The Land Claims of First Nations in British Columbia

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This paper reviews the historical background and current status of land claims of aboriginal peoples in British Columbia, some responses to the decision in Delgamuudu *v* The Queen *in the Supreme Court of British columbia, and recent provincial government policy changes which led to the establishment of a British Columbia Treaty Commission in September 1992. The Commission, comprising representatives of federal and provincial governments and aboriginal peoples, will supervise "treaty" negotiations which recognise the "new relationship" between the Canadian Crown and "First Nations" in British Columbia. Some comment is also made on the suggestion that the Waitangi Tribunal is an appropriate model for the British Columbia Treaty Commission.*

I INTRODUCTION

In a British colony, any pre-existing title to lands, waters and other resources, often called aboriginal title, has normally been extinguished either by conquest, or some form of treaty of cession. New Zealand has a single treaty with all the tribes, the Treaty of Waitangi, which in Article the Second "confirms and guarantees possession" of lands, estates, forests, fisheries and other properties to Maori. Aboriginal title to land was normally extinguished either by purchase, or by transmuting customary tenure into Maori freehold title through the procedures of the Maori Land Court. There is still debate over the nature of aboriginal title to resources other than land. In contrast, in British Columbia, a colony which evolved over a similar time span as New Zealand, there was no conquest, and no formal legal or political acknowledgement of aboriginal title to land. The "First Nations" of British Columbia maintain the view that their aboriginal title has not been extinguished. This paper reviews recent efforts to reach some resolution of land claims in British Columbia.

The term First Nations is used to refer to the indigenous peoples of Canada, who have historically been described by Europeans as Indians. The term Indian as a legal definition in Canada refers to Indians who have status under the Indian Act and excludes non status Indians, Metis and Inuit. The term native is also used to describe aboriginal people of Canada but the tribal councils prefer First Nations. Recently, the term aboriginal has been replacing native in official parlance. Late in 1991, for example, the Ministry of Native Affairs in British Columbia provincial government was renamed the Ministry of Aboriginal Affairs. However the federal government department still refers

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to "Indian Affairs" in its title. The federal government is responsible for administration of the Indian Act and lands set aside as Indian reserves.

The Canadian Constitution Act 1982 provides in section 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". In section 35(2) aboriginal peoples are defined as including "Indian, Inuit and Metis peoples of Canada". These aboriginal and treaty rights are based on the Royal Proclamation 1763 which stated, among other things:

> that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

This Proclamation also established a form of Crown pre-emption and protection of Indian land within the Canadian territories, including "the Limits of the Territory granted to the Hudson's Bay Company, and also all the lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West".

The vagueness of this description of territorial limits is the basis for the British Columbia provincial government claim that the Royal Proclamation does not apply to this province, west of the Rocky Mountains. The Royal Proclamation of 1763 established the basis for what became a federal government responsibility for Indian affairs, including the negotiation of treaties of cession. As European settlement advanced westward, a number of treaties were negotiated with tribes east of the Rockies. An extension of Treaty No 8 included the northeastern portion of British Columbia in 1899.[1] Meanwhile, a British colony had been established on Vancouver Island in 1840, and was administered by the Hudson's Bay Company which had been operating there for some years. In 1858 mainland British Columbia became a British colony. The two colonies were united in 1866 and joined the Canadian confederation in 1871.

Between 1850 and 1854, James Douglas, Governor of Vancouver and chief official of the Hudson's Bay Company, negotiated several purchases of lands on Vancouver Island. The Company Secretary in London, Archibald Barclay, had instructed Douglas "to consider the natives as the rightful possessors of such lands only as they are occupied by cultivation, or had houses built on, at the time when the Island came under the undivided sovereignty of Great Britain in 1846", after the Oregon Treaty. "All other land is to be regarded as waste, and applicable to the purposes of colonization".[2] Indian hunting and fishing rights were acknowledged, and when their lands were registered, Indians would enjoy the same rights and privileges as settlers. Douglas began the process with a conference of chiefs of southern Vancouver Island:.[3]

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1 P Tennant *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia 1849-1989* (University of British Columbia, Vancouver, 1990) 65-67.

2 Above n 1, 18.

3 Above n 1, 19.

> Douglas had the chiefs indicate their approval at the foot of a blank sheet of paper; he then wrote to Barclay asking for a suitable text to place on the upper portion of the sheet. Barclay responded with a text virtually identical to that already used by the New Zealand Company in purchasing land from the Maori. Douglas himself then copied the text, with the necessary additions of names, dates, and amount of payment, onto the original sheet of paper. The same text was used for subsequent purchases from the Indian groups

A total of 14 purchases were made of an area of about 358 square miles, about 3 percent of Vancouver Island. As Tennant observed, these agreements owed more to the New Zealand Compnay than to the Royal Proclamation of 1763.

These Vancouver Island agreements were not true treaties, although sometimes described as such. The significant point is that by negotiating land purchases, aboriginal title to land was recognised. In Treaty No 8, reserves were allocated by the federal government to Indians on the basis of 640 acres for each family of five. In spite of these forms of recognition of aboriginal title, there has been no formal acknowledgement of First Nations land rights by the provincial government of British Columbia. In 1973, in a split decision on the *Calder* case,[4] three judges of a panel of seven in the Supreme Court of Canada acknowledged the existence of aboriginal title for the Nisga'a tribe in British Columbia. During the 1970s, the federal government instituted a policy of accepting "comprehensive native claims". Within federal Arctic territories, some progress has been made in reaching agreements. From British Columbia, the Nisga'a Tribal Council applied in 1974 to negotiate their comprehensive claims. They were followed by the Kitwancool Band and the Gitskan Wet'suwet'en Tribal Council in 1977. In early 1978 the British Columbia government responded with a statement:[5]

> The provincial government does not recognize the existence of an unextinguished aboriginal title to lands in the province, nor does it recognize claims relating to aboriginal title which give rise to other interests in lands based on the traditional use and occupancy of land. The position of the Province is that if any aboriginal title or interest may once have existed, the title or interest was extinguished prior to the union of British Columbia with Canada in 1871.

Between 1978 and 1988 another 20 comprehensive claims were lodged with the federal government by tribal councils in British Columbia. There was also continuing Indian political activity, Court proceedings (including successful injunctions against logging on lands under claim), protests and increasing media attention on Indian claims.[6] In 1987 the Gitskan Wet'suwet'en Tribal Council began court action in the

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4 *Calder* v *Attorney-General for Biritsh Columbia* (1973) 34 DLR (4th) 145.

5 First Nations Congress *Indian Land Claims in British Columbia* (Vancouver FNC, 1991).

6 See Clavin *A Death Feast in Dimla Hamid* (New Star Books, Vancouver, 1990) and above n 1.

Supreme Court of British Columbia.[7] In March 1991 Chief Justice McEachern issued his judgment which dismissed the plaintiffs' claims for ownership and aboriginal rights in their tribal territory. It was acknowledged in the judgment that the plaintiffs "are entitled to a declaration that, subject to the general law of the province, they have a continuing legal right to use unoccupied or vacant Crown land in the [tribal] territory for aboriginal sustenance purposes".[8]

II THE IMPLICATIONS OF *DELGAMUUKW AND OTHERS* V *THE QUEEN*

In his reasons for judgment, Chief Justice McEachern concluded that "aboriginal interests arise by operation of law upon indefinite, long aboriginal use of lands".[9] In Canada, aboriginal interests also arise out of the provisions of the Royal Proclamation 1763, but McEachern CJ accepted the long-established British Columbia government position that the "Royal Proclamation 1763 has never had any application or operation in British Columbia".[10] This would appear to retain the status quo, that the federal government has responsibility for indigenous tribes but that Crown title is vested in the British Columbia Crown without any burden of aboriginal interests. McEachern CJ made it clear that the provisions of section 35 of the Constitution Act 1982 could not apply "because it only recognizes and affirms aboriginal rights which I have excluded in this case".[11]

Extinguishment of Gitskan Wet'suwet'en aboriginal title is implied by the imposition of British sovereignty in the Colony of British Columbia in 1858, colonial administration of Indians until admission of British Columbia to the Canadian confederation in 1871, and subsequent Indian compliance with Canadian law. This "doctrine of extinguishment by implication" was attacked by Hamar Foster in his 1991 paper.[12] He suggested that the "conveyancing forms virtually identical to those used in New Zealand (by the New Zealand Company)" in the so-called "Douglas treaties" in southern Vancouver Island appear to acknowledge some kind of aboriginal interests in these lands. However, the colonial officials who succeeded Douglas denied aboriginal interests. It did not extinguish them. Land purchases by the Crown, or after 1865, titles confirmed by the Maori Land Court, were the mechanisms for extinguishing

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7 Gisday Wa and Delgamuukw *The Spirit in the Land: The Opening Statement of the Gitskan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia* (Reflections, Gabriola, BC, 1989) and D Monet *Colonialism on Trial, Indigenous Land Rights and the Gitskan and Wet'suwet'en Sovereignty Case* (New Society Publishers, Gabriola Island, BC, 1992).

8 *Delgamuukw and Ors* v *The Queen* (1991) 79 DLR (4th) 185, 537.

9 Above n 8, 307.

10 Above n 8, 307.

11 Above n 8, 480.

12 H Foster "It goes without saying: Precedent and the Doctrine of Extinguishment by Implication in *Delgamuukw et al* v *The Queen*" (1991) 49 The Advocate 341, also included in F Cassidy (ed) *Aboriginal Title in British Columbia: Delgamuukw* v *The Queen, Proceedings of a Conference held September 10 - 11, 1991* (Oolichan Books, Lantzville, BC, 1992).

"customary" title to land in New Zealand. Few British Columbian tribes were party to any form of treaty or land purchase agreement.

Perhaps the issue in *Delgamuukw* which is most relevant for New Zealand is the concept of a "fiduciary obligation" of the Crown toward indigenous people in British Columbia. Having concluded that the aboriginal interests of Gitskan and Wet'suwet'en were "lawfully extinguished by the Crown during the colonial period" McEachern CJ went on to state:[13]

> The plaintiffs are entitled to a declaration that the Gitskan and Wet'suwet'en peoples are entitled, as against the Crown but subject to the general law, to use unoccupied, vacant Crown lands within the [tribal] territory for aboriginal sustenance activities until it is required for an adverse purpose. I limit this declaration to the territory because that is the only land which is in issue in this action but I see no reason why it should not apply to the province generally.

The term aboriginal sustenance used here implies a subsistence economy. As McEachern CJ explained, "These aboriginal rights do not include commercial practices".[14] In New Zealand, the Waitangi Tribunal in the Muriwhenua Fishing Report and elsewhere has rejected the limitation of Maori rights under the Treaty of Waitangi to practices current in 1840, and suggested that a right to development of resources and access to technology arises out of the Treaty. "A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty".[15]

McEachern CJ's comments on Crown obligations, "fiduciary duties" and "the honour of the Crown" are worth noting in the New Zealand context. Governor Douglas in 1860 had promised that reserve land in British Columbia would be allocated for Indians, to include village sites and land to cultivate, "and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the Colony".[16] McEachern CJ interpreted this to mean the Crown obligation was not exactly an enforceable one. "The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land".[17] Crown lands that had been conveyed away, say for logging, could become available again, but this example, quoted by McEachern CJ, begs the question whether aboriginal sustenance would be possible on clear-cut forest lands in British Columbia. There are New Zealand parallels perhaps in traditional Maori uses of National Parks such as for picking food or medicinal plants, or the Crown forests subject to Maori claims, vested in the Forestry Corporation where timber cutting rights have been sold to third parties. We have no formal provisions acknowledging any continuing rights of aboriginal sustenance on such Crown lands, on the assumption that all customary rights were extinguished upon Crown acquisition.

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13 Above n 8, 490.

14 Above n 8, 462.

15 Waitangi Tribunal *The Muriwhenua Fishing Report* (Department of Justice, Wellington, 1988) 234.

16 Above n 8, 479.

17 Above n 8, 482.

Chief Justice McEachern set out some "principles which should govern the Crown's duty" which he intended as a "framework for a justification and reconciliation process".[18] Having stated his view of matters of concern to the plaintiffs, he set out a number of propositions on the matter of fiduciary duty:[19]

> First, the federal and provincial Crown, each in its own jurisdiction, always keeping the honour of the Crown in mind, must be free to direct the development of the province and the management of its resources and economy in the best interests of both the Indians and non-Indians of the territory and of the province ... . It would seriously undermine the ability of the Crown to manage the resources of the territory if, subject to what follows, it did not have the ongoing right to develop or alienate the land and resources of the province.
>
> Secondly, the Ministers of the province and their officers should always keep the aboriginal interests of the plaintiffs very much in mind in deciding what legislation to recommend to the legislature, and what policies to implement in the territory. There should be reasonable consultation so that the plaintiffs will know the extent to which their use might be terminated or disturbed. A right of consultation does not include a veto, or any requirement for consent or agreement, although such is much to be desired.
>
> Thirdly, the province should make genuine efforts to ensure that aboriginal sustenance from the cultural activities upon unoccupied Crown land are not impaired arbitrarily or unduly. If that should occur from time to time then suitable alternative arrangements should be made. It must be assumed that there will often be interference because the most likely tension will be between forestry operations and sustenance rights. Most of such interference should not be permanent in any particular area of the territory and these competing interests must be reconciled ... .[General conservation and environmental questions were specifically excluded]
>
> Fourthly, whether any proposal or resulting interference offends unduly upon aboriginal activities and brings the honour of the Crown into question will in large measure depend upon the nature of the aboriginal activity sought to be protected and the extent it is ordinarily exercised; the reasonable alternatives available to all parties; the nature and extent of the interference; its duration; and a fair weighing of advantages and disadvantages both to the Crown representing all the citizens and the Indians ... .
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> Fifthly, notwithstanding what I have just said, I would expect the province to provide some sustenance priority to Indians in the use of vacant land ... this will become most important if shortages of game arise not just in specific areas, but in the area generally. If that should occur then Indians should have priority for such game and other sustenance items over non-Indians after the requirements of reasonable conservation have been satisfied. This is not to say the plaintiffs will always have priority over other Crown authorized activities in the territory. Those kinds of conflicts may well arise from time to time, and they must be resolved honourably and reasonably. A reasonable decision is usually an honourable decision.

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18 Above n 8, 484.

19 Above n 8, 487-490.

> Sixthly, while I would not purport to define what legal proceedings may be brought to challenge Crown activities authorized by provincial legislation, I am satisfied it would not have been the expectation of the Supreme Court of Canada, if it had dealt with this case, that Crown authorized activities in such a vast and almost empty territory would often give rise to legal proceedings ... challenges regarding conflicts between Indian use and competing activities should be confined to issues which call the honour of the Crown into question with respect to the territory as a whole. Local operating decisions such as to log a block here, or build a road there, should surely not call for judicial intervention.
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> This is because it is not the law, or common sense, nor is it in the interest of the people of the province or of the plaintiff that the development, business and economy of the province and its citizens should constantly be burdened by litigation or be injunctioned into abeyance by endless or successive legal proceedings. Proper planning and appropriate consultation with, or disclosure to, the plaintiff or their advisors, and reasonable accommodations on all sides, should make the difficulties I have just mentioned unnecessary.

As far as British Columbia is concerned, these propositions comprised a firm directive to the provincial government to get involved in the process of resolution of First Nations claims, and not ignore them as a federal responsibility. There is also an indication of the unsatisfactory nature of the adversarial process of litigation in the Courts and a need for negotiation. The case has been taken to the British Columbia Court of Appeal, and heard during 1992. A judgment is not expected before 1993. The response of the provincial government is outlined in a later section.

III RESPONSES TO THE DELGAMUUKW JUDGMENT

There has been adverse comment on many aspects of the reasons for judgment, in particular the concept of extinguishment of aboriginal title by implication when British Columbia joined the Canadian Confederation in 1871.[20] There are New Zealand parallels in the Crown assumption of prerogative rights in harbours, estuaries, foreshores and coastal waters which generally denied Maori rights to traditional seafood resources. Can the New Zealand Crown really assume extinguishment of aboriginal interests by imposition of British common law rights in such place? What is the relevance of McEachern CJ's comments on the fiduciary obligations of the Crown? Do New Zealand Maori have a parallel right to unoccupied Crown lands, including foreshores and waters, for aboriginal sustenance? This is a different argument from the one based on guarantees in the Treaty of Waitangi, but in both the honour and fiduciary obligations of the Crown are at stake. As far as First Nations in British Columbia are concerned the reasons for judgment only confirmed established attitudes that Indians seldom win, that Indian cultures are not really understood by the dominant culture.

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20 Above n 12.

Many university academics - lawyers, historians, archaeologists, anthropologists and others - were involved with the Gitskan Wet'suwet'en case. McEachern CJ was relatively kind to the historians:[21]

> Generally speaking, I accept just about everything they put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections largely spoke for themselves.

A good deal of criticism was directed at social scientists, and some anthropologists in particular. One of the problems McEachern CJ identified was the difficulty of accepting oral tradition as admissible evidence in his Court. While accepting that the tribes had lived in the region for a long time, McEachern CJ states, "I am unable to accept adaawk, kungax [tribal tradition] and oral histories as reliable bases for detailed history but they could confirm findings based on other admissible evidence".[22] He also had difficulty with concepts of tribal law which he considered,[23]

> ... is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves. I heard many instances of prominent Chiefs conducting themselves other than in accordance with these rules, such as logging or trapping on another chief's territory although there always seemed to be an aboriginal exception which made almost any departure from aboriginal rules permissible. In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws.

In his comments on evidence, McEachern CJ noted,[24]

> I am satisfied that the lay witnesses (ie Gitskan and Wet'suwet'en people) honestly believed everything they said was true and accurate. It was obvious to me, however, that very often they were recounting matters of faith that had become fact to them. If I do not accept their evidence it will seldom be because I think they are untruthful, but rather because I have a different view of what is fact and what is belief.

McEachern CJ had much sterner comments to make about a number of academic witnesses and their interpretation of Indian cultures:[25]

> I am disposed with considerable hesitation, and with due allowances for weight, to recognize that culture, in a generic sense, may have a role in the formulation of opinions in these sciences. In a case such as this, however, when the plaintiffs and their ancestors are the only sources of these histories, the Court may not be the best forum for resolving such difficult and controversial academic questions. One cannot, however, disregard the "indianness" of these people whose culture seems to pervade

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21 Above n 8, 251.
22 Above n 8, 281.
23 Above n 8, 447.
24 Above n 8, 248.
25 Above n 8, 247.

> everything in which they are involved. I have no doubt they are a truly distinctive people with many unique qualities.
>
> For example they have an unwritten history which they believe is literally true both in its origins and in its details. I believe the plaintiffs have a romantic view of their history which leads them to believe their remote ancestors were always in specific parts of the [tribal] territory, in perfect harmony with natural forces, actually doing what the plaintiffs remember their immediate ancestors were doing in the early years of this country ... . I do not accept that the immediate and more remote ancestors of some of the plaintiffs were eking out an aboriginal life in all parts of the [tribal] territory for a long, long time. In fact, I am not able to find that ancestors of the plaintiffs were using all the territory for the length of time required for the creation of aboriginal rights ... .

The evidence of two anthropologists on behalf of the plaintiffs was severely attacked. "Their type of study is called participant observation but the evidence shows they dealt almost exclusively with chiefs which, in my view, is fatal to the credibility and reliability of their conclusions".[26] They failed to keep sufficient notes of observations, "were too closely associated with the plaintiffs after the commencement of litigation" and acted more as "an advocate than a witness". McEachern CJ noted too that, "Honestly held biases were not uncommon with many of the professional witnesses, which is not unusual in litigation", and went on to quote a section of the Statement of Ethics of the American Anthropological Association which one of the witnesses had produced:[27]

> Relations to those studied: In research, an anthropologist's paramount responsibility is to those he [sic] studies. When there is a conflict of interest, these individuals must come first. The anthropologist must do everything within his power to protect their physical, social and psychological welfare and to honour their dignity and privacy.

McEachern CJ concluded that "apart from urging almost total acceptance of all Gitskan and Wet'suwet'en cultural values, the anthropologists add little to the important questions that must be decided in this case".[28]

Understandably, academic anthropologists were outraged by these and other remarks in the reasons for judgment. The *Vancouver Sun* reported that the Gitskan Wet'suwet'en "ruling by the British Columbian Supreme Court has so angered and disgusted many of Canada's leading anthropologists that they are considering legal action".[29] Several academics were quoted:

> Robin Ridington, an anthropologist from the University of British Columbia, says the judge has "really gone too far", by loading the ruling with colonial ideas of the superiority of Western culture ... . Riding, who teaches and studies aboriginal cultures,

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26 Above n 8, 248.
27 Above n 8, 249.
28 Above n 8, 251.
29 *Vancouver Sun,* Vancouver, BC, Canada, 13 July 1991.

> sat as a spectator during some of the lengthy trial, which heard extensive evidence of the Indians' ancient and modern society from anthropologists and tribal elders.
>
> He says McEachern dismissed that evidence out of hand, while adopting his own federal and provincial government defence submissions that the Gitskan and Wet'suwet'en had a primitive, brutal society with few redeeming values.
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> "They (defence) just consciously laid on every bit of racist claptrap that they could think of, and he bought the whole package" ... .
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> Antonia Mills, a University of Virginia anthropologist who gave six days of expert testimony during the trial, calls McEachern's "judgment and his language reprehensible".
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> The dismissal of anthropological evidence in a land claims case is akin to dismissing psychiatric evidence in a criminal court, anthropologists say ... .
>
> Michael Asch says McEachern's ruling follows a line of European judicial logic that has at various times concluded that Christian societies had legal claims over infidels, that slaves were property, that women were not legal persons and that legal authority vests in the Canadian Crown.

In September 1991 a conference on the *Delgamuukw* judgment was held at the University of Victoria, British Columbia and the proceedings subsequently published.[30] In separate papers, Ridington and Asch elaborated their criticisms of underlying assumptions in the reasons for judgment. Ridington described Chief Justice McEachern as "the prisoner of his own culture's colonial ideology".[31] Asch also attacked the "ethnocentric" reasoning shown and questioned whether the "facts" so adduced could have real validity. One passage from the reasons for judgment can be singled out to illustrate the underlying notions of "primitive" cultures, and ideas about "civilisation" and "progress":[32]

> It would be accurate to assume that even pre-contact existence in the territory was not in the least idyllic. The plaintiff's ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not unknown, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs [sic], that aboriginal life in the territory was, at best, "nasty, brutish and short".

Similar assumptions are implied in the suggestion that a great deal of "acculturation" has occurred since European contact:[33]

> Most Gitskan and Wet'suwet'en people do not now live an aboriginal life. They have been gradually moving away from it since contact, and there is practically no one hunting and trapping full time, although fishing has remained an important part of their culture and economy.

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30 Cassidy, above n 12.
31 Cassidy, above n 12, 217.
32 Above n 8, 208.
33 Above n 8, 256.

Ridington and Asch were not arguing legal issues of hearsay evidence or oral tradition, or their admissibility in a court of law. Their analysis put the focus on the cultural assumptions of a judge belonging to the dominant culture trying to understand the complexities of tribal cultures. Several commentators saw the *Delgamuukw* judgment as continuing in a tradition which Asch commented "states views that have deep roots in colonial thought generally and in BC specifically".[34] Several presentations by members of the legal profession concentrated on issues of recognition of aboriginal title in Canadian cases and in other jurisdictions, including New Zealand, and definitions of aboriginal title, aboriginal rights, applicability of section 35 of the Constitution Act 1982 and Royal Proclamation 1763 in British Columbia, and strategies for litigation of land claims in courts of law.[35] There is certainly plenty of material to occupy academics, lawyers, consultants and bureaucrats in conferences and learned publications now and in the near future. Perhaps there will be another conference when the British Columbia Court of Appeal issues a decision on *Delgamuukw*.

Having spent nearly four years on this case, Chief Justice McEachern commented, "I do not expect my judgment to be the last word on this case. I expect it to be appealed ... .".[36] He expressed concern about excessive concentration on legal and constitutional questions which "will not solve underlying social and economic problems which have disadvantaged Indian peoples from earliest times". He noted that Indians had "many opportunities to join mainstream Canadian economic and social life" but not all had chosen to do so:[37]

> This increasingly cacophonous dialogue about legal rights and social wrongs has created a positional attitude with many exaggerated allegations and arguments, and a serious lack of reality ... . Optimism about what was going on, and I think as younger people, as those who are picking up the torch and trying to carry on and win this struggle, we too have to be optimistic. Ultimately, we must be optimistic.
>
> You have to go back to the mid-70s and early 80s to understand why we did what we did. Because the provincial Government refused to negotiate ... .

IV BRITISH COLUMBIA GOVERNMENT RESPONSE TO LAND CLAIMS

In the words of the First Nations Congress,[38]

> [i]t was probably just simple, expedient politics that caused the Government of British Columbia to announce in the summer of 1990 that the Province would abandon its long-standing policy of refusing to participate in the negotiation of Indian claims.

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34 Cassidy, above n 12, 217.
35 Cassidy, above n 12, 34.
36 Above n 8, 537.
37 Cassidy, above n 12, 303.
38 Above n 5.

On October 1990, two ministers in the British Columbia provincial government went to Greenville on the Nass River to attend ceremonies marking the beginning of negotiations on Nisga'a comprehensive claims. On 20 March 1991 the Nisga'a Framework Agreement was signed by representatives of federal and British Columbia governments and the Nisga'a Tribal Council. Negotiations on this claim are proceeding under the comprehensive claims policy of the federal government with participation by the British Columbia provincial government through the Ministry of Aboriginal Affairs.

In 1987 a Native Affairs Secretariat had been created, at the direction of British Columbia Premier Vander Zalm, within the Ministry of Intergovernmental Relations. A Cabinet Committee on Native Affairs was also established "as a focal point for bringing the concerns of Native people to the provincial government". In 1988 the Secretariat was restructured as the Ministry of Native Affairs with a mandate to "establish ongoing consultative mechanisms with Native people", provide coordination at interministerial and provincial/federal levels on Native concerns, negotiate "self-government arrangements with Native communities", develop new Native policies for the Provincial government, and to administer the First Citizens' Fund loan programme.[39]

In July 1989 the Premier's Council on Native Affairs was created, comprising Premier Vander Zalm, the Minister of Native Affairs and six members, three Indian and three non-Indian. The Council heard submissions from 11 tribal councils and 9 other Indian organisations. Submissions covered social, economic, health, education and environmental issues, but most of all land issues loomed large. In an interim report of the Council in July 1990, it was clear that the *Sparrow* decision[40] had influenced attitudes on aboriginal title. This decision of the British Columbia Court of Appeal ruled that an aboriginal right to food fishery continued to exist under section 35 of the Constitution Act 1982, but it did not apply to land. Indian confrontations over logging of British Columbian forests, mining and other environmental issues were also relevant:

> The Council urges Canada to rework its policies to reflect new legal and geographical realities and to develop a comprehensive framework for settling British Columbia's land issues ... .
>
> Currently management of the land and natural resources which, in part, might form the basis for a settlement of some claims, are vested in the provincial Crown, and thus its vital that the Government of British Columbia be an active participant at the negotiating table.
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> In addition, the Province should be at the table to ensure that the interests of all British Columbians are taken into consideration as part of the negotiations between Canada and the Indian bands.

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39 Ministry of Native Affairs *Annual Report 1988 - 1989* (Province of British Columbia, Victoria, 1989).

40 *Regina* v *Sparrow* (1990) 70 DLR (4th) 395 (SCC).

> We do not believe that the Government of British Columbia, by agreeing to such a recommendation, would in any way be relieving Canada of its legal and financial obligations to Native people of the Province.

There was no fundamental change in attitude that it was still a federal responsibility to negotiate land claims, and bear costs. There was now a willingness by the British Columbia government to participate in negotiation. In August 1990 the Cabinet accepted Council recommendations to change land claims policy by becoming directly involved in negotiation.

Meanwhile, the Ministry of Native Affairs negotiated agreements on several "cut-off land claims". During the late nineteenth century a number of "reserves" were allocated, usually in areas where there was an Indian settlement, or "fishing station". The earliest attempts by Indian groups to assert aboriginal title in the 1870s arose out of the provincial government moves to survey reserves and abolish Indian rights to pre-empt land. The present position is that under section 18 (1) of the Indian Act, "reserves are held for Her Majesty for the use and benefit of the respective bands for which they were set apart." In 1912-15 a Royal Commission, known as the "McKenna-McBride Commission", reviewed Indian reserves in British Columbia. The small areas allocated, the poor quality of many and lack of access had been a source of Indian grievances for many years. Although the final report in 1916 recommended some additional reserve areas, the Commission also recommended a total of 47058 acres (74 square miles), mostly good land suitable for agricultural purposes, be "cut-off" from existing reserves. While the result was a province-wide allocation of 150 acres per registered Indian family of 5 persons (compared with Treaty No 8 provisions of 640 acres) many communities lost valuable lands.[41] Negotiations on these "cut-off land claims" are still proceeding. "Specific claims" such as these have to do with matter related to treaties, or government administration of Indian reserves and are separate from the comprehensive claims submitted through tribal councils. A related function of the Ministry of Native Affairs is to develop natural resource policy and encourage "[n]ative resource development opportunities with the view of facilitating conflict resolution".[42]

One of the driving forces, the political expediency aspect perhaps, is the role of third party interest in First Nations land claims. In April 1991 the inaugural meeting of the "Third Party Advisory Committee" was held. This Committee comprises 32 representatives from timber, pulp and paper and fishing industries, mining and petroleum interests, recreational and environmental groups, and farming interests. Two working groups have been established, one on fisheries and the other on "interim measures", which refer to "a range of strategies designed to address the occupation, use and management of land and resources pending resolution of a land claim".[43] It is not clear how influential third party interests will be in negotiation of land claims. However, the very existence of such a committee suggests that there are significant

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41 Above n 1, 96 - 98.

42 Above n 39.

43 Ministry of Native Affairs *The Aboriginal Peoples of British Columbia: A Profile* (Province of British Columbia, Victoria, 1990).

resource management and development issues which need to be resolved. "Interim measures have the ability to develop creative, mutually beneficial arrangements. They might involve consultation before a major resource development takes place".[44] The Minister of Native Affairs, John Savage, was quoted in the same publication:

> We also recognize that if we are to resolve these issues in a way that is equitable and just for all British Columbians we are going to continue to need the advice and guidance of key stakeholders on an ongoing basis. I am confident that the third party advisory committee will help fulfil that vital function.

On 28 June 1991 the British Columbia Claims Task Force produced a report in response to a brief which required them to "define the scope of negotiations, the organization and process of negotiations including the time frames for negotiations; the need for and value of interim measures and public education".[45] The membership of the Task Force, set up in December 1990, comprised two nominees each from the governments of Canada and British Columbia, and three Indian nominees, two from the First Nations Congress and one from the Union of British Columbian Chiefs, with the responsibility to chair the group rotating among members. In their Introduction, the Task Force commented on the "new relationship" which must replace the troubled historical relationship between the Crown and First Nations, at the same time acknowledging the conflicting interests between First Nations and later comers who acquired various interests from the Crown:[46]

> In its place, a new relationship which recognises the unique place of aboriginal people and First Nations in Canada must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories and ways of life must be the hall mark of this new relationship ... .
>
> First Nations have been forceful in their demands for the peaceful resolution of the land question. The public and the courts have made it clear that the matters in contention are properly resolved politically.

Resolution is to be achieved by a process of "voluntary negotiations" which "will conclude with modern-day treaties. These treaties must be fair and honourable" and protected under section 35 of the Constitution Act 1982:[47]

> For a new relationship to be meaningful and lasting the spirit and interest of the treaties must be honoured not by their breach but by full and complete implementation ... .
>
> In the negotiation of treaties certainty is an objective shared by all. These treaties will be unique constitutional instruments. They will identify, define and implement a

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44 Above n 43.

45 J Mathias *et al The Report of the British Columbia Claims Task Force* (Vancouver, 1991).

46 Above n 45, 16.

47 Above n 45, 17 - 18.

> range of rights and obligations, including existing and future interests in land, sea and resources, structures and authorities of government, regulatory processes, amending processes, dispute resolution, financial compensation, fiscal relations and so on. It is important that the items for negotiation not be arbitrarily limited by any of the parties ... .
>
> Important to the relationship between the Crown and aboriginal peoples is the concept of fiduciary duty owed by the Crown. This duty is rooted in history and reflects the unique and special place of aboriginal peoples in Canada. The treaty-making process will define and clarify the terms of the new relationship between the Crown and aboriginal peoples but it cannot end the Crown's fiduciary duty.

Also proposed were provisions for interim agreements, acknowledging that negotiations take time, and the debilitating social and economic effects of delay in resolution, but these agreements would not prejudice a final treaty negotiation. It was also acknowledged that a well-informed public was a necessary part of the process. Education and information would be required toward public understanding of the new relationship.

In the matters to be negotiated, "First Nation government", or tribal self-government, was given high priority. This requires that institutional and jurisdictional matters be addressed in the context of constitutional issues in both federal and provincial government. Land, sea and resources also figured large and were seen as the source of most conflict with non-Indians:[48]

> Canada and British Columbia exercise authority over the First Nation traditional territories without their consent. For First Nations, hereditary title is the source of all their rights within their traditional territories. The land, sea and resources have supported their families, communities and governments for centuries, and form the basis of the aboriginal spiritual, philosophical and cultural views of the world. Stewardship of the land, sea and resources is for the First Nations a sacred trust, with immense responsibilities to be exercised with care and diligence, for the benefit of future generations ... . The land, sea and resources will also provide the foundation of new economic opportunities for First Nations.

Negotiation of treaties would need to include a financial component, the form depending on individual circumstances, such as cash payments, resource revenue sharing or credit, and the taxation treatment of such income or resource allocation. Negotiations would also include services currently provided by federal and provincial governments in the categories of resource management, economic development, social development and human resources, and justice services.

V A BRITISH COLUMBIA TREATY COMMISSION

One of the aims of treaty-making, as seen by the Task Force, is the achievement of certainty in the relationship between First Nations and government, both federal and

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48 Above n 45, 24 - 25.

provincial. Issues of ownership and jurisdiction over land and resources need to be expressed in some precise terms. However, certainty does not necessarily mean inflexibility and provisions for subsequent amendment to accommodate changes may also be incorporated. The legal and practical aspects of implementation are also matters for treaty negotiation, so that a workable document is produced, including a time frame for implementation, in stages if appropriate. Above all the Task Force considered that the process must be voluntary:

> To achieve lasting agreements as quickly as possible, the negotiation process must be "Made in British Columbia", fair, impartial, effective and understandable. To help meet these objectives the Task Force recommends the establishment of the British Columbia Treaty Commission. The commission would be a tripartite organization appointed by the First Nations and the federal and provincial governments ... .

The proposed commission would not be directly involved in negotiations. These would be carried out by skilled negotiators appointed by the parties involved. The commission would have a role in ensuring progress in negotiations, but how this would be done is not stated. The services to be provided by the commission were set out as follows:[49]

1. Coordinating the schedule for the start of negotiations;
2. Deciding the amount and distribution of funds required by First Nations to participate in the process;
3. Determining the readiness of each of the parties to begin negotiations based upon criteria they have agreed to;
4. Encouraging timely negotiations by assisting the parties to establish a schedule and monitoring their progress in meeting deadlines;
5. Identifying the need for and providing dispute resolution services as requested by the parties;
6. Submitting annually to the Parliament of Canada, the Legislative Assembly of British Columbia, and the First Nations, a report on the progress of negotiations and an evaluation of the process;
7. Developing an information base on negotiations to assist the parties;
8. Providing a public record of the status of each negotiation and documents which the parties agree to make public.

It is proposed that the commission comprise a full-time Chairperson and four members, one each from provincial and federal governments and two from First Nations. Funding would come from federal and provincial governments. "Secure long-term funding for the operation of the commission and the First Nations participation in the process will give all the parties confidence in the commission and the process". The hope was also expressed that it "should not add unnecessary bureaucracy".[50]

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49 Above n 45, 38.
50 Above n 45, 40.

In October 1991 the Social Credit government of British Columbia was defeated in the provincial election and the New Democratic Party elected. The NDP election policy included a "just and honourable settlement" of the "Indian Land Question". This was stated as "recognition of aboriginal title and aboriginal peoples' inherent right to self-government" and "provincial participation in negotiated treaties on the land question", while acknowledging that primary financial responsibility for this process rests with the federal government. The NDP policy also acknowledged that third-party interests had to be accommodated in treaty negotiations and proposed "consultations with municipalities and other third-parties to define the nature and extent of their interests and options." Further, the NDP policy statement included the belief "that a resolution of the Land Question based on recognition of aboriginal title and aboriginal peoples' inherent right of self-government does not threaten in any way the future economic prosperity of British Columbia's regions".[51]

By December 1991, the new provincial government of British Columbia affirmed a policy of recognising aboriginal title, without defining what this is or assigning any enforceable proprietary interest. It seems that this is a device to enable negotiations to proceed, but it can be assumed that the official federal and provincial view is that title is vested in the Crown and that any aboriginal "rights" are a burden on the Crown title. With a new Minister, a change of name from Ministry of Native Affairs to Ministry of Aboriginal Rights, and some new personnel at senior level in the Ministry, the provincial government also agreed to the establishment of the British Columbia Treaty Commission, under the terms of reference recommended in the 1991 report of the Task Force.

VI TREATY NEGOTIATION IN THE 1990'S

The British Columbia Claims Task Force proposed a six-stage process for negotiating treaties under the supervision of the BC Treaty Commission:

1. Submission of Statement of Intent to negotiate treaty.
2. Preparations for negotiations.
3. Negotiation of Framework Agreement.
4. Negotiation of Agreement in Principle.
5. Negotiation to finalize treaty.
6. Implementation of the treaty.

Other relevant recommendations included provisions for the treaty negotiation process to be open to all the First Nations, but organisation for negotiations to be a decision made by each. Likewise, First Nations must resolve issues of overlapping boundaries of claims among themselves. So far claims have been lodged by Tribal Councils under federal criteria set down for comprehensive claims, but other organised groups are not excluded from the process. Each Statement of Intent requires an

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51 The full text of the statement is reproduced as an appendix in F Cassidy (ed) *Reaching Just Settlements: Land Claims in British Columbia, Proceedings of a Conference held September 21 - 22, 1990* (Oolichan Books, Lantzville, BC, 1991).

indication of area claimed and a number of British Columbia claims overlap. The second stage of negotiation "must include discussions with neighbouring First Nations" and "a process for resolution should be in place before conclusion of a treaty." The commission would "provide advice in dispute resolution services" but it was suggested that in exceptional cases, the parties may agree to implement the provisions of a treaty in all but the disputed territory. However, it is not expected that the Treaty Commission would agree to begin negotiations until there is some resolution of disputed overlapping claims.

Negotiations on several claims at once could proceed, unlike the federal comprehensive claims procedures which had restricted negotiation at any time to one major claim per province:[52]

> Negotiating treaties with all First Nations in British Columbia must be considered a matter of urgency by all the parties. The resolution of these issues is too important to delay. The federal and provincial governments must be prepared to begin negotiations as soon as First Nations are ready. No limit should be placed upon the number of negotiations ongoing at one time.
>
> There is no question that conducting the number of negotiations that may be required at one time will call for substantial commitment of resources by all the parties.

It has been suggested that the Waitangi Tribunal might be an appropriate model for the BC Treaty Commission, but there are important structural and functional differences. The Waitangi Tribunal is an independent commission of inquiry, which investigates claims put before it and makes recommendations to government. It does not participate in subsequent negotiations between claimant and government, although its recommendations may become the framework for subsequent negotiations. Its 16 members are appointed for their skills and experience in relevant fields including legal, Maori, academic research such as history, geography and anthropology, and farming. The Chief Judge of the Maori Land Court chairs the Waitangi Tribunal and other judges of the Maori Land Court can also act as presiding officers of a Tribunal set up to hear claims. There is no equivalent institution to the Maori Land Court in British Columbia. Nor is there any equivalent of the long convoluted web of Maori land legislation. The Indian Act has operated since the 19th century within a federal government policy of administering to registered Indians who usually live on defined Indian reserves which remain Crown land. Non-status Indians and those of mixed inheritance, such as Metis, are outside this jurisdiction. However, it is intended that all First Nations are eligible to negotiate treaties, but it is implied that such negotiations will normally be arranged through Tribal Councils, which are institutions set up under the Indian Act.

The Treaty of Waitangi Act allows for any Maori group, or group of Maori, to make claims. However, with the recent tendency to group the hearing of related claims within tribal areas, and the Waitangi Tribunal recommendation to government on the "legal

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52 Above n 45, 53.

personality" of Ngai Tahu for negotiation purposes,[53] there may well be a convergence toward tribal identification in negotiation of claims in New Zealand. The important difference in structure is that the Waitangi Tribunal undertakes the inquiry into Maori grievances then makes recommendations which become the basis for negotiation between claimants and the Crown. The Tribunal is guided by its statutory requirement to investigate alleged breaches by the Crown and determine the principles of the Treaty of Waitangi which provide the philosophical underpinnig of the inquiry process. There is no equivalent of the Treaty of Waitangi in British Columbia.

The First Nations of British Columbia are entering a process of negotiating treaties in the 1990s. There are many overlapping claims which the parties are expected to sort out for themselves. The New Zealand experience would suggest that this is no simple matter where tribal mana is at stake. It is still not clear whether the proposed Treaty Commission will act as referee, mediator, conciliator, facilitator or final arbitrator in its dispute resolution services. Nor is it clear what powers of commissioning research or making inquiries will be given to it. The Waitangi Tribunal sets its own procedures of inquiry, which include use of Maori language, acceptance of oral tradition, and hearings on a marae, in a Maori setting. The first task of the Treaty Commission will be to address procedural issues. An indication of the scope of negotiations to be included in modern treaty-making is to be found in the statement of the Nisga'a Tribal Council, March 1992:[54]

> Whatever the form of a final treaty or agreement, Nisga'a negotiators insist on security for their people's future, the right to protect and practise cultural traditions and a guarantee of self-determination as well as the following:
>
> - Ownership of land and resources.
> - The unimpeded capacity for decision-making on land and resource issues; and the ability to manage and use the fishery resources of the Nass River and adjacent coastal waters as well as the animal and plant resources within the watershed.
> - Opportunities for long term economic development through tourism, mining, fishing, hunting, trapping and intensive sustainable forest use.
> - Planned growth of existing communities and the creation of new ones.
> - The implementation of an integrated management regime for the Nass River watershed.
> - Effective control over the social and environmental effects of future industrial projects.

Underlying all the negotiations is the legal and philosophical contradiction of title to lands, Crown prerogative or a form of aboriginal title. The Nisga'a Tribal Council defined aboriginal title as a:[55]

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53 Waitangi Tribunal *Ngai Tahu Claim Supplementary Report* (Department of Justice, Wellington, 1991).

54 A McKay *et al Nisga'a: People of the Mighty River* (Nisga'a Tribal Council, New Aiyansh, BC, 1992).

55 Above n 55.

> Term used to describe the source of traditional ownership rights to land by individual First Nations. In resolving the Land Question with First Nations, the federal government has sought to extinguish aboriginal title completely, and in return to grant back certain specified rights. This has been the most controversial element of land claims agreements signed to date, as most First Nations are extremely reluctant to extinguish aboriginal title.

In using the term "Land Question" rather than land claims, the Nisga'a stated: "The term is a misnomer as it suggests natives are claiming something which belongs to the governments." The Nisga'a see land claims as "the struggle of aboriginal people in Canada for recognition of their rights to their traditional land."[56]

With increasing emphasis on negotiations between Crown and claimants following Waitangi Tribunal recommendations, there will be considerable New Zealand interest in how the British Columbia Treaty Commission manages the negotiation process. Of particular interest will be the extent to which "third party interests" become involved. In many respects the proposed British Columbia Treaty Commission is more of a model for the Treaty of Waitangi Policy Unit in the Department of Justice which services the negotiations between Crown and claimants in New Zealand. These developments in British Columbia also need to be seen in the context of current debate on constitutional issues and increasing political pressure on other provincial governments and the federal government of Canada to reach some resolution of the "land question". Perhaps the last word should be left with the First Nations of British Columbia:[57]

> The pace of political developments continued to accelerate as Prime Minister Mulroney announced in Victoria in April [1991] that the federal government hoped to resolve Indian land claims throughout Canada by the year 2000. The Prime Minister also announced a Royal Commission on Indian social, economic and cultural issues. As peoples who have been the subject of numerous inquiries over the years, First Nations greeted the announcement with little enthusiasm.
>
> But the developments of the last year made one thing clear: after having been ignored for almost 150 years, the aspirations of the Indians of British Columbia were at last receiving the attentions of governments.

On 21 September 1992, at a gathering in Vancouver of over a thousand representatives of First Nations of British Columbia, the Prime Minster, Mr Mulroney, and the BC Premier, Mr Harcourt, signed the British Columbia Treaty Commission Agreement.

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56 Above n 55.
57 Above n 5.