indian Act*" (Assembly of First Nations n.d.).

Canadian Federalism

The Canadian federal system is seen as a "multinational" federalism, rather than a "territorial" regional-based federalism because Canada accommodates independently operating states with an otherwise minority population, with claims to unique nationhood (Quebec) (Kymlicka and Raviot 1997). Spain (with the Basque and Castellan nations) and Switzerland (with French, German and Italian nations) are also

examples of multinational federalism (Kymlicka and Raviot 1997). A territorially-based federalism, such as the United States and Brazil, simply apportion regional powers based on resource/industry similarities and for efficiency in management, with the majority of the populace identifying with the dominant state ethnicity (Kymlicka and Raviot 1997). Kymlicka and Raviot argued that territorial federalist states, such as the United States, have even withheld statehood from regions until the minority population was outnumbered by the non-indigenous population (e.g., Hawaii) (1997).

First Nation(s)

The term First Nation began to be used more commonly in the 1970s to replace the term Indian when referring to a group of Indigenous Canadians. Despite its widespread use, there is no legal definition for this term in Canada (Assembly of First Nations n.d.).

Many Indigenous people prefer to be called First Nation or First Nations Peoples instead of Indians. The term is not synonymous with Aboriginal Peoples because First Nations do not include Inuit or Métis. Individual First Nations and bands choose which term they prefer to use to refer to their community or nation.

First Peoples

First Peoples is a collective term used to describe the Indigenous peoples of Canada. This term is used somewhat less frequently than terms like Aboriginal Peoples and Native Peoples (National Aboriginal Health Organization 2003).

Indian

The term Indian is used by the federal government and others to collectively describe all the Indigenous People in Canada who are not Inuit or Métis.

Indian Peoples are one of three peoples recognized as Aboriginal in the *Constitution Act, 1982* along with Inuit and Métis. Three categories apply to Indians in Canada: Status Indians, Non-Status Indians and Treaty Indians. (Assembly of First Nations n.d.)

The term Indian is considered outdated by many Canadian people and is used less and less frequently.

Indigenous

An excerpt from the United Nations' draft definition of the term Indigenous peoples reads:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. (United Nations 2004)

The term is increasingly used in Canada to describe Aboriginal people, organizations and groups, partly because of its international usage and also the collective nature that makes the term applicable to those groups that include First Nations and/or Indians, Inuit, and Métis). The term is commonly used internationally, particularly by the United Nations in its working groups (e.g., the Decade of the World's Indigenous People).

Métis

The *Constitution Act, 1982* recognizes Métis as one of the three Aboriginal Peoples in Canada.

The word Métis is French for "mixed blood." Historically, the term Métis applied to the children of French fur traders and Cree women in the Prairies, of English and Scottish traders and Dene women in the north, and Inuit and British in Newfoundland and Labrador....

The term is also used broadly to describe people with mixed First Nations and European ancestry who identify themselves as Métis....

Métis organizations in Canada have differing criteria about who qualifies as a Métis person (National Aboriginal Health Organization 2003).

Native

Native is an adjective similar in meaning to Aboriginal. "Native Peoples is a collective term to describe the descendants of the original peoples of North America" (Assembly of First Nations 2004). "The term is increasingly seen as outdated (particularly when used as a noun) and is starting to lose acceptance" (National Aboriginal Health Organization 2003).

Native American

This term is used commonly in the United States to describe the descendants of the original peoples of North America. American Indian is the legal term used in the United States to describe Indigenous peoples. The term Native American is not used in Canada because of the apparent reference to U.S. citizenship. "Native North American has been

used to identify the original peoples of Canada and the United States” but is not a commonly used term (National Aboriginal Health Organization 2003).

Ontology

The branch of philosophy that concerns what can be said to exist and co-exist. See Section 2.6 entitled Ontological Difference for more.

Other

The term ‘the Other’, often capitalized, is used in social science to describe a minority, and unfavoured one, or simply something other than oneself. The Other was first used to in the former two manners in gender studies to refer to women, and then applied to the study of colonized people (e.g., referring to someone non-European or non-Western). In recent writing, the Other has also been used to refer to the non-human world.

Potlach

The term Potlach is understood to be an anglicized version of an Indigenous language term whose origins are unclear. This term has been used in English to refer to feasting and gift-giving ceremonies of First Nations peoples in British Columbia. However, there are many different Indigenous languages that use different terms for these ceremonies. Umek (E. Richard Atleo), in his book, *Tsawalk*, suggests that the term potlach may have its origins in the Nuu-chah-nulth word (a verb) "pachitle" which means "to give" (2004, 3). He notes that there is no direct translation, but non-Aboriginal people have come to associate potlach with ceremonial feasting and gift giving (2004).

Different terms are used by First Nations for coming of age ceremonies, memorials, marriages, and other occasions when a potlatch may be held (Anderson and Halpin 2000). Many North American Indigenous peoples have a similar cultural practice of gift giving and feasting, but use other terms. For instance, Liligit have feasts for the purposeful calling together of Chiefs and their House members in Gitksan territory (Anderson and Halpin 2000).

Furthermore, in many languages, each ceremony has its own term. As Gitksan elder Joan Ryan explains,

there are many different kinds of feasts: settlement feasts after funerals, totem or gravestone raising feasts, welcome feasts, smoke feasts, retirement feasts, divorce feasts, wedding feast, shame feasts, first game feasts, birth feasts, cleansing feasts, coming of age feasts, graduation feasts.... (Anderson and Halpin 2000, ix)

The term potlach is not used by the Gitksan (Anderson and Halpin 2000).

Reserve

A reserve, or Indian reserve, is a term used in Canada for the land that was set aside by the Crown for the use and benefit of an Indian band or group of Aboriginal peoples.

The Indian Act describes a reserve as lands which have been set apart for the use and benefit of a Band, and for which the legal title rests with the Crown in right of Canada. The federal government has primary jurisdiction over these lands and the people living on them. (Assembly of First Nations n.d.)

Rights

Two types of rights are generally described in theories of justice: those that are positive, describing what someone is due, or those that are negative, outlining a freedom or liberty that results from a right to noninterference (Van De Veer and Pierce 1998).

Section 35 (1), *Constitution Act, 1982*

Section 35 of the *Constitution Act, 1982* relates to the rights of Aboriginal Peoples of Canada. It states:

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

(2) In this Act, "Aboriginal peoples of Canada" includes Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1), "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the Aboriginal peoples of Canada to participate in discussions on that item.

Section 35(1) is just one influence in the multi-player process of defining the relationship between Aboriginal peoples and the Canadian government. Section 35(1) plays out in Aboriginal and treaty rights claims litigation, legislation, and policy.

Stó:lō

The Stó:lō people reside in the lower Fraser River valley area. Stó:lō is variously spelled Sto:lo, Stó:lō, and Stolo by Stó:lō members and organizations. The two major Stó:lō political entities are the Stó:lō Tribal Council and the Stó:lō Nation. See Section 4.4 for more on the Stó:lō case and political groups.

Traditional Ecological Knowledge

The term Traditional Ecological Knowledge tends to be used more often in North America in favour of other common terms such as “local knowledge”, IPK (Indigenous peoples’ knowledge), local and Indigenous knowledge systems (LINKS) and traditional ecological knowledge and wisdom (TEKW). Except for TEKW, what these terms have in common is the focus on knowledge as information. A widely referenced definition of Traditional Ecological Knowledge used in Canada is Berkes’ definition, where

Traditional Ecological Knowledge is a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment. Further, Traditional Ecological Knowledge is an attribute of societies with historical continuity in resource use practices; by and large, these are non-industrial or less technologically advanced societies, many of them indigenous or tribal. (Berkes 1993, 3)

Unfortunately, the first portion of Berkes’ definition, around knowledge and beliefs, is often applied by Western scientists without rooting Traditional Ecological Knowledge

in culture and spiritual traditions. Further, Berkes' definition is purposefully general but omits critical aspects of Traditional Ecological Knowledge such as ontology (worldview) and continuous learning.

Tribal Council

Many Tribal Councils were formed in Canada to co-ordinate administration and funds from the federal Department of Indian and Northern Affairs Canada (INAC).

A tribal council is a group made up of several bands and represents the interests of those bands. A tribal council may administer funds or deliver common services to those bands. Membership in a tribal council tends to be organized around geographic, political, treaty, cultural, and/or linguistic lines. (Assembly of First Nations n.d.)

Worldview

Clark defines worldviews as "beliefs and assumptions by which an individual makes sense of experiences that are hidden deep within the language and traditions of the surrounding society" (LeBaron 2003, n.p.). A worldview combines a person's ontological beliefs about what is, with a set of cultural values about what is important to them.

Preface

My life experiences, particularly my working career, have guided me towards this doctoral process. I have spent fifteen years working as an environmental engineer and resource planner in British Columbia, Canada, with stints abroad in Denmark, the United States, and Japan. I have led and been involved in numerous engagement and consultation processes with First Nations communities throughout British Columbia, and have been peripherally involved in projects impacting Indigenous peoples in South America and Africa. In these fifteen years, I have seen enough to know that something has to change.

Working with resource extraction projects related to mining, fishing, forestry, and energy, as well as working with First Nations communities made me realize the Western treatment of the Other¹ is often unjust or unsustainable. In my experience, even in cases where Euro-Canadians have fairly good intentions, the end result of both the consultation and development often ends up appearing socially unbalanced and ecologically unsustainable. And First Nation peoples are rarely included as co-jurisdictional land stewards in development decision-making.

¹ See Glossary for expanded discussion of the use of the phrase the Other.

A review of Canadian legal case history shows First Nations' title and rights to land as somehow subordinate to European settlers' title and rights. I see in this some of the injustice that is created by a dominant culture in a privileged position of might and majority. I think of the *Taku*² judgment and wonder how any consultation can be meaningful if both parties are not required to come to some sort of agreement, particularly when the Taku River Tlingit have a strong case for land title and have not ceded their territory through war or treaty. I wonder how First Nations peoples will be able to protect their land and lifeways in the face of a majority dominant culture which gives itself the right to alter the landscape if it benefits that majority, as implied in the *Delgamuukw* judgment (*Delgamuukw* 1997, par. 204). These legal judgments form the foundation for the existing relationship between Crown governments, private corporations, and First Nations governments, with the power of final decision-making currently resting outside the hands of the First Nations.

My intention with this research is to make a positive contribution to the discourse in Canada on consultation requirements, and more specifically for these consultative processes to enable the just inclusion of First Nations, their community values, and worldviews. I hope to provide guidance for Canadians operating in the dominant culture and government system, guidance that will lead to fair treatment of Indigenous peoples and their lands. My intention is that this dissertation goes some of the way towards tying together the important themes about consultation that arose in my

² See Section 2.3 for a summary of key legal case history related to consultation and accommodation.

interviews. Ultimately my hope is that the time and energy put into this project by all the participants, myself and my colleagues, will provide a context for future efforts to achieve meaningful consultation, negotiation, and reconciliation as required by Canadian courts (*Delgamuukw* 1997; *Haida* 2004) and international declarations (United Nations 2007).

All my relations have also guided me to this doctoral process. I am a first generation Canadian on my mother's side and a second generation Canadian on my father's side. My family roots trace back to Denmark, England, Scotland, and Wales. I have a fair dose of 'exploring settler' in me. My grandfather, Eijler Marius Østergård, arrived in British Columbia in the early 20th century, at a time when the colonial province of British Columbia (B.C.) was still very new and First Nations peoples outnumbered newcomers in most areas. My mother, Linda Edith Mollison, arrived in Canada in 1965 when, legally, things were beginning to change for Indigenous peoples in the country. And finally, from the James side of my father's family, I have inherited a strong sense of connection with the Creator and a keen sense of social justice. I have a strong relationship with the land, one that is renewed through my precious time outdoors. I hope that this connection and conviction will guide me and this research to a good outcome.

Acknowledgements

I have lived most of my life in Halkomelem (Coast Salish) Territory and I wish to acknowledge the traditional caretakers of this beautiful land. I hope that this work is of use to Halkomelem (Coast Salish) people, and other Indigenous Nations, in their efforts to steward their territories.

This project would be nothing without the time, thought and energy contributed by each research participant. I deeply appreciate the support that they gave to my research. I was also fortunate enough to be given a warm welcome by each of the communities I visited, and to be invited to interview a wide variety of community members, each with a range of experiences. I would like to thank all of those people who shared their stories with me.

I could not have engaged with communities and cases in the way that I did without the help of my friends, colleagues and contacts. Dr. Dawn Mills put me in touch with Ernie Crey; Ernie has been a thoughtful and informed supporter throughout the research process. Chief Bob Chamberlin of the Kwicksutaineuk-ah-kwa-ah-mish First Nation connected me with Chief Bill Cranmer, who facilitated the inclusion of all the 'N̓amgis cases. Finally, my former colleague Trevor Jones, now Executive Director of the Hupačasath First Nation, provided me with immediate support and contacts for the Hupačasath cases. Thank you also to George Speck at 'N̓amgis, and Sru-Ets-Lan-Ough

(Chief Douglas) and Martha Fredette at Cheam for the introductions and co-ordination they provided that made this work possible.

I have been blessed with dynamic and supportive supervisors and committee members: Drs. Paul Wood, Nancy Mackin, Ron Trosper and Coll Thrush. Thank you also to Dr. Graham Smith who was an integral part of my committee until his return to Aotearoa (New Zealand) in 2007. My classroom studies have guided me through this process, particularly my early doctoral course work with Dr. Linc Kesler in Indigenous Research Methods and Dr. Piers Hale in Environmental Ethics. I would like to acknowledge their thorough and inspiring teaching, which helped nurture and shape my ideas, my direction, and my writing.

My father, Dave Estergaard, has been an invaluable editor throughout my many years of study, in every aspect of my work. I am thankful for the hours of thoughtful effort he has put into reading and thinking about this topic and my dissertation. Sincere thanks also to Fraser's head-babysitters: Grandma Meredith and Granddad Dave. I could not have pressed through this process without the love and continued encouragement of my husband David. He championed my vision, challenged my thinking, and cheered on my small accomplishments. Thank you to my son Fraser for forcing me to produce a draft before I produced him, and for being a patient little guy while I finished this work.

To Fraser.

May you always know and respect your home.

*Except for the idea of a creator,
there is no idea quite as bewildering as the idea of home,
nor one that causes as many conflicts.*

J. Edward Chamberlin 2003.

Chapter 1. Introduction

1.1. Research Objectives

This dissertation presents individual First Nations peoples' experiences with cases related to decisions about resource use in British Columbia over the past decade, and describes some of the aspects of consultation and negotiation that made the interactions more meaningful for the First Nations peoples involved. Through case study, I describe the critical process elements and fundamental principles that are required to give substance and meaning to relations, negotiations, and interactions between non-Indigenous peoples and the First Nations when exploring stewardship and management questions regarding the land in British Columbia. Case study analysis³ was applied because of its particular relevance as a useful heuristic approach where there is a void in existing literature or theory of the social sciences (Creswell 1998; VanWynsberghe and Kahn 2007). Case study as a method is described in more detail in Section 3.4.1 Case Study.

The outcomes of this research bring together the kind of process-design and affirmative principles that will assist in the creation of meaningful forums for First Nations peoples to participate in land management. Through the results of this research, I justify the need for inclusion and implementation of the principles of strong consultation. I argue that the interactions called for in the *Delgamuukw* case, interactions that are strong

³ More discussion of the significance of case study can be found in Section 3.4.1.

enough to be “something more than mere consultation,” (*Delgamuukw* 1997, par. 168) require not only the recognition of rights and a fair distribution of power, but negotiation based on an understanding of different histories, cultures, and goals based on different perspectives and ontological values. Finally, I identify some of the physical, economic, cultural, and ontological challenges to be faced when striving to achieve justice in negotiations between First Nations and the Crown regarding land management.

1.2. Research Context

Land and resource use decisions made in Canada often directly affect the territories and lives of the Indigenous peoples of this country (Berkes 1981; Kinsky 1987; Rogers 1995; Campbell et al. 2003). Industrial-scale forestry, hydro-electric power, mining, energy, pipelines, transportation, commercial and recreational fishing, and other projects can have “social, health, economic and cultural implications” and “impacts on fauna and ecology” due to significant environmental change (Kinsky 1987, 94). These impacts and concerns can also include “social problems from new-comers [sic], community strain from a resettlement scheme and erosion of lifestyles” (Kinsky 1987, 82). Large- and small-scale industrial projects were part of the colonization process in the province of British Columbia. “The resource-rich province was a prime investment opportunity for business and developers, and they paid little or no heed to First Nations land use or resource management” (Campbell et al. 2003, 148). Similar industrial resource-use

projects continue to have impacts on First Nations peoples' traditional territories and lifeways today.

Many Indigenous nations in Canada, including most of the Aboriginal First Nations in the province of British Columbia, claim title to all or some portion of their traditional territories. Although positions around land-title and resource management in Canada still appear to be based on long-entrenched colonial ideas, assimilation goals, or racism (Flanagan 2000; Widdowson 2002), these attitudes may slowly be shifting to form a more constructive and respectful dialogue (e.g., *New Relationship* 2005)⁴ in British Columbia.

Aboriginal title conveys some rights to First Nations in relation to their land, rights that have yet to be fully defined. In the *Delgamuukw* decision, the Supreme Court recognized Aboriginal title as a right to "exclusive use and occupation of the land" (*Delgamuukw* 1997, par. 117). Resource planning and development have significant potential to impact these lands, traditional-use rights, and management practices (Howitt 2001; Daly 2005). Over the past thirty-five years, Canadian courts have successively clarified that there is, at a minimum, a requirement for consultation when activities could impact Aboriginal treaty rights or Aboriginal title lands (see Section 2.3 for more on cases). Canadian courts have stated that potential infringement on Aboriginal title triggers a requirement for at a minimum consultation and substantial

⁴ Government of British Columbia et al. 2005.

accommodation of Aboriginal interests (*Delgamuukw* 1997, par. 168), and in most cases, something “significantly deeper than mere consultation” (*Delgamuukw* 1997, par. 168).

The definition and scope of Aboriginal title is also evolving in Canadian case law. In the recent *Tsilhqot’in* judgment, Justice Vickers states that the current limited view of Aboriginal title as simply a usufructuary⁵ right is no longer valid (*Tsilhqot’in* 2007). In this case, framing Aboriginal title as a usufructuary right implies that Aboriginal title is subordinate to the primary title and ownership of the Crown.

Viewed through a more contemporary lens, it is not surprising the Supreme Court of Canada has found that describing Aboriginal title as a usufructuary right is ‘not particularly helpful’: *Delgamuukw* (S.C.C.) at par. 112. Given the nature of Aboriginal title as now defined by the jurisprudence, it is fair to say that it can no longer be characterized as a usufructuary right. (*Tsilhqot’in* 2007, par. 478)

Despite the advances in both jurisprudence, and to some extent in political positions regarding Aboriginal title (e.g., the British Columbia *New Relationship* 2005)⁶, consultative processes are still predicated on the idea that Aboriginal title is subsumed under Crown title. This subjugation of Indigenous peoples’ land conceptions and interests has a significant effect on the First Nations’ position and power in land dealings, such as treaty negotiations and consultation processes with the Crown. Fundamental questions, goals, decision frameworks, processes, timelines, and power distribution, are just some of the elements of land related negotiation that need to be

⁵ A usufructuary right implies that land is allowed to be used by one group while being owned by another.

⁶ Government of British Columbia et al. 2005.

revamped in order to move beyond colonization of land a peoples and move towards reconciliation.

However, cases do exist where First Nations participants describe their level of involvement in negotiations as improving or good, if not coequal with provincial and private interests. Key case examples, influenced by the 1997 *Delgamuukw* decision, can be found throughout British Columbia in a variety of industrial resource-use sectors including forestry, mining, energy, fisheries, and land-use planning. An analysis of a selection of these positive cases⁷ was conducted to elucidate those decision-making elements that facilitate the inclusion of “different takes” (Rhoades and Harlan 1999, 278) on seeing problems and solutions. I show that, while they are better than what took place in the past, these cases are still constrained by the limited degree to which the First Nations are able, enabled, and permitted to drive priorities, processes, and final decisions. The principles of strong consultation, or balanced negotiation, identified through this research, may assist in improving consultation practices in British Columbia.

1.3. Research Timing

The outcomes of this study are intended to provide fundamental principles and guidance for First Nations and Crown governments challenged to create meaningful forums for government-to-government consultation and negotiation related to land.

⁷ See Section 3.4.2, Case Selection, for a brief discussion of the relevance of unsuccessful land management cases.

This work is timely and significant due to the developments around the definition of meaningful consultation in both the federal and provincial political arenas. I deal with each in the following way. First, the definition of negotiation or engagement that is “significantly deeper than mere consultation” as required by the *Delgamuukw* decision has yet to be fully described in Canada (1997, par. 168). Government leaders, politicians, lawyers, and interest groups are jockeying to define this concept. I will argue that since a degree of flexibility and uniqueness constitutes part of the meaningfulness in each situation, if consultation is rigidly defined it will be at the peril of not achieving truly meaningful consultation.

At the time of writing, the federal government is waiting for an appeal hearing in which they wish to seek clarification on the definition of meaningful consultation. This appeal case flows from the Federal Court decision in the *Dene Tha' First Nation v. Canada (Minister of Environment et al.)* case (*Dene Tha' 2006*), which reached an out-of-court settlement in 2006 (Indian and Northern Affairs Canada 2007a).

On December 5th, 2006, Canada filed a Notice of Appeal of the Federal Court decision of November 10th, 2006, concerning the Dene Tha' First Nation and the Mackenzie Gas Project. The Appeal is independent of the Settlement Agreement, and continues in the interests of seeking greater clarity of the law on Aboriginal consultation. (Indian and Northern Affairs Canada 2007b, n.p.)

The outcomes of the federal government's appeal case could have significant implications for all First Nations in Canada, and particularly for most British Columbian First Nations who rely on these consultation processes to steward their

territories in the absence of treaties and co-management agreements. With the appeal case soon to be heard, there is immediate need for the variety, breadth, and complexity of deeper, stronger, more meaningful consultation to be discussed and researched. No single template could meet the needs of all First Nations, yet a combination of key elements and principles may form a constructive foundation.

The second ongoing activity that makes this research particularly timely is the work going on between the provincial government of British Columbia and the member organizations of the First Nations Leadership Council (FNLC) of British Columbia⁸. These two groups signed a *New Relationship Agreement* in May, 2005 (Government of British Columbia et al. 2005). As part of this agreement, a joint FNLC-British Columbia Recognition Working Group was tasked with achieving the main deliverables from the *New Relationship* document, for example “producing principles and mechanisms for recognition and Honour of the Crown, consultation/accommodation, shared decision-making, revenue & benefit sharing, and other matters” (FNLC Bulletin in Union of B.C. Indian Chiefs 2007, n.p.). This group is currently focused on recognition legislation as its first priority. Furthermore, as part of the *New Relationship* deal, a New Relationship Trust (NRT) was set up. This Trust has also identified developing capacity and frameworks for consultation as priorities in their 2008 to 2010 strategic plan (NRT 2007). For the principles of the *New Relationship* and the objectives of the Trust to be fully

⁸ The First Nations Leadership Council is made up of three member organizations: the Union of British Columbia Indian Chiefs, First Nations Summit, and the British Columbia Assembly of First Nations.

realized, the limitations of the current consultation and co-management mechanisms need to be brought to light.

1.4. Interdisciplinary Research

This dissertation is interdisciplinary in that it touches on topics that would typically reside in the disciplines of First Nations studies, resource management, social science, history, philosophy and law. It seems fitting that research involving First Nations peoples, who do not typically share the distinctive worldview of Westerners that resulted in the “reductionist disciplines” (Newell in Lattuca 2001, 5) of academia, would be difficult to fit squarely into an academic disciplinary box. Devon Mihesuah, professor of applied Indigenous studies and history, describes interdisciplinary research as “the most effective way of making sure you have included all information [when writing about American Indians], but it still is not accepted by the old guard of scholars who demand that writers remain ‘discipline specific’” (2005, 4). While my research has not faced criticism for being interdisciplinary, it certainly has been more effective to gather information and use techniques from across disciplines, as described by Mihesuah (2005).

However, an interdisciplinary researcher must be careful to balance the needs of their research objectives with the expectations of the disciplines they would like to follow and respect.

In the past, when interdisciplinarity was criticized for not being 'disciplined,' the charge was a presumed lack of rigorous thinking and methodology. Scholars attempting interdisciplinary work were suspected dilettantes who knew too little and claimed too much. (Lattuca 2001, 3)

The format and style conventions used in this dissertation closely ally with resource management and environmental studies – generally scientific disciplines. However, the research methods, uncovered themes, and overall writing style borrow strongly from First Nations studies and social sciences.

While my research is not aimed at resolving conceptions of Aboriginal title, or fully describing an Indigenous peoples worldview, or restating the principles of conflict resolution or negotiation, or critiquing the common law that serves as foundation for much of this discussion, each of these topics, that are typically discussed in far flung disciplines, is introduced to provide the reader background and substance for the principles of fair land-management negotiations that follow. I leave the full treatment of these issues – title, sovereignty, ontology, Indigenous Knowledge and conflict resolution – to specialists in their disciplines. Fuller treatments of the *Delgamuukw* case, decision, and discussion of the cultural limitations of the judgment can be found in *Our Box Was Full* (Daly 2005), and *If This is Your Land, Where Are Your Stores?* (Chamberlin 2003).

1.5. A Note on Terms

First Peoples in Canada use various terms for referring generally to themselves and their communities in English. First Nation(s), First Peoples, Aboriginal, Indigenous, Indian, and Native are among the most commonly used terms. However, each of these terms has some underlying connotations and the careful writer can set a tone by simply applying one or two of these terms. Wherever possible I have employed First Nations and First Peoples for their respectful and common political usage in British Columbia by both Indigenous and non-Indigenous peoples. I have also used the terms Aboriginal and Indigenous as adjectives to refer to cultural or political aspects of local First Peoples. The term 'Aboriginal' is commonly used in Canada as an adjective and is particularly necessary when referring to Aboriginal rights and title whereas Indigenous is commonly used in international contexts and is increasing in usage among Canada's Indigenous peoples. The convention in Canada is to capitalize Aboriginal in most instances, whereas Indigenous is variously capitalized, more so in academic work, and has been in this work.

When referring to legal or governmental references, Indian or Indian Band may need to be used because of their use in the Canadian statute the *Indian Act* (1985), although these terms are outdated and demonstrative of early newcomers' geographic

ignorance.⁹ A glossary is provided at the end of this dissertation to further describe how these terms are used in Canada.

However, all of these terms have their own inferences and I have used them variously so as not to preference one term. My friend and colleague Cliff Atleo Jr. wrote, in his review of Steve Tilley's write up about *One Dead Indian*, that it is

Journalism 101: Writing about the locals. 'First Nations' are happy, singing folk. 'Natives' are angry and often break the law. 'Aboriginals' get lots of money. 'Indians' only seem to appear in the *National Post* and Fraser Institute publications (Interestingly, the term now seems to offend Aboriginals and their friends but does not seem to perturb Indigenous people too much anymore). (C. Atleo 2006, n.p.)

I note that new groups and initiatives in British Columbia have started to use the term Indigenous more often, which is a recent change in the province. For this reason I have preferred the term Indigenous where appropriate in my writing.

A discussion of human relationships with the earth's biosphere also leads to some terminology choices. Most English language references to the environment, nature, or resources separate humans from the rest of the natural world. Even referring to decision-making around land as *resource* management separates humans from nature and commodifies the natural world as a resource. Indigenous peoples often refer to the land as a complete material and non-material ecosystem which includes themselves (Youngblood Henderson 2000; Campbell 2003; E.R. Umek Atleo 2004). As described by

⁹ Many of my Aboriginal friends and colleagues refer to themselves or other Aboriginal people as Indians, however, in my experience this reference is generally used in close company or in humour. Further, older generations of First Nation people are more likely to use the term Indian due to its long use during their lifetimes in Canada.

Gleb Raygorodetsky, Gwich'in¹⁰ elder and co-ordinator of the Gwich'in Environmental Knowledge project:

The term "Land"... is not restricted to the physical environment only. It has a much broader meaning, used by Indigenous people to refer to the physical, biological, and spiritual environments fused together. The closest scientific equivalent of the "Land", taken without its spiritual component, is "ecosystem". (1997, 14)

Thus, Aboriginal references to land incorporate animals (including humans), water, air, trees and the non-material spiritual world. However, using the term 'land' for the environment can be problematic when Westerners are involved. Many Western scientists think of land as earth/soil, distinct from water, air, animals and fauna, while other Indigenous and non-Indigenous scientists have used the term land in its more inclusive and holistic sense. I have chosen to use variously the terms 'land' when referring to the whole earth system, and 'resource management' when referencing activities related to choices around the use of that land.

¹⁰ As described on the Gwich'in website, the Gwich'in are Athapaskan peoples who are one of the most northerly aboriginal peoples in Canada. Their territory lies within the Yukon, Alaska and the Mackenzie River Valley.

Chapter 2. Historical and Cultural Context

2.1. Colonization and Land Management

Fundamental questions of justice surround the not-yet-resolved questions of what constitutes meaningful consultation and accommodation for First Nations in Canada, and who should be in a position of authority for land stewardship and land negotiations. Moreover, one must examine who and what defines land ownership, proprietorship, title, sovereignty, and communally-held territory.¹¹ The history of colonization in Canada and British Columbia forms part of the foundation for answering these questions. While this research does not set out to determine a just distribution of power and land, the thesis does require an understanding of the colonial history of the province, and the concepts of title and sovereignty, to understand the roles that non-Indigenous people have assumed, and Indigenous people have lost, in land-use decision-making processes.

2.1.1. Indigenous Peoples Occupation Since Time Immemorial

Indigenous peoples have lived on the northwest coast of the Pacific Ocean for thousands of years. Many First Nations in British Columbia refer to their presence in their territories since “time immemorial” (Crey interview 2007; BC AFN 2007b; Hupačasath 2007), which is to say that they have been here since a time beyond

¹¹ Because this issue of ownership is critical to the degree to which consultation is conducted in British Columbia, I provide some brief background on the concepts of ownership and the Indian land question, but suggest the reader turn to Jacobs (1998) for detailed discussion of ownership and its relation to First Nation property concepts.

memory, a time long past. This rather broad statement has been made somewhat more specific through the oral histories and anthropological studies conducted in the province and the continent. And in some cases, the phrase time immemorial may not describe the true depth and duration of the presence of First Nations.

The experience of “human beings in America begins almost 25,000 years ago, a full 15,000 to 18,000 years before the emergence of agriculture in Asia and Africa, and 20,000 years before the emergence of urban living in Asia and Africa” (Hooker 1996, n.p.). At least 10,500 years ago the ice sheets began to recede in British Columbia. Many First Nations in British Columbia date their presence in the province prior to glaciation receding (e.g., the Haida) and have demonstrated this presence through their oral history, while Western scientists tend to assume Aboriginal presence began roughly at the time period of glacial retreat. However, recent archeological evidence shows a pre-Clovis¹² period presence on Vancouver Island that debunks, or calls into strong question the long-held belief that Indigenous peoples simply wandered across the then-dry Bering Straight from Asia, did not arrive by sea, and would not have been able to live in British Columbia during the ice age. For instance, a series of discoveries of bison bones, some with evidence of butchering, on Vancouver Island and nearby Orcas Island

¹² Clovis, Folsom and Plano are Western anthropological terms given to Native Americans from different periods before present; all three terms are more generally labeled Paleo-Indians 11,500 to 8,000 BP. Paleo-Indians have been described by Westerners as having subsistence living standards and being nomadic hunters. The Archaic Period (8,000 to 1,000 BP) shows Western scientific evidence of agriculture. The Early Woodland Period (3500 BP) archeological evidences shows the development of pottery and tombs. (Footnote content summarized from Hooker 1996).

in Washington state provided evidence of the presence of Ice Age hunters some 14,000 years before present, earlier than previous Western scientific estimates of the arrival of indigenous peoples on the west coast of North America. (Al-Suwaidi et al. 2006; Wilson, Kenady and Schalk 2009)

The population of Aboriginal people in British Columbia at the time of contact was vast. Harris estimates that the population was upwards of 200,000, while late nineteenth century census estimates had only put the pre-contact number at 80,000 (Barman 2007, 16). Of the four million people living in British Columbia, nearly 200,000 people responding to the government census¹³ in 2006 and identifying as Aboriginal, Métis or Inuit, has risen to nearly 200,000.

Indigenous peoples' oral history and traditions describe the presence and control First Nations peoples had over their territories in British Columbia long prior to any European contact. First Nations have begun, through lengthy court processes, to document (in a Western sense) their presence and control over traditional territories in the province. In *Delgamuukw*, it was found:

that there was some form of human habitation in the [Gitksan and Wet'suwet'en] territory and its surrounding areas from 3,500 to 6,000 years ago, and intense occupation of the Hagwilget Canyon site (near Hazelton), prior to about 4,000 to 3,500 years ago. This occupation was mainly in or near villages on the Skeena River, the Babine River or the Bulkley River, where salmon, the staple of their diet, was easily obtainable. (1997, 24)

¹³ See Statistics Canada website for data (<http://www12.statcan.ca/english/census06/data/profiles/aboriginal/Details/>).

In the recent *Tsilhqo'tin* decision¹⁴, judge Vickers stated that the Tsilhqo'tin peoples had occupied their traditional territory in south-central British Columbia in the Chilko Lake region for “over 200 years” (2007, par. 1374). Proof of this duration of presence was the important to the case as it pre-dates British claims of sovereignty over the British Columbia mainland. Dr. Richard Matson, archeologist and witness for the plaintiff (the Tsilhqot'in First Nation) in the case, asserted that the Tsilhqo'tin were descendents of Athapaskan peoples and “concluded that Tsilhqot'in people have been in the region since at least 1645 - 1660 AD” or for nearly 400 years (*Tsilhqot'in* 2007, par. 218).



Accessed From Host on Fri, Dec 5 08:56:47 2008

Figure 1. Lillooet First Nation Women Drying Salmon, 1954
(Image I – 29074. Reprinted courtesy of Royal BC Museum, BC Archives)

¹⁴ See Section 2.3.9 for a fuller discussion of the *Tsilhqot'in* decision.

In British Columbia, colonization is part of our recent collective history. European explorers, searching for new resources and items of trade began to arrive on the west coast of British Columbia in the 18th century. Russians began trading on the west coast of the Pacific in the mid-1700's, along with the arrival of Danish and Spanish explorers.

However:

There was little European influence in western Canada until the arrival of Capt. Cook at Nootka on Vancouver Island in 1778, which led to the sea otter hunt in the north Pacific. This influence grew with the establishment of the first Hudson's Bay trading post west of the Rockies (although east of the territories claimed [in central British Columbia]) by Simon Fraser in 1805-1806. (Delgamuukw 1997, par. 11)

Thus, Europeans in British Columbia have had a presence and influence for just over 200 years, whereas Indigenous peoples date their presence and use of the land to 500 or thousands of years before present.

Furthermore, the British official claim of sovereignty over the province only dates back one hundred and fifty years. The debate over Nootka Sound in the late 1700's on the west coast of Vancouver Island is sometimes cited at the point in history where Spain relinquished claims of sovereignty to Britain (see Canada in *Tsilhqot'in* 2007). And while the Nootka crisis involved the struggle over the so-called new trading territory, it also drew in European political issues of the day and ultimately ended with the Nootka Convention of the 1790 where Spain agreed to abandon its exclusive claims to Nootka

on the west coast (Barman 2007).¹⁵ Following the Nootka Convention, European interest in the west coast “waxed and waned” and “even a half century of maritime exploitation, during which the sea otter was nearly exterminated, had little effect on the eventual determination of sovereignty over the territory that would become British Columbia” (Barman 2007, 33).

The Canadian courts have applied 1846 as the date of British sovereignty over British Columbia, where Britain exercised sufficient occupation and control over the province to deem themselves sovereign.

I have no difficulty in concluding that The Treaty of Oregon, 1846 is a watershed date that the courts have relied upon up to now. I see no reason to move from that date. Indeed, as the Province has argued, the authorities would appear to be too well entrenched to admit any reconsideration at this level of court: see *Calder* (S.C.C.) at p. 325, per Judson J.; *Delgamuukw* (B.C.S.C.); *Delgamuukw* (B.C.C.A.); *Delgamuukw* (S.C.C.); *Haida First Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 65 [emphases in original].

Apart from that, by 1846 there was a *de facto* [emphasis in original] British presence in the area. The Treaty of Oregon is a treaty with another nation settling a boundary dispute and providing international recognition of sovereignty to the land and territory north of the 49th parallel. The assertion of sovereignty, recognized by another nation, is clear at this point in our history. (Tsilhqot'in 2007, par. 601, 602)

But it was not until 1858, in response to potential American assertions of sovereignty over the mainland of the province, that Britain took action and in “July 1858 a bill was

¹⁵ It took over five years for the Nootka Convention to be implemented. For more on the European exploration of the west coast, see *The West Beyond the West* by Jean Barman (2007).

introduced in the House of Commons to create a mainland colony of New Caledonia¹⁶, comprising that part of the HBC's [Hudson Bay Company's] fur-trade monopoly lying west of the Rocky Mountains" (Barman 2007, 72). And thus the British claimed sovereignty over the colony of British Columbia. The denial of legitimacy for Indigenous peoples, their claims to land title, and their forms of governance, is steeped in colonial history and continues today.

2.1.2. Justifying Newcomer Land Title

European exploration for resources in the New World began in the late 15th century, and is significantly marked in America by the arrival of Columbus in 1492. Columbus was Italian, but his voyage was funded by Spain and thus he represented the Spanish monarch during his exploration. In British Columbia,

the first encounters between seagoing explorers and local peoples occurred as recently as the eighteenth century. By then the European, in blatant disregard for indigenous populations with distinct cultures, claimed to have 'discovered' most of the world, rather than having encountered long-established ways of life. Among areas lying off established sea routes was the Pacific Northwest, extending from northern California to Alaska. (Barman 2007, 15)

As part of the colonization project, European countries applied their own rites for claiming sovereignty over their so-called discoveries in the New World. In North America, as in many other colonized areas of the world, gaining sovereignty was recognized by the French, Spanish, English, Dutch and Portuguese through a "series of

¹⁶ This name was later abandoned due to potential confusion with French colonial island in the Pacific Ocean (Barman 2007).

acts” mutually recognized by European powers (Macklem 2001, 113). These acts ranged from simply planting a flag, reading a manifesto to local Indigenous people, such as the Spanish *Requerimiento* of 1513 ⁽¹⁷⁾, or occupying an area with settlers (Rivera 1992; Macklem 2001). The English claiming rites were “almost anticereemonial” whereby they employed “architectural objects and everyday agricultural activity” (Seed 1995, 13). However these “fences and hedges” were not necessarily recognized as persuasive claiming rites, by say the Spanish, who would read their “Spanish speeches (duly notarized)” (Seed 1995, 12). Furthermore, “the other European legal systems that would come to the New World – French, Spanish, Portuguese, and Dutch – required either formal permission or written records to acquire title even to apparently unused land” (Seed 1995, 19). British Columbia and much of Canada was shaped by the colonization of the English and “in English law, neither a ceremony nor a document but the ordinary action of constructing a dwelling place created the right of possession. The continuing presence and habitation of the object – the house – maintained that right” (Seed 1995, 19).

While claiming rites differed between countries, Western European colonizers eventually developed their own principles governing the distribution of sovereignty. The established rules of the day included the so-called doctrine of discovery, whereby sovereignty could be acquired in one of three primary instances: when territory was

¹⁷ The Spanish colonizers in the New World read a manifesto called *El Requerimiento* which stated, among other demands, that the local people convert to Christianity or suffer war. The Spanish also used this *Requirimiento* and associated religious and royal justifications in their wars against the Moors of Granada. The *Requerimiento* was read in Spanish to local Indigenous peoples who did not speak Spanish.

considered to be unoccupied (*terra nullius*), or through cession of occupied territory through war or treaty (Ashe 1997).

The method of declaring sovereignty for a European Crown by deeming land unoccupied was achieved in one of two ways. First, the concept of *terra nullius*, land unoccupied by humans or people considered fully human,¹⁸ was developed by Western Europeans to justify settlement in Australia, parts of North America, South America, New Zealand and many other colonized areas of the world. Second, the Western, particularly English, concept of occupied land also required the land to be used by peoples considered civilized and organized, living in villages with fences, agriculture, resource extraction, and development. In the case of the Indigenous peoples of North America, “European powers viewed Aboriginal nations as insufficiently Christian or civilized to justify recognizing them as sovereign over their lands and people” (Macklem 2001, 114) rather than recognizing that they had met some of the world’s “most distinctive” Indigenous peoples (Barman 2007, 15). The Indigenous peoples of British Columbia “spoke complex languages, they were economically self-sufficient, and they boasted of cultures that were in many ways more developed than those of any other part of the continent north of Mexico” (Barman 2007, 15).

¹⁸ In the early 16th century, debate ensued in Spain about whether Indigenous peoples of the West Indies and Africa were humans or sub-human and whether they were solely suited for slavery or deserved protection under the law (Bartolome de Las Casas 1552).

The functioning ecosystems managed by Indigenous people were not viewed as occupied by British colonizers. Many colonizers saw these ecosystems as untouched landscapes, rather than the managed systems they were. When Captain George Vancouver sailed into Burrard Inlet, the area that now bears a city of his name, he said it required “only to be enriched by man to render it the most lovely country that can be imagined” (Penikett 2006, 73). However, Indigenous territory throughout the world, from the Penan people's *molonged* (nurtured) rattan forest-fields in Western Borneo (Brosius 2001) to the fire-managed landscapes of the North American Garry Oak ecosystems on the west coast (Turner 2005), were seen by European colonizers as wilderness, nature, or “raw land”, lacking and requiring “commodification by imperialism” to acquire value (Forbes 2001, 109).

Furthermore, the Indigenous systems of governance, communal property law, and feasting, to name a few, were not recognized by the administration of the new Colony as acts of control by a sovereign nation over its territory (Forbes 2001, 76). In the late 19th century, when land title issues were being decided by Western European colonizers in parts of the New World, including British Columbia, Lockean principles of private property were influential (Harris 2002). In essence, the labour theory of property posited by John Locke contended that when one puts his¹⁹ labour into a piece of land, one then has a special right to that land, or in European terms, has ownership of that

¹⁹ In late 19th century Europe, the labour of women was not recognized as contributing to land ownership.

land (see Laslett's 1988 edited work of Locke's *Two Treatises of Government*²⁰). In 1867, Joseph Trutch, chief commissioner of lands and eventual Governor of the Colony that would be British Columbia, stated clearly the common colonial opinion: that First Nations people were not using their lands sufficiently to maintain ownership or title to the lands they claim.²¹

Many First Nations in British Columbia were viewed as lawless because they did not have a system of laws and government that was recognizable to the European newcomers. In contemporary international law, a new system of law cannot be imposed on another Nation if one already exists. This perceived absence of law in the colonizers' eyes was another justification the colonizers used to impose their people, culture, and laws on these Indigenous Nations. This attitude prevailed through much of the 20th century as well, as evidenced by the lower court ruling in *Delgamuukw* that did not recognize the Gitksan and Wet'suwet'en First Nation forms of law and governance (songs, stories, feasting) as legitimate evidence of a legal system of governance.

²⁰ Locke, John. [1690]. 1988. *Two Treatises of Government*. Ed. Laslett, Peter. Cambridge: Cambridge University Press.

²¹ "The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them, and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony or be allowed to make a market of them either to the Government or to Individuals" (Trutch quoted in Penikett 2006, 75)

2.1.3. Colonization, Treaties, and Reserves in British Columbia

The British established the colony of Vancouver Island, off the west coast of British Columbia, in 1849. Between 1850 and 1854, the Hudson's Bay Company (who was responsible for settlement in the new colony) and Governor of the new colony, James Douglas, made fourteen land purchases on Vancouver Island. In 1858, the British colony of British Columbia was created, and the issue of Aboriginal title was never clearly addressed on the mainland (Harris 2002). Governor Douglas's policy shifted to the mainland and to marking out larger, anticipatory reserves that were defined by the First Nations themselves in advance of settlers making claims (Harris 2002).

[For instance], the Kamloops Reserve land base was established in 1862 under the direction of then Governor James Douglas. It included an area approximately 26 miles east of the North Thompson River by 26 miles north of the South Thompson River, adjacent to the City of Kamloops. Although the Secwepemc never signed away their rights to this land, in subsequent years the reserve was reduced in size to around 7 by 7 miles today. In 1988 the Kamloops Indian Band filed a claim to the original Douglas Reserve. In 2001 the Canadian Government rejected the claim. The Kamloops Indian Band is currently preparing to file a new claim under the Douglas Reserve Initiative [...]. (Freeman et al. 2005, n.p.)

Unfortunately, title was not settled in these processes, and the reserves were not registered in the provincial gazette and were summarily rescinded, reduced, or redrawn during the governing years of Joseph Trutch, the primary author of native land policy in British Columbia (Harris 2002).

Colonizers also set up rules for how land could be acquired by newcomers for settlement. Governor James Douglas's land preemption policy for British Columbia,

which allowed settlers to claim title to unused portions of land, enabled “native people to pre-empt on the same terms as anyone else” (Harris 2002, 36). However, when these lands were preempted, a Western standard of land-use needed to be applied (fences, rowed agriculture, animal husbandry) in order to claim title to the land.²² These land use requirements proved very difficult for most First Nations people to achieve and sustain for both cultural and financial reasons.

After Douglas’s retirement in 1864, his land policies were largely abandoned. The prevailing settler view that “almost all provincial land was unsettled and unused – or used slightly in ways that deserved to be replaced by more intensive, modern land uses” was adopted and not debated (Harris 2002, 45). Indigenous methods of land stewardship were not seen as sufficient justification to maintain ownership or governance of a piece of land.²³ The European newcomers imposed a new industrial land “management regime, one that worked for the newcomers, but not necessarily for the original inhabitants and their culture” (Ommer and Turner 2004, 10). The legacy of the colonial reserve system and land allocation system in British Columbia had

²² “Native pre-emptors were to reside continuously on their farms for two years; build a 20 x 30 foot house of squared log walls ten feet high and roofed with shingles; clear, fence, and cultivate two acres of forest or five acres of prairie in the first year; and in each of the second through fifth years similarly prepare three acres of forest or six acres of prairie... Given that the cost of clearing an acre of coastal forest was some \$300 (the wage of a Chinese or Native worker for a year)...” and that Native people were not permitted to sell portions of their pre-empted land to raise capital, such terms would have made Native land pre-emption and ownership nearly impossible (Harris 2002, 36).

²³ British colonists viewed planting, tilling, gardening, house construction and bounding of space (through fences) to signify possession of that land (Harris 2002). “It followed from this that those who did not plant gardens, or did not fence them, or did not create landscapes that bore imprints familiar to the English, did not possess the land and could not have property right to it ...”. A Native garden, unfenced, was inadequate (Harris 2002, 48).

devastating effects on First Nations peoples. “In taking away almost all their land, it had very nearly snuffed Native people out” (Harris 2002, 291).

First Nations in British Columbia have been resisting the British claim to sovereignty and land title for over one hundred years. For instance, there is “abundant evidence that Indians had claimed title from the beginning [contact] and had demanded treaties as early as 1887 in the north coast hearings” (Tennant 1990, 110). A detailed historical treatment of Indigenous peoples claims to land title can be found in political scientist Paul Tennant’s book *Aboriginal Peoples and Politics – The Indian Land Question in British Columbia 1889 – 1989* (1990). The activism around land title of British Columbia First Nations peoples and their representative in the early twentieth century led to the insertion of section 141 into the Indian Act in 1927²⁴. This section made it illegal for “Indians to take any of the necessary steps to get their claims into court” including hiring lawyers or raising funds for land claim related activities (Tennant 1990, 113).

²⁴ This section was not repealed until 1951 (Tennant 1990).



Figure 2. First B.C. Chiefs Conference, 1969

(Photo courtesy of the Union of BC Indian Chief. © Union of British Columbia Indian Chiefs. All rights reserved. Reprinted with permission.)

Yoox (Elmer Derrick), Chief Negotiator and Gitksan member, recounts how the Gitksan resistance to reserve boundaries and limitations led to incarceration of some of its members.

In the 1920's one of my grandfathers was sent to Oakalla Prison Farm for obstruction of justice. He and three other men from Kitwancool spent six months in the federal prison in New Westminster. My grandfather's offense was to defend the action of his mother in law who had threatened surveyors when they were putting posts around their property at Kitwancool Lake. The surveyors had come to establish a reserve so that my great grandparents would have titled land. My great grandmother stated to the government people that the land was hers and told them to leave. They left but came back with police. The police attempted to remove my great grandmother from her yard. My grandfather intervened and he was picked up and sent to Oakalla.

Following the establishment of the Kitwancool Reserves the people of Kitwancool were not allowed access to their lands and resources. (2008, n.p.)

This history of colonization in British Columbia did not end with the British declaration of sovereignty (1790s), the formation of the colony of British Columbia (1858) or the

signing of the *Constitution Act (British North America Act), 1867* or the *Constitution Act, 1982*; colonization continues today in many aspects of the lives of First Nations peoples. Colonization continues through the remnants of old colonial systems (the existence of reserves, the non-recognition of Aboriginal title, the presence of INAC, and the understanding that Aboriginal people are a burden on the Crown) and in modern forms such as the encouragement of Western forms of so-called progress for communities, the loss of Indigenous peoples' languages and perspectives in the education systems and the dominance of a Western worldview in land management, to name but a few forms colonization continues to take. This notion of an ongoing colonization is important when framing and understanding the key issues that need to be addressed in land and resource management in the province.

The basic history of sovereignty claims, treaty making, and reserve allocations provide important context for the ongoing effects that this colonization has had for Indigenous peoples in British Columbia and elsewhere in Canada. The land that has been assumed and consumed by British colonizers and other newcomers is the very land for which Indigenous peoples struggle to retain, or reclaim, title. In the absence of reconciliation of land title and sovereignty issues, consultation and negotiation are left as mechanisms for resolutions and agreements. For a full treatment of the history of land pre-emption and reserve allocations in British Columbia, see *Making Native Space* by Cole Harris (2002).

2.1.4. Impacts of Colonization on the Ability to Steward Land

Related to the limitations placed on Indigenous peoples' ability to maintain sovereignty over their land, colonization in Canada and British Columbia created overlapping and cumulative negative social impacts on Indigenous people's ability to steward the ecosystems and resources of their land. In addition to the diseases that led to severe population decline, which made First Nations land more vulnerable to encroachment by settlers and developers, numerous assimilationist laws and practices directly impacted land stewardship. For instance, the 1885 *Indian Act* banned feasting (potlatching), which made it very difficult for many First Nations to govern and manage their land-based resources in a traditional way (see Glossary for potlatch).²⁵ Many First Nations' laws and management practices are communicated, and the redistribution of resources is accomplished through different feast ceremonies. In addition, the creation of tiny, "postage stamp" (*Tsilhqot'in* 2007, par. 610) federal land reserves set aside for Indigenous people in British Columbia left many First Nations with a very limited ability to influence development activities occurring in their territories. And some federal and provincial so-called conservation regulations placed an outright ban on Indigenous people's access to food resources (e.g., Abalone on the north coast) (Turner 2005).

²⁵ The ban on the potlatch was not rescinded until 1951.



Figure 3. Carrier First Nation "Welcome Dance" circa 1930

(Image B - 01350 Reprinted with permission of Royal BC Museum, BC Archives)

Possibly the most damaging blow to First Nations' ability to continue to steward their land and transfer traditional land management knowledge was the incarceration of Aboriginal children in federal residential schools.²⁶ Aboriginal children were taken to residential/industrial schools, often hundreds of kilometers from their families. This distance and the limited time spent within their own community disabled elders from passing on Indigenous Knowledge and wisdom to their next generations. As stated by Prime Minister Stephen Harper in his apology in 2008:

Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and

²⁶ For detailed and personal accounts of over a century of residential school impacts in British Columbia, see John Milloy's *A National Crime: The Canadian Government and the Residential School System* (1999), Celia Haig-Brown's *Resistance And Renewal: Surviving the Indian Residential School* (1989), and Suzanne Fornier and Ernie Crey's *Stolen from Our Embrace* (1998) among others.

cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

The assimilation²⁷ goals of these residential schools in British Columbia and across Canada resulted in a generation of First Nations people who had a weakened or lost contact with their culture, including language, ceremony and lifeways.



Thomas Moore before and after his entrance into the Regina Indian Residential School in Saskatchewan in 1874.
Library and Archives Canada / NL-022474

Figure 4. Thomas Moore in Residential School Photos, 1874

(Image R-A8223-1 and R-A8223-2 courtesy of the Saskatchewan Archive Board. Images now in public domain.)

²⁷ Colonization of British Columbia by Crown agents, settlers and religious groups pursued a primary goal of assimilation of the Aboriginal population into Western European culture and lifestyles. Ultimately, assimilation would lead to the loss of language, culture, values, livelihood, and governance methods.

2.1.5. Land Under Treaty in British Columbia

Colonization in Canada took many different forms as settlers made their way west across the country. British and French newcomers signed treaties in large parts of Canada on behalf of their European Crowns “early in the history of European expansion” to formalize a “peaceful co-existence between Aboriginal nations and newcomers to the continent (Macklem 2001, 136). These early treaties in Canada, or historic treaties, include treaties signed in Upper Canada (the *Covenant Chain* 1677) and on the east coast of Canada (*Peace and Friendship Treaties*), various pre-Confederation treaties, and the post-Confederation treaties known as ‘numbered treaties’ 1 through 11 that cover a large part of Canada (Figure 5).

However, in some regions of Canada, including Northern Quebec, the Canadian North and most of British Columbia, Crown treaties were not signed at the time of Confederation. While newcomers were occupying what they saw as new, unused Crown land, “native people lost almost all their land and, with it, their means of livelihood, to an aggressively colonized settler society” (Harris 2002, 293). Modern treaties were signed in the latter part of the twentieth century in Northern Quebec with the James Bay Cree, and in the Canadian north (Nunavut, Inuvialuit, and the Yukon). Settled lands associated with treaties or allocated reserves in British Columbia are very limited in area. Historic treaties were not developed in the major part of British Columbia, leaving British Columbia in a unique position compared to the rest of



Figure 5. Historic and Numbered Treaties in Canada

(image adapted from Natural Resource Canada map,

<http://atlas.nrcan.gc.ca/site/english/maps/historical/indiantreaties/historicaltreaties>)

Canada, where settled historic or modern treaty rights are common.²⁸ The Nisga'a Treaty (2000), and the more recent First Nations of Maa-Nulth Treaty (2007) and Tsawwassen Treaty (2008),²⁹ represent the only modern treaties and claims settlements in British Columbia and involve numerous agreement items including the transfer of

²⁸ Treaty 8 spans northern Alberta, part of northwest Saskatchewan, and includes the portion of northeast British Columbia east of the Rocky Mountain divide (peaks of the Rocky Mountains).

²⁹ As of March, 2008 "On December 6, 2007 the Chief of the Tsawwassen First Nation Kim Baird, federal Minister of Indian Affairs Chuck Strahl and Minister of Aboriginal Relations and Reconciliation Michael de Jong signed the Final Agreement at a ceremony in Ottawa. Settlement legislation was then introduced in the House of Commons and given first reading. After the legislation receives approval by the Parliament of Canada and Senate, the Final Agreement will take effect on a date agreed to by the parties" (B.C. Ministry of Aboriginal Relations and Reconciliation 2007).

funds, some fee-simple land ownership, and some degree of land jurisdiction to traditional territory, the First Nations.³⁰ At the time of writing, the somewhat controversial Tsawwassen Treaty, British Columbia's first modern urban treaty, was before the British Columbia legislature for ratification. In December 2008, the Maanulth Treaty was still awaiting ratification by the federal government. Furthermore, Indian reserves cover just 0.36 percent of the British Columbia land base, a tiny portion of First Nations traditional territory; in some cases, reserve land that was appointed by the Crown nearly a century ago is not within a First Nation's traditional territory (BCTC 2006).

First Nations traditional territory, to which individual First Nations claim title, encompasses all parts of British Columbia, with many areas involving overlap between Nations. Given the small reserves and lack of treaties, most land encountered in British Columbia will be unceded³¹ Aboriginal lands.

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. (*Haida* 2004, par. 25)

³⁰ See the First Nations' respective websites for more on their treaties: www.nisgaalisims.ca, www.tsawwassenfirstnation.com, and www.maanulth.ca.

³¹ The term 'unceded' refers to the territories of Indigenous people in Canada who claim to have not ceded, or given up, title to their lands through treaty, war or conquest.

2.1.6. Aboriginal Title

Historically, the position of the Crown courts states that title to the majority of the land in Canada is held by the Crown, with Aboriginal rights and title only a burden on that Crown title (*St. Catherine's Milling* 1888). Challenging this deep-rooted position, Mohawk scholar Taiaiake Alfred states that “all land claims in Canada ... arise from the mistaken premise that Canada owns the land it is situated on. In fact, where Indigenous people have not surrendered ownership, legal title to ‘Crown’ land does not exist – it is a fiction of Canadian (colonial) law” (1999, 120). For most First Nations peoples in British Columbia, their title to their land has not been ceded through war or treaty.³² This unceded title, given a somewhat limiting term of “Aboriginal title”³³ by Canadian courts, remains as simply an encumbrance, limitation, or a “burden” on Crown claims to prime “underlying” title to lands and resources (*Delgamuukw* 1997, par. 145).³⁴

Currently, there are three leading conceptions of Aboriginal title in Canada: “as a customary right, a right under English common law, and a *sui generis* right” (Slattery 2007, 256). The Supreme Court of Canada has described Aboriginal title in *Delgamuukw v. British Columbia* 1997.

³² See Section 2.1.5, Land Under Treaty in British Columbia, for more discussion of treaties in British Columbia.

³³ See Glossary for a fuller description of Aboriginal title.

³⁴ For a complete review of the implications of the *Delgamuukw* decision on Aboriginal title, see Mary Hurley’s work entitled *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia* prepared for the Land and Government Division of the Library of Parliament (2000).

...first ...Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land. (*Delgamuukw* 1997, par. 117)

[Aboriginal title] is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in Aboriginal legal systems. As with other Aboriginal rights, it must be understood by reference to both common law and Aboriginal perspectives. (*Delgamuukw* 1997, par. 112)

A further dimension of Aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of Aboriginal title which is *sui generis* and distinguishes it from normal property interests. (*Delgamuukw* 1997, par. 115)

While the *Delgamuukw* decision established that Aboriginal title has not been extinguished, the decision did so "without clarifying either from what it derives or how, or to what extent, it may be infringed" (Harris 2002, 296). And the hope that Aboriginal title has been fairly clearly described in Canada has "been shaken with the recent decision of the Supreme Court in *R v. Marshall/R. v. Bernard* [original cases 1999] where the Court seems adrift in a conceptual sea, without benefit of star or compass" (Harris 2002, 256).

The Supreme Court's description of Aboriginal title also places limits on this type of title versus Crown title.³⁵ One of the limiting factors of the Supreme Court's definition of Aboriginal title surrounds the uses that may be made of the land, given the relationship Indigenous people had, and still have, with the land. The Court views the past use and relationship with the land as unevolving and unchangeable.

It seems to me that these elements of Aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims Aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot). (*Delgamuukw* 1997, par. 128)

The recent 2007 *Tsilhqot'in* ruling in the British Columbia provincial courts supported the assertion that Indigenous people hold title, over and above provincial jurisdiction, to all or some of their claimed territory (*Tsilhqot'in* 2007). The judgment clearly states that the *Tsilhqot'in* First Nation's sovereignty and land title was not ceded by the symbolic acts of the British Crown in the 18th century.

I am not persuaded that private adventurers or commissioned officers of His Majesty's Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. They are, in

³⁵ Crown occupation and sovereignty has been justified on sometimes racist, and always evolving, justice arguments proceeding from *terra nullis* (the land was unoccupied), biological racism (Indians were an inherently savage species requiring protection), and cultural racism (European governance and industrialization is a sign of progress, evolution and civilization, something for Indians to aim to achieve) (Haig-Brown and Nock 2006).

my view, just words blowing in the wind. I agree entirely with Lambert J. A. when he said in *Delgamuukw* [emphasis in original] (B.C.C.A.) at par. 707:

Sovereignty, of course, does not occur when the first sea captain steps ashore with a flag and claims the land for the British Crown. Cook did that in 1778. Sovereignty involves both a measure of settled occupation and a measure of administrative control.³⁶ (*Tsilhqot'in* 2007, par. 596)

During the process of writing this dissertation, the voices of Indigenous leaders in British Columbia have become stronger and more unified around the issue of Aboriginal title, particularly in light of the landmark *Tsilhqot'in* decision. In November of 2007, the First Nations Leadership Council hosted a three day strategic planning session which was attended by over 120 First Nations leaders from across British Columbia. First Nations leaders examined and discussed the important *Tsilhqot'in Nation v. BC* decision and presented a unified signed strategy entitled "*All Our Relations*" *A Declaration of the Sovereign Indigenous Nations of British Columbia*, affirming Aboriginal title to their traditional territories across the province (First Nations Leadership Council 2007). The opening paragraph states:

We, the Indigenous leaders of British Columbia, come together united and celebrate the victory of the Tsilhqot'in and Xeni Gwet'in peoples in securing recognition of their Aboriginal title and rights – and all those Indigenous Nations and individuals that have brought important court cases over the years resulting in significant contributions in the protection and advancement of Aboriginal title and rights, including the Nisga'a, Gitksan, Wet'suwet'en, Haida, Taku River Tlingit, Musqueam, Heiltsuk and Sto:lo [sic] - shining light on the darkness of years of Crown denial of our title and rights. After pursuing different pathways, we now come together to make this solemn Declaration out of our common desire to be unified in affirming our Aboriginal title. (First Nations Leadership Council 2007)

³⁶ Emphasis and lack of internal quotation marks in original.

2.2. Contemporary Requirement for Consultation

The requirement for consultation, with regard to land use, with First Nations in Canada has three legal sources: constitutional, common law, and fiduciary. First, Aboriginal and treaty rights are recognized and protected by the s. 35 of the *Constitution Act* (Macklem 2001) and infringement on these rights requires consultation and accommodation of First Nations' interests. Second, legal judgments have increasingly supported and expanded the nature of aboriginal title and the requirement for consultation at an early stage. And finally, the duty to consult also "originates in the fiduciary duty imposed on the Crown under its responsibility for Aboriginal peoples," as described in the Supreme Court of Canada ruling *Guerin* (1984) (Brackstone 2002, 1). This fiduciary duty in the Crown's relationship with First Nations peoples was enshrined in the *Constitution Act, 1982* of Canada and reaffirmed in the Supreme Court decisions in *Sparrow* (1990) and *Delgamuukw* (1997). However, it is now considered that the ultimate source of the duty for the Crown to consult is to uphold the honour of the Crown (*Haida* 2004; Hunter 2005; *Tsilhqot'in* 2007).

Furthermore, court decisions indicate that the level of consultation should not merely uphold the fiduciary, trust-like relationship between the Crown and Aboriginal people, but should uphold the "honour of the Crown" (*Haida* 2004, par. 41). "In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances" (*Haida* 2004, par. 41). In most cases of

activities that may affect Indigenous lands, Chief Justice Vickers reaffirms that “where Aboriginal title exists or is alleged to exist, there is always a duty of consultation” (*Tsilhqot’in* 2007, par. 1114). Furthermore, the *Delgamuukw* decision states that there “is always a duty of consultation and, in most cases, the duty will be *significantly deeper than mere consultation* [emphasis added]” (1997, par. 168). Section 2.3 contains a summary of the key court cases that have described the requirement for negotiation with First Nations within their traditional territories.

The development of meaningful consultation, negotiation and co-jurisdiction processes is in its infancy and has yet to be widely defined in British Columbia. At a minimum consultation requires talking together to gain mutual understanding. Therefore, current jurisprudence suggests that consultation could mean simply meeting and speaking with First Nations to understand their concerns. From this basic definition, the degree to which these concerns are accommodated may be minimal. However, consultation with title and rights holders in a territory ought to involve something significantly deeper than mere consultation (*Delgamuukw* 1997) which, in the case of significant resource developments, land disturbances, or environmental impacts, coupled with the gravity of the decision, is likely to mean strong consultation with culturally-aware accommodation and compensation. Accommodation and compensation involve adjusting plans to accommodate interests, or in some cases, compensating communities for infringement on their rights and interests.

In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation – which is reconciliation – must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown. The goal of consultation does not also indicate any specific result in any particular case. It does not mean that the Crown must accept any particular position put forward by a First Nations people. (*Dene Tha'* 2006, par. 82)

The Courts have stated that determination of the degree of consultation required is two-pronged: the first being the strength of claim, and the second being the level of potential impacts on rights.

Unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult (*Dene Tha'* 2006, par. 86).

However, the ability and responsibility to determine this strength of claim is left in the hands of the Crown. Chief Sayers sees this as a source of power imbalance in the relationship between First Nations and the Crown (see Section 5.5 for more on power imbalance).

The other thing we have to get out of the province is “Strength of claim”. Based on the strength of claim, ‘we get to decide how much you get to be consulted and accommodated’. Well, do they get to be the judge and jury on how strong our claim is? You know, and how much research are they going to do to determine how strong our claim is? We’re looking at court cases saying we have a very strong title. (Chief Sayers interview 2007)

The issues of Aboriginal title, its content, and the nature of its associated rights remain under debate despite the fact that over three decades have passed since the courts recognized that Aboriginal title had not been extinguished (*Calder* 1973). It has also been over a decade since the governments of Canada and the province of British Columbia have been legally required to conduct, at a minimum, consultation with the aim to substantially address the concerns of the First Nations whose territory may be impacted by resource extraction projects, industrial developments, and other aspects of Western economic resource use such as land transfers and licence issuance (*Delgamuukw* 1997; *Haida* 2004).

Relying on a rights-based argument in courts of law in Canada is not seen as the ultimate solution for First Nations and their land dispute resolutions. While the courts have “prodded, and may be able to prod a little more,” their “capacity for distributive justice is finite” (Harris 2002, 297). These issues must be dealt with through politics and negotiations, where “unbalanced distributions of power are the creations of settler colonialism” (Harris 2002, 297).

2.2.1. Consultation - Negotiating Without Treaties

First Nations have “expressed deep concerns about the continued alienation of resources in their territories, from which they received little or no benefit” (Penikett 2006, 230). Consultation and negotiation are means by which First Nations can exercise their Aboriginal title. “Consultation and accommodation before final claims resolution

preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands” (*Haida* 2004, par. 4).

For instance, Chief Sayers discusses how consultation is a key avenue for the

Hupačasath to protect their sacred medicines, grasses and other sites of interest.

But those are the kinds of things that are really hard to come by, like a particular plant that we eat, those kinds of things, that we try to protect through our consultation. Which is why we put the Land Use Plan in place to begin with, because we were just getting smeared with so many consul-... so many referrals. You know, it’s nice to be consulted, but the Crown gives us no money whatsoever for any of the consultation processes, and you have to do it on your own. And so we needed help. (Chief Sayers interview 2007)

The unique aspects of Aboriginal title “do not justify a level of legal protection less than what non-Aboriginal proprietary interests receive under Canadian law” (Macklem 2001, 89). Thus, consultation ought to protect Indigenous interest in their traditional lands in the absence of treaties or other management agreements.

2.2.2. *Delgamuukw* Decision and Consultation

Successive Supreme Court of Canada rulings have led to a clarification of the requirement for First Nations to be consulted when resource development projects will take place within their traditional territories. Both the *Sparrow* (1990) and *Delgamuukw* (1997) decisions paved the way for the recognition of rights and unextinguished title, and the associated requirements for consultation that were more clearly stated in the later *Haida* (2004), *Taku* (2004), and *Dene Tha’* (2006) decisions.

The breadth of activities identified through which First Nations' land rights and title can be justifiably infringed for the benefit of majority Canadians is vast. Chief Justice Lamer states in his judgment:

...the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this [First] purpose and, in principle, can justify the infringement of Aboriginal title. (*Delgamuukw* 1997, par. 165)

The 1990 *Sparrow* decision marked the first instance where the Canadian judiciary recognized the need to consult Aboriginal peoples with regard to impacts on their traditional lands. However, consultation in British Columbia "remained an undisciplined and uncoordinated affair until at least December 1997" with the handing down of the *Delgamuukw* decision (Penikett 2006, 138). The *Delgamuukw* decision was considered to mark the potential for the beginning of a new era in relations between newcomers and First Peoples in Canada and British Columbia in particular (McNeil 1998). This ruling resulted from the case brought forward in 1987 by the hereditary chiefs of "two neighbouring Nations, the Gitksan and the Wet'suwet'en of the Skeena and Bulkley rivers, who sued the provincial government for ownership of over 57,000 square kilometres of their traditional territories in northwestern British Columbia (Campbell et al. 2003, 144).

The *Delgamuukw* decision, including its definition of Aboriginal title and introduction of oral histories into evidence, was expected to have "far-reaching implications that could

lead to the economic and political empowerment of Aboriginal peoples and to a radical restructuring of Canadian federalism” (McNeil 1998, 2) (see Glossary for more on *Canadian federalism*). This ruling made it clear that First Nations had neither ceded nor lost their title and rights to all or portions of the land in British Columbia, and that consultation is required to accommodate these rights and interests when land and resource-based activities are going to have impacts on this land. Specifically in *Delgamuukw*, the court stated that the duty of consultation will vary in degree given the circumstances.

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal Nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands. (*Delgamuukw* 1997, par. 168)

Despite this requirement of *Delgamuukw* that mere consultation is not sufficient, “subsequent lower court decisions have not held the Crown to requirements that are ‘significantly deeper than mere consultation’” (Macklem 2001, 280). Historically, the position of the Crown courts states that sovereignty to the land is held by the Crown,

with Aboriginal rights and title only a burden on that Crown title (*St. Catherine's Milling* 1888).³⁷ The assumption of Canadian sovereignty owes its

...origins to a colonization project that assumed that Aboriginal peoples were inferior to European peoples, and, to the extent it fails to recognize Aboriginal forms of sovereignty, the present distribution of sovereignty in North America is unjust. (Macklem 2001, 7)

This concept that Aboriginal rights are simply a burden on overarching Crown title is important. Had the tenets of the Royal Proclamation of 1763 prevailed, rights to land and lifeways would be construed as negative rights, a right to noninterference by the Crown and settlers alike. Since the Crown has subsumed or extinguished Aboriginal title through treaty in many areas of Canada, Aboriginal rights are now described in general discourse as defined as a positive right (a *desert to* land and lifeways) (see Glossary for *Rights*). The Royal Proclamation, with its stronger statement of noninterference with First Nations, was written when First Nations' power was more balanced with small settler populations, and the First Nations role in military issues was valued. Later documents, including the Constitution Act in 1867, gave the Canadian government the juridical power to dominate relations with First Nations peoples (Schouls 2003), which still holds today. Later documents and court cases reframed the discussion in a primarily positive right argument of what is due, and allowed the government the flexibility to determine what constitutes justifiable infringement and therefore decide what is due to First Nations with regard to land.

³⁷ "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden" (*St. Catherine's Milling* 1888, par. 58).

In addition to the limitations imposed by making Aboriginal rights a positive right, elements of the *Delgamuukw* decision are limiting and problematic with relation to issues of Aboriginal title. Of particular concern is the allowance for development on Aboriginal lands if deemed necessary for the greater good, which is made up of a non-Aboriginal majority. Even the “path-breaking” *Haida Nation* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* decisions,

[...] mark the emergence of a new constitutional paradigm governing Aboriginal rights. This paradigm views section 35 of the *Constitution Act, 1982* as the basis of a *generative* constitutional order — one that mandates the Crown to negotiate with Indigenous peoples for the recognition of their rights in a form that balances their contemporary needs and interests with the needs and interests of the broader society. (Slattery 2007, 285)

This need for balance with broader Canadian society, a non-Aboriginal majority population, may lead to First Nations rights, concerns, and interests being held as secondary to non-Aboriginal interests. Furthermore, as determined by legal judgments, the authority to set out process and goals that carry weight in natural resource decisions currently rests with the Province, yet the Province is under no obligation to reach agreement with the First Nation, as evidenced by several recent court decisions (*Haida* 2004; *Taku* 2004). Depending on one’s definition of Aboriginal title,³⁸ the Province’s position is challenged by the Indigenous peoples who hold unceded title in their traditional territories (Kennedy 2007; *Tsilhqot’in* 2007).

³⁸ See Glossary for more on Aboriginal title.

Despite these limitations, however, the clear statement of a requirement for consultation and accommodation heralded a significant change in the role of First Nations and Indian Bands in land-use decision-making in Canada (Crey interview 2007). British Columbia First Nations who are without treaties are particularly reliant on consultation and accommodation as a mechanism to protect their land and interests (Williams-Davidson 2005). However, in the decade that has passed since the *Delgamuukw* decision it is my experience, confirmed through this research, that this vague notion of something “significantly deeper than mere consultation” that is required in many land management decisions (*Delgamuukw* 1997, par. 168) has yet to be fully described or put into practice consistently in Canada or British Columbia.

2.3. Related Judgments and Declarations

Numerous provincial and federal court cases have been heard regarding the clarification of Aboriginal rights, title, and requirements for land-related negotiations. Each case built on, revised, or referred back to the previous cases. The following judgments form the key foundations for the justification for recognizing outstanding Aboriginal title in British Columbia, and the need for strong consultation or negotiation regarding resource management in light of this pre-existing title. While numerous Supreme Court cases have not been summarized here³⁹, these cases are the cornerstones

³⁹ For instance, one could include *St. Catherine's Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33.

of many judgments and they represent the current position of the Crown courts.

Furthermore, these case summaries are not exhaustive and focus primarily on the impact the case had on First Nations' ability to manage their traditional lands.

The cases included and summarized in the following sections are intended to highlight land-management related aspects of Supreme Court judgments only. First Nations typically view resource extraction or other development projects as an infringement, or a potential infringement, on Aboriginal title within their traditional territories. The requirement for consultation and accommodation currently serves as the primary avenue for First Nations' participation in resource decisions. Despite the fact that vast tracts of land in British Columbia fall under asserted Aboriginal claim, recent court cases have ruled that the provincial and federal governments can infringe on Aboriginal title rights under a myriad of conditions, as long as the outcomes benefit greater Canadian society and Aboriginal groups are compensated for the loss of their rights or the infringement on their title. However, the decision in *Tsilhqot'in*⁴⁰ (2007) may begin to shift this position to one where Aboriginal title can not be infringed unilaterally because:

Aboriginal title land is not "Crown land" as defined by provincial forestry legislation. The provincial Forest Act does not apply to Aboriginal title land. The jurisdiction to legislate with respect to Aboriginal title land lies with the Federal government pursuant to s. 91(24) of the Constitution Act, 1967.

The Province has no jurisdiction to extinguish Aboriginal title and such title has not been extinguished by a conveyance of fee simple title. (iv)

⁴⁰ See section 2.3.9 for more on the B.C. Supreme Court *Tsilhqot'in* decision (2007).

In the absence of treaty agreements that clearly eliminate title, and notwithstanding the potential restrictions the Crown may try to impose to pre-contact use (such as hunting, fishing or trapping that occurred prior to colonization), there is now more complexity and opportunity for creativity in negotiations that put Aboriginal parties in a stronger negotiating position that respects their title. In land-management cases such as those in this research, where negotiations have been more balanced, some optimism is warranted that Aboriginal perspectives and goals may be incorporated into land-use decisions.

2.3.1. *Calder* Decision, 1973 and *Guerin* Decision, 1984

In the *Calder* decision, the Supreme Court recognized that Aboriginal title had not been extinguished.

Calder was a turning point which changed our basic understanding of Aboriginal rights and allowed us 'to move from a framework grounded in imperial history to a framework more open to local history, tradition, and perspectives' Slattery, "The Organic Constitution" at p. 107.

In the *Calder* case the Nishga [sic] [Nisga'a] people sought a declaration of Aboriginal title to lands their ancestors had occupied and used from time immemorial. The Court split three ways, disagreeing on the result. A majority of the Court suggested that Aboriginal title may exist separately from the Royal Proclamation. Judson J., speaking for Maitland and Ritchie JJ., found that the geographical limitations of the Royal Proclamation meant that it had no bearing upon the question of "Indian title" in British Columbia. (*Tsilhqot'in* 2007, par. 482-483)

In the 1980s, *Guerin* affirmed the minority ruling in *Calder* that Aboriginal title is a unique (*sui generis*) inherent legal right that arises independent of government acts of creation and recognition (Bell 1998, 39). *Guerin* involved the Musqueam First Nation and their dispute with the federal government over an unfavourable land lease to the Shaughnessy Golf Club of Musqueam reserve lands to the golf club. The negotiation of the lease and subsequent changes to the terms of the lease were handled by the federal government (Tennant 1990). The Supreme Court of Canada's *Guerin* decision clearly affirmed, by majority decision, that Aboriginal peoples'

interest in their lands is a pre-existing legal right not create by the Royal Proclamation, by... the Idndinan Act, or by any other executive order or legislative provision. It does not matter , in my opinion, that the present case is concerned with the interest of an Indian band in a researve rather than with unrecognized title in traditional tribal lands. The Indian (sic) interest in the land is the same in both cases. (*Guerin* 1984, para. 497)

The "Guerin decision had major practical implications in British Columbia concerning the role of the courts and the means by which Indian groups could protect their interests in the land against the efforts of the province" (Tennant 1990, 222).

2.3.2. Sparrow Decision, 1990

The *Sparrow* case involved Mr. Ronald Edward Sparrow, a Musqueam First Nation fisherman, who had been charged with fishing with a drift net longer than his Nation's licence would allow. Put most simply, *Sparrow* recognized the Aboriginal right to fish and to fish by their preferred method. This ruling indicated that while Aboriginal

rights would be subject to conservation measures, they must be “given priority over the demands of other groups” including commercial and sport/recreational fisheries (Campbell et al. 2003, 142). Furthermore, the concept of resource management consultation was first raised in *Sparrow*. The judgment states that in order to justify infringement on an Aboriginal right (in this case through fishery conservation regulations) that the regulating authority must determine if “fair compensation is available; and whether the aboriginal group in question has been consulted (Sparrow 1990, 7).

Since the recognition and affirmation of Aboriginal rights in the *Constitution Act* in 1982, the opinion of the Supreme Court in *R. v. Sparrow* has been the primary source of legal principles for the identification and definition of Aboriginal constitutional rights. The *Sparrow* decision also reaffirmed the concept of fiduciary duty⁴¹ on behalf of the Crown in its dealings with Aboriginal peoples, Aboriginal title and Aboriginal rights. The ruling indicated that “the concept of fiduciary duty compels specific and honourable objectives and conduct in Crown dealings with Aboriginal people” (Bell 1998, 38). *Sparrow* is one of two landmark decisions rendered since the confirmation of common-law Aboriginal title in the *Calder* case, the other being *Guerin*, 1984.

⁴¹ The concept of fiduciary duty was first introduced in the original *Guerin* case heard in the Federal Court (1982), it appeared in the *Constitution Act, 1982* and was subsequently affirmed in the Supreme Court *Guerin* judgment, 1984.

2.3.3. *Van der Peet* Decision, 1996

The *Van der Peet* decision is well known for including and describing the test as to what constitutes an Aboriginal right. In this case, the courts stated that Aboriginal rights did not extend to commercial fishing as it was not part of their distinctive culture. “[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right” (Van der Peet 1996, 4). The Court developed an “integral to distinctive culture” test to determine if a given practice was part of their constitutionally protected rights. This test described in *Van der Peet* essentially required the following:

- Aboriginal peoples’ perspectives must be taken into account (1996, par. 49)
- Courts must identify “precisely the nature of the claim” being made (1996, par. 50).
- The practices, customs and traditions must have been an integral part of the distinctiveness of their culture prior to colonial contact, or a modern version of such practice (1996, par. 54).
- The practices must be of central significance to the society (1996, par. 55).

One aspect of *Van der Peet* has particular impact on future land rights and thus land management direction, that Aboriginal rights are restricted to pre-contact activities, although allowed to evolve and are not frozen in time.

The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow*, supra, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of

continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights. (*Van der Peet* 1996, par. 64)

2.3.4. *Delgamuukw* Decision, 1997

The *Delgamuukw* case (see also Section 2.2.2 *Delgamuukw* Decision and Consultation) involved *Delgamuukw*, also known as Earl Muldoe, a Gitksan Hereditary Chief, suing the province "on his own behalf and on behalf of all the members of the Houses of *Delgamuukw* and *Haaxw*, and others suing on their own behalf and on behalf of thirty-eight Gitksan Houses and twelve *Wet'suwet'en* Houses..." (1997). The appellants claimed "claimed separate portions of 58,000 square kilometres in British Columbia" (*Delgamuukw* 1997, 2). The first, provincial-level *Delgamuukw* case was heard in Smithers, British Columbia in 1987. "In the trial, the chiefs sought recognition of ownership and jurisdiction. B.C. and Canada counterclaimed the Gitksan had no rights, title or interest in the territory. If there was evidence for a claim, said the province, it should be in the form of compensation from the federal government" (Gitksan Chiefs Office n.d.). The trial judge, Judge Allen McEachern, has been widely criticized for his conduct of the trial and ruling, both of which contained colonial overtones of racism and prejudice against the appellants. He dismissed the appellant's claims and claims for damages. In addition to the basic ruling, McEachern passed racially charged

judgment on the lives of the Gitksan and Wet'suwet'en, stating they were "nasty, brutish, and short" prior to the arrival of the colonizers (Daly 2005, 10). A United Nations report called the ruling "ethnocentric", likely a polite reference to racism; the Gitksan "appealed the *Delgamuukw* case to the Supreme Court of Canada in an attempt to wipe Judge McEachern's racist findings from the record books and also to try to establish a new test by which the courts decide aboriginal title" (Gitksan Chiefs Office n.d.).

The Supreme Court of Canada *Delgamuukw* decision provided new guidance in areas related to title, that would have a significant effect on the degree to which First Nations must be consulted in relation to projects and activities that may effect their territories (1997). The Supreme Court of Canada ruling confirmed that Aboriginal title does exist and is a right to the land itself, not just the right to hunt, fish and gather.

Although the appeal to the Supreme Court of Canada was transformed primarily into an Aboriginal title claim, the findings of the court are important in assessing future recognition of rights. The judgment gives direction about

- (a) the relationship between Aboriginal rights and Aboriginal title;
- (b) the weight to be given to oral history in the proof of Aboriginal claims;
- (c) the importance of continuity from historical times to the present;
- (d) the endorsement of the *Gladstone*⁴² case and elaboration on legitimate justifications for interfering with Aboriginal rights;
- (e) the power of the province to extinguish Aboriginal rights ; and
- (f) the application of the *Van der Peet/Pamajewon*⁴³ analysis to self-government. (Bell 1998, 58)

⁴² *Gladstone* (2005) was heard in the Supreme Court of Canada. *Gladstone* was also heard in the British Columbia Supreme Court in 1996, prior to the *Delgamuukw* decision in 1997.

⁴³ *Van der Peet* (1996). *Pamajewon* (1996).

These aspects of *Delgamuukw* strengthened the case that many First Nations were attempting to make – that their traditional territories had not been ceded to the Crown through treaty and thus, they ought to be able to exert some jurisdiction over their lands. Further, the decision strengthened the ability of Indigenous peoples to apply oral history and Indigenous laws to Crown court proceedings in order to support their cases for Aboriginal rights and title. *Delgamuukw* is discussed and referenced throughout this dissertation, and particularly in Section 2.2.2 *Delgamuukw* Decision and Consultation.

Delgamuukw also held that Aboriginal title is a right to the land itself, including the minerals (and oil and gas) beneath it (1997). Aboriginal title also includes the right to make land-use decisions, but does not permit a First Nation community to use their lands in such a manner that destroys the relationship the community has with their lands, which could include the construction of open-pit mining, for instance. This restriction of use presents an inherent limit to the uses under title, and raises the question whether First Nations are entitled to freely develop the resources on their territories, particularly given the complication of the *Van der Peet* test, which limits Aboriginal rights to pre-contact activities, or pre-contact activities that have evolved (*Van der Peet* 1996).⁴⁴

⁴⁴ “A distinction must be made between (1) the recognition of a general right to occupy and possess ancestral lands and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. The latter has been defined as the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose. By contrast, a general claim to occupy and

This inherent limit of *Delgamuukw* also implies that exercise of Aboriginal title rights is dependent on healthy ecosystems, where the environment is able to support the community's continued traditional use and occupation of their Aboriginal title lands. In some cases, First Nations have been encouraged to negotiate settlements that define the land as "fee simple," allowing for more flexible uses of the land but then putting their activities squarely under provincial regulation.⁴⁵ But at present, very little land is First Nation's fee simple, and most land in British Columbia is unceded.

2.3.5. *Taku* Decision, 2004

In the *Taku* case, the Court reviewed a situation where there had been an environmental assessment of a proposed mining project that involved the Taku River Tlingit First Nation. Here are elements of the consultation process which the Supreme Court confirmed, in that case, constituted adequate consultation:

- There were multiple meetings between the First Nation, corporation and environmental assessment office staff to set up and implement a process which fully included the First Nation in the environmental assessment process.
- First Nation members participated on the overall environmental assessment Project Committee, and served on subcommittees dealing with concerns of particularly impact on their community.
- Financial assistance was provided to ensure that the First Nation could participate fully in the process.
- The First Nation's views were thoroughly and explicitly identified in the environmental assessment report, including where there were points of

possess vast tracts of territory is the right to use the land for a variety of activities related to the aboriginal society's habits and mode of life" (*Delgamuukw* 1997, 11).

⁴⁵ Dawn Mills, personal communication, March 2006.

- disagreement between the First Nation and the industry proponent, and those views were put before and considered by the Minister.
- Mitigation strategies were developed to address the concerns of the First Nation.
 - The First Nation's approval was sought for the appointment of which experts conducted traditional land-use studies and archaeological and ethnographic studies which assessed the impacts of the development. When the First Nation had concerns about the adequacy of one of the expert's reports, it was sent back for revision to address those concerns.
 - The industry proponent responded, with detailed information, to the First Nation's written and oral requests for information about impacts on fish, wildlife, terrain sensitivity and other impacts.
 - The First Nation was expected, after the environmental assessment process, to participate in long-term resource management strategies for the area, in the development of baseline data to track the impacts of the development, and in decision-making regarding the decommissioning of the project. In addition, there was a requirement that the First Nation would be consulted about any subsequent permitting, approval and licensing processes that were part of the overall project, but which would occur after the environmental assessment itself.

The *Taku River Tlingit* case... showed what some of the components of adequate consultation are where there is a serious, though unproven, Aboriginal title claim. It also shows that environmental assessment processes can be part of the way in which the duty of consultation is met, but the consultation obligation is not finished when the environmental assessment process is finished. There is an on-going consultation duty which will arise, for instance, in long term resource management and whenever new permits and licences associated with a project arise. (largely quoted from Jacobs 2004)

2.3.6. *Haida* Decision, 2004

2.3.6.1. Background

Haida Gwaii is an archipelago of more than 150 islands located off the northwest coast of the province of British Columbia. Approximately 6,000 Indigenous and non-Indigenous people call the islands home. The Indigenous people of Haida Gwaii,

represented by the Council of the Haida Nation (CHN), have strongly argued their right to govern the lands and resources of the islands and waters that comprise their traditional territory. The Haida are participating in the BC Treaty Commission process but had stalled at Stage 2 (readiness of the parties) in 2005. The CHN is preparing to put forward a case for title for the islands but are contemplating an alternative process, to avoid the courts, through reconciliation discussions with the Province of British Columbia (CHN vice-president Arnie Bellis, personal conversation, September 2006).

A number of key court decisions have involved the Province, international forest company Weyerhaeuser, and the Haida in the past five years. These decisions include:

- *Haida Nation v. B.C. and Weyerhaeuser* [February 2002] (BC Court of Appeal)
- *Haida Nation v. B.C. and Weyerhaeuser* [June 2002] (BC Court of Appeal)
- *Haida First Nation v. BC and Weyerhaeuser* [Nov. 2004] (Supreme Court of Canada)

At the same time that the CHN is working towards title recognition and increased co-management of their traditional territory, decades of logging, commercial fishing and other resource development practices have left the Haida's resources in a state of severe decline. In a presentation at the University of British Columbia in 2005, Guujaaw⁴⁶, the elected president of the Council of the Haida Nation, expressed his concern for the hunting and fishing abilities of future generations due to the depleting fish stocks and degraded habitat (Guujaaw 2005). Only ten percent of the large old-growth forests still

⁴⁶ Guujaaw goes by this single name, which means drum in the Haida language.

exist on Haida Gwaii (Williams-Davidson 2005), and there is a need to sustainably protect fish and game. “We have responsibilities to the land, and responsibilities to the next generation, that come with that governance” (Williams-Davidson 2005, n.p.).

In statements made at University of British Columbia in 2005, Guujaaw expressed his frustration with the government’s interpretation of upholding the honour of the Crown in consultation. Even since the *Delgamuukw* decision, that clearly required consultation with First Nations, “in every instance they [the province] fall back to the lowest common denominator in their approach to us” (Guujaaw 2005, n.p.). The court has described the provincial view of honour as impoverished (Guujaaw 2005) and “not honourable” (*Haida* 2004, par. 27). Even as the courts were “scolding this government,” the province was moving further away from its duty to fairly discuss issues with the First Nations (Guujaaw 2005, n.p.).

In the notable Supreme Court judgment of *Haida Nation v. British Columbia (Minister of Forests)* (*Haida* 2004), the court ruled that the Haida had a very strong case for title and rights and that logging had a strong potential to infringe on those rights (*Haida* 2004, par. 72). The judgment also stated that the consultation and accommodation mechanisms set up by the province and Weyerhaeuser did not constitute meaningful consultation. The five measures that the province held up as examples of consultation and accommodation were: protecting culturally modified trees, providing cedars through the permit system (which was only one percent), protecting cedar seedlings

from deer browsing, implementing new logging methods (variable retention), and also deferring logging in Haida protected areas. All these measures taken together were not significant enough to constitute meaningful consultation according to the courts. Haida lawyer Terri-Lynn Williams-Davidson said the most significant outcome of the Haida case was an understanding that “what needs to happen is protection of Aboriginal interests in the interim [while rights and title cases are awaiting hearing and ruling]... so we actually have something to negotiate in treaties or in negotiation” (Williams-Davidson 2005).

The court has also ruled that the bare minimum for consultation, where there is a weaker case for title and rights, is that the government has to substantially address the First Nation’s concerns. However, meaningful consultation does not give First Nations a veto power; veto can only be gained through proving title, and sometimes not even then. In a situation where there is a strong title case and high infringement, Williams-Davidson said what is required is “formal participation in the decision-making process” (Williams-Davidson 2005, n.p.).

2.3.6.2.The Decision

The *Haida* case is considered significant because the ruling showed that, particularly given a strong claim to land title, consultation had to be meaningful and uphold the honour of the Crown. The Court concluded on three major points in the Haida case:

[The Crown] does have an obligation to consult prior to the establishment of the asserted rights. Third parties, however, do not.

...[The] obligation to consult may carry with it an obligation to accommodate, or may not. That depends on what is discovered through the consultation process.

[And where] ...accommodation is required, the Aboriginal interest must balance with other interests. The Aboriginal claimants do not have a veto over government action. (Hunter 2005, 2)

Further, the Court described some principles regarding the duty to consult

Indigenous peoples when their land interests may be affected:

- Both the federal and the provincial Crowns have a duty to consult with First Nations who have asserted Aboriginal title or Aboriginal rights.
- The consultation duty is triggered when the Crown knows (or ought to know) that Aboriginal rights or Aboriginal title may exist, and is considering actions which may affect those rights.
- Consultation obligation is an ongoing duty, not a single meeting or series of meetings, that lasts for the length of time when an Aboriginal right is affected.
- The duty to consult is always [emphasis in original] triggered where a claimed Aboriginal title or other right is affected, but the content of the duty will vary. What degree of consultation will be required will depend on the strength of the case for Aboriginal title or rights, and on the degree of seriousness of the impacts to the Aboriginal community affected. Where the case is strong and the impacts potentially serious, the duty will include the duty to accommodate.
- The legal source of the duty to consult and accommodate, where the Aboriginal title or right is not yet proven, is the found in the need to uphold the so-called honour of the Crown. (modified from Jacobs 2004, n.p.)

The interpretation of *Haida* and *Taku* led the British Columbia Treaty process to proclaim the following:

This duty [to consult and accommodate] arises from the need to deal with Aboriginal rights in the interim prior to those rights being addressed through a treaty or court decision. Government cannot run roughshod over Aboriginal interests. And First Nations do not have a veto over what can be done with land pending final proof of claim. The consultative process must be fair and honourable, but at the end of the day, government is entitled to make decisions even in the absence of consensus. (BCTC 2007)

2.3.6.3.Haida Land Use Agreement

British Columbia's most comprehensive example of co-management in land use planning, the *Haida Gwaii/Queen Charlotte Islands Framework Agreement* (Ministry of Sustainable Resource Management and the Council of the Haida Nation 2003) and the subsequent *Haida Gwaii Strategic Land Use Agreement* (The Council of the Haida Nation and the Province of British Columbia 2007), was finalized and signed by both parties in 2007. The aim of this land use plan is to balance community, economic and environmental well-being while maintaining spiritual and cultural values. In the late 1990's, the Haida refused an attempt by the British Columbia government to initiate a land and resource management planning process. In April of 2003, the Council of the Haida Nation agreed with the government to co-create and co-manage a land management process (BC Ministry of Sustainable Resource Management (MSRM) and the Council of the Haida Nation 2003). This agreement was expected to provide equal power to the Haida Nation over all aspects of land use management in Haida Gwaii (Council of the Haida Nation 2005). For matters of dispute, two votes each were given to the Haida and the British Columbia government, with tie votes going to a neutral mediator (MSRM and the Council of the Haida Nation 2003). During this process, First Nations knowledge, information, practices and values were to be incorporated in a consensus-driven decision process. This case study is currently the best example in British Columbia of a move towards power balance between a First Nations group and the government for land management outside of historical colonial reserves.

2.3.7. *Marshall; Bernard* Decision, 2005

The Supreme Court decisions *R. v. Marshall* and *R. v. Bernard* (2005) were heard together and are termed *Marshall; Bernard*. The case involved Mi'kmaq logging activities in the province of Nova Scotia and New Brunswick. While the activities related to these cases did not occur in British Columbia, the judgment is particularly relevant for the guidance it provided on the Crown's position relative to post-contact resource use. However, it should be noted that these cases dealt with a situation where historic treaties⁴⁷ were signed and the limitation of the Aboriginal people to pre-contact uses was an interpretation of that historic treaty.

This appeal deals with two cases. In *Marshall*, 35 Mi'kmaq Indians were charged with cutting timber on Crown lands in Nova Scotia without authorization. In *Bernard*, a Mi'kmaq Indian was charged with unlawful possession of spruce logs he was hauling from the cutting site to the local saw mill. The logs had been cut on Crown lands in New Brunswick. In both cases, the accused argued that as Mi'kmaq Indians, they were not required to obtain provincial authorization to log because they have a right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title. (*Marshall; Bernard* 2005, 5)

2.3.8. *Dene Tha'* Decision, 2006

Attempts to clarify what the duty to consult entails are ongoing in a number of different forums. As part of the *Dene Tha'* (2006) Federal Court of Canada case, the federal government is now seeking clarity, through appeal, about what their duty to consult entails. This case involved a consortium of oil companies, led by Imperial Oil, who are planning to build a gas pipeline from Alberta to the Northwest Territories on the

⁴⁷ Mi'kmaq Treaties of 1760-61.

Beaufort Sea. The pipeline route crosses many traditional territories, including a portion of the Dene Tha' First Nation's territory. The portion of Dene Tha' territory in question lies in the southwestern part of the Northwest Territories.

The Dene Tha' First Nation (DTFN) filed an application for judicial review in the Federal Court of Canada in May 2005. Among other requests, the DTFN were seeking a statement from the Court that the various federal Ministers⁴⁸ involved in the case had a "duty to consult with the Nation with respect to the preparation and design of an environmental and regulatory review process related to the Mackenzie Valley Pipeline project" (Agreement July 2007)⁴⁹. In November 2006, the court ruled that the federal government failed to consult with the Dene Tha' and that consultation around the pipeline should be put on hold (*Dene Tha' 2006*).

In July 2007, Canada and the Dene Tha' First Nation signed an out-of-court agreement (see previous footnote). In this agreement, the Dene Tha' agreed to pursue no further court action against the Mackenzie Valley pipeline project. In addition to a financial settlement with the Dene Tha', the agreement sets out a protocol for the federal government to consult with the Dene Tha' on the pipeline project and connecting facilities (Indian and Northern Affairs Canada 2007b). The agreement goes on to say

⁴⁸ Ministers of: the Environment, Fisheries and Oceans, Indian Affairs and Northern Development, and Transport.

⁴⁹ The agreement, titled "Canada - Dene Tha' Mackenzie Valley Gas Project and Connecting Facilities Settlement Agreement" is not available online, but was emailed directly to me by the Minister's of Indian Affairs office in spring of 2008.

that this protocol will also apply to consultation for any future projects requiring federal authorization.

More recently, the federal Government of Canada released guidelines for federal officials to fulfill their obligations for consultation with Aboriginal peoples (Government of Canada 2008). This guideline document includes very basic steps for conducting consultation and also outlines the federal government's principles for consultation. More discussion of provincial and federal consultation guidelines can be found in Section 2.5, Existing Consultation Guidelines.

The agreement document does not directly address the unique situation in British Columbia or other areas of Canada with outstanding Aboriginal claims to title. Rather, it only states the accommodation may, and by inference may not, be required in a situation where a section 35 Aboriginal right may be infringed.

Accommodation may be required where there is a strong claim to a section 35 right and a potentially significant adverse impact on the claimed right. The courts have said that consultation would be meaningless if it excluded from the outset any form of accommodation. (Government of Canada 2008, 52)

A later portion of the guidelines also goes on to state that in addition to accommodation, consent may be required from the Aboriginal group.

An 'established' right or title may suggest a requirement for consent from the Aboriginal group(s). As this is not always the case, it is important to consult legal counsel when making the assessment. (Government of Canada 2008, 53)

The Agreement between the federal government and the Dene Tha' does not address the deeper and more difficult issue of how much effort must be placed on reaching meaningful consultation and accommodation. Given that the agreement now sets the stage for all future consultation between the federal government and the Dene Tha', I expected the document to lay out a thorough and meaningful protocol with which future negotiations will take place. I expected there to be a reference or nod to Indigenous principles or traditional decision-making, and some mention of Indigenous values or knowledge. However, the document outlines what looks like typical, Western-style consultation or negotiation process and principles typically used in general business negotiations.

Indian Affairs and Northern Development Minister Jim Prentice, in a statement on his website said:

With this agreement, we have demonstrated that Canada is committed to meaningfully consult with Aboriginal groups and, where appropriate, to accommodate their concerns with respect to how the Mackenzie gas project may affect their communities.

Yet, after the Federal Court ruled in favour of the Dene Tha' this past November 2007, the government filed a notice of appeal the next month. This appeal gave the appearance that there is a lack of commitment or some uncertainty remaining on the part of the federal government around their position on what constitutes meaningful consultation. In January 2008, the Supreme Court rejected the federal government's request for an appeal. In a statement, the Dene Tha' applauded the Federal Court decision.

The decision of the Federal Court of Appeal is yet another strong message to governments across Canada to stop minimizing the constitutional obligations owed to First Nations, including the duty to consult. (Dene Tha' 2008, n.p.)

2.3.9. *Tsilhqot'in* Decision, 2007

The 2007 *Tsilhqot'in* case involved the *Tsilhqot'in First Nation v. British Columbia* and was heard in the Supreme Court of British Columbia. The *Tsilhqot'in* First Nation sought declaration of Aboriginal title to a portion of their asserted traditional territory. The case was brought forward because of forestry activity in the *Tsilhqot'in* territory. While the judgment did not include a clear declaration of title as sought by the *Tsilhqot'in*, the decision did state that *Tsilhqot'in* Aboriginal title does exist "inside and outside the Claim Area" (*Tsilhqot'in* 2007, iii) and had not been ceded to the Crown.

While the *Tsilhqot'in* judgment holds many groundbreaking elements for First Nations in British Columbia, one element that remained similar to previous judgments was that of the limitation of land use to pre-contact activities. The judgment somewhat wrongly states that

In *Marshall; Bernard*, McLachlin C.J.C. suggested that the Court look to the pre-contact practice and then translate that practice into a modern right. Through this approach, some (but not all) of an Aboriginal group's contemporary interests will be considered. (*Tsilhqot'in* 2007, par. 1361)

The judgment goes on to question the limitations of such pre-contact definitions of rights, but also asserts:

The narrow role this court can play in defining Tsilhqot'in Aboriginal rights in the Claim Area lies in an application of the jurisprudence to the facts of this case. I can only hope that it will assist the parties in finding a contemporary solution that will balance Tsilhqot'in interests and needs with the interests and needs of the broader society. (Tsilhqot'in 2007, par. 1369)

The judgment confirms the presence of the Tsilhqot'in people for over 200 years in the area under claim in the case. The judgment goes on to ask questions that are relevant in unceded territory in British Columbia in general. Based on this recognition,

[...] how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the broader society? That is the challenge that lies in the immediate future for Tsilhqot'in people, Canada and British Columbia. (Tsilhqot'in 2007, par. 1378)

The province of British Columbia has since launched an appeal of the case. See Section 2.1.6 regarding Aboriginal title for more on the *Tsilhqot'in* decision.

2.3.10. *Wii'litswx* Decision, 2008

During the time of writing this dissertation, court decisions were handed down in cases relevant to this research. One such case was the September 2008 British Columbia Supreme Court ruling in the *Wii'litswx* case. This case involved the Hereditary Chiefs of the Gitanyow Nation versus the Province of British Columbia (Ministry of Forests) in a dispute over the sale of a partially Crown-owned forest company (Skeena Cellulose). The sale of the company also involved the transfer of forest licences to a private

company. The Chiefs were concerned about the transfer of these licences without adequate consultation and accommodation of the Gitanyow.

The Gitanyow people's territory is located in the northeastern interior region of British Columbia. Their culture and ability to support themselves have been negatively impacted by logging activities in their territory. This case, and preceding related cases, ruled that "Gitanyow and Gitxsan each have a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of the areas included within the lands covered by the Forest Licence" (*Wii'litswx* 2008, par. 87). Furthermore, the decision stated that the Crown's obligations for consultation and accommodation were broad according to the strength of the title claim and that the overall accommodation offered for the licence changes was not reasonable nor adequate (*Wii'litswx* 2008). The importance of this decision lies primarily in its further defining the honour of the Crown with regard to consultation, and the obligation that strategic decisions also require consultation when the strategic decision may impact a First Nation's claimed traditional territory.

2.3.11. United Nations - Rights of Indigenous Peoples

Based on this history and the guidance provided by current case law, the Indigenous nations in Canada require clearer commitments from the federal government to recognize the rights and title of Indigenous people and ultimately to ensure that development proposals and approvals that affect lands include a truly meaningful

approach to negotiation with First Nations peoples' about their rights and interests. In the decades during which treaties have been absent in British Columbia, lands and resources have been depleted in many areas, leaving less and less land available for treaty negotiation and ultimately for Indigenous governance. These concerns are echoed in the recently signed United Nations Declaration on the Rights of Indigenous Peoples (2007). The declaration states that United Nations representatives are

Concerned (emphasis in original) that Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests...

In the United Nations *Article 25*, the declaration goes on to say that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

And finally, the most strongly worded commitment to recognizing Indigenous peoples' rights to land and resources can be found in *Article 26*:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

These United Nations' declaration Articles have stronger wording related to Indigenous rights to manage traditional lands than those found in *Delgamuukw* and other Canadian

court cases (e.g., *Haida* 2004 and *Taku* 2004). Furthermore, while s. 35 of the *Constitution Act, 1982* provides protection for Aboriginal and treaty rights, this protection has not been clearly extended, either in courts or in practice, to Indigenous peoples' right to self-government and full participation in land-related decision making within their territories. The United Nations' Articles point to the idea that truly meaningful consultation, co-operation, and just redress are required for activities that affect the traditional territories of Indigenous peoples.

At the time of writing, only three United Nations member countries have refused to endorse the United Nations declaration; these countries are Canada, the United States of America, and New Zealand. Notably, these are three countries with somewhat similar histories of primarily British colonization, treaty making, and outstanding land claims and title issues. Initially, Australia had also refused to support the declaration, but reversed this decision on April 3, 2009 (Macklin 2009).

2.4. Land Management in British Columbia

2.4.1. Jurisdictional Breakdown for Resource Management

Canada is a federal nation with governmental powers divided between two orders of government: federal and provincial (see Glossary for more on *Canadian federalism*).

Some tertiary authority is delegated to other levels of government including municipal or administrative. Canada is made up of ten provinces and three territories. In order to

convince each of the provinces to join the federation in the 19th century, Canada developed a system of land jurisdiction that left primary responsibility for land and resource management to the provinces, including management of Crown lands (land deemed to be owned by the colonial government).

However, the impacts of resource management and development decisions have the potential to affect a wide range of people and groups who are often termed stakeholders in Western regulatory processes. These impacts can include environmental degradation such as lost terrestrial habitat, dammed aquatic habitat, increased road access to otherwise inaccessible habitat areas, and water and air pollution; social and community impacts such as increased population, local development, temporary employment boom; and economic impacts, both positive and negative. Those most directly impacted include local and regional people, their communities and culture, and the natural environment.

First Nations peoples are more than impacted third-party stakeholders in the British Columbia resource sector; they hold Aboriginal rights and title to all, or some portion, of their settled or asserted traditional territories as recognized by s. 35 of the *Constitution Act, 1982*. In light of outstanding title, Aboriginal rights, and Treaty rights, First Nations have, or ought to have, a primary role in the governance of resource management in British Columbia. Secondary actors could include a variety of third-

party stakeholders that hold no governance or legal role in the development process, including non-governmental organizations (NGOs).

Thus, the resource use sector in Canada involves four primary actors, each with their own interests, responsibilities and goals. These primary actors are:

- The provincial governments as resource “owners”, managers, and representatives of the majority public interests;
- The federal government in their role as responsible actors for “Indians and lands reserved for Indians” (*Constitution Act 1867, 91 (24)*), and environmental issues that have national scope: federal Environmental Assessment if triggered, endangered species, transportation, oceans, and anadromous fisheries;⁵⁰
- First Nations as holders of Aboriginal rights and title, with livelihoods and culture tied to the land; and
- Private sector companies (in the case of private sector developments).

Local governments also have a specific permitting and, possibly, planning role that will not be discussed here since the duty to consult with First Nations rests with the Crown

⁵⁰ In Canada, the federal government holds authority over aspects of natural resource management by way of: “Indians and land set aside for Indians” (via the *Indian Act 1985*); potential impacts to fish or marine species (*Fisheries Act 1985*) or ocean waters (*Oceans Act 1996*); potential impacts to endangered species (*Species at Risk Act 2002*) or migratory birds (*Migratory Birds Convention Act, 1994*). In the first instance, the federal government as a representative of the Crown holds a special responsibility to ensure that honourable dealings are conducted with regard to Aboriginal rights and title. Other Acts can also trigger federal participation in provincial land-management issues.

(federal and provincial governments) and the power of approval for large projects often rests largely with the provincial or federal government.⁵¹

Balancing these actors' varied interests and jurisdictions in land use is typically sought through a consultation or co-management process. Co-management processes are typically developed where treaty rights exist (e.g., Nisga'a First Nation, James Bay and Northern Quebec) or strong cases for claim have been established (e.g., Haida, 'Namgis, and Wuikinuxv First Nations in British Columbia). However, in areas of unceded land and existing Aboriginal title, which is the major part of land in British Columbia, consultation is generally the primary vehicle for First Nations participation in resource management. There are instances where co-management agreements and interim agreements are put in place, but these are not considered ideal. As described by Doug Aberley, Director of Treaty Negotiations Resource Department for the 'Namgis First Nation, "They're not a solution to the issue of power, but they provide a short-term benefit..." (Aberley interview 2007).

As evidenced by legal judgments in British Columbia (*Haida* 2004; *Taku* 2004), authority and the power to determine the process and the goals that carry weight in resource-

⁵¹ Local non-Aboriginal governments (municipalities and regional districts) also have a role to play through regional planning, representing local labour pools and contractors, zoning and permitting processes, however their responsibilities for land regulation and consultation with First Nations are secondary to provincial and federal governments. Local non-Aboriginal government goals will not be distinguished in this work. Further, the public and local community interests are sometimes represented by non-government organizations (NGOs), but will be framed in this paper under the interests of the provincial or federal government.

based decision-making primarily rests with the Province. Requirements for licencing and approvals are typically outlined at a very high level through provincial guidelines or Acts. For example, the primary regulatory process for many development projects in British Columbia occurs under the Environmental Assessment (EA) Act. Such projects could include:

- New or redeveloped mine projects.
- Energy projects greater than 50MW installed capacity.
- Development projects with the potential to impact fish-bearing waterways.

The various provincial ministries responsible for individual jurisdictions in British Columbia often place little emphasis on the inclusion of First Nations in their existing guideline documents. The British Columbia Ministry of Energy, Mines and Petroleum Resources (BCMEMP) provides proponents with a guide to permitting steps, where neither consultation nor First Nations are shown in a figure depicting the Summary of Mines Act Permit Review Sequences (see BCMEMP 1998). In a flow chart that depicts the British Columbia Environmental Assessment (EA) process, consultation with First Nations is shown as input to three stages in the EA approval process:

- 1) prior to Application,
- 2) during the 30 - 75 day application review period, and
- 3) during the 45 to 60 day project report review period (BCMEMP 1998).

Proponents are required to invite First Nations to be part of an overall Project Review Committee. The time limitations for review, as described as a firm requirement of the

EA process, have significant impact on First Nations' ability to participate meaningfully, an issue that will be discussed more fully in later sections.

Permits for construction and operation of a large development project would typically trigger this Environmental Assessment (EA) process, which would involve local governments and First Nations input. Before the EA process begins, there is an application phase and qualifying test to ensure that a company has the basic requirements to proceed, operate and complete a project. Similar to the ruling in the *Dene Tha'* case (*Dene Tha'* 2006) that states the need for early involvement, it is during this pre-application phase when initial engagement with First Nations governments ought to occur in order to include their perspectives, knowledge and concerns prior to the planning and development process being established and underway.

No language is provided in the British Columbia Environmental Assessment (EA) process guidelines stating that First Nations consultation must be adequate or meaningful, or that adequate and meaningful agreements with First Nations must be reached prior to Ministerial approval. This lack of clarity in the EA leaves open to question what extent the goals and objectives of First Nations will be considered in the development consultation process in British Columbia.

2.4.2. The *New Relationship* and Land Management in British Columbia

We have seen the consequences of shattered hope spawned by over a century of betrayal, denial and negligence by governments of every stripe.

*There are no more excuses.*⁵²

(Premier of the Province of British Columbia, Gordon Campbell, statement in the legislature, May 4, 2006.)

Over the past five years, British Columbia's current conservative Liberal government has undergone a swift change in its approach to dealing with First Nations. In 1998, Gordon Campbell, the then leader of the opposition and now leader of the provincial government, protested the signing of the Nisga'a Treaty on the grounds of unfair race-based preferential treatment for Indigenous peoples that created new rights not covered in the *Constitution Act* (Canadian Broadcasting Corporation (CBC) 1998). After gaining majority power, the Liberal government created a province-wide referendum in 2002 about treaty issues. Many Indigenous and non-Indigenous people refused to participate on the grounds that it was racist, unbalanced fear mongering which perpetuated the idea of the tyranny of the majority. First Nations leaders called the

⁵² Excerpt from Premier Campbell's statement in the legislature:

We have seen the consequences of Canada's collective political failure to its first citizens. We know the toll it has taken on Aboriginal children and families – and there are no more excuses.

We have seen the consequences of shattered hope spawned by over a century of betrayal, denial and negligence by governments of every stripe. There are no more excuses.

We have seen the consequences of confrontation, litigation and opportunities lost. We know too well the consequences of frustration, anger, mistrust and despair. There are no more excuses.

So I say to the federal government – this is Canada's moment of truth... (2006)

referendum “divisive and said it could spark anti-native racism in the province” (CBC 2004, 1). They called “for a boycott of the referendum, encouraging voters to spoil their ballots or send blank ballots to native bands for disposal” (CBC 2004, 1).

The controversy around the referendum and other high-profile First Nation-related issues increased the willingness of British Columbia’s three major Aboriginal organizations⁵³ to work together and lobby the government for a new direction. The *Haida* Supreme Court case results in 2004 provided added impetus for the government to meet with the newly formed First Nations Leadership Council. Resulting from these discussions was the *New Relationship* document of 2005 (Government of British Columbia et al. 2005). The *New Relationship* is an unsigned, undated document that outlines in broad strokes the new visions and shared aims of the province and First Nations in British Columbia (Government of British Columbia et al. 2005).

Significantly, the statement of vision recognizes that “the right to Aboriginal title ‘in its full form’” includes the right for the community to make decisions about land use and create political structures to do so (Government of British Columbia et al. 2005, 1). Each party states their goals separately and recognizes the other’s aims. Common ground can be found between First Nations’ social goals, goals for economic self-sufficiency, and for ecologically sustainable development, and the provincial aims for a healthy, well educated population, with environmentally sound development creating jobs for

⁵³ Union of British Columbia Indian Chief, the First Nations Summit and the National Assembly of First Nations.

the province (Government of British Columbia et al. 2005). General principles and action items outline their intentions to achieve shared decision-making and create the financing, resources, institutions, frameworks, efficiencies and dispute resolution mechanisms required to achieve co-operation through “practical and workable arrangements” (Government of British Columbia et al. 2005, 3).

In the two shared sections of the document, Vision and Action Items, there is a strong focus on land use and land management, which recognizes the centrality of land to First Nations issues in British Columbia, and the existing provincial jurisdiction (versus federal) for the major portion of land and resource management in British Columbia. In large part, this *Relationship* came in response to recent court decisions which include the Province as a responsible party in meaningful consultation and accommodation with First Nations when Aboriginal rights and title are potentially infringed by activity in their territories (*Haida* 2004; *Taku* 2004). Given that Aboriginal title claims cover all areas of the province, the government recognizes that thousands of individual consultation processes may be required to satisfy this requirement, which could slow resource extraction and development if disputes were to be settled in court processes (Morris 2006).

In many respects, the Province’s openness for a new dialogue and change is reflective of past motivations by federal and provincial governments to reach land agreements with Indigenous peoples in Canada. The 1975 James Bay and Northern Quebec Agreement

was initiated as a result of protests over the massive hydroelectric projects in northern Quebec, and the 1984 Inuvialuit land claim agreement was designed to facilitate Beaufort Sea oil development (Penikett 2006). “Wherever there was a mega-project pending, national governments rushed to clear Aboriginal title” (Penikett 2006, 6). In a similar vein, unresolved Aboriginal title issues present an impediment or uncertainty for some large-scale development in mining, oil and gas, energy, and forestry in British Columbia which has, to a degree, stimulated the desire for a new relationship. On the other hand, viewed more generously, the document may represent a true change of heart on the part of the province, a move out of the state of “denial and studied amnesia” about historical injustice as described by Haig-Brown and Nock, to a place where all parties can work to transform traditional colonization behaviours by co-creating a future for the province (2006, 5).

On the part of the First Nations Leadership Council, the wording in the *New Relationship* document (Government of British Columbia et al. 2005), particularly their goal statements, reflects their consistent demands for just distribution of resources, full recognition of Aboriginal rights and title described in the *Constitution Act, 1982*, and reconciliation and clarification of jurisdiction. These demands have been clearly articulated for over a century by First Nations leaders in British Columbia (Harris 2002).⁵⁴

⁵⁴ For example, the Nisga’a Nation’s Petition to the Privy Council of 1913 <http://www.kermode.net/nisgaa/timeline/time.fr.html>.

The *Relationship* document does not specifically recognize that reconciliation will require meaningful and sufficient spaces (physical, social and political) to allow for First Nations to exercise those rights and titles. Furthermore, the Crown position in the British Columbia treaty process has required the extinguishment of Aboriginal title as a starting point for discussions, in exchange for land use rights, self-governance elements, and co-management arrangements (Maaka and Fleras 2005). Because the Crown's full position on Aboriginal rights and title is not clear, some assumptions can be ascertained from history. Nevertheless there is evidence that a more contemporary view on the land question may be developing.

2.4.3. Land Use Planning in British Columbia

Land use applications and planning in British Columbia have involved increased First Nations input in recent years. All regions of the province have land use plans in place that have included First Nations, except in the Atlin Taku region where only a framework agreement exists as of March 2008. In some cases, however, specific First Nations groups declined participation either due to the nature of the management structure or for other political reasons. For instance, the *Nootka Coastal Land Use Plan* (NCLUP) is a provincial government-created land use plan that claims to have requested input from a number of Nuuchahnulth First Nations groups through the Nuuchahnulth Tribal Council. These groups opted not to involve themselves in the

Plan and opted instead to pursue land negotiations through their existing treaty negotiations with the federal and provincial governments (NCLUP 2001).

In a more positive engagement, a notable example of linking First Nations and Western scientific resource management is the well-known encounter in Clayoquot Sound on the west coast of Vancouver Island. A controversy and stand-off began when the timber companies holding the licences to operate (at the time, MacMillan Bloedel and Interfor) in the area was planning to log old growth forest in the region. The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound (or CSSP as it is also known) was then created to provide the government with recommendations on how to best manage the forest resource of the Sound. Eventually, the five Nuu-chah-nulth Nations were included in the Clayoquot Sound Scientific Panel (Nuu-chah-nulth Tribal Council, 2005). This group created new land management rules based on ecological and cultural integrity, with other benefits including “an improvement in consultation effectiveness for all parties, and increased confidence among First Nations that their values are being protected” (Mabee and Hoberg 2004, i). While the Nuu-chah-nulth have equal management input and make management recommendations, the Scientific Panel’s guidelines remain unlegislated and vulnerable to being overruled by the provincial Ministry. Since the ultimate decision for implementation sits with the British Columbia government, management equality does not truly exist in this process, however, it is an early example of co-management between multiple sectors, including First Nations.

2.4.3.1. Co-management Agreements

A growing number of examples of potentially sustainable land use plans can be found in co-management models that are emerging in BC. The land-related values of First Nations in British Columbia could lead to a new generation of sustainable plans, as evidenced in plans created over the past ten years.

Land use plans have been created in a number of territories ranging from the earlier plan in the Nuu-chah-nulth Nation in Clayoquot Sound to the more recent plan with the Haida Nation in Gwaii Haanas (CSSP 1995; CHN and the Province of BC 2007). Precedent-setting agreements were reached in the Spirit Bear Rainforest (2006) between the Province and six coastal First Nations.⁵⁵ These co-management models forge new relationships between the values and views of First Nations and the resource-use managers from provincial agencies and private sector interests. Forest management models that incorporate Aboriginal perspectives have emerged in British Columbia, such as the Nicola Tribal Association Tmix^W Research Adaptive Management Initiative in the Nicola Valley. It is reasonable to assume that examples of co-management, innovative practices, and meaningful consultation, if applied consistently throughout the province, could lead to satisfactory inclusion of First Nations and more concerted ecological sustainability efforts overall.

⁵⁵ Gitga'at First Nation, Haisla Nation, Heiltsuk Nation, Kitsoo/Xaixais First Nation, Metlakatla First Nation, and the Wuikinuxv First Nation

2.5. Existing Consultation Guidelines

Consultation with First Nations with regard to land is primarily a federal government responsibility, although this responsibility is sometimes allocated to provincial resource management ministries. In February 2008, the federal department of Indian and Northern Affairs Canada (INAC) released a guideline document on Aboriginal consultation and accommodation (Government of Canada 2008). This guidelines document outlines some basic steps that consultation practitioners can use to move through a consultation process. These phases are (Government of Canada 2008, 39):

- (a) Pre-consultation analysis and planning
- (b) Consultation process
- (c) Accommodation
- (d) Implementation, monitoring and follow-up

Significant policy and legal issues are not addressed in this guideline document.

However, within the guidelines document, the federal government commits to developing the following material in the months ahead:

[...] Develop a federal policy on consultation and accommodation that will address outstanding legal and policy matters including:

- the scope of the duty,
- who is the Crown,
- the nature and scope of accommodation,
- capacity of government and Aboriginal groups to engage in consultation, and
- the reconciliation of the evolving legal duty with statutory and other legally based obligations to consult (e.g. comprehensive land claim agreements).
(Government of Canada 2008, 8)

The principles of consultation on the part of the federal government are described as (paraphrased from Government of Canada 2008):

- Legal Principles
 - Honour of the Crown – uphold the honour of the Crown by discharging the duty to consult in a manner that promotes reconciliation of interests.
 - Reconciliation – consultation and accommodation should be consistent with the “overarching objective of reconciliation with Aboriginal groups.”
 - Reasonableness – balance other societal interests.
 - Meaningful Consultation – genuine effort and willingness and ability to adjust plans to address concerns and interests.
 - Good Faith – disclosure of relevant facts, no “oblique motive,” and the absence of “sharp dealing.”
 - Responsiveness
- Principles from Practices
 - Mutual Respect – taking into account “different interests, perspectives, cultures, understandings and concerns.”
 - Accessibility and Inclusiveness. Ensure “access of Aboriginal groups to the process, taking into account community capacities, geographic location and/or their linguistic, socio-economic background or physical capabilities.
 - Openness and Transparency – to create a procedurally fair and clear process.
 - Efficiency
 - Timeliness – early initiation and clear timelines for completion.

These principles expressed by the Government of Canada are a positive step in addressing the need for deeper consultation and accommodation, particularly if the expressed intention of dealing with issues of Nation capacity, differing perspectives, values and worldviews, and early initiation is followed. However, these three key principles (capacity, differing views, and early initiation) are not always followed (e.g., timeliness in the *Dene Tha'* case) and continue to limit the consultation. There is some distance to go before these principles are transformed into new, firm policy that is regularly implemented.

Furthermore, these principles imply that meaningful consultation is achieved when a proponent is willing to alter their plans to accommodate First Nation(s) interests, or finding a monetary and/or economic package to compensate the First Nation(s) for compromise. However, as this dissertation shows, meaningful consultation requires much more than simply adjusting plans. Essentially, meaningful consultation would only be achieved if all of the federal consultation principles were followed, not only the need to adjust plans.

In British Columbia, the government's most recent policy document regarding consultation with First Nations is dated 2002, before the *Haida* 2004, *Taku* 2004 and now *Tsilhqot'in* (2007) and *Wii'litswx* (2008) decisions. This policy document is no longer available on the BC government website and does not likely represent current

provincial policy. However, the document is all that is available as guidance within the province. Since the signing of the *New Relationship* in 2005, the First Nations Leadership Council and the Province have been working on a new consultation and accommodation framework, among other priorities.⁵⁶

The lack of clear and meaningful provincial consultation guidelines has been noted by First Nations. For example, in a statement about the demand for a moratorium on coalbed methane development in the province of British Columbia, representatives from the First Nations Summit⁵⁷ cite the lack of strong regulations and consultation guidelines as two of the drivers for demanding development be halted (Office of the Wet'suwet'en 2008). David deWit, the Wet'suwet'en First Nation's Natural Resources Manager states:

Contrary to what Gordon Campbell [premier of the province] is saying, British Columbia does not have adequate, let alone world class, regulations for coalbed methane – particularly when it comes to consulting and accommodating First Nations. This simply has to change. (Office of the Wet'suwet'en 2008, n.p.)

While process-related consultation guidelines do exist in various forms, what is lacking in most government guidelines is a foundational discussion of how to ensure that these consultations are ethical, meaningful, and balanced in order that they may achieve the deeper consultation required by the *Delgamuukw* decision and the reconciliation called for in the *Tsilhqot'in* decision.

⁵⁶ As described on the British Columbia Ministry of Aboriginal Relations and Reconciliation's website (no date) www.gov.bc.ca/arr/treaty/negotiating/public.html.

⁵⁷ The First Nations Summit represents First Nation groups that are involved in the B.C. treaty process. For more on First Nation associations in B.C., see footnote in Section 1.3.

2.6. Ontological Difference

Three terms, ontology, values and worldview, were raised in many of the interviews that form part of this research. It is important to introduce these terms, at least at a basic level, to provide context for the interviews, themes, and principles that result from the research. The concepts are introduced here also because of their importance in the exploration of relationships and understanding between Indigenous and non-Indigenous peoples. The different ontological conceptions of European and Indigenous peoples are at the root of some of the challenges faced in resolving land-based consultation and negotiation. Because ontology shapes one's worldview and associated values, ontology also shapes the goals, objectives and interests that form the starting point for consultation and negotiation.

The terms ontology and worldview are not interchangeable. They do, however, have close ties to each other. Both concepts form our often unspoken philosophical foundation for land-use decision making by shaping our ideas around, and our relationship with, the land under discussion. Ontology is the science of being, or the study of "our thought about being" (Lowe 2006, 4). Ontology is a branch of metaphysics, which is itself a branch of philosophy. Ontology is concerned "with what kinds of things [can be said to] exist and co-exist" (Lowe 2006, 5). The noun worldview is often used in a more general sense than ontology; the term describes one's view of reality and overall understanding of the world. Worldview encompasses the general

concepts of ontology and includes not only one's picture of reality, but also one's sense of what has meaning and value.

Although the term worldview has been described as poorly defined by some (van Steenberg 2005), definitions do exist and it is more often a misunderstood concept. Clark defines worldviews as "beliefs and assumptions by which an individual makes sense of experiences that are hidden deep within the language and traditions of the surrounding society" (LeBaron 2003, n.p.). Worldview is a culture bound construct reflecting the tendency of Westerners to think of the world as something "picturable" and knowledge itself to be something visual (Naugle 2002, 332) gained through scientific reduction and dissection, rather than Indigenous worldviews where the world is whole and knowable through land-based spiritual communion (McGregor 2000) and language and culture constructs such as song, dance and story (Christie 2004).

While there is no single definitive Indigenous worldview that is common across all Indigenous cultures, similarities can be seen that generally contrast some fundamental aspects of a traditional Indigenous worldview with a Western worldview. The Indigenous peoples working with the United Nations draws comparisons between Indigenous knowledge, culture and practices and finds similarities on a global scale (United Nations 2004; United Nations 2007), while understanding that "Indigenous peoples have a collective and individual right to maintain and develop their distinct identities and characteristics..." (United Nations 2004, 3). Similar broad comparisons

can be drawn between the variety of Indigenous worldviews, particularly as they relate to their relationship with, and valuing of land in British Columbia (Atleo 2004; Guujaaw 2005; Racette et al. 2006). Furthermore, there are also other non-Western worldviews that have at their basis different ontological constructions. One distinct difference between Western and non-Western ontology is that non-Western people generally do not “seem to make any sharp distinction between things and people” in their “ordering of beings” (Latour 2004, 44). The difference is not that “natives” live in harmony with nature, or that “the savages” treat nature well, but “rather in their not treating it all” (Latour 2004, 44). As Chamberlin describes, quoting Kiowa author N. Scott Momaday:

... a traditional Indian view of nature involves bringing people and nature into alignment, first of all to achieve some kind of moral order and then to enable a person ‘not only to see what is really there, but also to see what is *really* [emphasis in original] there’. (Chamberlin 2003, 133)

In *Politics of Nature* French philosopher Bruno Latour describes non-Western cultures as providing “an alternative” worldview that puts an end to the Western ontological schism between humans and non-humans (2004, 42). He describes nature as a category unique to Western culture. This alternative, non-Western ontology he describes in an indirect way as follows:

Non-Western cultures *have never been interested* [emphasis in original] in nature; they have never adopted it as a category; they have never found a use for it....

[P]recisely because they [non-Western cultures] have never lived in nature, [they] have preserved the conceptual institutions, the reflexes and routines that we Westerners need in order to rid ourselves of the intoxicating idea of nature. ... These cultures offer us indispensable alternatives to the nature-politics opposition, by proposing ways of collecting associations of humans and nonhumans using a single collective clearly identified as political. (2004, 43)

Many First Nations peoples in British Columbia hold a worldview that does not separate nature from humans; as Latour describes, in such a worldview, there is no need for a category termed nature. First Nations peoples recognize their relationship with the land as fundamental and inseparable from themselves, their identity, and their reality. In turn, they are an inseparable part of the land (Racette et al. 2006). For instance, in his book *Tsawalk*, Atleo presents the Nuu-chah-nulth perspective of *heshook-ish tsawalk*, meaning “everything is one” including the physical and metaphysical (Atleo 2004, xi). The Hul’qumi’num of the south coast of British Columbia express how this worldview and associated laws and values are integral to their culture.

Hul’qumi’num *snuw’uy’ulh* [laws] teaches us that Hul’qumi’num *Mustimuhw* [people who speak the Hul’qumi’num language] have an inalienable connection to the traditional territory. This connection to our land and resources is both a right and a responsibility. These laws are the foundation on which our relationship with the natural world is built, a relationship connecting the Hul’qumi’num *Mustimuhw* to our First Ancestors. It is a connection fundamental to our cultural identity and way of being. This oral history and the customary laws handed down over time teach the Hul’qumi’num that we are not of the land, but are the land and its resources. (Racette et al. 2006, 14)

This conception of a merged “common world” (Latour 2004, 239) is the fundamental ontological difference between Indigenous worldviews and most Westerner’s binary view of humans and nature (Waters 2004). According to Whiteman and Mamen, Indigenous ontology that does not see a separation between themselves and the Earth in the way most Western people do, shapes Indigenous environmental management

and is at the core of traditional knowledge (2002).⁵⁸ This interconnectedness leads many First Nations to value nature differently. “The Western world somehow got out of step with all Indigenous cultures by changing the basic premise of its interactions with the natural world” (Michel and Gayton 2002, 5). Thus, the value First Nations peoples have for the land and all of creation is more complex than the dualistic, anthropocentric values of many Westerners that aim for development in the form of resource extraction (Howitt 2001). Any despoiling of the land is as an attack on their relations, their family, or their own person (e.g., Mohs 1994; Racette et al. 2006).

Of particular interest to the case of land and resource management is the material self-interest that has been assumed, in Western ideology, to be a primary motivating factor for human beings, and the idea that individuals can maximize the common good through self-centered activity (A. Smith 1789). Based in part on this worldview held by many (but not all) Westerners, “current ideas about development often pander to one small subset of human interest [that of] maximizing individual wealth” (Macqueen 2004). These utilitarian values and assertions for the need for economic efficiency tend to devalue environmental issues, community connection, and the spiritual values emphasized in alternate non-dual worldviews (Howitt 2001). These devalued elements are often fundamental components of First Nations’ goals in land use planning,

⁵⁸ Any commonalities implied in this paper between two Indigenous groups or separate Western government or corporate entities are simply illustrative generalizations, but nonetheless may be useful in highlighting the differences between goals and values in consultation and negotiation processes. Clearly, some First Nations may have, and should be permitted to have, worldviews, values and goals that are vastly different from other Indigenous cultures.

resource development, and associated consultation (e.g., International Institute for Sustainable Development 2001; Squamish Nation 2001; Hupačasath First Nation 2003; Racette et al. 2006).

In current Western industrial societies, value systems that derive from Western ontology are often specifically anthropocentric and predominantly physically and mildly emotionally justified, in the sense that one product, action, or service is compared to others for its utilitarian and consumer value. In my experience, in Western decisions regarding the environment, values are often reduced to monetary measurement, either explicitly or implicitly, as represented by actions taken or resulting monetary allocations and accommodation. Thus, in the current Western worldview, nonhuman nature's continued existence is dependent on the value humans find in, and place on, nature. The worth of nature is described through monetization of some anthropocentric aspect, such as its economic resource potential, biological systems, aesthetic or recreational value. These values are not only anthropocentric but clearly conditional, dependent on social arrangements, local conditions, or human emotions and experience.

This Western worldview dominates colonized societies and contrasts with some holistic, non-dual or circular Indigenous worldviews. The majority of non-Aboriginal Canadians are likely to hold values (or at least act in ways) that are based in utilitarian

theory and developmentalism⁵⁹ (Howitt 2001) which aim to maximize human want satisfaction and the making of nature (resources) into material value. I will avoid restating the origin of these theories and instead point the reader to Van De Veer and Pierce, who summarize the implications on land use from the European Enlightenment period through to 18th and 19th century writings by Adam Smith, Jeremy Bentham, and John Stuart Mill (1998).

Underlying values and worldviews which drive decision making and define suitable accommodation are not acknowledged through the basic listing of goals and airing of concerns around authority. To the contrary, assumptions are made that these goals derive from a shared point of view and way of seeing the world, and these assumptions are not easily eliminated in institutional processes.

Some modernists think of Eurocentrism as a prejudice that can be eliminated in the same way that attempts have been made to eliminate racism, sexism, and religious bigotry. However, Eurocentrism is not a matter of attitudes in the sense of values and prejudices. It has been the dominant artificial context for the last five centuries and is an integral part of all scholarship, opinion, and law. As an institutional and imaginative context, it includes a set of assumptions and beliefs about empirical reality. (Youngblood Henderson 2000, 58)

Inadvertently, stronger parties may try to impose their worldview, understanding of knowledge, and associated values on the process (LeBaron 2003). As described by Latour (2004) the concept of value is irreducibly tied to the concept of fact, where:

⁵⁹ *Developmentalism* has been defined and applied variously in numerous fields including finance, education, international development, and economics. The definition applied here is used with respect to industrial developmentalism (Howitt 2001) based on the Western linear notion defined by Friberg and Hettne as “a common corporate industrial culture based on the values of competitive individualism, rationality, growth, efficiency, specialization, centralization and big scale” (in Hove 2004).

the scales are thus not weighted evenly between someone who can define the ineluctable and indisputable reality of what simply 'is' (the common world) and someone who has to maintain the indisputable and ineluctable necessity of what must be (the common good), come hell or high water. (97)

Some First Nations have expressed concern about misunderstandings in federal Environmental Assessment processes. In one case, there was concern about non-Indian company consultants coming to study their communities, because the consultants were unable to understand their culture or the importance of their land to them, and were thus unable to accurately reflect their needs and aspirations (Kansky 1987). Because of this, unique perspectives are lost. This omission leaves First Nations' goals open to misinterpretation and may lead to inadequate accommodation or compensation.

2.6.1. Traditional Knowledge

The non-dual worldview held by most Indigenous peoples leads to a distinct epistemology, or way of knowing and learning. Indigenous knowledge and wisdom, that is described, understood and categorized (or not categorized) differently from Western knowledge systems, is one of the aspects that requires consideration in cross-cultural land management interactions. Traditional Ecological Knowledge is a term commonly used in North America to describe a field that varies from a narrow definition of specific information held by Indigenous peoples about the environment to a broader recognition that Traditional Knowledge includes information and knowledge, practices, values, wisdom and worldviews of the Indigenous peoples.

In recent years, the volume of literature and study in Traditional Ecological Knowledge has exploded, particularly as it relates to the management of natural resources (Berkes 1999; Turner 2000; Nadasdy 2003). The use and application of the term has progressively narrowed to the former, more data centric interpretation of knowledge. The philosophy and worldview absent from many of these narrow Traditional Ecological Knowledge discussions comprises the moral, ethical and spiritual dimension of Traditional Ecological Knowledge and Wisdom “with which practitioners of rationalist scientific traditions are most uncomfortable” (Ford and Martinez 2000, 1249).

Despite its popularity, Traditional Ecological Knowledge is a problematic term and its attractiveness to Western scientists could be considered convenient and unfortunate.

As Nadasdy describes, the constituent terms “traditional” “ecological” and “knowledge” are products of a distinctly European conception of the world and constrain Aboriginal perspectives to being static (traditional), Cartesian in the separation of humans and nature (ecological), and seen as intellectual (knowledge) products (2003). Although compartmentalization might enable Western science to consider data from Indigenous elders or hunters as discreet packets of biological, climatological, or other Western scientific information, it disables our ability to truly consider and incorporate Indigenous values, knowledge and worldviews. For these reasons, I have preferred the term Indigenous Knowledge in this research, except where participants have used another term.

Until relatively recently, the Western world knew little about Indigenous knowledge and wisdom. The history of colonization worked to discredit and eradicate Indigenous peoples' knowledge (IPK),

only to then expropriate Indigenous knowledge through patent and copyright. This colonial practice has silenced generations of potential Indigenous knowledge keepers and practitioners and severely curtailed any integration of IPK with Western science. (Michel and Gayton 2002, 6)

Over the past two decades, Western recognition of and appreciation for Indigenous knowledge has increased, as evidenced in part by the 1992 United Nations Conference on Environment and Development emphasizing the importance of Indigenous knowledge, particularly as local knowledge relates to biological diversity (Johannes 1989; United Nations 1992). The Convention on Biological Diversity addressed the "knowledge, innovations and practices of Indigenous and local communities," (CBD 2003, Article 8(j) n.p.). An intergovernmental committee, the United Nation's World Intellectual Property Organization, is concerned with preserving, protecting and revitalizing intellectual property and genetic resources, as well as traditional knowledge and folklore (2007). These international references relate specifically to information, data, and physical practices that fit neatly within the Western scientific paradigm, rather than more fundamental philosophies and ideologies of some Indigenous cultures. Even the United Nations Education, Scientific and Cultural Organization (UNESCO) questions the benefits of integrating local knowledge into development projects, as they describe in the following:

One of the greatest challenges today is to determine how holders of local knowledge, and the communities of which they are a part, should best engage in these processes. Will the integration of indigenous knowledge in development and conservation efforts contribute to community empowerment? Or is there a risk that rural and indigenous peoples may be further dispossessed, and their distinctive worldviews misrepresented and undermined? (UNESCO 2002, n.p.)

There is a subtle difference between the descriptions of Traditional Ecological Knowledge in academic circles and Traditional Ecological Knowledge's actual application in resource management and co-management processes. Although the knowledge aspect understood in Traditional Ecological Knowledge's is more commonly considered in resource management issues, it is the inadequately understood worldview that is typically omitted from Western resource management discourse. Academics and researchers (e.g., Nadasdy 2003; Turner 2005) will often make mention of the more holistic and ontological aspects of Traditional Ecological Knowledge, whereas practitioners will revert to Traditional Ecological Knowledge as knowledge only when incorporating it into decision making, as demonstrated is the cases from British Columbia (Estergaard 2006). The degree of understanding and incorporation of each First Nation's Traditional Knowledge was considered as part of this research into land-based decision-making process.

2.6.2. Collaborating for Sustainable Stewardship

Despite the similarities in Indigenous ontology and knowledge systems that can be found in some First Nations communities, each First Nation is unique and Indigenous peoples' response to resource development proposals

in or near their traditional territory can take a wide range of forms, from formal 'business-like' negotiations to armed resistance, depending on several factors ranging from recognition of their rights to philosophical differences with regards to resource development.... (Hipwell et al. 2002, 14)

However, working to include Indigenous peoples and their philosophies on resource development projects can lead to enhanced project outcomes, such as sustainability and community acceptance. Numerous Indigenous and Western scholars (Knudtson and Suzuki 1992; Berkes 1999; Cajete 1999; Howitt 2001; Fixico 2003; Morgan 2004; Turner 2005) have suggested that important lessons can be learned from First Nations' Indigenous wisdom and that "in building new ecological ethics, traditional ecological knowledge bridges the gap between" human-centric ethics and "biocentric ethics" (Berkes 1999, 182). American Indian scholar and author Ron Trosper describes these Indigenous environmental perspectives and ethics as key components of resilient, sustainable governance; specifically the "unity of man and nature", "restraint in consumption", and consideration of a "long time horizon" (2002, 335). My research has also emphasized the importance of common property, circular or cyclical perspectives of land and life, intergenerational transfer of knowledge and skills, and sharing and reciprocity (Trosper 2002; Dumont 2003; Fixico 2003). These Indigenous values are rarely substantially included in resource planning and development decision-making processes (P. Smith 2006; Kennedy 2007). The United Nations' *Declaration of the Rights of Indigenous People* recognizes that "respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment" (United Nations 2007, 2).

When compared to a Western worldview, the relationship and values associated with many Indigenous peoples and their land form a major part of distinctive Indigenous worldviews. In Section 2.6 I highlight the primary ontological differences between many First Nations traditions and Western worldviews as they relate to land-use and environmental stewardship. Understanding and respecting different values and Indigenous laws poses a significant challenge in the achievement of meaningful consultation and substantial accommodation. However, achieving this aim of cultural recognition in consultation would not only strengthen consultation processes, but could lead to more ecologically sustainable land-management outcomes.

Chapter 3. Methods

3.1. Decolonizing My Methods

As a non-Aboriginal person working with Indigenous people, each step of my research, from design of the process, to conducting the research, to analysis, has required me to be aware that I was working with communities, people, and data that come from Indigenous cultures with understandings and assumptions that may be different from my own. The assumptions, knowledge, values and context I bring to this research sometimes differ from those of the people and communities with and for whom I have conducted this research.

Indigenous people around the world have been the object of study and research for centuries (Canadian Institutes of Health Research 2007). The positivist reductionist paradigm that dominates Western scientific approaches to research, including scientific anthropology which views people as “objects to be studied at a distance rather than as participants and co-researchers engaged in inquiry,” is more likely to “violate Indigenous values, beliefs and experience” (Castleden 1992, 235). In an attempt to move away from this paradigm, I focused on collaborative research and made the object of my research the cases, and made the issue consultation and negotiation, rather than the object and issue being the communities and individuals themselves. I see myself as working with and for the communities involved in the research project. Rather than observing or describing a culture through ethnographic methods, I have been recording

and compiling individual experiences with consultation and negotiation, as much as possible placing the power for the narrative in the participants' voices.

In the design stages of my research, I worked closely with my advisory committee and heeded their advice as to what would be the most useful objectives for this research. Their input came from both the Indigenous and non-Indigenous perspectives. I also invited community leader participants in the research to comment on or revise my research objectives, if they wanted. I consistently heard that the objectives, as they were originally developed with my committee, were useful and clear.

In the process of case selection, setting up my field work, and interviews, I strove to include as much input from community members and leaders as they would like to provide. In general, this involved community leaders identifying cases that they thought could provide useful input to my research, and also allowing the interviews to take as long as necessary for participants to fully express their views.

And finally, in the analysis of this data, I was conscious of the context in which statements were made and data collected, particularly because there is the risk of misunderstanding in a cross-cultural context. While this research is not anthropologic or ethnographic in nature, I am aware of the lessons learned and insight gained from past work in these fields. I am aware that the misinterpretation or over-interpretation of data by non-Aboriginal researchers can throw conclusions far off base, in part

because of our different worldviews. What I believe to be my understanding may actually be misunderstanding simply because understanding is “praxis of constant transformation” (Fabian 1999, 98) with the process of understanding being personally situated.

Misinterpretation and misunderstanding due to personal context and worldview can be damaging for a community or a people. I think of how the anthropologist Boas, in his writings about First Nations of the West coast of B.C. that began in 1886, characterized the Kwakwaka'wakw as cannibals and how that work affected those communities for many decades (Goldman 1981).⁶⁰ While the issue of context may be “too difficult for philosophers or anyone else to solve” (Scharfstein 1989, 4) it is important to alert readers and users of this research that there could be an issue with contextual difference between myself and the participants.

3.2. Honouring Indigenous Methods

Academic research is a Western concept and has been performed largely by Westerners in academic institutions. Few texts have been written that focus specifically on Indigenous research methods. Certainly, writers and researchers have written about the neocolonial elements inherent in Western research approaches, including the continued colonization perpetuated by cross-cultural research conducted by Western

⁶⁰ Anthropologist Goldman critiqued Boas’ “arbitrary translations of [community informant and collaborator George] Hunt’s Kwakiutl language and direct descriptions of culture” (e.g., retranslating Hunt’s “man eater” provided in English to “cannibal” when Hunt is referring to a supra-human or supernatural being) (Goldman 1981, 87).

researchers viewing cultures through the lens of a Western European worldview. Writers have also discussed Indigenous methodology as a theory about research (L.T. Smith 2000). These works focus on decolonizing one's approach to research while still applying Western academic research methods, but also focus on who is doing the research and for what purpose. I tried to follow the guidance provided by L.T. Smith on decolonizing my approach to the research process (1999). However, I was also interested in incorporating Indigenous methods if possible.

Western analytical research approaches themselves can continue the process of colonization by assuming there are no alternatives to the typical qualitative research methods presented in Western discourse. Contemporary academics and graduate students are attempting to bring Indigenous methods into academia. As an example from Western Canada, Maggie Kovach (2007) dedicated much of her doctoral dissertation to the description and application of Indigenous research methods. She described the difficulty she had in applying non-Western research methods (including dreaming and journaling) to her research approach, particularly because traditional Western academics are uncomfortable with some Indigenous methods.

[I]ntegrating spiritual knowings and processes, like ceremonies, dreams, [and] synchronicities, that act as catalysts or portals for gaining knowledge makes people uncomfortable, especially when brought into the discussion of academic research. This is because of the outward knowing vs. inward knowing dichotomy. Yet what I have been hearing and learning along this journey is that both ways of knowing are needed. (Kovach 2007, 31)

Indigenous knowledge is gained through experience and transferred through stories, song and ceremony. As described by Joely De La Torre (Proudfit) in *Indigenizing the Academy*, Indigenous knowledge “is the established knowledge of the tribe [or First Nation], the tribe’s worldview, and the customs and traditions that direct the tribe” (2004, 187). This experiential knowledge can be made through outward knowing from observations or inward knowing from spiritual or personal observations. As McGregor has described “Indigenous knowledge as spiritually derived, whether it is learned directly from the spirit world or teachings originally derived from the spirit world that are then taught by people and/or other beings” (2000, 26). The self, metaphysical spaces, and the land itself can also be teachers and help one gain new understandings.

An Indigenous paradigm comes from the fundamental belief that knowledge is relational, is shared with all creation, and therefore cannot be owned or discovered. Indigenous research methods should reflect these beliefs and the obligations they imply. (Wilson 2001, 176)

Developing a large body of understanding and academic acceptance of Indigenous methods will mean moving beyond simply placing, or overlaying an Indigenous perspective on non-Indigenous research paradigms.

Indigenous research and communication methods include narratives, storytelling, interviews, focus groups, talking circles, and sharing circles. In addition, dreaming and vision quests can also be sources of guidance, knowledge and wisdom in many Indigenous cultures. Some of these methods are common across Indigenous and non-

Indigenous methods, while others are more difficult to apply and find acceptance for in conventional Western academic institutions and even in some Indigenous communities.

An important part of my research has been the positive relationships I have developed with the communities and participants in the research. I have been self-reflective throughout the process, questioning my actions and my results. I also have welcomed my dreams to guide me in the direction of my research, but I have received few directions this way. Most importantly, I have maintained my relationship to the land through meditation outdoors on the Fraser River. Okanagan elder Dorothy Christian, in her talking circle entitled “Can you love the land like I do?” (held at Simon Fraser University, August 2007) reminded me of the importance of this practice for learning, healing, and healthy relations. As much as I can, I try to keep up this practice.

I have chosen to use qualitative methods, particularly audio-recorded interviews, which allow the data, the voices of the participants, to be heard as directly as possible.

Narratives and storytelling are two methods for sharing knowledge and creating new understandings.

The use of narratives and storytelling are often associated with the teaching and learning practices of Indigenous societies and there is ample evidence to support this as a valid connection. In addition, much contemporary research by Indigenous scholars uses narrative and storytelling as the primary method of supporting research objectives and community goals at the same time. (Weber-Pillwax 2004, 78)

While my interviews did not contain historical Indigenous stories, each interview contained the contemporary “story” of individual experience in the case and the relationships formed in the case. These narratives form the foundation for my research, and were kept whole in many quotes and places.

Western approaches to research tend to separate the researcher from the data so that the research can be “objective” in a Western scientific sense. L.T. Smith touches upon this when she writes that so much of the research process gets lost and the “voices of the research subjects become increasingly silenced as the act of organizing, analyzing, and interpreting the data starts to take over” (2000, 243). For this reason, I have chosen not to use mechanistic qualitative methods that break down the interview into bites of specific key words and fragments of ideas (e.g., some applications of Grounded Theory) and rather address the interviews as wholes, identifying major emergent themes.

Smith briefly addresses the practice of collecting data in her chapter of *Reclaiming Indigenous Voice and Vision* (L.T. Smith 2000). Kaupapa Maori research methods include the following:

- A commitment to report back to the people concerned, both as reciprocity and accountability.
- A continued relationship established, in some way, with the community or individual.

I have heeded this guidance and will be reporting back with my dissertation to communities, in person if desired by the individuals.

And last, many Indigenous researchers apply interdisciplinary approaches to their research (L.T. Smith 2000; Weber-Pillwax 2004; Kovach 2007) which is a reflection of the integrated epistemology of Indigenous knowledge. Interdisciplinary research can be difficult to slot into the silos of disciplinarity found in Western academic institutions. My research has been inherently interdisciplinary, touching upon issues and applying techniques from social science, planning, philosophy, law, and history. While my research may have been supported (financially and academically) in a more traditional disciplinary setting, I think that the field and program of interdisciplinary studies allowed me to freely explore the most important aspects of this research question without the constraints of focusing on one disciplinary aspect.

3.3. Ethical Considerations

My ethical concerns throughout this research have been twofold: to do my very best to ensure that the outcomes are useful to First Nations communities in British Columbia and Canada, and to do no harm to individuals I have worked with or to First Nations communities in general. I tried to deal with the first concern by being collaborative at the outset, and then being thorough, thoughtful and self-critical of my research and analysis. The second concern, that of harm to persons or the community, was partly addressed through my collaborative research methods, choice of data analysis methods,

and remaining mindful of the fact that I am a non-Aboriginal person entering into and working with Indigenous communities. I expand on this concept of harm below.

My interview-based research had the potential to do harm to individuals and communities in a two ways: first through misinterpretation of the data, and second through misinterpretation or misuse of my results in the future. Similar to Andie-Diane Palmer's feelings about her work at Alkali Lake, I doubt that any of the participants I worked with need me to interpret their experiences or culture back to them for their benefit or greater understanding (2005). What I have tried to do is use the language and contributions of the participants directly, and then to draw out themes in the conversation. I was aware of my bias and preference towards hearing more about relationships with the land than might otherwise have been stated. I have tried to be true to the interviews and draw phenomena from the participants themselves.

The primary potential harm could be that the treatment of the results could lead to misuse or misinterpretation, specifically:

- narrowing or restricting approaches to consultation or collaboration,
- pushing for a hybridization of Western and First Nations decision-making needs and theories, and
- stereotyping, narrowing, restricting, essentializing or homogenizing the diverse worldviews and associated values within and between First Nations regarding land and resource management.

Such misinterpretation could occur through my analysis and treatment of the data or by third party interpretation of my results and presentation. In the first instance, I intend not to dissect the data and remove ideas and concepts from their intended context, but to allow statements and themes to stand wholly and unto themselves. I also plan to present my results in a way that allows for reader/user reflection, and creative interpretation and use, rather than restrictive prescriptive solutions that may be limiting to First Nations.

Second, the revelation of confidential or controversial information within an interview, which is then used in a publicly available dissertation, could cause harm to a participant or a community. Each participant was offered the opportunity to review and revise their transcripts and no transcripts have been used without the approval of the individual. In cases where I thought a quote might be controversial, I sent a note to the individual saying that I would be quoting a particular section of the interview, which might otherwise have gone unnoticed.

Finally, the form or presentation of the outcomes themselves could be harmful to individuals or communities. I was concerned that the outcomes of this research could be limiting, rather than clarifying or empowering. To address this concern, I tried to highlight the critical point that the development of a negotiation, engagement or consultation template could only be limiting and detrimental to First Nations and

should be avoided. Principles and guidelines would probably be most helpful without being prescriptive and limiting. This idea is discussed in Section 5.4.2.

3.4. Research Design

Qualitative research is most often applied when one needs to develop new “theories or hypotheses”, develop a “deeper understanding” of an issue, and is “willing to trade details for generalizability” (Trochim 2006, under *Qualitative Measures*). My research question suited these three justifications for applying qualitative research. The qualitative research method of case study was applied to address the research question, particularly because there is a void in literature regarding decision-making and negotiating processes that fully and meaningfully include First Nations experience in British Columbia.

3.4.1. Case Study

I applied a case study strategy and related methods to my research question. As defined by Yin:

A case study is an empirical inquiry that

- investigates a contemporary phenomenon within its real-life context, especially when
- the boundaries between phenomenon and context are not clearly evident. (2003, 13)

While case study is neither a method nor research design in itself, it is a strategy or approach that involves “careful delineation of the phenomena for which evidence is being collected (event, concept, program, process, etc.)” (VanWynsberghe and Khan

2007, 2). Case study analysis is best used when there is a gap in existing knowledge that may be filled by the experience or outcomes of a particular case study, or group of cases.

In general, case studies are the preferred strategy when 'how' or 'why' questions are being posed, when the investigator has little control over events and when the focus is on a contemporary phenomenon within some real-life context. (Yin 2003, 1)

My qualitative research was conducted using a collective case study and cross-case embedded analysis (Creswell 1998). Collective case study involves studying a number of instrumental cases jointly "in order to investigate a phenomenon, population or general condition" (Stake 2005, 445). Conversely, instrumental case study involves one case to study a phenomena and intrinsic case study is applied when one wishes only to examine the case itself to understand the case more thoroughly.⁶¹ As was the situation in this research individual cases in the collection of a collective case study "may or may not be known in advance to manifest some common characteristic", but the cases are studied because "it is believed that understanding them will lead to better understanding... about a still larger collection of cases" (Stake 2005, 446). The consultation and negotiation cases included in my research were expected to provide insight into a larger collection, that being future consultation and negotiation processes.

⁶¹ I concur with Stake (2005) and others who distinguish single case study from the design and analysis of multiple case study. However, Yin considers "single- and multiple-case design to be variants within the same methodological framework" with "no broad distinction... made between the so-called classic (i.e., single) case study and multiple-case studies" (2003, 46).

Good qualitative research involves the layering of multiple levels of abstraction, from the general to the particular (Creswell 1998). The cross-case analysis allows for progressively deeper levels of analysis of the interviews. See Section 3.4.3.5 for more on the analysis of interviews and cases.

Creating a one-size-fits-all description of a successful consultation process based on few cases could be more detrimental and restrictive than helpful to Indigenous peoples. In particular, the diversity of First Nations' perspectives on resource management issues in British Columbia would not be well represented by one or two cases. Although the complete breadth of potential worldviews and associated values cannot be captured by this research, the similarities and diversity of worldviews may be illustrated by including cases from different Nations and regions. The lack of examples of meaningful consultation and balanced co-management in large-scale resource use and planning exercises in British Columbia required the examination of a number of best available cases, rather than one case study. Furthermore, by using six cases in a collective, a menu of meaningful framework elements and themes were identified rather than a single description of one case. Comparison and representation of the diversity of resource use issues in British Columbia (forestry, mining, energy, and fisheries) was also best be represented by this broader selection of cases.

3.4.2. Case Selection

As part of this research, I reviewed the available literature and discussed with my colleagues over twenty prominent cases that might be considered successful or positive; cases involving consultation and negotiation related to land use in British Columbia. Many cases were rejected on the basis that Indigenous values or perspectives were not considerably taken into account, despite, in some cases, assertions in literature to the contrary (see Estergaard 2006). The selection of cases was based on the results of a literature review, my contacts in British Columbia's Indigenous communities, discussions with my colleagues, availability of research participants, and my experience.

It might be argued that another source of data to identify elements of success in cross-cultural decision making would be to examine unsuccessful consultation and engagement processes. There are likely hundreds of unsuccessful land-related interactions between non-Aboriginal governments, private-sector developers and First Nations available in British Columbia in the decade following *Delgamuukw* alone. The cases would come from the fields of mining, forestry, fisheries, energy development, transportation, tourism and agriculture, to name just a few. From my experience in the energy, mining and water management industries, I can think of about twenty significant case examples in my field of work and at least another twenty I know of

from other fields. Numerous unsuccessful cases have been documented through court proceedings and still others are more difficult to find a documented record.

In the environment of the Crown's nonrecognition of First Nations rights to territorial governance, there have rarely been common decision-making processes, few opportunities for substantive dialogue, and consultation processes have seldom met the expectations of the parties. The successes in government-to-government relationships over resource management in British Columbia have generally been based on the approach of putting aside differences to reach primarily short-term solutions. (Olding et al. 2008, 2)

The difficulty in selecting from the large pool of unsuccessful cases would be defining what 'unsuccessful' means – did the case not even get off the ground (i.e., First Nation(s) were not invited or refused to participate), did the First Nation(s) leave the consultation table part way through, were there armed stand-offs or blockades, did only a portion of the community stand against the process and decision, or was a successful conclusion reached, but only after more than a decade of negotiation or only to be reversed by one of the parties? Furthermore, there would be unsuccessful or unsatisfactory cases where First Nations participated through to conclusion believing this was their only option. To define 'unsuccessful' and systematically choose the worst among this large pool would be nearly impossible. Moreover, the decision-making, practical, and relationship elements that led to the lack of success would be innumerable and therefore of little value for this work.

Thus, relatively positive and successful cases were selected from resource planning and development projects conducted in the post-*Delgamuukw* period from 1997-2006 in

British Columbia. This pool of potential cases is much smaller and more easily defined than the negative set. Cases have taken place in areas of British Columbia without treaties and, wherever possible, include the following characteristics:

- Involvement of an industrial or large-scale resource management decision-making process.
- Inclusion of terms of reference, other documentation, or verbal confirmation that outlines a commitment to what would widely be considered to constitute meaningful consultation, co-management, or the inclusion of First Nations worldviews and associated values.
- Complete, or draft recommendations or outcomes available.
- Location within a geographic or cultural area separate from other cases (to increase variety and diversity of experience).

A preliminary set of cases was selected from major resource planning and development projects conducted from 1997-2006 in British Columbia. The cases and communities were recommended to me by First Nation and non-Aboriginal friends, acquaintances and colleagues.

Individuals in the following communities expressed interest in partnering in and working on the research. Cases were identified that met the criteria set out for cases in this research and the communities were invited to participate in the research project:

1. Stó:lō Tribal Council: Fraser River fisheries management agreements (with commercial fishers via Commercial Salmon Advisory Board), initiated by the Soowahlie Nation;
2. Cheam Band: Drift Net fishing research and agreements with the Department of Fisheries and Oceans (the DFO) Canada, on the Fraser River;
3. Hupačasath First Nation: Polaris mineral resources and the British Columbia Hydro Vancouver Island natural gas project; and
4. 'Nāmgis First Nation: Parks co-management agreement, hydro-electric development project and mineral exploration management.

Figure 6 shows the location of the communities included in this research.

Interest was also expressed by the following First Nations with associated cases, but for reasons described below, these cases were not included in the research.

1. Lake Babine First Nation, forest resource management agreements;
2. Chehalis Indian Band: Harrison Chum, Weaver and Chehalis hatchery fisheries;
3. Ktunaxa Kinbasket Nation Council, Columbia River fisheries management.

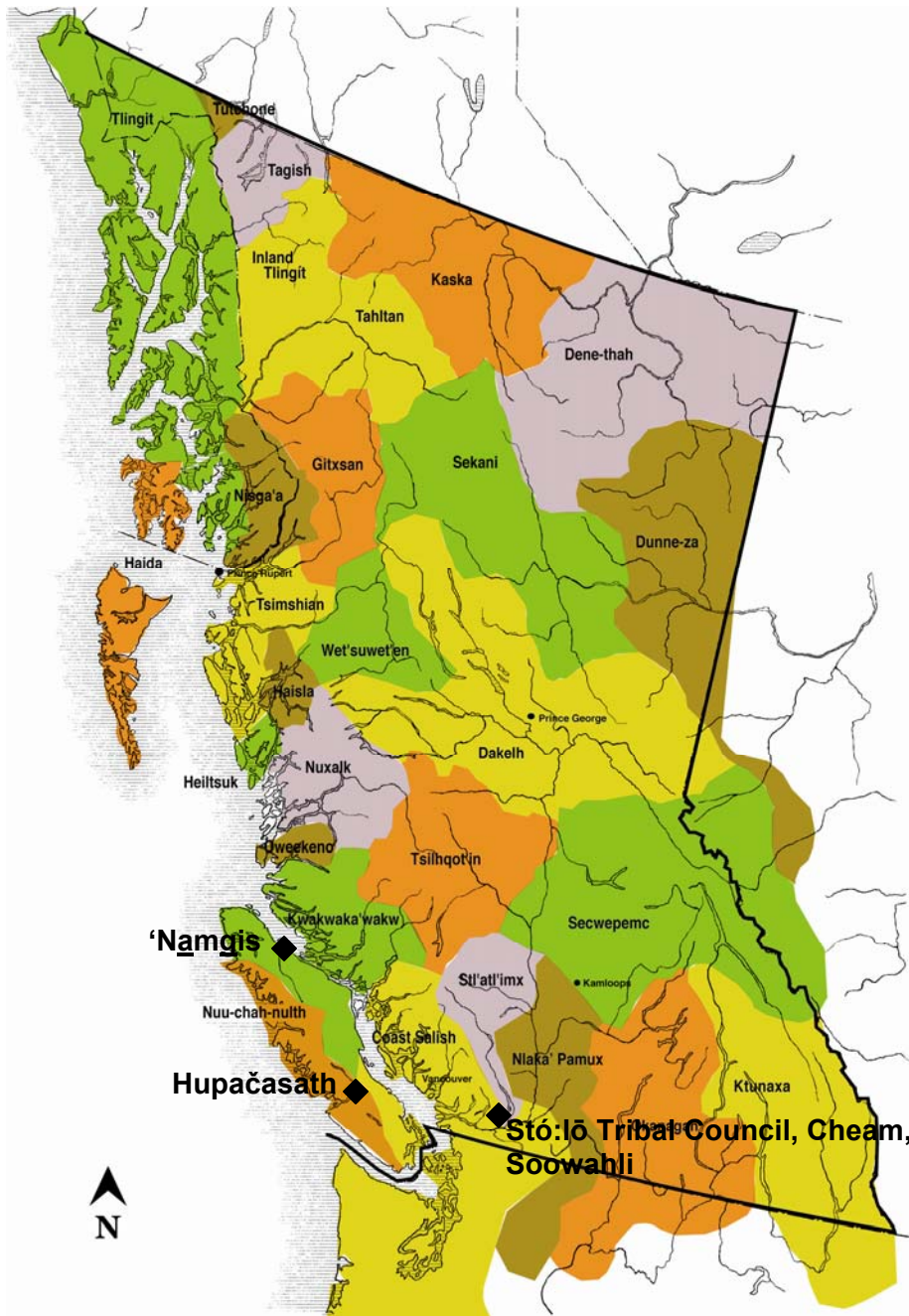


Figure 6. Nation and Case Locations in British Columbia

(Map adapted from the Union of British Columbia Indian Chiefs (UBCIC) Sovereign Nations Territorial Boundary Map)

The Forest and Range Opportunities agreement (FRO) put forward by a few members of the Lake Babine Nation as a potential positive case study was not included in the

research because these FRO and the associated negotiation process are seen as less than desirable and equitable by many other First Nations (see next Section for more on FROs). The FRO provides interim agreements that some find adequate, but the process and its limitations were developed by the provincial government.

A Chehalis Indian Band case was put forward as a potential case study, but was not pursued given the inclusion of the Soowahlie Nation and Cheam Band cases, already from the Stó:lō Nation.

Lastly, the Ktunaxa expressed some interest in the research, but were too busy with other consultation and negotiation processes to consider involvement in 2006 and early 2007. I would have very much liked to include the Ktunaxa to increase the geographic and cultural coverage of the research.

In addition to these cases, the Haida Gwaii Land Use Planning process and the Sustainable Forest Practices in Clayoquot Sound are often identified as good examples of consultation/negotiation with First Nations governments in British Columbia. In the former case, at the time of my research, I was working as a consultant with the Council of the Haida Nation on a consultation project. Conducting research with the Council of the Haida Nation at that time would have formed a potential conflict of interest or awkward situation. Fortunately, both these cases can be referenced from other sources and will be discussed in the dissertation.

The Sections that follow outline the methods applied in my research, the background for each case, the individual experiences with each case, the themes arising within a case, a cross-case analysis for similar themes, and an examination of the limitations of these cases.

3.4.2.1. Forest and Range Opportunities Agreements

In an effort to provide some geographic coverage of our province, an Interior First Nation was invited to participate in the research. The invitation was met with a positive response from some of my former colleagues within the Nation. The case I was invited to include in the research was a Forest and Range Opportunities Agreement (FROs). FROs are a modification of the former Forest and Range Agreements or FRAs. The new FRO template maintained many of the same aspects of the FRAs that were unacceptable to First Nations in the UBCIC (UBCIC 2007).

While over one hundred First Nations in British Columbia have signed FRAs or FROs the template and outcomes are fraught with controversy among and within First Nations. For instance, in support of the Nadleh Whut'en, Stelat'en, and Saik'uz First Nations,⁶² Grand Chief Stewart Phillip, long time President of the Union of British

⁶²These Nations are located in the Interior of the province of British Columbia, to the west of the city of Prince George: Nadleh Whut'en territory is in the Fort Fraser region, Stelat'en territory in the Fraser Lake region, and Saik'uz territory is nearer Vanderhoof.

Columbia Indian Chiefs (UBCIC) ⁶³ prepared a press release which included the following statement regarding FRAs.

In January 2006, the UBCIC Chiefs Council passed Resolution 2006-06 rejecting the FRA template on the basis that the benefits provided do not constitute an acceptable standard for economic accommodation for the infringement of Aboriginal Title and Rights; recognition of Aboriginal Title is fundamental to the success of the *New Relationship* and provisions within the template has an opposite effect; and the allocation under the agreement must include long-term tenures. (UBCIC 2007, n.p.)

Furthermore, the Huu-Ay-Aht First Nation on Vancouver Island launched court action against the provincial government rejecting the FRA framework and agreements. The court ruled that the FRAs did not meet the Crown's constitutional duty to consult (Huu-Ay-Aht 2005).

The statement by UBCIC, the Huu-Ay-Aht court action and ruling, the statement in the *New Relationship* (Government of British Columbia et al. 2005) that the FRA process needs to be revamped, and my own thoughts around the somewhat limited opportunity for open negotiation presented by the FRA template, led me to not include an FRO or FRA case in this research. After careful consideration I opted not to include the case in the body of research, though this was a difficult decision since my intent was to enable First Nations representatives to select those cases they felt were at, or above the status quo level of consultation and negotiation.

⁶³ See Chapter 4 for more on provincial and national First Nation groups.

3.4.3. Research Methods

Research methods in the social sciences are typically techniques, procedures, or means for gathering evidence or collecting data (VanWynsberghe and Khan 2007, 3).

Commonly used research techniques and methods include interviews, participant observations,⁶⁴ and document analysis. All three of these common methods were applied in this research, with interviews being the primary source of data.

3.4.3.1. Entering Community and Participant Selection

In each case, initial contact and invitation was made by me at the community level, either with the First Nation leadership or designated person, as described through any existing research protocols. Once a contact for each case had been identified, contacted, and interest in the research expressed, a letter of invitation was sent to the Chief and Council of the Nation involved (see Appendix A for sample letter).

There was a total of four First Nations who participated in this research and a total of seven cases discussed in the interviews. Primarily Aboriginal participants from each of four Nations were invited to become involved in the research process. In all cases, I asked the prime community contact to suggest who I should interview for the case study.

⁶⁴ Participant observations were used only in the Stó:lō - Soowahlie case where I was invited to attend meetings held by the M.O.U. (Memorandum of Understanding) signatory group as they worked to finalize the next steps stemming from the M.O.U.

Because the 'Namgis First Nation and the Ktunaxa Kinbasket Tribal Council (KKTC) ⁶⁵ each have a specific research protocol, their protocols were followed when proposing the study and inviting the community to participate in the research. My research proposal was presented at a 'Namgis Chief and Council meeting and I received written approval via email on February 2, 2007. The 'Namgis did not request any changes to the research objectives or approach. I also signed a copy of the 'Namgis Research Agreement, which was required in order to work with the First Nation.

In each case, I asked the community leaders and contacts if they were satisfied with the objectives of the research or if they would like to collaborate and modify the objectives in some way. In all cases, the community leader or contact did not raise any issues or concerns with the objectives and scope of the project. They expressed interest and eagerness to see the outcomes as soon as possible.

After receiving approval from the Nation to proceed and contact potential participants, I contacted participants in person, first by letter email, then by follow-up phone calls. Interviews were conducted in person within the participant's community.

Non-Aboriginal participants were limited to key First Nation representatives (e.g., treaty negotiators, executive officers, resource managers, facilitators and managers)

⁶⁵ Due to time constraints and commitments to numerous ongoing resource management projects and issues, the KKTC declined to participate in the research.

with responsible roles in the decision-making process.⁶⁶ Because the aim of my research was to identify what ought to occur in order to provide normative principles that may decolonize future negotiation processes and create fairness for First Nations participants, it was the experience of the colonized that I was seeking to understand. It was these narratives, the story of experience by the First Nation participants that needed to be documented and examined for guidance for improvement in land management. The experience and preferred approach of non-Aboriginal governments and private-sector resource developers can be found intrinsically in the many unsuccessful, and few successful cases that have transpired in our province (see Section 3.4.2, Case Selection for more on unsuccessful cases). First Nation community contacts recommended any non-Aboriginal people who were representatives of the First Nation as participants for interviews and study participation, and thus they were invited to participate in the study. These individuals were similarly contacted by letter/email and phone.

All participants had the option of removing themselves from the research project at any time. This option was made clear through the university Behavioural Research Ethics Board (BREB) application form and participant consent process.

⁶⁶ In the Stó:lō and Lower Fraser First Nation case, Ernie Crey strongly recommended that I interview Dave Barrett, who represented the Commercial Salmon Advisory Board (CSAB) in the negotiations within the case. Since there were few primary participants in the case, and respecting Ernie's belief that Dave may have some insight into the history of the case and reasons for success, I agreed to include this participant.

3.4.3.2. Interviews

This case study research collected evidence about positive negotiation processes using of personal interviews methods. Semi-directed open-ended interviews were conducted with key participants and community leaders directly or strongly peripherally involved in each case study. Using audio-recorded interviews allowed me to gather the most detailed and authentic representations of participant experience.

The objective of participant interviews was to determine how effective various processes were in identifying, understanding, respecting, and including Indigenous values and interests into land-use and resource management decisions. Decision-making framework elements that were seen as key in any degree of success were discussed. Interviews also elicited the environmental values that were not successfully included in management processes, and suggestions for improved future applications.

The interviews focused on the participants' perspectives of the case, rather than a reported or documented version of events. The combination of interviewee experiences in the variety of cases in the research built a holistic picture of the cross-case experiences.

Participants were guided in discussion of the following topic areas in the form of open-ended questions. Appendix B includes an interview script and questions. Interviews are intended to illicit the following:

General Description and Understanding of the Case

- The resource issue or process in question.
- Significance of the resource project or decision, from the participants' perspective.
- Land use issues of concern considered (or omitted) as part of the process.
- Roles of community, private, government and public in the process.

Participation and Decision-Making Fundamentals

- Actual and desired participation of the interviewee in the design of the process (e.g., the planning time horizon, meeting locations and format, objective and outcome development, value elicitation).
- Decision-making authority and power (perceived) in the process.
- Presence or absence of the discussion of drivers (goals and values) applied in the planning or management process.
- Involvement in the development of fundamental decision-making values applied in the process.

Perceived Gaps in the Process

- Suggestions for change in the design, implementation, or overall goals of the process, including a discussion of the need for recognition of rights and title,

involvement in the design of the process and timelines, meaningful geographic scale.

Approximately thirty hours of interviews with eighteen participants were audio taped with a digital recorder. All interviews were conducted in English, and to the best of my knowledge, English was the first or, in possibly a few cases, second language of all the participants. In some cases, place or Nation names are said in the local language and the spelling has been derived from local spellings.

Interviews were conducted in spaces and places ranging from quiet offices, to sunny river-side beaches, to busy restaurants, to noisy cafés. The locations were generally suggested by the participants and I followed their suggestions.

Almost all of the interviews, even those conducted outdoors, had very good sound quality, with one exception; one of the interviews had very poor sound quality due primarily to background noise. My interview with Mr. Mike Rodger, Chief Treaty Negotiator for the 'Nāmgis, had extremely poor pick-up and quality. This interview was conducted in the local diner/café with the sports network on television in the background. My transcriber and I had a very difficult time with this interview and were only able to hear approximately 40 percent of the interview.

Quotations used in the body of the dissertation were edited for clarity only, removing 'ums', 'uhs' and misstated or half-stated words.

3.4.3.3. Transcription and Participant Review

After attempting to transcribe the interviews myself, and taking two weeks to transcribe my interviews with Trevor Jones and Judith Sayers, I decided it would be more efficient to send the interviews out for professional transcription. Marilyn Rimek at TCtranscribe conducted the transcription. After receiving the transcripts from TCtranscribe, I would review the interview audio beside the transcript and edit for spelling and any missed words or portions. It was sometimes difficult for Marilyn to understand place, Nation, and organization names with which she was not familiar. I would fill these in.

Once the transcripts were as correct and complete as possible, they were sent out via email to each participant for their review and approval for use in the dissertation. In many cases, participants requested that they only review the quotes and reference ultimately included in the dissertation. A draft of the dissertation was sent instead of full transcripts. Participants were offered the opportunity to delete any sections, or provide additional text to clarify any of their statements. This transcription and review process took the months of the summer and fall of 2007 to complete. A few approvals were not received until late 2008.

3.4.3.4. Transcription Notation

To ensure that my research participants' words are heard exactly as intended, it is important to provide quotes from interview transcripts that were as close to verbatim as possible. Transposing the oral narrative to written already form changes much of our ability to understand the words as they were intended, in part due to the loss of tone, pace, emphasis, and other audible characteristics. Editing the quotes for clarity would have further weakened the participants' intended meaning.⁶⁷

In this vein, I included most of the "signals of continued attention" in the body of the interview, but right-aligned in the text and placed in italics (Palmer 2005, xi). This concept was employed by Palmer (2005). These signals of continued attention include words and sounds like 'uh huh', 'mmhm' and 'hmm'. While many English speakers omit signals of attention and view them as irrelevant to the content and flow of the interview (Palmer 2005), these words and sounds of affirmation can often have an influence on the continued flow (or lack thereof) and direction of the interview, and have therefore been included but right aligned in the text. Many of the word-based pauses in speech have not been included: pauses such 'ums' and 'uhs' and have been replaced with dots as described below.

⁶⁷ Quotes from participant interviews were not edited, with the exception of the interview with Doug Aberley. Doug Aberley edited his quotes for clarity and correctness.

Similar to the transcription notation used by Gumperz (1982, xi) and Palmer (2005, xx), the following conventions have been used in interview transcripts for this research.

- Unintelligible word: ()
- Orientation notes encapsulated by square brackets and provider identified.
 - For example - Andrea:[Fraser Salmon Advisory Board made up of 12 members].
- Increased volume - All capital letter text.
 - For example - We had NO idea that was their intention.
- New paragraphs in the transcriptions are inserted based on pauses in speech. Long pauses are denoted with three dots..., whereas longer pauses are denoted with six dots

3.4.3.5.Data Analysis

Cross-case analysis of using collective case study typically involves no more than four cases (Creswell 1998). Therefore, four primary cases⁶⁸ were initially selected for the research, but ultimately six case studies were included for more detailed analysis of the decision-making elements in the case that could provide broad guidance for consultation and negotiation between Indigenous and non-Indigenous people.

⁶⁸ My initial intention was to interview the 'Nāmgis participants about the Parks co-management agreement, but during the interview process the 'Nāmgis presented three positive consultation cases.

The steps involved in my qualitative analysis of the cases and participant interviews included (as described in Miles and Huberman 1994):

1. Devising and assigning topics to transcribed interviews and documentary evidence.
2. Noting my reflections on the topics through a research journal.
3. Identifying preliminary patterns, themes, and relationships in a semi-structured analysis.
4. Gradually arriving at interpretations and primary themes within the data.

I then followed the general analysis approach described by Yin (2003) whereby the researcher:

- writes individual case reports (or summaries),
- draws cross-case conclusions, and
- modifies a theory (in this case the theory was the development of principles).⁶⁹

My research analysis was not intended to apply grounded theory, nor is it likely that grounded theory computer-aided analytical tools could be used to dissect and reconstruct the data into themes (Creswell 1998). My approach is similar to that taken by the Alaskan group of researchers headed by Easley and Charles where

⁶⁹ Yin also describes two further steps in analysis, those of “develop policy implications” and “write cross-case report” (2003, 50). Policy implications were not specifically discussed in this dissertation, and the cross-case report is essentially this research document.

interviews from the Elders [participants] were open-ended in nature which allowed a qualitative research approach to be utilized. Qualitative analysis permits the hypotheses to be derived directly from the data. From the beginning of the analysis of the raw interviews, the research team saw concepts emerge and began to link the concepts together. The hunches we developed about the way in which the concepts are related are the 'hypotheses' that have been validated and elaborated upon. (Graves et al. 2004, 3)

The analytical method of grounded theory was developed by sociologists Glaser and Strauss in the 1960s, and involves evaluating a body of data (typically interview data), dissecting the interviews into bits, recombining into themes, and ultimately developing a new theory from the data (Glaser and Strauss 1967). Grounded theory has subsequently developed into two separate but similar streams, each set by these pioneering researchers: one stream emphasizing Glaser's stress on emergence and the other focusing on Strauss' emphasis on coding data and computer-aided techniques (Strauss and Corbin 1990; Glaser 1992). In this research, reflection and interpretation of the interview data took place in a more holistic and thematic manner, similar to Glaser's recommended approach, rather than breaking interviews into bits (data bits) and properties used in axial coding variations of grounded theory analysis (Kirby and McKenna 1989; Creswell 1998).

The broadest interpretation of what Grounded Theory encompasses is analysis to develop a new theory grounded in the data. In this sense, I followed the broad guidelines of Grounded Theory where I allowed themes to emerge through coding of interviews, cross-interview comparison for categories, and ultimately arriving at core

themes due to their dominance in the record (Glaser and Strauss 1967; Glaser 1992).

These themes were then used to develop a theory grounded in the data collected, hence, broadly aligning with grounded theory.

During my analysis, I listened to the audio recordings as equally as I reviewed the text, keeping in mind that the interviews came from participants from traditionally oral cultures.⁷⁰ It is my emphasis on the oral recordings and reluctance to reduce my thematic coding to single-word extractions that shows divergence from traditional Grounded Theory approaches to data gathering and analysis. I marked out themes on paragraphs of the interviews transcripts, but aimed not to lose touch with the message that was delivered through the narrative of the interview through tone and emphasis. I found that case study and cross-case analysis was the most applicable Western qualitative strategy that would allow me to maintain this integrity of voice and intent.

⁷⁰ Experts in grounded theory often recommend not audio-recording interviews, partly due to the large volume of data created and the time spent transcribing interviews that could otherwise be spent collecting more data in and effort to reach thematic saturation. These grounded theory experts instead recommend taking notes during the interview that highlight key words (Glaser 1992). I felt this approach would not gather the detail and the narrative that I was aiming for in this research.

Chapter 4. Nations, Cases, and Conversations

The borders of the province of British Columbia encompass 203 independent First Nations groups.⁷¹ Many of these Nations are affiliated with Tribal Councils (e.g., the Shuswap Tribal Council) or collective Nation affiliations (e.g., the Stó:lō Nation). In addition to Nation and Tribal associations, there are also three primary organizations with which the First Nations in British Columbia affiliate: the national Assembly of First Nations (AFN) (BC Chapter);⁷² the Union of British Columbia Indian Chiefs (UBCIC);⁷³ and the First Nations' Summit⁷⁴. These three organizations formed the First Nations Leadership Council (FNLC)⁷⁵ in 2005, in part to develop and implement the *New Relationship* objectives with the provincial government of British Columbia (Government of British Columbia et al. 2005). And, while the First Nations in British Columbia “are many and diverse, they have at least one thing in common: they have an

⁷¹ The estimate of 203 First Nations is used by the First Peoples' Heritage, Language, and Culture Council (2007), the BC Assembly of First Nations (2007b), and the government of British Columbia (2008).

⁷² “The BC Assembly of First Nations (BCAFN) is a Political Territorial Organization (PTO) that represents the 203 First Nations in British Columbia. The BCAFN is inclusive in its representation including First Nations involved in the treaty process and those that have chosen not to engage” (BC AFN 2007b).

⁷³ The Union of British Columbia Indian Chiefs “was founded in November, 1969, by a majority of Indian chiefs in BC [British Columbia], partly in response to the federal government's 1969 White Paper, which was a blueprint for assimilating Canada's First Peoples” (UBCIC website “Our History”). “The UBCIC is probably best known for its uncompromising stand on the issue of Aboriginal Title and Rights” (UBCIC website “Our History”) and in general, UBCIC members are not participating in the BC treaty process, which requires First Nations to cede title as a primary condition of treaty.

⁷⁴ The First Nations Summit “speaks on behalf of First Nations participating in the British Columbia Treaty Process” (First Nations Summit 2007, 1).

⁷⁵ The First Nations Summit, UBCIC and the BCAFN signed a Leadership Accord March 17th 2005 (First Nations Leadership Council 2005, 1).

enduring relationship with the land, a bond so strong that it defines who they are” (Campbell et al. 2003, 16).

The Union of British Columbia Indian Chiefs (UBCIC) created a Sovereign Nations Territorial Boundary Map which shows there are twenty-three distinct sovereign Indigenous nations in British Columbia, which are distinguished by language group, culture, alliances, and biogeoclimatic differences.

The Nations who contributed cases and experiences to this research are from the Nuu-chah-nulth, Kwakwaka’wakw, and Coast Salish territories in British Columbia.

Invitations were also extended to the Ktunaxa, the Haida, and the Lake Babine First Nation in the Dalkelh territory. While greater coverage of communities throughout British Columbia would have been ideal, the cases and communities included brought together a suitable range of experiences in a variety of resource sectors.

As described in earlier chapters of this dissertation, the Nations involved in these cases have a shared history of colonization, and in particular the colonial practices that took place in British Columbia. Colonization led to Nations and communities “that are disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day” (Kapp 2008, 5).

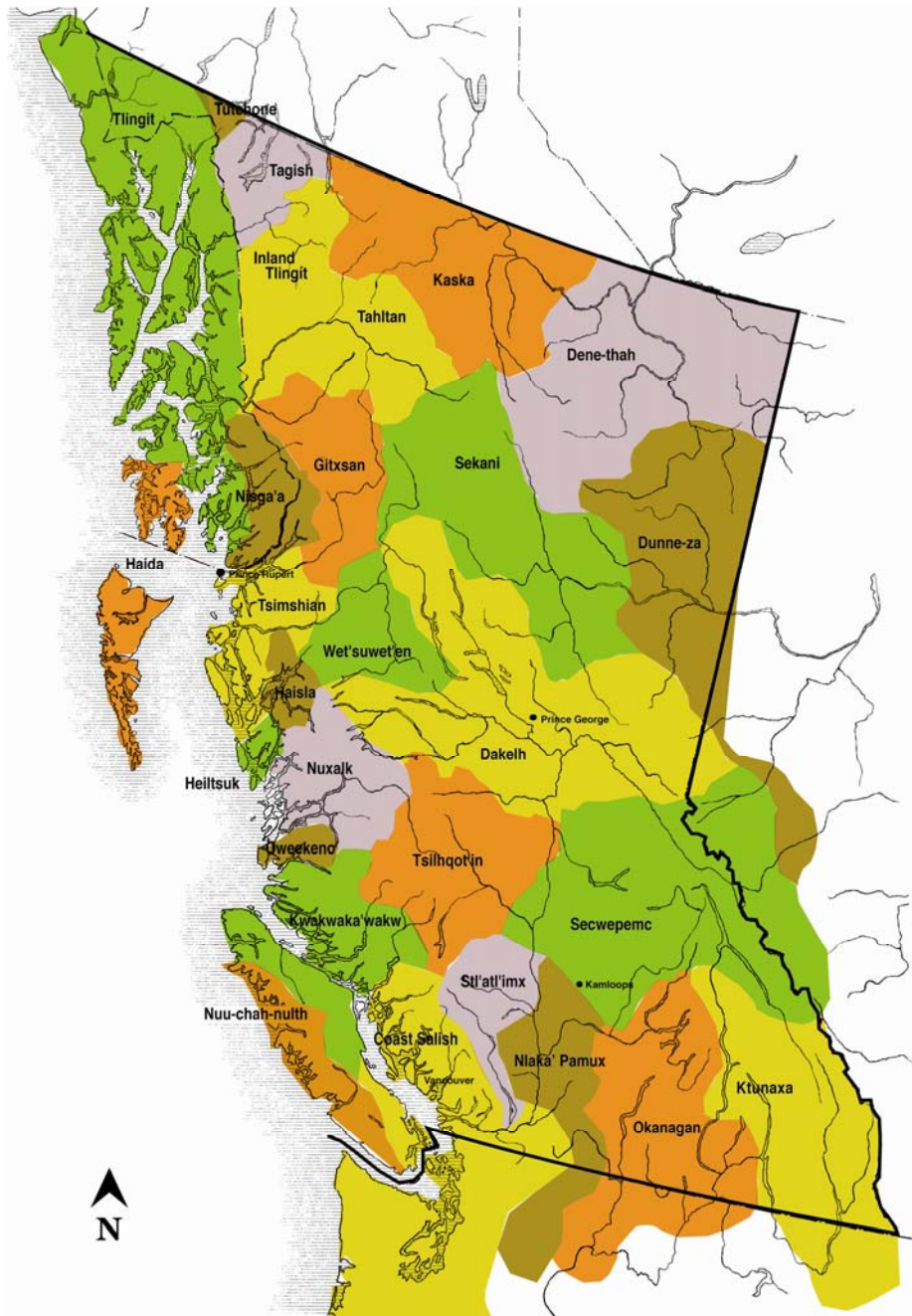


Figure 7. First Nation Cultural Groups in British Columbia

(Map adapted from the Union of British Columbia Indian Chiefs (UBCIC) Sovereign Nations Territorial Boundary Map)

4.1. Cheam First Nation – Drift Net Fishing Case

4.1.1. Historical Context

The Cheam are the last remaining band of the Pelho-lhxw (Pilalt) Temexw tribe whose traditional territory is located in the northeastern part of the Coast Salish region. The Cheam are also members of the larger Stó:lō First Nation. “Four tribes are considered Stó:lō. The Tait, the Ch-ihl-kway-uhk, the Pilalt, and the Sumas are all part of the Stó:lō. For ease of relationships, they're all dealt with collectively as a Nation” (Chester Douglas in Standing Committee on Fisheries and Oceans (SCOFO) 2006, 10). The Stó:lō are part of the broader Coast Salish cultural group which includes the First Peoples of much of the Georgia Basin, the Gulf Islands, and the west coast of northern Washington State in the United States.

Of approximately 500 Cheam members, sixty percent live on Cheam reserves (Chief Douglas in SCOFO 2006). The largest reserve, IR #1, is located on the Fraser River near Rosedale, upstream of the Mission Bridge, about two hours east of the city of Vancouver. The Cheam First Nation is a member of the Stó:lō Tribal Council and a member of the Assembly of First Nations (both national and British Columbia assemblies). The Stó:lō Tribal Council is not actively participating in the British Columbia Treaty Commission process, whereas eleven Stó:lō First Nations are participating in the treaty process through the group called the Stó:lō Nation. See Section 4.4 for expanded description of these two Stó:lō organizations.



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Figure 8. First Nation People in the Harrison / Cheam Area, 1867
(Image F - 08914 Reprinted courtesy of Royal BC Museum, BC Archives)

4.1.2. Contemporary Context

Many media in British Columbia and Canada have created a contemporary story about the Cheam that portrays members of this First Nation as unlawful warriors on the Fraser River, sometimes creating dramatic confrontations with federal authorities. For example, the Cheam First Nation has been called “radical” and “militant” for their strong stance on their Aboriginal right to fish (Dolha 2003, n.p.). Some of the confrontations with federal authorities also involved land disputes and engaged members of the Native Youth Movement in their struggle.

In 1999, the Cheam First Nation recruited members of the Native Youth Movement to assist them as they engaged in their Fraser River salmon fishery in

defiance of Canadian regulations. ... Soon, they donned their fatigues and set up a three-month roadblock to protect Cheam fishing camps.⁷⁶ (Alfred and Lowe 2006, n.p.)

Through to at least 2004, the Cheam continued to be described, by some non-Aboriginal fisherman, as illegal fishers on the Fraser who were responsible for the lack of sockeye; sockeye numbers were below those predicted to return by the Department of Fisheries and Oceans (the DFO), Canada (Southern Salmon Fishery Post-Season Review Committee 2005). In the *2004 DFO Post-Season Report*, Cheam were repeatedly singled out through testimony given by non-Aboriginal sport and commercial fishers, for allegedly fishing illegally at night (Southern Salmon Fishery Post-Season Review Committee 2005).



Figure 9. Cheam Protestors

(Photo courtesy of Bert Crowfoot. © *Windspeaker* online journal.)

⁷⁶ Fishing camp areas that were slated for parkland development.

Murray Chatwin, an executive with the Ocean Fishing Company, testified that poaching in the Fraser is a very serious problem, especially at night. In his view, the biggest problem regarding the missing sockeye is the unaccounted for fish in the Fraser River and that the illegal sale of fish is a serious component of that problem because it created 'pressure to catch more fish'. (Southern Salmon Fishery Post-Season Review Committee 2005, 35)

Growing up in Coast Salish territory, I was influenced by the media reports and characterization of these stories over the past decades. On my first visit to Cheam in early 2007, I remember having some trepidation, expecting to be unwelcome as a non-Aboriginal visitor. Instead, my experience with Cheam members has only been welcoming, positive, enjoyable, and relaxed. The Cheam Council members and biologists that I have spoken with are well organized, sincere, clear about their goals, and open to building settler-Indigenous alliances to enable them to manage the fishery sustainably, gain more recognition, and incorporate their Aboriginal rights and values.



Figure 10. Mount Cheam in Pilalt Territory

4.1.3. Cheam and the Salmon Fishery

First Nations have occupied their territories since time immemorial and our relationships with the lands and resources of our territories form the foundation of our culture and identity...

(BC AFN 2007a, “Resolution: Support of Cheam Fishers”)

The salmon fishery on the Fraser is a critical component to the cultural practice and identity of the Cheam Nation (Crey interview 2007). The case included in this research was significant to the Cheam for a number of reasons including cultural, economic, biological, and political impacts. First, there is a strong concern in many members of the Cheam that the salmon fishery is heading towards collapse (Crey interview 2007), and its current decline is having an effect on community well-being (Fredette interview 2007). This case represents just one step in the efforts of the Cheam Nation to work with the DFO to better manage the fishery and make it sustainable.

Second, the poor relationship with the DFO has led to costly legal action that the Cheam First Nation has great difficulty affording (Sru-Ets-Lan-Ough (Chief Douglas) interview 2007). From 1999 to 2004, some Cheam fishers and the Cheam government decided that they would fish without DFO approval, as they saw fishing as a legitimate exercise of their Section 35 Aboriginal rights⁷⁷ and would not deal directly with the DFO to gain approvals for that fishing (Quipp 2007). This approach resulted in many lengthy and

⁷⁷ Section 35(1) of the Constitution Act, 1982 affirms existing Aboriginal and treaty rights in Canada. See Glossary for more.

expensive legal cases between the Cheam and the federal government. Despite winning many of these court cases, the decline in the salmon fishery and the confrontation on the river with other fishing sectors and authorities has reduced the pure enjoyment of the fishery that Cheam fisheries technician Martha Fredette remembers from her childhood.

When you start seeing your food source depleted ... it does change your relationship. When you know that that food source might become extinct, you get a little bit of a change there. It makes you really aware... [of] the importance. (Fredette interview 2007)

The anxiety surrounding the fishery, particularly due to the tensions between Cheam, the DFO, and other fishing sectors, has been “trying on the community, trying on the Council” (Chester Douglas interview 2007). Martha indicated that the decline in the fishery has been gradual over the past few decades, and she began her work as a biologist in the fishery specifically because of her concerns for the longevity of the fishery.

With the fishery depleting and seeing how it's affected our community, as far as being able to harvest and maintain a cultural involvement in fishery, and seeing the downgrade and depression that is threatening the communities, I think I felt I wanted to be involved in some way. (Fredette interview 2007)

The cause of the decline is multi-faceted and may be linked to climate change, industrial growth, forestry and over-fishing (Fredette interview 2007). For instance, the higher water temperatures in the river could be attributed to any or all of the three former causes, or to natural cycles. No matter the cause, water temperatures are having an impact on fish stocks. Research conducted by Tony Farrell and Scott Hinch at the University of British Columbia (UBC) has shown that salmon species have particular

“thermal windows” within which they can survive (Farrell in UBC 2008, n.p.) The UBC study showed “that high temperatures push certain sockeye salmon stocks beyond their thermal window, resulting in cardiovascular failure and death” (Farrell in UBC 2008, n.p.). Furthermore, in February 2008, the Upper Fraser Fisheries Conservation Alliance released a report that indicates that climate change, over-fishing, and pollution are three of the primary causes of the severe decline and near extinction of many of the Fraser River salmon runs (Levy et al. 2008)

If you look at the trends over the last five years you can see that the water temperature in the month of August, probably about mid August towards the end of August, is very high which causes a lot of stress on the fish and it could be leading to a high mortality and diseased fish. (Fredette interview 2007)

Alongside this decline in salmon returns, the Cheam are dealing with a growing population and an increased need for fishing access in their community. Sedimentation in the Fraser River has also rendered many traditional fishing set net sites unusable (Chief Sru-Ets-Lan-Ough (Chief Douglas) Interview 2007). The primary method of fishing used over the past century since colonial contact and regulation has been set nets, where families and family heads hold permission to fish in a particular riverside set net location⁷⁸ (Crey interview 2007). The Stó:lō have used these and other fishing methods in the past, including drift nets and weirs (Crey interview 2007). Today, many

⁷⁸ Set net fishing at Cheam requires a fisher to have a family site on the bank of the river in which to set a fishing net for a period of time. Drift net fishing at Cheam is conducted with small (less than 20') motorized boats where nets are let out and retrieved manually. Cheam have also used weirs and other methods for harvesting (Crey interview 2007). “The Sto:lo (sic) used these [set gill nets, drift gill nets, traps, weirs, and other] methods prior to European contact. However, with the imposition of state management of our fishery, DF0 banned many of our traditional fishing techniques and methods and forced us to use set gillnets” (Ernie Crey, personal communication, January 15, 2009).

young fishers in the community do not have access to these set net locations and would prefer to access the fish through a drift net method.

Our driftnet fishery was constantly being turned down and we were forced to fish under the set net fishery, which was very restrictive. [Set netting] lowered our opportunities to harvest fish ... We found that the driftnet fishery was the most successful fishery, which gave opportunity for everybody in the community to get fish. (Fredette interview 2007)

Village ownership of fishing sites was virtually unknown to the Upper Stó:lō except for salmon dip-net stations. In the past, use of fishing sites was extended to anyone who could “claim a right through kinship,” which could bring fishers from the mouth of the Fraser River (Musqueam) or as far away as Vancouver Island (Linkos Brown 2006, 53). “In the wake of over a century of regulation, fishing times, sites, and techniques are no longer decided upon by Siya:m (community leaders) as in the past, but by fisheries officers” which complicates and restricts the openings, eligibility and sharing of the fishery resource (Linkos Brown 2006, 53).

Salmon fishing in Cheam is a community-based effort. Some community members do not participate directly in the fishery, but fish are shared with all community members whenever possible. Elder and fisherman Isaac Aleck explains:

Isaac: The amount of fishermen, the amount of fishing spots are less. The spots are filling in so they're no more fish so how are we to get what we need? And each fisherman has his own group of people he gives to. Myself I got about 15, 20 families I give fish to. I don't charge 'em, I just give it to 'em. Here - you know.

Friend: (They can't fish.)

Isaac: They don't have the gear or access to the river. So I catch fish and give them it and sometimes I'll trade... for things I need. (Aleck interview 2007)

4.1.4. Case Description - Drift Net Fishing

The Cheam case discussed here involves the Cheam's right to fish by their preferred method and the restrictions the DFO has placed on Cheam members fishing by one of those preferred methods: drift net fishing. A lack of good set net sites and Cheam community population increases have led to the increased need for manual drift net fishing (Chester Douglas interview 2007), a method the Cheam have been using for hundreds of years. The understanding that this method was a "means that [the Cheam] did practise before... weighed heavy on [the Cheam]" when pushing for the acceptance of this fishing method (Chester Douglas interview 2007).

My people used to drift before contact. And they used, not the drifts they use today, it was called a bag net. And they used two canoes and their net was kind of like a bag. So drifting isn't really new to us. It was banned in the late 1800's because some of the commercial fishery felt that the First Nations were superior in the fishery. And they were worried and they wanted to get more of the catch.

That's when we were squeezed out of the commercial market. A lot of our fishing methods were banned because they were too effective. (Sru-Ets-Lan-Ough (Chief Douglas) interview 2007)

Since commercial fishing involve gill-net fishing methods, and commercial fishing (hence net fishing gear) was not allowed upstream of the Mission Bridge, the ban on drift net fishing was partly related to the boundaries placed on commercial fishing

gear.⁷⁹ However, the Supreme Court has ruled that Cheam members have a right to fish by drift net, or any other method they prefer, to exercise their right to fish (*Sparrow* 1990). Yet the Cheam have encountered difficulties with federal authorities when fishing by this method, and court decisions have stated a need for more study and consultation between the parties (Chester Douglas interview 2007). Through relationship building and collaborative efforts in studies and projects, this case and the disputes involved did not reach the courts.



Figure 11. Drift Net Fishing on the Fraser River

Sru-Ets-Lan-Ough (Chief Sidney Douglas) introduced this case as part of his evidence to a federal Standing Committee on Fisheries and Oceans (SCFO) in 2006. He used this case as example of the improved relations between Cheam and the DFO in their new efforts to work together in a “more co-operative and respectful relationship” (SCFO).

I would like to take a few minutes to give you a picture of how relations between Cheam and the Department of Fisheries and Oceans have changed in recent years.

⁷⁹ In 1878, regulations began to emerge that eliminated and restricted some of the fishing techniques traditionally used by First Nations (Linkos Brown 2006). For instance, in 1894, First Nations peoples were “prohibited from taking fish by spear, trap or pen, and dip nets were allowed only with special permission” (Linkos Brown 2006, 61). The elimination of live-capture and selective fishing methods (fish weirs, 1904, beach seines 1919) forced First Nations to adopt more of the mixed capture net fisheries (Linkos Brown 2006, 61).

One area of serious contention for many years was the question of whether or not it was appropriate for Cheam members to use drift nets to harvest salmon. This has become an issue as accretion and sediment build-up in our river has rendered many traditional harvesting areas unusable. And our opportunities to harvest in other parts of the river have been limited by increased commercial and recreational use of the river. (Chief Douglas in *Evidence* SCFO 2006)

Cheam have been fishing salmon from the Fraser River since time immemorial (Crey interview 2007). Cheam have historically used many methods to fish on the Fraser, including weirs, set nets, drift nets and other methods to harvest fish. Colonization and non-Aboriginal government rules have led to significant changes in the way the Cheam harvest fish, but the culture and traditional practice remain with many of the Stó:lō and Cheam people. Ernie Crey explains:

Ernie: [The Stó:lō], they nevertheless have an entirely different culture than the one, the larger community lives, inside us, right.

The larger community lives a sort of corporate culture that exists at DFO. These societies of people are worlds apart and you would think they wouldn't be because DFO's been managing our fishery here for over a hundred years. You would think in that time they would have built up an appreciation for different Aboriginal peoples, for the different cultures, you'd think they would come to a real understanding of the Indian community up and down the Fraser River but they haven't. They haven't been required to. For example before *Sparrow* there was the time in which there was a fisheries regulation. It was those regulations that disallowed the communities from maintaining their cultural life.

For example, the fishery you see now where everyone has a gillnet that is set off a pole, or suspended in the river and anchored at either end and of course more recently drifted gillnets in the last five, five or so years. That fishery is not the traditional Stó:lō fishery. The traditional Stó:lō fishery was shut down, declared illegal, uprooted and destroyed 80 or 90 years ago. What do I mean by that? Well the people around here fished using weirs and traps and other fishing contrivances.

Andrea: Okay.

Ernie: This phenomenon of the set gillnet and now the drifting gillnet, that's relatively new to the aboriginal fishery.

Andrea: Okay I didn't know that.

Ernie: Yeah. To the extent that it's being used...

Andrea: Yeah, right. As a dominant kind of form.

Ernie: That's because DFO imposed that kind of fishery on us but trashed all the old traditional methods of fishing.

Ernie: Using fish weirs, fish traps. We did have gillnets in the past. They were made of nettles and the like so it's not true that gillnet was unknown to aboriginal societies before non-Indians got here.

So my point is this: that as a cultural expression and a means of fishing the Stó:lō fished in entirely different ways and in different locations along the lower Fraser than is the case today. And those older methods, time-tested methods and very effective methods that we utilized in the past were outlawed and guess why. To this very day notwithstanding the *Sparrow*, communities here still think they can't return to, that they can't revive or return to those older fishing methods that our forefathers and mothers used for millennia.

Andrea: Wow. Yeah.

Ernie: They think they're still illegal. (Crey Interview 2007)

Federal DFO rules still state that no drift net fishing is allowed upstream of the Mission Bridge (Chester Douglas 2007). The reasoning for this ban goes back over a century and is linked to the ban of intertidal fishing in England and Scotland in the 19th Century (Milne interview 2007) and the efficiency of the fishery in upstream areas. In the late 19th and early 20th Century, commercial fishing licences were only issued to British subjects and aboriginal fishers were "relegated to being deck hands or working in the processing plants" (Chester Douglas interview 2007). Large seine drift-net fishing,

with which the DFO is familiar, is allowed in the main stem of the Fraser and the ocean fisheries below the Mission Bridge. The DFO had not previously distinguished between large seine mechanical drift net fishing conducted on the lower Fraser and open marine fisheries, and the small-boat manual drift fishing conducted by the Cheam.



Figure 12. Unloading Drift Net in Cheam Territory

(Photo credit: Stuart Davis, *Vancouver Sun*. © Vancouver Sun)

The DFO was not providing openings for small drift net fishing upstream of the Mission Bridge and indicated that they did not have enough information to create and provide openings for that fishing method. Not only are these federal rules unjustifiable from a practical and scientific perspective, they are also in contravention of the Cheam's right to fish to meet their needs for food, and fulfill social and ceremonial purposes, by their preferred method. Some Cheam fishers saw this as just another effort by the DFO to exert control of the First Nation's fishing:

They want to try and control every little bit. Their unspoken idea is that as long as they give us a chance to get what we want but, due to the conditions they

might sometimes throw at us, if we don't get what we need it's tough... tough luck.

Which is kind of contrary to what *Sparrow* says [referring to the 1990 *Sparrow* decision] (Aleck interview 2007).

The DFO had imposed fishing methods and banned many traditional Aboriginal fishing methods such as “using fish weirs and fish traps. We [the Stó:lō] did have gillnets in the past. They were made of nettles and the like so it's not true that gillnet was unknown to Aboriginal societies before non-Indians got here” (Crey interview 2007).

4.1.4.1. Research Participants

This case involved participation from Cheam Chief and Councilors, biologists, fishers and community members. Non-Aboriginal participants included senior management at the DFO in early negotiations, DFO biologists in study design and implementation, and DFO Conservation and Protection officers observing part of the study.

Through the invitation and organization of Sru-Ets-Lan-Ough (Chief Douglas), Saul Milne and Martha Fredette, the following participants were interviewed about the Drift Net Fishing Case. Brief profiles of each participant are included in Appendix E.

- Sru-Ets-Lan-Ough, Chief Sidney Douglas, elected Chief of the Cheam.
- Isaac Aleck, Cheam elder and fisherman.
- Councilor Chester Douglas, Cheam.
- Martha Fredette, Cheam, fisheries technician.

- Saul Milne, Cheam member, study coordinator and negotiator.
- Rick Quipp, Cheam fisherman.

I first met with Saul Milne in October 2006 to discuss the possibility of including the Cheam case in my research. We talked at length over brunch about the history and relationships behind this case and it appeared to be a good candidate to show some elements of improved, effective negotiation between a First Nation and the federal government. Saul suggested that I get in touch with Sru-Ets-Lan-Ough to invite Cheam to the research project and seek his approval. After a few phone conversations, a first information meeting was set up between Sru-Ets-Lan-Ough and me on February 12, 2007. I also conducted an interview with Councilor Chester Douglas that day in his office at Cheam. On April 12, 2007 interviews were conducted with Sru-Ets-Lan-Ough at a local restaurant, with Isaac Aleck on the south shore of Fraser River, with Martha Fredette in her office at Cheam Band offices, and with Rick Quipp next to the Fraser River over lunch. And lastly, an official interview with Saul Milne was conducted October 2007 at Saul's office at the Fraser Basin Council in Vancouver.

4.1.4.2.Relations with the DFO

The fact that DFO persists with this pre-1990 [pre-Sparrow] attitude, an attitude straight out of the 19th century, that's what is at the bottom of a lot of the friction; because they haven't learned to consult. Now is this surprising? No. A lot of the people that work at DFO, as the kids say today, are 'kickin' it old school'.

(Crey interview 2007).

The Cheam have a long history of poor relationships and struggle with the federal government fisheries agency, stemming from the federal government policies that restricted or disabled their Aboriginal right to fish in the 19th century (Linkos Brown 2006; Sru-Ets-Lan-Ough (Chief Douglas) interview 2007). At the root of the tension between the Cheam First Nation and the Government of Canada (represented by the DFO) is the differing view on who should be stewarding or managing this resource, and in particular over the DFO's handling of the Nation's access to fish.

...one of the things [that led to the deterioration of relationships with the government] is that most of the B.C. first nations [sic] have not signed treaties or given up resources in any agreements with the federal or provincial governments. A lot of our people feel that because of this, the resources still belong to the first nations [sic]. With both governments also claiming ownership of the resources, the federal and provincial laws conflict with our thoughts about Aboriginal rights.

Further, the last couple of [Cheam] councils felt that there was a better way than fighting in the courts and having confrontations on the river. We felt that neither side is going to be leaving their country, so we have to start negotiating for a better path for all of us.

We have made positive steps in the right direction on both sides, and there will probably still be a few more struggles in the future. But if the government realizes that rather than having unilateral decisions from Ottawa, they go back to our first nations [sic] and work with our first nations [sic] people to try to create solutions that will be better for everybody, I think we could all advance in a good way. (Sru-Ets-Lan-Ough (Chief Douglas) in SCFO 2006, 15)

As recently as May 2003, relations between the DFO and Cheam were at an all-time low when Sru-Ets-Lan-Ough was attacked by DFO officers while operating gravel grader machinery near the Fraser River.

DFO enforcement officers illegally trespassed on Cheam and physically assaulted our Chief Councilor Sidney Douglas. DFO enforcement officers choked, pepper sprayed and handcuffed our leader. A standoff ensued until the DFO promised that the offending officers will not interact with our members and that the RCMP seizes DFO's truck. (Milne 2003, 1)

Disputes arise over issues such as when Cheam members have been allowed to fish by the DFO, for what duration, and by what methods. The Cheam strongly maintain that they have a right to fish, which is constitutionally protected under Section 35 of the *Constitution Act, 1982*. Following the *Sparrow* decision of 1990, the DFO was legally to acknowledge and accommodate the pre-existing Aboriginal right to fish (*Sparrow* 1990). Furthermore, this inherent right to fish marked the end of the Indian food fishery that had long been the regulation under which First Nations were permitted to fish in BC.

What had been the Indian food fishery - that vanished. I tried to tell many people that the Indian food fishery is done. It's gone; it no longer exists. People can get confused but really what the Indian food fishery was, it was the section of the BC Fisheries general regulations. It described the Indian food fishery in the regulation. In a nutshell the fishery in the regulation said that an Indian (you had to be a status Indian) had nothing to do with Aboriginal rights at that juncture or before May of 1990.

DFO could issue some food fish permits to any status Indian so that that status Indian could catch fish for, for himself or herself and the immediate family. No one else. (Crey interview 2007)

The DFO set up the Aboriginal Fishery Strategy (AFS) to more fully include First Nations. As described by the DFO,

The AFS is applicable to areas where DFO manages the fishery and where land claims settlements have not already put a fisheries management regime in place. The AFS encourages and enables the establishment of relationships with

Aboriginal people, provides a mechanism for DFO to address its legal obligations and promotes stable and orderly fisheries management for the benefit of all Canadians. It is also in keeping with the fact that courts have repeatedly encouraged governments and First Nations to resolve issues related to Aboriginal rights by negotiation rather than litigation. (DFO 2006a, n.p.)

The relationship between the Cheam, the DFO and other fisheries sectors has been strained for decades, but has reached particular tension in the 1990s. The relationships on the lower Fraser River have been identified as some of the worst in the country by an intergovernmental panel.

In addition to resource issues for Fraser River salmon, there are also long-standing and serious problems between the harvesters. Uncertainty over allocation has resulted in an antagonistic and sometimes confrontational relationship between Aboriginals and non-Aboriginals, which has made resource management more complex and difficult. Providing stability and certainty of access is a key requirement to reforming Fraser River fisheries. All participants, including the DFO, must work together to ensure conservation, sustainability of fisheries, and security of access. Nowhere else in British Columbia have the problems been so severe. (Government of Canada 2005, n.p.)

The lack of recognition for the rights of Cheam fishers to fish by their preferred methods, and with sufficient openings to meet their needs, is at the root of these conflicts.

Allocation and access issues concerning Fraser River sockeye issues have been particularly contentious, and it is imperative that the Department work with First Nations and other stakeholders to address these concerns, to promote cooperation amongst harvesters and to support long-term stability and fairness. (Government of Canada 2005, n.p.)

Despite the 1990 *Sparrow* decision, the DFO continued to view fisheries and the Aboriginal fishery in much the same way as they had prior to 1990. This was another source of friction for the Fraser First Nations, including the Cheam.

May of 1990 rolled around and the *Sparrow* decision came down. And it sent shock waves throughout the department (DFO) into the West Coast salmon fishery and in fact any fishery on either three coasts. The Arctic coast, the Atlantic coast and the Pacific coast. It was because the Indian people, or Aboriginal people, were now found to have a constitutional right to fish.

And I won't go into all the details but basically the DFO was told: 'look - the food fishery - that regulation that you had, forget it. That's history now. It's over and done with. These people enjoy a constitutionally protected right to fish. Tell you what. There's a few more things we'll tell you. You can't be arbitrary in how you manage your fishery that people enjoy a right to now. You have to talk to them. You cannot unilaterally impose fishing times, fishing methods, and fishing quotas on them. You can't do that unilaterally. You cannot be that arbitrary any more. Do you understand?'

So DFO was in shock. Because they actually now had to talk to Indian leaders and spokesmen in the aboriginal fishing community. (Now I don't mean the commercial aboriginal fishery). (Crey interview 2007)

The DFO laid over a dozen charges against Cheam fishers relating to incidents in 2002, 2004 and 2005. In January 2007, the multiple charges against Cheam fishers were stayed. In part, this court decision supported the Cheam's right to be consulted and accommodated as part of fishery planning exercises (Cheam First Nation 2007). Dealing with the 2004 and 2005 charges, the question was raised about a lack of disclosure of relevant documents to do with consultation and accommodation of Aboriginal rights. The Crown had refused to provide relevant documentation until a later stage in the trial. Provincial court judge Kenneth Skilnick found a breach of the Crown's constitutional obligations:

I do not accept the Crown's submission that the requested disclosure is irrelevant until the trial has reached the second stage. The authorities cited earlier make it clear that consultation is a lie issue [sic] once a defence of an Aboriginal right has an air of reality, as it certainly does in this case. The Crown is aware of the existence of this issue from the beginning. It has knowledge, or at least the ability to acquire knowledge necessary to assess the evidence on consultation and accommodation.

By putting the defence in a position where it cannot access this evidence until after the first stage of the trial, the playing field is not level. I am of the view that, the Crown has not met its disclosure obligation as set out in *Stinchcombe*⁸⁰. I am of the view that the only clear cause of action to address these circumstances is to remedy these breaches with a judicial stay of proceedings. (Cheam Indian Band 2007, 2)

4.1.4.3. Missing Fish

In 2004, the DFO reported that there were fish missing from their expected count of returning salmon in the Upper Fraser (Fredette interview 2007). There was a review of the fishery for that year and much debate ensued about the whereabouts of the missing fish. Some suspected that the DFO predictions were inaccurate and over-predicted, others suspected the Aboriginal fishers, and particularly the Cheam, were taking more than their allowable catch. "There has been a lot of speculation in the media about us, particularly the Cheam, killing off some of the fish, but it just isn't the case" (Chester Douglas interview 2007). In the 2004 Parliamentary Committee review, the Cheam and other First Nations who were using set gill nets and drift gill nets were accused of being the primary cause of the 1.8 million missing salmon that year.

The Cheam First Nation band have been illegally drift netting for salmon stocks from May through September for the past four seasons, with the bulk of the drift

⁸⁰ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 ("*Stinchcombe*")

net activity happening from mid- July through mid-September. This very effective and deadly method has the ability to take large numbers of fish in a very short timeframe with no consideration to threatened species of concern or weak salmon returns. (Nootebos⁸¹ in Standing Committee on Fisheries and Oceans 2004, 13)

The accusations against the Cheam were strong, with the editor of the *Maple Ridge News*, a local newspaper in the Fraser River Valley, calling the drift net fishery a “curtain of death” on the Fraser River (Fletcher 2004). The Cheam decided that their policy of not working collaboratively with the DFO was becoming too costly and not getting them where they needed to be in terms of access to the fishery (Fredette interview 2007; Sru-Ets-Lan-Ough (Chief Douglas) interview 2007).

We were getting the blame for a lot of the ‘missing fish’. So we needed to do the drift study to show that we weren’t catching all the fish. We know we weren’t catching all the fish that were going ‘missing’ according to DFO. So we tried to develop a way to show that we weren’t. I don’t know, some of our band members were against it at the time. But our Council felt that it was a major way that our people could contribute to the data analysis and that people needed to know. (Sru-Ets-Lan-Ough (Chief Douglas) interview 2007)

Increased collaboration and transparency would help the Cheam to quell the accusations that their drift net fishing and/or alleged illegal fishing above their Food, Social and Ceremonial (FSC) permits was the cause of the so-called missing salmon. The drift net study was intended to show that these accusations were untrue (Chester Douglas interview 2007).

⁸¹ Tony Nootebos was identified as the Director, Fraser Valley Angling Guides Association.

4.1.4.4. Relations with Other Fishing Sectors

There are three primary fisheries sectors in British Columbia that are offered openings permitted by the DFO.⁸² The first priority for fish allocation, after conservation, should be, but is not always, openings for First Nations' food, social and ceremonial (FSC) fisheries as required by their constitutional right to fish. Second, the DFO will often open a recreational or "sport" catch-and-release fishery if returning numbers are expected to be low. And finally, full sport and commercial openings will be permitted. There are just over two thousand commercial licences for Pacific salmon issued by the DFO, for three different gear types, in numerous Pacific region areas (DFO 2006b).

Cheam fishers see an unfairness in how the sport fishers are treated compared to Aboriginal fishers. For instance, when a vulnerable fishery is closed to Aboriginal and commercial fishing, such as the Fraser River sockeye fishery was closed in summer 2007, there will nonetheless often be openings for a catch-and-release sport fishery. But the methods used for sport fishing for catch-and-release are not necessarily benign. A hooked fish may die or bleed and not make it to its destination, despite being released. Furthermore, it is the impression of some Cheam that the regulations on the types of hooks (supposed to be barbless) and the amount of fish caught are not enforced as strongly as the Aboriginal fishery. Cheam fisherman Isaac Aleck explains.

⁸² There are three categories of fishery openings in Canada: Aboriginal, Commercial and Recreational. Each opening has restrictions of fishing method, duration and total allowable catch imposed by the federal Department of Fisheries and Oceans. For a full treatment of the history and policy surrounding the British Columbia fishery, see Douglas Harris's *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia* (2008).

Isaac: I've had sportsmen tell me they're lucky if they get stopped once every five years.

Andrea: Wow. And you probably get stopped, how many times a year?

Friend: (Every day we're out there).

Isaac: You know, it used to be the only time they did a lot of patrols was when the native fishery was out and then they targeted natives, they didn't target the sportsmen. Only when they get embarrassed did they do that one year. '97 I think? Well I was at a meeting and I had run into the RDG [regional director general of DFO] and I was squawking' about how selective their enforcement was and I embarrassed her. And she come down, in our area and I think there was about 50 charges laid.

Andrea: On the sports side of things... (Aleck interview 2007)

According to Aleck, this enforcement of the sport fishery was one of the only times the DFO enforcement appeared to be directed at that sector, rather than exclusively at the native fishery. The enforcement directed at the First Nations, coupled with the lack of access for Aboriginal fisheries, has created much of the tension on the river.

One of the biggest issues that our people used to face is the fact that our people would be closed to our fishery, yet our neighbouring sectors, recreational and commercial, were allowed to target it. Other First Nations outside of our area were also allowed to target the same fish that we were not.

Over the years, you can go back and look at how many times the Stó:lō people were closed off to the fishery, yet all the fisheries around them remained in operation. That started to create a lot of confrontation, because our people were getting frustrated at being blocked out of the waters and not being able to access our food and fish to sustain our people. (Sru-Ets-Lan-Ough (Chief Douglas) in *Evidence for the Standing Committee on Fisheries and Oceans 2006*)

Relationships between the Stó:lō and the sport and commercial fishing sectors are also improving (see Section 4.4 for more). Specifically, the Cheam initiated and organized a barbeque event inviting recreational and commercial fishermen to talk about the studies and “dispel a lot of the misinformation that everybody had in mind and how they were conducting themselves” (Chester Douglas interview 2007).

4.1.5. Developing the Drift Net Study

It was clear to the Cheam, and increasingly to the DFO, that the Cheam needed and planned to continue drift net fishing on the Fraser. Chester Douglas indicated that the *Delgamuukw* decision had influenced this case because it “opened up the big idea of consultation and affirmed that it had to be done” and in this situation of repeated court actions “something different had to be put in place” (Chester Douglas interview 2007).

Court actions were becoming costly on both sides, for both tax payers and Cheam members (Chester Douglas interview 2007). In order to avoid another costly court action, the Cheam decided to work with the DFO and demonstrate to the DFO that their manual method of drift-net fishing had a far lower catch per unit effort⁸³ than large seine net fishing (Sru-Ets-Lan-Ough interview 2007), and possibly lower than the set net fishing on which their FSC openings were based (Milne interview 2007). Furthermore, the Cheam suspect that their manual drift net fishing had a high number of drop outs⁸⁴

⁸³ Catch per unit effort refers to the catch per time period (usually an hour) of opening.

⁸⁴ Drop outs are those fish that approach the drift net, sense the presence of a barrier, and swim under or around the drift net. This drop out was measured with Didson underwater video during studies in 2006.

particularly compared to seine net fishing in the lower Fraser, as well as a lower by-catch⁸⁵ and lower physical effects on the by-catch than set net fishing (Fredette interview 2007; Milne interview 2007). In 2005, the Cheam and other Stó:lō Nations began to work with the DFO to set up studies to research the amount of catch per unit effort during open periods, the drop out, the by-catch and the physical effects on the by-catch (Fredette Interview 2007).

In 2005, the Standing Committee⁸⁶ for the Government of Canada presented twelve recommendations in its response to the Second Report of the Standing Committee on Fisheries and Oceans (Government of Canada 2005). The drift net study was supported by the Government of Canada. However, the studies themselves did not go far enough in resolving the situation. Although the first recommendations dealt with increased enforcement on the Fraser, enforcement management with law enforcement background, and a reorganization of the Conservation and Protection (enforcement) reporting structure, the fourth recommendation focused on drift net fishing above the Mission Bridge. The recommendation by the Standing Committee was as follows:

... the Department of Fisheries and Oceans undertake immediately a study on the impacts of drift gillnets and set gillnets in the Fraser River on the mortality of migrating salmon. In particular, the so-called “drop rate” and any compounding effects of elevated water temperature should be studied. In the interim, the Department should disallow the use of drift gillnets above the Mission bridge pending the findings of the study. (Government of Canada 2005, np.)

⁸⁵ By-catch refers to the fish of non-targeted species caught inadvertently and then released. For example, in a Chum Salmon opening, sockeye may be part of a by-catch.

⁸⁶ Standing Committees are generally made up of elected Members of Parliament for Canada.

While the recommendation for studies was a welcome one, the additional recommendation to disallow drift net fishing in the interim was surprising as it would be in contravention of *R. v. Sparrow* (Sparrow 1990). In recognition of this contravention, The DFO disagreed with the Standing Committee and issued the following direction:

DFO does not accept the position that drift gillnets are fundamentally bad and does not agree with the recommendation for an immediate ban on the use of drift gillnets above Mission. Pending completion of the 2005 exploratory study, DFO will continue to assess, on a case- by-case basis, whether the use of drift gillnets can be authorized in Aboriginal fisheries above the Mission bridge. (Government of Canada 2005, n.p.)

The DFO proceeded to hire consultants to design and set up a study to investigate the issues around manual drift netting. Unfortunately, the 2005 drift net studies that resulted from these recommendations were designed in an uncollaborative and unsatisfactory manner to the Cheam. “A lot of decisions were made that didn’t really represent our fishery” (Fredette interview 2007). In the design of the 2005 study, Cheam fishers were excluded from the research for, what the Cheam perceived to be, personal relationship issues. As described by fisherman and elder Isaac Aleck:

Isaac: When that drift study first come out they had no clue as to how to hang it [the net] for the river, they had no clue about colour or weight of net, or lead lines. They didn’t have no clue about depth. Two years ago they had one [a study] and I, because of all my years on the river, I thought I’d fit in someplace. You know, either as a monitor or a fisherman or a sampler, but I was blacklisted.

Andrea: Why?

Isaac: Because they wanted ‘yes people’. Ones they didn’t know and ones that don’t have a record of...

Andrea: Having an opinion? or knowledge?

Isaac: Having been fighting them. (Aleck interview 2007)

The inclusion of these fishers, and the setting aside of differences, was critical to the adequate design and running of the study. “[The DFO] need to put those differences aside because they’re not going to change our membership. These are our fishermen whether they like it or not. And these are the ones that are taking part in the fishery” (Fredette interview 2007).

Martha: Because they [Cheam fishers] were the ones that we were assessing. They [DFO] were assessing our driftnet fishery for communal purposes so we can manage that kind of fishery. Taking people - hiring them and they don’t even fish in our fishery anymore.

Andrea: Comparing apples to oranges.

Martha: You’re not getting accurate information. (Fredette interview 2007)

The Cheam decided not to participate in the 2005 studies and as a result the DFO gathered unsatisfactory information due to a number of factors: inadequate drift reaches and locations, inexperienced drift net fishers, moving from “site to site” and getting “inconsistent results”, problems handling the fish, and using the DFO-supplied drift nets that were too heavy and not adequate (Aleck interview 2007; Chester Douglas interview 2007; Fredette interview 2007; Milne interview 2007).

Based on these past relationships, finally reaching collaboration between the two parties was difficult. The Cheam Chief and Council faced strong opposition within the

community for working with the DFO (Milne interview 2007; Sru-Ets-Lan-Ough interview 2007). However, due to the lack of success in the 2005 drift study, the DFO realized they needed to include the Cheam fishers in order to get accurate information. “[A]fter the First year ... they didn’t have a successful year. And the idea of the driftnet study was to assess above Mission driftnet fishery which was mainly Cheam. They needed to be involved here” (Fredette interview 2007).

New Approach

The DFO then engaged the Cheam in the planning of the 2006 studies with a renewed, collaborative approach. The consultant who had been hired to plan the 2005 study was released, and a new study and terms were designed collaboratively (Fredette interview 2007; Milne interview 2007). The design of the study and the equipment and fishers used were planned to be more reflective of Cheam actual practices, therefore many Cheam decided to participate in the research.

We just sat down and talked about why the first year didn’t work out and what could change. And see if they were willing to work with us with these changes. And so we were able to come to an agreement that if we were to do a study it needed to represent our fishery regardless of the feelings towards some of the people in our community. (Fredette interview 2007)

Results of the studies in 2006 were being published in draft at the time of writing, but early indications suggested that location along the river and method of fishing had a great impact on the number of fish being caught. In 2006 the study included the Yale

First Nation upstream of the Cheam fishery, which was evaluated against the Cheam fishery.

They [Yale] definitely caught a lot more fish in their set net test fishery than we did in our drift. On a daily [basis] they were catching about 300 [units]. On a study daily we were catching maybe 150. (Fredette Interview 2007)

4.1.5.1. Participation and Decision Making Fundamentals

The Cheam wanted meaningful and significant participation in the planning and decision-making around the drift net test fishery. They felt that since the study was intended to test Cheam catch per unit effort, the test fishery should involve nets and gear, fishers, and locations that truly represented the Cheam drift net fishery. They stood firm in their determination to attain meaningful participation, and decided not to participate in the 2005 study since the DFO and their hired consultant did not consider the Cheam reality sufficiently. The decision-making authority in 2005 was not shared, nor did the Cheam think that the results would be credible (Chester Douglas interview 2007).

In the 2005 case, it was not the basic elements of the meetings that Cheam found insufficient (e.g., location and participants). Their objection was that their level of participation and authority was not meaningful, and respect for their fishing methods and locations was not incorporated.

In 2006, Cheam had much more participation and leadership in the planning of the drift net study. Most of the meetings between Cheam and the DFO were held at Cheam (Chester Douglas interview 2007), although this was not raised as a significant issue by any of the research participants. The study was planned and funded for one year. A longer term of funding would be more meaningful to assess the effectiveness of drifting (Chief Sru-Ets-Lan-Ough interview 2007) but ultimately, the DFO had final approval authority for the format and budget for the study.

While the reasons behind particular goals may be different, both parties (the DFO and Cheam) had some shared goals in conducting this drift net test fishery. Most significantly, both were interested in determining the actual catch per unit effort of the drift net fishing in order to more effectively understand and manage the fishery.

This case was not without controversy within the community, however. The research participants suggested by Chief Sru-Ets-Lan-Ough represented a mix of Cheam members, both those supportive and those skeptical of working with the DFO on the drift net study. There were some Cheam community members and fishers who refused to participate and others who participated reluctantly. Some members of Cheam protested working with the DFO to provide counts of their fish because they felt this was an infringement on their rights.

We only did it [participated in the study] one year and we were supposed to be involved in the year before but there were a few of us protested against [it] because it would give our numbers. The ones that agreed with it fished last year, gave their

numbers and I think they got 80 percent compliance about, with the regulations and fishing. The other members still went [fishing] under Section 35 [of the *Constitution Act, 1982*]. (Rick Quipp 2007)

4.1.6. Themes in the Cheam Case

The Cheam had a number of reasons for engaging with the DFO on the drift net studies. First, they want to exercise their title to the land and the management responsibilities that flow from that title. The study, monitoring, and participation in the fishery were seen as a means for participating in management. Also, Chief Sru-Ets-Lan-Ough recognized that if Cheam want to manage their fishery sustainably and take on more of that management responsibility, they need to build the internal capacity to handle that management. Training monitors and biologists to conduct the study alongside the DFO biologists was a means of increasing their internal technical capacity. Ultimately, the confrontations and poor relationship with the DFO, and to some extent the general non-Aboriginal public, were starting to take a financial and emotional toll on the Cheam.

4.1.6.1. Motivation for Collaboration

There were a number of motivating factors that led the Cheam and the DFO to eventually work together and begin to improve relations. The mere practicality of reducing the financial burden of court cases was an often repeated motivating factor, for not only the Cheam but to the DFO as well. Cheam were motivated to improve the public and the DFO's understanding of the impacts of their drifting, due to the ongoing accusations of over fishing and missing fish. And finally there was an assumption on

the part of some Cheam fishers that a deeper recognition of First Nations' right to fish was also a motivator.

That's how come the second year they wanted us in on it because our band pushes for our rights and we won't back down.

So we just tell them ' No. You're wrong.' They tried charging us and we just tell 'em they're infringing on our Aboriginal rights and the conservation officers are officers of Canada and it's their job to support the laws not selectively pick which laws they want to enforce. (Aleck interview 2007)

Sru-Ets-Lan-Ough describes the impetus for the collaborative studies.

Before we got into the drift study and the monitoring programs, we were more or less on a confrontational basis. With the change in leadership, we felt that we needed to go in a different direction because confrontation was costing our community too much. We needed to do something different, rather than let the lawyers get rich from it. And DFO could see that it was costing them too much money. We were in court five days at a time and they were in court five days at a time. And that's much harder because two or three officers have to stay two or three days. They didn't know when they would get called up to be a witness. It was tying up officer time plus lawyer time for them. It would cost us man time and lawyer time.

Andrea: It's unfortunate that confrontation and the results of court cases that bring you together, but at least it was a reason to try and make things work, I guess.

Sru-Ets-Lan-Ough: Ya. Well, we could see with the confrontation that somebody was going to get hurt. If something happened to one of our guys, I mean DFO is allowed to carry firearms, and if something was to happen to our guys, our guys might get over the limit as well. It's a natural reaction. (interview 2007)

4.1.6.2. Relationships and Respect

*New institutional arrangements need to be considered
to address the serious relationship issues.*

(Government of Canada 2005

referring to inter-sector relationships in the Lower Fraser fishery)

The slowly improving relationships between the Cheam and the DFO resulted in increased interactions between the two groups and ultimately the Cheam gained much deserved respect from the non-Aboriginal participants. Improved relations, decreased tension, and increased respect were key factors in the success of the drift net study case. A key objective of conducting the drift net study together was to further improve relations between the two groups.

In addition to the scientific objectives of the project, this study is intended to improve the working relationship between DFO and Lower Fraser First Nations, and to enhance efforts to increase capacity within Lower Fraser First Nations communities. (DFO 2005a, n.p.)

Relations between the Cheam and the DFO began to improve in 2005 and 2006. The Cheam were invited to address the DFO's new Conservation and Protection recruits in 2006. The Cheam had a chance "to explain where [they] were coming from with the fishery... and I think that really made a difference between enforcement and protection staff and our fishermen" (Chester Douglas interview 2007). Cheam case participants indicated that the cooperation through studies, monitoring, and the signing of safety and enforcement agreements had improved the relationship between the Cheam and the DFO. Moreover, empowering the Cheam to create their own annual fishing plans,

create more flexible processes for ceremonial fishery approvals, and conduct their own monitoring, has enabled the Cheam government to encourage Cheam fishers to comply with fishing plans, which reduces tension that occurs when enforcement action is taken by the DFO.

An example of improved relations between the DFO and Cheam is their cooperation on the monitoring of the salmon fishery. This includes counting and recording the catch during openings. It is interesting to note that in 2006 the Government of Canada Standing Committee on Fisheries and Oceans repeatedly questioned the ability of Cheam to monitor their own fishery, something that seems offensive given that non-Aboriginal fishers are able to provide their own counts and information to the DFO. Furthermore, cases have been described where Western science has led to an overestimation of fish and wildlife resources (e.g., Nadasdy 2003). For instance, in the Nisga'a fishery fishwheel program Harry Nyce and his colleagues showed that the DFO had miscalculated (overestimated) the number of salmon by as much as 300 percent because the DFO counted the fish as they entered each stream, whereas the fish would often go back and forth into the same stream several times.⁸⁷ With the fish wheel capture method, along with fish tagging and specialized computer modelling, the Nisga'a were able to eliminate the duplicate counting intrinsic to the DFO method.

The computer modelling tool developed by the Nisga'a accounts for the escapement requirements for the different sockeye stock mix in northern B.C. and Alaska. The results were so impressive that the model is now being used to

⁸⁷ Personal communication, Nancy Mackin 2007.

assist Canada and the U.S. in implementing the Canada/U.S. Salmon Treaty.
(INAC 2004? n.p.)

The Nisga'a fisheries management program has gained significant respect with the DFO and fisheries biologists (Corsiglia and Snively 1997). Respect for knowledge and methods is often at the foundation of improved cross-cultural relationships. However, First Nations are typically left to defend the integrity and applicability of Indigenous Knowledge and management methods. When questioned by Member of Parliament (Conservative Party Member) Mr. Randy Kamp, Srug-ets-Lan-Ough was left to defend the honesty and effectiveness of their monitoring and stewardship program.

As far as encountering infractions goes, there were infractions on the part of some individuals. What the monitors do is contact our fishery coordinator and the council, and all we do is deliver the message to the violators that this is not part of our agreement and that we can't support them in that activity. If they were fishing outside an authorized fishery, we would deliver the information that we would not support them financially or legally if they were charged for that fishing. They would have to suffer the consequences.

And just in addition to that, this year I think there were only going to be three to five charges laid, whereas in the past there have been anywhere from 40 to 100 or even 150 charges laid on an annual basis for fishing infractions. (Chief Douglas in SCOF 2006)

Eventually, the DFO came to the realization that their relationship with the Cheam had to improve, the Cheam themselves decided that a better relationship with the DFO would be beneficial for their community.

Cheam has taken a turn to saying we want to work with the fishery despite this bias, corruption and [saying it's our] fault. We're going to have to keep moving forward and building on relationships, and if you want to point your finger at us and say we took the fish or whatever, we're just going to keep moving forward

and we're going to prove you wrong that we're not the problem here, that there's a number of different things that are happening. And everybody needs to start taking accountability for that. (Fredette interview 2007)

The drift net study was essentially co-designed by the DFO and the Cheam. "We had a big part in designing the program. Saul Milne led the development of it ... And we had discussions with our title and rights department as to what should be taking place" (Chester Douglas interview 2007).

Relationships continue to build and strengthen between the DFO and the Cheam.

When referring to the growth in the relationship, former Councillor Chester Douglas stated: "[w]e've made strides in trust and respect ... and co-operation in the last couple of years" through these studies. These improved relations are good for the Cheam community and for the DFO. While the studies "quelled a lot of the radicals out there that would make assumptions and portray their assumptions as fact," there is still a need for ongoing and "respectful dialogue" particularly with the other fishing sectors (Chester Douglas interview 2007).

These respectful discussions also included the DFO integrating and respecting the local and Indigenous Knowledge of elder fishermen in the Cheam community. Interviews were conducted with some older fishermen, and that knowledge was incorporated into the design of the drift net study for 2006 (Chester Douglas interview 2007). This local knowledge was also used to convince the DFO to negotiate a real fishing plan for the Cheam that included drift netting.

4.1.6.3. Aboriginal Rights and Responsibilities

A number of Cheam research participants referred to their strong desire to participate more meaningfully in the direction and management of the Fraser River salmon fishery. This desire to participate meaningfully is supported by their constitutionally protected Aboriginal right to fish. Without sustainable salmon fishery management, the Cheam's Aboriginal right to fish will be less and less able to be exercised.

The presence of DFO personnel working with Cheam biologists seems to represent some recognition that Cheam have a right to participate in the management of the fishery. What this means as far as a deeper recognition of Cheam's Aboriginal title on the part of the federal department is unclear.

Now how we resolve that [issue of Aboriginal rights] is very contentious and DFO has a dramatically different perspective than First Nations do about what those rights entail as far as a management prerogative. But despite all that I think there's a clear recognition within DFO that title and rights exist. (Milne interview 2007)

The following statement by the B.C. Assembly of First Nations eloquently describes both the importance of the fishery to the Cheam people and the Assembly's support of their right to fish. The statements supported the Cheam First Nation's Federal Court of Appeal case where they were attempting to overturn convictions against Cheam members who fished without a federal department opening for First Nations when, at that same time, a recreational fishery was opened. The appeal case revolves around whether the Cheam First Nation ought to be consulted with regards to fishery openings

in the marine environment when they, the Cheam, are not permitted openings on the Fraser River. The statement opening this declaration of solidarity clearly lays out the position of the Cheam and provides some foundation and context for the case study that follows in this research.

First Nations have occupied their territories since time immemorial and our relationships with the lands and resources of our territories form the foundation of our culture and identity, and...

our Title and Rights are recognized in the Constitution of Canada and re-affirmed by court decisions such as *Haida*, *Taku River Tlingit*, *Delgamuukw*, and *Sparrow*, and ...

the rulings of the Supreme Court of Canada require the governments of British Columbia and Canada to fulfill their duties to act honourably toward all First Nations through meaningful consultation and accommodation, and through good faith negotiations aimed at fair reconciliation of pre-existing Aboriginal sovereignty and asserted Crown sovereignty, and ...

Cheam Indian Band members were charged with various fishing offenses in July 2000 and were convicted by the Provincial Court, and ...

the Department of Fisheries allowed a Sport Fisheries opening in July 2000 but did not uphold the Honour of the Crown and failed to consult Cheam Indian Band, and ...

the Cheam Indian Band appealed the convictions to the British Columbia Supreme Court who set aside the convictions, and ...

the Crown appealed the British Columbia Supreme Court decision to the British Columbia Court of Appeal who restored the original Provincial Court convictions, and ...

the Cheam Indian Band will be seeking leave for appeal to the Supreme Court of Canada and must do so no later than July 2, 2007. (BCAFN 2007a)

The statement above clearly supports the Cheam's right to fish for their purposes and their right to be consulted about fisheries openings as a priority above, or at least alongside, recreational fishers.

The DFO has increasingly understood the need to recognize and accommodate this Aboriginal right to fish. The Supreme Court's *Sparrow* decision led to the development of the Aboriginal Fisheries Strategy (AFS) in the 1990s. This DFO program "is applicable to areas where the DFO manages the fishery and where land claims settlements have not already put a fisheries management regime in place" (DFO 2005b, n.p.).

4.1.6.4. Recognition of Sustainable Values

With recognition of the Cheam's knowledge, ability and rights to manage their fishery could also come an improvement in the sustainability of the fishery.

(Milne interview 2007)

The Cheam have often been accused of severe over-fishing by non-Aboriginal fishers. Increasing the involvement of Cheam members in the management of their own fishery, alongside collaborative studies with the DFO, has enabled the Cheam to clearly state that their aim is to fish and manage a sustainable Cheam salmon fishery.

We take what we need. We don't see a need to have great wealth. Our wealth is within our family... We would manage that fishery in the same manner that it was managed traditionally.

My vision ... what I would like to see happen, is just seeing the different Nations actually coming together as one Nation and taking responsibility for that fishery and implementing policy, working on habitat together. You know, having strong voices at that fishing table, that say, 'Okay, we as a Nation are not going to allow corporate or bureaucratic corruption in the fisheries. We're here to protect the fishery'. (Fredette interview 2007)

Ongoing fisheries management by the Cheam alongside the DFO will serve to increase understanding on the part of DFO that the Cheam are deeply connected to the fishery and committed to protecting its sustainability.

4.1.6.5. Capacity Building Leading to More Independent Management

A number of the Cheam interview participants mentioned that a motivation behind collaborating with the DFO on the studies was to slowly build the internal Cheam capacity to manage their fishery and participate in the management of the Fraser fishery more generally. This theme was evident in Saul Milne's description of how progressively gaining management authority will incrementally allow the Cheam to exercise their rights over their territory.

Saul: So, we talked before about kind of a 'light switch on and off' for exercising title and rights. So, some folks who may be more in the classic line of recognition have asked for 100% recognition of rights and title immediately and they're making good arguments for it. Sid [Chief Douglas] has this vision in his mind that if we could get monitoring done, and that would be kind of 'one plank out onto the river'.

Andrea: Right.

Saul: And that successively after that that we would have other planks. So habitat monitoring around the river would be added, not just catch monitoring any more. And then there would be habitat monitoring outside of the river....

Andrea: Mm hm.

Saul: And then you consider continuing to build from our views, from our foundation, the capacity to deal with other fisheries-related management issues. ... and that every time you build one of these planks that you would use that as a foundation to move off and create some more current comprehensive management.

Andrea: Right.

Saul: So this is maybe a different perspective on how you obtain recognition of your title and rights rather than asking the department, or the governments in this case, to recognize 100% that we have title and all the rights that there are, it entailed rather than you were incrementally [gaining management capacity and authority]. (Milne interview 2007)

4.2. Hupačasath First Nation

4.2.1. Historical and Political Context

Since time immemorial the Hupačasath have lived on the west side of Vancouver Island, British Columbia in the Port Alberni Valley. They have managed their land resources sustainably (Hupačasath 2006). Their Nation has never ceded title to their territory and has stated publicly that they will not do so through any treaty or other agreement (Hupačasath 2006). The Hupačasath are a member nation of the Nuu-chah-nulth Tribal Council (NTC). As described by the NTC: "each Nuu-chah-nulth First Nation includes several chiefly families, and most include what were once considered several separate local groups" (Nuu-chah-nulth TC 2006).

The Nuu-chah-nulth peoples were among the first Indigenous people on the northwest coast of the Pacific to come into contact with Europeans. Spain and Britain debated

over control of what was called Nootka Sound, in the Nuu-chah-nulth territory (see Section 2.1 for more on Nootka Convention history).

4.2.2. Contemporary Situation

Fourteen Nuu-chah-nulth First Nations are divided into three regions, making up the major part of the west side of Vancouver Island:

Northern Region: Ehattesaht, Ka:'yu:'k't'h'/Che:k'tles7et'h' (Kyuquot), Mowachat/
Muchalaht, and Nuchatlaht

Central Region: Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht, and Ucluelet

Southern Region: Ditidaht, Huu-ay-aht, Hupačasath, Tse-shaht, and Uchucklesaht

Five of these Nations created a treaty with Canada and the province of British Columbia under the Maa-nulth Treaty.⁸⁸ Four of the Nations signed the agreement: Uchucklesaht, Toquaht, Ucluelet, and Ka:'yu:'k't'h'/Che:k'tles7et'h' (Kyuquot). The fifth nation, the Huu-ay-aht are requesting changes to the treaty (that would currently require them to drop out of fisheries related litigation they are involved in together with the Nuu-chah-nulth) (Huu-ay-aht 2008). As of May 2008, the treaty was awaiting ratification by the federal government (see Maa-nulth website). Seven other NTC member Nations are

⁸⁸ See the Maa-nulth website (www.maanulth.ca) and Huu-ay-aht website (www.huuayaht.org) for more on the Maa-nulth treaty.

participating in the treaty process together. The Ditidaht are participating separately from other Nuu-chah-nulth, but partnering with the Pacheedaht.

The Hupačasath are participating in the British Columbia treaty process independently from the other Nuu-chah-nulth Nations. The Hupačasath traditional territory, as displayed in their maps, has overlaps with the Nuu-chah-nulth traditional territorial maps provided in the British Columbia Treaty Commission process, specifically in the area claimed as Tse-shaht territory (Chief Sayers interview 2007; Morrow 2008).

4.2.2.1.Land, Culture, and Values

The Hupačasath have clearly laid out their territorial boundaries and identified their interests in their land through a comprehensive Land Use Plan that can be viewed on the Hupačasath website (Hupačasath 2003). In this document they also outline their knowledge and the value they place on their land.

We as a First Nation in our territory know the balance of all life cycles, how they affect one another, and how to keep harmony and balance. We know how the environment used to be and we can recover and restore our territory's natural resources to what they once were. Our interest in the natural resources is not driven by economics, but by resource sustainability for all people of the lands. To be First Nations is to be part of the land, water, air and to respect it. (Hupačasath 2003, n.p.)

The Hupačasath describe their concepts and principles for sustainable resource management that include the following points: healthy people, strong culture, healthy environment, successful economy, and strong governance. Each of these principles

relates back to a holistic management approach to land use. The value the Hupačasath place on the land has spiritual and communal elements.

We will give back to mother earth the respect and sanctity she rightfully deserves.

We will make our lands, waters and air inviolable.

We will spiritually cleanse the lands that have already been violated.

We will take back our place as the rightful caretakers of our territory and far exceed the provincial and federal standards, for they are lax and inefficient.

(Hupačasath Treaty Main Table 1998 in Hupačasath 2003)

The comprehensive Land Use Plan led to a unique and highly advanced website that includes interactive maps based on sophisticated Geographical Information System (GIS) information. Developers and potential developers can easily use this information and the online referral tool to locate a potential project within the Hupačasath territory.

The Land Use Plan was conducted in two phases, completed in 2003 and 2006 respectively.

As their website explains, the Hupačasath have divided their territory into 29 Hupačasath Use Areas (28 land based areas and 1 marine based area) for land use planning purposes. They indicate that this list and the designations are not meant to imply that one area or use is more or less valuable to their Nation. All of the land and resources within their territory are important to sustain their Nation's way of life.

4.2.3. Case Description – Polaris Minerals

These partnerships have been widely acknowledged as groundbreaking agreements and as industry-best practices. The agreements are also being used as models by other corporations and First Nations communities.

(Polaris Minerals 2007)

Polaris approached the Hupačasath First Nation in 2000 to discuss their proposal for an aggregate materials quarry in the Hupačasath territory. The Hupačasath immediately let Polaris know that the gravel quarry is located in an area of overlap between the Ucluelet, Tse-shaht and Hupačasath Nations (Chief Sayers interview 2007).

Consequently, after some early meetings between the Hupačasath and Polaris, all three Nations were invited to participate in negotiations. In the end, Ucluelet and Hupačasath chose to participate and negotiate a partnership agreement. The Tse-shaht decided not to partner with Polaris, but rather maintain more of an arms-length governance role and receive royalties. In early 2007, a ten percent share of Eagle Rock was still being held in Trust for the Tse-shaht, should they choose to partner in the project.

The Hupačasath negotiated an agreement with Polaris Minerals Corporation that enabled the First Nation to purchase up to a twelve percent share in the joint venture company, Eagle Rock Aggregates, by using revenue from the production to purchase shares. In the agreement, it would take some years before the First Nations reached their share percentage and then reap financial profit benefits. In 25 years, the First

Nation was also allowed to double their share in the project (Chief Sayers interview 2007). An impact-benefits agreement was developed that created a community trust fund, or heritage fund, based on a small percentage of profits that would be used to fund community events, ventures, and needs.⁸⁹

Despite the somewhat low initial percentage position of the First Nations in the project (prior to them being able to amass or purchase their share of the joint venture) the negotiated agreement included provisions to include the First Nations in ongoing major decision-making.

We negotiated a very good agreement...and we had 10 major decisions, of which there needs to be unanimous consent. Two out of the 3 First Nations, and basically, the other First Nation [Tse-shaht] has not come in, so they would need both of us for any decision that would affect the environment, that would effect a major shift of the company, those kinds of issues [that are part of the ten major decision areas]. So, I think we negotiated a really good deal. (Chief Sayers interview 2007)

Polaris Minerals Corporation formed in 2000 and was led by President Marco Romero and other experienced members from the mining and financial sectors. Many of the company directors have participated in other mining companies at executive and management levels including Eldorado Gold Corporation, Canico Resource Corp, Placer Dome, and other large and small mining companies (see Polaris Minerals website).

⁸⁹ For every tonne of material sold, ten cents is put away in the heritage fund, so the fund could be anywhere from \$400,000 to \$600,000 per year (Chief Sayers interview 2007).

Prior to contacting with the Hupačasath, Polaris had done some preliminary work on the proposed project by means of site identification and pre-feasibility studies (Chief

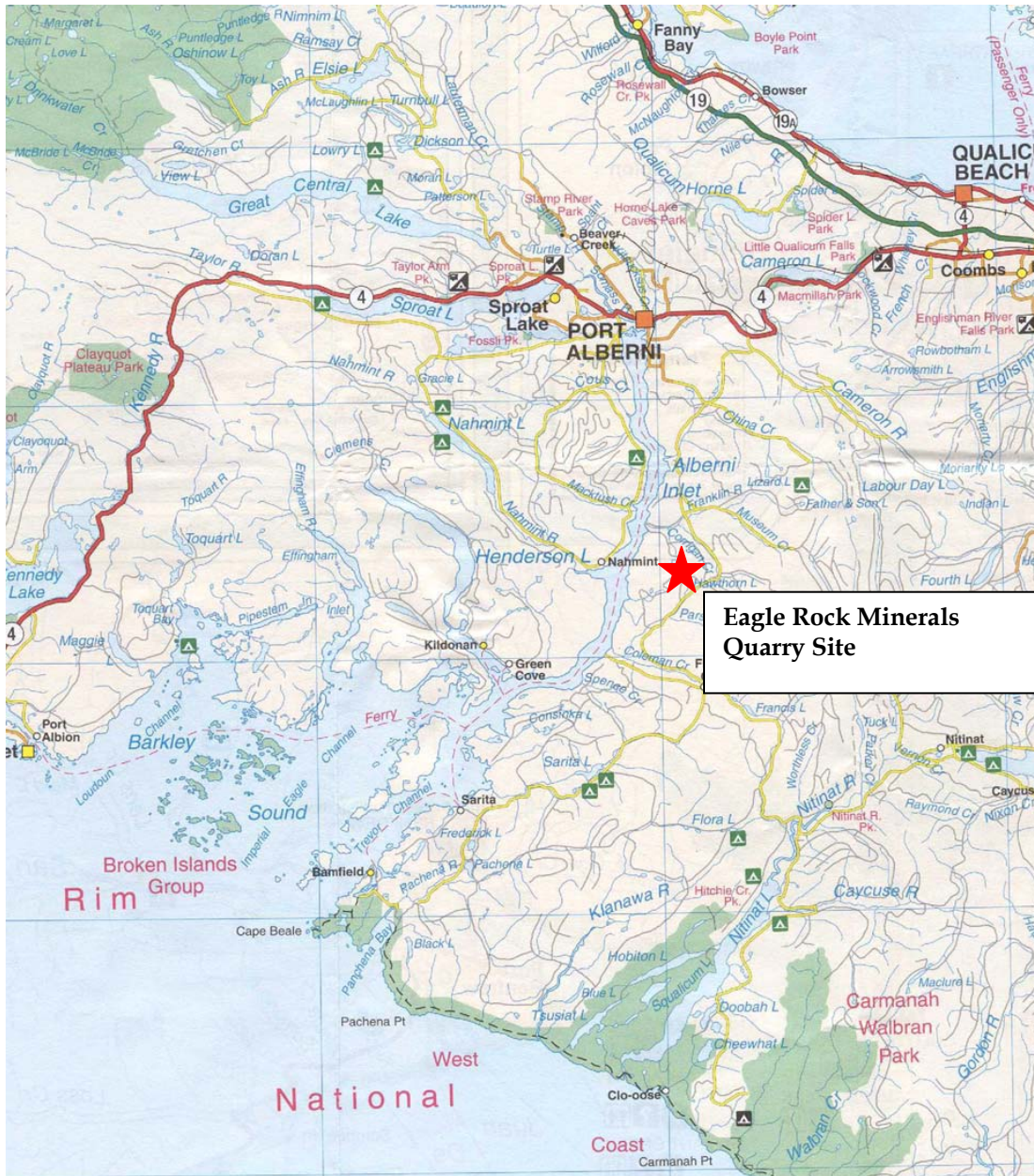


Figure 13. Location of Eagle Rock Quarry Site

(Adapted from AMEC 2005. Original © Polaris Minerals Corporation.)

Sayers interview 2007). The future quarry site is located in Alberni Inlet and has the potential to quarry aggregate for just over 100 years, providing a long-term industry for the area. Initial plans were to export the aggregate to construction markets in California. However, a reduction in highway construction and other market influences reduced the need for aggregate imports in that state (Chief Sayers interview 2007). The project was on hold at the time of writing.

The Hupačasath felt that Polaris came to them for input very early on in the process of their project development, which was beneficial to relationship building. Hupačasath leadership expressed their concerns about environmental impacts and impacts on Aboriginal rights and title very early on in the process of discussions with Polaris.

During the first meeting with Polaris '...I'm very clear with them... and I said okay "this is neat and this is nice", but for me the first question is how is it going to affect the environment? How will it affect our rights? And if we can get to those questions, well then I'll feel better about this'. (Chief Sayers interview 2007)

The relationship between Polaris and the Hupačasath government was built over time, and was shaped by all parties with a degree of flexibility for each others' interests. At the same time, the Hupačasath were very clear early on that they wanted to be an active partner in the project and company. They did not want to "just be sitting at the Board table and rubber stamping everything that was done... we wanted to learn about the company and what was going to go on" (Chief Sayers interview 2007).

4.2.3.1. Research Participants

I had the honour of working briefly with the Hupačasath in 2000, seeking their input and support for a potential wind energy development and the installation of a wind monitoring tower in their territory. At the time, I was working with Trevor Jones, who is now the Executive Director of the Hupačasath First Nation. When I contacted Trevor about this research, he suggested that the Polaris Minerals case or the China Creek small-hydro-electric power development project may represent some good elements of positive negotiation with First Nations governments and communities. He also raised the Vancouver Island Generation Project's federal Environmental Assessment process as another relatively good case for study.

Thanks to Trevor's introduction, I met with a number of Nation members in February 2007 to talk with them about their experiences with resource development in their territory, in particular the joint venture agreement they signed with Polaris Minerals to develop an aggregate mine site under the joint venture company name Eagle Rock Aggregates Inc.

I traveled to Nuuchahnulth territory in February 2007 to conduct the interviews.

Included in the individual interviews were:

- Chief Judith Sayers, elected Chief of the Hupačasath First Nation
- Trevor Jones, Executive Director, Hupačasath First Nation

- Aaron Hamilton, Economic Development Board and Youth Member, Hupačasath First Nation
- Sharean Van Volsen, elder, Hupačasath First Nation.

Executive Director Trevor Jones was the primary representative for the Hupačasath in the negotiations related to the case. Chief Judith Sayers played more of a leadership and spokesperson role for the joint venture Eagle Rock Aggregates. Community members were involved through various public events and information presentations sponsored by Polaris. A small team of people from Polaris, the participating First Nations, and lawyers were brought together to negotiate the joint venture deals. As Executive Director Trevor Jones describes:

We basically decided it was going to be myself, this lawyer and one representative from the Ucluelet First Nation. So the three of us, basically, entered into negotiations with Polaris who had their CFO and their president, Marco, there. So the five of us, often times the four of us because Ucluelet didn't show up all that regularly; we really kind of drove that. That was a negotiation that probably took about six months, meeting as a committee maybe three or four days a month. (Jones interview 2007)

4.2.4. Themes in the Hupačasath Case

4.2.4.1. Recognition of Rights and Title

Polaris recognized that the First Nations had rights fairly early on in their discussions with the Hupačasath, although the degree to which Polaris understood or respected these rights initially was unclear. Chief Sayers felt that they fully recognized Aboriginal

rights and title from the very beginning (Chief Sayers interview 2007), whereas Hupačasath Executive Director Trevor Jones felt the recognition was only a token.

Jones describes:

...it was real tough thing to get them [Polaris] to understand about title and title wasn't just mere assertion, but something that's a matter of fact in Aboriginal communities. And the connection and sense of stewardship of the resources, from a First Nations perspective was something that should be easily translated into real value. And the company was really coming from a much more principled place around title; they would recognize it but they wouldn't agree to compensate you for it. (Jones interview 2007)

Some recognition of title was ostensibly recognized by Polaris through the partnership agreement. The Hupačasath portion of the upfront development costs, up to a construction decision, were to be covered wholly by the private development partner, Polaris, costs that were expected to total one million dollars or more including permitting fees, tenure applications, marketing costs, engineering studies and preliminary designs. Having Polaris cover those costs was intended to recognize that the Hupačasath were essentially taking their title "and converting it in supporting the project and converting that interest into the partnership" (Jones interview 2007).

Chief Sayers said that Polaris' understanding of Aboriginal title and the strength of the Hupačasath claims grew and evolved as the project progressed.

I think that they [Polaris] had a conflict in their mind. They knew that they had to talk to First Nations, and... they knew we had rights, but I don't know that the acknowledgement came right up front, but pretty close, at the very beginning. Otherwise I don't think they would have worked with us the way they did.

But I think as they got to know both communities [Hupačasath and Ucluelet] a lot better, they really understood the strength of our title and claims. They learned a lot from us. And they just took this model and they just put it back into Orca [sand and gravel, a Polaris project with Kwakwaka'wakw First Nations]. (Chief Sayers interview 2007)

The community understood that this partnership agreement and the upfront capital investment in the project were done partly in recognition of Hupačasath title in their territory. However recognition of title may not have been Polaris' initial motivation for approaching the Hupačasath, but rather an expedient way to accommodate First Nation interests which would otherwise need to be addressed through consultation (Jones interview 2007). Most community members thought that this compensation was sufficient.

So what was good on Polaris' side is they said, 'well why don't we just include both of you' [Ucluelet and Hupačasath due to territorial overlap]. And Tse-shat, the other band up here, it's theirs too but they chose not to participate for whatever reason. [Polaris] they've tried how many times to get them included too. They say, 'look the door's open'.

And did it all the way up until the shareholder agreement and [said] this is your last crack and we have to proceed with it, with or without you. But you see all that, they, they've done out of their own, I guess you call it good will. (Hamilton interview 2007)

Although the impression left with the community was that Polaris was working with the Hupačasath and continuing to attempt to partner with the Tse-shaht out of good will, Polaris knew that the Province legally had to consult with the First Nations and

accommodate their interests. The construction of a partnership or joint venture which brings the First Nation onside provides the private developer some certainty of the potential for the project to be blocked and also of how far they would be accommodated. Therefore, Polaris' desire to partner with Tse-shaht may have been good will, but it can just as easily have been based on business sense or governmental requirements.

4.2.4.2. Relationships

The importance of the strong relationships built between Polaris representatives and the Hupačasath leadership was emphasized in the interviews. These relationships formed a level of trust that enabled the Hupačasath to feel comfortable working on the project. These relationships were quite dependent, at least initially, on the approach and attitude of Polaris' president, Marco Romero. I asked Chief Sayers if she thought that the relationships were wholly dependent on Marco for success and longevity.

Andrea: Could the relationship survive without the individual personalities or relationships do you think?

Chief Sayers: I think so. And that's one of the things we wanted to ensure. And we were clear about that, from the very beginning, we wanted to make sure that the agreements would carry on. I know that Ucluelet, at our negotiations, wanted to have some guarantee that Marco would be there forever, but we didn't want that. But they had that kind of close relationship. They saw Marco as the mover and shaker of all of this. But they can't guarantee that. (Chief Sayers interview 2007)

4.2.4.3.Capacity Support

One key element of the success of the negotiations between Hupačasath and Polaris was the ability of Chief Sayers to secure funding from Polaris for independent studies of the project and other agreements in an early Memorandum of Understanding (MOU) and at an early stage in the process.

I, at that point in time, negotiated a memorandum of understanding with them, about what they would do, that they would not enter into any business arrangements with anyone other than the First Nations of the territory this was on, because this is an area with triple overlap. (Chief Sayers interview 2007)

Funds were supplied for a consultant to review not only the environmental impacts of the proposed aggregate project, but to review the viability of the business proposal and also the backgrounds of personnel involved in the Polaris team.

4.2.4.4.Community Involvement

Another of the strong aspects of the Polaris negotiations was Polaris' willingness to meet with the community and try to form relationships. Hupačasath leadership also ensured there was a high level of communication with the community. While the close relationship with the community and the level of community incentives and encouragement provide through Polaris' engagement might have compromised some people's impartiality over the project (Jones interview 2007), others saw the engagement as only a positive.

So during the process of course, we brought the project to the community... at various times; our own community. We brought them any of the presentations. We put everybody on a bus, and we took them down to the site, and we showed

them around the site. We had special meetings, talking about the financial side of it, and the environmental side of it, and we tried to answer the questions or concerns as we were going through this project. Talking about jobs, what are the potential jobs. So we tried to hold as many as possible, not just with the public, but here as well, but as well as in Ucluelet. (Chief Sayers interview 2007)



Figure 14. Hupačasath Gathering House (Offices and Community Building)

(Image reprinted courtesy of the Hupačasath First Nation. © Hupačasath First Nation.)

Economic Development (Ec-Dev) Board member and youth member Aaron Hamilton, recognized that many people in the community, and some members of the Hupačasath Ec-Dev Board wished to have more involvement in the project. However, he sympathized with the proponent Polaris and the struggle to engage community members effectively. As part of Aaron's ongoing work with the HFN he also faced the challenge of drawing community members out to planning and decision-making sessions.

It kind of gets daunting and then, 'Oh man I got to go back and do this again' [repeated engagement efforts]. Well yes, they [community members] would want more involvement, but the more practical business side of me is saying 'well they did quite a bit already. How much more do you want from them?' Besides having them hold your hand all the way through, it shouldn't be what happens. (Hamilton interview 2007)

In general, the regular Council meetings and occasional luncheons and dinners put on by Polaris provided community members with opportunities to stay abreast of the project developments if they desired. Elder Sharean VanVolsen attended most of the meetings that related to Polaris and found the process quite satisfactory.

I believe [Polaris] put it out there that we would be involved and could just keep in touch with the community but we get community letters every month. And we get notices for meetings that the council think is important for us to attend. Which is nearly all meetings. They're very good that way.

So I feel, yes, that Eagle Rock kept us well informed of what was going on. (VanVolsen Interview 2007)

Like Aaron, Sharean also felt the onus was on community members to ensure that they participated in the meetings that were made available to them, and that the quality of the meetings and information offered was more than adequate.

You can't just totally ignore stuff that comes to your door or whatever the case is or not attend a meeting because I just don't feel like going to it. You know it's important. That's why they call meetings.

And then you have the audacity to come to the community meeting and stand up and feel you got an issue with what was said or what was done on behalf of Hupačasath members? (VanVolsen 2007)

4.2.4.5. Environmental Concerns and Traditional Use

At the outset of discussions with Polaris representatives, Chief Sayers was interested in the potential environmental impacts from an aggregate mine. Funding was provided for the Nation to hire an independent consultant, Golder Associates, to conduct a business and environmental feasibility review of the proposed project.

Golder came back with their report. They concluded that there was minimal environmental impact. The only question that still remains in my mind at this point in time is: what does it do to the landscape when you remove a hill? So we're talking about 117 years of aggregate being crushed and shipped off to California. What happens to the environment around it when you take down a hill? No one has been able to answer that question for me... does it increase the wind, does it increase the amount of drainage - what does it do? (Chief Sayers interview 2007)



Figure 15. Eagle Rock Quarry Site - View from the Water

(Image reprinted courtesy of the Polaris Minerals Corporation. © Polaris Minerals Corporation.)

It appears these questions were left unanswered at this stage of the project planning. However, in general, the site and project were seen to have low impact on Hupačasath interests. Polaris had identified the site prior to engaging the First Nations and then enabled and funded the Hupačasath and Ucluelet to study the site and project as part of the First Nations' due diligence.

We did a complete archeological assessment of the area, and there wasn't anything. I think just because of the location. There wasn't anything that we were concerned about... It was just one of those perfect sites that works for fisheries values, wildlife values... that kind of thing. (Chief Sayers interview 2007)

After the partnership agreements were signed, the joint venture company Eagle Rock Aggregates was required to go through the government required environmental assessment process for the project. It is as a part of this Environmental Assessment (EA) that consultation with First Nations is typically required by the government. The EA for this project was a screening level assessment and was expedited fairly quickly, in large part because the Hupačasath and Ucluelet were already partners in the development.

The Hupačasath used their extensive GIS (Geographic Information System) to access Traditional Use Study (TUS) information to investigate the potential impacts of the project site. Hupačasath Elder Sharean VanVolsen indicated that the working committee of family heads did not get involved in that end of the project. When asked how Elders were involved in the identification of important traditional use sites, she responded:

You know I'm not really sure. I know one of our elders went down there with council and with some other members and they walked around and they looked at everything there and my understanding is that they were all okay with it. (VanVolsen interview 2007)

This expedited process may have resulted in some increased infringement on Aboriginal rights, although they were likely minor in this case. For a larger

development case and a different site, such an expedited process could lead to more infringement on important areas.⁹⁰

The only thing I would say is that with respect to the land that I know they utilized their [Hupačasath] natural resource person to get the whole idea of what traditional use has been done there. We're just learning now that there's a few people that weren't interviewed through that process and if they would have done that at the beginning that would have helped a bit more to know exactly what went on there, what cultural significances were there.

So we've been finding out in the last while, cause we're redoing some of the TUS work, some people are saying... I'm not saying that's in general, but there's some sites that we didn't really know of in the past, say oh well that's used for medicine gathering and this is for cedar bark stripping, you know, bathing sites. So you know... I think with that work you can never do enough. Even if it takes phoning up every community member just to make sure. We're not that big. (Hamilton interview 2007)

Traditional Ecological Knowledge was not specifically incorporated into the Polaris project. However, the Hupačasath have incorporated Traditional Ecological Knowledge into other processes.

We applied some of our traditional knowledge in our land use plan standards, and how we operate our wood lots, and trying to replant cedars and those kinds of things. But that's kind of where we come from in any consultation is, kind of our knowledge of the land and how to manage things; it's kind of built into everything. (Chief Sayers interview 2007)

In a separate resource development case, the Hupačasath were able to prevent a wood lot being given a licence in an area that contained a sacred site within their traditional territory:

⁹⁰ Polaris first " tried to look in the area around Bella Coola [on the west coast of the BC mainland], but apparently there was an environmental group that wasn't going to let anything go ahead there, so they just backed out of that project and left that behind. And that was their first experience" (Chief Sayers interview 2007).

The Minister [of Forests] came to us one time, and they wanted to put a wood lot, and they told us where it was, and we said “You can’t put a wood lot around Devil’s Den”. It’s a sacred site. They did anyway. So they started a consultation process and of course we were fighting it the whole way, and they put out the call for tenders, everybody put it in, they were going to put it in, and they were going to make their choice, and it created quite a political stink. And then finally they changed district managers, and the new district manager came in and said ‘Well, you can’t do this’.

And so what they did they appointed their...they had an Aboriginal liaison at the time to come into our community; to see whether or not this was really true, whether it was a sacred site. So he came in and he interviewed a select number of people, and he went back and he said ‘Yes, this is a sacred site, you cannot put a wood lot around here, around this area’.

And you know, that’s the first district manager that’s listened to us. [The previous manager] could have just left this piece out, found another little piece of the forest. (Chief Sayers interview 2007)

4.2.4.6. Power and Inclusion

Polaris also came across as very inclusive of their First Nation partners in the overall development of the joint venture Eagle rock company.

[W]e’ve always been a part of this company, they have been very inclusive in everything that we’ve done. We were the ones who picked the name, we were the ones who chose the corporate structure. We were the ones who set the environmental standards, and we’ve chosen to have higher environmental standards than anywhere else. (Chief Sayers interview 2007)

The Hupačasath were in a position of relative strength in a number of ways in their relationship with Polaris. The Hupačasath brought local and provincial contacts and relationships to the table that Polaris might not have otherwise been able to access. “I actually think we brought a lot to the table, and they brought a lot as well. So I think it was a really good partnership” (Chief Sayers interview 2007).

4.2.4.7. Partnership versus Governance

Turning consultation into a business partnership is the best possible thing.

(Chief Sayers interview 2007).

Polaris gained a lot of insight and local support by partnering with the First Nations.

Polaris was able to benefit from the local and provincial relationships that had already been built by the Hupačasath. These relationships were a valuable piece that First Nations was able to bring to the table.

I really think they learned a whole lot from us, and you know, we brought a lot to the table, you know, so many of the provincial people and the federal people because of our consultations. And so we already had established relationships.
(Chief Sayers interview 2007)

Also, by partnering with Polaris in the project, the Hupačasath were in the unique and sometimes compromised position of being both one of the proponents of the project and one of the First Nations that needed to be consulted and accommodated by the government and/or proponent according to Canadian law.

It was really funny, you know, being the proponent, we were also being consulted as the First Nations. So, we're sitting on one side of the table, move to the other side. But the Province did go through the motions, and did ask us to sign off on all of these things.

.....

I mean, a royalty brings you nothing... you know, it gives you money, if you can negotiate a good one, but you know it doesn't teach you how to run a company, it doesn't teach you management, it doesn't teach you any kind of skills and, I keep telling the community, you can be the janitor, or you can be the CEO, you can be the conveyor belt operator, you can do anything. The world is yours.
(Chief Sayers interview 2007)

4.2.5. Vancouver Island Generation Project Case

Trevor Jones and Chief Sayers also talked about BC Hydro's⁹¹ Vancouver Island Generation Project (VIGP) as being an example of positive consultation experience. This case had been recommended to me by personnel at BC Hydro as a potential case study for this research because they had received letters of appreciation from the Snuneymuxw (Nanaimo) First Nation on the effectiveness of their consultation process. However, the case was not included in this research because of the project work I was conducting with BC Hydro at the time and the potential for creating a conflict of interest.

VIGP involved a planned gas-fired generation plant on Vancouver Island with proposed locations in the vicinity of Port Alberni and Nanaimo. The project has since been abandoned by BC Hydro, because the project did not receive BCUC (British Columbia Utilities Commission)⁹² approval for business and financial reasons.

Similar to the Polaris Minerals Case, one of the positive aspects of the VIGP Environmental Assessment (EA) process was the provision of capacity support to enable Hupačasath to participate fully and include their interests in the EA review

⁹¹ British Columbia Hydro and Power Authority (BC Hydro) is a provincial Crown corporation that provides electricity to the major part of the province of British Columbia.

⁹² The British Columbia Utilities Commission (BCUC) is an oversight body for utility operations in the province. The body is intended to represent the best interests of the public and provides approval for financial matters including annual expenditures and rate increases. Electricity and natural gas services fall under this body.

process. BC Hydro provided the Hupačasath \$25,000 to conduct additional environmental studies in their territory, studies that they felt were necessary to help to identify Hupačasath concerns (Chief Sayers interview 2007).

Other Cases

The Hupačasath have recently been involved in a small hydro-electric development project in their territory. Trevor Jones was the lead on that project. However, we did not discuss the project in our interview. Chief Sayers mentioned the accommodation that was achieved in recognition for the small hydro site being within their territory.

One accommodation we took on the power project is ...the fact they wanted to buy the land from the Crown. And so we had no specific interest That there were sacred sites or anything. So... we're really honest about this sort of thing. So in the end we got 10 percent of the profits. 10 percent of their profits alone. That was a negotiation. That was a real small thing, but it was something. (interview 2007)

4.3. 'Namgis First Nation

The following sections introduce the three cases from the 'Namgis First Nation. These cases are provincial Parks co-management, Orca Sand and Gravel, and Kwagis Power involving the parks, mine development, and hydro-electric power development.

4.3.1. Brief Introduction to the Cases

I had the privilege of working with the 'Namgis administration and some community members in 2000 and 2001 as a BC Hydro representative. However, it was through my

acquaintance, work, and conversations with Chief Bob Chamberlin of the Kwicksutaineuk-ah-kwa-ah-mish First Nation (affiliated with 'Namgis through their Tribal Council) that I connected with the 'Namgis for this research. Chief Chamberlin suggested that the 'Namgis may have some case examples of fairly good consultation experiences with the government and developers. It is interesting to note that Chief Chamberlin could not think of one case within his own territory which would provide an example of good consultation. The Kwicksutaineuk-ah-kwa-ah-mish First Nation deals with forestry, fishery and aquaculture issues on a regular basis. Chief Chamberlin put me in touch with Chief Bill Cranmer, which led to my connection with the 'Namgis community and their cases.

The 'Namgis have a research approval protocol which I followed. After my initial contact with Chief Cranmer and his expression of interest in the project, I contacted George Speck who assisted me with the research protocol process and remained my primary contact during the research process. My research proposal received approval from Council in early 2007 and I received notice from George Speck of their sanction on February 2, 2007.

During my interviews in 'Namgis territory, a number of cases were discussed by the participants as examples of successful negotiations. These cases included:

1. Co-management Agreement with B.C. (British Columbia) Parks
2. Orca Sand and Gravel – Joint Venture with Polaris Minerals

3. Kwagis Power – Hydro-electric power project, joint venture with Brookfield Power

4.3.2. Historical and Political Context

The 'Namgis First Nation is a Kwakwaka'wakw Nation whose territory is located on the northeast region of Vancouver Island (Figure 16). The majority of their territory lies within the Nimpkish and Kokish River watersheds. The main 'Namgis community is now located in a village called 'Yalis, near the town of Alert Bay on Cormorant Island, but their primary community site is on the Gwa'ni, or Nimpkish River (so named by European newcomers pronouncing 'Namgis incorrectly). The Gwa'ni is located on Vancouver Island across the water from Cormorant Island.

The 'Namgis creation stories tell of their relationship with Gwa'ni and the river's importance in their lives. The 'Namgis also speak of their important relationship with the natural world.

The villages of the 'Namgis were organized into extended family units ('na'mima) each sharing a single Big House. The ceremonies and rituals of the Potlatch regulated all aspects of 'Namgis social life. Central to that social life was a reverence for the natural world. For example, when taking and using anything of the natural world the 'Namgis always thanked the spirits inhabiting those things for giving themselves up for use by the 'Namgis. ('Namgis 2007, n.p.)



Figure 16. 'Namgis Traditional Territory

(Territory outlined in red. Adapted and redrafted from 'Namgis image at <http://www.namgis.bc.ca/treaty/pages/planning.htm>)

The 'Namgis have always been an ocean-going people and were active commercial fisherman when the fishery was strong in their area, particularly in the 20th century.



Figure 17. Alert Bay circa 1914

(Image H - 07213 Reprinted courtesy of Royal BC Museum, BC Archives.)

A large residential school was situated in Alert Bay, of which the brick building remains but now functions as administration offices. Colonization, industrialization and the history of that residential school had significant negative impacts on the culture and social fabric of the 'Namgis. But the 'Namgis have gone through major social and physical rebuilding in the past thirty years. There are currently approximately 130 employees working for the Nation, which has an annual operating budget of approximately fifteen million dollars (Aberley interview 2007).

In the 80s, the 'Namgis community pretty much said 'we're going to change our whole social infrastructure'. Over a twenty-year period we've built a health centre, a dental clinic, a treatment centre, early childhood education, an elementary school, a rec' center, a new government building and it goes on and on. And then the village of Alert Bay convinced the government to build a hospital with provincial money on Indian reserve land. (Aberley interview 2007)



Accessed From Host on Thu Nov 27 10:07:56 2008

Figure 18. General View of Alert Bay circa 1900

(Showing houses and poles. Date unknown. Image E - 07873)

Reprinted courtesy of Royal BC Museum, BC Archives)

The 'Namgis are affiliated with the Musgamagw Tsawataineuk Tribal Council, the other two members of which are the Kwicksutaineuk-ah-kwa-ah-mish First Nation and the Tsawataineuk First Nation. The 'Namgis are participating independently in the provincial treaty process and are currently nearing the end of Stage 4, which is negotiating an agreement in principle with the province. Typical treaty settlements in British Columbia (B.C.) have only provided First Nations with management control in ten to fifteen percent of the claimed traditional territory, which the 'Namgis are

enhancing through other land and resource management arrangements, such as those outline in the cases in this research.

In their involvement in the treaty process path, the 'N̄amgis have not ruled out the "full tool kit" of First Nations' options for dealing with the "colonizers and oppressors" (Aberley 2007). This tool kit includes litigation, direct action, and interim management agreements.

First Nations have several roads they can walk down in their engagement with the colonizers, or the oppressors or whatever you want to call it (the business and central government). Over the past 150 years it's been very much a one-way top-down relationship of either ignoring First Nations or actively going against their wishes and carving up their territory's, degrading resources, direct and indirect, oppression of individuals, families, communities, tribes. And First Nations have several reactions to that. And one of them is simply to seek legal redress for wrongs. And to very much not want to engage with central governments or big business. And the method of confrontation can be either direct action or in the legal realm.

There's another group of First Nations that have entered into the treaty process [BC treaty process] and ... it's really all eggs in the treaty basket, and that the treaty will both solve the problems of the past and provide mechanisms for the future.

There's another angle and that's what the 'N̄amgis are all about and other First Nations are, which is to say we will be involved in the treaty process, we will be involved in litigation and direct action when necessary -- like a full tool kit, which would be direct action or litigation, negotiation and the fourth one is actually ignoring Canada and BC as having any legitimate force and just running your government as a sovereign entity. (Aberley interview 2007)

Through various co-management and interim agreements, the 'N̄amgis are striving to have management input throughout their traditional territory. Between old growth

management areas, the Parks Co-Management Agreement, the Forest and Range Agreement,⁹³ an Aboriginal Fisheries Strategy Management Plan with the Department of Fisheries and Oceans,⁹⁴ potential management of the recreation areas currently managed under the auspices of the Ministry of Tourism, Culture and the Arts,⁹⁵ and future treaty settlement lands, the 'N̄amgis anticipate having management influence in nearly sixty percent of their territory (Aberley interview 2007; Alfred interview 2007). They are also trying to buy some of the fee simple⁹⁶ land that borders Nimpkish Lake in their territory. "That's one of the biggest things, that once they give things away you're never getting it back, so it's better that we get into it now" (Alfred interview 2007). However, participation in interim co-management agreements is not seen as ideal and creates

acrimonious debate about it [in the community]. It's seen as surrendering. It's seen as dancing with the devil. It's seen as not having any of the protections that you would feel comfortable with. But the community has decided to hold its nose and go down this non-treaty benefits path. (Aberley interview 2007)

The 'N̄amgis are building a strong capacity within their Nation to take on these increasing responsibilities for land and resource management. These skills will serve

⁹³ The 'N̄amgis have negotiated, through the Forest and Range Opportunity agreements (FRO) formulas, "3.7 million dollars and 400,000 cubic metres of timber so in the short term, that works for us" (Aberley interview 2007).

⁹⁴ The Aboriginal Fisheries Strategy (AFS) agreement includes a Food, Social and Ceremonial (FSC) fishery, and "provides \$200,000 a year and 13 commercial communal fishing licences and a whole bunch of benefits" (Aberley interview 2007).

⁹⁵ Provincial recreation areas are located on Crown land, typically within TFLs. There are two Tree Farm Licensees (TFLs) in 'N̄amgis territory: Timberwest's TFL 47 and Canfor's TFL37. The TFLs encompass most of the 'N̄amgis territory (Alfred interview 2007). These sites were formerly managed by the then Ministry of Forests, and are still commonly known as forest rec sites or forest campsites.

⁹⁶ Fee simple land ownership is the most common form of real estate ownership. In Canada, the land title is held by the Crown and fee simple ownership may or may not include subsurface mineral or resource rights.

them well when and if they reach a treaty agreement and more management responsibilities are transferred to their governance jurisdiction.

The 'Namgis natural resources department uses a bioregionalism approach to information management and planning. This approach involves extensive GIS capabilities in order to map the resources and interests of the Nation on a large, detailed mapping system. Aberley describes the goals of this initiative:

Using the leverage of the treaty processes we've assembled [approximately] 90percent of the information about this territory. We have brought it home here so there's hundreds and hundreds of data sets. We have full GIS capacity, we have a great technical staff. And our goal is to know more about this territory and its cultural and biophysical dimensions than any outside agency or force. We're not there yet. We're getting there.

We understand from that we're able to actually do planning. We have an information base and we go out and we identify opportunities in the territory for economic development, cultural protection, cultural enhancement, all sorts of things and we become the most active agents of change in the region. (Aberley interview 2007)

The natural resources department at 'Namgis is impressive: high tech, organized and comparable to a small but comprehensive natural resource government agency office.

This knowledge and the tools being applied enable the 'Namgis to engage with developers and provincial planners on an informed and equal basis.

4.3.3. Past Experience with Developers and Government

'Namgis territory contains many natural resources that are of interest to industrial developers. Hydro-electric potential from streams, forestry opportunities, parks and

tourism interest, mining, and tidal energy are just some of the current and potential developments in the area. Past development in forestry in particular has been extensive in the 'Namgis territory.

There is kind of a tradition of economic development that's bypassed us. That tradition isn't entirely gone now. There's still entrepreneurs out there that don't know that the world has changed in terms of Aboriginal rights and accommodation and consultation. And we still see that [bypassing], but prior to Orca Sand ... it was business as usual as far as we could see; people would make their plans for our territory, come in and do what they wanted and their consultation was a note to us saying that this was going to happen, this was going to impact your traditional territory, and that was it. (Speck interview 2007)

Garry Ullstrom recalls a proposed hydro-electric project in the territory in the late 1980s or early 1990s proposed by a former company called West Coast Power Generation Company (WCPG). They had identified the Kokish River as a potential hydroelectric power development. WCPG "flew some councilors down to Oregon to look at one of their existing projects when I was here. But I'm saying 'they flew', but I can't remember if we ultimately had to pay the bill for that or whether they funded that trip" (Ullstrom interview 2007). The company was eventually sold and the project was not pursued. It is interesting to note that this company approached the 'Namgis and involved them, given this was not the norm in the province or the industry at that time.

As recently as 2005, some hydroelectric power developers viewed a letter of information as an adequate method for consulting with the 'Namgis First Nation.

One company we told that it is simply not adequate is to simply write us a letter and us to write a letter back and you call that consultation. We want to know about your project. We want to know what you envision our participation being and we want to know what studies you've done. (Speck interview 2007)

Other natural resources in the 'N̓amgis territory are being investigated by developers. For example, tidal energy potential in the straights around Cormorant Island and Hanson Island are being investigated by international tidal power developers. These developers require Investigative Use Permits (IUPs) in order to conduct any monitoring and to “stake a claim” on a particular resource area. Unfortunately, there is no requirement for consultation prior to a developer receiving such a permit. However, these permits, and the sense of ownership they set up with the developer proponent, certainly have an impact on the 'N̓amgis territory. Up until now, notices have been all that the 'N̓amgis have received. George Speck, in discussing the other resources being investigated in 'N̓amgis territory, indicated that the 'N̓amgis have not been contacted by these developers and the government is only sending written notices once the IUPs have been granted.

4.3.4. 'N̓amgis Research Participants

After initiating contact with the 'N̓amgis in the fall of 2006, I visited 'N̓amgis territory in April 2007. During this time, I conducted interviews with a variety of 'N̓amgis staff and consultants. These participants were suggested to me by George Speck and included a number of non-Aboriginal 'N̓amgis staff members. While I had initially been reluctant to interview non-Indigenous people as part of the research because my primary aim was to reflect the priorities and experience of First Nations peoples, I recognized that

these people had played significant roles in the negotiation of agreements for the 'Namgis cases. George felt that these men would best provide the story for the cases.

- Doug Aberley, Natural Resources Manager for 'Namgis
- Harry Alfred, 'Namgis, Resource Management Technician
- George Speck, 'Namgis, 'Namgis Administrator
- Garry Ullstrom, Comptroller for 'Namgis
- Mike Rodger, Chief Treaty Negotiator for 'Namgis

'Namgis resource manager Doug Aberley attributes their success in partnerships, negotiation and co-management to their exceptional team.

Chief Bill Cranmer has an amazing reputation you know. He speaks very quietly and he's not a table-pounder. He has a lot of power. Mike Rodger [Chief negotiator], he could argue. Very persuasive. Garry Ullstrom is the controller and has amazing financial skills. [We have] a band manager [George Speck] who really understands the tough politics of the community, of the 'Namgis. He can bring the work of the technicians to the politicians in a way that really is important. We supply the information through the atlases and through a planning process that people seem to like. (Aberley interview 2007)

George Speck echoed these sentiments when he said "We've got a good team here - we've got a great team" (Speck interview 2007). I was honoured to spend time with their team and learn more about their successes and future aims.

4.3.5. 'N̄amgis Cases

4.3.5.1. Provincial Parks

In May 2006, the 'N̄amgis First Nation and the Province of British Columbia signed an agreement to collaboratively manage the provincial parks with the 'N̄amgis territory. Mike Rodger, Chief Treaty Negotiator, and Doug Aberley, Natural Resources Manager, were the primary negotiators for this agreement. Other 'N̄amgis staff were at the negotiating table, including Harry Alfred.

The Environment Minister for British Columbia at that time, Barry Penner, stated:

This government-to-government agreement between the Province and the 'N̄amgis will allow us to work together to manage parks as effectively as possible. In keeping with the spirit of the *New Relationship*, the agreement paves the way for future discussions between First Nations and the Province regarding the collaborative management of parks in First Nations' traditional territories. (British Columbia Ministry of Environment 2006)

The negotiation of this agreement occurred over a fairly short period, less than three months (Alfred interview 2007), with most meetings held in Victoria, British Columbia. Rodger's previous experience negotiating a similar deal for the Wuikinuxv First Nation in Rivers Inlet on the west coast of the BC mainland was one of the motivators behind the creation of this agreement. His experience with the Wuikinuxv agreement served as a template for the 'N̄amgis agreement, and likely sped the process along. Chief negotiator Rodger told the provincial negotiator that "if we're going to negotiate an



Figure 19. 'Namgis Parks Agreement Signing

(Namgis Chief Bill Cranmer and British Columbia Environment Minister, Barry Penner. Photo © Province of British Columbia. All rights reserved. Reprinted with permission of the Province of British Columbia)

agreement over there [at Wuikinuxv], guess what... we're going to negotiate an agreement over here" (Rodger, 2007). Furthermore, the provincial Parks and Protected Areas Program⁹⁷ have small budgets for the management of provincial parks. The 'Namgis' ability to tap into additional funding sources for improvements within the parks in their territory was considered a benefit to both parties (Alfred 2007).⁹⁸ The

⁹⁷ Parks in British Columbia are managed under the BC Parks and Protected Areas Program, part of the Environmental Stewardship Division of the British Columbia Ministry of Environment.

⁹⁸ There are approximately thirty similar parks co-management agreements in B.C. with First Nations. However, the province has since pulled back from doing what Aberley calls these "Cadillac agreements" which transfer a lot of planning and management power to the First Nation. The Province is now encouraging shorter documents that allow for more flexibility.

‘Namgis proposed a comprehensive parks agreement based on past agreements signed in the province.

The final parks agreement ties together a number of areas within ‘Namgis territory that the ‘Namgis have been working to bring under their management control (or co-management control).

It works out to be 20,000 hectares of land that we more or less have a say what’s going to happen and so when you look at the land selection, (paper shuffling and display of maps). These are the parks, the old growth management areas and our land selection goes all the way down the middle so it ties in all of the land and so that’s another 20,000 hectares of land that we get to manage and have a say what goes on in our territory (Alfred interview 2007).

The ‘Namgis will now be responsible for developing annual management plans for the Parks. Funding is provided by the provincial Ministry for the development of these plans. When asked whether the management of the parks in their territory will be co-jurisdictional, or is ‘Namgis simply a sub-manager to the Ministry staff, Harry Alfred indicated:

...we’ll find out after we do our management plans for the Cormorant Marine Channel and we’ll see because we’re going to, they’ve given us so much money to do a management plan and then we’ll send it to them and then we’ll go back and forth and until we have a final document so this will be the test from that. (Alfred interview 2007)

It is interesting to note that many of the parks included in the agreement were designated in approximately 1997, without consultation with the ‘Namgis (Alfred interview 2007). Some of the park boundaries had to be redrawn, one in particular because it completely circled ‘Namgis reserve land I.R. #4 and cut off access to it. The

Cormorant Marine Channel Park includes some protected areas and also allows for First Nation use, including fishing. These uses were to be described in the management plan.

‘N̄amgis Nation Capacity

The ‘N̄amgis have developed strong capacity to manage their natural resources and parks. This capacity is exceptional compared to many First Nations I have worked with in the province. Understanding that some First Nations are fully capable of taking over management responsibility for land is difficult for some non-Indigenous people to accept.

Some of the Parks staff were concerned about the technical and human resource capacity of the ‘N̄amgis to manage the parks in their territory. As First Nations in British Columbia gain capacity and experience, government agencies need to adapt and evolve their notions of what each community is capable of managing. Kind of like a teenager that’s prejudiced I guess. An expectation that First Nations community would look a certain way and we didn’t meet that expectation. They had to revisit that prejudice. (Speck interview 2007)

Based on my discussions with ‘N̄amgis administration and staff, the collaborative elements and distribution of power of this management agreement for the parks appear to be positive first steps, but have some weaknesses. This agreement essentially shifted the responsibility for management plan preparation for the Parks to the ‘N̄amgis. This positive element of the case involves the transfer of the management planning to ‘N̄amgis and allow for the day-to-day management of the parks, including campsites within the Parks to the ‘N̄amgis. However, the weakness of this agreement is that the

ultimate decision-making authority still rests solely with the Province, since these management plans are reviewed and approved by the provincial Ministry of Environment.

The 'N_am_gi_s would like to rectify some of the imbalance in power that currently exists by having a management board set up for final decision-making around parks issues. This board would be comprised of two 'N_am_gi_s board members and two provincial members.

['N_am_gi_s] want to be involved in all aspects of what goes on so virtually if you're going come into any of those five parks, BC parks you call us first. We will join you. We want to learn how to do it. And we want to do it together in a very positive and innovative way. (Aberley interview 2007)

4.3.5.2.Orca Sand and Gravel

The whole Polaris interaction was a really interesting one and a real learning experience for everyone - a valuable one. Really valuable. It basically set the tone for how we deal with other corporations and business interests that want to come into our territory...

(Speck interview 2007).

Polaris Minerals approached the 'N_am_gi_s First Nation in December 2001 to discuss the possibility of extracting aggregates (e.g., sand and gravel) from potential quarry sites in their traditional territory. The two parties ultimately developed a joint venture partnership, Orca Sand and Gravel, to develop the aggregates.

Polaris began their relationship with 'Namgis saying “that they wanted to work with the local band to identify possible sand and gravel sites to export to California and they wanted to take a different approach in recognizing Aboriginal claims to these areas” (Speck interview 2007). This open, proactive approach of Polaris was based on the foundation of the company’s experience with the Hupačasath and Ucluelet in the years previous and understanding what had worked with those Nations. A significant difference from the Eagle Rock Aggregates case with Hupačasath was that Polaris approached 'Namgis and Kwaguilth Nations prior to identifying a site and, in an initial exploration agreement, gave the First Nations veto power on the location of any extraction site. The site selected in on the mainland of Vancouver Island near Port McNeil (



Figure 20. Orca Sand and Gravel Site

(Image reprinted courtesy of Polaris Minerals Corporation. © Polaris Minerals Corporation.)

Garry Ullstrom was the project leader for the discussion with Polaris and he recalls that the discussion quickly became an interest-based discussion with each party genuinely working to understand each others' interests (Ullstrom interview 2007).

These guys seem willing to accommodate our interests. We'd better figure out what our interests are. Because normally we have to be very reactive. You want to build a dam somewhere or you want to cut down a bunch of trees; it's quite easy for us to assess the negative implications and just say no for these reasons. Whereas here we had to proactively say 'what will the issues be?' looking ahead if this comes to pass, what are our concerns. (Ullstrom interview 2007)

This collaborative approach from a private sector developer was a first for 'Namgis (Speck interview 2007). Not unexpectedly, it was met with much doubt and uncertainty on the part of the 'Namgis:

There was lots of skepticism at our table, saying, you know, 'white entrepreneurs come into our territory recognizing first of all our Aboriginal right and title and then... I guess they have a theory as to whether they were going to explore or not... And it took us a long time working with them to actually believe them. (Speck interview 2007)

Polaris identified a number of sites in the territory, including some near the Nimpkish River. Those sites next to the river were rejected immediately by the 'Namgis. In April 2003, Polaris eventually signed a partnership agreement with the 'Namgis and Kwaguilth First Nations for the Orca Sand and Gravel joint venture company for the development of the quarry. The agreements were very similar to the partnership agreements formed with Hupačasath and Ucluelet. 'Namgis has a twelve percent share in the joint venture company Orca Sand and Gravel. George Speck explains that this percentage was going to be much lower, but the Kwaguilth First Nation eventually

changed their position and decided to go with a royalty, freeing up their percentage of the project for 'Namgis to buy in future.

The project is now up and running. Local 'Namgis are working on the project and are happy with the various jobs that they have taken on.

...lots of good reports in terms of the work they're doing and how happy they are doing the work they're doing. You know, great big machines. Women are out there too you know and women see the possibilities for employment in these kinds of projects. Before, you know, it used to be the preserve of, you know, the guys. (Speck 2007)

4.3.5.3.Kwagis Power Case

"It's your territory and if you say no, we're not going to build."
(George Speck, 'Namgis Administrator, 2007
recalling Brookfield's approach to negotiation)

In 2004, the 'Namgis began negotiations with Brookfield Power Corporation (formerly Brascan) for the potential development of a hydroelectric power project (Rodger interview 2007). In March 2006, the 'Namgis First Nation signed a partnership agreement with Brookfield for the development of a 40 megawatt run-of-river hydroelectric generation project on the Kokish River, near Telegraph Cove, British Columbia. The development site is located on Vancouver Island, west of Alert Bay and within the 'Namgis territory.

'N̄amgis had a team of negotiators, led by Mike Rodger, working out a deal with Brookfield power. Other participants included Chief Cranmer, band administrator George Speck, comptroller Garry Ullstrom, a technical team led by Doug Aberley, and additional financial advisors to assist in the project. Chief Cranmer and George Speck are more closely involved in the 'N̄amgis community political arena than the other team members (Rodger interview 2007). Initially, Brookfield offered a one percent interest in the project. 'N̄amgis countered saying they wanted three percent ownership initially with the option to purchase an additional twenty-two percent of the project interest. This proposed deal was brought to 'N̄amgis Council for approval.

We said we want a revenue stream to the community for social programs. But we want to take the great majority of that revenue from the three percent over the first ten years and with that revenue we want to buy an additional twenty-two percent ownership in the project and we want 25 percent. And we want you to loan us the money which we will pay back to you from the 3 percent. And we want a really good interest rate. What do you think? And of course we want to be involved in the environmental impact statements you know, we want to work out the terms of reference together and they said 'fantastic'. (Aberley interview 2007)

The negotiations and eventual agreement led to a 75-25 percent partnership between Brookfield and 'N̄amgis, respectively. 'N̄amgis will be able to purchase this twenty-five percent share through profits from the company. This percentage of partnership shares negotiated by 'N̄amgis was much more than the industry standard their consultants (Eco-Trust) said was being offered by other power developers around the province (Speck interview 2007).

The reasons for the success of this negotiation process were summed up by Mike Rodger. He stated that “there were a lot of things at play. One thing is that ‘N̄amgis is a very special case with respect to how they approach these kind of arrangements” (Rodger interview 2007). The ‘N̄amgis have a confidence in their territory that enables them to be strong negotiators. “They know what’s going on there [in their territory], they see what is going on there, they’re in that valley, they’re working all the time” (Rodger interview 2007). The ‘N̄amgis also have business-minded members of Council, the ‘N̄amgis have a certain “pride” in being able to negotiate a deal (Rodger interview 2007). Rodger also credits the personnel at Brookfield, and one in particular who had experience working in Brazil on a similar kind of equity agreement with a community (interview 2007). Rodger also noticed that the way that Brookfield physically worked together, in communal spaces and large open offices, reflected the approach and open attitudes of Brookfield personnel when working with the ‘N̄amgis (interview 2007).

Relationships

Brookfield has now used this agreement and relationship with ‘N̄amgis to strengthen their position and relationships in other projects with First Nations.⁹⁹ In 2006, Richard Legault, President and Chief Operating Officer of Brookfield Power stated on the Brookfield website:

⁹⁹ Brookfield “actually referred other First Nations... they’ve got 100 mega-watt project done on the prairies where they’re negotiating with First Nations. The band manager phoned us up here and said they wanted to come and talk to us about our agreement” (Speck interview 2007).

This partnership is a meaningful step for Brookfield Power as a developer of renewable sources of power. We take great pride in working with the communities in which we operate. The relationship that we have established with the 'Namgis First Nation will not only enhance the success of this project, but will also serve as a model for future partnerships to follow.

The relationship between 'Namgis and Brookfield was so positive and beneficial to both parties that, along with the formal project partnership agreement, the 'Namgis stated their intention to pursue additional projects in their territory with Brookfield.

'Namgis is all about relationships. So they really liked these guys you know we come up with a ground-breaking deal here. We want now to work this Kwagis 75/25 joint venture. We don't want to just do that one project. Any project that comes up in the territory we very much would like you to go out and you know together we will buy up these prospects. (Aberley interview 2007)

Brookfield was a new player in BC and they were aware of the reputation that First Nations in BC had gained for demanding to be involved in resource planning and development (Aberley interview 2007). However, in the initial discussions with 'Namgis, Brookfield did not discuss anything specific with regards to negotiating positions or partnership deals. Rodger described those first discussions with Brookfield's representatives and consultants as "nebulous," in that Brookfield was not clear on what they wanted to do in the area or offer the 'Namgis (Rodger interview 2007). And the 'Namgis, like many First Nations in B.C., were still trying to understand the implications of the *Haida* and *Taku* decisions. The 'Namgis representatives decided to be creative and assertive, and to improvise, partly based on their ongoing experience with the Orca Sand and Gravel project. Therefore, they asked to see the projected

finances for the project and requested an equity interest in the proposed project (Rodger interview 2007).

While Brookfield (Brascan) came to negotiations without a particular position with regard to how to involve First Nations in their development proposal (e.g., level of consultation or partnership). It was George Speck's understanding that the corporate culture had begun to change prior to coming to 'Namgis and Brookfield had become more open to involving First Nations through partnership agreements.

[These agreements] sort of smooth the way for what they want to do. The reality is that they do capture Indians' water and that there is some change in the ecosystem that they're working with. It's better to work with community and have community on board and, and so that's what it's been doing. (Speck interview 2007)

I asked Doug Aberley if Brookfield came to the table understanding the Crown's legal obligations to consult with the 'Namgis, and Brookfield's role in this consultation.

Brookfield's understanding of their obligation was not clear at the outset.

Doug indicated that the negotiations were difficult and drawn out, with a lot of legal wrangling over a six- to eight-month period. Negotiating meetings took place primarily in 'Namgis territory, with Brookfield personnel coming from Quebec and lawyers coming from Vancouver to attend meetings. Some meetings were also held in Vancouver.

4.3.6. Themes in the 'N̄amgis Cases

A number of common themes ran through these three 'N̄amgis cases. In general, the 'N̄amgis came to each of these cases and negotiations with a stronger position and higher technical capacity than they had presented with previous proponents. George Speck believes that the major change seen in these cases was that the 'N̄amgis were more fully included in planning and that the 'N̄amgis “now have to be accommodated, which is something, ... an onus on these companies to consult and accommodate our interests whether it be financial or otherwise so, and more companies are more willing” (Speck interview 2007). This deeper level of consultation, or negotiation, shapes the themes in the 'N̄amgis cases.

4.3.6.1. Gaining Management and Decision-making Power

The 'N̄amgis viewed these resource management and development projects as opportunities to expand their stewardship influence throughout their territory. It took some time for the 'N̄amgis to feel comfortable welcoming Western developers within their traditional territory. “The inclination on the part of many First Nations, myself included as their representative, is to say ‘wait a minute, go somewhere else’, you know. ‘Don’t give us this problem right now’” (Rodger interview 2007). However, the result of the Kwagis Power agreements was that 'N̄amgis demanded to “be in the driver’s seat” when dealing with fisheries issues, environmental impact assessments, and the related selection of consultants (Rodger interview 2007).

The Polaris case represented an opportunity for shared decision-making power from the outset of the project. No site had been selected nor permit applied for prior to reaching approval for that site from the 'N̄amgis. Polaris approached the 'N̄amgis very early on in their planning and development process, which allowed the 'N̄amgis to comment on and influence the project from its inception. Unfortunately, this level of early involvement is not the norm from private developers in British Columbia.

Planning and permitting processes for resource development often progress before consultation because the provincial government has only included the requirement for significant consultation in the BC Environmental Assessment (EA) process, rather than making it a requirement in initial investigative permitting and licencing processes. For instance, a water licence for a potential hydro-electric project or an investigative use permit for ocean energy do not require, in the initial stages, consultation with First Nations. George Speck pointed out that the 'N̄amgis know there are tidal power "claims" (Investigative Use Permits) held in their territory (Speck interview 2007). "But we haven't been approached by these people yet so we're not at the point of developing that. We get notices... The Province notifies us that these permits are being given out" (Speck interview 2007). This provincial process for resource investigation permits compromises First Nations' ability to participate early in the project and influence early aspects of projects such site and size.

Sharing power is often difficult for bureaucracies and agencies that are used to their position of power, and the 'N̄amgis faced significant resistance from Parks when pursuing co-management agreements. "It's a real struggle. I mean what you're doing is you're taking some power away from the bureaucrats" (Aberley interview 2007).

4.3.6.2. Respect for the Environment

*It's always in the back of our minds;
things about fish, and the environment,
and what we're going to leave to our children...*

(George Speck interview 2007).

In both private development cases included in this research (Orca and Kwagis), the 'N̄amgis were able to insert their environmental concerns and values into the site selection and design of the projects. George Speck describes the protection and enhancement of fish resources as a paramount concern in both projects. "On the Council and in the community... the first question is always 'what about the fish?'" (Speck 2007). At the time of the Brookfield negotiations, the majority of 'N̄amgis Council members were former fishermen, and the concern about impacts on fish in the Kokish River was high. The project needed to consider both environmental and business interests. Mike Rodger describes this "dynamic tension" between these often competing interests as part of the "magic of the group" of managers at 'N̄amgis because they "have this element that is very green and this element that is not so green" but at the same time they all "share the view of sustainability" when it comes to the type of

projects that are pursued and developed (Rodger interview 2007). In Rodger's opinion, creating a management team with this type of "balance" was a strategic decision on the part of 'Namgis government. .

Key components of the 'Namgis business vision were described to me by Doug Aberley. He indicated that these principles often create tension between environmental protection and financial business objectives of the 'Namgis, but that tension is good and leads to sustainable projects.

[The main component of the vision is] not to hurt the environment. [Other priorities are] respectful relationships and probably a partnership beyond consultation and accommodation. It is partnership and the relationship that comes from that leads into other activities. And the whole community should benefit and there should be employment for the local community. The 'Namgis values should be evident. The logo of the company, the scholarship that we give to the kids to learn Kwakwaka'wakw language here. Those things should be prominent (Aberley interview 2007)

'Namgis environmental priorities were incorporated into both the Kwagis project and the Orca Sand and Gravel project through protection of traditional food harvesting areas during construction and additional studies for potential impacts.

Orca, they had to build [and drive] pilings down into the ocean you know to offload the gravel by conveyor belts to big boats. We moved every abalone, we had a biologist watching the whole thing, testing the noise so the orcas wouldn't hurt their ears. And eel grass you know wouldn't get hurt.

They traded a new reef so abalone would happily live there. Abalone get poached a lot around here. So this abalone reef is right next to where the ships load and there's a camera trained right on the abalone.

None of that obviously would have happened without 'Namgis participation. (Aberley interview 2007)

‘N̄amgis were able to assert their unique values concerning the land and managed to have them accommodated through these partnership arrangements in development. In the Kwagis power project, environmental impact studies were conducted on a watershed-wide basis, rather than simply a project footprint basis. The terms of reference were drafted in collaboration with ‘N̄amgis. The ‘N̄amgis also managed to get the design of the project modified to reduce the size of the head pond impoundment and to have more of a run-of-river project rather than a conventional storage hydro-electric project. Reservoir storage was thought to have the potential to impact wetlands in the watershed. This accommodation of ‘N̄amgis concerns reduced the project from a proposed 50 MW to approximately 40 MW size. According to Aberley, the impact assessment and modification were novel and would not have happened without ‘N̄amgis being a partner in the project.

4.3.6.3. Building Nation Capacity

A number of the ‘N̄amgis research participants stated that building ‘N̄amgis capacity in the field of land management was a significant motivator for their involvement in these co-management and partnership arrangements. While ‘N̄amgis is involved in the slow and sometimes frustrating BC Treaty process, these interim or side-table agreements lead to a flow of funds and resources that enable the community to better manage their own territory. As described in earlier sections, the ‘N̄amgis are now managing or co-managing nearly sixty percent of their traditional territory. This management requires

the technical skills, human resources, and equipment that have been built over the past ten to fifteen years in their resource management department. Doug Aberley explains the strength and capacity building within the Nation:

... it's all about building capacity and competence and confidence. What we have done is gone out, and using the leverage of the treaty processes, assembled, I don't know, 90 percent of the information about this territory. We have brought it home here so there's hundreds and hundreds of data sets. We have full GIS capacity, we have a great technical staff. And our goal is to know more about this territory and its cultural and biophysical dimensions than any outside agency or force and... we're not there yet. We're getting there.

We understand from that we're able to actually do planning. We have an information base and we go out and we identify opportunities in the territory for economic development, cultural protection, cultural enhancement, all sorts of things and we become the most active agents of change in the region (Aberley interview 2007).

4.3.6.4. Recognition of Rights

Another theme identified across the 'N̄amgis interviews was the recognition of Aboriginal rights and title. And while rights and title are not a dominant topic of discussion in their recent negotiations (Aberley interview 2007), an understanding of 'N̄amgis title to their territory forms the foundation for all of their land management work. Every negotiation involves some compromises on both sides (Rodger interview 2007), but "first and foremost we have this set of rights that we need to protect..." (Rodger interview 2007).

Even when Polaris approached the 'Namgis stating that they recognized 'Namgis rights and title, the 'Namgis took quite some time to believe this claim. As described by George Speck in his interview:

George: The first agreement that we had [with Polaris] was an exploration agreement and in that agreement we had right of veto which was kind of unusual. Nobody had ever approached us [like that]. There was lots of skepticism at our table, saying, you know, 'white entrepreneurs come into our territory recognizing first of all our aboriginal right and title?' and then, I guess they have a theory as to whether they were going to explore or not so...

Andrea: Mm hm. And that was the first?

George: Yeah. And it took us a long time working with them to actually believe them. (Speck interview 2007)

4.3.6.5. Respectful Relationships

Doug Aberley and George Speck both identified relationships and individuals as an important part of the success in these cases. It is interesting to note that while the personality of Marco Romero was unique to Polaris, the company's position, which formed the basis of the strong relationship with 'Namgis, was built on their experience and negotiation with the Hupačasath Nation a few years earlier.

They [both] are really great corporations; young and hungry and with personality... It's all personality again. Marco Romero was the president of Polaris and before he did anything he came respectfully to the Kwaguilth and the 'Namgis and said 'I know this will be in your territory so I want you to either have a royalty or ownership position if you care to buy one. And we'll do the environmental impact together and we'll pay you to hire experts to purchase the environmental expertise'. (Aberley 2008)

In contrast to Polaris, the Parks agreement initially met with a local, North Vancouver Island bureaucrat who acted as a gatekeeper for the co-management agreement 'N̄amgis proposed. "To negotiate a new agreement or the success of agreement is based on the development of personal working relationships and if the bureaucrat that you're dealing with is not into it can just bring everything to a halt. ... it was a tough decision, it was decided that this one person was the gatekeeper and she was blocking the process, so we went around this person to her superiors" (Aberley interview 2007).

4.3.6.Partnership versus Governance

In considering the Brookfield and Orca projects, 'N̄amgis were unsure of whether to take a governing role and benefit from royalties, or go the partnership route. The benefits, knowledge, influence and involvement gained from being in partnership with the developers was considered a greater benefit than royalties, and thus joint venture agreements were developed. The 'N̄amgis were and are trying to take creative and proactive approaches to working with the resources in their territory.

People don't expect to hear... they never expect what they get from 'N̄amgis.

There's some shouting but not much, you know. It's not all about rights and title. It's about relationship and partnership and businesses and values and they [developers] get a proposal that's outside of the box but it's not unfair. (Aberley interview 2007)

In addition to the partnership agreement, George Speck described the community benefits funds and the impacts-benefit agreement created as accommodation for allowing the developers access to 'N̄amgis territory. This benefits fund was one aspect

of another recurring theme in the interviews: that of community involvement in management and partnership decisions.

4.3.6.7. Community Involvement

The amount of community involvement in management and partnership decisions came up less in my interview with 'Namgis than with Cheam or Hupačasath.

However, I asked George Speck whether he felt the broader 'Namgis community values were heard and incorporated into these projects and he said that they were.

Our voices, and from our communities, are always involved. Brookfield had to go to the community and they are expecting to go back to the community in the next little while to give us updates on how the Kwagis power project's going. Polaris minerals had to face our membership. They had to explain what they wanted to do and they got some pretty tough questions and they had a message in terms of community values and how the community saw their territory. (Speck interview 2007)

Many of the community meetings held by the two private companies in these cases were well attended. Up to 100 community members, a third of on-island adult members, attended one of the Orca meetings, and somewhere around 60 would attend other public meetings (Speck interview 2007). The discussion of impacts in their territory and the potential for jobs seemed to draw people out to these meetings, especially if the impacts had anything to do with fish (Speck interview 2007).

4.4. Soowahli First Nation and Stó:lō Tribal Council Case

“We, the people of the Stó:lō Tribes know the Creator put us here.

*The Creator gave us laws that govern all our relationships
to live in harmony with nature and mankind”*

(Stó:lō Declaration 1975).¹⁰⁰

The Stó:lō peoples are of the lower Fraser River Valley. Their connection with the land is deep and forms a part of their identity. As described in a publication by the Fraser Basin Council:

Stó:lō elders pass down knowledge of the land and resources, teaching that the world was mixed up until the three sons and daughter of Redheaded Woodpecker and Black Bear came into the world to make it right. They travelled through Stó:lō territory transforming people into resources like salmon, sturgeon, beaver, stones, mountains, and trees. Because the resources were once people, they are to be respected. The Stó:lō believe the original person’s life force still lives inside each animal and natural feature. (2006, 8)

A description of Stó:lō history is provided by the treaty table in 2006 as follows:

As Stó:lo, we are the ‘People of the River.’ Since the time of *sxwoxwiyám*, time immemorial, we have occupied *S’ólh Téméxw* (‘Our World’; ‘Our Territory’) – the Lower Fraser River Watershed... Our experience with *Xwelítem* (literally ‘Hungry People’; non-Aboriginal newcomers) is only a tiny and recent piece of our history; many millennia long. We are a self-governing people. We carry a language and culture shared among the Tribes of the Lower Fraser Watershed. We form a collective identity based on the interconnectedness of our families, of our creation by is otherwise known as southwestern British Columbia and northwestern Washington Chichelh Siya:m; of our transformation by *Xexá:ls*; and of our inherent aboriginal rights and title. On these grounds we recognize ourselves now, in continuity with our traditional past, as the collective Stó:lo *Xwewilmexw* [emphases in original].

¹⁰⁰ Stó:lō Xwewilmexw Treaty Table 2006, 4.

Over the generations our Stó:lo position for treaty negotiations has been clearly and consistently articulated: in the petition of 1874; the petition of 1875; the petition of 1877; in testimony before the Royal Commission of 1913, and on many other occasions. Stó:lō Xwexwilmexw Treaty Table 2006, 4

In the mid-1970's, twenty-one of twenty-four Stó:lō First Nations signed the Stó:lō Declaration, stating their intention to ensure that "Stó:lō Aboriginal Title & Rights are to be recognized not sold or extinguished (Stó:lō Xwexwilmexw Treaty Table 2006). In 1995, the Stó:lō Nation entered a treaty process with the federal and provincial governments. In 2005, the Stó:lō First Nations underwent a reorganization process, leaving eight Nations in the Stó:lō Tribal Council (STC) and eleven in the Stó:lō Nation (SN).¹⁰¹ These two groups now work together on many regional issues. One of the primary differences between the two is that the STC is negotiating with the federal and provincial governments outside the British Columbia treaty process while the SN is participating in it.

The Stó:lō Tribal Council (STC) has taken a stronger stance on rights and title issues in the treaty process than the Stó:lō Nation itself. While Grand Chief Clarence Pennier, Chief of the STC, reaffirmed the STC's support of the treaty process, he also recently announced that the STC signed onto a Unity Protocol with 46 First Nations to try to create a forum to discuss creating a negotiating environment for treaties, to try to

¹⁰¹ Stó:lō Tribal Council includes: Chawathil, Cheam, Kwantlen, Kwaw-kwaw-Apilt, Scowlitz, Seabird Island, Shxw'ow'hamel and Soowahlie First Nations. Stó:lō Nation includes: Aitchelitz, Leq'a:mel, Matsqui, Popkum, Shxwhá:y Village, Skawahlook, Skowkale, Squiala, Sumas, Tzeachten, and Yakweakwioose First Nations (B.C. Ministry of Aboriginal Relations and Reconciliation website 2007).



Figure 21. First Nation Gathering in Fraser Valley (Sardis) About Land Question

(Circa 1914. Image I - 31908 Reprinted courtesy of Royal BC Museum, BC Archives)¹⁰²

amend the current situation where the provincial and federal governments come to the table with rigid mandates, unwilling or unable to negotiate (Pennier 2007). The six main issues that the Unity First Nations are addressing are: Constitutional Status of Lands, Fishing, Certainty, Lands and Co-management, Governance and Fiscal Relations, and Taxation. “This initiative is being used to try and get the governments to change their mandates on these particular issues” (Pennier 2007, 2). This statement underscores the position of the STC and some of the concerns that led them to leave the treaty talks in 2005. Grand Chief Doug Kelly echoed these thoughts in a recent media interview:

¹⁰² BC Archives photo title was “Indian Pow-wow About Land Question, Sardis”

Sto:lo Tribal Council is a membership organization," he said. "Sto:lo Tribal Council members support treaty negotiations to resolve the outstanding land question, and define Sto:lo jurisdiction; however, they don't support current mandates offered by Canada and B.C. (Grand Chief Doug Kelly in Henderson 2008)

It is in this light and with these values that the Stó:lō Tribal Council have approached issues related to their Aboriginal right to fish and their responsibility for protecting the fishery for future generations. The Stó:lō First Nations have an integral relationship with the fish, particularly the salmon, provided by the Fraser River and its tributaries. "Stó:lō" is the Halq'eméylem language word for "people of the river" or people of the lower Fraser River in honour of the relationship the people have with the river in their territory (Mohs 1994, 185). Aboriginal rights to fishing are of paramount importance to their cultural, food, spiritual and economic needs (Mohs 1994, 185).

4.4.1. Significance of Salmon

In our 2007 interview, Grand Chief Kelly spoke of the importance of the salmon and the land to the Stó:lō, and the long-term view they take to using and managing their resources.

You're not going to find a garbage dump. You're not going to find stump dumps or other things that people don't want to use the land for afterwards and it's because of the teaching that we've received. If you take something from Mother Earth you've got to put something back. So that's why when we're talking about these kinds of things, that's the approach that we take. It was taken by my late dad when he was Chief from the early 60s to his death in January '72 and it was taken by subsequent chiefs; the same kind of approach was taken. (interview 2007)

Grand Chief Kelly talked about the historical abundance of salmon that he remembers during his lifetime.

When I came of age and I can remember back as far as being six years old, going fishing, sports fishing, rod and reel fishing on this river. We weren't supposed to, but we did. We didn't like walking or cycling through this end of the reserve when we were kids at certain times of the year. Cause it smelled so rotten from the rotting fish. So there was a lot of fish returning and spawning, dying, feeding all kinds of critters and really smelling awful. So we'd go the other way even if it meant six miles of hard walking, we'd go the other way! (interview 2007)

The Pacific Salmon fishery comprises six species of salmon¹⁰³ that inhabit coastal waters. These species include:¹⁰⁴ sockeye, pink, Coho, Chinook, chum or dog, and steelhead. Most of these stocks have seen a decline in the past century,¹⁰⁵ and particularly the past few decades. As described by Grand Chief Doug Kelly, “not as many fish come back. So all the species used to come through here [Stó:lō Territory], through here and through the Chilliwack - you don't get the size of the returns any more. So those are the things we know” (Grand Chief Kelly interview 2007).

In 1998, David Anderson, the former minister of Fisheries and Oceans for Canada, announced the banning of the Coho salmon fishery on the West Coast and the curtailment of the salmon fishery in general to prevent loss of Coho through bycatch

¹⁰³ *Oncorhynchus*

¹⁰⁴ The six species are *O. nerka*, *O. gorbuscha*, *O. kisutch*, *O. tshawytscha*, *O. keta*, and *O. mykiss*.

¹⁰⁵ See Department of Fisheries and Oceans accounts of the Fraser River salmon return declines, particularly since the construction-related slide on Fraser River at Hell's Gate in 1913 (<http://www-comm.pac.dfo-mpo.gc.ca/publications/speciesbook/Salmon/sockeye.fraser.html>).

(Linkos Brown 2006). This significant announcement was based on the DFO scientific evidence that Coho stocks were at extreme risk for biological extinction (Linkos Brown 2006). Not long after the closure of the Coho fishery, various sockeye stocks on the Fraser also began to cause serious concern. “In about 2002 or 2003, Soowahli became aware that Cultus sockeye were dangerously close to becoming an endangered species” (Grand Chief Kelly interview 2007).

4.4.2. Description of the Case - ‘Salmon Table’ MOU

In the summer of 2006, Dr. Dawn Mills suggested that I contact Ernie Crey to learn about potential positive consultation and negotiation studies that he was involved in. Ernie and I met for coffee in Chilliwack in the Fall of 2006 and decided that the Stó:lō Tribal Council’s work on a Memorandum of Understanding (MOU) with the Commercial Salmon Advisory Board (CSAB) would be a good example of negotiation between Indigenous and non-Indigenous parties on fairly equal terms. The participants in the negotiation of the MOU referred to their group as the “Salmon Table”.

The Stó:lō have been concerned about the health and management of the salmon fishery in their territory for decades. In particular, there has been a marked decline in the Cultus Lake sockeye salmon run. The Cultus Lake sockeye spawn in November or December. “The fish spend their first two years of life in freshwater before migrating to the sea. The salmon spend a further two years in the ocean before returning to Cultus Lake to spawn” (DFO 2007).

Despite the COSEWIC¹⁰⁶ designating Cultus Lake sockeye salmon as endangered, and efforts on the part of the Stó:lō to have the Cultus sockeye listed as endangered under the *Species at Risk Act* (SARA) regulations, the government of Canada refused to list the species under SARA. While COSEWIC can scientifically determine and designate a species as endangered, it is a listing under SARA that provides protection under the law.

The Cultus Lake sockeye salmon is designated as endangered by COSEWIC. In January 2005, a final decision was made by the Government of Canada to not list Cultus Lake sockeye salmon under the *Species at Risk Act* (SARA), due to the significant socio-economic impacts on sockeye fishers and coastal communities. (DFO 2007, n.p.)

One of the key considerations for the conservation or protection of a salmon run is to allow “adequate escapement to reproduce the run” (Linkos Brown 2006, 49), which means that enough of the salmon returning must be allowed to return to their inland destinations to spawn. Grand Chief Doug Kelly describes the Stó:lō ongoing concern for Cultus to me (A) in the following exchange.

Doug: DFO set by-catch targets and they come back with other healthier runs, right. So when they're harvested they're with other runs that are stronger to sustain fisheries. Cultus can't. So part of what we did last year... in 2005, industry, the Commercial Salmon Advisory Board, made a blunt offer. They said We'll give you money if you increase the by-catch or support an increase in the by-catch. I just said flat out No.

Andrea: You thought you might they might wipe them out.

¹⁰⁶ COSEWIC is the Committee on the Status of Endangered Wildlife in Canada. COSEWIC is made up of “experts that assesses and designates which wild species are in some danger of disappearing from Canada” (COSEWIC 2002). These experts then make recommendations for which species should be listed under SARA.

Doug: Well, that's what our concern was. (Grand Chief Kelly interview 2007)

The efforts of the federal government to protect Cultus Lake sockeye were not having the positive effects that were urgently needed to protect the sockeye run.

Jeff Regan, with the Ministry then, he said, the Department would take action to begin protecting Cultus sockeye. So in 2004 they set targets, by-catch targets, for Cultus sockeye and promptly exceeded them by a significant margin. And in 2005, same thing. (Grand Chief Kelly interview 2007)

In 2005, Grand Chief Kelly had made comments at the National Assembly of First Nations about the Canadian Fishing Company, better known as Canfisco¹⁰⁷, "for always taking and not putting anything back into the resource" (Grand Chief Kelly interview 2007). A member for the Nisga'a First Nation and a friend of Kelly's approached him and suggested he meet with the CEO of Canfisco, Jimmy Pattison, because the Nisga'a had a different and positive experience dealing with Pattison through the Nisga'a Treaty (Grand Chief Kelly interview 2007).

Jim Pattison, Managing Director and CEO of the Jim Pattison Group, which includes Canfisco, was invited to attend one of the Stó:lō Tribal Council meetings. He had brought along Executive Vice-President (and former British Columbia premier) Glen Clarke to the meeting. They ended up dialoging with the STC for over four hours. The

¹⁰⁷ As stated on the Canfisco website, Canfisco is Canada's has operated in "the Pacific fisheries" for over one hundred years and is "largest producer of wild salmon and herring roe... owns and operates the largest fleet of commercial fishing vessels in British Columbia and procures additional fish from hundreds of independent vessel operators throughout the province".

result of these discussions was the beginning of a new dialogue between the commercial fishing sector (via the Commercial Salmon Advisory Board) and the Stó:lō First Nation.

4.4.2.1. Participants in the Case

The Salmon Table participants include many Indigenous and non-Indigenous representatives. Since my research was focusing on the initial negotiation of the Salmon Table MOU, I focused on the participants that were integral to the first discussions between the Stó:lō and the Commercial Salmon Advisory Board. I conducted interviews with:

- Grand Chief Doug Kelly, elected Chief of Soowahlie, Tribal Chief of the Stó:lō Tribal Council.
- Ernie Crey, Fisheries management representative for the Stó:lō Tribal Council.
- Dave Barrett, Executive Director, Commercial Salmon Advisory Board.

Ernie Crey suggested that I could interview Rob Morley, vice-president of Canfisco, which I considered and discussed, but I decided that the most relevant experiences for my research were those of the First Nation participants. Interviews with more non-Aboriginal participants and discussion of what made the negotiations more successful for them would be the basis of or context for another research project.

Future interviews regarding the CSAB and collaboration with First Nations in the Fraser River region may include CSAB members such as:

- Rob Morely, Canadian Fishing Company and early participant in the structured decision-making process with the Stó:lō and CSAB representative Dave Barrett.
- Gordie Wasden and Brian Assu – Aboriginal commercial fisherman, Kwaguilth.

Commercial Salmon Advisory Board

The Commercial Salmon Advisory Board represents industrial fishers, both non-Aboriginal and Aboriginal. The group acts as a liaison group between the DFO and the commercial fishers, and is recognized by the DFO as the advisory board for commercial salmon fishery (Barrett 2007). In the case included in this research, the CSAB was acting as a liaison between commercial fishers and First Nations.

The structure of the CSAB was described to me by Dave Barrett, the Executive Director of the Board. The twenty member Board is elected by regional sectors of members or selected by specific commercial interests. It includes:

- Two members from each of eight Area Harvest Committees, for a total of 16 members.
- Two members from the Native Brotherhood of B.C.

- United Fishermen and Allied Workers Union.
- Fish processing companies.

4.4.2.2. Case Fundamentals

Early in this case and negotiation process, in the spring of 2006, a structured decision-making process was designed and led by consultant Richard McGuigan (Diamond Management Consulting). He acted as a mediator between the two groups and facilitated the development of mutual objectives and direction for the group.

The case included in this research involves the ongoing dialogue and negotiation process of the Stó:lō with multiple fishing sectors on the lower Fraser River working together to develop a management and recovery plan for the Cultus Lake sockeye. During the time of writing, the group had expanded their vision to include all Fraser River salmon and hopefully to engage with upper and lower Fraser River fishing sectors.

In late April of 2006, industrial fishers, represented by the Commercial Salmon Advisory Board, approached the Stó:lō to start meeting around the issue of Cultus Lake sockeye.

And so what we ended up talking about was Cultus sockeye at first. And how they wanted to come to an understanding on the exploitation rating and get our support for it. But that's really the issue that brought us together. (Grand Chief Doug Kelly interview 2007)

The group began with just the Lower Fraser First Nations represented by The Stó:lō Tribal Council, The Stó:lō Nation Society, Chehalis Indian Band, and Katzie First Nation, and CSAB as the representative for the commercial sector. Continued discussion and partnership between the groups resulted in the formation of the Salmon Table and the development of the MOU.

The Parties [the Salmon Table] seek ways to collaboratively resolve conflict over conservation, management and allocation issues related to Fraser River Salmon. Through ongoing dialogue, supported with learning from Science and Traditional Knowledge, the Parties will create a shared agenda, identify issues, determine each party's respective interests and create mutual resolutions. The Parties will conserve Salmon Resources and Habitat for future generations.

This Memorandum of Understanding sets a Table for Dialogue and Action that addresses the interests of the Parties. This Table is open to other organizations that seek to improve Fraser River Salmon Fisheries management through respectful dialogue, learning, and action. How and when these other organizations participate at the Salmon Table will be negotiated by them and the signatories of the day to the Salmon Table .

This MOU is a statement of the intent and clear expression by the Parties to resolve their conflict through honourable and good faith negotiations. (Stó:lō Tribal Council et al. Draft Version 5 2006)

Early discussions of the Salmon Table focused on Cultus Lake sockeye and an appropriate, sustainable exploitation rate.

That [MOU] discussion resulted in an agreement where we supported an exploitation rate of 30 percent this last summer of Cultus sockeye and that the industry would conduct a fishery and set aside anywhere from 50 to 75 percent of the proceeds for investment in Cultus recovery activities. And so bear in mind they exceeded the two years before. (Grand Chief Kelly interview 2007)

The result of the implementation of this management strategy and partnership was the creation of a one million dollar trust fund to support recovery efforts for the Cultus Lake sockeye. This Salmon Table grew to include sport/recreational fishing representatives, environmental NGOs, DFO representatives, and additional First Nations from the lower and upper Fraser River. The Salmon Table meetings and activities are currently facilitated by Richard McGuigan of DiamondMC Inc. The group is in the process of forming a not-for-profit organization called the Fraser River Salmon Table Society.

Implications of the *Larocque* Decision on this Case

The monies generated through the Salmon Table MOU were intended to fund restoration projects related to Cultus Lake salmon, and other future projects. A recent federal court ruling has had implications for the advancement of projects under the MOU. In the 2006 *Larocque* decision, the federal appeal court ruled that the DFO was not permitted to raise funds for scientific research projects by opening a fishery, or increasing a quota, specifically designated to raise money to conduct scientific work (*Larocque* 2006). The case originated in New Brunswick, but had ripple effects across the country. In essence, the fish are a common, public resource and should be managed for the public good. What constitutes the public good should be determined by elected officials. Thus, if the federal parliament had not approved and provided money to the

DFO for scientific research, the DFO was not permitted to raise additional funds for studies and work out of this publicly held resource.

Unfortunately, some parallels have been drawn between the Trust Funds generated by the Stó:lō, and the CSAB MOU. The funds generated within this agreement required that the DFO approve the total allowable catch recommended by the MOU group. This agreed total allowable catch was somewhat higher than the Stó:lō might otherwise have recommended, had the Trust Fund monies not been set aside. Thus, the DFO is again seen to be assisting in the generation of funds for studies and fisheries enhancement by approving an increased quota. Because of this court ruling, the use of the funds within the MOU Trust Fund was on hold at the time of writing.

It should be noted that the *Larocque* case has had other implications. For instance, for more than 50 years the DFO had allowed for a one-day charity herring fishery opening from which the proceeds would go to the CKNW (radio station) Orphans Fund charity and the T. Buck Suzuki Foundation for Injured Fishermen. This program was terminated in November 2007. Themes in the Soowahlie – Stó:lō – Lower Fraser Case

4.4.2.3. Finding Common Ground

One of the key themes in the success of the Stó:lō case the ability of the various parties to find common ground and goals for moving forward and working together. Both parties were able to set aside their differences and come together in the common interest of managing the fishery in a sustainable way.

Originally, the Province, the CSAB, and the various members of the Integrated Harvest Planning Committee (IHPC) embarked on a process to determine the exploitation rate of sockeye for 2005. A structured decision-making process led by consultants Robin Gregory and Graham Long was a significant factor in the convergence of the parties. In this process, structured decision-making techniques enable participants in the negotiation to move away from contentious issues by discussing overarching goals and objectives. Values are then elicited through techniques that will cast light on each participant's potential biases or blind spots, and provide information to decision-makers about which course of action or option might best meet their goals (see <http://structureddecisionmaking.org> for more on this process). This process led to a recommendation of ten to twenty percent harvesting, but the CSAB management wanted a higher rate and demanded that the DFO determine harvesting rates.

Rather than turning over the decision to the government, Dave Barrett of the CSAB recommended that the Harvest Planning Committee approach the Stó:lō and see if these two groups could come to an agreement around sockeye harvesting. It was through these discussions that enough common ground was found to form the Salmon Table and the MOU between the CSAB and Stó:lō.

4.4.2.4. Reciprocal Respect for Knowledge

Like many long-resident peoples, the Stó:lō have a deep knowledge of the resources and land within their territory. This knowledge has been used by the Nation to access and manage their resources, but it has also highlighted concerns for the health of the land overall.

We also know the logging practices up in the Chilliwack river valley and what it's done. We know about all of the different kinds of developments that have taken place around the lake, the quality of the water in the lake. So there's lots of things that we know just from local knowledge and we talked about that through the course of this [negotiation]. (Grand Chief Kelly interview 2007)

When asked if this knowledge is respected, Kelly responded in the affirmative, but also emphasized that commercial fishermen have a depth of knowledge that deserves respect as well (Grand Chief Kelly interview 2007).

So if they want to be heard... Listen to others. It's a process of learning and both sides - all of the sides - that come to these meetings are learning. They're learning how to listen to one another. The more time you spend listening to one another the better we understand that we have more issues in common. If you focus on what you have in common you're less likely to have conflict. And that's the approach that's worked. If we focus on differences all we do is fight all the time. (Grand Chief Kelly interview 2007)

Chapter 5. Common Themes

5.1. Common Elements of Positive Negotiation Cases

My aim in this research was to describe themes that emerged as positive elements¹⁰⁸ within the cases provided by the research participants. I also sought to identify themes that were generally common across cases. Each interview was reviewed to identify topic or subject areas. These topics were then bundled under general themes (see Appendix F for list of topics and themes). I reviewed the interviews and marked (coded) each paragraph with topic and major theme identifiers.

My general philosophy and approach with regard to the interviews and cases was to maintain their integrity and the wholeness of the narrative. I was challenged when attempting to apply a rigorous analytical framework that requires dissection and reorganization of the interviews, such as that demanded by the qualitative approach of Grounded Theory. As McGregor¹⁰⁹ states in her doctoral dissertation, Grounded Theory is at odds with an “epistemological stance of holism and inclusiveness” (McGregor 2000, 198). Thus, I followed the methods of McGregor (2000) and Crotty (1998) and returned to an epistemological standpoint of wholeness throughout the

¹⁰⁸ Following on the discussion in Section 3.4.2 Case Selection, while the cases presented in the interviews represented relatively successful negotiations, many interview participants reflected on negative aspects of past unsuccessful cases (see Appendix E for more). The positive elements identified are essentially the corollary of any negative approaches previously experienced.

¹⁰⁹ Dr. Deborah McGregor is an assistant professor at the University of Toronto and a member of the Anishinabe First Nation in Ontario, Canada.

analytical process while still analyzing the interview data to arrive at some core variables.

Themes that were repeated and emphasized across the cases are discussed below.

Historical colonial themes of ignored Indigenous sovereignty, cultural oppression and assimilation, discounted Indigenous governance and lifeways, and misunderstanding across worldviews echo in the threads of the issues that still dominate land relations in British Columbia. The common themes across cases in this research reflect unresolved historical issues.

These cross-case themes are listed in order of how often they were discussed and the emphasis they were given collectively in the interviews. This system identifies themes in their general order of frequency of discussion in the interviews, although each case and participant was unique. For instance, Theme #1 on aboriginal rights and title was not discussed by all participants. The relevance or importance of these themes for creating meaningful consultation and negotiation forums cannot be determined from this frequency. All that can be determined is that the participants were focused on these issues at the time of the interviews. The primary themes identified across the cases were:

Theme #1 - Recognition of Aboriginal rights and title to land.

Theme #2 - Relationships and Trust

Theme #3 - Achieving Something Significantly Deeper Than Mere Consultation

Theme #4 - Power Rebalance and Capacity Building

Theme #5 - Community Involvement and Support

Theme #6 - Inclusion of Indigenous Governance and Practices

Theme #7 - Respect for Traditional Knowledge

Theme #8 - Understanding Indigenous Ontology and Values

To some extent, the frequency of discussion of these themes in the interviews may indicate a hierarchy of needs or priorities for many First Nations in British Columbia at this time, though future interviews could see this emphasis order reversed. For instance, if the Crown were to recognize Aboriginal title more fully and require fair and balanced negotiations with First Nations, it is quite possible that Theme #7 or Theme #8 could take more prominence in future discussions.

5.2. Theme #1 - Recognition of Aboriginal Rights and Title

*I think... the thing that Polaris did right was,
number one they always recognized First Nations rights and title,
from the very beginning.
(Chief Sayers interview 2007)*

The general theme of justice or fairness towards First Nations was raised in almost all of the cases discussed in this research. Justice was generally discussed in terms of recognition of Aboriginal rights, Aboriginal title, and the fair dealings in negotiations or consultation that ought to flow from these rights. It does not appear, however, that the non-Aboriginal participants in these cases were motivated by justice per se. The

motivation for non-Aboriginal consultation was more often for legal or business reasons (see Section 5.2.1 for more on motivation for consultation). However, Aboriginal research participants stated that pursuing justice in relation to the management of their territory, resources, or Aboriginal rights was the fundamental motivator for them to increase their participation in resource-use decisions in their territory.

In simplest terms “justice concerns what people are due,” and in essence what they deserve (Schmidt 2006, 7). Justice is then typically expressed through constitutions and laws as a series of individual or group rights.¹¹⁰ Interview participants discussed the fact that positive negotiations were typically founded on what they saw as a fair recognition and inclusion of their interests, and rights as protected under the *Constitution Act, 1982*.

Constitutional changes and common law have led government agencies, including the DFO, to increasingly respect the rights of Indigenous people. Ernie Crey discusses this shift as it relates to the Cheam and Stó:lō cases:

There’s been a fair amount of change from the mid 1980s when I started work at DFO to the present date. The reason for the difference in how DFO deals with the Indian bands along the Fraser and everywhere else that I’m aware of, is that in May of 1990 the *Sparrow* decision came down. The first really significant fisheries case and in that case the courts recognized that an Aboriginal right, constitutionally protected Aboriginal rights, existed. (Crey interview 2007)

¹¹⁰ Two types of rights are identified: those that are positive, describing what someone is due, or negative, outlining a freedom or liberty that results from a right to noninterference (Van De Veer and Pierce 1998).

First Nations peoples contend that they are owed the ability to exercise their Aboriginal and treaty rights and enjoy those rights and lifeways associated with the territories they hold and have held for millennia prior to the arrival of British colonists and settler communities (Calder 1973). Many First Nations consistently assert a right to sovereignty and self-governance that existed prior to settler occupation. The ability to exercise these rights and maintain Aboriginal title involves resolving issues of justice related to property, title and territorial sovereignty – questions intrinsically tied to the land.

The questions and conflicts arising from unresolved land title issues between the Crown and First Nations is often called the “Native land problem in this province” (Harris 2002, 322). The just allocation of land and resources are issues difficult for Crown governments to reconcile broadly because of entrenched historical conceptions of justice and a reluctance to give up resources and revenue (Maaka and Fleras 2005).¹¹¹

The *New Relationship* in British Columbia points toward significant change on this front by acknowledging Aboriginal rights and title to the land (Government of British Columbia et al. 2005). Moreover, a proposed indicator of success for the *Kelowna Accord*, for which the *Relationship* is a foundational document, is to finalize “treaties and other agreements” (Government of British Columbia et al. 2005, 3).

¹¹¹ There are other reasons that reconciling land title issues is difficult for the federal government, including “the perceived complications associated with Quebec nationalism that may arise in the Canadian federal system if Nation-based pluralism were to be fully accommodated (Kymlicka and Raviot 1997). See Glossary for more on Canadian federalism.

The political climate right now, I mean people just need to catch up. History has moved beyond doing business without us. ... The whole political environment around accommodation has changed. Our interest has to be considered and accounted for. (Speck interview 2007)

Results of this research indicate that early and clear recognition of Aboriginal rights and title is necessary to form the foundation of a positive negotiation forum, particularly in areas where treaties are absent. Recognition and understanding of Aboriginal rights is also important in negotiations related to treaty land. For instance, the lack of recognition of Aboriginal rights is an ongoing concern in the Athabasca Delta region of Alberta, where excessive water use for tar sand oil extraction is threatening the Aboriginal right to culture and lifeways (Thomas-Muller 2008). This region is covered by Treaties 8 and 11, but local First Nations are concerned that their rights are not being acknowledged or protected by the federal and provincial governments (Thomas-Muller 2008). Therefore, whether a government or proponent is working with a First Nation with or without a treaty, the recognition and understanding of Aboriginal rights and Aboriginal title is critical.

The theme of recognition of title and rights was raised by participants as a positive aspect of the Hupačasath and 'N̄amgis cases, and as an area in need of improvement in the Cheam case with the DFO. Cheam fisher and elder Isaac Aleck explained that the Cheam are well known for declaring their Aboriginal rights and that the DFO enforcement officers were not supportive of what Cheam saw as a right to fish by their preferred method. This area of unrecognized or unclarified Aboriginal rights was a

source of tension as the two groups were trying to work together on the case included in this research.

Isaac: ... so that's how come the second year they wanted us in on it [the drift net study] because our band pushes for our rights and we won't back down.

Andrea: Yeah.

Isaac: So we just tell them 'No. You're wrong.' They tried charging us and we just tell 'em they're infringing on our Aboriginal rights and the conservation officers are officers of Canada and it's their job to support the laws not selectively pick which laws they want to enforce. (Aleck interview 2007)

Clarification and recognition of Aboriginal rights and outstanding title, and what these elements mean for negotiation process and goals, are important issues to deal with in order to effect positive negotiations. Ernie Crey, Stó:lō fisheries manager, explained that relations with the DFO will continue to be strained while this federal department continues to use a limited and outdated interpretation of Aboriginal rights.

Ernie: A number of communities don't automatically comply [with the DFO fishing allocations] because they know the new rules of the game and one, one community is Cheam. Another may be Musqueam and there may be other communities around the province that take the position of 'No, it's not going to work this way. The courts have said so. This is how it's supposed to work you know, you folks from DFO don't ride in and tell us when we're going to fish, how we're going to fish, how long we can fish. And impose a community quota that's like a salmon quota on us'.

Andrea: Right.

Ernie: It doesn't work that way any more. In fact you might even be infringing the right if you attempt to do so. You may be bringing dishonor to the Crown. In doing so we'll see later, if you think you can do that kind of thing. And if I know that you're doing nothing to improve your working relationship with us, the law aside, you may be doing things that are not improving your working relationship with us, so how about if we roll up our sleeves and sit down and have a meaningful consultation about our fishery?

Some of the communities did take that position [demanding to be consulted] and they're within their rights because that's what the courts have said.

But DFO, as I said, although they've made some changes, are largely still living in that era where they think 'We call all the shots'. (Crey interview 2007)

This source of tension between the Cheam and the DFO could be resolved by clarifying the issue of Aboriginal rights to the fishery. Theme #1 emerging from this research involves the improvement in relationships and negotiating outcomes that results from a clear respect and recognition for Aboriginal rights.

5.2.1. Necessity on the part of the Non-Aboriginal Group

I don't care what motivates you. Let's just work on it.

Grand Chief Doug Kelly interview 2007.

In most of the cases studied in this research, the non-Aboriginal government or company involved in the negotiations recognized the need for reaching agreements with the First Nation, generally because of a full or partial recognition of aboriginal rights and/or title. It was the perception of the First Nation participants and their representatives that the motivation for consultation on the part of the government or corporation¹¹² in these cases was founded on one or more of these motivating factors:

- Recognizing and acting upon legal requirements for consultation;

¹¹² The true and nuanced reasons for non-Aboriginal parties to negotiate with First Nations could only be elucidated through direct discussion with those non-Aboriginal parties. Any inference to the contrary is unintended by the author.

- An interest in reducing project completion risk and uncertainty through community support;
- An interest in increasing or speeding access to natural resources;
- An interest in avoiding costly court confrontations; and/or
- An environmental or resource sustainability concern.

So while the *New Relationship* document in British Columbia indicates a stronger recognition of the need for justice and reconciliation of First Nations issues in the province, there still appears to be a lack of this same recognition at the federal government level and with project proponents in general. Some degree of recognition of Aboriginal rights and title was a theme in some of the cases; others did not specifically have this recognition from the non-Aboriginal groups or participants specifically. In those cases, the negotiations proceeded based on the non-right related necessities and drivers listed above. Furthermore, the recognition of Aboriginal rights and title on the part of the non-Aboriginal parties was described as motivated by legal requirements, not reconciliation or justice per se.

5.3. Theme #2 – Trust and Relationships

...if we can work together we can learn to respect each other's way.
(Cheam fisher Issac Aleck 2007
talking about improving the relationship between Cheam and the DFO).

Each of the cases in this research involved an increasing level of trust between the First Nations and the negotiating non-Aboriginal group. As evidenced by McGregor in her 2000 research in Ontario, “ensuring meaningful participation of Aboriginal people in any process requires relationship building; positive relations based on trust, friendship, peace and respect must be established” (2000, 197). Native American scholar Gregory Cajete adds to this idea that “intellectual, social and spiritual learning unfolds in a definite context of relationships” (1994, 192). “From an Aboriginal perspective positive relationships hold the key to a move toward sustainability” (McGregor 2000, 192). “And [if] you ... start off by irritating First Nations it’s really hard to backtrack. And to set the tone for how your relationship is going to proceed. Most First Nations, because of historical reasons start out being stressful” (Speck 2007).

Strong relationships between First Nations and non-Aboriginal groups can avoid disputes that may lead to mistrust, costly project delays, or court action. For instance, strong relationships with private sector interests had previously enabled the Hupačasath to work quite smoothly with the forest sector. Chief Sayers discusses the changing relationships in the forests on Vancouver Island as forest licences change hands.

And when you’re working together, you can do those kinds of things. You know, and we had such a good working relationship with Weyerhaeuser and through the years that we never had to go to the District Manager for approval. We never had to fight. We had differences of opinion and we ended up compromising on some things, but we never had to go to a referee to make the final decision. (Chief Sayers interview 2007)

Positive or improving elements of relationships were identified throughout these interviews. The change-over of personnel interacting with the First Nation, their ability to make and keep commitments, and a forthright approach to discussing their position were seen as important aspects of these strong relationships. And the converse was also said to end discussions or slow them indefinitely: relationship weaknesses such as inconsistent or constantly changing personnel, sending representatives who were not in the position of authority to make commitments and keep them, and dishonesty or indirectness when dealing with the Nation. Chief Judith Sayers of the Hupačasath First Nation related her feelings about how the federal government typically inadequately forms and maintains relationships with First Nations, particularly in consultation and negotiation processes:

Relationship building is so important. And the people that do it the worst are the federal government. They are the worst. They don't even know what the word means. And then as you start to get a good working relationship with someone, then they yank them out of here and give you someone you can't even begin to work with. I have just been so frustrated because there is no process in the federal government, although they've committed now to putting one in place, because they're getting sued of course, on the pipeline... in Alberta. It's those hard lessons that I think they're just going to have to learn. (Sayers interview 2007)

5.3.1. Approaching Communities

The following guidelines are relevant to creating strong negotiating relationships with First Nations and were created from the results of these interviews and my personal experience, and expand on the former British Columbia Ministry of Sustainable

Resource Management guidelines for consultation with First Nations (2004)¹¹³.

Consider the following to help to build a relationship with a First Nation (Table 1).

¹¹³ These 2004 SRM guidelines and the 2002 provincial consultation guidelines are no longer current provincial policy, but have yet to be replaced. The Province is working with the First Nations Leadership Council to develop a new framework for consultation and negotiation based on the 2005 *New Relationship* principles.

Table 1. Keys for Building Strong Relationships

Method	Description
Gain some background	Learn as much as possible about the First Nations in the territory you are investigating. Find and follow any available written protocols.
Approach with Respect	Recognize that you are a visitor in their territory, that the First Nation has Aboriginal rights and title in their territory, and approach your discussions with that in mind. Be open to the First Nation's unique objectives, values and interests. Ask for guidance when you are unsure of local protocols.
Approach Early	Contact with communities should be made at the earliest possible stage such that development plans are open to accommodating the First Nation's interests.
Find and Make Personal Introductions	Find someone who can make introductions on your behalf. Possibly someone from another First Nation, the municipality, provincial agency, another office or company who deals with the traditional territory or neighbouring territory who can make introductions on your behalf (BC 2004).
Approach with an Open Mind	Each Nation is unique. Listen without assumptions to the Nation's concerns and preferences for consultation.
Send Invitations to Meet and Negotiation, Rather Than Requests	Invite the First Nation into the process early – sometimes an invitation is more welcoming than requesting their presence at a meeting.

Method	Description
Meet in person	Visit the band/tribal council office. Hold meetings in the First Nations territory.
Build Trust	Be clear, direct, truthful and forthright in your discussions.

5.3.2. Shared Interests or Need on Both Sides

*They just realized that nothing will happen without 'Namgis in the project.
(Doug Aberley interview 2007, referring to Brookfield Power)*

In the cases I researched, part of the reason for success in the consultation process was that both parties had something to gain from working together. Incorporating the interests of others into a bureaucratic process is more likely to be successful when individual incentives exist for collaboration, such as the economic incentives suggested by Pinkerton (in McGoodwin 2006) in his reasons behind incorporating local knowledge. In the case of the DFO working with the Cheam Nation, the collaboration did not necessarily represent a change of philosophy on the side of the DFO. "It's not really a change of heart. It's because they [the DFO] needed to have our fishery information" (Fredette interview 2007).

[The DFO was] in the firing line [trying to answer questions] and they needed to have answers and they weren't getting them and they needed, you know, our information and that's what's the bottom line really was for the decision-making and they decided 'whatever they [Cheam] need let's just give it to them as long as it's within reason'. (Fredette interview 2007)

In addition to the drivers listed above, I argue that the incentives for collaboration can be extended beyond economic incentives and through to other areas of mutual interest. In the case of the Stó:lō, their incentive to collaborate was not inherently commercial, but cultural. The decline in, and potential future loss of, the fishery could have deep cultural implications for the Stó:lō communities. While the Commercial Salmon Advisory Board's motivation for working with the Stó:lō may have been primarily financial, there were also significant cultural implications for commercial and recreational fishing-dependent communities on the lower Fraser River.

Simple economic or monetary incentives or accommodation can be shallow and short-term and may not form the same type of long-term incentive to collaborate as those that are more multi-faceted and linked to cultural or environmental interests. For instance, the economic incentives for the private sector to form joint venture partnerships with First Nations (rather than allow the First Nation to take revenue, profits, or royalties from a project) can be a matter of making financial prospectuses of the company appear more profitable from a percentage perspective. In both Polaris cases, one of the First Nations decided to maintain their governance position and pursue the royalty / governance route. One of the financial reasons that private sector proponents prefer to avoid the royalty route is that a royalty directly affects the return-on-investment (ROI)¹¹⁴. Whereas if an equity partnership is worked out then the equity invested by

¹¹⁴ ROI or rate of return is calculated as fraction of gain from investment less cost of investment (profits) divided by the cost of investment. Thus, royalties and other payments are costs of investment that are

the private proponent is reduced by the amount invested by the partner, which does not necessarily reduce the proponent's percentage ROI.

Another reason that a proponent would prefer a First Nation to take an equity position is so that they fundamentally share the goal of seeing the project through to success.

This involvement means that the First Nation has a greater incentive to help make the project proceed smoothly (Ullstrom interview 2007) since if the project proceeds, the community will achieve a return on their invested equity. While royalties also provide incentive for project success, there is no investment by the First Nation in the project and thus less at stake for a First Nation in a royalty/governance position.

5.4. Theme #3 - Processes Deeper than Mere Consultation

While not all the cases included in this research involved formal, legally required consultation regarding potential impacts on Aboriginal rights or title, all involved some form of negotiation between First Nations and non-Aboriginal groups regarding land or natural resource management. For instance, the Parks co-management case with the 'Namgis and the negotiation of an MOU between the Stó:lō and the CSAB were both cases that involved more or less voluntary negotiations where the Nations themselves initiated a negotiation with government or private sector entities. What these cases have in common is that the interactions and processes resulted in strong consultation,

subtracted from revenues (the gain) will reduce ROI. ROI is a critical indicator used by investors and financiers to judge the overall financial potential and health of a project (or other investment).

negotiation, and collaborative work, that likely resembles processes more mere consultation required by *Delgamuukw* (1997). Thoughtful, respectful approaches to deeper consultation and negotiation have led to successful enterprises for both the First Nations and non-Aboriginal groups involved in these cases.

In contrast to the cases in this research, many developers and levels of government have taken consultation to mean as little as simply informing or notifying First Nations governments of upcoming projects or processes. This limited view of consultation may lead to stalled or blocked development projects, court cases, or ongoing poor relations with the First Nations in the region. However, even at a minimum, basic consultation requires some sort of communication and dialogue. This minimum level of consultation, simply informing the First Nations and seeking to understand their interests, is seen by many First Nations as insufficient for their rights and interests to be understood and accommodated.

Thus, First Nations are seeking new land management relations that fully include and accommodate their interests through strong consultation and negotiation. For example, 'Namgis First Nation made it clear that mere consultation is not sufficient for new projects to go ahead in their territory. In 2006, BC Hydro put out a Call for Energy for proponents to provide new electric energy, and within those documents required some evidence that the proponents had pursued consultation with local First Nations.

...People were staking claims throughout our territory, and approaching us and trying to set up what they call consultation meetings so that they could put in their bid and say that they had talked to the First Nations. That one company we told you about, that it's simply not adequate to simply write us a letter and us to write a letter back and you call that consultation.

We want to know about your project. We want to know what you envision our participation being and uh we want to know what studies you've done. They sent a, a consultant that they hired to do a water, some sort of water analysis...hydrologist came out to talk to us. And we were like, 'well, what are you doing here?' (laughter).

We want to talk to your principle.¹¹⁵ (Speck interview 2007)

George said that in these situations the 'Namgis have learned how to deal with the prospectors. "We have since learned - don't write back!" (Speck interview 2007).

However, a number of provincial government guidelines still advocate a notification system for projects that the developer sees as having low potential to impact Aboriginal rights or title.

As stated previously, industrial projects can have significant social, environmental and cultural implications. In Canada, environmental assessment and project permitting are the two arenas where First Nations' rights, interests and concerns are typically considered. In contrast to Kinsky's recommendations from over 20 years ago, that "these implications" should be addressed "early in the process", such as in the "initial assessment phase" of the federal Environmental Assessment process (1987, 94), many federal and provincial government environmental assessment processes do not include

¹¹⁵ Despite the lack of consultation with, and support from the 'Namgis the proponent still received an Electricity Purchase Agreement from the Crown corporation BC Hydro. 'Namgis were trying to buy out the interests of this proponent at the time of my interviews.

First Nations in early planning or permitting processes that may have impacts on land. Both the British Columbia and Alberta government's guidelines for Crown land permits indicate that consultation is not required in the issuing of a permit or right to explore a resource (e.g., ocean energy investigative permits, mineral rights) (Alberta Department of Energy 2007; British Columbia Ministry of Agriculture and Lands 2008), although such a permit is the earliest and first phase in what could become a large development. And the limited consultation that does take place in later stages of resource investigation is frustrating to First Nations in Alberta.

Dene Tha' continues to be frustrated and disappointed, however, with the Government of Alberta's refusal to engage in meaningful consultation with Dene Tha' and other First Nations in Alberta. Alberta continues to approve thousands of projects every year in which adversely affect and infringe the hunting, trapping, fishing and gathering rights of First Nations without, in many cases, directly consulting with those First Nations at all. Chief Ahnassay said that "the time has come for Alberta to scrap their unconstitutional Consultation Guidelines and to sit down with Dene Tha' and other First Nations in Alberta to negotiate a mutually satisfactory consultation process. (Dene Tha' 2008)

The Alberta Government's justification for the lack of consultation in early stages is that the granting of a right, such as a mineral exploration right, does not "in and of itself, adversely impact First Nation rights and traditional uses" (Alberta Department of Energy 2007, 1). It is interesting to note that these guidelines from Alberta were developed after the *Haida* case decision which clearly stated that planning and strategic decisions had the potential to impact Aboriginal rights (*Haida* 2004).

There is more likelihood that negotiations will go smoothly when consultation is initiated early and as an exercise in fully informing a First Nation; gathering information about their potential concerns and interests, and accommodating those concerns and interests through a negotiation process. Strong consultation and negotiation would include a sincere effort to form a relationship with the First Nations government, or with individuals, and to approach resource and land use decision-making in a collaborative way.

5.4.1. Negotiation versus Mere Consultation

Consultation that takes place in BC today is not typically founded on the principles that guide negotiation; court judgments (*Haida, Taku*) have ruled that a mutually satisfactory outcome is not required from consultation. As stated in the *Haida* judgment,

Good faith consultation may in turn lead to an obligation to accommodate *Haida* concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. *There is no duty to reach agreement* [emphasis added]. (*Haida* 2004, par. 10).

First Nations in BC generally participate in decision-making processes regarding land and resource management through consultation, where their goals and values may not be fully considered nor is the government required to obtain their consent to proceed (*Taku* 2004). Given that the worldviews, values, and objectives of First Nations diverge from those of many public and private Western entities, participation alone in these province-led processes may serve to undermine Indigenous peoples' aims for self-government, self-definition and the assertion of Aboriginal rights and title. But

participate they must, since frustrating these often inadequate and unbalanced consultation processes is not seen by the Crown as a legitimate means for First Nations peoples to prevent the advancement of natural resource use or development (*Taku* 2004), even where such so called development may be incompatible with a traditional relationship to the land (*Haida* 2004).

In recent years, the legal requirement for deeper, more meaningful consultation as described in case law (*Delgamuukw* 1997; *Haida* 2004) and the concept of “co-management” between Western and Indigenous governments in Canada have given new depth and direction such consultations (Anderson and Nutall 2004; Nadasdy 2003). The cases included in this research represent examples of such deeper consultation. Meaningful consultation may include shared development of decision-making processes, planning objectives, and authority for outcomes. The Courts have clearly expressed that the “Crown's duty to consult is especially significant in light of repeated judicial calls for First Nations and the Crown not to tax the institutional competence of the judiciary by excessive litigation of disputes, and instead to attempt to reach *negotiated settlements* [emphasis added]” (Lawrence and Macklem 2000, 254).

Because “[u]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... the basic purpose of s. 35(1)-‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” (*Delgamuukw* 1997, 1123). However, meaningful participation in resource decision-making in BC, particularly an understanding

expressed from a First Nations peoples' perspective that is incorporated into a balanced negotiation process, has yet to be fully appreciated and widely applied (Kennedy 2007).

The cases included in this research represent consultation processes that resembled negotiations in that both parties were striving to reach an agreement. While the First Nations included in the cases may not have been on equal footing with the developers or government parties given the current climate and requirements for consultation (e.g., Hupačasath, 'N̄amgis), the overall aim in each case appeared to be mutual agreement.

First Nations require a rebalancing of the negotiating field in order for true negotiation to take place. While agreement is the ultimate aim of negotiation, making trade-offs and compromises are the means of getting there (Gottlieb and Healy). Given that the non-Aboriginal parties are not required to reach agreement with the First Nations, more trade-offs and compromises will be made on the part of a First Nation until they are seen as equal, or authoritative parties in the negotiation.

5.4.2. Flexible Approach Founded on Basic Principles

This dissertation was not intended to provide a template, universal model, or recipe for the initiation and completion of consultation and negotiation processes. While

Table 1. Keys for Building Strong Relationships outlines some mechanisms for forging better non-Aboriginal to Aboriginal relationships, this was by no means intended to be a template for consultation. The development of a consultation template for negotiation with First Nations would be counter to the goal of developing meaningful, personal forums to settle land management disputes. The breadth of community histories and personal experiences; the uniqueness of each First Nation culturally, economically and socially; the diversity of projects, applicable policy, and situations; and the variety of approaches expressed through these cases support this idea that the use and development of a consultation template would not improve these consultation processes.

Furthermore, an approach that works for consultation and negotiation with one First Nation may not be well received or accepted in another Nation.

But the important thing is their [Polaris'] attitude was one of an openness and a willingness to learn. That was the key, right? And I guess my advice here for any company even if you have tonnes of experience consulting with First Nations as you said at the start of this, you're not looking to create a cookie cutter. Because the 11th First Nation you'd see would be completely different as to where it's at and the processes required than the previous ten. (Ullstrom interview 2007)

A flexible approach founded on sound principles for relations and negotiations is required. When one examines the Polaris Minerals experience, they had three similar project proposals that were brought forward in three different regions of the west coast of British Columbia. The three projects involved a total of six First Nations (one in the

first project, three in the second and two in the third). Similar offerings were made to all the First Nations approached. The Hupačasath and Ucluelet signed on relatively quickly, within a matter of months of negotiation. Within their shared territory, the Tse-shaht, who share overlapping traditional territory with the Hupačasath and Ucluelet, did not partner with Polaris but accepted a royalty and impact-benefit agreement and retained a stronger governance role. In the case on the central-west coast of the mainland of British Columbia, the Nuxalk First Nation did not want a proposed Polaris mining project to go ahead (Ullstrom interview 2007; Chief Sayers interview 2007) and were successful in diverting Polaris from their territory. In the case of the 'Namgis and Kwaguilth, 'Namgis took longer to sign on with the project, and whereas a group within the Kwaguilth actually launched a court action to prevent the project.¹¹⁶ 'Namgis Comptroller Garry Ullstrom points out that these experiences covered the "complete spectrum," even though it was the same proponents and similar projects, because each project had a very different outcome.

Also, non-Aboriginal governments and developers must not confuse the prescriptive provincial and federal environmental assessment and impact assessment processes with First Nation consultation. While degrees of flexibility and cultural specificity must be allowed in consultation and accommodation processes, one could argue that

¹¹⁶ The Kwaguilth eventually held a referendum on the project to sign off and receive a royalty (Ullstrom interview 2007). The previous partnership agreement was signed by Chief and Council through a band council resolution (Ullstrom interview 2007). The agreement ended up not being binding, likely given the collective nature of Aboriginal rights. For their agreement, the 'Namgis consulted with their membership, including off-reserve members, by traveling to Victoria and Vancouver and seeking ratification for the project (Ullstrom interview 2007).

environmental “assessment guidelines ... must be clear, comprehensive and precise” (Kansky 1987, 97). Thus, consultation and negotiation processes ought to be kept separate from these policy and timeline driven assessment processes.

5.5. Theme #4 - Power Rebalance and Capacity Building

*Partnerships with Indigenous Peoples **must** address power asymmetries in order to be equitable. Providing resources for the strengthening of Indigenous decision-making structures and self-governance processes is key in this regard.*

(Weitzner 2002)

The theme of power imbalance and the need for power rebalance was addressed in most of the cases studied in this research, particularly by those research participants who work directly with non-Aboriginal governments and private corporations. Dr. Deborah McGregor, Anishinabe from Ontario and assistant professor at the University of Toronto, has identified a “lack of understanding of different world views and unequal distribution of power between Native and non-Native peoples” as hurdles that need to be overcome if Native peoples are to be fully included in Ontario’s forest management processes (2000, ii). The cases in this research echo McGregor’s findings, particularly the need for power rebalance between non-Indigenous and Indigenous peoples.

As observed in this research, power imbalance expresses itself in a number of different forms in consultation and negotiation processes. These processes may include an unequal distribution in the power to design and direct the process, the power to gather

information and knowledge, the power to define knowledge and fact, and the power to make final decisions. Each of these elements of power in action and cognition needs to be addressed when power issues are redressed.

Power rebalancing may require policy changes in order to be achieved. While court decisions have led to some policy and/or consultation guideline changes, on the issue of creating just policies for land negotiations and reconciliation, Harris states that “[p]robably not much more can be expected from the courts” (2002, 297). The Courts are part of the colonial state that created the situation we now found ourselves in with the Indigenous peoples of Canada.

Indeed, over the last 30 years the Supreme Court of Canada has consistently refused to recognize Indigenous peoples’ equal and self-determining status. This refusal is based on the Court’s adherence to legal precedent ... that indigenous societies were too primitive to bear fundamental political rights when they first encountered European powers. Even though the Court has secured an unprecedented degree of recognition for certain cultural practices within the state, it has nonetheless failed to challenge their generative structures – in this case the racist capitalist economy and the colonial state that lead to non-Aboriginal Canada’s assumed authority over indigenous peoples and their territories. (Coulthard 2006, 12)

In this light, the Courts are not likely to produce more specific or progressive directions regarding consultation or negotiation with the Indigenous people of Canada. “The courts have prodded, and may be able to prod a little more, but their capacity for distributive justice is finite” (Harris 2002, 297).

The courts, having determined Canada’s dominant position to land title, have been reluctant to define policy for consultation and have recommended consultation be

worked out through negotiation. However, the federal government's appeal in the *Dene Tha'* case may lead to further clarification of what constitutes justice in this realm. Ultimately, the questions will return to the theatre of the public and politics, where the tables are lopsided and the distribution of power is vastly unbalanced. However, the questions must eventually be resolved since "we are all here to stay" (Campbell 2005). "Unlike the African colonies from which administrators, armies [and small communities of immigrants] could leave, a highly successful colonial settler society like British Columbia is here to stay" (Harris 2002, 297).

5.5.1. Process Design - Developing Goals

An important element of redressing the power balance is developing a negotiating platform that is based on mutually developed and recognized goals or objectives. For the primary agents involved in land and resource management in British Columbia - provincial, federal and First Nations governments, and sometimes the private sector - the goal of reaching successful resolution in consultation or co-management is a strong motivator.

Whiteman and Mamen describe strong versus weak consultation processes, which are relevant to the discussion of whose goals count and what constitutes meaningful consultation or meaningful negotiation. In a strong consultation process, goals are jointly developed by Indigenous communities and companies prior to negotiation and these goals are binding, whereas in a weak consultation process "goals are developed

by companies in isolation and are not binding” (Whiteman and Mamen 2002).

Although successful cases of land and resource negotiation, such as the De Beers case in the Northwest Territories, do not specifically reference the shared development of goals for consultation, they clearly describe an environment of consideration for other values and interests in their project development (De Beers 2006).

An analysis of participant contributions to this research, to literature, and to the Whiteman and Mamen work, combined with the fundamental goals listed in previous sections of this dissertation, in the context of land management and resource development, Indigenous peoples primary goals likely include the following:

- Recognition of land rights and title;
- Early identification of competing or conflicting issues, and working to find acceptable solutions to these (Saunders 1999);
- Identification of potential project and cumulative impacts (social, environmental, cultural, economic, spiritual);
- Specific accommodation of First Nations peoples’ interests;
- Creating projects which are more ecologically, economically and socially sustainable (Saunders 1999); and
- Ensuring that communities share in the benefits of resource development projects that go ahead.

In order to create a process that is more than mere consultation, one which attempts to rebalance the power between the two parties' goals, the recognition of these goals must be coupled with the working out of two additional complexities:

- The fundamentally different worldviews and associated values that, for many First Nations, shape the discussions; and
- The contrasting understandings and recognition of Aboriginal rights and title and implications for consultation and negotiation.

5.5.2. Consideration for Capacity

*I think that the biggest thing is putting together a good technical team...
and then give them the room to understand the project thoroughly and if you don't have the
expertise, hire it. Whatever the need is.
Find people you trust who can give you advice as to who is best and do that.
(Speck interview 2007)*

Many First Nations administrators and staff are dealing with an incredible spectrum of issues and projects, from health care to education to construction to mine development. Some consideration for the capacity, level of knowledge, and number of staff in each First Nation must be considered as part of just negotiations. For instance, George Speck is a knowledgeable administrator for the 'N̄amgis and Chief Sayers is a lawyer and knowledgeable leader for the Hupačasath, but both these exceptional people expressed how stretched they feel sometimes with the breadth of technical, social and business-related issues that fall within their responsibility.

Cheam fisher Rick Quipp refers to the fact that Cheam has only recently been able to rebuild their capacity in relation to describing their interests and rights related to the land.

Rick: Cheam spent the first three months in the treaty process and found out we were \$600,000 or \$650,000 in debt in the first three months.

Andrea: Wow.

Rick: So when we found that out and we thought about how we're fighting for Aboriginal rights and title, we pulled out and now we're finally getting the manpower to look at certain things. You know, the land, the water, the treaty. Our land base. My Uncle Sam, he was our chief for about 30 years. (Quipp interview 2007)

Capacity assistance was provided at early stages in negotiations in three of the cases in this research and was a positive element of the negotiation process. Having the technical and personnel capacity to participate comfortably in the negotiations gives the Nation representatives confidence.

We feel confident [about our ability] and [have] good examples to lean back on, good experience to lean back on. ...

We are learning to be proud of what we do. ...

And it helps. I mean, we're a lot more comfortable going to the table and we've always been rather aggressive anyway (laughter). But we're a lot more comfortable with people now, with these developers, on a face to face basis. (Speck interview 2007)

Ensuring First Nations have the capacity to represent themselves and their community adequately may require capacity assistance (funding or personnel) from governments.

5.5.3. Process Design - Adequate Timelines

Patience. You've got to have patience to work with First Nation people. These 30 or 90 day deadlines, they just don't work.
(Chief Sayers interview 2007)

Time limitations on consultation and negotiation processes result in a power imbalance, with the weaker, less prepared party less able to respond meaningfully in the time allowed. Flexible timelines were mentioned as a positive element of the cases included in this research. The various provincial Acts and guidelines that dictate the necessity for consultation all include severe limitations on the duration over which consultation can take place (BC Environmental Assessment Act SBC 2002, BCMEMPR 1998, Canadian Environmental Assessment Act 1992, c.37) but the proponents and non-Aboriginal groups in the cases cited above did not insist that these rigid and short timelines be followed.

Time constraints can lead to a number of difficulties: the inability to muster human resources and information to respond adequately to notifications and requests (Chief Sayers interview 2007), adequate time to gather baseline data (*Taku* 2004), and the ability to participate meaningfully in the critical early stages of a project design and development. For instance, federal Environmental Assessment panel schedules are often "much too rushed" (Kansky 1987, 6). Adequate time to sufficiently consider the First Nation involved is required for consultation to reach a balance of power between the two parties. "Native people should be consulted about the optimum time for

[Environmental Assessment Process] hearings because the Indian people travel to the country to engage in traditional activities such as hunting and fishing” (Kansky 1987, 88). Misunderstanding this need for appropriate timing has been occurring for centuries in Canada, such as when the Crown was deciding where Indian reserves should be bounded. In British Columbia, when reserves were laid out in the north, many First Nations peoples were away at fishing camps, and were then not considered or counted by land surveyors (N. Mackin, personal communication, April 12, 2008).

While the capacity constraints faced and timelines requested by First Nations may be frustrating for non-Aboriginal groups who want to advance a project or policy quickly, the imbalance in resources and abilities needs to be accommodated in order for interactions to be meaningful. Garry Ullstrom confirmed this idea when he stated “...things don’t move fast in ‘Namgis territory... and First Nations territory sometimes and that’s a challenge for some of these companies” (Ullstrom interview 2007).

The lack of capacity (knowledge or personnel) can lead to vulnerability for the First Nations. Prospectors and developers may move their project approvals and development along at a quick pace even though these projects may have an impact on the Nation and their lands.

I get the impression that there’s all these prospectors out there running around trying to tie up all these potential [development] areas. And whether or not they put in a bid or make a bid tying it up so that they can sell it to us, I don’t know. Interesting stuff. I have no idea what... I mean Brookfield’s my first experience with Hydro electric power.

I'm learning more than I thought I'd ever know about hydro-electric power!
(Speck interview 2007)

This lack of capacity requires adequate process timelines and is linked to the theme of rebalancing power between the negotiating parties.

5.5.4. Building Capacity and Recognition in Stages

Many First Nations in Canada use economic development to serve a number of overarching objectives in their communities. The willingness of the 'N̄amgis, Hupačasath and Cheam to reach agreement and/or work together with non-Aboriginal groups involved compromise, but was made possible in part because of their objectives to build technical capacity for land and resource management within their communities and create recognition for their role in land management. As described by Cheam member Saul Milne in the local Chilliwack newspaper *The Progress*, “[the Cheam] need to show developed capacity within the community to manage the resource, even if we may have a different interpretation of 'management' of the fisheries” (Feinberg 2006, n.p.).

First Nations become involved in economic development initiatives for various reasons and with particular approaches. Citing earlier work by Anderson and Bone (1995), a report on First Nation business approaches lists seven primary characteristics of the approach typically applied by Indigenous communities to business. “One characteristic

relates to the overall approach, three relate to development purposes, and three to the development process” (Anderson 1995, 310). The overall “collective approach” (Anderson 1995, 310) and the development purposes and processes identified by Anderson and Bone have been revealed in my research and they serve as underlying drivers for the Nations’ interests in participating in each case. The collective approach was evident in my research cases; this development approach is thought to be tied to a First Nation's traditional lands, culture, and identity as a Nation. Pursuing development or joining in negotiation also contributed to the following purposes for the Nations included in my research (reworded from Anderson 1995, 310):

1. Attainment of economic self-sufficiency as a necessary condition for the realization of First Nations self-government.
2. Improvement of the socio-economic circumstances of the people of the First Nations.
3. Preservation and strengthening of traditional culture, values and languages and the reflection of the same in development activities.

The development processes described by Anderson and Bone were also identified in my interviews, but not in the same language and form as below:

1. Create and own businesses in order to exercise the control over the economic development process they require if they are to achieve their purposes.
2. Create businesses that can compete profitably over the long-run in the global economy, in order to build the economy necessary to support self-government and improve socioeconomic conditions.
3. Form alliances and joint ventures among themselves and with non- First Nation partners in order to create businesses that can compete profitably in the global economy. (Anderson and Bone 1995, 311)

The 'Namgis First Nation incorporated all three of these development purposes into their approach to business and co-management agreements:

So this is maybe a different perspective on how you obtain recognition of your title and rights rather than asking the department or the governments in this case to recognize 100 percent that we have title and all the rights that there are entailed rather than you were incrementally.

And I think too chief and council had in mind the Boldt decision down in Washington and frustration of those tribes that were all of a sudden in place of 50 percent that didn't have the capacity to manage 50 percent of the fishery,

And now all the fights and the conflicts that happened internally and externally out of the Boldt decision and the folks who've come up -- and I had presented at different places and I'm sure chief and council talked to them as well -- they kept on saying 'Get your capacity, get your house in order first'. (Milne interview 2007)

Building capacity was also a driver for the Cheam to collaborate with the DFO on the drift net studies (Milne interview 2007). By participating in the study design, counting, video monitoring and data analysis, the Cheam would be well equipped to conduct similar studies for their own, or their region's, purposes in the future.

5.5.5. Legitimizing Knowledge

Constructing and legitimating knowledge is another form in which power manifests itself in land management discussions. "Wolfe et al. observe that those acculturated in Western tradition presume that their belief and knowledge system is sound and rational, that anything else is unsound and a-rational, and that adherents to other system should be reeducated to adopt the system which they utilize" (McGregor 2000, 190). In order for First Nations to be unencumbered by the dominant non-Indigenous worldview, the structures that frame most non-Aboriginal bureaucratic land

management decisions and processes need to be critiqued. In Aotearoa (New Zealand), Kaupapa Maori critical theory includes “notions of critique, resistance, struggle and emancipation” (L.T. Smith 2000, 228), and intrinsic in this critique is “an analysis of existing power structures and societal inequalities” (L.T. Smith 2000, 228). Dominant groups construct the concepts and content of what is common sense¹¹⁷ and fact. Basic critical theory has failed to address communities such as the Maori in Aotearoa, and Kaupapa Maori theory can be seen as a form of resistance (L.T. Smith 2000). A similar critique needs to be applied to land management processes in British Columbia in order for this element of power over knowledge, fact, and point of view to be addressed.

Cheam fisher Isaac Aleck recalled that his traditional and local knowledge was not respected by the DFO until he took a Western education certificate course as a fisheries technician (Aleck interview 2007). His decades of fishing experience and generations of knowledge were not considered legitimated until this Western course had been taken. Further, Isaac Aleck suggested that the studies being conducted with the DFO and Cheam were one way to help the DFO respect local and traditional knowledge. “So that’s the ideal situation. But probably if we can work together we can learn to respect each other’s way” (Aleck interview 2007).

¹¹⁷ The concept of common sense is an important construct in Canadian common law. Common sense more generally is also part of the foundation of land-based decision makings discussions.

5.6. Theme #5 – Community Involvement and Support

Ensuring that community members have a voice in the decision-making process is often important to First Nations governments in BC. The communally-held nature of Aboriginal title, traditional governance philosophies and practices, and the close knit nature of many small First Nations communities all lead to the desire for a higher level of community understanding and involvement than might otherwise be expected or seen in non-Indigenous communities. The 'Namgis community is always involved in resource- and land-based decisions, as expressed by George Speck in his 2007 interview:

Our voices and [those] from our communities are always involved. Brookfield had to go to the community and is expecting to go back to the community in the next little while to give us updates on how the Kwagis power project's going. Polaris minerals has also had to face our membership. (Speck interview 2007)

The British Columbia consultation guidelines suggest including “the community in as many aspects of decision-making as possible” (BC 2004, 21).

Furthermore, hereditary chiefs and other family groups may or may not be represented by the INAC-driven Chief and Council. Therefore, governments and proponents need to recognize that there are community-based leaders that also need to be engaged. The strength of negotiations in the Hupacasath - Polaris case was enhanced through a strong community and community-leader involvement process. Trevor Jones describes the efforts made by Polaris to engage with the community and the First Nation administration.

[Polaris representatives] showed up fairly early in that process and really initiated contact within the community in a way that we hadn't really experienced before, in the sense that he [Marco Romero from Polaris] really wanted to reach beyond just the elected council and he made quite an effort to connect with other community members; including, you know, he did quite a bit of work understanding who the hereditary leaders were in the community. Who the main family heads were... So they seemed to do lot of their homework. And they knew who in the community they were going to have to develop a relationship with to get the kind of support they were looking for.

So it was done in a two-pronged approach. They [Polaris] were reaching out in a community way all the time, whether that was holding dinners or events or funding things in the community; they were always trying to create that relationship. And then they were also engaging the administration in some more subtle ways. (Jones interview 2007).

5.7. Theme #6 - (Mis)understanding First Nations peoples' Worldview

'uwu ni'us 'uw tumuhw'ul nilh s'ul'e'tst

It is not just land – it is our life

Hul'qumi'num Member First Nations and
Hul'qumi'num Treaty Group
(Racette et al. 2006)

As discussed in Section 2.6, the value that many First Nations place in the land and resources in their territory is the product of an Indigenous ontology that sees humans as part of the land, and spirit as part of that “common world” (Latour 2004, 239). This Indigenous understanding of reality, where nature is not separate from humans, and the corresponding knowledge systems, meaning and values that stem from this reality, constitutes the fundamentals of an Indigenous worldview. The issues of land-based values, and Indigenous ontology was raised in each community's set of case studies,

although not by each participant. This theme was raised more often in the Cheam, Stó:lō, and 'Namgis cases as compared to the Hupačasath case.

Unique First Nations' perspectives tend to be subsumed (assimilated) by the Western perspective when Indigenous goals are ignored or merely expressed without sharing an understanding of values and worldview. We might expect assimilation to occur only where the self-definition and culture of one group is seen a less valuable and holding less power in relation to a dominant group. The inference here is that such assimilation should not occur in a country that values pluralism; self-definition should be supported and unique cultural and self-defining elements ought not to be assimilated (Young 1990). Hence, this topic of worldviews deserves some expansion with regard to its role in meaningful consultation, negotiation or co-management.

The provincial government has a role to play in creating an environment of recognition that is whole and avoids using litigation to reach agreements. Simply assuming that Western scientific evidence is the ultimate authority for truth and fact, and knowledge systems in general, may hinder consultation processes. As Chief Judith Sayers states:

how does that meet our concerns if they [the non-Aboriginal government or proponent] say 'this scientist says this', and we don't agree with them, with our traditional knowledge or otherwise, or because we just *know*. Those are the kinds of things that I think still have to be worked out with the Province; is when you've got conflict and they make the final decision. ... (interview 2007)

The following sections expand on the importance and substance of this theme of ontology as it relates to land-based values and knowledge systems.

5.7.1. Values and Ecological Sustainability

An interest in the long-term ecological sustainability of resources and the land in general was raised in a number of the interviews. Interview participants discussed the need for ecologically sustainable development within their territories in the context of being able to preserve their ability to exercise Aboriginal rights, particularly traditional lifeways. Recent evidence provided in *Tsilhqot'in* (2007) suggests that this interconnected relationship with the land continues in First Nations communities in British Columbia.

In the early nineteenth century, Tsilhqot'in people lived in a semi-nomadic hunter, gatherer society in a harsh environment. They were a rule ordered society, tied by language, kinship and customs. Reverence for the land that supported and nourished them continues to the present generation. Tsilhqot'in people no longer live as their forefathers at the time of sovereignty assertion. However, the land continues as a central theme in their lives, providing continuity and stability from generation to generation. (*Tsilhqot'in* 2007, 138)

In the face of much evidence pointing to sustainable lessons available from Indigenous perspectives, it is curious to consider whose purpose it now serves to deny that most, if not all, traditional Indigenous perspectives include a deep connection and respect for the land. In this regard, numerous authors warn of replacing old, negative stereotypes of "savage" wild Indians with new, positive stereotypes that imbue Indigenous peoples with an innate, impressive spirituality and personal connection with nature (Berger 1997; Haig-Brown and Nock 2006). Stereotypes of any kind tend to be limiting.

In reference to these arguments that Indigenous societies were in fact destroyers of ecosystems, Sponsel states that “Western society has always rationalized its practices in relation to indigenous and other non-Western societies, in part by devaluing them in one way or another” (2001, 169). Stereotypes of any kind can be restrictive and disabling to the group being defined, particularly if this is a minority group striving for the ability to be self-determining. With this caution to avoid stereotyping First Nations’ values around land in mind, it is quite likely that increasing the involvement of First Nations in land management would result in more ecologically sustainable management of resources and landscapes, as suggested by numerous Indigenous and non-Indigenous authors (Knudtson and Suzuki 1992; Dumont 1993; Atsenhainton in Alfred 1999; Alfred 1999; Berkes 1999; Cajete 1999; Ford and Martinez 2000; Howitt 2001; Trosper 2002; Fixico 2003; Nadasdy 2003; Atleo 2004; Morgan 2004; Turner 2005). Thus, honouring and including First Nations’ perspectives and relationships to the land may sustain both their culture and worldview and positively impact environmental sustainability. If strong consultation and negotiation is pursued in British Columbia, significant changes could result, in the form of increased environmental and social sustainability throughout the province.

Ecological sustainability is linked to the concept of intergenerational continuity of traditional Indigenous cultures. Many First Nations have managed, despite centuries of colonization, to continue to teach and transfer their Indigenous Knowledge, management philosophies, and practices to current generations of First Nations

peoples. Unfortunately, Western texts and accounts of history tend to describe Canada's Indigenous cultures as something that occurred in the past, not the living and growing cultures that they are. This assumption that Indigenous cultures are extinct or assimilated is part of the so-called museumification of First Nations living cultures, where, put simply, First Nations art, skills and tools are deemed artifacts and packaged for tourism. Here, Ernie talks about the intergenerational importance of maintaining a healthy fishery.

I predict that if we don't work hard and do things to mitigate climate change and changes in conditions of the river itself, the Fraser [river], that in 20 years a lot of the methods of fishing from boats to gillnets to drift and gillnets to dry racks and stuff like that, all of those things will be in a museum of Stó:lō culture. That's where they'll be. They won't be on the water. They'll be in a museum.

And that's the legacy we'll leave for our grandchildren. [We would say] 'You want to know how we lived? In Chilliwack there's a two-storey building with 15,000 square feet. Go and learn about your past. That's where you go.' So they'll be filing all those Stó:lō kids from the local schools, put 'em on buses, send 'em down to the museum of Stó:lō culture. And they'll all file through off the buses and walk through the museum and say, Oh! Oh. (Crey interview 2007)

Sustainable land use is important for the continued existence of First Nations cultures that are inextricably linked to their lands. Examples of potentially sustainable land use plans can be found in co-management models that are emerging in British Columbia, such as the Nuu-chah-nulth Nation in Clayoquot Sound and the Haida Nation in Gwaii Haanas (Clayoquot Sound Scientific Panel 1995; Ministry of Sustainable Resource Management and the Council of the Haida Nation 2003). These co-management models forge new relationships between the values and views of First Nations and the resource

use managers from provincial agencies and private sector interests. Forest management models, such as the Nicola Tribal Association Tmix^W Research Adaptive Management Initiative in the Nicola Valley provide examples of Aboriginal groups developing creative initiatives to increase the ecological sustainability of resource management in their region. These examples of co-management, innovative practices, and meaningful consultation, if applied throughout the province more consistently, could lead to more concerted ecological sustainability efforts, which in turn could support the continuation and revitalization of First Nations' cultures.

5.8. Theme #7 - Respect for Traditional Knowledge

*S'olh temexw te ikw'elo.
Xolhemet to mekw'stam it kwelat.*

(This is our land. We have to look after everything that belongs to us.)

Stó:lō Tribal Council 2004.

Local or Indigenous Knowledge was not always taken into consideration in the cases in this research, despite them being some of the better examples of collaboration between Indigenous peoples and non-Indigenous groups in British Columbia.

I don't really know how much of [Indigenous Knowledge] is used in the [fisheries] management because I reviewed policies and models and a number of different things and strategy planning for fisheries management but I don't see any of the local knowledge for the First Nations being involved in that, like, meaningful involvement in putting together those. I think a lot of it is we're told the plans but not really 'what is your input.' ... There's been a lot of talk around developing models involving the First Nations but that hasn't come to light. (Fredette interview 2007)

Many Western scientists begin to recognize Indigenous Knowledge when it is shaped to reflect Western knowledge or it is supported by an Aboriginal person with a Western post-secondary educational degree or certification. This qualified acceptance and inclusion of Indigenous Knowledge is not a true recognition of Indigenous or local knowledge. Isaac Aleck, elder fisherman at Cheam, explains how his fisheries technologist certificate helps to give credence to his knowledge of the fishery.

It is the beginning of changes but you also have to realize the, due to the beetle kill, that snow isn't being held there. So, a quick balance, we're going to suffer years of highs and lows. It's going to take 80 years for that to grow back and then, that's a rough estimate, another 40 to bring the runs back.

So that's something that they have to start thinkin' about. At the time I was saying that I didn't have a degree. I took fisheries technology training with Martha. So I have this all-fired degree that I can put behind my name instead of common knowledge. You know, local knowledge so... That's what they don't understand. (Aleck interview 2007)

One idea which is often not addressed in negotiations driven by a Western oriented process is that natural resource developments and massive changes to land as a natural place can cause culture loss, both through loss of possession and loss of kinship (Snyder et al. 2003). The recognition, prevention and valuing of this culture loss can be very difficult for Westerners to achieve:

Our society has developed a sophisticated understanding of *hwulmuhw* (Indigenous) relationships, *s'aalh tumuhw* and resource and extraction rights, as well as a worldview that reflects a spiritual relationship with the environment and an obligation to manage responsibly the use of resources. This worldview recognizes the need to manage human behaviour relative to the needs, including the spiritual needs, of the environment. (Racette et al. 2006, 12)

5.9. Theme #8 – Inclusion of Indigenous Governance

The topic of Indigenous governance and decision-making mechanisms was raised in only two of the cases included in this research. For the most part, negotiations and any mediation took place within a Western bureaucratic system of planning and decision-making. However, as First Nations in British Columbia gain strength and capacity, the issues of Nation-specific governance and decision-making methods will likely be raised and requested by First Nations more frequently. For instance, I am aware of the traditional practices of Ontario First Nations, who have requested that a Sacred Roundhouse dispute resolution mechanism be used for any situation where two parties cannot reach consensus. The parties enter the Roundhouse and remain in the Roundhouse until an agreement can be reached.

Trevor Jones of the Hupačasath Nation indicated that his Nation is in a period of rejuvenating these Indigenous governance methods:

...because we are small it's easy to find out who those heads are. If you're a couple thousand strong, it's more difficult from the outside looking in to see who those family heads are. But every community is at a different stage of cultural reemergence; some of those power structures are defunct or hidden, whereas some of them are more healthy, alive and transparent. (Jones interview 2007)

Understanding and incorporating Indigenous self-governance and self-sufficiency enable the design and implementation of Nation-specific resource planning and land management programs. Advances in the inclusion of First Nations values and interests in land

management negotiations will require significant changes in justice and governance relationships.

The denial of legitimacy for Indigenous forms of governance is steeped in Western history and its adherence to democracy, private property, and free-market systems. In post-modern critiques, these political forms have been shown to lead to the 'tyranny of the majority,' endowment- and inheritance-sensitive distribution systems, and a quality of life based on ability to pay. The Darwinian evolutionary theory of cultures suggests that these Western forms of governance are progressive and superior (Service 1962). *Societas* based on kinship, with egalitarian and redistributive systems, were [and often still are] seen as primitive and without governance, whereas *civistas*, with private property, entrepreneurs, markets, and socioeconomic classes were seen as civilized (Service 1962).

A redistributive system, such as those evidenced in egalitarian Indigenous governments, has been called an example of "primitive communism" reflecting the inability of anthropologists to translate "unfamiliar and unnamed" concepts into anything beyond those that they have experienced or known (Service 1962, 173). Chiefdoms have been likened to states without the legitimized uses of force (Service 1962), which corresponds with Alfred's description of peace being a foundation of Indigenous governance (although early colonizers and 19th century anthropologists interpreted these different forms of governance as lawless) (Alfred 1999). However, since evolutionary anthropology viewed *societas*, including Chiefdoms, as less evolved than *civistas* in some hierarchy of

development and quality, their conclusions supported the notion that Indigenous governance must evolve to, and assimilate with, Western systems. It is in opposition to this traditional thinking that new governance policies must be forged based on enlightened governance and true understanding of difference; a significant change that could be brought about through improved land management processes.

While this issue of whose governance system (Western or Indigenous) was superior or preferred was not raised in my interview, the continued dominance of the Western approach to governance and decision-making is a result of the remnants of a colonialist backdrop and misunderstanding of First Nations' governance practices. The backdrop, whether conscious or subconscious, influences how much weight is given to Indigenous forms of governance and preferences for decision-making processes.

5.10. Themes Given Less Emphasis

Two of the themes I was expecting to encounter more often in my interview results reflect portions of the two core variables identified by Deborah McGregor in her doctoral research involving forest planning in Ontario (2000). These two core themes identified in Ontario were, first, "World View, Spirituality and Native Values", and second "Relationships and Power" (McGregor 2000, 179). One particular difference between my results and those from McGregor's Ontario-based research was that, while a few participants in my research raised the idea of the need for an increase in

understanding of a First Nations' worldview, this was not one of the strongest themes in the interviews. And while there was extensive discussion of respectful relationships in negotiation, the issue of power and power balance redress was also not discussed extensively.

The following sections describe some of the methodological reasons that could have led to this missing data. However, the lack of emphasis on the topic of ontology or worldview could have less to do with method and more to do with the differences in political reality for many First Nations in British Columbia versus Ontario. Many First Nations in Ontario hold treaties and exercise treaty rights in land management negotiations, which may place them in a clearer position than that of First Nations in British Columbia who do not hold treaties. Furthermore, when treaties are signed, the issues of territorial boundaries, and thus which First Nations hold rights in a given area, are often more defined. This clarity allows a First Nation to move forward from a discussion of Aboriginal title and rights to secondary needs such as culture and values (Saul Milne, former Cheam fisheries co-ordinator, personal conversation, October 2006, Dr. Deborah McGregor, personal conversation, July 2007).¹¹⁸

I also expected more discussion of the true power holders in each of cases, be it holding power through money, personnel capacity or decision-making authority. While the

¹¹⁸ The hierarchy of needs for Aboriginal people may be quite different from the hierarchy of Western people as described by Maslow (1943). Family, cultural and spiritual needs may be as primary as food, shelter and water for their continued existence, particularly their continued existence as a peoples.

topic was raised by some of the participants, particularly the First Nations leaders (Chief Sayers, Ernie Crey, Chief Douglas), the topic of power redress and creating situations of co-jurisdiction was less emphasized. It is likely that this missing data is related to methodology, in particular case selection bias. The following sections expand on this topic of missing data in this qualitative research.

5.10.1. Missing Data not Missing At All

There is the potential that this research project, through the methods applied, or the limited number of cases or participants selected, resulted in missing data; data that exists in the pool of experience regarding consultation in British Columbia but was not discussed in my research interviews. This possibility is discussed in the sections that follow. However, the perceived omissions might not be omissions at all. Particularly with the topics of ontology, worldview and Traditional Knowledge, information and understandings may be assumed by Aboriginal participants to be included as an underlying foundation of the discussion in the interview. Furthermore, in many Indigenous cultures around the world, narrative cannot be dissociated from land. Andie Diane Palmer speaks of “narratives of personal experience and historical narratives can be seen as forming an oral map that corresponds to landscape” (Palmer 2005, 165-166). Therefore, the narratives included in these interviews were essentially rooted in the land and traditions where the cases took place, which may not need to have been reiterated by each participant.

Sometimes what is left unsaid is assumed to be basic information understood by both parties. I recall an evening in Haida Gwaii, British Columbia, during a public engagement session when a group of non-Aboriginal and Haida participants were being asked to express the importance they place on certain aspects and impacts of energy/electricity systems by placing star-stickers on poster boards. They were each given ten stickers and could place them beside an impact such as “noise” or “local job creation”. I noticed that very few people had placed stickers beside “greenhouse gases” and “environmental impacts such as land-based impacts”. When asked why this was, the group of participants looked surprised and said “[o]f course the environment is our number one priority... why would we waste one of our stickers there”? Clearly, what was left unsaid was *assumed* to be basic information shared between the local participants and the energy utility company.

Therefore, the sections that follow, which discuss themes given less emphasis in the interviews, may or may not reflect themes of less importance to each case and to the participants. It is possible that additional data that would emphasize the theme is ‘missing’ due to the aforementioned causes of missing data in qualitative research.

5.10.2. Missing Data in Research Findings

The concept of missing data has often been ignored in social science research (McKnight et al. 2007) but recent work and publishing has focused on this idea. There are a

number of study design elements that can lead to the potential for missing data in research (from McKnight et al. 2007):

1. Case Selection Bias
2. Participant Selection Bias
3. Interview Questions
4. Interviewer Characteristics
5. Setting for Interviews

Of these reasons for possible missing data, I suspect that all five had some part in limiting the data in my research, but particularly Case Selection and Interviewer Characteristics.

For instance, the cases and communities invited to participate in this research were selected based primarily on the availability of a case that the community leader(s) identified as having some good elements of negotiation and good negotiated outcomes. The depth of information and degree of conflict associated with each case was not entirely clear until the interviews had been conducted. Some of the cases included very little need for Indigenous Knowledge, values or perspectives to be discussed in the decision-making process. While case study methodology guidelines recommend that no cases be included in the research that are not significant and likely to yield appropriate results (Yin 2004), I took the approach that if the community leader(s) felt that the case had good elements and outcomes, then it was worth including because I

did not want to judge their experiences and positions . In only one instance did I decide not to include a case that I suspected would not have the more meaningful elements of the Aboriginal – non-Aboriginal negotiation that I was seeking. This case involved the British Columbia Forest and Range Opportunities (FRO) agreement process, and I have heard and read negative feelings about the FRO’s limited framework from Indigenous leaders (see Section 3.4.2.1 for more on case selection and FROs in BC).

Two of the cases eventually included in my research took place with communities in the lower mainland and south coastal areas of British Columbia. These areas are not remote and have had nearly a century of intensive contact and interaction with Western industry and governments in British Columbia. They are more heavily populated and exposed to many resource extraction industries. My concern with this geographic, albeit rural, location was that traditional worldviews, values and lifeways may not have been retained as strongly in these communities. Instead, the cases and conversations in these rural or sub-urban locations provided discussion around land values and connections between land and culture similar to my cases from more remote locations of the province. The similarity in expressed values about land points to the commonality between First Nations in British Columbia and their “enduring relationship with the land, a bond so strong that it defines who they are” (Campbell et al. 2003, 16). However, the topic was not emphasized by all research participants.

The participants for the interviews were selected by my community contacts. I found that most contacts provided a good demographic and opinion cross-section for each case. For instance, Chief Sru-Ets-Lan-Ough suggested that I interview community members and fishermen who were in favour of collaborating with the DFO as well as those who refused to participate. This cross-section of opinions added to the richness and diversity of the views encompassed in this study.

In retrospect, I wish that more of the interviews had been conducted outdoors. I believe that my interview locations, primarily office and restaurant settings, were a limiting factor on the kind of conversations we had and the data that I was provided in the interviews. I now believe that I should have suggested outdoor spaces more often. I think that the participants' connection and relationship with the land may have been more prominent in these situations. For example, Rick Quipp's interview was held next to the Fraser River and the presence and song of the spring birds drew his attention and resulted in a narrative about traditional fishing knowledge held in the migration and presence of the birds, which then led him to a description of Cheam Pilalt territorial space.

My presence as a non-Aboriginal interviewer may also have restricted the participants' willingness to share stories and thoughts about their relationship to the land and the impact this relationship had, if any, on the case in question. Interview participants will often feel uncomfortable in the presence of an interviewer who they do not see as

similar to themselves (e.g., dissimilar in gender, race, ethnicity, sexual orientation) (McKnight et al. 2007).

5.10.3. Ontological Difference and Values

Not all aspects of truly meaningful and strong consultation with First Nations or Indigenous peoples, as identified in other cases and literature, were emphasized strongly through these interviews. The less than expected degree of discussion of an Indigenous worldview in my research may be in part because of the typical reasons for missing data in qualitative research (non-Aboriginal interviewer, case selection, participant selection).¹¹⁹ When comparing the level of discussion in my interviews compared to the two primary themes in McGregor's research, the difference may be because McGregor's research focused on forest management and the inclusion of Traditional Ecological Knowledge (or Indigenous Knowledge) specifically. Her discussion of Traditional Ecological Knowledge may have focused her interviews and interview questions on the issue of worldview as it relates to the Western concepts of nature and commodification of resources.

The challenges of cross-cultural interactions and the dominance of non-Indigenous perspectives were concepts that I expected to encounter more often in my research. And while the topics were discussed in some interviews, references to worldview and values were limited. Even though cases referenced in this research represented some of

¹¹⁹ See next section for more on missing data in qualitative research.

the better examples of negotiation in the post-*Delgamuukw* decade, none of these cases was thought or said to epitomize meaningful consultation. Perhaps this perceived deficiency results in part from a failure on the part of the non-Aboriginal proponents to fully recognize the different worldview and associated values of the First Nations people.

Despite the perceived lack of discussion of ontology, the interviews in this research substantiate this notion that the distinct worldview of many First Nations in British Columbia shapes the value they place on the land. Research participants such as Ernie Crey, Grand Chief Doug Kelly, Martha Fredette, Saul Milne, George Speck and Chief Judith Sayers each placed a deep value on the land. Ontology and worldview, if not material and important to every First Nation, forms part of the foundational misunderstanding in many Indigenous and non-Indigenous conversations around land and resources.

5.10.4. Compromise and Collaborative Expectations

A recurring theme in these case studies was that the leaders and communities in these Nations were accepting compromised positions in order to reach agreements and move things forward. The compromises ranged from collaborating in a position that had less decision-making power than the government or was weaker than the private sector, to accepting agreements that gave the Nation less power or share than they had wanted, to

the Nations resigning themselves temporarily to a less than complete recognition of their right and title, to simply participating in a process that had no design or creative input from the Nation itself. In most of the cases, these compromises were recognized by the First Nation participants and were justified in different forms, as discussed below.

First Nations who have reached treaty agreements with the federal government have been able to expend more of their energies towards secondary or tertiary political and ontological pursuits. For instance, Dr. Deborah McGregor recounted that First Nations in Ontario have rejected two-dimensional¹²⁰ Traditional Value Mapping as a method to express and demonstrate their interests in land use and forest management.^{121,122} This method did not wholly meet their needs or interests. However, in many cases in British Columbia and elsewhere in Canada, First Nations are focused on meeting basic needs or advancing fundamental issues such as land title, rather than pursuing the land

¹²⁰ Researchers John J. Lewis and Dr. Stephen R.J. Sheppard have shown that communication between Aboriginal and non-Aboriginal groups can be improved with innovative techniques such as “three dimensional” representations of land management impacts (i.e., photo imagery) (2002, 43). “The study concluded the

unprecedented finding that placing land-use information in standard cartographic format impairs cross-cultural communication between First Nations and resource managers. Three-dimensional visual models of the landscape are the most effective means of eliciting community reactions to management plans across several dimensions including cultural uses, aesthetics, and spiritual values. To be effective, shared decision-making in forest management requires new and relatively untested tools for cross-cultural communication (e.g., ‘sociocultural’ planning frameworks, landscape visualisation, etc.) that can facilitate the incorporation of cultural values into standard forest management methodologies. (Lewis and Sheppard 2002, 43)

¹²¹ Personal communication with D. McGregor, July 2007.

¹²² McGregor’s research is also discussed in Section 5.10.4.3, Growth of Expectations.

management processes that best fit with their worldview and express their values (Milne interview 2007).

5.10.4.1. Freedom to Contract

Health, social and economic conditions similar to Third World conditions are common elements of Indigenous peoples' life both on and off-reserve in Canada.¹²³ Depressed economic conditions, including high rates of unemployment, affect many First Nations communities in B.C. The attraction of jobs and economic development can be a large driver for participation in industrial development projects. Many impact-benefit agreements, such as those developed in the Canadian mining industry, focus on economic issues and include a commitment for hiring Aboriginal employees. These economic incentives can be so appealing as to dominate other needs of a community such as cultural needs.

The formation of a valid contract involves the consent of two free and equal parties.

“The concept of freedom to contract formally assumes that the parties have equal bargaining power” (Sarcevic 1989, 34). An effort to rebalance power in land use negotiations requires the acknowledgement that many First Nations communities may not be in a situation to enjoy a strong bargaining position. Due to hardship,

¹²³ “First Nations living conditions or quality of life ranks 63rd, or amongst Third World conditions, according to an Indian and Northern Affairs Canada study that applied First Nations-specific statistics to the Human Development Index created by the United Nations. Canada dropped from first to eighth as the best country in the world to live primarily due to housing and health conditions in First Nations communities” (Assembly of First Nations n.d., approximately 2004).

desperation, or lack of resources, these Nations may not be philosophically and economically unencumbered enough to be free to contract.¹²⁴

I am not suggesting that First Nations governments or people not be permitted to reach agreements and contracts, but rather that a party with far greater power and resources ought to recognize their advantage and consider the situation fully. Having economic wealth and technical resources are two source of power in land-based negotiations. In certain negotiations the rebalancing of power, and particularly of resources, may be required to ensure that two equally powerful parties are entering into negotiation and agreement.¹²⁵ Negotiated settlements ought to be examined to ensure that outcomes reflect what one would expect from two equal parties.

A community's obligation to meet basic needs, such as housing and employment, may influence their willingness to welcome development in their region. For instance, one of the most positive aspects of the Eagle Rock Aggregates case and the Orca Sand and Gravel was that it brought revenue to the community and jobs to individuals in Hupačasath and 'Nāmgis territory respectively.

¹²⁴ The concept of freedom to contract, also referred to as freedom of contract or liberty of contract, is a cornerstone of the *laissez faire* libertarian capitalist system most notably embodied in the *Constitution of the United States of America* (Ninth Amendment, Article 1, Section 10). Freedom to contract imbues individuals with the right to make decisions and to contract with whomever they wish.

¹²⁵ It should be noted that First Nations have also been able to raise funds and resources in order to challenge non-Aboriginal authorities. Such was the case for the Nisga'a, who "achieved a great deal through fund-raising at feasts to send Frank Calder to fight in the Supreme Court for the *Calder case*" (personal communication, January 10 2009, Dr. Nancy Mackin).

I never really had any negative feelings about anything they [Polaris] were doing. I was just quite happy to have an outside company come and want to be involved in our community and help us get ahead, help us with job opportunities and like I said, you know, hopefully further down the road we might see a little bit of money generating so that we could either use that for more housing for our membership, or towards anything else that we might need it for. I think housing is our major issue right now. (VanVolsen interview 2007)

That is not to say the Eagle Rock Aggregates partnership was bad for the Hupačasath, or that the project had unacknowledged or unacceptable impacts on their interests. The mineral site was considered to be low impact and likely did have low impacts. It is possible, however, that a better agreement for the Hupačasath may have been reached around the level of partnership, percentage of ownership, and timelines for development. This view was given some substance when Trevor Jones recalled a level of uneasiness that remained around the notion that the negotiations could possibly have gone more slowly and had a somewhat better outcome. At an early stage in negotiations, Hupačasath had their consultants conduct a review of the personnel involved in the Polaris company to increase the Nation's comfort with the parties involved.

That was a really revealing exercise. Because the information we found was not very flattering. And when they were confronted with this information, they were extremely, you know, reactive and in denial. And you really saw another side of them that from my view really tainted their, sort of, intention. I just didn't have any trust when I was negotiating with them. But because there was such political will to do the deal, you know, we were kind of told to make it happen, even though I wouldn't have in my individual professional opinion have recommended that they do the deal. (Jones interview 2007)

That being said, the partnership represents a new and, at the time it was created, unique approach to the purchase of shares and it was a first for Polaris minerals in a partnership with an Indigenous group.

The need for economic certainty influences the overall enthusiasm for a project or partnership deal presented.

But, once again, the [Hupačasath] community was so enamored with the whole idea of a project that was going to last a hundred years, a project that was going to have 50 jobs. You know, there was a lot of promises made.

And the timeline that was offered up [was also attractive] that within two years of signing we'd be all working. So that momentum and those promises really catapulted the community into saying yes.

Because this is a really depressed area economically. The ability to actually create jobs isn't something they've seen in the Valley for probably 50 years. The fact that they were taking their own natural resources and creating value was really attractive to them. To have a company that recognized Title and was bringing some mechanism to give them a true meaningful role in the business was brand new. (Jones interview 2007)

This idea of an employment focus was emphasized by Elder Sharean VanVolsen. She indicated that the working committee, an informal community advisory committee, occasionally thought about Aboriginal rights and title and how the project would impact those issues, but their main focus was on employment.

I think one of the main things as most times we were looking at the job opportunities that it might create. And eventually down the road probably, I wouldn't necessarily see it, but an established type of coexistence with Eagle Rock or Polaris. Where we would hopefully be generating you know some money for our community. (VanVolsen 2007)

The physical health, emotional wellness and holistic well-being of First Nations peoples and communities are, in many but not all cases, in a severely degraded condition,

particularly in comparison to non-Aboriginal Canadians' standard of living. As reported by the Canadian Broadcasting Corporation (CBC) a United Nations special report on Canada's Indigenous people concluded that "poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, child prostitution are all much higher among Aboriginal people than in any other sector of Canadian society" (Stavenhagen 2005).¹²⁶ These conditions should be of serious concern to non-Aboriginal Canadians, yet are often out of sight and attention to the non-Aboriginal majority and were sighted as the "most pressing human rights issue facing" the country (Stavenhagen 2005). These concerning social conditions, and the associated lack of human, financial, and informational resources with which many First Nations will embark on negotiations, must be considered when powerful governments or corporations are entering into negotiations with a First Nation.

5.10.4.2. Working with the Current Political Reality

In some cases in this research, the reasons for the Nation accepting an agreement were not so much to do with economic or social need, but rather with a political reality that seemed to be facing the Nation within the province at the time. In almost every case in this research, the Nations struck agreements that required compromise of principles or ultimate desires in order to move a higher agenda forward. These issues included

¹²⁶ United Nations, Commission on Human Rights. 2 December 2004. "Indigenous Issues. Human rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people", Rodolfo Stavenhagen, Addendum, Mission to Canada. E/CN.4/2005/88/ Add.3.

protection of a species and increasing management influence, among others. Doug Aberley describes the Parks co-management agreement as a compromise (Aberley interview 2007). The agreement is less comprehensive than previous agreements signed in the province with First Nations for parks management, but 'Namgis were convinced that previous "Cadillac" agreements would not receive approval at that time (Rodgers interview 2007).

It's all bare knuckles politics you know. We're giving something up. We didn't get the best agreement but we got around the gatekeeper who was blocking us. We got an agreement. We got a ceremony with the Minister. We got lots of publicity.

[The 'Namgis], they're still nervous about it. It isn't perfect you know and it isn't... you're always making the most of something that isn't perfect. And trying to get that immediate benefit as well as saving energy to work towards the treaty and ... gain capacity and experience for the future. (Aberley interview 2007)

In the case of the Brookfield Power project, the 'Namgis would have liked an option to purchase up to 49 percent of the joint venture company in the future, but this condition could not be negotiated. Further, the 'Namgis are relying to some extent on the Environmental Assessment process to take care of any outstanding environmental concerns and "protect their concerns" (Ullstrom 2007).

5.10.4.3. Growth of Expectations

For over a century, First Nations in British Columbia have been given meager opportunities to assert their interests and values in land management processes and decision-making in their traditional territories. Recent court decisions involving First

Nations' rights to steward their traditional territories' natural resources, combined with the 2005 *New Relationship* in British Columbia (Government of British Columbia et al. 2005), have led to increased expectations among First Nations for deeper, quality involvement in land use decision-making. This increase in expectations may lead to more First Nations throughout British Columbia incorporating their worldview and values in land-use processes.

Work still needs to be done to move from a change in rhetoric through to a change in attitude, policy, and practice.

With the *New Relationship*, there's certainly a different attitude but the policy change hasn't come yet. That's what we're working on at the Leadership Council level.... But it's coming. There are things that have been changed. The Great Bear Rainforest [agreement and land use plan] is one. We're talking about ecosystem stewardship planning now instead of ecosystem based management... there's all of those things. (Chief Sayers interview 2007)

It is interesting to note that the First Nations within each province in Canada experience a somewhat different reality with regard to land management given differences in provincial land use policy and approach, varying socio-economic states within each Nation, differing stages of treaty making, and other factors that affect their ability to participate in land-use decisions. For instance, many First Nations in Ontario have signed historic treaties with the federal government. The process of treaty-making in B.C. is very costly for First Nations and results in a drain on finances and human resources. First Nations such as those in Ontario, who have signed treaties, are often

able to focus more effort on other important social, economic and environmental issues. Furthermore, treaties create some certainty around a Nation's right to be involved in issues regarding their territory, the boundaries of that territory, and their treaty rights.

Dr. Deborah McGregor conducted research on the effectiveness and degree of inclusion of First Nations perspectives and values in forest management with First Nations in Ontario in the late 1990s, and published in 2000. The "Native Values Mapping" (NVM) process used in Ontario was unique and more meaningful than processes ongoing at that time in British Columbia, quite possibly due to the higher degree of overall inclusion of Ontario First Nations in land management in general. While the Ontario NVM was still seen as an inadequate process for truly incorporating First Nations peoples' land values, due to a lack of capacity and differing views of native values (McGregor 2000), this process was a strong attempt to include Traditional Ecological Knowledge and First Nations values in forest management. In time, as BC First Nation's expectations, confidence, and legal standing increase with regard to involvement in resource management within their territories, processes such as the NVM and other improved co-existence models for land-use information gathering and decision-making, will increase in usage in BC.

Chapter 6. Making the Story Meaningful – Principles for Negotiation

6.1. Moving Towards Negotiation

For First Nations in British Columbia who are without a treaty with the federal government, there are typically three primary mechanisms for them to participate in decision making that impacts their land. First, they have the option of participating in the BC treaty process to develop long term agreements about land management. Second, First Nations could rely on the initiation of legally required consultation processes in the face of a particular issue or project. Third, many First Nations end up pursuing litigation to prevent impacts on their traditional lands.^{127,128} None of these processes currently allow or advocate for true negotiation between equal parties with exclusive land-based interests. In *Reconciliation*, Tony Penikett argues that the BC treaty process is imbalanced as it is currently constructed and makes a strong case for moving it towards something resembling true negotiation (2006). The existing rigid and limited mandate of BC treaty negotiators would need to be eased in order for negotiation to truly include First Nations' goals and interests. However, restructuring the treaty

¹²⁷ Interim agreements often arise from BC treaty negotiations, such as Parks, marine area, or land-use co-management agreements.

¹²⁸ First Nations and the provincial government may also embark on reconciliation agreements (e.g., the Musqueam agreement, March 2008), or more substantive reconciliation of title negotiations in an effort to move beyond the restrictions of the BC treaty process mandate and to avoid more lengthy and costly court cases (personal communication, April 1, 2008, Arnie Bellis, Vice-president of the Council of the Haida Nation).

process will take time and may not help First Nations who are faced with an immediate need to steward their lands more effectively or to protect their interests from land and resource development impacts. Furthermore, only half of the First Nations in BC are participating in the British Columbia treaty process.

Macklem argues that the law (litigation) is “too blunt and instrument to reflect the complex political, economic, jurisdictional, and remedial judgments necessary to resolve competing claims to territory” (2001, 95). Litigation is also “expensive and time-consuming” (Macklem 2001, 95). While First Nations argue that consultation and accommodation cannot be seen as a replacement for the treaty process (Penikett 2006, 258), consultation and accommodation is seen as the one arena where many Aboriginal rights issues could be addressed through “hard bargaining” on the part of the Crown (corporate lawyer Thomas Isaac in Penikett 2006, 258).

The cases in this research present a fourth avenue for resolving land disputes - at least in the interim period while treaties are in progress – negotiation that resembles co-jurisdictional management. Here I argue that creating something “significantly deeper than mere consultation” requires fair negotiation (*Delgamuukw* 1997, par. 168). Fairness would require recognition of the cultural and historical difference of BC’s Indigenous peoples in the design and implementation of negotiating processes. The Assembly of First Nations sees negotiation as the right path to reconciliation as long as the issue of fairness and power is addressed.

Existing policies assume an equality of bargaining position. They do not take into account in their design or policy framework the actual power imbalance between the parties and how this affects both the process and the outcomes. (Assembly of First Nations 2005 in Penikett 2006, 259)

Resource management discussions in British Columbia require an understanding of the evolution of the legal requirement for consultation and should begin with acknowledgment and discussion of the Aboriginal title held by the Indigenous peoples of British Columbia. Recognition of Aboriginal title would require First Nations to be treated at least equally, if not as leaders, in the stewardship of their traditional lands. The rhetoric and discussion associated with consultation has become paralyzed by the dominance of non-Aboriginal groups in the design and implementation of consultation processes. Negotiation between parties would refresh cross-cultural discussions about land-management by including First Nations as equal parties. A meaningful recognition of unresolved Aboriginal title would require the Province to negotiate land management decisions separately with First Nations as co-jurisdictional partners in all, or some portion, of their claimed traditional territory and in all, or some portion, of the land management decisions that may impact that territory.

The current method of embedding consultation requirements in the Environmental Assessment (EA) process is ineffective, particularly because not all medium- and small-

sized development projects are required to embark on a comprehensive EA in British Columbia.¹²⁹

I think that we have to find those types of processes that will help to get through those hard issues. I think the Environmental Assessment needs to be revamped and we're trying to do that as well. Because it was never meant to be consultation. And the Province is taking it as consultation. But we always knew that when we got through the EA process that if there was ever a decision to go with a process that they would have to come and consult with us. We made it very clear, that we had a second kick at the can. Nobody liked it, but we said it's true. (Chief Sayers interview 2007)

Furthermore, consultation on individual decisions and projects is a piecemeal approach to land management. A more effective means of management would be to include cultural references, knowledge, and interests at strategic, policy and early decision-making levels.

6.2. Principles for Meaningful Land Management in B.C.

As shown in previous sections, various guidelines exist for consultation with First Nations in Canada and in British Columbia. These guidelines provide mechanistic and practical direction for what the government or project proponent ought to do as part of consultation. Some guidelines provide legal justification and basic, practical approaches with which to conduct required consultation. This dissertation is not intended to provide basic instructions on how to conduct the mechanics of consultation or negotiation. For instance, such basic mechanics and administration of consultation can include: provision of suitable information, communication, appropriate timing,

¹²⁹ British Columbia *Environmental Assessment Act*. Reviewable Projects Regulation. [includes amendments up to B.C. Reg. 14/2006, February 10, 2006]

responsiveness and feedback, ongoing evaluation, and reporting. What is lacking in most government guidelines is a foundational discussion of how to ensure that these consultations are ethical, meaningful and balanced in order that they may achieve the deeper consultation required by *Delgamuukw* and the reconciliation called for in *Tsilhqot'in*.

The goal of this research was to address this directional void and to identify elements of consultation and accommodation that lead to meaningful and just land management, particularly in areas of Canada with outstanding claims to land title. The cases in this research were used to identify, and provide context for primary elements of positive negotiations between Indigenous and non-Indigenous groups. These elements describe what occurred in the case and were drawn together as emergent themes. Each theme was then deconstructed to identify the Principles that would need to be applied to ensure similar themes emerged in future cases.

While case study research does not generate universal generalizations “in the positivist sense,” cases do provide contextual, time-bound, and tentative generalizations that may be “useful beyond the case[s]” themselves (VanWhynsberghe and Khan 2007, 5). The cases analyzed, literature reviewed, and history combine to form emergent foundational Principles that ought to be considered as part of strong consultation and negotiation with First Nations in British Columbia.

Each of these Principles includes a subset of concepts that expand on the implications of each principle. Key Principles established are:

Principle #1 - Recognize Aboriginal Rights and Title to Land

Principle #2 - Embark on Negotiation

Principle #3 - Strive for Power Rebalance

Principle #4 - Emphasize Strong Relationships and Trust

Principle #5 - Respect First Nations Ontology, Values, and Goals

Principle #6 - Achieve Meaningful Accommodation

Principle #7 - Ensure Community Involvement and Support

The order of these Principles is representative of the emphasis the underlying themes were given in the cases and the impact each principle is expected to have on improving future consultation or negotiation processes. I would expect the order of these Principles might change in the future, and some Principles may not be required per se, when treaties, fundamental legal obligations, reconciliation with the Crown, and cultural rejuvenation are achieved by First Nations in British Columbia. Furthermore, each of the Principles will require different degrees of attention and reconciliation depending on individual First Nation cultures, worldviews, and social conditions.

Given that the participants in the research were First Nation individuals or non-Aboriginal representatives of First Nation communities, the Principles developed primarily serve as an advocacy piece for First Nation peoples when attempting to

improve or decolonize land-management relationships and forums in the future. Moreover, the Principles serve as an instructive work for Crown or private sector representatives wanting to embark on just and successful negotiations. That being said, the position and motivation of non-Aboriginal parties (Crown or private sector) is intrinsically covered in the research given that the historical situation and current design of the decision-making playing field has been predominantly created by non-Aboriginal parties, reflecting their power, governance structures, worldview, goals and values. The Principles in this research thus serve as guidance for both First Nation and Crown or private sector participants for future change in the land management sector.

A case could be made that further research is required that focuses on what makes cross-cultural interaction more successful from a non-Aboriginal perspective. I agree that such research could be useful, particularly once decision-making processes begin to be co-designed.

6.2.1. Practical Elements and Community Characteristics

The interviews themselves and the themes identified focused on aspects of the decision-making process that made the negotiations more meaningful and inclusive for the First Nations and their representatives. These themes represent the key ingredients of the beginnings of the decolonization of land-management relationships and processes, which will often lead to more successful negotiations. There are, however, other interpersonal, practical, political and mechanistic elements to the decision-making that

quite likely led to, or supported, the successful outcomes. These more practical and specific elements, such as consistent company, government and community representation, timely communication, and responsive staff members, were not developed into themes from the interviews as they did not broadly support the development of a normative principle. Characteristics of the First Nation culture or community itself, such as complexity of customary decision-making practices, size of population, approach to resource development, support for economic development and modernization, desire for community involvement, and strength of leadership, would also contribute to the success or failure of land-management negotiations. Again, these characteristics are not elements that can be developed into normative recommendations for change without being prescriptive for a community's direction and future. Rather, these community characteristics form the backdrop for relationships and negotiation.

That being said, many of these interpersonal and political elements are encompassed by Principle #4, Emphasize Strong Relationships and Trust. Implementation of these Principles will likely involve the development of protocols that would address many of the practical and mechanistic elements that lead to negotiation success. Community characteristics may simply determine the degree to which a particular normative Principle needs to be emphasized in the design and conduct of negotiations. For instance, a First Nation community that conducts business and values economic development in a form more similar to the non-Aboriginal party with whom they are

negotiating may put less emphasis on certain aspects of Principles #3 and #5 (Power Rebalance and Respect for Indigenous Ontology, Values and Goals).

6.2.2. Principle #1 - Recognize Aboriginal Rights and Title to Land

A foundational principle for positive negotiations with First Nations in British Columbia is the recognition of outstanding title claims and the implications that resolution could have in future land management. The history and current practice of land management in British Columbia provides part of the structure from which justice for First Nations peoples must be constructed. We must ask what First Nations are due. I argue that a meaningful interpretation of *Delgamuukw*, *Tsilhqot'in*, and related decisions point toward recognition of difference, which in turn results in recognition of different forms of law, land proprietorship, stewardship, use, and value that are at least equal, if not preemptory based on history, to Crown claims of title, and Western industrial forms of land use.

If different forms of land holdings and use are recognized as legitimate by Westerners, then for this reason alone First Nations deserve to have at least some portion of their land title recognized, and to be enabled to exercise the subsequent rights to the lands they claim to steward. These rights can be justified on an historical basis, but require the will of the predominantly non-Aboriginal majority and their governments to be advanced. Unfortunately, “the facts about what has been done to Aboriginal peoples

just do not seem to penetrate the twentieth-century [non-Aboriginal] consciousness” (Brody 1988, xiii).

The lack of recognition and respect for outstanding Aboriginal title claims leaves First Nation territory vulnerable to extensive impacts and possibly permanent destruction from resource development projects. An ongoing case in Ontario, involving outstanding title claims and a proposed uranium mine in Anishinabek territory, has led to tension between the First Nation concerned, the developer and provincial government. As described by Isadore Day (Wiindawtegowinini), Elected Chief of Anishinabek at Serpent River, Serpent River First Nation:

It poses real challenges between industry and First Nations when government moves slower in First Nation negotiations than it does when pushing through proponent approvals for expropriation of Crown lands... What’s worse is that Consultation and Accommodation requirements are not even in the form of mutually agreed policy between the Crown and the First Nations, and yet government is approving land expropriation in favor of development in traditional lands. (2008)

Future consultation and negotiation should reflect the potential results of Aboriginal title claims in British Columbia. Furthermore, the practice of having the Crown determine the “strength of claim,” rather than an independent body or arbitrator, puts First Nations’ title claims in a subordinate position to that of the Crown.

The other thing we have to get out of the Province is “strength of claim.” Based on the strength of claim, ‘we [the Province] get to decide how much you get to be consulted and accommodated.’ Well, do they get to be the judge and jury on how strong our claim is? How much research are they going to do to determine how strong our claim is? We’re looking at court cases saying we have a very strong title claim.... Maybe they need to go in front of somebody who’s got

expertise or try and mediate something and work something out. So it's not just government imposing something on you that you end up in court for. (Chief Sayers interview 2007)

In *Tsilhqot'in*, Justice Vickers affirmed that Aboriginal title includes the right to choose land use and to direct decision making within a traditional territory: "It bears repeating that the right to use resources, the right to choose land use, and the right to direct and benefit from the economic potential of the land are all aspects of Aboriginal title" (*Tsilhqot'in* 2007, 1077). Therefore, meaningful, strong consultation ought to reflect the recognition that a future proven title will confer decision-making authority to the Indigenous nation. In the interim, decision-making authority ought to, at a minimum, be shared.

Furthermore, Aboriginal title, when recognized in its fullest form, must allow for the nation to evolve and grow. Indigenous culture and communities are not timeless and unchanging, as many European doctrines would describe (Youngblood Henderson 2000). This myth of the non-evolving, primitive cultures of Indigenous peoples still underlies Eurocentric thinking. The belief by some is that First Nations peoples need "progress and economic and moral uplifting" similar to the historical evolution experienced by colonial cultures (Youngblood Henderson 2000, 68). The "timeless traditional culture" (Youngblood Henderson 2000, 68) myth that is part of Eurocentric thought limits the future of what it means to be an Aboriginal person. This European assumption of timelessness is also reflected in Canada's imposition of limits to

Aboriginal resource use rights to land, and with it limits the imagination of how Indigenous communities could expand or change their use of their land.

Recognition of Aboriginal title to all or some portion of their claimed traditional territory would lead to the inclusion of First Nations in land management discussions at a deeper level than mere consultation, and this entitlement may or may not be adequately accommodated. Approval of projects and long-term management of land would get closer to something like co-jurisdictional relations. Principle #2, embarking on negotiation to achieve processes significantly deeper than mere consultation, would flow from a meaningful recognition of Aboriginal title.

In summary, Principle #1 requires non-Aboriginal governments and proponents to consider and understand the following when they embark on negotiation with First Nations:

- Whose land they are on, how it is currently governed, and any outstanding and/or overlapping claims, etc.
- Clear about understanding of Aboriginal rights and title.
- Recognition of what a resolution of title would mean for the project or negotiation.

6.2.3. Principle #2 - Embark on Negotiation

As stated in case law, most consultation processes with First Nations in B.C. regarding land impacts will require a process that resembles something significantly deeper than mere consultation. Successful cases of Indigenous and non-Indigenous groups working together on resource management issues show characteristics that are, or are similar to negotiation. Strong consultation coupled with negotiated accommodation and agreements has more potential to lead to long term reconciliation of Indigenous peoples' land and resource interests in Canada. For instance, in the case of the Cheam drift net fishing studies, it was not until the DFO came to the table with consensus and collaborative outcomes as their goal¹³⁰ that the Cheam were willing to participate in the process that ultimately led to the design and execution of a successful study (Chester Douglas interview 2007).

Including concepts of negotiation in consultation processes advances land management discussions along the continuum of participation levels towards proactive relationships within which the parties are striving for reconciliation. Reconciliation is one of the goals of the *New Relationship* in British Columbia (Government of British Columbia et al. 2005) between First Nations and the provincial government. Hizkias Assefa, professor and consultant in conflict resolution and national reconciliation processes, describes “reconciliation as a paradigm shift from coercive force to voluntarism and from staunch

¹³⁰ Pressure came from Ottawa for the local and regional DFO representatives to engage the Cheam in the drift net studies because the friction between fishing sectors was often focused on the Cheam specifically, rather than the Lower Fraser First Nations in general.

individualism to interdependence and mutuality” (Sutherland 2005, 30). The following diagram illustrates the continuum and underlying values of participation.

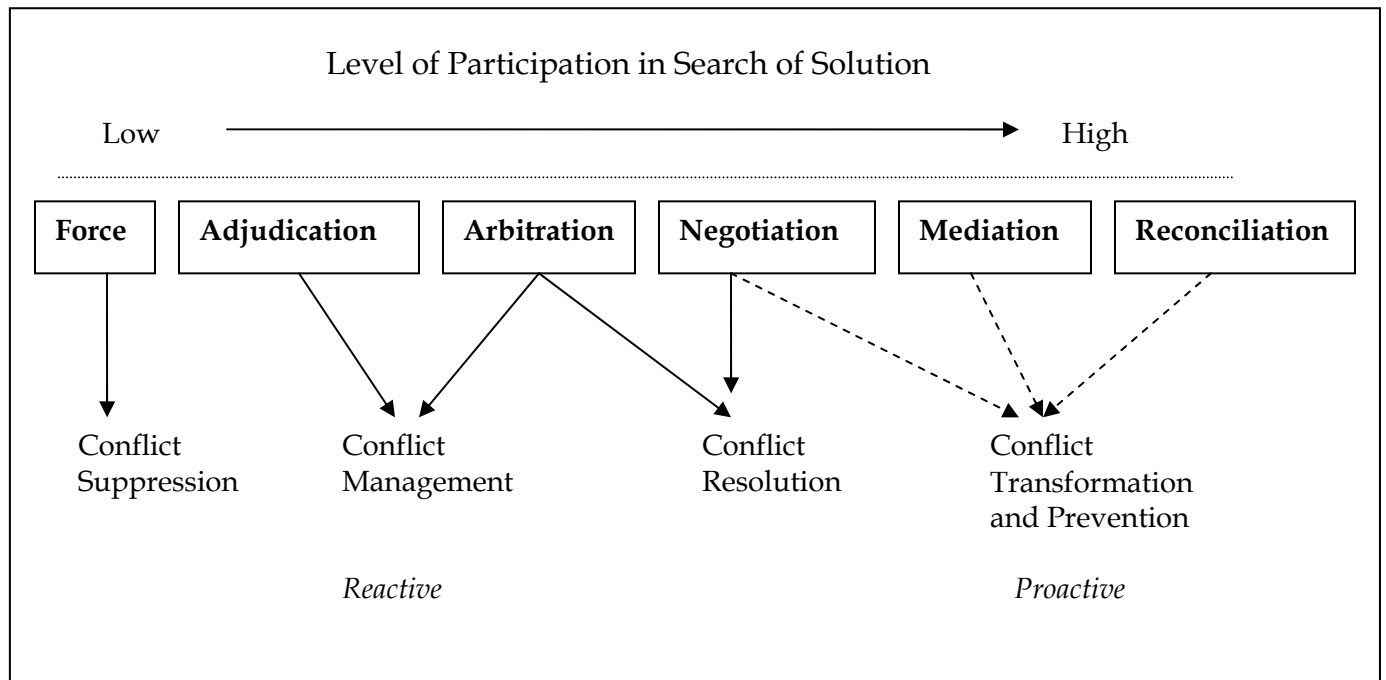


Figure 22. Spectrum of Conflict Handling Mechanisms

(Adapted from Assefa in Sutherland 2005)

The complex task of moving to negotiations that respect First Nations’ status in the process can be aided by adopting appropriate mediation processes and developing mechanisms for co-jurisdictional management.

6.2.3.1. Include Mediation Processes

Meaningful negotiations could include the use of mediators for dispute resolution. The *New Relationship* business group recommended that the Province develop a list of

skilled mediators to help resolve differences when First Nations, government and private sector interests come to an impasse (New Relationship Business Group 2007). In *Hupacasath* (2005) the BC Supreme Court order that is the provincial government and the Hupacasath First Nation fail to find agreement on the matters surrounding the privatization of Crown land held within Tree Farm Licence (TFL) 44, that the negotiations would go to mediation. “This is a novel approach to addressing problems that have arisen in previous Court-directed consultation processes” (UBCIC 2005, n.p.).

Mediators working to resolve land-based negotiation stalemates would need to be trained and fluent in cross-cultural arenas. Similarly, Chief Judith Sayers promoted the idea of a provincial Ombudsperson to mediate irreconcilable differences over land management and development.

We really need to have an Ombudsperson or some kind of adjudication, some kind of mediator; so that you're not having everybody's progress stopped. You know, whether it's an issue in Kemess, whether it's the GVRD dump, you know, people have conflicting types of things. Maybe they need to go in front of somebody who's got expertise or try and mediate something and work something out. So it's not just government imposing something on you that you end up in court for.

I think that we have to find those types of processes that will help to get through those hard issues. I think the Environmental Assessment needs to be revamped and we're trying to do that as well [as part of the *New Relationship*¹³¹ work]. (Chief Sayers interview 2007)

Many dispute resolution practitioners argue that the Western values used in interest-based negotiating, and the underlying non-communitarian perspectives involved,

¹³¹ Government of British Columbia et al. 2005.

counter Indigenous “cultural norms around conflict and community cohesion” (Sutherland 2005, 90). Within these Indigenous culture norms, “community welfare is seen as paramount and individual responsibility lies not in gaining personal satisfaction, but rather in contributing their skills to ensure a collective cohesion and harmony” (Sutherland 2005, 90). Within Indigenous cultures it is the “relationships, the expression of emotion, and the use of third parties such as elders”, that is valued as much as the substance of the final outcome (Sutherland 2005, 90). Thus, Western, interest-based mediation “can inadvertently create cultural dissonance and ultimately fuel new sources of conflict” (Sutherland 2005, 90).

This is where I think the ability to ... have a good negotiator, or have a good spokesperson on your side is really important as well in the communities. A person who can identify those issues and speak to those issues, and know the processes, and knows how to lobby; there’s so many things that come into this. But power imbalance is definitely, still I think, a big issue. (Chief Sayers interview 2007)

6.2.3.2. Create Co-jurisdiction versus Co-management

Themes described in the cases in this research point to the need for a recognition of the position of First Nations peoples as full and equal partners in land management within their traditional territories; First Nations who are enabled in these processes to honour their worldviews and values that govern their internal processes and decision making. Acting as full and equal partners implies that land management between the Crown and Indigenous governments should, at the very least, resemble co-jurisdictional management.

I recognize that co-jurisdictional management would require significant policy changes in our provincial land management regime. However, the recommendation to move beyond co-management as it is currently constructed is still relevant. Nadasdy, in his book *Hunters and Bureaucrats*, has by his own admission been criticized for not offering recommendations for the improvement of land claims and land co-management processes with the Kluane First Nation in the Yukon. He argues that:

Given the realities of state power and the bureaucratic nature of the government in Canada, it is difficult ... to imagine some alternate way of giving Kluane people a role in the management of their own land and resources. In theory, one could certainly suggest all manner of hypothetical alternatives, but – in the contemporary context – these seem completely unrealistic, with no ground whatsoever in social reality. (Nadasday 2003, 268)

I would argue that evidence from cases included in this research suggest existing negotiation principles and methods that, even if expanded to co-jurisdiction or jurisdictional transfer, are not only possible to implement in the contemporary context but are being implemented today. The *Haida Gwaii Strategic Land Use Agreement* (2007),¹³² the emerging Council of the Haida Nation project permitting process, and the new *Framework Agreement for Shared Decision-Making Respecting Land Use and Wildlife Management* (2007)¹³³ between the Taku River Tlingit First Nation and the province of BC are just a few examples of First Nations taking a strong co-management role in their

¹³² Document can be found at the website
http://ilmbwww.gov.bc.ca/slrp/docs/Haida_SLUPA_Dec_07.pdf

¹³³ Document can be found at the website
http://ilmbwww.gov.bc.ca/slrp/lrmp/smithers/atlin_taku/docs/trtbc_frameworkagreement_20080317.pdf

territories, a role that includes management and dispute resolution mechanisms which resemble co-jurisdiction.

Furthermore, in order for such co-management to occur, strong efforts need to be made to address concerns raised in this research and by other researchers about power imbalance and the dominance of Western bureaucratic processes (McGregor 2000; Nadasdy 2003). This necessity for addressing the distribution of power in negotiations leads to Principle #3, the push for power rebalance.

First Nations are also starting to link their ability and right to influence and manage the resources in their territories with their constitutionally protected right to access these resources. The right to access these resources presupposes a resource that is healthy and perpetuated sustainably for future generations. For instance, Ernie Crey spoke of a second phase of activism in the salmon fishery, activism that is based on views similar to other First Nations leaders in British Columbia (Guujaaw 2005; Crey interview 2007; Speck interview 2007).

Ernie: So some of it is the aboriginal community itself has to... have a change of attitude towards their fishery. A more proactive attitude towards their fishery and by that I don't mean just to go fishing because of the right, the fishery is so near and dear to them and the law is largely with them on their right to fish. I think they need to become far more assertive in *actually protecting* the fishery, not just being a regulated group of people whom DFO says: 'Now you can fish, no now you have to stop fishing, no you can't fish with that, you gotta fish with this. They need to move away from that place to a place where they're basically telling DFO well: 'Hell of a lot of good this right that we enjoy will mean if there aren't any fish around'.

Andrea: Yeah.

Ernie: So here's stage two of the game we're gonna play with one another. And the game is all about making the right that we have in the fishery a right that's perpetuated on into the future. So that was the sort of framework that I brought to the Cultus Lake issue is, ... At one time, the Soowahlie Indian band had simply walked down to Sweltzer Creek with a dip net or a gaff and pulled out a few sockeye, wandered back up to their household. They had dinner.

Andrea Yeah.

Ernie: Well as the decades have gone by, what had been maybe 60,000 fish 50 years ago or thereabouts, has now dwindled down to a couple of thousand fish and maybe this year it's a thousand.

Andrea: Hard to believe it's going to...
I mean a thousand, it's not much you know.

Ernie: Yeah. SO in that respect I think the average First Nation everywhere in BC has to become far more proactive in preserving the runs so that the rights they enjoyed in the fishery mean something. (Crey interview 2007)

Here Ernie Crey describes a duty to protect the fishery as coupled with the right to the fishery. The fiduciary relationship the federal government has with First Nations also implies a duty to protect the fishery as part of the duty to enable a right to fish.

Furthermore, it is this desire to ensure that land and resources are sustained for future generations that makes co-management imperative for many First Nations. Thus, First Nations embark on consultation and co-management relationships, even in the absence of co-jurisdiction, recognition of title, or coequal power.

6.2.4. Principle #3 - Strive for Power Rebalance

Recognition of a power imbalance is a fundamental starting point for the development of fair and meaningful negotiations with First Nations. Even if the negotiating parties

could agree to a “procedurally fair processes,” basic procedural reform would not be addressing the “real problem: the dramatic inequality of bargaining power that exists between the parties” (Macklem 2001, 96). This power imbalance has legal, historical and socio-economic origins, all of which need to be addressed in a negotiating process in order for power imbalance to be truly redressed. As described by Schouls, “current imbalances in power at all levels must be equalized if Aboriginal persons are to enjoy a full measure of freedom and dignity within Canada” (2003, 114). McGregor identified power imbalance as a key “hurdle to be overcome” if Native values are to be included in resource management and if sustainable resource management is to be achieved (2000, ii). Power involves control over both action and cognition (van Dijk 1994). Both aspects requiring power rebalance will be discussed in this section.

First Nations in British Columbia typically enter a negotiating forum where the current legal recognition of Aboriginal title still allows the Crown to regulate Indigenous peoples’ activity and authorize third-party activity on the land (Macklem 2001), although this unlimited Crown ability is being weakened somewhat by recent court decisions (*Tsilhqot’in* 2007; *Wii’litswx* 2008). Macklem, a constitutional scholar, provokingly asks what the negotiating positions and relative bargaining power of each party would be like if Canadian courts recognized that Aboriginal title “confers exclusive right to a wide range of activities in the territory, including exclusive rights to develop surface and subsurface renewable and non-renewable resources” and that “the Crown possesses no proprietary authority over the territory in question and

furthermore that third-party interests are subject to the exercise of rights associated with Aboriginal title” (Macklem 2001, 97). The *sui generis* nature of Aboriginal title has served as an “an excuse to allow extinguishment by executive action” to frustrate access to “compensation in the event of expropriation” and more restrictions (Macklem 2001, 97). The situation described by Macklem would redistribute negotiation power towards First Nations as full title holders and managers of their traditional land. Unfortunately, current conditions provide a “legal allowance for governments and industry to infringe on Aboriginal title” which “creates a consultation environment of imbalanced negotiation” where some agreement must be reached and “there is an allocation of sacrifices and a distribution of benefits” (Kennedy 2007, 8). In the absence of the recognition described by Macklem, a number of principles can be followed in negotiations that may serve to rebalance the power between the First Nations and non-Aboriginal parties.

Furthermore, many First Nations people in British Columbia are recovering from the deep cultural and personal impacts of colonization, especially the residential school system. Given that the last residential school in British Columbia closed in the mid-1980s, many of today’s First Nations leadership are either personally affected by the residential school system or are direct descendents of residential school survivors. The implications of this social history are manifold for negotiations and must be considered, particularly the impact of a loss of cultural strength and self-confidence that resulted from the residential schools.

Resolving the power imbalance between the parties will require:

- Recognition that each Nation is at a different stage of regrowth, capacity, and strength.
- Adjusted timelines.
- Understanding current, and increasing First Nations' technical and management capacity.
- Avoidance of assimilation through Western or bureaucratic process.
- Inclusion of aboriginal governance and decision-making practices.

6.2.4.1. Avoid Systemic Assimilation through Process

Addressing the issue of power imbalance is critical in the design of decision-making processes themselves. The assumption that existing land claims, treaty, and co-management processes are empowering for First Nations peoples has been challenged by numerous authors (McGregor 2000; Nadasdy 2003; Penikett 2006). Land management process, including land claims, co-management, and consultation processes are inherently "biased" because they force First Nations "to speak and act in uncharacteristic ways. By framing the debates over land and animals in the Euro-North American languages of biology and property relations" the processes put many First Nations peoples at an immediate cultural disadvantage (Nadasdy 2003, 263). "State systems of resource management are not neutral or objective; they are products of the

worldview, society and culture that produced them” (McGregor 2000, 188). First Nations have little choice but to participate in these processes and “bureaucratize their societies,” facing the incongruity of some of the process mechanisms with their traditional methods of stewardship (McGregor 2000, 265).¹³⁴

Negotiation or collaborative processes are most often structured in such a way as to be reflective of typical Western-European ideals of bureaucracy and process, enabling the inclusion of evidence from Western biologists, engineers, lawyers and other specialists. An underlying assumption, or naïve oversight by many resource managers and bureaucrats, is that simply equipping First Nations peoples to participate in the Western acculturated processes is empowering and represents fairness and justice for First Peoples. Well-known Canadian anthropologist Harvey Feit, working with the Cree Nation, recalls one of his early recollections of this potential for naïve assumption. As a graduate student in 1967-68 he prepared recommendations for a five-year study on the future of the Cree in their rapidly developing territory. The Cree at this time were being impacted by mining, forestry, and soon the proposal for the massive James Bay hydro-electric project. Feit and his fellow researchers assumed that offering courses on how the “political, social and economic systems work, and how decisions were made in Canada” would be empowering for the Cree. Feit recognizes that there was “implicit colonial tutelage in this thinking” (Feit 1995, 115).

¹³⁴ American anthropologist Nadasdy argues in his acclaimed book *Hunters and Bureaucrats* that the treatment of knowledge is inextricably linked to the exercise of power and how the lack of inclusion of Traditional Knowledge in land management processes is a form of legitimating the state’s position of power in the management system (Nadasdy 2003).

Justice towards indigenous groups requires substantial acknowledgement and recognition of the values and institutions of the relevant indigenous group; yet, these values and institutions may not readily fall under the framework of existing state structures. Attempts to redress injustice towards indigenous groups which do not question the justice of existing state institutions will therefore prove to be inadequate responses to indigenous peoples' demands for substantive justice. (Dodds 1998, 187)

The incident recounted by Feit helped him to see that he and his team's assumption has been that there was a choice for First Nations' culture: go on living traditionally on the land, or to become "modernized" (Feit 1995, 116). In reality, there is a middle ground where Indigenous people can maintain their culture and ties to the land while participating in a global and bureaucratic community. The assumption that there are only two paths for First Nations communities, and moreover that the latter is at the very least preferred, is dangerous and limiting for First Nations. The assumption that the Cree, and other Canadian First Nations, are assimilated to the Euro-Canadian culture only serves to weaken First Nations leaders ability to make claims of autonomy (Feit 1995, 124). Furthermore, the assumption of assimilation restricts First Nations' claims for the need for culturally sensitive processes that recognize Indigenous difference.

Another source of power in negotiations is control over the agenda. This control can have broad impacts on the overall agenda, and at the practical level influences the agenda for the process or individual meetings. The assumption of control of this agenda is reflective of Smith's discussion of control over research agendas, and centralizing control of Maori research agendas (L.T. Smith 2000, 239). The questions of

purpose, scope, agenda and methods should affirm the importance of addressing these questions to Indigenous people. Non-Aboriginal people should also be included in the creation of this process.

6.2.4.2.Enable Indigenous Governance

A meaningful interpretation of something more than mere consultation, or strong consultation that allows for Aboriginal rights and title to be exercised, is closely related to the design of governance and power relationships. Self-governance “is fundamentally about Indigenous communities gradually building capacity to exercise control at a local level over a range of jurisdictions that they consider essential to their community identities” (Schouls 2003, 180). Meaningful self-governance also requires adequate resources and metaphorical space for governance systems to be self-defined (Schouls 2003). Both jurisdiction and design are crucial in the development of Indigenous systems for First Nations peoples.

Negotiations need to be sensitive to the fact that many communities are rebuilding and finding their way between the formerly imposed INAC (Indian and Northern Affairs Canada) governance system and the traditional governance of the Nation. In the case of the Hupačasath, their traditional governance system had not fully re-emerged at the time of the cases in question, but may evolve as the strength of the Nation increases. A working committee of family heads or representatives currently meets and acts as an informal advisory committee to the Hupačasath Council. The working committee

consisted of almost a member from each family and we met usually at least once a month but many times more than once a month depending on what organization or what kind of economic development we might have been involved in at the time.

We'd have a meeting and participate and discussion and if we were asked for input or recommendations we would do that. (VanVolsen interview 2007)

At the same time, the governance is expanding and creating new ways to engage with other members of the community who may not be part of these larger family groups.

We're looking at shifting into more of a custom election code and sort of establishing an Elders advisory process. Trying to balance it. Because, as we're finding, as we develop more and more, and become more sophisticated and bring more and more benefits to the community, there's a great struggle for power.

If you build a fire, more people want to come stand around it. At this critical juncture we need to embrace the hereditary system in a progressive... sort of emerging...corporate and political governance system. (Jones interview 2007)

Any conception of the meaningful inclusion of Indigenous governance within these land management spaces ought to take into account the First Nations' need to defend and rejuvenate cultural elements including language, education, and decision-making structures, and to control what counts as health, wealth, wellness and well-being, and "those attributes central to their identity" (Schouls 2003, 134). These are broad concepts, but one can infer some of the relevant potential areas of jurisdiction from previous treaty agreements: political structures, leadership and voting, education, social programs, local law-making abilities, and land and resource management.¹³⁵ In a state founded on liberal universalism, or multicultural pluralism, there exists the "blanket belief that everyone has the same needs and experiences" (Maaka and Fleras 2005, 277).

¹³⁵ See the Nisga'a Lisims Government website for more on the Nisga'a Treaty (2000). <http://www.nisgaalisims.ca/?q=treaty-nisgaa-final-agreement>.

Differences are typically accommodated within existing institutions and programs. A “bi-nation” agenda “interrogates the colonial structure and mindset” and requires an evaluation of programs, services and structures from an Indigenous perspective (Maaka and Fleras 2005, 276). To this end, changes are beginning to take place in BC, specifically with regard to First Nation involvement in education, and child and youth welfare (FNESC 2006). However, the ability of a Nation to be self-governing is a prerequisite that enables the independence and power to create and implement directions, programs and requirements in key jurisdictions. Meaningful land management arrangements will require advances in self-governance.

In the current situation, Western hegemony dictates the form that governance takes, imposing political institutions and processes that follow “precisely the same line as in Europe, and in ways calculated to oppress and impoverish the indigenous inhabitants” (Berger 1991, 159). Moreover, in the case of the Alaska Native Claims Settlement Act, Indigenous Alaskans “have come to see that both corporate and elective systems of representation are incompatible with indigenous political cultures” (Alfred 1999, 117). Alfred points out that because they are dominated by the non-indigenous majority “indigenous people in British Columbia are in danger of being led toward a non-indigenous future” in part based on state-sponsored treaty-making processes that limit creativity and self-definition through a so-called “fair and democratic processes” (1999: 128, 124). A significant change would occur if governance structures were self-defined by First Nations to be meaningful in an indigenous context.

6.2.4.3. Recognize Different Stages of Capacity

Rebalancing the power within a negotiating forum includes recognizing that communities are at different stages of cultural regeneration, and also have varying levels of technical and administrative capacity, both due to current realities and historical colonial practices. The extent to which a Nation has confidence in its identity, achieved health, and developed technical and management capacity all contribute to that Nation's strength. Nation strength will determine a number of aspects of negotiating ability, the primary being human capacity to address negotiation affectively.

I don't think we're there yet with power imbalance. Until we actually can make sure we have the resources we need and the capacity we need to meet all these demands. And it's only going to get more technical, as everything begins to develop. And these companies are huge... (Chief Sayers interview 2007)

The requirement for consultation is a legal requirement based in part on the lack of treaties and other jurisdictional agreements between the Crown and non-Indigenous people. Financial and time expenditures for meaningful negotiations can be quite high. Chief Sayers advocates a cost recovery approach to address the need for capacity (often acquired by First Nations through expensive specialist consultants).

Being able to access the expertise you need has to be an integral part of consultation, plus having the money given to you to do it. So, I've been advocating to the government that they should be putting a consultation fee on every application. If it's something minor, it's a minor cost. If it's something major, then it should be a major cost. (Chief Sayers interview 2007)

In addition to funding for First Nation capacity, a consortium of British Columbia business councils alongside the Council of Tourism of Associations,¹³⁶ amalgamated under the name the New Relationship Business Group, has recommended to the provincial government that provincial funding be made available for non-Aboriginal parties for consultation with First Nations (New Relationship Business Group 2007).

Solutions to the capacity challenge may include the funding of:

- community/stakeholder education;
- company education: local politics and culture, needs, concerns and development goals incorporating local opinions and Indigenous Knowledge;
- projects to ensure local empowerment and capacity-building; and
- improvements to corporate transparency and accountability (modified from Whiteman and Mamen 2002).

6.2.5. Principle #4 - Emphasize Strong Relationships and Trust

Throughout this research, the theme of relationships was raised by participants as an important factor in the success of the negotiations in each case. The strength of the relationships was facilitated by mutual respect between the parties and a consistency in the players through the process. Strong relationships play an essential role in the reconciliation of differences because relationships and trust-development represent a

¹³⁶ The New Relationship Business Group includes the Council of Tourism Associations, Business Council of British Columbia, BC Chamber of Commerce, The Mining Association of British Columbia, Coast Forest Products Association, BC Road Builders and Heavy Construction Association, BC Utility Advisory Council, the Association of Mineral Exploration, BC and the BC Salmon Farmers Association.

transformation, from systems where Western governments and industry dominate, to processes and relationships of mutuality. The key aspects of building strong relationships were described in the cases and Section 5.3 Theme #2 – Trust and Relationships, and can be summarized as follows:

- Deal honestly.
- Send the right people at the right time.
- Develop consistent relationships.
- Develop principles or protocols for interaction, communication, and administration.

6.2.6. Principle #5 – Respect First Nations Ontology, Values and Goals

As described in Section 2.6 Ontological Difference, in most Indigenous worldviews, “the world in which we live is alive” (Deloria 1997, 40) and humans are “integrated with the natural world, not separate from it” (Campbell et al. 2003, 18). Conversely, many non-Indigenous people, and particularly many Western scientists, hold a Cartesian (dualistic) view of the world, which shapes a significant part of the non-Indigenous worldview (Deloria 1997). A dualistic view holds that humans are distinctly separate actors in, or merely managers of, the rest of the natural world. Western, dualistic perspectives that divide humans from nature affect many aspects of resource management, including the time required for decision-making, language used to describe the land, the importance or value placed in the land, and the justification methods for decisions. For instance, on the issue of trade-offs and compensation, the

principle of substitutability that drives market economies assumes that all of nature (resources) has a market value and can, for a price, be substituted or exchanged in the market (Van De Veer and Pierce 1998). This assumption of substitutability leads to the idea that compensation through monetary payment is always possible, even in the case of loss of livelihood for future generations, or loss of non-human life and species.

LeBaron provides strong justification for why worldviews and different value structures are important for those interested in conflict and conflict resolution (2003).

The following concepts, adapted from LeBaron 2003, are pertinent to the consultation and negotiation situations considered in this research:

- If we have a fundamentally different view of the world ... we may not be addressing those deeper differences that continue to fuel conflicts.
- When worldviews are neither in our awareness nor acknowledged, the stronger parties in the conflict may advertently or inadvertently try to impose their worldviews on others. Far more profound than trying to impose a particular solution to a conflict or a way of communicating, the imposition of a worldview can be destructive to a whole way of life...
- Since worldviews contain and shape cultures (shared starting points and currencies or values), working effectively across cultures requires some understanding of the source of our culture – which is worldviews.

An expanded discussion of the impact of worldviews on decision-making and negotiation in British Columbia, and of solutions for making the discussions more meaningful to both Indigenous and non-Indigenous parties, is critical to achieving something deeper than mere consultation. This discussion of worldviews and values may be required to different degrees in each community, depending on the culture and worldview inherent in the people. In general, I argue that it behooves resource managers and those involved in consultation to consider that significant impacts to First Nations livelihood, culture, spirit and land may exceed a payable price, because of the wholly different concept and associated value many Indigenous peoples see in the land. Even a discussion of intrinsic values is still rooted in the dualistic Western perception of reality, where humans and nature are separate entities and only some of their composite entities deserve to be valued. For meaningful participation to occur, a fundamental recognition and accommodation of different worldviews and associated values, where they exist, at the outset of a consultation or co-management process is required. This phase would be in the earliest process design and power structure negotiation period, when knowledge, fact, and process are being defined.

The challenge lies in understanding and finding methods of co-existence when different ontological conceptions and worldviews are encountered in the two groups. Typically, an Indigenous understanding of being in the world is that “all things interpenetrate and are relationally interdependent” and creates a world reality with multiple connects and “intimate fusions” (Waters 2004, xxv), whereas the Western European view of being has

been described as binary and discrete (Waters 2004, xxv). The current source, or cultural foundation, for aspects important to land stewardship has been this dominant Euro-Canadian binary worldview. This Western ontological foundation forms the starting point for non-Aboriginal people in negotiations, and forms the overall framework for discussions; what is common sense, what is fact, and what has status or value. Typically, both Indigenous and non-Indigenous participants are assumed to hold similar views.

The ontology to which each of us subscribes is so utterly familiar that few of us ever hear or use the word. Our reality is so certain to admit no alternatives, that we have trouble in accepting it, with any sincerity, as *just one* (emphasis in original) possible version of reality, believing it in our heart of heart, to be *the only* (emphasis in original) possible reality. (M. Christie quoted in Howitt 2001, 116)

When developing the ground rules or framework for negotiation, the views and values of Indigenous Canadians should be presented, with any similarities and differences highlighted. And to whatever extent possible, non-Aboriginal government and proponent representatives ought to respect, and attempt to understand, the impact that an alternate worldview could and should have on land-use decision-making processes.

Simply respecting ontological difference may be an appropriate goal for Western resource managers since it may be detrimental for Westerners to believe they can truly understand an Indigenous worldview when we are steeped in our own binary culture of humans and nature, the civilized and the wild. It is difficult, if not impossible, for a someone with a Western worldview to truly understand or represent a different

worldview, particularly when an Indigenous worldview is best described in the language and oral stories and songs that are part of the Indigenous culture.

The practical challenge to resource managers is to ‘see’ the dimensions of resource management all together – to visualize the simultaneity of cultural, economic and ecological domains; to be critically aware of what *various models and approaches render important, and what they render invisible* [emphasis added]. (Howitt 2001, 78)

The challenge is also one of perception on the part of Westerners; the ability to see and hear an alternate worldview. In *If this is your land, where are your stories* J. Edward Chamberlin describes a situation in the *Delgamuukw* proceedings where Antgulilibix (Mary Johnson) stated that she must sing a song as part of the assertion of claim to the Gitksan traditional territory. Chamberlin goes on to say that:

Most of us go through life assuming that we could make not only music but meaning out of Mary Johnson’s song. It is like assuming we can translate *tulku* and *tjujurrpa*^[137]. For the Mary Johnsons of the world, it is a sinister assumption. It is an assumption that understanding sophisticated oral traditions comes naturally to the sympathetic ear. It doesn’t. Just as we learn how to read, so we learn how to listen; and this learning does not come naturally. (2003, 21)

Non-Aboriginal governments and proponents should proceed with caution when assuming they understand the difference between their worldview – their ontology and values – as compared to an Indigenous peoples’ worldview. Indigenous people may also make assumptions about the motivations and values of non-Aboriginal representative and governments. For instance, as described in my interview with Chief

¹³⁷ Australian Indigenous language words roughly meaning song and dreaming (Chamberlin 2003, 14).

Sru-Ets-Lan-Ough, the Cheam have the impression that the DFO places a different kind of value on the salmon than the Cheam.

Andrea: Do you find that when you're dealing with DFO understand the value of the fish to your people, as a part of Cheam culture?

Sru-Ets-Lan-Ough: Well, they see it as a commodity just to live off. (interview 2007)

Efforts can be made on both sides to describe what is knowledge and what has value within their respective cultures, but the full understanding of the First Nations worldview, the depth of land related values, and the accommodation required to satisfy land-based interests is best described and resolved by the knowledge and culture holders themselves.

Steps can be taken in consultation and negotiation processes to achieve this foundational principle of understanding and incorporating ontological difference when needed if cultural differences require. Non-Aboriginal governments and proponents could:

- Read and understand any land use plans, land use visions or related documents developed by the First Nation.
- Ask for guidance from leaders, elders and community members in understanding the Nation's priorities and interests.
- Understand that non-Aboriginal people may never be able to fully hear and see some Indigenous peoples' reality.

- Ensure that negotiation processes clarify the unique goals, objectives and values held by each party. Structured decision-making processes can be helpful for this task.

Strong consultation and negotiation must include enabling First Nations to understand and express their Aboriginal rights and title, and express their associated values and interests related to the land. Some Nations, including those in this research, have highly developed understandings of their position. Chief Sayers suggests that land use planning and clear statements of rights and interests through mapping will help First Nations strengthen their cases with proponents and government. “I think that the First Nations have really got to... really got to pull it together. They have to do this” (Chief Sayers interview 2007).

Each First Nation community will have worldviews and values that differ in degrees from Western values and approach to land management. The goal of this principle is to avoid assimilation through process wherever possible. Nevertheless, in each situation and where required, a fundamental recognition and accommodation of different worldviews and associated values at the outset of a consultation or co-management process is required for meaningful participation, particularly in the process and power structure design period. Furthermore, this “recognition of divergent perspectives and values is required as part of accommodation such that the *worth* of nature, or livelihood,

or Aboriginal title can be defined meaningfully in consultation with First Nations” which ties into Principle #6 (Kennedy 2007, 11).

6.2.6.1. Respect Land, Spirit, and Intergenerational Values

A living, healthy ecosystem is an integral part of many, but not all, First Nations peoples’ “culture and lifeways” (Turner and Clifton 2006, 65). For instance “foods provide far more than calories and nutrients; they help define the identity and heritage of a people” (Turner and Clifton 2006, 65). The value First Nations place on the land is tied to culture in ways, and with an inherent value that most Westerners cannot understand.

Martha: It’s [the fishery] for a need, it’s not for great wealth. We don’t see it is our wealth, having food for our family, for certain things that come from corporate bureaucracy, great wealth and good for the economy. Everybody can live you know. You know you can sit and live your life and take vacations and trips and then you look at some of the impact that occurs as a result of that enjoyment, you start to look around you and look at things a little differently. How much you’re impacting your environment. And how much we take for granted. And we’re all guilty of it.

Andrea: Yeah. A different definition of wealth would help.

Martha: Yeah. (interview 2007)

Negotiation with First Nations peoples in British Columbia requires and understanding of the importance of maintaining a living land with thriving ecosystems that are able to nourish a community, in body and spirit, in order for the central relationship of

Indigenous peoples with the land to be maintained. The 1996 Report of the Royal Commission of Aboriginal Peoples (RCAP) described Indigenous spirituality well:

Spirituality, in Aboriginal discourse, is not a system of beliefs that can be defined like a religion: it is a way of life in which people acknowledge that every element of the material world is infused with spirit, and all human behaviour is affected by, and in turn has an effect in, the non-material, spiritual realm". (Report of the Royal Commission on Aboriginal People in Campbell et al. 2003, 45)

"It is important to understand what is meant by the spiritual to realize its significance in First Nations' relationship with the land and their view about resource management" (Campbell et al. 2003, 45).

A recognition of the intergenerational perspectives and interests of many First Nations leads to a need to include a long-term horizon in resource-use decision-making beyond the typical twenty year time horizon that drives business financial decisions.

6.2.7. Principle #6 - Achieve Meaningful Accommodation

There are hundreds of Aboriginal land claims in Canada and more than forty treaty processes ongoing in British Columbia at the time of writing. The attempt to resolve these claims, treaties, and issues of traditional title has been ongoing for decades and will continue for many years. Land claims for traditional territories are seen by First Nations as the mechanism by which they can protect "Indian culture and values" (Kansky 1987, 84), and the Canadian courts have recognized the need for reconciliation as the "fundamental objective of the modern law of Aboriginal and treaty rights" (Slattery 2007, 256).

In the absence of the resolution of land claims and treaties, achieving meaningful, strong consultation and substantial accommodation is of immediate importance to First Nations who are struggling with the impacts that unsustainable resource developments are having on their territories and lifeways. Macklem points out that the

legal acceptance of the fiction of original Crown occupancy combined with the non-proprietary status of Aboriginal title produced a distribution of proprietary authority that has severely disadvantaged, in fact and in law, Aboriginal people in their efforts to maintain the integrity of their ancestral territories against non-Aboriginal incursion. (Macklem 2001, 95)

An application of Principle #6 requires that all parties conduct negotiations with the following foundations:

- Aim for consensus, particularly through the use of mediation.
- Substantially accommodate concerns. Project, proposal or policy adjustments constitute accommodation. Monetary payments are not the first or best form of accommodation.
- Compensation (e.g., land or money) is only a last resort.
- Accommodation and compensation may need to reflect values related to land that are different from Western values.

Even some of the best efforts of settler peoples to understand the priorities of Indigenous peoples fall short of including the values unique to many First Nations (Estergaard 2006; Nadasdy 2003; Harris 2002). For instance, there may be no accommodation that is satisfactory to a First Nation for the loss of an Aboriginal right.

Those are the kinds of things that I think still have to be worked out with the Province; is when you've got conflict and they make the final decision. Personally, I don't ever want compensation for our rights. I want our right to continue. And how do you come to that without having to fight it out in court? (Chief Sayers interview 2007)

This is due in large part to the strong link between Principle #5 and Principle #6 - cultural preconceptions of participants often results in a failure to recognize the outstanding claims to title, and the existence and importance of cultural and ontological difference, or of a worldview different from our own (Nadasdy 2003; Harris 2002).

There is a necessity for non-Aboriginal governments and proponents to understand that accommodation or compensation does not simply mean compensating for the fee-simple value of the land.

Rather, the question of accommodation of "Aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting Aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the Aboriginal peoples; see *Sparrow, supra*, at p. 1119. Indeed, the treatment of "Aboriginal title" as a compensable right can be traced back to the *Royal Proclamation, 1763*. The relevant portions of the *Proclamation* are as follows:

. . . such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them [Aboriginal peoples] or any of them, as their Hunting Grounds. . .

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians . . . but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name.

(*Delgamuukw* 1997, par. 203)

The *Royal Proclamation, 1763* declared that Indigenous peoples would be compensated for the surrender of their lands. According to *Delgamuukw*, compensation must reflect the right associated with the land, must be in “keeping with the honour of the Crown” and must take into account “the interdependence of traditional uses to which the land was put” (*Delgamuukw* 1997, par. 204). It is this latter portion of the requirements of accommodation that many non-Indigenous people have difficulty valuing because the Western theory of property is different from an Indigenous cultural and spiritual relationship to land and land-based lifeways.

In many instances it is difficult for Euro-Canadians to understand Indigenous values and how they relate to land and land stewardship. For instance, in the late 1990’s, the Cree opposition to the proposed Great Whale hydro-electric project in northern Quebec¹³⁸ was seen by the federal and Quebec governments as a manipulation by the Cree who only wanted “more compensation monies and control of economically valuable natural resources to use for their own benefit” (Feit 1995, 123). A past president of Hydro Quebec¹³⁹ stated “[w]hen they [the Cree] say it’s not a question of material compensation, I don’t believe them” (Feit 1995, 123). This kind of Euro-Canadian attitude towards an understanding of First Nations’ worldviews and values prevents accommodation of Aboriginal title, rights and interests from being truly meaningful to Aboriginal parties. Furthermore, Aboriginal title is such an important

¹³⁸ The Great Whale hydro-electric project was suspended.

¹³⁹ Hydro Quebec is the public electric utility in the province of Quebec.

issue to First Nations that accommodation through monetary compensation will not likely be welcome. Compensation should be a last resort, once all efforts to accommodate both government and First Nations interests and to reach a mutually acceptable proposal have been exhausted.

6.2.8. Principle #7 - Ensure Community Involvement and Support

Aboriginal title is a collective right held by all Nation members in the community. As such, strong and ongoing community involvement in a consultation and negotiation process is paramount. Often, individuals such as First Nations governments and representatives will negotiate on behalf of Nation members, but their authority to do so and the ongoing support for their leadership role must stem from the community. In the case of the Orca Bay Sand and Gravel project, a change in Kwaguilth-elected band council resulted in the community and leadership overturning the joint venture partnership entered into by the previous elected council. The only resolution to this uncertainty for Polaris was to hold a community-wide referendum that was binding and secured by a legal professional.

Given the communally-held nature of Aboriginal rights and title to the land, broad community support for an initiative, plan or project will likely be required for a proposal to proceed in First Nations traditional territory.

6.2.9. Comparison to Recent Consultation and Engagement Principles

The Principles outlined in my research align well with sets of principles recently described by local and international groups for the improvement of involvement of Indigenous peoples in resource development projects. This section outlines some of these alternate sets of principles and shows how the Principles in this research encompass them. It should be noted that none of the sets of principles encompasses all seven of the Principles developed in this research.

In 2003, consultant Tawney Lem prepared a draft consultation guidance document for the Hupačasath First Nation. This 17 page document outlines the purpose and principles of consultation, and recommendations for putting these principles into practice with the Hupacasath First Nation. Under the heading “What is Consultation” the document outlines the following legal principles supported by Canadian legal cases. A general guideline that did not fit neatly under one of the Principles from my research was that consultation processes should vary “with the circumstances of each situation (*Sparrow, Sampson, Delgamuuk’w* [sic], *Nikal*)” which supports the discussion in Section 5.4.2 (Flexible Approach Founded on Basic Principles) of this dissertation that emphasizes the importance of not depending on templates. Furthermore, the legal requirement for meaningful consultation aligns with all of the Principles described in this dissertation; without each of these Principles being followed to the degree necessary in a given process, the negotiation will not likely be meaningful to First

Nations. The guidance document states the following: “Consultation is a good faith, reasonable information disclosure between the First Nation and the licensee that includes the following legal components” (Lem 2003, 2). The components describe by Lem, which were described and listed with supporting provincial and Supreme Court decisions, have been reordered and regrouped here to show how they align with the Principles outlined in this research¹⁴⁰:

Principle #1 - Recognize Aboriginal Rights and Title to Land

- Is separate and distinct from any public consultation process (*Mikisew*)
- Takes the claims of the First Nation seriously (*Alphonse*)

Principle #3 – Strive for Power Rebalance

- Has a full disclosure of information to the First Nation on a timely and continuous basis so it can make an informed decision (*Jack, John and John; Halfway; Sampson*)
- Is meaningful (*Delgamuuk’w [sic]; Halfway; Taku*)
- Has the duty to arise before legislation is enacted or measure taken (*Halfway; Jack, John and John; Sampson*)
- Is proactive versus waiting for the First Nation to approach the proponent (*Sampson*)

¹⁴⁰ The following cases, referenced by Lem, are only referenced in this Section of the thesis: *Alphonse (R. v. William Alphonse 1993 B.C.C.A.)*; *Blueberry (Blueberry River First Nation v. B.C. et al., [1997] B.C.J. No. 2864 (B.C.S.C.))*; *Cheslatta (Cheslatta Carrier Nation v. British Columbia, 2000 BCCA 539)*; *Halfway (Halfway River First Nation v. British Columbia (Ministry of Forests), [1999] 4 C.N.L.R. 1 (B.C.C.A.))*; *Jack, John and John (R. v. Jack, John and John, [1995] 131 D.L.R. (4th) 165 (B.C.C.A.))*; *Mikisew (Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] S.C.C. 69)*; *Ryan (possibly Ryan et al. v. Fort St. James Forest District (District Manager) (BCSC) [1994] B.C.J. No 2642)*. All other cases in this section can be found in the Reference section.

- Is started at an early stage before decisions have been made
- Is conducted to the best ability of the parties (*Blueberry*)
- Is a two-way street with an obligation on the First Nation to also participate in good faith (*Cheslatta; Ryan*)

Principle #4 – Emphasize Strong Relationships and Trust

- Is reasonable (*Nikal; Halfway*)
- Is conducted in good faith (*Delgamuuk'w [sic]*)

Principle #5 – Respect First Nations Ontology, Values, and Goals

- Is meaningful (*Delgamuuk'w [sic], Halfway, Taku*)
- Includes the proponent informing itself of the First Nation's perspective, practices and rights (*Jack, John and John; Halfway*)
- Endeavors to seek workable accommodations of the cultural and economic interests of both the Indigenous and non-Indigenous parties (*Haida; Taku*)

Principle #6 – Achieve Meaningful Accommodation

- Is meaningful (*Delgamuuk'w [sic]; Halfway; Taku*)
- Has the purpose of substantially addressing the First Nation interest at stake (*Delgamuuk'w [sic]; Taku*)

- Endeavors to seek workable accommodations of the cultural and economic interests of both the Indigenous and non-Indigenous parties (*Haida; Taku*)
- Occasionally may require, at the end, consent (*Delgamuuk'w* [sic])

In another example, the Principles recommended in this dissertation align with some of the principles for community engagement with First Nations described by Carol-Ann Hilton¹⁴¹ (in Arbour et al. 2008, 5). She describes these principles as ones “that need to be recognized and addressed when approaching our communities for economic and social partnerships, which we truly need”. The following paragraph groups the principles outlined by Hilton under the related principles from this thesis.

Principle #1 - Recognize Aboriginal Rights and Title to Land

- Recognize the traditional territories and areas of cultural or heritage interests of the First Nations.
- Recognize that the bands can have overlapping or shared territories.
- Support the conclusion of fair, affordable and reasonable treaties.

Principle #3 – Strive for Power Rebalance

- Respect the internal affairs of First Nations bands.
- Recognize that First Nations have been historically displaced from participating in the economy.
- Acknowledge there’s a shortage of capital and capacity to involve First Nations in cooperative ventures.

¹⁴¹ Carol-Ann Hilton is from the Hesquiaht First Nation. Her educational background is a Masters in Business Management, and a Bachelor Degree in First Nations Studies.

- Understand that economic development plans need to include life skills support, training, and employment programs for First Nations.
- Support First Nations' aspirations in securing economic opportunity.
- Be patient, compassionate, and appreciative of our West Coast humour and lifestyle.

Principle #4 – Emphasize Strong Relationships and Trust

- Be patient, compassionate, and appreciative of our West Coast humour and lifestyle.

Principle #5 – Respect First Nations Ontology, Values, and Goals

- Respect the diversity of interests and cultures among bands.
- Have a commitment to sustainability and respect for the land and its resources.
- Recognize that First Nations have varying interests and objectives in relationships and cooperative ventures.

The World Summit on Sustainable Development (WSSD) project (based on work with Indigenous peoples in Guyana and Columbia) identified similar principles required for consultation with Indigenous people regarding mining projects. Although not called principles in their report, the insights and lessons described have similarities to my research outcomes and are relevant whether one is discussing a mining-related project or other work done with natural resources. The WSSD brief “underscores that the Draft Plan of Implementation and current proposals for Type II partnerships are founded on

several premises that ‘assume away’ – or ignore – a series of fundamental issues” (Weitzner 2002, 1).¹⁴² The fundamental principles, identified by Weitzner, are presented in here an abbreviated version and in the order presented in her report. I have added words in italics that highlight the Principles described in this dissertation that align with the WSSD outcomes.

WSSD: Mining projects may not contribute to poverty reduction or sustainable development when negative environmental and social impacts are considered, leading to questions as to whether mining projects should be promoted as a priority mechanism for poverty reduction.

Aligns with Principle #5 - Respect First Nations Ontology, Values and

Goals: Recognize that Indigenous peoples may have different priorities, interests and values than a project proponent.

WSSD: Indigenous Peoples may or may not be willing to participate in mining as a vehicle for development, depending on their vision of development and self-determination.

Aligns with Principle #5 – Respect First Nations Ontology, Values and

Goals. As above.

WSSD: Decision-making mechanisms should treat Indigenous Peoples as rights-holders in their traditional territories rather than simply stakeholders, and should recognize Indigenous Peoples’ right to free, prior and informed consent.

Aligns with Principle # 1 – Recognize Aboriginal Rights and Title to Land

¹⁴² Adapted from Weitzner 2002. Words in italics added.

WSSD: 'No-go' criteria need to be developed, particularly in the context of armed conflict where Indigenous Peoples are subject to severe human rights abuses in the name of progress.

Aligns with Principle # 3 - Strive for Power Rebalance.

WSSD: Partnerships with Indigenous Peoples **must** [emphasis in original] address power asymmetries in order to be equitable. Providing resources for the strengthening of Indigenous decision-making structures and self-governance processes is key in this regard.

Aligns with Principle # 3 - Strive for Power Rebalance. Particularly strive for the inclusion of Indigenous decision-making processes and self-defined governance structures.

WSSD: Corporate social responsibility should not be confused with or substituted for government social responsibility. Governments need to uphold and implement their national and international legal obligations to Indigenous Peoples, and strengthen legal, regulatory and judicial frameworks where these are weak.

Aligns with Principle #1 - Recognize Aboriginal Rights and Title to Land. Government recognition of Aboriginal rights can lead to the development of stronger policy frameworks.

WSSD: Corporations should embrace and implement the concept of free, prior and informed consent in their Aboriginal and/or sustainability policies and practice.

Aligns with Principle #3 - Strive for Power Rebalance. Early consultation is required if Indigenous peoples are to meaningfully participate in

negotiation processes prior to any strategic, planning, decision process, or implementation decisions being made.

The WSSD also describes a need, in their list of principles, that:

There is a need for participatory research involving Indigenous Peoples to document the economic, environmental and social – particularly gender – impacts of mining activities, in order to help target policies and practice appropriately. (2002, 1).

These principles outlined by the WSSD underscore the Principles developed through my research.

In another recent example of principles development in Canada, the Saulteau First Nations and Finavera Renewables agreed “to work together to begin to address the priorities identified by both parties”, as described on the Finavera website. They would work together in the development of a wind energy project in the Treaty 8 territory, a Treaty area partly represented by the Saulteau First Nation. As part of this agreement, priorities were developed. The priorities are summarized from the Finavera website and alignment with Principles from this research are shown as follows:

- [Collaboratively work to determine the] location and access [to the project].
Aligns with Principle #1 and #3 – Recognize Aboriginal Rights and Strive for Power Rebalance.
- Provide support to address capacity issues associated with the Environmental Assessment.
Aligns with Principle #3 – Strive for Power Rebalance.

- Employment and economic benefits
Loosely aligns with Principle #6 – Strive for meaningful accommodation.
- Identify economic development opportunities based on the principle of mutual benefit.
Loosely aligns with Principle #6 – Strive for meaningful accommodation.
- Culture and Indigenous knowledge will be respected and incorporated. Respecting Saulteau First Nations cultural and traditional values.
Aligns with Principle #5 – Respect First Nations Ontology, Values and Goals.
- Environmental values will be addressed. Minimize the environmental impacts and rehabilitate the environment where possible. Protect the natural environment through respectful, sustainable clean energy project development, and avoiding detrimental environmental impacts for the benefit of all.
Aligns with Principle #5 – Respect First Nations Ontology, Values and Goals.

This comparison to recent sets of consultation and engagement principles serves to show that the overarching Principles developed in this dissertation encompass the breadth of issues that are typically raised at the outset of consultative relationships with First Nations. The comparison shows that Principles 1, 3 and 5, (recognition of rights and title, power rebalance, and respect for First Nations values and interests), are emphasized in each situation. Principles 4 and 6 (emphasizing strong relationships and trust, and striving for meaningful accommodation) are also raised. However, Principles #2 (embark on negotiation versus mere consultation) and #7 (community involvement) are not mentioned. In the former Principle, given that the context of these other sets of

principles was specifically to provide guidance for consultation and/or engagement with First Nations, it would be incongruous for the principles to then recommend negotiation.¹⁴³ In the latter Principle, community involvement and support was mentioned as an important element in five of the six cases involved in this research. Further, in my experience, ensuring community support beyond the INAC-supported administration and Council of the First Nation, are very important for consultations to be considered meaningful and negotiations to be successful and accepted by the community at large. Thus, the Principles developed in this dissertation form a more complete set of normative Principles for future land-related negotiations.

6.2.10. Non-Adherence to Principles

This research suggests that adherence to the Principles will likely lead to successful consultation or negotiation processes. However, there are other practical, background conditions that may lead to failure in negotiations that are not fully covered by these Principles (see Section 6.2.1, Practical Elements and Community Characteristics). Future research in this regard could be useful. The possibility of success without applying the Principles or failure while applying the Principles emphasizes the point that these Principles are not prescriptive, exhaustive or intended to be a universal model for cross-cultural negotiations. The Principles provide normative

¹⁴³ The principles proposed by the Hupacasath and the WSSD do mention 'consent' and 'veto power' respectively, and in order to include this level of First Nation involvement would require processes similar to negotiation to achieve. In a recent document, the Hul'qumi'num Treaty Group propose methods and principles for shared-decision making that also echo Principles #1 and #2 in this research (Olding, Rogers and Thom 2008).

recommendations for what ought to happen in future, decolonized land-management relationships when colonial impacts and justice are of concern. However, individual practitioners, managers and participants must be reflective throughout their own decision-making processes when determining the degree of need for each Principle, and conversely the need for additional, community and situation specific principles.

Chapter 7. Conclusion: Creating a Just and Sustainable Future

In recent years, new depth and direction has been given to land management with First Nations in Canada, particularly through the legal requirement for consultation, or processes “significantly deeper than mere consultation” (*Delgamuukw* 1997, par. 168), such as strong consultation or “meaningful consultation” as described in case law (*Haida* 2004, par. 10) and the concept of co-jurisdiction between Western and Indigenous governments (Nadasdy 2003; Anderson and Nutall 2004). Something significantly deeper than mere consultation may include shared development of planning objectives, decision-making processes, and authority for outcomes. However, principles that lead to meaningful First Nations participation in resource decision-making in British Columbia, particularly as expressed from a First Nations peoples’ perspective, has yet to be widely appreciated and applied.

Meaningful consultation requires not only the understanding of contrasting goals, recognition of legal title and rights, and a fair distribution of power, but also negotiation of outcomes and accommodation based on an understanding of fundamentally different ontological perspectives and land-related values. McGregor recommends “the ancient ‘Co-Existence Model’ ... as a way of achieving cooperation between Native and non-Native peoples in working toward [sustainable resource management while] allowing cultural identities to remain intact” (2000, ii).

Many cases reviewed prior to this research and recent case law in Canada suggest that the goals of Indigenous peoples, their perspectives, and their values count only weakly, if at all, in land management decisions in British Columbia. Also, despite the past decade showing a perceived positive “ ‘flip’ in attitudes towards Indigenous interest and governance over... resources, others point out there is still a long way to go before Aboriginal views are appropriately integrated into decision making” (Hipwell et al. 2002). Appropriate incorporation of First Nations interests is a requirement of something more than mere consultation in Canada; meaningful consultation upholding the honour of the Crown needs to be defined around the concepts of power, rights, goals and values.

In most of British Columbia, consultation and accommodation represent more than mechanisms for dealing with treaty rights, as they often are in other parts of the country. Consultation in British Columbia is inherently an interim land management measure applied while treaties and land title are unresolved. Given the *Constitutional* rights, outstanding title issues, and deep cultural interests of Indigenous people in their unceded traditional territories, the honour of the Crown described in *Haida*, would be best upheld through a negotiation process that works to develop goals with a consensus-based approach between First Nations and non-Aboriginal parties (2004). Strong consultation (or negotiation) would include jointly designing the process so that it is “culturally appropriate; tailored to the local context”, with the agenda determined

by both parties and clear evidence of shared decision-making power (Whiteman and Mamen 2002, 74).¹⁴⁴ First Nations cultures often include, among other elements, decision-making by consensus, belief in a special relationship with the land, respect for the wisdom of elders, regard for the environment, and a willingness to share (Berger 1991; Alfred 1995). Sponsel also describes and provides evidence for four important assumptions about Indigenous societies that underlay Indigenous traditions and relationships with the land, in that they have (2001, 159):

1. Significant knowledge about the ecosystems of their land;
2. Economic practices that use land and resources sustainably;
3. Conservation promotion mechanisms; and
4. Spirituality connected with the environment.

To ensure meaningful inclusion of the First Nations' voice on the basis of unique needs, values, wishes, and points of view, the parties must to be explicit about including these aspects, where they exist culturally, in process and policy development. Western values and assertions for economic efficiency often devalue community well-being as a whole, environmental and community connection, and spiritual values found in alternate non-dual worldviews. These devalued elements are critical components of First Nations goals in consultation.

¹⁴⁴ Some activities that could support meaningful consultation and negotiation include: community/stakeholder education; company education on local politics and culture, needs, concerns and development goals incorporating local opinions and traditional knowledge; ensuring local empowerment and capacity-building; and improving corporate transparency and accountability (modified from Whiteman and Mamen 2002).

By expressing goals in a negotiation forum without expressing the fundamental worldview (beliefs and values) that shape goals, any unique First Nations' perspective is essentially subsumed (assimilated) into the Western perspective. This should not be the case, whether or not these values are more, or less, similar to a Western perspective of land; self-definition should be supported and any unique cultural and self-defining elements ought not to be assimilated (Young 1990). Hence, the issue of values deserves special attention with regard to its role in meaningful consultation, negotiation or co-management and change resulting from new and deeper approaches to land management negotiation. This is an area for concerted effort by policy makers and resource managers. One method for incorporating worldviews and associated values into the policy dialogues would be to explicitly and consistently include the co-creation of a declaration of principles and ethical codes, or statement of difference at the outset of a consultation, negotiation or co-management process (Trzyna 2001).

The Principles described in this dissertation provide a foundation for creating protocols for land management processes that will more fully include First Nations interests, culture and values. First, the government and private sector companies must clearly state their position regarding the rights and title of the participating First Nations. Ideally, Aboriginal rights and title recognition and respect would form a fundamental part of the foundation of discussions. Conversely, government and private sector interests might openly state they are undecided or choose not to acknowledge

Aboriginal rights and title to the land in question. In either case, the rights issue must be clearly stated and acknowledged as a fundamental goal for First Nations.

Second, the issue of power imbalance must be addressed at the outset of a consultation process. Where treaty agreements do not exist to the contrary, meaningful consultation and accommodation should be based on no less than shared authority and consensus building. Colonization and colonial history have created deep social and cultural imbalances in power between Indigenous and non-Indigenous groups in Canada. Power rebalance in these land management scenarios may require that additional means, resources, and roles be provided to First Nations, at least until Indigenous communities and governments regain their cultural and community strength. Given the historical relationship between the parties and the inherently biased debates and methods used for decision-making (Nadasdy 2003), First Nations may even require additional means, greater than the means provided to the dominant party, to create balance in authority. And ultimately, while agreement should be the aim of these land-based negotiations, making trade-offs and compromises will be the means of getting there (Gottlieb and Healy).

Lastly, and most fundamentally, values shaped by different worldviews must be recognized at the outset of a consultation process and through the development of accommodation and compensation. This recognition may be required to different degrees depending on the culture and worldview of a particular Indigenous group.

This recognition could lead to an accommodation of time requirements, location of meetings, format of information, and other process design elements. Accommodating First Nations perspectives at the outset may lead to an increased probability of success when shared power, equality of inclusion, and consensus building are primary aims. Understanding First Nations' differing values may result in accommodations that might not otherwise be undertaken, or in the provision of meaningful compensation.

In order to imagine what moves toward sustainability might result from the significant involvement of First Nations in land management in their traditional territories in BC, Indigenous values in relation to the land need to be considered. Turner describes the Kwakwaka'wakw philosophy of land management as aiming for "keeping it living" on the coast of British Columbia (2005). "The First Nations of BC have always had a close and special relationship with the land, which is marked by respect" (Campbell et al. 2003, 47). This respect for the land and ongoing determination to keep ecosystems living through responsible stewardship, if meaningfully incorporated into land-use decision-making processes, could enhance resource management in the province more generally.

Moreover, improved decision-making frameworks that enable the inclusion of First Nations values and approaches have the potential for cross-cultural educational benefits for non-Aboriginal resource managers in British Columbia. Principles of ecological sustainability may be transferred to other management situations in British

Columbia. Provincial agents and actors who are involved in co-management with First Nations in one instance may bring a new form of decision-making or valuing to another approval process where First Nations participation is not a required component.

Given the evidence from cases throughout British Columbia and Canada, there is room for hope that meaningful decision-making and negotiating processes will continue to be designed along with an increased understanding of what strong consultation or negotiation entails. The degree to which First Nations' goals are incorporated into the fabric of decision-making depends on whether the Crown, as represented by the provincial and federal governments, determines that the *honour* of the Crown and associated meaningful consultation are defined by processes that strive for shared power, inclusion, understanding, and consensus. Surely, the honour of the Crown is best represented by strong consultation, balanced negotiation power, and shared authority, particularly when impacts are high and the land in question is under asserted claim with a *prima facie* case. Future cases will further define what constitutes processes significantly deeper than mere consultation, and thus what upholds this honour in land management between First Nations and the Crown.

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Appendices

Appendix A. Sample Introduction Letter to Communities

Dear Chief Douglas and Council Members:

**RE: Letter of Information and Invitation for Participation
University Research Project: Rethinking Environmental Values**

I am writing to invite some members of your community to participate in a Ph.D. research project regarding resource management, valuing land and nature, and First Nations in BC. I had the pleasure of meeting with Saul Milne to discuss some potential fisheries related case studies for this work. He suggested that the Cheam have had some experiences with government agencies around drift net fisheries management that may be a good case study for the research project. I appreciated the invitation from Saul to send some more information to Chief and Council about the project and seek your support to continue working together. Based on this advice and initial interest, I am pleased to send the following.

The research project is in the planning stages and I welcome input on the direction and form the research takes. If you choose to partner in the research, I will continuously welcome your thoughts, suggestions and changes to the approach, and hope we can work together on a project that is useful and meaningful to your community.

The study itself would involve identifying participants who worked on the drift net case study, and myself conducting interviews with First Nation community leaders and members who participated in that process. I plan to invite four or five communities to participate in the research. I contacted Saul based on Ernie Crey's recommendation and your community's experience with fisheries and other resource management issues. The following letter provides background about the project. I would be happy to provide more information as we proceed together in this research process.

Background

I am a non-aboriginal Canadian, born and raised in the Vancouver area. My family and I reside in the lower mainland and despite living and working other places, I always come home to B.C. Over the last ten years, my career as an environmental engineer and resource manager has involved resource projects influencing indigenous people from places such as Peru, Uganda, and Canada. I have been fortunate to work directly with numerous First Nation leaders and communities in British Columbia on water use planning, energy use planning, and most recently, to bring new or improved electricity systems to remote First Nation communities in BC.

Through these experiences, I have become concerned about the dominantly economic focus of resource management decision-making in BC. While the interest and legal obligation among resource managers and governments to include First Nations values in management decisions has increased over the last decade, the descriptions, use and application of such elements as Traditional Ecological Knowledge, traditional use surveys, and capacity building have narrowed the discussions somewhat. I am interested in describing ways of designing and conducting decision-making, consultation and negotiation that enable the full and meaningful inclusion of First Nation values around land, including spiritual, cultural and social values and uses. In my experience, the case studies in BC that achieve such an aim are better than the status quo.

I am fortunate to be guided by my First Nation colleagues, friends and also an excellent supervisory committee at UBC. My committee at UBC includes:

- Dr. Paul Wood (Canadian, Centre for Applied Conservation Research, UBC),

- Dr. Nancy Mackin (Nisga'a, Interdisciplinary Studies UBC),
- Dr. Ron Trooper (Flathead Kootenai Tribe, Faculty of Forestry, UBC), and
- Dr. Graham Smith (Maori, Faculty of Education, UBC)

Case Studies and Purpose

I have asked you to participate because of your community's specific experience regarding the development of the drift net fishing program that might be considered representative of some good aspects of decision-making and consultation. I am hoping you and the participants might be willing to share their experiences on this topic.

The purpose of the research is to describe and share experiences from across the province on some of the better case studies in a variety of resource management negotiations and decision-making processes. Although all the potential case studies have some positive and negative aspects, it is the comparison and learning between case studies that may be most useful to your community, First Nations in BC and across Canada. The results are intended to provide guidance, support and advocacy for First Nations, governments, third parties and resource managers designing collaborative, consultative or co-management decision-making processes; particularly those processes with sustainable outcomes as an aim.

To achieve this purpose, I plan to conduct 15 to 30 interviews in 4 or 5 communities as part of this research in 2006 and early 2007. I will be describing and comparing people's experiences, opinions and recollections about their involvement in large-scale resource management decision-making processes. I would not need to ask questions about, or discuss the specific agreements or outcomes of any negotiations. Interviewees would need to have been participants in the case study process.

Outcomes of the research project will result in publication of a thesis. Any participants from your community will have the option to allow interview material to be included in publications if they wish, and/or to remain an anonymous contributor, if they wish.

Next Steps

The research methods have been reviewed by my university supervisory committee and while we are happy with the general approach, we are welcoming community input into the direction and implementation of the research.

I am looking forward to working with your community and designated representative to discuss the next steps in the research process. In general, these steps will likely be:

- 1. Expressions of Interest - August - October 2006:** Receiving an expression of interest from Chief and Council, or their representative, about the research proposal and process.
- 2. Logistics - October 2006:** Identifying a primary contact within the community for the research process and general communication, possibly Saul Milne;
 - Working with the community contact to identify appropriate case studies, and participants in the case study who would be available and interested in interviews;
 - Discussing the research process with community representative and identify any areas of concern or desire for change;
- 3. Research Proposal Approval and Ethics Review Board Application – Fall 2006**
 - The research process proposal has been formally approved by both my supervisory committee and is in the process of approval by the UBC behavioural research ethics board.
- 4. Meet with Representatives and/or Chief and Council - January 2007:**
 - Meeting with Chief and Council, if requested, to discuss the research and formally initiate the research process.
- 5. Interview Process – January 2007 to March 2007:**
 - Letters of invitation and consent to individual interview participants in the Fall.
 - Interviews will be conducted over the winter of 2007. I plan to visit communities and conduct interviews in person.

I will be happy to answer any questions you may have about the research. I look forward to talking with you soon. I will be in touch to follow up on this letter and your level of interest.

Sincerely,

Andrea Estergaard, M.A.Sc.

Ph.D. Student, University of British Columbia

cc. Saul Milne

Appendix B. Interview Script and Questions

Interview Script and Questions Ph.D. Research Project Rethinking Environmental Decision-Making

Principal Investigator: Dr. Paul Wood, Forest Resources Management, Faculty of Forestry, University of British Columbia

Co-Investigator: Andrea Estergaard, Ph.D. Student, Interdisciplinary Studies Program, UBC.

Primary Contact: Andrea Estergaard

Purpose:

Andrea Estergaard is examining case studies involving environmental management in BC, and conducting participant interviews as part of a Ph.D. research project at the University of British Columbia. She will be comparing people's experiences, opinions and recollections about their involvement in large-scale resource management decision-making processes.

Interview Script:

Review the research project purpose and objectives with the participant.

Request participation and discuss consent with the participant. Allow the participant time and privacy to review the consent form and sign as they see fit.

If Consent is received, begin interview and audio taping.

Conduct interview based on the interview questions below. Additional questions may be asked by the co-investigator to clarify specific points raised by the participant.

At the conclusion of the interview, indicate that audio taping has stopped, thank the participant, and outline next steps in the study process clearly.

Interview Questions:

Case Study Background

- Please describe the background for this case (history of the question or Case, issue involved, resource in question, and duration of negotiation or consultation).
- How did you get involved in this case?

- On what basis was this process founded (who asserted responsibility for environmental stewardship or resource 'ownership'?) Were you starting from an acceptable position? What compromises were made?
- Who was participating? (Government agencies? Technical experts? Private sector companies?)
- Are you familiar with the history and case law that requires consultation with First Nations on resource management within their traditional territories?
- (If yes) Was this a case of engagement, consultation, negotiation or co-management? Other? Was this adequate, in your opinion, given the case in question?
- How many meetings were held over what period of time? Who was invited? Who participated?

Participant Role

- What is your role in the community? In this case study? (Knowledge holder? Advisor? Observer or witness? Technical expert? Manager? Other?) Is this a recognized role, or informal?
- Did you have some degree of decision-making authority in this Case and process? How was this input solicited and included?
- Who else was participating and what were their roles? (Government agencies? Technical experts? Private sector companies? Environment?)
- Was there anyone excluded from the process? If yes, for what reason?
- Were these roles and responsibilities clearly laid out at the onset of the Case? Was this (inclusion or omission) important?

Relationships

- Did the participants know each other in advance of this Case?
- Was there an atmosphere of trust between participants?
- How important was this trust or mistrust in the Case?
- How did relationships evolve over the period of the Case?

Process

- How was the decision-making process designed and developed? (Evolved organically? Prescribed by regulations? Co-developed by participants? Partially prescribed?).
- Did you know in advance how the decision making process would unfold? Who laid-out and described the process? Or was it not described at all in advance?
- Does your community have their own decision-making processes that are generally followed within this community? Are these traditional processes? Were these processes applied in this situation, or even consulted?
- Who led the process in this Case?
- Was authority and power discussed openly and resolved?
- Was community capacity for participation a challenge? Was this challenge addressed in any way (training, funding for consultants or technical support)?
- How were goals developed? Who described the over-arching and specific goals of the process?
- Were your community's goals specific to economic development, or did they include multiple goals and values? (Cultural, social, spiritual, ecological community).
- Were these goals respected and included throughout the process?
- Was Traditional Knowledge formally (or informally?) included in the process? How?
- Was information and knowledge openly shared between participants?
- Were Traditional Values and Wisdom included in the process?
- How were issues of importance addressed in the process? Economic needs? Societal, community needs? Cultural values? Spiritual importance? How was balance sought, or was balance sought?
- How were decisions reached? Was consensus sought? Consensus with whom?
- Roughly how many meetings were held? Who decided how much time each decision would take?
- Where were meetings held?
- Did this process meet your (or the other participants') needs and desires?

- Was this one of the better cases you have participated in? In what ways, if any, was it better than the status quo?
- In what ways was this case and associated decision process lacking from your perspective?

Outcomes

- What were the primary outcomes or conclusions of the process?
- What decisions were made or agreements reached? (Private business details not required here, just a description of what types of decisions for action, accommodation or other were made).
- Did the outcomes meet your expectations and needs? The community needs?
- What issues of importance were emphasized in the outcomes? Economic needs? Societal, community needs? Cultural values? Spiritual importance?
- Did you receive feedback from community members on this decision? What was the nature of the feedback? (Positive, negative, neutral).
- What action, development, studies or changes have occurred as a result of this process? Did it fit with the stated outcomes of the process.
- Are relationships stronger because of this experience? (Within community, with whole natural community, with agencies, with private sector?).
- Have any new tables been struck or formed for decision making since this process took place? Was new knowledge or learning brought to the next process?

Participant Experience

- Could you describe your overall experience in this process? Was it positive? Frustrating? Learning? Challenging? Other?
- Did you feel your voice was heard?
- What aspects of the process could have been changed to improve your experience and inclusion, if any? (Timing, power balance, decision methods, meeting locations, goals of the process?)

Collaboration or Learning

- How do you learn about different approaches to consultation or negotiation? Talking to other leaders? Internet? Other protocol agreements?
- Do you have formal pathways of learning from other First Nation communities' experience? (Shared websites, Meetings, workshops, journals?)

Wrap Up

- Is there anything you would like to add that we have not discussed so far?

Appendix C. Behavioural Research Ethics Board (BREB) Approval



The University of British Columbia
Office of Research Services
Behavioural Research Ethics Board
Suite 102, 6190 Agronomy Road, Vancouver, B.C. V6T 1Z3

CERTIFICATE OF APPROVAL - MINIMAL RISK

PRINCIPAL INVESTIGATOR: Paul Wood	INSTITUTION / DEPARTMENT: UBC/Forestry/Forest Resources Mgt	UBC BREB NUMBER: H06-03813
INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT:		
Institution UBC		Site Point Grey Site
Other locations where the research will be conducted: Interviews will be conducted within the community at a quiet, private location selected by the participant, likely the participant offices or a community centre.		
CO-INVESTIGATOR(S): Andrea H. Estergaard		
SPONSORING AGENCIES: N/A		
PROJECT TITLE: Rethinking Environmental Decision-Making in B.C. post-Delgam Uukw		

CERTIFICATE EXPIRY DATE: January 9, 2008

DOCUMENTS INCLUDED IN THIS APPROVAL:	DATE APPROVED: January 9, 2007	
Document Name	Version	Date
Protocol: Estergaard Doctoral Research Proposal November 2006	1	March 11, 2006
Consent Forms: Participant Consent Form Version 1	1	November 22, 2006
Participant Consent Form Version 2	2	December 13, 2006
Questionnaire, Questionnaire Cover Letter, Tests: Interview Script Version 1	1	March 11, 2006
Letter of Initial Contact: Participant Invitation Letter	1	March 11, 2006
Community Invitation Letter	1	November 24, 2006

The application for ethical review and the document(s) listed above have been reviewed and the procedures were found to be acceptable on ethical grounds for research involving human subjects.

Approval is issued on behalf of the Behavioural Research Ethics Board
and signed electronically by one of the following:

Dr. Peter Suedfeld, Chair
Dr. Jim Rupert, Associate Chair
Dr. Arminee Kazanjian, Associate Chair
Dr. M. Judith Lynam, Associate Chair

Appendix D. 'Namgis Research Protocol Agreement

Please note that a signed version, dated January 30, 2007, was sent via email to George Speck. George Speck provided 'Namgis approval via an email note dated February 2, 2007.

‘NAMGIS FIRST NATION



Guidelines for Visiting Researchers/Access to Information

Version 1.12 / May 2005

‘NAMGIS FIRST NATION

Guidelines for Visiting Researchers/Access to Information

Not only in Alert Bay but also within many other British Columbia First Nations, visiting researchers are welcome provided that they commit themselves to observing certain ‘Rules of Conduct’. Those for the ‘Namgis First Nation have been developed at the direction and request of our Council, Advisors and the Keepers of our Culture.

These rules are not meant to make life difficult for the researcher; on the contrary, they are meant to ensure clarity and fairness in the relationship between, on the one hand, the visiting researcher and his/her supporting institution and possible funding sources, and on the other, the hosting First Nation, its research and development objectives, and the First Nation members serving as leaders and staff of the First Nation.

In exchange for accepting and abiding by the rules, the ‘Namgis First Nation will support the researcher with, firstly, permission to conduct research within ‘Namgis First Nation territory, and secondly with what pertinent resources it can offer.

Briefly stated the rules and guidelines listed below are intended to ensure that the following basic concerns of the ‘Namgis First Nation are met:

- a) That the research be of benefit to the ‘Namgis First Nation, both in its intent and its outcome;
- b) That it be conducted according to professional standards and ethics;

Note: With regards to the latter, prospective researchers and supporting institutions are referred to section 8 of “Ethical Guidelines for Research with Human Subjects”, adopted March 1979 by the SSHRC re: individual and collective rights. Two principles basic to all ethical guidelines are:

- 1) No harm, and
 - 2) Informed consent.
- c) That the interests of the ‘Namgis First Nation and the confidentiality of informants be protected with regard to the dissemination of original research data to any third party (that is to persons or institutions other than the researcher);

Note: “the interests of the ‘Namgis First Nation...etc.” are to be determined in consultation with the government of the ‘Namgis First Nation and are not to be a matter of unilateral assumption on the part of the researcher or his/her supporting institution.

- d) The ‘Namgis First Nation welcomes projects leading to the dissemination of accurate and respectful descriptions of its heritage and culture, especially when native perspectives and interpretations are included in the presentation.

The 'Namgis First Nation may wish, however, to retain copyright of both the research data and any publications (including papers presented in a public or professional forum) arising from the outcome of the research project. This consideration would depend upon the nature of the proposed project, the degree of professional assistance provided by the 'Namgis First Nation, or local concepts of ownership of certain kinds of cultural knowledge.

The matter of copyright and of any restrictions the 'Namgis First Nation may wish to place on either the dissemination of research data or interpretations derived therefore, should be discussed or negotiated at the outset of the project. Likewise, any conflict between conditions set by the 'Namgis First Nation on the one hand, and commitments required of the researcher by any other institution or funding source, on the other hand, should be made known to the 'Namgis First Nation and resolved at the outset.

The RULES and PROCEDURES for visiting researchers wishing to conduct research on the reserve are as follows:

- 1) Prior to consent being given to conduct research, a written proposal must be submitted to the 'Namgis First Nation for its consideration.

- 2) The proposal should provide the following information:
 - a) Name, address, telephone number of the prospective researcher.
 - b) Title of research project.
 - c) Detailed project description, to be based on the principle of "full disclosure" and to include:
 - i) Statement of research objectives;
 - ii) Proposed manner in which research will be carried out, including project phases and research methodology;
 - iii) Purpose of the research;
 - iv) Intended/proposed application of research results.
 - d) Name of sponsoring agencies and/or institutions;
 - e) Copies of ethical review policies and ethical review committee approvals for sponsoring agencies and/or institutions.
 - f) Name of funding agency or agencies.
 - g) Names and addresses of three references (or letters of reference).
 - h) Anticipated date of start and completion of project
 - i) Dates when research will be carried out within 'Namgis First Nation territory
 - j) Include also: curriculum vita of applicant researcher.

- 3) The review and approval process is as follows:
 - a) Assessment by the staff of the 'Namgis First Nation, or other designate of Council, for compliance with 'Namgis First Nation information requirements, including references check;

- b) Presentation of project proposal or request for information and all details relating to (2) to Chief and Council;
 - c) Presentation to 'Namgis First Nation of all commentary and recommendations from staff and Cultural Advisors for final decision.

- 4) Upon approval by the 'Namgis First Nation of the proposed research project, the next step is the formalization of mutually agreed upon conditions governing the following:
 - a) Conduct of research in the community and/or territory;
 - b) Disposition and ownership of research data;
 - c) Copyright of resulting reports and publications.

The above conditions are usually set out in the form of a signed contract between the researcher and the 'Namgis First Nation. A sample contract is attached. It should be noted that the 'Namgis First Nation generally requires:

- a) That originals of all tape recordings and copies of all field notes remain with or be provided to the 'Namgis First Nation;
- b) That copies of original research data not be disseminated to any third party (person or institution) without prior knowledge and consent of the 'Namgis First Nation
- c) That the 'Namgis First Nation be consulted prior to the publication or public presentation of any outcomes of the research project, and;
- d) That the 'Namgis First Nation receive 3 copies of all books, reports, or other documents published as a result of the research.

‘NAMGIS FIRST NATION

**Guidelines for Visiting Researchers/ Access to Information
CONTRACT**

I (Applicant) (please print) _____, have read and understand the terms and conditions in the document titled ‘Namgis First Nation Guidelines for Visiting Researchers/Access to Information’ and hereby agree to abide by the ‘Terms and Conditions’ contained therein.

Date Signed: _____, 20 _____

Signature of Applicant: _____

Applicant Name of Institute, Contact and Address information:

Signature of ‘Namgis First Nation Representative: _____

Start Date: _____ End Date: _____

Please return this contract to:

Appendix E. Participant Profiles

These participant profiles are current as of January 2009. The role or employment of each participant may have changed since the writing of the profiles (e.g., through Chief and Councillor elections).

Cheam First Nation Case - Participants

Isaac Aleck

Isaac is a Cheam band member and experienced fisher.

Chester Douglas

Chester is a Cheam band member and was an elected Cheam Council member from 2005 to November 2007, after a ten year break from Council. He has been a Cheam Councilor for a total of nearly twenty years. He is a fish buyer and has always taken a strong interest in the fishery and its management.

Chief Sidney Douglas (Sru-Ets-Lan-Ough)

Sru-Ets-Lan-Ough, Chief Douglas, is the elected Chief Councillor of the Cheam Band Council.

Martha Fredette

Martha is a member of the Gitksan Nation, a fisheries technician, and was the fisheries program supervisor with the Cheam band at the time of my interviews. She is married

into the Cheam Nation through her husband. She has since joined the administration of the Stó:lō Tribal Council, managing their S.T.E.P. program.

Saul Milne

At the time of the case, Saul was the fisheries manager for Cheam. At the time of our interview, and currently he works with Fraser Basin Council in Vancouver, British Columbia.

Rick Quipp

Rick is an experienced Cheam fisher. Rick was not a Council member at the time of our interviews, but he was re-elected to council November 2007.

Hupačasath First Nation Case Participants

Aaron Hamilton

Aaron is a Hupačasath First Nation member and was a Hupačasath Economic Development Board member at the time of my interviews (2007). As of December 2008, he is the Director of Operations for the Hupačasath First Nation

Trevor Jones

Trevor is the Executive Director of the Hupačasath First Nation.

Chief Judith Sayers

Chief Sayers is the elected Chief of the Hupačasath First Nation. As described on the EcoTrust Website,

Chief Judith Sayers, Kekinusuqs, (Nuu-chah-nulth) was an honoured 2006 Ecotrust Award finalist for her contributions to Aboriginal rights, treaty settlements, and a sustainable future and equal rights for First Nations women. Chief Sayers has successfully worked to improve the economic, cultural, environmental and social conditions of the Hupačasath First Nation and helped move regional issues to the national stage. She currently resides in Port Alberni, British Columbia, Canada.

Hupačasath First Nation first elected Chief Sayers in 1995. As Chief, she oversees the political, administrative and economic development of the Hupačasath First Nation. Chief Sayers has been proactive in improving her people's economic condition by developing partnerships with the government and businesses. She has also served as the Chief Negotiator for the Hupačasath First Nation since 1993 in the British Columbia treaty process. Chief Sayers was re-elected in 2007 for another two-year term.

Sharean VanVolsen

Sharean is a Hupačasath elder who works in the field of community service and social work.

Soowahli First Nation and Stó:lō Tribal Council Case Participants

Dave Barrett - Executive Director, Commercial Salmon Advisory Board

Dave Barrett has been the Executive Director of the CSAB since 2004.

Ernie Crey

Ernie Crey is the Stó:lō Tribal Council Fisheries manager, co-author of *Stolen From Our Embrace* written with journalist Suzanne Fournier, activist, and frequent spokesperson on numerous social and environmental issues facing First Nations in the Fraser Valley.

Grand Chief Doug Kelly

(Biography quoted from the Soowahli Council Website <http://www.soowahlie.ca>)

Doug Kelly carries the ancestral name of his late maternal grandfather - Tseem. Married, with a blended family of six children, he resides on the Soowahlie Indian Reserve located near Cultus Lake, BC. Tseem, a proud Sto:lo, knows that his large family extends into many Coast Salish villages including Sumas, Tzeachten, Skowkale, Chehalis, Cowichan, Snuneymuxw, Songhees, and Chemainus.

Elected chief of Soowahlie in March 2001, the Soowahlie Council asked Doug Kelly to take on two portfolios - Treaty and Health. In support of the Sto:lo Nation Treaty Table, Doug participates on several working committees including the Sto:lo Nation Wide Caucus, Mining, Forestry, and Communications. Recently the First Nations Summit appointed Doug Kelly to the Chiefs' Health Committee.

Doug Kelly has twenty-one years of experience in leadership roles for Aboriginal communities. This experience includes 6 years as a self-employed Community Development Consultant. This service also includes thirteen years in senior management including: Executive Director, First Nations Summit Chiefs' Health Committee, Executive Director, Health and Social Development for Sto:lo Nation, Operations Manager for the Sto:lo Tribal Council. In 1992, the First Nations Summit elected Doug Kelly to serve as a Commissioner for the BC Treaty Commission.

First elected chief in 1983, Doug Kelly held this position for 4 years. He served on the Sto:lo Nation Executive and held the portfolios of Education, Social Development, and Child Welfare.

'Namgis First Nation Case Participants

Doug Aberley

Doug Aberley is the Director of the Treaty Natural Resources Department for the 'Namgis First Nation. He is a community and regional planner, an author, and he is a former professor at University of British Columbia (confirm) and spent several years consulting with the Tsleil-Waututh First Nation in North Vancouver and the 'Namgis First Nation, before moving to Cormorant Island six years ago and living with and working full-time for the 'Namgis Administration.

Harry Alfred

Harry Alfred is 'Namgis and the Natural Resources Officer for the 'Namgis First Nation. He has been working with the 'Namgis administration since 2003. His previous position was as an Assistant Forester. He has lived on Cormorant Island for 35 years, which is most of his life, and spent 2 years in Merritt pursuing education.

Mike Rodger

Mike is the Chief treaty negotiator for the 'Namgis First Nation.

George Speck

George Speck is 'Namgis and the Band Administrator for the 'Namgis First Nation.

Garry Ullstrom

Garry has worked with the 'Nangis administration for over twenty years and is their financial comptroller. He lives on Cormorant Island with his wife and children.

Appendix F. Topics and Themes Identified in Cases

Theme or Topic	Topic Number	Identified in Interview
Relationships		
Early Engagement key ingredient for success	100	Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power
Early engagement, but some permitting already underway	101	Hupačasath – Polaris 'N̄amgis - Brookfield Power
Very inclusive throughout, or became inclusive	102	Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power Stó:lō, Soowahlie & CSAB
Meaningful involvement	103	Cheam Case Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power 'N̄amgis- Parks Stó:lō, Soowahlie & CSAB
Poor relations not tolerated, or no longer tolerated	104	Cheam Case Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power 'N̄amgis- Parks Stó:lō, Soowahlie & CSAB

Theme or Topic	Topic Number	Identified in Interview
First Nation Involvement Needed, Required, Desired by others		
Legally	201	Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power
Financially	202	Cheam Case
Strategically	203	Cheam Case 'N̄amgis- Parks Stó:lō, Soowahlie & CSAB
Mere consultation no longer enough – relations or situation had to change	204	Cheam Case 'N̄amgis- Parks Stó:lō, Soowahlie & CSAB
Community Relationships and Engagement		
Community Engagement Important	300	Cheam Case somewhat Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power
Traditional Govn. or Hereditary Chief Engagement	301	Hupačasath – Polaris
High community expectations	302	Cheam Case Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power 'N̄amgis- Parks
Needed more community involvement in negotiations	303	Hupačasath – Polaris

Theme or Topic	Topic Number	Identified in Interview
Community members have personal responsibility to get informed	304	Hupačasath – Polaris
Community benefits important	305	Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power
Aspects of Negotiation		
Negotiation revealed non-Indigenous interests	400	Hupačasath – Polaris Stó:lō, Soowahlie & CSAB
Needed more people (FNs) in negotiation	401	Hupačasath – Polaris
Effort to rebalance power through negotiations	402	Hupačasath – Polaris (somewhat) 'N̄amgis- Orca (somewhat) Stó:lō, Soowahlie & CSAB (somewhat)
Proponent included and showed interest in FN interests, concerns and values	403	Hupačasath – Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power
Aboriginal Rights and Title		
Aboriginal title recognized	500	Hupačasath – Polaris (somewhat) 'N̄amgis- Orca (somewhat) 'N̄amgis - Brookfield Power
Not specifically recognized or addressed	501	Cheam Case Stó:lō, Soowahlie & CSAB

Theme or Topic	Topic Number	Identified in Interview
Partially or minimally recognized	502	'N̄amgis- Parks
Rights discussed in interviews and recognized in negotiations	503	Cheam Case Hupačasath - Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power 'N̄amgis- Parks Stó:lō, Soowahlie & CSAB
Case was an opportunity to express rights	504	Cheam Case Stó:lō, Soowahlie & CSAB
Aboriginal right continued and not extinguished or decreased through negotiations - recognition may improve in future	505	Cheam Case 'N̄amgis- Parks Stó:lō, Soowahlie & CSAB
Contract between Equals		
Negotiated outcome somewhat lacking for First Nations. Greater strength on part of FNs may have led to offer rejection and/or improvement	600	Cheam Case Hupačasath - Polaris 'N̄amgis- Orca 'N̄amgis - Brookfield Power Stó:lō, Soowahlie & CSAB
Focus on jobs on the part of the First Nation	601	Hupačasath - Polaris 'N̄amgis- Orca 'N̄amgis- Parks

Theme or Topic	Topic Number	Identified in Interview
Trust		
Trust raised as an important issue	700	Cheam Case Hupačasath - Polaris 'N <u>a</u> mgis- Orca 'N <u>a</u> mgis - Brookfield Power 'N <u>a</u> mgis- Parks Stó:lō, Soowahlie & CSAB
Trust raised as initially lacking	701	Cheam Case Hupačasath - Polaris 'N <u>a</u> mgis- Orca 'N <u>a</u> mgis- Parks Stó:lō, Soowahlie & CSAB
Consider Nation Capacity	800	
Capacity funding provided in some form (for consultants or studies or other)	801	Cheam Case Hupačasath - Polaris 'N <u>a</u> mgis- Orca 'N <u>a</u> mgis - Brookfield Power
Funding was independent	802	Hupačasath - Polaris 'N <u>a</u> mgis- Orca 'N <u>a</u> mgis - Brookfield Power
Funding was inadequate (short duration, under control of non-Aboriginal party)		Cheam Case
Partnership vs. Governance	900	
Partnership with private sector offered First Nation economic advantages not	901	Hupačasath - Polaris 'N <u>a</u> mgis- Orca

Theme or Topic	Topic Number	Identified in Interview
seen to be gained through maintaining a governance role		'N <u>am</u> gis - Brookfield Power
Governance power still held by Crown or non-Aboriginal parties. Partnership seen as only option for First Nations to participation	902	Cheam Case 'N <u>am</u> gis- Parks Stó:lō, Soowahlie & CSAB
Identify Shared Interests	1000	
Shared interests as an ingredient for successful negotiations.	1001	Cheam Case Hupačasath - Polaris Stó:lō, Soowahlie & CSAB
TEK Inclusion	1100	
Discussed in interviews as inadequate	1101	Cheam Case
Discussed in interviews as adequate or good	1102	Hupačasath - Polaris 'N <u>am</u> gis- Orca Stó:lō, Soowahlie & CSAB
Not discussed or not identified as a major theme	1103	Hupačasath - Polaris 'N <u>am</u> gis - Brookfield Power 'N <u>am</u> gis- Parks Stó:lō, Soowahlie & CSAB
Environment / Sustainability Concerns		
Environment or land discussed as important in negotiations		Cheam Case Hupačasath - Polaris 'N <u>am</u> gis- Orca 'N <u>am</u> gis - Brookfield Power Stó:lō, Soowahlie & CSAB

Theme or Topic	Topic Number	Identified in Interview
Sustainability discussed as important in negotiations		Cheam Case 'N <u>a</u> mgis - Brookfield Power Stó:lō, Soowahlie & CSAB
Accommodation		
Concept of accommodation discussed in interviews		Cheam Case Hupačasath – Polaris 'N <u>a</u> mgis- Orca 'N <u>a</u> mgis - Brookfield Power Stó:lō, Soowahlie & CSAB
Accommodation was adequate and/or meaningful		Hupačasath – Polaris 'N <u>a</u> mgis- Orca 'N <u>a</u> mgis - Brookfield Power
Power	1400	
Power redistribution or rebalancing discussed in interviews	1401	Hupačasath – Polaris 'N <u>a</u> mgis- Parks Stó:lō, Soowahlie & CSAB
Time for negotiations (adequate or ample)	1402	Cheam Case Hupačasath – Polaris 'N <u>a</u> mgis- Orca * Although not discussed in sets of case interviews, inadequate time was not raised as an issue.
Self-governance enabled	1403	Cheam Case somewhat Hupačasath – Polaris 'N <u>a</u> mgis- Orca 'N <u>a</u> mgis - Brookfield Power

Theme or Topic	Topic Number	Identified in Interview
		'Namgis- Parks Stó:lō, Soowahlie & CSAB