

INTEROFFICE MEMORANDUM

Created: 11-Dec-1997 06:45am PST  
Sent: 11-Dec-1997 02:45pm PST  
From: Gillian Wallace  
gillian.wallace@ag.gov.bc.ca@GEMS  
Title.  
Dept:  
Tel No:

TO: nlane ( nlane@A1 )  
TO: jhoskins ( jhoskins@A1 )  
CC: Debbie.Mar@ag.gov.bc.ca ( Debbie.Mar@ag.gov.bc.ca@GEMS@VENU  
CC: Sandy.Shaw@ag.gov.bc.ca ( Sandy.Shaw@ag.gov.bc.ca@GEMS@VENU

Subject: Delgamuukw

Please let Maureen know that although Deputies Council has been cancelled on Monday, there are a group of deputies who are asking for a Delgamuukw briefing on Monday morning. I presume that we should provide this, if they want it, and will let you know whether it is going to happen.

*Yes absolutely - send my regrets  
for not attending*

## Key Points

-- on Delgamuukw decision by SCC

---

- The Province's legal staff are carefully reviewing this complex decision.
- I believe the decision reinforces the need for the treaty process for resolving these issues.
- We are hopeful that this matter will not go to trial - we hope that the parties will resolve the issues through the treaty negotiation process;
- We encourage all First Nations to use the treaty negotiation process rather than litigation;
- We accept that the Court placed an obligation on the Province to consult with First Nations;
- We will be consulting with third parties and First Nations about what the consultation obligation means;
- The Province is prepared to continue its work towards resolving these issues through negotiations with the Gitksan and Wet'suwet'en.

December 11, 1997

*Manson*

*- Key Points for Premier's  
Office*

*- AG's office has approved  
these points and they  
have been sent to Premier's  
Office*

*They*

INTEROFFICE MEMORANDUM

Created: 12-Dec-1997 04:48pm PST  
Sent: 12-Dec-1997 04:49pm PST  
From: Nancy Lane of AG  
NLANE  
Title. A/Executive Coordinator, Deputy'  
Dept: Ministry of Attorney General  
Tel No: 387-5211

TO: Jeannie Hoskins of AG

( JHOSKINS )

Subject: Delgamuukw

There is a meeting scheduled for December 16th with Jack Ebbels.

Ingrid from Jack's office just called and said Eloise and Doug want the discussion paper on Monday so she wanted to get Maureen and Jack together on Sunday or Monday. I suggested Jack call Maureen at home this weekend.

I advised Sandy Shaw of this and said Maureen may call Jill this weekend.

So who knows what will happen on Monday???

N-  
meeting still on for Tues. Jack and  
Maureen spoke at length on the  
weekend, but no paper prepared.

FILE 0011



# National Indian Brotherhood

## ASSEMBLY OF FIRST NATIONS

RECEIVED

WALJQI

DEC 18 1997

10120-00/N/DELG  
DEPUTY ATTORNEY GENERAL1 NICHOLAS ST., 10TH FLOOR  
OTTAWA, ONTARIO K1N 7B7  
TEL.: (613) 241-6789 FAX: (613) 241-5808Dec 17/97  
DR.

### FAX COVER SHEET

DATE: 17 Dec/97	TIME:
TO: Dave Kennedy	FROM: Jean LaRose
FAX: 250 387-1920	PROGRAM:
SUBJECT: Letters to <del>John Brown</del> - as requested	
MESSAGE: Chrétien	
Copy to: Jack Ebbels Gillian Wallace Robin Ciesni P.T.I. DR.	
WE ARE TRANSMITTING <u>43</u> PAGES, INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (613) 241-6789 AND ASK FOR MELISSA AT EXT. 243.	

#### HEAD OFFICE:

TERRITORY OF AKWESASNE, P.R. #3, CORNWALL ISLAND, ONTARIO K6H 5R7 TEL.: (613) 932-0410 FAX: (613) 932-0415

000/1003

EXECUTIVE OFFICE

12/17/97 17:50 FAX 613 241 5808



## National Indian Brotherhood

### ASSEMBLY OF FIRST NATIONS

1 NICHOLAS ST., 10TH FLOOR  
OTTAWA, ONTARIO K1N 7B7  
TEL.: (613) 241-6789 FAX: (613) 241-5808

December 12, 1997

The Right Honourable Jean Chrétien  
Prime Minister of Canada  
Langevin Block  
Ottawa, Ontario  
K1A 0A2

Dear Prime Minister:

The Supreme Court of Canada in its decision yesterday in the Delgamuukw case, provided all Canadians, First Nations citizens and others with new insights and directions towards the resolution of the moral, political and legal issues which could redefine Canada to benefit all its founding peoples.

In one of the most important decisions in Canadian legal history, the Court, amongst other things, found Aboriginal title and the inherent right of self-government to be constitutionally guaranteed.

Two fundamental propositions rest at the case of the decision: first, that First Nations are partners with other Canadian governments in the sharing of land, resources and governance of this country; and second, that it is no longer acceptable that the nature and extent of the institutions to implement the partnership be determined by litigation. In other words, the Court has instructed all of us to bargain in good faith together to define our economic, legal and political relationships.

As a result, I hereby request that you immediately call a First Ministers' Meeting, with our full and equal participation, for the purpose of putting into place a

...2

HEAD OFFICE:

TERRITORY OF AKWESASNE, P.R. #3, CORNWALL ISLAND, ONTARIO K6H 5R7 TEL.: (613) 932-0410 FAX: (613) 932-0415

000/2002

EXECUTIVE OFFICE

12/17/97 17:51 FAX 613 241 5808

-2-

comprehensive process within which to negotiate the sovereignty of the Crown with  
*the nationhood and inherent right of self-government of the First Nations.*

We are fully prepared to engage with you and the other First Ministers in a  
meaningful and constructive dialogue. We look forward to your early response and  
action.

Sincerely,



Phil Fontaine  
National Chief

c.c. Provincial Premiers

/0120-20/NTUS/

Delg.

ARVJ39

A R V A Y F I N L  
BARRISTERS

FEED FAX THIS END

<b>FAX</b>	
To:	<i>Jill</i>
Dept.:	
Fax No.:	
No. of Pages:	<i>1</i>
From:	<i>Nancy</i>
Date:	<i>Jan 15/98</i>
Company:	
Fax No.:	
Comments:	<i>Maureen asked that you deal with this</i>
Post-it 7903E <b>THANKS!!</b>	

Reply to: Joseph J. Arvay  
Our file: 840

18 December 1997

Maureen Maloney  
Deputy Minister  
Executive Committee  
11<sup>th</sup> Floor, 1001 Douglas Street  
Victoria, BC V8V 1X4

Dear Ms Maloney: *Maureen*

Re: Delgamuukw v. Her Majesty The Queen

Enclosed is a draft of a brochure that has been sent to me in anticipation that I would be a speaker at the Delgamuukw Conference being sponsored by the Pacific Business and Law Institute. Given all that has occurred recently, I am not particularly keen on appearing and I certainly will not appear if you consider that it may be problematic. They require a decision from me prior to the 22<sup>nd</sup> of December. I will ask them to take my name off of the agenda for now and will let them know when I get back after the New Year.

Sincerely,

ARVAY FINLAY

Per: *JJ*  
Joseph J. Arvay

JJA\*scs

840\letters\Maloney.Dec. 18-97

JOSEPH J. ARVAY, Q.C.\* JOHN L. FINLAY\* T. MURRAY RANKIN\* IRENE C. FAULKNER MARK G. UNDERHILL CHRISTOPHER JONES

4TH FLOOR - 888 FORT ST., VICTORIA, B.C., V8W 1H8  
(250) 388-6868 FAX (250) 388-4456

310 - 900 HOWE ST., VANCOUVER, B.C., V6Z 2M4  
(604) 689-4438 FAX (604) 684-6401

\*denotes a law corporation

Fax Cover Sheet  
**Pacific Business & Law Institute**

412-2150 West Broadway  
Vancouver, BC V6K 4L9  
Telephone (604) 730-6008, Fax (604) 730-5085

Date: 17-Dec-97

Pages: 3

To: Mr. Joseph Arvey, Q.C.

Fax No: 388-4456

Firm: Arvey, Finlay  
4th Floor 888 Fort St.  
Victoria BC V8W 1H8

Sender: Pauline M. Cusack

Re: Aboriginal Rights After *Delgamuukw* Conference  
February 12<sup>th</sup> & 13<sup>th</sup>, 1998  
Waterfront Center Hotel, Vancouver, B.C.

Dear Joe,

Further to our telephone conversation earlier today, I am writing to invite you to participate as faculty at our upcoming conference. Attached please find the draft conference outline for your review and input.

We are hoping to finalize the program this week and to submit the brochure to the printer on Monday, December 22<sup>nd</sup>.

We think that this will be a really great conference!

We will be delighted if you are involved.

Yours,

  
Pauline M. Cusack

**DRAFT**

Dec 17/97

**9:00 Welcome and Introduction to Day One - February 12th, 1998**  
**Putting the Decision into Context**

Marvin R. V. Storrow, Q.C.  
*Blake, Cassels & Graydon*

**The Supreme Court of Canada**  
**Redefines Aboriginal Title**

**9:15 The *Delgamuukw* Definition of**  
**Aboriginal Title**

Moderator: Marvin R. V. Storrow, Q.C.  
*Blake, Cassels & Graydon*

Stuart A. Rush, Q.C.      Joseph J. M. Arvay, Q.C.  
*Rush, Crane,*      *Arvay, Finlay*  
*Guenther & Adams*  
(Graham Garton)      Brian Slattery  
*Dept. of Justice, Ottawa*      *Osgood Hall Law School*

- The new definition of aboriginal title
- The test for aboriginal title
- Diminution of Provincial and Federal Powers?
- Admission of oral history at trial
- Extension of aboriginal title
- Extinguishing aboriginal title
- Application of Royal Proclamation of 1763
- The duty to negotiate in good faith
- Shared entitlement and dealing with overlapping titles
- Impact of *Delgamuukw* on other outstanding cases

**10:25 Coffee Break**

**10:45 The New Duty to Consult and**  
**Justification Analysis**

Moderator: Marvin R. V. Storrow, Q.C.  
*Blake, Cassels & Graydon*

Stuart A. Rush, Q.C.      Joseph J. M. Arvay, Q.C.  
*Rush, Crane,*      *Arvay, Finlay*  
*Guenther & Adams*  
(Graham Garton)      Brian Slattery  
*Dept. of Justice, Ottawa*      *Osgood Hall Law School*

- What is reasonable consultation after *Delgamuukw*
- What kind of decisions engage the duty to consult?
- Has the scope been enlarged?
- Are there new groups who must be involved in the consultation process?
- Are there new values at play?
- Re-opening past consultations
- New remedies under *Delgamuukw*?
- Justification analysis and compensation as it applies to aboriginal title
- What the Supreme Court of Canada has decided
- What has not been decided
- How will compensation be determined? Who will be entitled to compensation?

**12:00 Questions and Discussion**

**12:15 Luncheon Adjournment**

**Proving Aboriginal Title**

**2:00 The *Delgamuukw* Test for Proving**  
**Aboriginal Title**

Moderator: (The Honorable Chief Justice  
Bryan Williams)

*The Supreme Court of British Columbia*

(J. Keith Lowes)  
*Barrister & Solicitor*

Maria A. Morellato  
*Blake Cassels & Graydon*

Brian Slattery  
*Osgood Hall Law School*

- The legal test as formulated by the Supreme Court of Canada
- Occupation and use of land - What constitutes occupation?
- Occupation of land prior to British sovereignty - What is the date of British sovereignty?
- Present occupation of land as proof of aboriginal title - Establishing a link with the land today
- How must the land have been used? Is there a new qualitative test? What activities constitute use or occupation?
- Duration of use or occupation - What about periodic uses or occupations? Do seasonal activities such as fishing, hunting or food gathering apply?
- Is there a relationship between the quality of use and occupation, and the extent or power of the aboriginal title?
- The significance of oral history

**2:50 Questions and Discussion**

**3:05 Coffee Break**

**3:25 What Evidence is Required?**

Moderator: (The Honorable Chief Justice  
Bryan Williams)

*The Supreme Court of British Columbia*

(J. Keith Lowes)  
*Barrister & Solicitor*

Maria A. Morellato  
*Blake Cassels & Graydon*

Brian Slattery  
*Osgood Hall Law School*

- Types of evidence for proving aboriginal title
- Proving the date of British Sovereignty
- What constitutes oral history?
- The best way to present oral history
  - What kind of witnesses? The difficulties and hazards
- Anthropological and archaeological evidence

**4:10 Questions and Discussion**

**4:30 Conference Adjourns for Day One**

**DRAFT**

*Dec 17/97*

**9:00 Welcome and Introduction to Day  
Two - February 13, 1998**

Marvin R. V. Storrow, Q.C.  
Blake, Cassels & Graydon

**The Impact of *Delgamuukw* on the  
Treaty Process**

**9:10 The Government of British  
Columbia Position - (Address By The  
Honorable John Cashore)**

Minister of Aboriginal Affairs, British Columbia

**9:45 The Mandate to Negotiate Treaties**

Moderator: Alec C. Robertson, Q.C.  
B.C. Treaty Commission

(Robert Louie)  
First Nations Summit

(Dr. Frank Cassidy)  
University of Victoria

(Wendy Grant-John)  
Associate Regional Director General  
Dept. of Indian Affairs

- Does the *Delgamuukw* decision change the positions of the parties in the negotiation process?
- Will *Delgamuukw* accelerate treaty negotiations?
- What is the political will to negotiate after *Delgamuukw*?
- The mandate to negotiate in good faith
- How will land be protected during the treaty negotiations
- To litigate or not?

**10:40 Coffee Break**

**10:55 Roundtable - How Will the Recent  
*Delgamuukw* Decision Affect  
Ongoing Treaty Negotiations?**

Moderator: Alec C. Robertson, Q.C.  
B.C. Treaty Commission

(The Honorable John Cashore)  
Ministry of Aboriginal Affairs

(Dr. Frank Cassidy)  
University of Victoria

(Wendy Grant-John)  
Dept. of Indian Affairs

(Chief Robert Louie)  
First Nations Summit

- Will the significance of oral history evidence facilitate aboriginal groups?

**11:55 Questions and Discussion**

**12:10 Luncheon Adjournment**

**The Impact *Delgamuukw* on  
Resource Development**

**1:45 The New Consultation Mandate -  
Methods of Compliance**

Moderator: Marvin R. V. Storrow, Q.C.  
Blake Cassels & Graydon

John L. Howard, Q.C.  
Consultant

(Geoff Plant)

MLA - Richmond Steveston

(Herb George)

Paul Tennant

Wet'suwet'en Nation

University of British Columbia

- New consultation mandate
- When will consents be required?
- Who has the authority to give consent?
- Compensation to aboriginal peoples for infringement

**2:45 Coffee Break**

**3:05 Panel Discussion - Living With  
*Delgamuukw* Until the Final  
Settlement of Treaties**

Moderator: Marvin R. V. Storrow, Q.C.  
Blake Cassels & Graydon

John L. Howard, Q.C.  
Consultant

(Geoff Plant)

MLA - Richmond Steveston

(Herb George)

Paul Tennant

Wet'suwet'en Nation

University of British Columbia

- Finding a balance we can live with
- Who will regulate and approve resource development?

**4:00 Questions and Discussion**

**4:15 Conference Concludes**

✓

I N T E R O F F I C E   M E M O R A N D U M

Created: 26-Jan-1998 04:05pm PST  
Sent: 26-Jan-1998 04:05pm PST  
From: Sanford, Donna CPCS:EX  
Donna.Sanford@gems3.gov.bc.ca@GEM  
Title.  
Dept:  
Tel No:

TO: See Below

Subject: Delgam update

Hello everyone. Brenda Edwards and I met with Doug earlier today to review the document we prepared based on the work of the strategy team. Doug has asked for a considerable rewrite, which primarily involves changes to packaging and presentation of recommendations. We are now doing the "rewrite" which will go to Doug by end of day tomorrow, at which time Doug will decide whether it will be distributed to Cabinet. We will forward a copy of the revised paper to you tomorrow.

There had been discussion of a Deputies' Steering Committee meeting Wed Jan 28 at 10 AM. Brenda and I will be on call for Cabinet that day, so we will work with Jack to re-schedule that meeting.

Please call if you'd like to discuss.

Regards,  
Donna

Donna.Sanford@gems3.gov.bc.ca  
Senior Policy Advisor, CPCS  
Phone: (250) 356-6548  
Fax: (250) 387-6687

Distribution:

TO: Armstrong, Gerry R FIN:OV	( PR_U=GRAMSTR@PR_L=bcsc02@MRP@GAL
TO: McFarlane, Lawrie FIN:CC	( Lawrie McFarlane@fincc05.fin.gov.
TO: RCICERI	( RCICERI@A1 )
TO: MMALONEY	( MMALONEY@A1 )
TO: Allan, John FOR:EX	( John.Allan@gems1.gov.bc.ca@GEMS@V
TO: Doyle, Cassie ENV:MS	( CDOYLE@EXECUTIVE.env.gov.bc.ca@GE
TO: Ebbels, Jack AAF:EX	( jack.ebbels@gems2.gov.bc.ca@GEMS@
CC: BEDWARDS	( BEDWARDS@A1 )

**Deputy Ministers' Committee on Delgamuukw  
February 25, 1998 Action Items**

**CONFIDENTIAL**

✓  
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52410  
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10120-20 / Delgamuukw  
DEPUTY ATTORNEY GENERAL

**1) Cabinet Submissions**

Nisga'a submission edited by Patrick O'Rourke. Recommendations remain the same. Has been circulated to Maureen Maloney, Rob Lapper and Richard Simpson. Scheduled for review by Planning and Priorities Committee (PPC) on March 3rd. Jack Ebbels to attend PPC on March 3rd to ensure messages from this Committee are conveyed.

Delgamuukw Strategy submission is also tentatively scheduled for review by PPC on March 3rd. It will go forward as a multi-ministry submission signed by the Minister of Aboriginal Affairs on behalf of all. Jose Villa Arce to revise submission to incorporate a couple of lines stating this Committee will be responsible for coordinating implementation of the recommended strategies.

**2) Interim Consultation Principles**

An initial draft of interim principles to guide Delgamuukw operational issues was reviewed and discussed. Doug Caul will rework the principles to incorporate aboriginal rights and clarify direction being provided to field staff with regard to the basis and verification of title. Doug should also connect with Barbara Gray-Wiksten who is preparing on the ground directions.

**3) Interim Legal Responses**

Staff in the AG's ministry will be firming up these responses this afternoon.

**4) Draft Federal Strategy**

Robin Ciceri has developed a draft strategy and now needs to meet with Jack Ebbels. Jack and Robin to meet as soon as possible.

**5) Communication Plan**

Shelagh Stanley is preparing a communications plan for the Nisga'a submission. It should be ready by tomorrow afternoon.

Peter Smith and Trish Web are revising the Delgamuukw Strategy communications plan. It will be ready tomorrow as well. Jose Villa Arce to ensure initial bullet responses to each of the topics is incorporated into the plan together with a plan for how the Premier, Ministers and line ministry staff respond to the issue.

**DEPUTY MINISTERS COMMITTEE ON DELGAMUUKW  
MEETING SCHEDULE  
908 Pandora Avenue  
10:00 to 12:00**

March 4	2nd floor boardroom	← FPT meeting
March 11	4th floor boardroom	← Management Committee Retreat
March 18	2nd floor boardroom	
March 25	4th floor boardroom	
April 1	4th floor boardroom	
April 8	2nd floor boardroom	
April 15	4th floor boardroom	
April 22	2nd floor boardroom	
April 29	4th floor boardroom	

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50405  
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DEPUTY ATTORNEY GENERAL

Feb 27

M

Should Jiel go  
for you? yes please

N

Feb Mar 2

Talked to Del - Jiel not  
available March 4 +  
She's a MC March 11

I N T E R O F F I C E   M E M O R A N D U M

Created: 03-Mar-1998 02:33am PST  
Sent: 03-Mar-1998 10:33am PST  
From: Debbie Mar  
debbie.mar@ag.gov.bc.ca@GEMS@VENU  
Title.  
Dept:  
Tel No:

TO: nlane

( nlane@A1 )

Subject: Delgam Steering

confirming:

Eliz Argall will attend on the 4th  
and Rob Lapper will attend on the 11th

I N T E R O F F I C E   M E M O R A N D U M

Created: 03-Mar-1998 11:36am PST  
Sent: 03-Mar-1998 11:37am PST  
From: Huff, Judy AAF:EX  
judy.huff@gems5.gov.bc.ca@GEMS@VE  
Title.  
Dept:  
Tel No:

TO: NLANE

( NLANE@A1 )

Subject: Re: DMSC on Delgamuukw

Thanks for the note, Nancy, have let the appropriate people know.

Cheers!

> -----

> From: Lane, Nancy M AG:A1  
> Sent: March 3, 1998 11:32  
> To: Huff, Judy AAF:EX  
> Cc: Mar, Debbie AG:EU  
> Subject: DMSC on Delgamuukw

>  
> Just wanted to let you know Maureen will not be attending the  
> meetings  
> on March 4th and 11th. Elizabeth Argall will attend on the 4th  
> and Rob  
> Lapper will attend on the 11th. Thanks!!  
>  
>

**DEPUTY MINISTERS STEERING COMMITTEE  
ON DELGAMUUKW**

**2nd Floor Boardroom, 908 Pandora  
March 4, 1998  
10:00 to 12:00**

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53415  
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10120-20/nys/defer  
DEPUTY ATTORNEY GENERAL

**Revised Agenda**

- 1) Next Steps
- 2) Report on March 3rd meeting with Summit and Federal Government  
- Next Steps and Responsibilities
- 3) Update on memo to staff
- 4) Standing Items
  - Legal Update
    - Report on Ladner Downs meeting
    - Status of other work
    - next steps
  - Communications
    - second level task assignments
    - next steps
  - Cabinet Submissions
    - next steps
  - Interim Consultation Principles
    - next steps
- 5) Engaging Canada (e.g. Tulsequah, etc)
- 6) Hot Issues
  - Issues from early warning system
- 7) Establishing Title
  - unilateral, bilateral, tripartite
  - next steps

Man 2

Delb says Jill +  
Rob not available  
She'll let me know who  
will attend

s.15

Man 2 - cc Delb.

CONFIDENTIAL

**CONFIDENTIAL**

**DEPUTY MINISTERS STEERING COMMITTEE  
ON DELGAMUUKW**

**2nd Floor Boardroom, 908 Pandora  
March 4, 1998  
10:00 to 12:00**

RECEIVED  
62418  
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10120-201njus  
DEPUTY ATTORNEY GENERAL

- 1) **Next Steps**
- 2) **Report on March 3rd meeting with Summit and Federal Government**  
- Next Steps and Responsibilities
- 3) **Update on memo to staff**
- 4) **Standing Items**
  - **Legal Update**
    - Report on Ladner Downs meeting
    - Status of other work
    - next steps
  - **Communications**
    - second level task assignments
    - next steps
  - **Cabinet Submissions**
    - next steps
  - **Interim Consultation Principles**
    - next steps
- 5) **Hot Issues**
  - Issues from early warning system
- 6) **Establishing Title**
  - unilateral, bilateral, tripartite
  - next steps
- 7) **Water**

**Jose will circulate a copy of the revised plan to Committee members. Gloria Williams should discuss with CPCS the option of incorporating Select Standing Committee responses on treaty issues.**

**The memo for Deputy Ministers to send to staff has been circulated. Doug and Jose to check with Deputy Ministers to ensure the memo has been distributed.**

**6) March 3rd Meeting with First Nations Summit**

**A meeting is scheduled between the Summit, DIAND, Dept. of Justice, AG's and MAA staff on the morning of March 3rd to discuss legal issues arising from Delgamuukw. This will be followed by an afternoon meeting between the Summit, DIAND and MAA staff to exchange lists of issues arising from Delgamuukw. A list of the highest priorities is expected to result from this initial meeting. Ministers Lovick and Stewart will then meet with the Summit on March 13th. Initial messages will be required for the March 3rd meeting.**

**7) Musqueam Letter on Block 97**

**Lawrie McFarlane will advise Lorne Seitz to wait for another week before responding.**

**9) Te'Mex'w and Tsay Keh Dena Negotiations**

**Both of these First Nations are pursuing court action against the Province related to aboriginal title. Once Cabinet direction is received the Steering Committee should consider negotiation vs. litigation.**

**10) Water**

**Cassie Doyle will bring forward a note explaining this issue to the next meeting for discussion. Hydro should be involved in the discussion.**

Office of the  
Premier

## MEMORANDUM ✓

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52955

MAR 6 1998

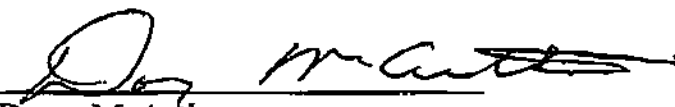
10120-20/NTUS/DETJ  
DEPUTY ATTORNEY GENERAL

DATE: MARCH 6, 1998

TO: Deputy Minister's Committee On Delgamuukw  
All Staff At Ministry Of Aboriginal Affairs  
All Staff At Ministry Of Women's EqualityFROM: DOUG McARTHUR  
Deputy Minister to the Premier

In order to bring to a conclusion the Nisga'a Agreement, I have asked Jack Ebbels to work full-time on the Nisga'a negotiations. Target date for completion of these negotiations is April 15th. In order to accommodate this priority of Cabinet, Val Mitchell has agreed to take on the additional responsibility for managing the day-to-day activities of the Ministry of Aboriginal Affairs as Acting Deputy Minister. I would ask that you all provide support and assistance to her for this period of time.

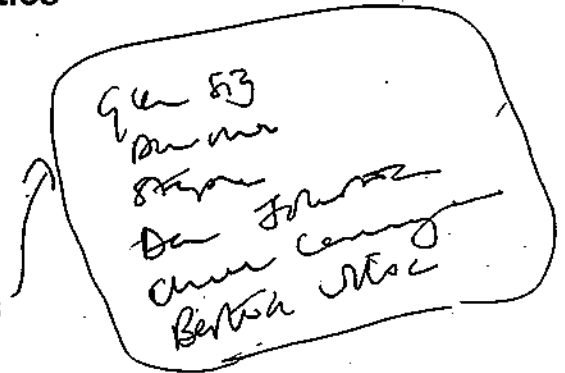
Maureen Maloney will be chairing the Deputy Minister's Committee on Delgamuukw and leading the government's response to Delgamuukw.

  
Doug McArthur

## AGENDA MARCH 13, 1998



1. Welcome
2. Opening Comments from each of the Parties
3. Report from the BCTC
4. Objectives of the facilitated process
5. Structure of the facilitated process
  - ✓5.1 Review suggestions for facilitators
  - ✓5.2 Date of first session
  - ✓5.3 List of issues to be discussed
  - 5.4 Membership of teams
  - 5.5 Time frame for this process
6. Process for including other stakeholders
7. Public Statements regarding the process
8. Date of next meeting with the Ministers
9. Other issues





## FACSIMILE TRANSMITTAL FORM

DATE: MARCH 13/98TO: MAUREEN MACINNEYOF: DEPUTYFROM: HEIDIURGENT: ✓✓CONFIDENTIAL:           NUMBER OF PAGES (INCLUDING COVER): 4 pgsMESSAGE (IF ANY):           

Ujjal can't make the  
attached! Could you suggest  
who should go (if anyone)  
in the AG's place?

ThsHeidi

M-?  
BF - next  
Legal Advisor  
March 20

Province of  
British Columbia

Attorney General

Parliament Buildings  
Victoria, British Columbia  
V8V 1X4

MARCH 26.

# Secwepemc Cultural Education Society

## Shuswap Declaration

TO WORK IN UNITY ON SHUSWAP LANGUAGE, HISTORY AND CULTURE

March 12, 1998

The Honorable Ujjal Dosanjh  
Attorney General  
Parliament Buildings  
Victoria, B.C.  
V8V 1X4

<b>RECEIVED</b>	
OFFICE OF THE ATTORNEY GENERAL	
#53420	
MAR 12 1998	
Heidi	
REFER TO MAIL REGISTRY <input type="checkbox"/>	
OTHER	
LITIGANT REPLY	REPLY DIRECT <input type="checkbox"/>
LITIGANT FILE	FILE IN INFORMATION <input type="checkbox"/>

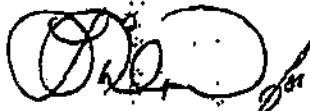
Dear Mr. Dosanjh:

The Secwepemc Cultural Education Society is planning to hold a one day conference on *The Delgamuukw Decision* in Kamloops on Thursday, March 26, 1998. We would very much like to have you as a speaker at this conference. If you are unavailable, however, could you please appoint someone from your office that is familiar with Delgamuukw. A draft brochure is enclosed providing additional information on the conference.

Please call Lori Pilon at (250) 828-9778 to confirm if you are available and interested. We would like to start promoting the conference as soon as possible, so if possible a call, today, would be great!

Sincerely,

**SECWEPEMC CULTURAL EDUCATION SOCIETY**



Chief Ron Ignace  
President

S C E S

03/12/1998 04:13 2503721127

# Delgamuukw

## REGISTRATION INFORMATION

The Delgamuukw Conference will be held on Thursday, March 26 from 8 am to 4 pm at the Chiel Louis Centre on the Kamloops Indian Reserve. Enrollment is limited, so we encourage you to register early. The cost is \$225 per person which includes workshop materials, luncheon and refreshments throughout the day.

### How to Register

You may register by telephone, 250-828-9778 between the hours of 8:30 am and 4:30 pm; by fax, 250-872-1127, or by mail to the following address:

Secwepemc Cultural Education Society,  
355 Yellowhead Highway  
Kamloops, B.C. V2H 1H1

### Registration Form

Name: \_\_\_\_\_  
Company/Organization: \_\_\_\_\_  
Mailing Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_  
I am paying by: ☐ Cheque ☐ Visa ☐ Mastercard  
Card #: \_\_\_\_\_ Expiry Date: \_\_\_\_\_  
Purchase Order Number: \_\_\_\_\_

Registration is not considered complete without payment. Please make cheques payable to: Secwepemc Cultural Education Society.

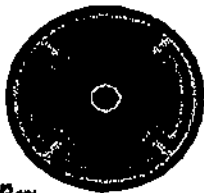
# Delgamuukw

## CONFERENCE SPEAKERS

Haib George, Salween, is the Hereditary Chief and Speaker for the Wet'suwet'en Nation, Moricetown, B.C. He has been a leading advocate of Aboriginal rights for many years. His involvement includes the Gitksan/Wet'suwet'en Delgamuukw case and treaty negotiations.

Louise Mandell, Q.C. is a partner in the law firm Mandell Pinder in Vancouver. She has worked exclusively in the area of Aboriginal law for more than 20 years and has been involved in many of the leading land claims cases in B.C. and Alberta including Sparrow, Guerin, Delgamuukw and Vanderpeet.

Thomas Berger, Q.C. is the former Chief Justice of the B.C. Supreme Court. From 1975 to 1977 he headed up the Berger Commission which investigated the Mackenzie Pipeline, involving Native land claims.



Chief Arthur Manuel is Chair of the Shuswap Nation Tribal Council and Chief of Neskonlith Band.

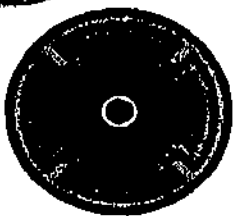
Chief Nathan Mathew is Chair of the provincial First Nations Education Steering Committee, former Chair of the Shuswap Nation Tribal Council and Chief of North Thompson Band.

Chief Ron Ignace is President of the Secwepemc Cultural Education Society, Chair of the First Peoples' Heritage Foundation, Chief of Skeetchestn Band and Chair of the year-to-be-convened National Aboriginal Language Committee.

Chief Manny Jules is Director of the national Indian Taxation Advisory Board, a founding member of the Shuswap Nation Tribal Council, the founding director of the Secwepemc Cultural Education Society and Chief of Kamloops Indian Band.

# Delgamuukw

An informative one-day conference on the impact and implications of the Delgamuukw decision by the Supreme Court of Canada



FOA - Business people, Consultants, Financiers, Educators, Professionals, Lawyers, Government representatives and staff from First Nations organizations

presented by the Secwepemc Cultural Education Society and the Shuswap Nation Tribal Council

03/12/1998 04:13

2503721127



On December 11, 1997, the Supreme Court of Canada brought down its far-reaching

decision in the *Grisson and Ute-Sweeten* land claim, known as the Delgamuukw case. The Court found that Aboriginal title had never been extinguished by the province, and defined Aboriginal title as a right to the land, which includes an economic interest. The judgement also states that Aboriginal rights and interests are recognized and confirmed in Canada's constitution. The decision requires both the federal and provincial Crown

to act honestly and in good faith, and to join First Nations in meaningful dialogue as equals.

The legal environment has changed and new opportunities and relationships can now be explored.

The Delgamuukw conference, presented by the Secwepemc Cultural Education Society and the Shuswap Nation Tribal Council, will help participants learn more about the ramifications of this decision and ways to manage the change created by this new legal landscape.

A panel of speakers, well-informed on the Delgamuukw decision, will discuss the various components of the judgement and invite your questions.



## WHO SHOULD ATTEND?



The Delgamuukw Conference is intended for:

- Businesses looking to work with First Nations communities
- Lawyers, accountants, consultants and advisors to First Nations
- Managers and administrative staff from banks, trust companies and financial institutions
- Teachers, managers and administrative staff from educational organizations
- Managers and administrative staff from federal, provincial and local governments
- Staff from bands and other First Nations organizations

THURSDAY, MARCH 26, 1998 at CHIEF LOUIS CENTRE on the HERNALOPS INDIAN RESERVE



# Delgamuukw

## Morning Session: 9 am to 12 noon THE DELGAMUUKW DECISION

### SPEAKERS:

Herb George (Seabear), Wet'suwet'en Hereditary Chief  
Louise Mandell, QC, Partner, Mandell Pinder, Vancouver  
Thomas Berger, QC, former Chief Justice, B.C. Supreme Court  
Representative, Ministry of Aboriginal Affairs (TBA)

### Topics:

- Summary of case and decision
- Aboriginal title defined
- Admission of oral histories
- Duty to consult, justify and compensate
- Duty to negotiate in good faith



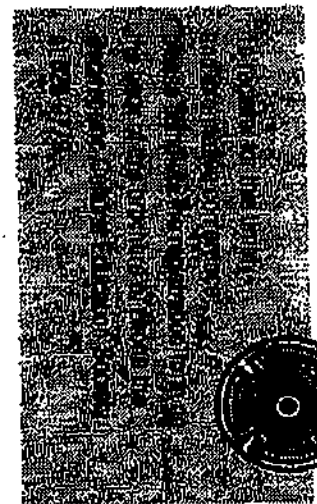
## Afternoon Session: 1 pm to 4 pm MANAGING CHANGE

### SPEAKERS:

Chief Arthur Manuel, Neskaneum Band, SNTC Chair  
Chief Heather Matthews, North Thompson Band  
Chief Ron Jones, Skeetchesh Band  
Chief Henry John, Kwantlen Band

### Topics:

- Background on the Secwepemc's treaty efforts
- Impact on treaty process/treaty negotiations
- Economics of doing business on First Nations lands
- Impact on resource management and extraction
- Management, consultation and compensation
- Interim measures



**DRAFT**

## News Release Communiqué

### **CANADA, BRITISH COLUMBIA AND FIRST NATIONS AGREE TO A JOINT REVIEW OF THE B.C. TREATY PROCESS**

**VANCOUVER, B.C. (March 13, 1998)** -- Federal Minister of Indian Affairs and Northern Development Jane Stewart, B.C. Minister of Aboriginal Affairs Dale Lovick and Grand Chief Edward John of the First Nations Summit Task Group met today and agreed to a joint review of the B.C. treaty process in light of the December 11, 1997 Supreme Court of Canada decision in *Delgamuukw*. Also in attendance at the meeting was Assembly of First Nations Vice-Chief Herb George representing all First Nations in B.C.

At a meeting today, the Ministers and First Nations leaders established a senior level committee to examine how the *Delgamuukw* decision affects the treaty process. The committee will be meeting over the next two months to explore ways to improve the treaty process to achieve the agreements necessary for economic and social stability in B.C.

"The *Delgamuukw* decision provides opportunities for dialogue and debate on the B.C. treaty process," said Minister Stewart. "I am pleased to be part of a process that will allow governments, First Nations, third parties and other groups with a stake in treaty negotiations to consider its implications in partnership."

"The B.C. government is committed to achieving land-use certainty and creating jobs," said Minister Lovick. "I am very pleased to be working in partnership with my federal and First Nations counterparts to help streamline and improve negotiations in light of the *Delgamuukw* decision."

Finding ways to expedite the resolution of land claims issues is the top priority for Canada, British Columbia and First Nations involved in the tripartite B.C. treaty process. The process they follow to do so will necessarily involve finding solutions that allow the economy of B.C. to flourish while negotiating effective and workable treaty settlements.

"First Nations share a common objective with other British Columbians that a strong and productive economy benefits everyone, and we are prepared to do what we can to ensure economic stability in B.C.," said Grand Chief Edward John, a member of the First Nations Summit Task Group.

.../2



FIRST NATIONS SUMMIT

Canada

Agreement was also reached on the critical importance of including affected third parties, business leaders and the Treaty Negotiation Advisory Committee, which was established to provide advice to governments on treaty negotiations. As such, they also gave their full support to cooperative initiatives to foster constructive dialogue about the *Delgamuukw* decision, such as the annual *Business at the Summit* conference.

Mr. Danny Watts, who is Co-Chair of both the First Nations Summit and *Business at the Summit*, said, "We need to expand the dialogue already occurring through increased participation at events like *Business at the Summit*."

This yearly forum, sponsored by the First Nations Summit and a number of B.C. corporations, provides the opportunity for First Nations and business leaders to come together and discuss issues of mutual interest. This year's conference, scheduled for May 7, 1998, will focus on building partnerships in a post-*Delgamuukw* environment.

"The time has come to cut through red tape and deal with treaty matters in a more business-like way," said Brian Smith, Chair of B.C. Hydro and Co-Chair of Business at the Summit. "Business and First Nations share a common desire to create a stronger B.C. economy, new partnerships and new opportunities for investment and jobs."

The Supreme Court of Canada decision in *Delgamuukw* sends a strong message to all Canadians to strengthen the relationship with Aboriginal people. As Chief Justice Antonio Lamer wrote, "Let us face it, we are all here to stay." The Court's decision also reaffirms that negotiation is the best way to reconcile the interest of Aboriginal and non-Aboriginal Canadians to achieve certainty over the use and ownership of lands and resources.

This news release and accompanying backgrounder are available on the Internet at either of the following addresses:

Canada: <http://www.inac.gc.ca>  
B.C.: <http://www.aaf.gov.bc.ca/aaf/>

For more information:

Lucie Zaharoff  
Federal Treaty Negotiation Office  
Tel: (604) 775-8016  
Fax: (604) 775-7149  
Toll free: (800) 665-9320

Jim Durham  
Ministry of Aboriginal Affairs  
Tel: (250) 356-8283  
Fax: (250) 356-2213  
Toll free: (800) 880-1022

Colin Braker  
First Nations Summit  
Tel: (604) 990-9939  
Fax: (604) 990-9949

## INTEROFFICE MEMORANDUM

Created: 18-Mar-1998 12:41pm PST  
 Sent: 18-Mar-1998 12:42pm PST  
 From: Durham, Jim AAF:EX  
 Jim.Durham@gems7.gov.bc.ca@GEMS@V  
 Title.  
 Dept:  
 Tel No:

TO: See Below

Subject: delgamuukw speaking points

As discussed at the Delgamuukw Deputy Steering Committee this am, Peter Smith is going to prepare speaking notes for use by Minister Lovick next week during meetings with COFI on March 24 and at the UNBC Delgamuukw conference in Pr. George on Mar 27/28. The TNAC meet on March 27 is apparently cancelled/postponed.

Peter will provide draft speak notes to Philip Steenkamp, Jose Villa Arce, Doug Caul and Brenda Edwards by end of day Thursday, March 19 with a request to provide comments back by noon on Friday, Mar. 20. Peter will then incorporate any revisions, provide copies back to this same group and send copies to Val Mitchell and Maureen Maloney for final approval.

We would like to get final approval of these from the two deputies by noon on Monday March 23 so Peter can incorporate any final changes and get a copy to Minister Lovick thru his MA Thelma Oliver by mid afternoon on Monday. This would allow him time to review the speaking points in preparation for the COFI meeting on Tuesday March 24.

Doug Caul will use the speaking points to provide same for Minister Zirnheilt who is also participating in the UNBC conference.

I am away in Vancouver Mar 19/20 Thursday pm and Friday all day (but reachable on cell at 213-8691 for emergencies) so please contact Peter Smith directly if you require further information (tel. 356-8750).

Thanks,

jd

Jim Durham

Director

Communications Branch

Ministry of Aboriginal Affairs

Tel. 356-8283

Fax. 356-2213

Distribution:

TO: BEDWARDS	( BEDWARDS@A1 )
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TO: Villaarce, Jose AAF:EX	( Jose.Villaarce@gems9.gov.bc.ca@GE
TO: JVILLARCE	( JVILLARCE@A1 )
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CC: Fee, Ingrid AAF:EX	( Ingrid.Fee@gems7.gov.bc.ca@GEMS@V
CC: Fraser, Ernie D FOR:EX	( Ernie.Fraser@gems8.gov.bc.ca@GEMS
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CC: McPhee, Linda AAF:EX  
CC: McLeod, Nancy AAF:EX

( Linda.McPhee@gems4.gov.bc.ca@GEMS  
( nancy.mcleod@gems4.gov.bc.ca@GEMS

INTEROFFICE MEMORANDUM

Created: 20-Mar-1998 05:00pm PST  
Sent: 20-Mar-1998 05:02pm PST  
From: Nancy Lane of AG  
NLANE  
Title: A/Executive Coordinator, Deputy  
Dept: Ministry of Attorney General  
Tel No: 387-5211

TO: Heidi Reid of AG

( s.15 )

Subject: Invitation to AG from Secwepemc Cultural Education Society

CLIFF #53420

There was a meeting today on Delgamuukw at which this invitation was discussed. They decided no one should attend this conference.

Thanks!!

Mar 20 - gave to Jill .

Deb said she asked

Jill + no one needs to go .

**Ministry of Aboriginal Affairs**

PO Box 9100 STN PROV GOVT

Victoria, B.C. V8W 9B1

Location:

908 Pandora Avenue, Victoria, B.C.

**FACSIMILE**

Date:

3/24/98Number of Pages Being Transmitted:  
(Including this cover page)5

To:

Maurice Maloney

Fax No:

387-6224

Telephone No:

From:

**Suzanne Burrows****Co-ordinator of Consultation Meetings****Policy & Implementation Branch****Negotiations Support Division****Telephone : (250) 356-0222****Fax No.: (250) 356-2213**

Comments:

Re - Meeting - March 26<sup>th</sup> /98

NR

March 26, 1997  
Committee of the Whole Meeting  
B.C.I.T  
Boardroom 282, 555 Seymour Street  
Vancouver

2:00 p.m. - 5:00 p.m. - Federal/Provincial Legal Counsel  
Presentations: *Delgamuukw*



Ministry of  
Aboriginal Affairs

Office of the

## MEMORANDUM

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54322

MAR 24 1998

10100-20/NSJUS/DEEG

DEPUTY ATTORNEY GENERAL

March 24, 1998

File No. 60100-20/TNAC 08

To: Maureen Maloney  
Deputy Minister  
Attorney General

Re: Committee of the Whole Meeting - March 26, 1998  
*Delgamuukw*

The presenters for the *Delgamuukw* presentation are Rob Lapper, Attorney General and Fred Morris from the Federal Department of Justice. In addition to TNAC members, there will be a limited number of provincial and federal representatives at this meeting.

I am enclosing a list of the TNAC members/alternates and their organizations as you requested.

If you have any further questions, please do not hesitate to contact Jean Dragushan at 387-7616 or myself at 356-0222.

  
Suzanne Burrows

Co-ordinator of Consultation Meetings

March 25 - advised Judy 7-6838  
H not able to attend.  
Shell let S/J know.

**TREATY NEGOTIATION ADVISORY COMMITTEE  
MEMBERSHIP LIST**

**B.C. Cattlemen's Association**

Mary MacGregor, Barrister

Alternate: Guy Rose/Lorne Greenaway

**B.C. Chamber of Commerce**

Gerry L. Martin, Co-owner of Northern Drugs

Alternate: John R. Winter

**B.C. Environmental Network**

Steve Rison

Alternate: Brad Benson

**B.C. Agriculture Council**

Cor van der Meulen, President of Bulkley Valley Dairymen Association

**B.C. Federation of Labour**

Kenneth Georgetti, President

Alternate: Hilarie McMurray

**B.C. Fishing Resorts & Outfitters**

Dick McMaster, Executive Director

Alternate: Mary Mahon Jones, Council of Tourism

**BCGEU**

John Shields, President

Alternate: Cliff Andstein

**B.C. Real Estate Association**

Rob Fraser, Past President of Victoria and B.C. Real Estate Association

Alternate: Robin Hill

**B.C. Shellfish Growers Association**

Deb Logan, Vice-President

Alternate: Barbara Sharpe

**B.C. Trappers Association**

David Hatler

Alternate: Rob Seaton

**B.C. Utilities Advisory Council**

Freydis Welland, Government &amp; Relations Director

**B.C. Wildlife Federation**

Doug Walker

Alternate: Don Robinson/Wayne Harling

-2-

**B.C. & Yukon Chamber of Mines**

William J. Wolfe, President

Alternate: Jack Patterson

**Business Council of British Columbia**

Jock A. Finlayson, Vice-President

Alternate: Jerry Lampert/Graham Dallas

**Canadian Association of Petroleum Producers**

Chris Peirce, Vice President of Strategic Planning

Alternate: David Luff

**Canadian Parks and Wilderness Society**

Alternate: Sabine Jessen

**Cariboo Lumber Manufacturers Association**

Duncan Barnett

Alternate: Don Couch/Lloyd Whyte

**Central Interior Logging Association**

Roy Nagel

**Commercial Fishing Industry Council**

Ron Fowler, Co-chairman

**Communications, Energy and Paperworkers Union**

Brian Payne, Vice-President, Western Region

Alternate: Fred Wilson

**Co-operative Fishermen's Guild of Prince Rupert**

Paddy Greene, Appointee of the Pacific Regional Council, DFO

Alternate: Rick Haugan

**Council of Forest Industries**

Marlie Beets, Vice-President

Alternate: Susan Yurkovich

**Fisheries Council of British Columbia**

Mike Hunter, President

Alternate: Michelle James

**IWA - Canada**

Dave Haggard, President

Alternate: Clay Perry

**Mining Association of British Columbia**

Ken Sumanik, Director of Environment and Land Use

Alternate: Dr. W. Wolfe

**Outdoor Recreation Council of British Columbia**

Norma Wilson

Alternate: Ruth Madsen

-3-

**Sports Fishing Institute of British Columbia**

Tim Cyr

Alternate: Robert H. Wright

**Steelhead Society of British Columbia**

Kevin Church

Alternate: Dan Burns

**The Guide Outfitters Association of British Columbia**

Harry McCowan, McCowan's Sporting Adventure

Alternate: Dale Drown

**The Truck Loggers Association**

Graham Lea

Alternate: Rick Jeffery

**Union of British Columbia Municipalities**

Gillian Trumper, Mayor of City of Port Alberni

Alternate: Richard Taylor

**United Fishermen and Allied Workers' Union**

John Radosevic, President

Alternate: Jack Nichol

**United Steelworkers of America**

Ken Neumann, Director for District 3 (Western Provinces &amp; Territories)

Alternates: Jack Hill/Bob Fortin

UPDATED: January 15, 1998

s.15

60100-20/TNAC - 06



Ministry of  
Aboriginal Affairs

Office of the

## MEMORANDUM

To: Maureen Maloney  
Deputy Minister  
Ministry of Attorney General

March 25, 1998  
File No. 60100-20/TNAC 01

Re: Treaty Negotiation Advisory Committee

Please find attached copies of federal and provincial legal presentations on *Delgamuukw* made at a March 3, 1998 meeting with the First Nations Summit. As TNAC's request to send observers to that meeting request was denied, we have scheduled the March 26 *Delgamuukw* session to give members the opportunity to hear those legal presentations.

There will be about an hour's discussion of "Next Steps" following the presentations. It is expected that TNAC members will want to address a number of issues during that time. Specifically, they will want to hear how the federal and provincial governments plan to engage in discussions with the First Nations Summit, and whether there might be a role for them in that process. Some TNAC members are aware that meetings involving the B.C. Treaty Commission, First Nations Summit, and federal and provincial government officials are planned for April 7-9.

TNAC has been told that governments will engage in a review of policy issues arising out of the *Delgamuukw* decision. Members expect to participate in this review process; at their December 12, 1997 meeting, immediately following release of the decision, Minister John Cashore told TNAC that the Province would consult with them on policy changes. On February 2, governments presented a list of priority areas for policy work to the Committee. However, as no substantive discussion of those priority areas has taken place, questions may be raised about how and when a policy review process will begin.

I have spoken to Jose Villa Arce about TNAC's interests and expectations with respect to their role in the policy review process, and their wish to participate in broader stakeholder discussions with the First Nations Summit. He will raise these issues with Philip Steenkamp.

I look forward to seeing you at the March 26 afternoon meeting and would be pleased to answer any questions you might have concerning TNAC in advance of that meeting.

cc: Jose Villa Arce  
A/Director, Policy & Implementation

Philip Steenkamp  
Treaty Negotiator, North Interior Regional Team

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54356  
MAR 25 1998  
10120 - 20 / JWS / DELG  
DEPUTY ATTORNEY GENERAL

## Issues arising from the Supreme Court of Canada Decision in *Delgamuukw*

### PROOF OF TITLE:

#### Issues:

- *What is the geographic extent of aboriginal title?*
- *What claimant groups can establish aboriginal title?*
- *What is the significance of the maintenance of substantial connection to the land? If the substantial connection has been interrupted or terminated by intervening activities, what effect does the interruption or termination have on the claim for title, or the remedies available?*

### INFRINGEMENT:

#### Issues:

- *-What is nature of consultation which must be undertaken with aboriginal people in specific cases?*
- *-What processes might be designed to address these issues?*
- *-How and where should disputes about infringements/ and appropriate remedies (consultation and compensation) be resolved?*
- *- What, if any, remedies are available for past infringements?*
- *- How should compensation be calculated?*

### OVERLAPS

#### Issues:

- *-Does the Court's suggestion that all claimant groups who have a stake in the area must be at the table mean that in cases where aboriginal title issues are raised, all other First Nations who may have interests in the area must be named as parties?*

- *-Can treaties be concluded with one First Nation, where there are outstanding aboriginal title claims of other First Nations in the same area?*
- *- Are contemporary First Nations organizations which have been structured under the Indian Act, necessarily the appropriate entities to deal with title claims, or do all representatives of historic communities have to be involved?*

## **SURRENDER:**

### **Issues:**

- *-Under what circumstances does a potential infringement of aboriginal title, amount to a circumstance which requires a surrender?*
- *-If aboriginal title lands are to be freed of the "inherent limitations" on their use, so that aboriginal people might use them without restriction, will a surrender ordinarily be required? Are there any other mechanisms which can achieve this?*

## **FEDERAL ROLE:**

### **Issues:**

- *Given that Canada has the primary legislative jurisdiction in relation to aboriginal title lands, what involvement of Canada is required in infringement processes and remedies?*
- *Specifically, is Canada now required to be part of "consultation" processes relating to infringements of aboriginal rights?*
- *Does Canada have some obligation to provide some or all of the compensation when aboriginal rights are infringed?.*

# **DELGAMUUKW**

## **A PRELIMINARY ANALYSIS**

### **OF THE**

### **SUPREME COURT OF CANADA'S DECISION**

### **FOR A DISCUSSION WITH LEGAL COUNSEL FOR**

### **BRITISH COLUMBIA AND FIRST NATIONS**

**DEPARTMENT OF JUSTICE CANADA**

**MARCH 3, 1998**

## **DELGAMUUKW - ABORIGINAL TITLE**

### **1. What the Supreme Court of Canada said:**

- This decision constitutes the Supreme Court's first comprehensive consideration of the legal principles applicable to Aboriginal title.
- The content of Aboriginal title can be summarized by two basic propositions:
  - Aboriginal title is a right to exclusive use and occupation of land which can be used for a variety of activities which are not necessarily practices, customs or traditions integral to the Aboriginal group. (Para. 111)
  - Because Aboriginal title is a *sui generis* interest in land, there are certain inherent limits to the use to which it may be put by the Aboriginal group. In particular, the use must not be irreconcilable with the nature of the group's attachment to the land in question. (Para. 111)

March 3, 1998  
Justice Canada/Preliminary Legal Analysis for  
Discussion with British Columbia and First Nation Summit

- The Court also notes that Aboriginal title:
  - must be understood by reference to both the Aboriginal perspective and the common law; (Para 112)
  - is *sui generis* and can only be transferred, sold or surrendered to the federal Crown; (Para. 113)
  - derives from the historical occupation and possession of Aboriginal lands prior to the assertion of British sovereignty; (Para. 114) and
  - is held communally. (Para 115)

March 3, 1998  
Justice Canada/Preliminary Legal Analysis for  
Discussion with British Columbia and First Nation Summit

## ***2. Preliminary Legal Analysis:***

- Case did not find any Aboriginal title in Gitxsan and Wet'suwet'en or any other First Nation.
- Court described content and set out test for proof of Aboriginal title.
- Burden of proof on First Nation claiming title.
- Case sent back for re-trial in B.C. Supreme Court.
- The test for exclusive use and occupation is at time sovereignty was established by the Crown.
- Community / group holding title may be different from groups in B.C.T.C. process.
- There is a spectrum of Aboriginal rights and the test may be higher for Aboriginal title (*Adams/ Côté*).

March 3, 1998  
Justice Canada/Preliminary Legal Analysis for  
Discussion with British Columbia and First Nation Summit

## **DELGAMUUKW - PROVINCIAL EXTINGUISHMENT**

### **1. What the Supreme Court of Canada said:**

- Since 1871, the exclusive power to legislate in relation to "Indians, and lands reserved for the Indians" has been vested with the federal government by virtue of s.91(24) of the *Constitution Act, 1867*. That head of jurisdiction encompasses within it the exclusive power to extinguish Aboriginal rights, including Aboriginal title. (Para. 173)
- Provincial laws of general application could never extinguish Aboriginal rights because the intention to do so would be outside provincial jurisdiction since laws evidencing a sufficiently clear and plain intention to extinguish Aboriginal rights would be laws in relation to Indians and Indian lands. (Para. 180)
- Provincial laws incorporated by reference through s. 88 of the *Indian Act* are not able to extinguish

March 3, 1998  
Justice Canada/Preliminary Legal Analysis for  
Discussion with British Columbia and First Nation Summit

Aboriginal rights including Aboriginal title because s. 88 does not evince a clear and plain intent to extinguish. (Paras. 182 and 183)

## ***2. Preliminary Legal Analysis:***

- Canada was able to extinguish pre -1982 where clear and plain intention is evident.
- Canada is still able to justifiably infringe Aboriginal title.
- Notwithstanding the lack of ability to extinguish, provinces can justifiably infringe Aboriginal title.
- Case does not speak to the validity of pre 1982 provincial grants. However, there are statements at B.C.C.A. level (Macfarlane) which support the validity of such grants. The question of compensation pre-1982 is not addressed by the Court.
- Leaves open the question of imperial and colonial extinguishment.

March 3, 1998  
Justice Canada/Preliminary Legal Analysis for  
Discussion with British Columbia and First Nation Summit

## **DELGAMUUKW - JUSTIFICATION FOR INFRINGEMENT**

### **1. *What the Supreme Court of Canada said:***

- Aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. They may be infringed both by the federal and provincial governments. (Para. 160)
- Principles of justification developed in *Sparrow* and *Gladstone* confirmed. (Paras. 161-164)
- Justification still depends on the legal and factual content of the cases.
- The test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. (Para. 162)
- With respect to valid legislative objective, Court broadened range of objectives beyond conservation and public safety to include, in appropriate cases, agricultural development, mining, forestry, hydro-electric projects, general economic development and settlement of foreign

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population. (Para. 165)

- With respect to the Crown fulfilling its fiduciary responsibility in justifying an infringement:
  - Exclusivity of Aboriginal title means government should give appropriate (not necessarily top) priority to Aboriginal title. (Para. 167)
  - Involving Aboriginal people in decisions taken with regard to their lands. Consultation is always required and in most cases something "significantly deeper than mere consultation" is needed. Some cases even require consent. (Para. 168)
  - Economic aspects of Aboriginal title indicate that fair compensation will ordinarily be required when Aboriginal title is infringed. (Para. 169)

## ***2. Preliminary Legal Analysis:***

- The decision does not impose a legal duty on Canada to prevent infringement of Aboriginal title by others.
- The case does not impose a legal duty on Canada to promote Aboriginal title.
- The fiduciary obligation to justify infringement includes the duty to consult; the duty to consult ranges from “mere consultation” to full consent with the majority of situations requiring “something significantly deeper than mere consultation” but less than consent.

## **DELGAMUUKW - CONSULTATION**

### ***1. What the Supreme Court of Canada said:***

- The Court held that there is always a duty of consultation as part of the justification of infringement of Aboriginal title and that this duty of consultation will vary with the circumstances of each case. (Para. 168)
- The consultation must be in good faith, and "with the intention of substantially addressing the concerns of Aboriginal peoples whose lands are at issue". (Para. 168)
- The Court goes on to say that "in most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal Nation". (Para. 168)

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## ***2. Preliminary Legal Analysis:***

- Whether there is a duty to consult with a particular First Nation over a particular matter, and the extent of that duty, must be evaluated on a case by case basis. There is no "one size fits all" answer.
- Even where there is a duty to consult, (i.e., where Aboriginal rights or title can be proven to exist), the duty to consult does not necessarily equal a duty to obtain consent.
- The case does not require the inclusion of consultation as a term in treaties but does not preclude this.

## **DELGAMUUKW - COMPENSATION**

### ***1. What the Supreme Court of Canada said:***

- Fair compensation will ordinarily be required where Aboriginal title is infringed. This, the judgment states, is consistent with the economic aspect of Aboriginal title and the honor and good faith of the Crown. (Para. 169)
- Issues of how to calculate damages for infringement is a difficult one and had not been argued before the Court. The matter was sent back to trial, without detailed directions for the new trial judge. (Para. 169)
- Decision does not comment on the size of the financial component of a treaty, as distinguished from claims for compensation for infringement of Aboriginal title.

## ***2. Preliminary Legal Analysis:***

- Under Canada's current policy, the negotiation of the financial component of treaties is done with reference to the overall interests of the parties, rather than the perspective of one or other of the parties or what might (or might not) be proven in court. A rights based analysis would change the process significantly.
- Some First Nations may not be able to prove Aboriginal rights or title in court, and therefore will not obtain compensation for infringement. They may not be the correct collectivity, or there may be defenses (i.e. extinguishment) to their claim.

## **DELGAMUUKW - INTERIM MEASURES**

### **1. *What the Supreme Court of Canada said:***

- The Supreme Court of Canada did not specifically comment on interim measures in the *Delgamuukw* decision.

### **2. *Preliminary Legal Analysis:***

- Canada's existing policies respecting interim measures and the disposition of federal Crown lands may be consistent with the *Delgamuukw* decision for several reasons:

1. The Court, in *Delgamuukw*, did not call into question the ability of the federal Crown to extinguish Aboriginal rights and title prior to 1982. Thus, the federal Crown's acquisition of lands prior to 1982 may have extinguished any Aboriginal rights or title.

2. Canada currently consults with respect to dispositions of federal Crown lands in areas where Aboriginal groups claim Aboriginal rights, even though there is no legal obligation to consult unless a First Nation could establish that they have an Aboriginal right that has been infringed by Canada's actions.

## **DELGAMUUKW - OVERLAPS**

### ***1. What the Supreme Court of Canada said:***

- Joint Aboriginal title can be established by demonstrating shared exclusivity to lands. (para. 158)
- If exclusivity cannot be proven, it may be possible to prove shared, non-exclusive, site-specific Aboriginal rights. (para. 159)
- Where a First Nation has commenced legal proceedings to prove Aboriginal title, it may be advisable if other First Nations who claim Aboriginal title over the same territory intervene in the litigation. (para. 185) Negotiations should include other First Nations that have a stake in the territory claimed. The Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. (para. 186)

## ***2. Preliminary Legal Analysis:***

- Joint Aboriginal title may be proven.
- Although the Court noted that negotiations with a First Nation regarding territorial claims should include other First Nations that have a stake in the territory claimed, the Court did not elaborate on the nature and scope of this direction.

## **DELGAMUUKW - SECTION 91 (24)**

### **1. What the Supreme Court of Canada said:**

- "Since 1871, the exclusive power to legislate in relation to 'Indians and Lands reserved for the Indians' has been vested in the federal government by virtue of s. 91(24) of the *Constitution Act, 1867.*" ( para.173)
- The jurisdiction conferred to the federal government over "Lands reserved for the Indians" encompasses not only the power to legislate in relation to "reserves" lands but also the power to legislate in relation to:
  - Aboriginal title (para. 174); and
  - other Aboriginal rights which are related to land (i.e. - site-specific Aboriginal rights) but which fall short of Aboriginal title. (para.176)

- The jurisdiction conferred to the federal government over "Indians" encompasses the power to legislate in relation to Aboriginal rights which are not tied to land. (para.178)

## ***2. Preliminary Legal Analysis:***

- Lands subject to Aboriginal title are "Lands reserved for the Indians" within the meaning of s. 91(24) and thus are within exclusive federal legislative jurisdiction.
- Provincial laws of general application that affect the core of "Indianness" only apply through s. 88 of the *Indian Act* by becoming federal laws. On its face, s. 88 makes no similar provision for "lands reserved for the Indians".
- The Court confirmed that the Provinces can justifiably infringe Aboriginal rights and title.

## DELGAMUUKW - CERTAINTY

### 1. *What the Supreme Court of Canada said:*

- Aboriginal title is *sui generis*, and cannot be transferred, sold or surrendered to anyone other than the federal Crown. (Para. 113)
- Aboriginal title is a proprietary right in land which encompasses the right to exclusive use and occupation of land for a variety of purposes, which need not be aspects of traditional Aboriginal practices and traditions. (Para. 111)
- Aboriginal title cannot be put to uses that may be irreconcilable with the nature of the occupation of that land and the relationship that Aboriginal group has with the land. (Para. 128) Uses that threaten their future relationship are by their nature excluded from the content of Aboriginal title. (Para. 127)

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- Nothing the Court said about the nature of Aboriginal title "should be taken to detract from the possibility of surrender to the (federal) Crown in exchange for valuable consideration". "If Aboriginal people wish to use their lands in a way that Aboriginal title does not permit then they must surrender those lands and convert them into non-title lands to do so." (Para. 131)
- The jurisdiction to accept surrenders of Aboriginal title lies with the federal Crown, as does the jurisdiction to extinguish Aboriginal title. (Para. 175)
- Aboriginal title is held communally. (Para. 115)

## ***2. Preliminary Legal Analysis:***

- It is questionable whether First Nations have the legal capacity to agree to future uses that are irreconcilable with Aboriginal title except by surrender to the Federal Crown. This may have implications for all interests in lands and resources, now and in future, including the interests of First Nations, federal and provincial governments and third parties.
- The court's pronouncements concerning Aboriginal title and section 91 (24) jurisdiction have implications for certainty techniques other than surrender.

## **DELGAMUUKW - LITIGATE/NEGOTIATE**

### **1. *What the Supreme Court of Canada said:***

- The Court emphasized in its concluding statement the importance of negotiating instead of litigating: "Finally, this litigation has been long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts." (Para. 186)

### **2. *Preliminary Legal Analysis:***

- Canada is firmly committed to the treaty negotiation process. However, Canada must consider the appropriateness of conducting treaty negotiations while litigation is ongoing.

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- In determining the appropriateness of conducting treaty negotiations in the face of litigation, Canada's considerations include the following:
  - Legal considerations
  - Prospects for Progress at the Treaty Tables
  - Resourcing/Duplication Considerations

## **DELGAMUUKW - DUTY TO NEGOTIATE**

### **1. *What the Supreme Court of Canada said:***

- The Crown is under a moral, if not a legal, duty to enter into and conduct negotiations in good faith. (Para 186)

### **2. *Preliminary Legal Analysis:***

- While the case does not impose a legal duty on the Crown to negotiate treaties, it strongly suggests negotiation as a sound alternative to litigation.
- Treaty Making is a voluntary process for all of the parties.
- If negotiations are entered into, then the Crown must conduct those negotiations in good faith.

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DEPUTY ATTORNEY GENERAL

# Delgamuukw

## *Roll up of questions and quotes from the field*

This document is a summary of questions and quotes on the Delgamuukw decision from the treaty consultation bodies and local media around British Columbia.

## Treaty Negotiations Advisory Committee

Following are quotes from TNAC members made at the TNAC main table and at certainty working group meetings on December 12 and 13, 1997

### **Jerry Lampert, Business Council of B.C.**

Does the federal government think there should be a new trial?

The Court agrees that the federal government has the capacity to extinguish Aboriginal title through surrenders.

Certainty provisions, using cede, release and surrender, are the means to accomplish this in treaties. It must be done through valuable consideration but it can be done.

All of this affects the economy of the Province and government need to understand the concerns caused by this decision.

Additionally the findings that for uses inconsistent with Aboriginal title, the First Nation must surrender the title is important finding for governments to consider.

### **Dale Drown, Guide Outfitters Assoc. of B.C.**

In light of the court's reference to surrender, what are the federal thoughts on its implications and the soundness of seeking surrenders in treaties?

### **Mike Hunter, Fisheries Council of B.C.**

It is important that the political system not overreact or speedily react to the Court's judgement. The response to Sparrow was too quick and consequently created many problems. We cannot sit quietly by if governments decide to make numerous and significant policy changes.

Ministers have to downplay the expectations that Aboriginal leaders have as a result of the decision.

### **Marlie Beets, Council of Forest Industries (COFI)**

I am late this afternoon because I have spent the last hour talking to our CEOs and trying to calm them down. This decision concerns the forest industry greatly. It remains to be seen what effect it will have on our licences and tenures, and for the investment our members have made in B.C. This has only created more uncertainty and we are very concerned by how governments will react to the Court's findings.

The decision makes the need for certainty through surrender all the more clear. We see no other alternative.

**Mike Redmond, BC TEL**

It seems we now have uncertainty over the relationship of Aboriginal rights and title that must now be resolved.

**Rob Fraser, B.C. Real Estate Association**

Based on the Court's use of extinguishment and surrender, in my view there is certainty in using that language and technique. The models the federal government suggests are interesting, but do they really accomplish what is needed at the end of a negotiation?

**Marlie Beets, COFI**

The practical thing to do is to look as cede, release and surrender language to free settlements from internal contention in First Nation community. If Aboriginal title remains, there will be challenges to economic activity based on environmental or cultural concerns. This will not be helpful to First Nations or industry who want to do business and develop resources on settlement lands.

First Nations must first meet the test of use and occupancy before Aboriginal title even comes into play. Governments should not be the ones to make that assessment.

The Court had an opportunity to look at and comment on alternatives to surrender and extinguishment, but they stuck to the old tried and true techniques and language.

**Chris Harvey, Legal Counsel, Russell and Dumoulin**

There is now uncertainty over whether the entire province is burdened by Aboriginal title. The situation on Vancouver Island is very unclear. To resolve this in a treaty it seems that there must be a surrender of the rights and title claimed by the First Nation.

There might well be benefit in proceeding with a test case on certainty provisions. It might narrow the focus of discussion and provide a means to resolve finally this issue.

Based on the decision, I don't think you can massage over the language. What is needed is a clear exchange and an end of Aboriginal rights and title for a defined set of treaty rights.

**Duncan Barnett, Interior Lumber Associations (CLMA, ILMA, NFPA)**

Do the federal government's certainty approaches meet the Court's demand for clear and plain intention? The Court has been very strong on this issue and it has to be considered by governments when looking at certainty provisions.

As a consequence of the Court's decision, it is really First Nations who must come up with workable and acceptable alternatives to cede, release and surrender.

**Susan Anderson Behn, B.C. Federation of Labour**

Are different approaches required to achieving certainty over aboriginal rights, and certainty over Aboriginal title?

In return for movement on surrender, First Nations are likely to seek expanded provisions on compensation, settlement land parameters, and other economic considerations in their treaty negotiations.

**Mary MacGregor, B.C. Cattlemen's Association**

Based on our reading of the decision, we are going to even more emphatic that all claimed Aboriginal rights and title are surrender in exchange for a defined set of treaty rights.

Without such a clear and plain approach our industry is faced with too much uncertainty. We will be putting great pressure on the provincial government to commit to a cede, release and surrender approach in Nisga'a and other negotiations.

With the uncertainty created by the test for Aboriginal title and First Nations' expectation that it covers most provincial crown land, this has serious implications for renewal of our tenures and lease interests.

At the end of the negotiations, the province must have the full extent of its section 92 jurisdictions. The potential confusion raised by federal jurisdiction over provincial crown lands, re Aboriginal title, creates many unknowns.

The court's acceptance of the legal theories of Brian Slattery and Michael Asch is also concerning in the influence those views will have on future Aboriginal rights and title

cases.

The Court has displayed an academic, legalistic approach to Aboriginal rights cases. The judgement is totally detached from the economic realities that exist in British Columbia. The complexities and additional costs of doing business likely resulting from this case will have serious economic consequences.

The Cattlemen's Association will be working closely with business and resource interests to ensure that our economic interests are preserved. We will insist that treaty settlements clearly surrender all claims of Aboriginal rights and title throughout a First Nations' claimed traditional territory.

## **Regional and Local Advisory Committees**

RAC and LAC members have been largely silent on Delgamuukw, and a few have asked for copies of the decision. Most people seem to understand that interpretation of the decision will take time. Those who have expressed an interest in the case are noted below.

Duncan Barnet, co chair of the Cariboo-Chilcotin Regional Treaty Negotiations Committee and the Aboriginal Affairs manager for the Cariboo Lumber Manufacturers Association indicated that his constituents were interested in answers to two questions: does the decision mean that the federal government now has jurisdiction over Crown land, and what effects do the new consultation guidelines have on third parties?

Fred Hancock a rancher who sits on the Lillooet-Fraser RAC expressed concern for his grazing leases and looked for a clear factual summary of the ruling from the federal government to clarify the various interpretations he had read in the media.

At the Kitimat-Skeena RAC, Gerry Martin of the B.C. Chamber of Commerce asked about the impact of Delgamuukw on overlap issues? Given the Nisga'a's problems with Gitanyow this needs to be resolved.

Greg Lyle of the Council of Forest Industries (COFI) wondered if provincial crown ownership of the land is burdened by Aboriginal title. The only way to relieve that burden is through a voluntary surrender to the federal crown. In our view, a full surrender is the only way certainty can be achieved, and full provincial authority over the land base instituted.

## **Local Media**

"It puts to rest after all, the question of aboriginal title. We got that in the judgement."

Sen. Len Marchand, *Kamloops This Week*, 12 Dec 1997

"In a nutshell, I think [the requirement to consult First Nations before infringing title] confuses issues even further. I think it certainly clouds the issue of Crown title, specifically with aspect to Crown resources."

Martyn Brown, Executive Director, Citizen's Voice on Native Claims, *The Prince George Free Press*, 14 Dec 1997

"Martyn Brown doesn't know it, but he supports treaty settlements. Settle treaties fairly and amicably and trust all the natives want is the freedom to run their own interests, no more no less. Or cross our arms and say no. Then the courts will decide for us. But the Delgamuukw decision should tell us that the courts are becoming less and less receptive to people who steal things and aren't willing to share."

Editorial, *The Prince George Free Press*, 17 Dec 1997

"[Governments] are involved in a complicated treaty process that the court says is the preferred manner for settling [land claims]. And, without saying so, it warns that referenda rejections of negotiated settlements are likely to be subjected to ever more rounds until a balance is found...Our economy and our sense of certainty and comfort are in for some shaking but our hearts must know the status quo cannot stand unchanged."

Steven Frahsen, columnist, *100 Mile House Free Press*, 17 Dec 1997

"It's particularly important to recognize that most of us in the province want to see efficient resource development continue...COFI member companies would much rather cooperate, build relationships and do whatever they can to involve aboriginal people in the forest economy."

Marlee Beets, VP, Aboriginal Affairs, Council of Forest Industries, *Quesnel Cariboo Observer*, 17 Dec 1997

"The ruling is an important step toward the 'recognition, respect and reconciliation' you have been seeking with such patience and dignity. Let's hope that we, your non-aboriginal neighbours, are able to see that we all now share an improved opportunity to create an equitable and sustainable future for our local communities."

Ivan Thompson, letter to the editor, *The Interior News (Smithers)*, 17 Dec 1997.

"In terms of British Columbia, [Delgamuukw] is breathtaking. This judgement has undermined certainty of title for virtually all lands in British Columbia."

Geoff Plant, BC Liberal MLA, *Richmond News*, 17 Dec 1997. He goes on to argue for a referendum to reconsider B.C.'s treaty negotiation mandates.

"[I]t is clear that our unelected judicial legislators, in approving the notion of 'aboriginal rights to the occupation and use of the land' have, to put it mildly, thrown into question

not only the ownership of the lands comprising 110% of the province of B.C., but also that of other western provinces too..."

Charles MacLean, columnist, *North Shore News*, 17 Dec 1997

"What was reality yesterday may no longer apply as a result of this decision."

Richard Hughs, Regional Director, Cowichan Valley Regional District, discussing how Delgamuukw may affect a claim by the Hul'qumi'num Treaty Group to a landfill site required by the CVRD. *Cowichan News Leader*, 17 Dec 1997

"According to the decision, aboriginal title to the land exists and it gives natives the exclusive right to occupy and use the land."

Phillip Mayfield, Reform MP (Cariboo-Chilcotin), *Williams Lake Tribune*, 18 Dec 1997.

"One of the first concerns out of anything like this is does that mean that the all the activity on the ground should grind to a halt. That part of the decision clearly says that activity shouldn't grind to a halt...It raises loud a clear questions to us that whatever gets resolved through the negotiations process has to have some finality to it."

Dave Peterson, President, Cariboo Lumber Manufacturers Association, *Williams Lake Tribune*, 18 Dec 1997

"I believe that the court decision widens the gap between aboriginal and other people, a disaster for all Canadians, an expansion of what I call affirmative apartheid"

Trevor Lautens, columnist, *North Shore News*, 19 Dec 1997.

"Under the Supreme Court of Canada directive, 'Oral History' must be given more credence, self-serving fiction will be unquestioningly accepted as solemn truth. The chiefs will be given title to vast tracks of land. ..Go knows our concerns will be completely ignored if we don't speak up."

Jerry Mendl, BC FIRE member, *The Interior News*, 23 Dec 1997.

"We believe this judgement provides for greater cooperation, more emphasis on the negotiations process and much less risk of injunctions against development."

Marlee Beets, VP, Aboriginal Affairs, COFI, *The Interior News*, 23 Dec 1997

"It's gonna cost a whole lot more money, more money that our province doesn't have. The only people who are going to get rich are the lawyers."

Unnamed New Hazelton businessman, *The Interior News*, 23 Dec 1997

"It finally put native people on an equal footing, they've been taken for granted and treated as second class citizens for too long, this gives them a stronger position to negotiate from."

Lt. David Payler, Gitanmaax Salvation Army, *The Interior News*, 23 Dec 1997

"If the decision was made as the media is saying, I think they shouldn't have. I don't

think you can take oral history as being accurate and factual. [Hudson Bay journals] are very different from what natives are saying now, it's all romanticized. You can't have a country with a million different rules. We'd all be happier if there was one set of rules and policies applied to everyone."

Richard Bruan, Owner, Two Mile Services, *The Interior News*, 23 Dec 1997

"The original decision didn't make sense or seem just to me, this is a new start."

John Sanks, high school teacher, *The Interior News*, 23 Dec 1997

"The Delgamuukw decision has flipped our entire land title system on its head because of its findings on aboriginal title...Indeed the province's unfettered title to virtually all Crown land in B.C. is now in question. ...it will increase racial tensions, particularly in resource-dependant communities...it will reinforce the special status for aboriginal Canadians – exactly the opposite of what most Canadians hope to achieve through treaty negotiations.

Martyn Brown, Executive Director, Citizen's Voice on Native Claims, *Terrace Standard*, 30 Dec 1997.

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March 30, 1998

UNION OF  
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PRESIDENT  
MAYOR  
STEPHEN D. WALLACE

EXECUTIVE DIRECTOR  
RICHARD TAYLOR

Honourable Dale Lovick  
Minister of Aboriginal Affairs and Labour  
Parliament Buildings  
Victoria, BC  
V8V 1X4

Honourable Jenny Kwan  
Minister of Municipal Affairs  
Parliament Buildings  
Victoria, BC  
V8V 1X4

Dear Ministers:

RE: SUPREME COURT OF CANADA DECISION ON  
DELGAMUUKW

Local governments in B.C. have growing concerns about the impacts of the Supreme Court of Canada decision in the *Delgamuukw* case. While the decision has spoken to several aspects of aboriginal title, it has also created uncertainty as to the effects on local government.

The Court's decision deals with the fiduciary obligations of the Crown toward aboriginal peoples. We understand that the decision may mean that the Crown will need to consider whether any of its proposed use of Crown lands may infringe on any aboriginal title or rights. The Court does not address some of the more practical issues facing local governments, such as how the decision may affect local government consultation processes.

Lack of direction to local government post-*Delgamuukw* is becoming more of a pressing concern. Some of our members have received notice by neighbouring First Nations of their increased expectations for participation in decision making on lands they consider to be within their traditional territory. Of particular concern to us are those lands that are within local government jurisdiction.

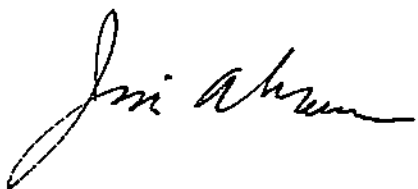
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The decision appears to place greater obligations on governments to consult with First Nations when governments might be infringing on aboriginal title. If viewed as a continuum of actions that might affect aboriginal title, at one end are the actions of the provincial government and at the other end would be the actions of owners of fee simple lands.

Local governments are often acting in the capacity of developing their own lands. In other cases, they are authorizing the development of private lands that might be argued authorizes an infringement on aboriginal title. Does this invoke special requirements to consult with First Nations? Or do the *Municipal Act* notice provisions continue? And if special requirements need to be considered, does the *Municipal Act* currently allow for this?

We ask that in the province's examination of the *Delgamuukw* case, a thorough analysis of how the decision effects local governments' jurisdiction, land-use planning processes, boundary extensions, etc., be conducted and that clear direction be provided to local government on this matter.

Sincerely,



Director Jim Abram  
Aboriginal Affairs Committee Chair

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Canada



British Columbia

NOTICE TO ALL TNAC MEMBERS AND ALTERNATES**RE: BILATERAL DISCUSSIONS BETWEEN TNAC ORGANIZATIONS AND FIRST NATIONS SUMMIT REPRESENTATIVES**

At the March 27, 1998 meeting with the First Nations Summit Task Group, the two organizations agreed to form a working group to discuss issues of mutual importance. The Summit representatives will now seek approval of their members to strike a Working Group to meet with TNAC's Working Group.

Proposals as to the number and composition of the committee should be submitted to Dick McMaster at Fax (250) 828-1586, or Ph. 828-1553. It may be impossible to have each and every sectoral interest represented on the working group. Please consider who would best represent your interests if only five or six representatives could participate. By the time of the April TNAC meetings, all TNAC organizations are requested to have authority to recommend and approve the members who will represent TNAC on the Bilateral Working Group.

As a guide to your thoughts on whom and how TNAC should be represented, the following are some of the topics TNAC members and the FN Summit thought useful to discuss bilaterally:

- Developing greater transparency and openness around the treaty negotiation process;
- Bringing expectations of both groups to what is achievable;
- Countering the negativism that is building up around the treaty process;
- Considering ways to expedite the treaty process by testing out possible approaches;
- Exploring ways to keep TNAC informed about the tripartite Principals' discussion on follow up to *Delegamukw*;
- Considering ways to build community contact in the interior and coastal regions;
- And, developing programs to foster Community - Stakeholder - First Nations discussions in various claimant areas.

These are provided only as a guide. TNAC members will need to give their working group members additional direction on TNAC's priorities and ideas to address these and other areas of mutual interest.

Government will support these discussions if we can. It is our sense that we should let this unfold without our participation. Dick McMaster has offered to act as a coordinator until the designated members are confirmed. We encourage you to contact him at the above numbers for additional information if required.

*Joseph Whiteside*  
Joseph Whiteside  
FTNO

Jean Dragushan  
MAA

COFI

APR - 2 1998

AB. AFFAIRS

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FAXED TO (250) 356-1124,  
ORIGINAL MAILED

April 4, 1998

Hon. Dale Lovick  
Minister of Aboriginal Affairs and Labour  
Room 325, Parliament Buildings  
Victoria, BC  
V8V 1X4

Dear Minister:

We wish to bring an urgent matter to your attention that will cause real problems if not dealt with expeditiously.

On April 2, 1998, UBCM conducted a seminar on *Delgamuukw* that was attended by over 140 local government representatives from throughout the province. The session was very informative. However, during the last panel discussion, which focused on the implications of the decision for the treaty negotiation process, two "bombshells" were dropped.

Chief Commissioner Alec Robertson of the B.C. Treaty Commission described the joint meetings that will commence next week between the principals as "negotiations".

Mr. Robert Louie went on in his presentation to list an extensive range of subjects that would be on the table at the tripartite meetings; a list that included major substantive issues such as certainty, and transfer and surrender of lands.

The impression was left that negotiations will occur with respect to major substantive matters and that these will begin next week. This is not what we understood to be the purpose of the tripartite meetings. The Joint News Release of March 13, 1998 states:

*"At the meeting, the Ministers and First Nations leaders established a senior level committee to examine how the Delgamuukw decision affects the treaty process"; and that "The committee will be meeting over the next two months to improve the treaty process..."*

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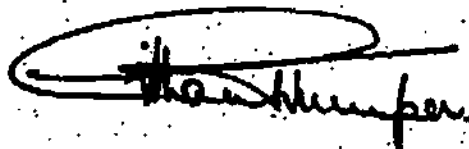
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The News Release talks about an examination, not negotiation and discussion concerning process, not substantive issues.

We would ask that you immediately clarify the scope and nature of the discussions.

If negotiations are commencing and the Province intends to table substantive proposals, it is also important that we have your views on the relationship of these negotiations to the provisions of the UBCM - British Columbia Memorandum of Understanding and Protocol Agreement regarding local government involvement in treaty negotiations.

Yours truly,

A handwritten signature in black ink, appearing to read "Gillian Trumper", is written over a horizontal line.

Mayor Gillian Trumper  
Past President and UBCM TNAC Representative

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Ministry of Aboriginal Affairs  
Communications Branch  
Positioning Statement

**DRAFT**

Date: April 7, 1998  
Issue: Tripartite Review Process (PS98-11)

**Positioning Statement:**

- The province recognizes the *Delgamuukw* decision and is working co-operatively with First Nations, stakeholders and Canada to fulfil the directions from the court.
- We want to achieve a stable investment climate and economic and land-use certainty in B.C., to provide opportunities and jobs for local and aboriginal communities.
- We will work in partnership with Canada and First Nations to help streamline and improve the treaty process - this is a challenge we willingly accept.
- We want to achieve certainty through a revitalized treaty process.

*Review process, April 7-9:*

- Senior officials from B.C., Canada and the First Nations Summit are meeting to explore the issues and clarify the perspectives of each party in the process.
- B.C. recognizes the interests of third parties and local government in the treaty process.
- We will ensure third parties are informed about the review process. The province will discuss the identified issues with third parties and seek their input before we proceed to more substantial discussions with Canada and the Summit and other First Nations leaders.

**NOTE:** Messages regarding "system overload" are attached.

**Facts:**

On Jan. 31, the federal and provincial Ministers agreed to the Treaty Commission's suggestion that the principals participate in a tripartite process to review the treaty process, as a result of *Delgamuukw* and to address "system overload" issues.

At a meeting of senior officials on March 5, it was agreed the time frame for completing the facilitated process would be April 30, 1998.

On April 2, at a UBCM workshop on *Delgamuukw*, Robert Louie of the First Nations Summit outlined a list of issues for review. The chair of the Lower Mainland TAC raised concerns that local government was being excluded from the review process. Members of TNAC and UBCM will be briefed on the review process, April 8. *B.C. has already committed to briefing TNAC at a meeting scheduled for April 15 and seeking their input.*

Approved By:

Director

ADM and/or DM

*[Signature]* / with change  
(ADM)

Date

*Apr 7/98*

(DM)

## HOUSE ISSUES NOTE - 98-31: System Overload

---

ISSUE: System Overload report and recommendations

---

### BACKGROUND/DISCUSSION:

In its 1995-96 annual report, the BCTC identified "system overload" as an emerging problem for the B.C. treaty process. The problem stems from two factors: 1) more First Nations have entered the process than initially estimated by the BC Claims Task Force, and 2) most treaty tables have proceeded through the early stages of the process more quickly than expected.

In September, 1996, the principals agreed to strike a committee, chaired by the Commission, to: review the issues; identify the problems; discuss options for possible solutions, and; make recommendations to the principals. The Commission - which raised the issue again in its 1997 annual report - sent the committee's report to the principals for their consideration. The committee's report makes 15 recommendations, including (in summary):

- criteria for assessing a First Nation's capacity to implement and negotiate a treaty; the federal and provincial governments commit more resources to the negotiations, and ensure their commitment to negotiate treaties is firm and long term;
- all parties ensure their negotiators obtain mandates that are "timely and sufficient" for treaty purposes;
- the principals establish criteria for fast-tracked negotiations;
- slower-tracked First Nations have access to interim measures;
- the principals establish a province-wide issues table;
- that regional tables be established for First Nations;
- that all parties in AiP stage ensure Chief Negotiators have sufficient working time for private sessions, to supplement open main tables, and;
- all parties in stage 4 develop realistic work plans.

The issue has been reported in the media, including the Vancouver Sun which suggested the problem is compounded by budget cuts at MAA and line ministries (MoF and MELP).

cont'd next page - recommended responses

**RECOMMENDED RESPONSES:**

- The province is involved in the treaty process as the means for resolving claims, achieving economic and land-use certainty and creating jobs in the province.
- The province is allocating its resources prudently and ensuring we are well represented at every treaty table.
- Until all options to improve the efficiency of the process have been explored with the other parties, it would be fiscally irresponsible of the province to allocate more resources to the treaty process at this time.

**Re: the report**

- The province has been reviewing the report and working with the Treaty Commission, Canada and First Nations to address the issues it raises.
- The province previously raised the system overload issue and stated our willingness to work with all parties to identify possible solutions for effectively managing and pacing negotiations.
- The province acknowledges the work of the committee and the BCTC, and the thoroughness with which it reviewed the problem and possible solutions.

**Re: budget cuts**

- The province is attempting to conclude agreements that will provide certainty and security for all British Columbians, aboriginal and non-aboriginal alike.
- The public is supportive of the process and wants treaties settled.
- At the same time, the government is committed to fiscal management and bringing spending under control - the public also places a high priority on sound fiscal management.
- The ministry met the budget targets without undermining our ability to participate in negotiations and conclude treaties.

---

**CONTACT:** Peter Smith**PHONE:** 356-8750**DATE:** Feb. 26/98

---

10/20-20/NSus/Delg



**Council of  
Forest Industries**

**Aboriginal Affairs**

203 - 197 North Second Avenue  
Williams Lake, British Columbia  
Canada V2G 1Z5

Telephone (250) 392-7770  
Fax (250) 392-5188

REF #A211-98

April 8, 1998

Joseph Whiteside  
Sr. Consultation Advisor  
Federal Treaty Negotiation Office  
#2700 - 650 West Georgia Street  
Vancouver, BC V6B 4N8

Jean Dragushan  
Manager, Special Projects  
Ministry of Aboriginal Affairs  
2<sup>nd</sup> Floor, 908 Pandora Avenue  
Victoria, BC V8V 3P3

Facsimile: 604-775-7149

Facsimile: 250-387-8195

Dear Joseph Whiteside and Jean Dragushan:

**Re: TNAC Involvement in BC, Canada and First Nations Summit Meetings**

I was encouraged by the attendance of First Nations Summit Task Group representatives, George Watts and Joe Mathias, at the March 27 meeting of the Treaty Negotiations Advisory Committee (TNAC). During the discussion, TNAC members expressed a desire to have some TNAC representation directly involved in the ongoing meetings among BC, Canada and the Summit to review the treaty process in light of issues arising from the *Delgamuukw* judgment.

This judgment, the treaty process, potential interim measures and related issues have major impacts on members of the Council of Forest Industries (COFI). We are therefore disappointed to see from your recent notice to TNAC members (attached) that our stated objective - TNAC direct involvement in discussions related to reviewing the treaty process - seems to have been lost in the summary of proposed topics which TNAC and the Summit might discuss.

While several of the suggested topics for bilateral discussion between the Summit and TNAC are subjects worthy of attention, in our view: *"Exploring ways to keep TNAC informed about the tripartite Principals' discussions on follow up to Delgamuukw"* is not a satisfactory approach to meet our interests, nor does it recognize the urgency of the situation.

Frustration is mounting among so-called "third parties" as we find ourselves increasingly excluded from discussions that directly affect our ability to operate our respective businesses successfully. Our stake in a successful treaty process and reasonable "interim" land use policies is as high as that of government and First Nations. Striking a working group to "keep us informed" about the discussions ignores the fact that TNAC

/2

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*Member Associations*

BC Pulp and  
Paper  
Association

Canadian  
Plywood  
Association

Cariboo Lumber  
Manufacturers'  
Association

Coast Forest  
and Lumber  
Association

Interior Lumber  
Manufacturers'  
Association

Northern Forest  
Products  
Association

J. Whiteside, J. Dragushan  
April 8, 1998  
Page 2



members are the most experienced and best positioned group to make constructive contributions to the current effort to review the treaty process and arrive at workable solutions.

In the tripartite press release regarding the treaty process review, Grand Chief Edward John said on behalf of the Summit Task Group: *"First Nations in this province require certainty just as much as business and government. The historic Delgamuukw decision gives us a unique opportunity to resolve how aboriginal title and rights co-exist with the rights of others in British Columbia."*

COFI agrees with Chief Ed John. We and our colleagues at TNAC are some of the "others" he is referring to. We would like to reiterate our desire to have a representative on behalf of each of TNAC's sectoral groups participate in the review of the treaty process which is currently underway.

Yours truly,

A handwritten signature in black ink, reading 'Marlie Beets'. The signature is written in a cursive, flowing style.

Marlie Beets  
Vice President, Aboriginal Affairs

Attachment

Copy to: Honourable Dale Lovick  
Honourable Jane Stewart  
Senator Jack Austin  
Grand Chief Ed John  
George Watts  
Chief Joe Mathias  
Alec Robertson  
Members & Alternates of the Treaty Negotiations Advisory Committee

Indian and Northern  
Affairs CanadaAffaires Indiennes  
et du Nord Canada

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APR 16 1998

10120-20 / NWS / DELG  
DEPUTY ATTORNEY GENERAL

Sent Via Fax: (250) 387-0087

April 16, 1998

Your file: 10120-20 / NWS / DELG

Our file: 10120-20 / NWS / DELG

FILE # 8300-16-G1

Mr. Bob Plecas  
Deputy Minister of Special Projects  
Premier's Office  
Room 272, West Annex  
Parliament Buildings  
VICTORIA BC V8V 1X4

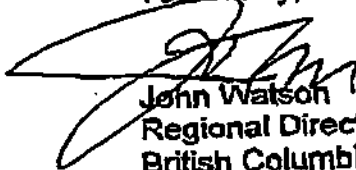
Dear Mr. Plecas:

**RE: DELGAMUUKW FACILITATED REVIEW**

Further to our discussions on Day 1 of the Delgamuukw Facilitated Review process, we have been asked to provide the name of Canada's representative who will sit on a small working group to examine the role of third parties. It is our understanding that you will chair this group. I have asked Doreen Mullins, Executive Director at the Federal Treaty Negotiation Office to participate in this working group. It is our understanding that this group will bring recommendations back to the next series of meetings for review by all participants.

Canada supports efforts to reach out to a broad set of players during the review process. It is important that we consult with business leaders to find creative solutions that accommodate the on-the-ground, day-to-day needs of First Nations people and the certainty and predictability that business requires. I am hopeful that some way can be found to accommodate the interests of all parties. I look forward to hearing the results of your discussions.

Yours truly,

  
John Watson  
Regional Director General  
British Columbia Region  
340 - 1550 Alberni Street  
VANCOUVER BC V8G 3C5

Canada

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c.c.: First Nations Summit Task Group  
Herb George, Vice Chief, Assembly of First Nations  
Valerie Mitchell, Acting Deputy Minister, Ministry of Aboriginal Affairs  
Scott Serson, Deputy Minister, DIAND  
John Sinclair, Assistant Deputy Minister, Claims and Indian Government  
Alec Robertson, Q.C. Chief Commissioner, British Columbia Treaty  
Commission  
Dan Johnston, Facilitator, Sutherland, Johnston, MacLean

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PROVINCE OF  
BRITISH COLUMBIA

Ministry of  
Aboriginal Affairs  
Parliament Buildings  
Victoria  
British Columbia  
V8V 1X4



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DEPUTY ATTORNEY GENERAL

To:

Maureen Maloney 7-6224  
Bob Plecas 6-7258

Fax No:

Telephone No:

From: Ingrid Fee, Manager  
Executive Planning and Operations  
Office of the Deputy Minister  
Ministry of Aboriginal Affairs  
4th floor, 908 Pandora Avenue  
Victoria, British Columbia  
V8V 1X4

*Rustl*

Facsimile No: (250) 387-6073

Telephone No: (250) 356-6804

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Comments:

Val is in Vancouver today and has  
not seen this yet. I assume she would want  
me to fax each of you a copy of this right  
away.



Indian and Northern  
Affairs Canada

Affaires Indiennes  
et du Nord Canada

Sent Via Fax: (604)-688-0094

April 16, 1998

Votre file Votre référence

Our file Notre référence

FILE # 8300-16-G1

Mr. Dan Johnston  
Sutherland, Johnston, MacLean  
Barristers and Solicitors  
#1600 - 777 Dunsmuir Street  
VANCOUVER BC V7Y 1K4

Dear Mr. Johnston: *DM*

**RE: Informal Certainty Working Group**

Further to our discussions on Day 3 of the *Delgamuukw* Facilitated Review process, we have been asked to provide the name of Canada's representative who will sit on a small, informal working group which will attempt to come up with creative wording on certainty acceptable to all parties involved. It is my understanding that you will chair this group and that the group will be an informal one which may meet in person or by telephone as appropriate. I have asked Mr. Fred Morris, one of our Federal Treaty Negotiation Office department of Justice staff members, and Ms. Gail Mitchell, Comprehensive Claims Branch, Department of Indian Affairs and Northern Development (DIAND) to participate in this working group.

As was reported by the Summit Task Group members, efforts involving all three parties to find some way around the certainty dilemma, have been ongoing. While I acknowledge the Summit's frustration at the lack of success in earlier efforts, I am also cognizant of the fact that certainty, perhaps more than any other issue, will be one of the most difficult to reconcile. Both governments are under tremendous pressure to ensure that we achieve the level of certainty required to reassure business and other third parties. That being said, I believe that we are entering these discussions in the same spirit as we have approached the review process as a whole, to challenge assumptions, explore ideas, be creative in our thinking and to bring suggestions back to the table for discussion by all parties. I have attached, for your information, a list of understandings which were developed during an earlier tripartite working group on certainty. I thought they might provide useful background material.

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I look forward to hearing about your discussions at our next meeting.

Yours truly,



John Watson  
Regional Director General  
British Columbia Region  
340 - 1550 Alberni Street  
VANCOUVER BC V6G 3C5

c.c.: First Nations Summit Task Group  
Herb George, Vice Chief, Assembly of First Nations  
Valerie Mitchell, Acting Deputy Minister, Ministry of Aboriginal Affairs  
Scott Serson, Deputy Minister, DIAND  
John Sinclair, Assistant Deputy Minister, Claims and Indian Government,  
DIAND  
Alec Robertson, Q.C. Chief Commissioner, British Columbia Treaty  
Commission

**DELGAMUUKW DECISION.**

**CLARK ON RAFE MAIR - APRIL 17, 1998**

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APR 17 1998

10/20 - 20 /JWS /DELS

DEPUTY ATTORNEY GENERAL

To Maureen M.  
Jul Wallace  
CZ.  
FROM BRENT

Mair said that the Delgamuukw decision is the most important question facing British Columbians today.

He asked how we're going to cope with it.

Clark said that the decision is a complex one. Clearly, aboriginal people feel it's a huge victory for them, and that there is some significant statements by the courts which give aboriginal people more comfort with respect to their rights. However, many forest companies and lawyers have looked at the decision and said that while it gives aboriginal people more rights, those rights should be tested in a court of law.

Clark added that the problem with the decision is that it increases polarization in the province by inviting aboriginal people to go to court because they think they have more rights given to them by the court.

He said the government is trying to find a way to use the decision to try to see if they can resolve some of these issues. E.G. starts talking about the Nisga deal.



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DEPUTY ATTORNEY GENERAL

## NORTHERN FOREST PRODUCTS ASSOCIATION

400 - 1488 Fourth Avenue, Prince George,  
British Columbia, Canada V2L 4Y2  
Telephone (250) 564-5136  
Fax (250) 564-3588  
E-Mail: ntps@pgweb.com

April 23, 1998

Mr. Ujjal Dosanjh  
Attorney General  
Room 232, Parliament Buildings  
Victoria, BC V8V 1X4

Dear Mr. Dosanjh:

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← Acknowledged

The Delgamuukw decision handed down by the Supreme Court of Canada last December has raised a great amount of discussion about jurisdiction over lands and resources in British Columbia. Many people agree that the Delgamuukw decision presents us with more questions than it answers and as a result, a vacuum in public policy currently exists. While it is understandable that a hasty response to the Delgamuukw decision is undesirable, the policy vacuum is creating a great amount of friction at the operational level for aboriginal groups, government staff and resource developers.

At the 1998 Northern Forest Products Association Annual Convention held in Prince George in early April, Chuck Willms (Russell & Dumoulin) offered the audience his impressions of the Delgamuukw decision and in the Davis & Company "Forestry Bulletin", John Hunter (Davis & Company) offered his interpretation of the decision. Both gentlemen present a forest industry perspective in their interpretation, which differs significantly from the widely disseminated representation of the Delgamuukw decision as granting unequivocal jurisdiction and authority over land and resources to aboriginal people. Attached for your review are copies of both Mr. Willms' speaking notes and John Hunters' paper. We are pleased to provide you with these materials to facilitate your informed consideration of the forest industry's perspectives on consultation and other policy issues arising from Delgamuukw.

Sincerely,

*Elizabeth R. Andersen*

Elizabeth R. Andersen  
Aboriginal Affairs/Forestry Manager

EAR/bhs  
attachment

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ELA

## SPEAKING NOTES OF C.F. WILLMS RE: LAND CLAIMS

## I. INTRODUCTION

In order to understand the recent Supreme Court of Canada judgment in Delgamuukw, in my view it is important to review some of the case law leading up to Delgamuukw, along with the history of the case. What I set out below is a brief overview of the case law of aboriginal title and rights and the history of the case.

## II. ABORIGINAL TITLE AND RIGHTS IN B.C.

In Calder v. Attorney General of British Columbia (1973), 34 D.L.R. (3d) 145 (S.C.C.), the Court had before it the question of whether or not aboriginal title had been extinguished in the province of British Columbia in the colonial period, that is, prior to 1871. The Court divided 3:3 on the issue of colonial extinguishment, but did not divide on aboriginal title, which was succinctly described by Judson J. at p.156:

"Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependant on the good will of the Sovereign'."

In 1982, the Constitution Act of Canada was amended to add Section 35 which provides, in part:

LIT/CFW/243341 J.W31

- 2 -

"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

In R. v. Sparrow (1990) 70 D.L.R. (4th) 385 (S.C.C.), the Supreme Court of Canada affirmed at p.404:

"It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown."

Sparrow did not deal with aboriginal title, it dealt with aboriginal rights. The Court said that if the aboriginal peoples could prove that an aboriginal right existed, then certain questions had to be asked to determine whether or not there was a prima facie infringement, (at p.411):

"First is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation."

The Court held that if a prima facie infringement was proved that this infringement could be justified by the Crown under a two-part justification test -- first, whether there was a valid legislative objective and, second, if there was a valid legislative objective, was the honour of the Crown maintained.

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The Court further refined the definition of aboriginal rights in Van der Peet v. The Queen (1996) 137 D.L.R. (4th) 289 (S.C.C.), where the Court held at p.310:

"In light of the suggestion of Sparrow, supra, and the purposes underlying Section 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by Section 35(1): In 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 claiming the right."

### III. DELGAMUUKW: TRIAL AND THE COURT OF APPEAL

The trial judge in Delgamuukw, McEachern, C.J.S.C., after hearing over 350 days of evidence, decided the issue that had been left undecided in Calder, that is, he decided that aboriginal interests in land had been extinguished in the colonial period. He further held that the Crown owed fiduciary duties to the aboriginal peoples arising out of the extinguishment of aboriginal interests in land. There is no significant distinction between the way McEachern, C.J.S.C. described aboriginal interests in land and the way the Supreme Court of Canada in Calder described aboriginal title. They were essentially the same.

On appeal to the Court of Appeal of British Columbia, the plaintiffs, the province of British Columbia and the government of Canada, submitted to the Court that the Chief Justice had erred in determining that aboriginal interests in land were extinguished in

LITG/CFW/243341\_1.W31

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the colonial period. The Court of Appeal accepted the submissions of the parties and reversed the judgment of McEachern, C.J.S.C. with respect to the issue of extinguishment.

No party appealed the issue of extinguishment in the colonial period to the Supreme Court of Canada. The Plaintiffs appealed the dismissal by the Court of Appeal of their claims to ownership and jurisdiction of the land and the finding by the Court of Appeal that the Plaintiffs had non-exclusive aboriginal rights to the land. The Province cross-appealed on post-Confederation extinguishment. This set the stage for the Supreme Court of Canada decision.

#### IV. SUPREME COURT DECISION IN DELGAMDUKW

The claims of the Plaintiffs for ownership and jurisdiction over the territory that had been advanced at trial and in the B.C. Court of Appeal were withdrawn by the Plaintiffs in the Supreme Court of Canada and the Plaintiffs asserted instead claims of "aboriginal title" and "self-government". The Supreme Court of Canada ordered a new trial on the issues of aboriginal title and self-government, holding that the record did not allow the Court to reach conclusions with respect to aboriginal title and self-government.

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The Court went on to define "aboriginal title". Aboriginal title is more than a bundle of aboriginal rights (such as hunting and fishing in the traditional manner). Aboriginal title is not quite fee simple; it is a sui generis right in land, and to uses and activities thereon.

Aboriginal title to land is founded on exclusive (or shared-exclusive) occupation of the land. Even if it exists, the Province of British Columbia can infringe on aboriginal title if it is for a justifiable purpose and the honour of the Crown is maintained. In most cases, infringement may be justified if the Crown has engaged in appropriate consultation. In some cases, joint management may be required. In other cases, aboriginal consent may be required.

The Court dealt with three issues:

1. the content of aboriginal title;
2. the legal test for the proof of title; and
3. whether aboriginal title as a right in land mandates a modified approach to the test of justification set out in Sparrow.

1. Content of Aboriginal Title

The Court held that aboriginal title was not tantamount to an inalienable fee simple nor was it simply a bundle of rights to

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engage in aboriginal rights activities. The Court said at paragraph 111:

"Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive culture of aboriginal societies. Those activities do not constitute the right per se; rather they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title."

The Court also said, in paragraph 131:

"If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, they must surrender those lands and convert them into non-title lands to do so."

## 2. Proof of Title

In order to prove aboriginal title, a group must show: (i) the land was occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty there is a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty that occupation was exclusive.

The Court acknowledges, in a less than clear passage, that there may be areas of shared exclusivity in respect of aboriginal title.

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With respect to a connection with the land, and the Sparrow and Van der Peet requirement that rights must be of central significance to the band's distinctive culture, the Court said at paragraph 151:

"However, in the case of title, it would seem clear that any land that is occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

An important question arises as to the geographic extent of aboriginal title. Does it include areas remote from village sites? It appears that it may. "Physical presence" on the land is required, but it appears that it may be sufficient if the land is used for hunting, provided that the use is exclusive in the sense that use by other aboriginal groups would be considered a trespass. (Thus, amicable "shared exclusivity" still qualifies as exclusive occupation). The concurring minority judgment of La Forest J. is more explicit on this point: "aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy." The Court also states that where there is continued occupancy, the aboriginal claimants need not prove that occupancy was of central importance to their distinctive culture.

LITG/CPW/243341\_1.W51

- 8 -

The extent of aboriginal title will be a critical issue for resource users - to know when an issue may arise and what to do.<sup>1</sup> At trial the Gitksan and Wet'suwet'en advanced a claim for ownership of 22,000 square miles largely on the basis that distant ancestors had trapped on lands remote from the villages or had travelled across land from time to time to reach a hunting ground. The Gitksan now say that the evidence they advanced at trial clearly establishes their claim for aboriginal title to the whole of the 22,000 square miles. It remains to be seen what level of proof will be required by the courts, either upon the retrial of Delgamuukw or another action.

In areas where aboriginal title cannot be shown to exist the Court recognized the possibility of "non-exclusive site-specific aboriginal rights". The existence of these depends of proof that the activity covered by the claimed right, e.g. hunting, was "an integral part of their distinctive culture".

The primary distinction between aboriginal title and aboriginal rights is that the former encompasses all activities and uses of the land whether they were ever an integral part of aboriginal

---

<sup>1</sup> It seems clear from Delgamuukw that the obligation to consult and/or compensate lies with the government. However, it has been the B.C. government's practise to download the obligation to consult (at least in part) on industry. This downloading is constitutionally suspect.

- 9 -

culture or not. The Court held that aboriginal title has "an inescapable economic component". The only limitation is that they cannot destroy the ability of the land to sustain future generations of aboriginal people.

3. Modified Justification Test

The Court unanimously held that:

"The development of agriculture, forestry, mining and hydro electric power, the general economic development of the interior of British Columbia, protection of the environment of endangered species, the building of infrastructure and the settlement of foreign populations to support their aims, are the kinds of objectives that are consistent with this purpose and in principle can justify the infringement of aboriginal title."

The government may act pursuant to proper legislative objectives, and the Supreme Court of Canada makes it very clear that resource and economic development are proper purposes.

In the justificatory analysis, the Court discussed an increased level of consultation required by the government which might "require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

The Court also discussed the possibility that compensation would be payable by the Crown if the Crown could not satisfy the modified

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justificatory analysis. Interestingly, the Court did not suggest that the infringement could be reversed if the Crown could not satisfy the second part of the justificatory analysis. With respect to hunting and fishing rights, it is a fair inference that the Court would refuse to enforce provincial hunting and fishing regulations absent aboriginal consent if that consent was required.

The Court discussed self-government briefly, relying on its judgment in Pamajewon and stated "that rights to self-government, if they exist, cannot be framed in excessively general terms". The Court confirmed that that kind of a claim is not cognizable under Section 35.

#### V. IMPRESSION OF JUDGMENT

It has been asserted that aboriginal title, if proved, will be a significant bar to the ability of the Province to grant resource tenure in British Columbia without payment of compensation and a level of consultation commensurate with the title being infringed. What is not clear from the judgment is the extent to which the availability of compensation for infringement will allow resource tenures to be granted without fear of injunctive relief being granted to a claimant aboriginal group who seeks to prevent the grant.

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The language used in the decision is quite expansive and can be interpreted as opening the door to far reaching claims to aboriginal title for the whole of the province (and indeed that claim has been made). However it also seems clear that the Court was struggling to create a regime in which aboriginal claims will be respected (and compensation paid for infringement) while ensuring that the province remains open for business. I suspect in the long run, it will prove to be a very expensive decision for all taxpayers, but that business will continue. In the short run, I would expect to see applications for injunctions and increased pressure on the government for "interim measures" and compensation.

It is my view that the Supreme Court of Canada did not intend to stop development in the province of British Columbia by its judgment. In fact, the judgment makes it clear that the province is entitled to continue to govern the province in accordance with its constitutional mandate. It is important to remember that the only portion of the Supreme Court of Canada judgment requiring consultation amounting to consent deals with hunting and fishing rights - those rights which could be said to be integral to the distinctive culture of an aboriginal group. It is thus my view that infringement of aboriginal title where that infringement does not amount to an infringement of a right that is integral to the distinctive culture of the aboriginal group will generally be

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compensable in damages, but not subject to aboriginal veto. There is no suggestion in the Supreme Court of Canada judgment of a veto or anything approaching a veto with respect to infringements which do not relate to the distinctive culture of aboriginal peoples.

There are two cases subsequent to Delgamuukw which I think support my proposition. One referred to Delgamuukw and one did not.

In R. v. Ignace, Franklin and Pitawanakwat (BCCA) February 5, 1998: The Court of Appeal confirmed that Delgamuukw (SCC) does not change the proposition that:

"... no aboriginal jurisdiction superior to laws intended to govern all inhabitants of this Province survived the assertion of sovereignty...."

Nothing in the Supreme Court of Canada's recent decision in Delgamuukw... casts doubt on that reasoning...."

This should put to rest overbroad claims of jurisdiction.

In Cheslatta Carrier Nation v. B.C. (Environmental Assessment Act...) (January 29, 1998), Huckleberry Mines applied for a permit to develop a mine in land claimed by the Cheslatta and the Wet'suwet'en. The new Environmental Assessment Act came in to effect part way through the process. Extensive consultation took place and a permit was issued. The two Nations sought judicial review arguing violation of several administrative law duties and a failure to properly consult.

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The Court rejected all of the arguments except one: Williams C.J.S.C. found that there had been a failure to properly consult on wildlife issues. Williams C.J.S.C. went on to say the issue of remedy was a difficult one: the company had invested \$65 million (US) in reliance on a certificate that had been granted following what he now found to be a flawed process. On the other hand, the aboriginal peoples were entitled to proper consultation. In the circumstances he chose not to quash the certificate. He ordered amended, reopened consultation, with a view that the further deliberations could affect the issuance of the remaining permits. The Court declined to grant an injunction.

It is my view that the signal sent out by Delgamuukw is that the issue of aboriginal title is an issue between governments and the aboriginal peoples of Canada. There is no doubt that the provincial government will become involved where acts of the provincial government may have the effect of infringing aboriginal title, but the Supreme Court of Canada judgment re-affirms that the primary responsibility with respect to aboriginal title rest with the federal government.

One other point is, in my view, clear. Non-governmental entities have no authority whatsoever to enter into agreements with First Nations dealing with aboriginal title. Those agreements must be

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entered into between aboriginal peoples and the federal government, with such participation of the provincial government as is necessary to carry into effect the promises in the treaty. There is nothing in Delgamuukw which requires or obligates those who have derived an interest in land from the Crown to deal with or negotiate in any way with aboriginal peoples. It has always been the sole constitutional responsibility of the Crown to treat with aboriginal peoples.

#### VI. CONCLUSION

What I take from the Delgamuukw judgment is this. When Crown tenure is granted, the tenure holder should be able to assume that the government has done appropriate consultation with aboriginal peoples before granting the tenure, since constitutional law does not require third party participation in that consultation. It is my view that once tenure is granted by the Crown, it will be the rare occasion where that tenure can later be interfered with by an aboriginal title claim. It is only where the government has authorized an infringement of aboriginal title that requires consent of the aboriginal peoples that it would seem to me that the third party tenure might be in jeopardy. Thus, I see Delgamuukw as support for tenure security rather than authority for tenure jeopardy.

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Governments will likely have to compensate aboriginal peoples for any infringement of aboriginal title which has taken place to date and may take place in the future, but that may be similar to issues which regularly arise in the area of expropriation. The question will be what title was infringed and how best to value the infringement.

I am not suggesting that the power of infringement of aboriginal title I am discussing extends to those rights of title which are integral to the distinctive nature of the culture. But I do believe that the economic reality of the province must continue, subject to consultation with aboriginal peoples.

As the Supreme Court of Canada said in Delgamuukw: "Let us face it, we are all here to stay."

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## FORESTRY BULLETIN

February, 1998

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### The *Delgamuukw* Decision— IMPLICATIONS FOR THE FOREST SECTOR

(continued on page 2)

Page 104 to/à Page 112

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10/20-20/105/2828  
DEPUTY ATTORNEY GENERAL

## FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Maureen Maloney	Daniel Johnston
COMPANY:	DATE:
Deputy Attorney General	April 24, 1998
FAX NUMBER:	SENDER'S FAX NUMBER:
250-387-6224	250-722-2892
PHONE NUMBER:	SENDER'S PHONE NUMBER:
1-387-5211	250-722-2855
TOTAL NO. OF PAGES INCLUDING COVER:	SENDER'S E-MAIL:
8	danieljohnston@bc.sympatico.ca
RE:	

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## NOTES/COMMENTS:

Dear Maureen,

See attached a proposed Agenda for the April 27-29, 1998 meeting together with a self explanatory covering memorandum. I would appreciate if you would make arrangements to have the necessary distribution within your negotiating team.

Regards,

Daniel Johnston

FEED FAX THIS END

<b>FAX</b>	
To:	Philip
Dept.:	
Fax No.:	7-0887
No. of Pages:	8
From:	Nancy
Date:	April 24/98
Company:	
Fax No.:	
Comments:	As discussed.
Post-it	fax pad 7803E

Ap 24 - done  
- copy to M (via Andrew)

**ISSUES EFFECTNG TREATY NEGOTIATIONS POST-DELGAMUUKW****APRIL 27-29, 1998 MEETING  
PROPOSED AGENDA**

**Location:** Wall Garden Center Hotel  
1088 Burrard Street,  
Main Ballroom #C and #D, Third Floor

**Date and Time:** April 27 at 10:00am to 5:00 pm, lunch provided  
April 28 and 29 at 9:00 am to 5:00 pm, lunch provided  
(evening sessions may also take place)

**1.0 OPENING PRAYER****2.0 INTRODUCTIONS****3.0 AGENDA APPROVAL****4.0 REVIEW OF ANY PRELIMINARY PROCEDURAL /PROCESS ISSUES****5.0 PRELIMINARY DISCUSSION OF OUTSTANDING TOPICS - a brief discussion of each of those topics not discussed at the April 7-9, 1998 meeting - this includes**

- role of BCTC
- funding - First Nations negotiations
- principles for good faith negotiations
- system overload
- compensation

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**6.0 REPORTS FROM WORKING GROUPS**

- reconciliation of aboriginal and crown titles
- lands, resources, and interim measures
- capacity building
- certainty

**7.0 FOCUSED DISCUSSION ON DELIVERABLES** - based on the preliminary discussion of each of the topics, taken together with the work of the working groups - a focussed discussion that identifies specific areas of agreement regarding each of these issues and the manner in which such agreement shall be implemented

**8.0 FOLLOW-UP AND SHORT-TERM ACTION ITEMS** - a brief discussion to confirm specific tasks to be attended to prior to the next meeting

**9.0 FUTURE MEETING DATES** - confirm the date(s) of any further required meetings

**10.0 OTHER**

## MEMORANDUM

**TO:** PARTICIPANTS IN THE DISCUSSIONS BETWEEN THE ASSEMBLY OF FIRST NATIONS, BRITISH COLUMBIA, CANADA, AND THE FIRST NATIONS SUMMIT REGARDING ISSUES AFFECTING TREATY NEGOTIATIONS ARISING FROM THE DELGAMUUKW DECISION OF THE SUPREME COURT OF CANADA

**FROM:** DANIEL JOHNSTON, FACILITATOR

**DATE:** APRIL 23, 1998

**RE:** APRIL 27-29, 1998 MEETING - PROPOSED AGENDA

Please find attached a proposed Agenda for the April 27-29, 1998 meeting. I have the following comments/observations with respect to both the proposed Agenda and the upcoming meeting in general:

1. As with the last meeting, the first item of business at the April 27-29 meeting will be approval of the proposed Agenda
2. At the previous meeting, the importance of producing "concrete deliverables" by the end of April was stressed on several occasions. Accordingly, it will be important to set aside a significant portion of the meeting for focussed discussion on what specifically parties can agree upon with respect to each of the issues. Therefore, I propose that the meeting proceed on the following basis:
  - a) Agenda Items 1.0 - 6.0 be dealt with on April 27<sup>th</sup> even if this means continuing discussion into the evening
  - b) at the end of discussion of Agenda Item 6.0, a specific discussion take place regarding how the discussion with respect to Agenda Item 7.0 can most productively/constructively take place:
    - the answer to this will depend in part on how discussion with respect to Agenda Items 5.0 and 6.0 unfolds; and

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- having said this, I believe that the answer to this will involve, in part, finding a way to get a draft document on the table that can serve as a starting point for further discussion. In facilitation/mediation this is referred to as a "single text" approach - I will provide some additional observations at the meeting on how this can be done; and
- c) most of April 28 and 29 be set aside for discussion of Agenda Item 7.0 including an evening session on April 28, if necessary
3. Given the need to produce "concrete deliverables" as described above, the nature of the difficulty of the topics that need to be discussed, and the limited time available (eg, 3 meeting days), the manner in which parties approach/engage in discussion will be very important. I have the following comments/observations in this regard:
- a) all parties have indicated to me that it is critical from their perspective that these meetings are successful and produce "concrete deliverables". Each party has also indicated that they are very committed to making this set of discussions productive and successful. However, each party has also raised concerns that one or more of the other parties may have a different agenda and/or may not be committed to reaching agreement on the issues that the parties have before them:
- question the motives or commitment of other parties in discussions such as these is seldom productive in terms of achieving results;
  - ultimately the commitment of each party will be determined by the outcome of the discussions; and
  - if you hear one of the other parties saying something you do not like or disagree with, it is far more productive to "ask questions" of clarification or propose a different way of approaching an issue than it is to respond by question or making assumptions regarding the motives of the other party.

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- b) it is important that there is a common understanding amongst all parties regarding the extent to which the discussions are intended to have a "negotiation" orientation as opposed to a "legal" orientation
- having a "negotiation" orientation means that the parties are seeking some agreement on some "principles" that the parties will use as the basis for negotiating agreements on the various issues that they are dealing with – in other words, it means that the parties are saying "for the purposes of negotiation", we agree as "negotiators" to negotiate on the basis of the following principles and see if we can reach agreement on those matters in dispute – this can be thought as "enabling" the negotiation;
  - having a "legal" orientation means that parties will focus more on what their respective "legal rights" are and be testing different suggestions made by others against what they believe their legal rights are, what will happen if the parties go back to court, and/or, the extent to which the suggestion requires them to give up any of their "legal rights" – this type of discussion tends to be more positional and less creative;
  - even if parties agree that the objective of the discussion is to develop agreement on some "principles" and other "concrete action" that can facilitate the negotiation of treaties it is inevitable that each of the parties may have some concern regarding the manner in which such "principles" or "concrete action" may affect their legal rights if the negotiation is not successful;
  - for this reason, it is important that there be an explicit understanding between the parties as to whether any of the "principles" or "concrete action" agreed to are with or without prejudice to the legal rights of each of the parties in the event that one of the parties decides to pursue in court any issue that they are unable to successfully negotiate as part of a treaty;
  - it may also be worthwhile to note that agreement on difficult issues is often reached on the basis of parties agreeing to something different than what each of them understand or believe their "strict" legal rights to be – the strict legal rights of parties are not always synonymous with their overall interests; and

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- to the extent that any party does focus on what its legal rights are on any given issue (and parties often do in terms of what their alternatives are), it is important that such consideration is "objective" and not "subjective" – in other words, parties should think about what a court "is likely to say" about an issue as opposed to what they believe a court "should say" about an issue.
- c) on the basis of both discussions at the previous meeting and subsequent discussions with each of the parties, I shall assume, **unless any party advises me to the contrary** that:
- the parties intend the discussions at the April 27-29 meeting to have a "negotiation" orientation and not a legal one;
  - the objective of the discussions is to agree upon some clear, substantive principles that the parties can use, as negotiators, as the basis for negotiating treaties and a reconciliation of aboriginal and crown title; and
  - the discussions at the April 27-29, 1998 meeting and the principles agreed upon are without prejudice to the legal rights of the parties.
- d) another issue that it is important for the parties to give some consideration to is what level of detail that is required, eg, what level of detail constitutes a successful outcome for the April 27-29 meeting:
- is a clear statement of principles committed to by each party sufficient?
  - does it need to include details/specifcics as to how each principle is to be achieved/implemented?
  - if a clear statement of principles is sufficient, is it necessary to clearly identify the mechanic/timelines for working out the details/specifcics?
- e) on the basis of both discussions at the previous meeting and subsequent discussions with the parties I shall assume, **unless any party advises me to the contrary**, that the level of detail required is a relatively brief (eg, two to four pages) statement of clear, substantive, principles together with a clear statement/commitment as to how the specifics will be worked out and implemented

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- f) where people hear a statement being made in the discussion that they disagree with, it is often helpful to first ask questions of clarification before engaging in debate - the clarifications that result from such questions can often avoid discussion/debate on issues that are not central to those matters that need to be addressed
  - g) to the extent possible, it would be helpful in terms of time efficiency if each of the parties had a single spokesperson who could speak to each of the topics that need to be addressed under Item 5.0 of the proposed Agenda. Having said this, I wish to be very clear that this is not intended to restrict participation in the discussion with respect to those topics listed under Agenda Items 5.0 - it is only intended to assist in using our time on April 27<sup>th</sup> efficiently. Accordingly to the extent that anyone sitting at the negotiating table feels they need to speak on a topic, they should feel free to do so
  - h) it would be helpful if each of the working groups was able to have prepared a very brief written summary of the results of their discussions - ideally this would be a maximum of one to two pages in "bullet point" form
4. I currently in Europe on business this afternoon and will not be returning to Vancouver until Sunday, April 26. If there are any issues that any party wishes to discuss with me in advance of the meeting, please contact my secretary (250-722-2855) and leave a message with her and I will return your call as soon as possible. She will also be able to provide you with a fax number as to where I can be reached in Europe. I anticipate arriving back in Vancouver approximately 5pm on Sunday and will be staying overnight in Vancouver at the Four Seasons Hotel
5. If any of the parties believes that the meeting should unfold in a manner different than that described in the proposed Agenda, or has any other specific issues that they wish to discuss prior to the meeting, I would ask that they leave a message for me at the Four Seasons Hotel including a phone number as to where I can contact them on Sunday evening

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# **Post-*Delgamuukw* Consultation Guidelines**

**September 1998**

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# **I. CONSULTATION ON ABORIGINAL RIGHTS AND TITLE**

## **A. PURPOSE**

This document will describe the need to consult with First Nations on aboriginal rights and title and will outline in detail the method to consider the potential of aboriginal title in decision making processes.

## **B. BACKGROUND**

In 1982, aboriginal rights were recognized and affirmed in Section 35(1) of the *Constitution Act, 1982*. Recent court decisions have clarified the nature of aboriginal rights and, as a consequence redefined the legal relationship between the Government of British Columbia and aboriginal peoples. In short, government activities cannot infringe aboriginal rights unless there is proper justification.

In addition, the Supreme Court of Canada recently rendered the *Delgamuukw* decision. The decision discussed aboriginal title, adding new factors which must be taken into consideration during consultation with aboriginal groups.

## **C. ABORIGINAL RIGHTS**

### **The Sparrow Decision (1990, Supreme Court of Canada)**

The Court provided the following framework, known as the "*Sparrow* test", for assessing whether an action of government (such as a regulation) could conflict with an aboriginal right and does interfere with that right, and if so, whether the interference is justifiable.

The *Sparrow* test is as follows:

1. Is there an existing aboriginal right?
2. Does the proposed government activity interfere with the right because it:
  - (a) is unreasonable;
  - (b) imposes undue hardship; or
  - (c) prevents the holder of the right the preferred means of exercising it?
3. If the right is interfered with, is the interference justified because:
  - (a) there is a valid legislative objective, such as conservation;
  - (b) after conservation measures are taken, priority is given to First Nations;
  - (c) there is as little infringement as possible;
  - (d) in the case of expropriation there is fair compensation; and
  - (e) there has been consultation?

According to *Sparrow*, any proposed government regulations that infringe aboriginal rights must be constitutionally justified. The Court further ruled:

- (a) aboriginal rights are capable of being exercised in a modern manner;
- (b) governments may infringe existing aboriginal rights only for a compelling and substantial objective such as the conservation and management of resources among others; and
- (c) after conservation goals are met, aboriginal people must be given priority to fish for food over other user groups.

### **The Van der Peet Decision (1996, Supreme Court of Canada)**

Based on the *Van der Peet* decision, the following factors must be considered in determining whether an aboriginal practice constitutes an aboriginal right:

- To constitute an aboriginal right, a practice, tradition or custom must be integral to the distinctive culture of an aboriginal society; that is, it must be a central and significant part of the society's distinctive culture.
- The practice, tradition or custom must have been integral prior to contact with European society.

- Aspects of aboriginal society that are true of every society such as eating to survive do not qualify as aboriginal rights, nor do activities that are incidental or occasional to the aboriginal society.
- The existence of an aboriginal right will depend entirely on the traditions, customs and practices of the particular aboriginal community claiming the right. The scope and content of aboriginal rights must be determined on a case-by-case basis.

Aboriginal rights may include the right to use land to hunt, fish and gather wood, berries and other fruits and materials for sustenance, social, spiritual and ceremonial purposes. Trading in a resource outside the aboriginal society in a manner akin to “commercial” activity may also constitute an aboriginal right in some circumstances. In *R. v. Gladstone*, the Supreme Court of Canada held that the Heiltsuk had an aboriginal right to trade commercially in herring spawn on kelp.

#### **D. CONSULTATION PRACTICES TO DATE FOR ABORIGINAL RIGHTS**

In order to ensure that the rights of aboriginal groups are considered and protected, Provincial organizations consult with First Nations on the potential existence of aboriginal rights.

Provincial ministries and agencies have implemented a strategy to consult with aboriginal groups to gather information on aboriginal considerations related to land and resource activities. While the methods of consultation often vary from agency to agency, they are all guided by the terms of the Province’s Crown Lands Activities and Aboriginal Rights Policy Framework (attached in Appendix A) that spells out the essential principles of consultation with First Nations. This Policy was amended in 1997 to reflect recent court decisions.

Generally, provincial organizations consult using a number of tools that build on working relationships between the Province and aboriginal groups. Many agencies have drafted their own internal procedures to formalize their plans to address aboriginal issues within the context of their operations.

Methods of consultation can include:

- meetings and correspondence with aboriginal groups;
- exchanges of information related to proposed activities;
- the development and negotiation of consultation protocols;
- site visits to explain the nature of proposed activities in relation to potential aboriginal rights;
- carrying out traditional use studies; and
- participation in local advisory bodies.

These methods serve a common purpose: to incorporate the consideration of aboriginal rights within the structure of statutory decision making.

## **E. THE NEW CONSIDERATION - ABORIGINAL TITLE**

In 1997, criteria for aboriginal title were set out in a decision by the Supreme Court of Canada. This decision, known as *Delgamuukw*, sets out principles with respect to aboriginal title and provides some guidance to governments in considering aboriginal title within statutory decision making processes.

The remainder of this document discusses aboriginal title, and describes how this consideration is to be included within existing consultation processes.

## **Background - The Decision**

The Court of Appeal decision on *Delgamuukw* was appealed to the Supreme Court of Canada by hereditary chiefs of the Gitksan and Wet'suwet'en people and the provincial government. A decision was rendered on December 11, 1997.

In its decision, the Supreme Court discussed legal relating to aboriginal title including its source, content, proof and inherent limitations. No determination was made with respect to the specific claims of the Gitksan and Wet'suwet'en to aboriginal title and self-government.

No factual findings regarding the existence of aboriginal title in British Columbia were made. These were left for a new trial.

## **Legal Implications - Supreme Court of Canada Decision**

Several key points flowed from this decision. They are:

### ***Principles respecting Aboriginal Title:***

- It is a right to exclusive use and occupation of land.
- It is a proprietary interest, but it is held communally, it cannot be alienated other than to the federal government, and has certain inherent limitations to ensure its continued existence unless it is surrendered to the Crown.
- It is a particular kind of aboriginal right, being a right to the land itself.
- It includes the right to choose to what uses land can be put (not restricted to traditional uses), and includes exploitation of mineral rights.
- It is subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain the kinds of activity which made it aboriginal title land in the first place.
- Lands held pursuant to aboriginal title have an inescapable economic component.

### ***Criteria to Prove Aboriginal Title:***

- Onus of proof lies with aboriginal groups.
- The land must have been occupied prior to sovereignty (1846).
- There must be a continuity between present and pre-sovereignty occupation if present occupation is relied on as proof of pre-sovereignty occupation.
- Occupation must have been exclusive at sovereignty; although there can be shared exclusivity resulting in joint title.

### ***Infringement of Aboriginal Title:***

- Both the federal and provincial governments can infringe aboriginal title in furtherance of a compelling and substantial legislative objective and if consistent with the special fiduciary relationship between the Crown and aboriginal people.
- The Crown may justifiably infringe aboriginal title for a variety of objectives including land settlement, economic development and environmental protection provided that it can meet the justification principles established in *Delgamuukw*.
- Where aboriginal title has been proven to exist, compensation may be payable as part of the justification for infringement.

### ***Consultation:***

- There is a duty to consult with aboriginal people when the Crown by its actions will infringe aboriginal title.
- The scope of the duty of consultation will vary with the circumstances. In most cases the duty will be significantly deeper than mere consultation, and in some cases may require consent.

### **Duty of Consultation**

Provincial agencies have a duty to consult with aboriginal people when the Crown by its actions will infringe aboriginal title. The consultation required will vary with the contemplated use of the land, ranging from discussions carried out in good faith to circumstances which may require the full consent of the First Nation.

The Supreme Court of Canada provided a model to illustrate how aboriginal title relates to aboriginal rights. In this model, the Supreme Court stated that there is a spectrum of aboriginal rights. Different forms of aboriginal rights lie at different points on the spectrum, according to their degree of connection with the land.

The diagram consists of a horizontal line with arrows at both ends. Above the center of the line is the text "Aboriginal rights". Below the line are three labels, each with an upward-pointing arrow indicating its position on the spectrum:

- Cultural and linguistic rights**: Located on the left side.
- Rights relating to use of land**: Located in the middle.
- Aboriginal title (exclusive occupation)**: Located on the right side.

## Compensation

## Consultation Guidelines - September 1998

## II. CONSIDERATIONS FOR CONSULTATION - ABORIGINAL TITLE

### A. INTRODUCTION

The remainder of this document outlines principles related to aboriginal rights and title, and a process to address consultation requirements raised in the Supreme Court of Canada's decision in *Delgamuukw*. These consultation guidelines are intended to enhance existing processes in order to address the potential for aboriginal title.

Accordingly, it is assumed that staff from line agencies have already received background training in policies and procedures to avoid infringing aboriginal rights. Staff who have not received training on their consultation process for aboriginal rights need to be instructed in these practices to ensure that the guidelines for considering aboriginal title are implemented in proper context.

**The following guidelines describe how decision makers should carry out their responsibilities for the allocation, management and development of Crown land and resources within the context of:**

- (a) the Crown's obligation to consult with First Nations; and**
- (b) assessing information gathered on potential aboriginal rights and title.**

As issues of aboriginal title are complex, it is important that methods outlined below are understood and applied **in their entirety**. Applying individual components of this document outside the larger context of the guidelines increases the risk of misinterpretation. Consistent application of the guidelines in this document across government is essential.

## B. SCOPE

These consultation guidelines are effective immediately. This document will be implemented in conjunction with the Crown Land Activities and Aboriginal Rights Policy Framework and agency specific consultation procedures with respect to aboriginal rights. These guidelines apply to all applicable provincial ministries, agencies, and Crown corporations.

The guidelines do not address capacity building, interim measures, and linkage to treaty negotiations.

The guidelines below are intended to provide minimum requirements for provincial consultation activities with respect to aboriginal title. Efforts to exceed these minimum consultation requirements are encouraged.

## C. OPERATIONAL GUIDELINES

The Province recognizes the need to streamline existing consultation processes and incorporate considerations of aboriginal title outlined in *Delgamuukw*. It is essential that consultation activities are well defined and carried out efficiently.

### Consultation Principles

While the nature and scope of consultation may vary depending on specific circumstances, the fundamental principles of consultation are the same for both aboriginal rights and aboriginal title. Consultation efforts must be made in good faith with the intention of substantially addressing a First Nations' concerns relating to infringement. In practical terms, this means the quality of consultation is of primary importance.

The following principles apply to all consultation efforts, and should be followed throughout the entire process of consultation: The principles are also attached in Appendix B.

- As the onus to prove aboriginal title lies with First Nations staff must not explicitly or implicitly confirm the existence of aboriginal title when consulting with First Nations.

- The province must assess the likelihood of aboriginal rights and title prior to land or resource decisions concerning Crown land activities.
- Consultation should be carried out as early as possible in decision making.
- Consultation is the responsibility of the Crown.
- Statutory decision makers should take steps to ensure consultation activities contain proper representation from all potentially affected aboriginal groups.
- Consultation processes need to be effective and timely, and meet applicable legislative timelines where possible.
- Existing consultation procedures geared towards assessing aboriginal rights should include an assessment for the potential of aboriginal title.
- The consultation process should inform decision makers of the potential infringement of aboriginal rights or title by a proposed activity.
- Consultation on activities that involve a number of agencies should be integrated wherever possible to ensure maximum clarity and efficiency.
- Consultation processes and operational decisions must not recognize the existence of aboriginal title for areas in question.
- Consultation processes should be clearly defined to First Nations, along with explanations of how information will be used in decision making.
- Consultation processes should illustrate how data provided by a First Nation was considered in decision making processes and planning, and how it will relate to other considerations.

- Consultation processes can be carried out in a variety of ways, depending on the circumstances and nature of the proposed activity. Methods for meaningful consultation should be selected in relation to nature of the proposed activity, the requests of the First Nation, and other relevant factors.
- The consultation process will inform the First Nation(s) of the potential “on the ground” effect of a proposed activity. Information should be provided in a manageable and understandable format, with adequate time for review.

### **What the Courts Say About Consultation**

Post *Delgamuukw* decisions to date have provided further commentary on consultation, and reaffirm a number of principles from previous cases, including *Delgamuukw*:

- The courts continually encourage consultation and negotiation over litigation.
- Consultation efforts must be meaningful and provide an understanding of a project’s impact on lands and resources.
- The courts have illustrated willingness to support consultation efforts which have been carried out in good faith.
- First Nations cannot attempt to stall a project by foregoing participation until the final stages of consultation.
- Consultation is a “two-way street” requiring First Nations to participate in consultation processes.
- In the two injunction applications made post-*Delgamuukw* the courts found on a balance of convenience that the economic development of an area should not be unduly delayed given the specific circumstances of each case.

## **D. OPERATIONAL IMPLEMENTATION**

As mentioned previously, the consultation guidelines contained in this paper are intended to enhance existing processes with respect to aboriginal rights in order to address the potential for aboriginal title. This section outlines the guidelines in detail.

The process below consists of a number of steps that can be summarized as:

- Pre-Consultation Assessment
- Step 1 - Initiate Consultation
- Step 2 - Determine if Activity will infringe or interfere with aboriginal title
- Step 3 - Determine if infringement can be justified
- Step 4 - Look for opportunities to accommodate aboriginal interests/negotiate resolution

Again, it is important that each of the steps below are carried out uniformly, and in direct relation to the other elements of the guidelines. Decision makers should consult with senior level personnel in their agency and where necessary Legal Services Branch, Ministry of Attorney General, when unclear on applying the guidelines.

### **Pre-Consultation Assessment**

First Nations often state that they are not able to keep up with the volume of referrals sent by the Province. The Province shares this concern. Additionally, provincial agencies often do not receive responses from First Nations to referrals, receive blanket opposition to any development within traditional territories, or are without resources to properly carry out consultation on all activities.

In order to address this problem, a number of factors may be used to evaluate whether a particular decision or activity will require consultation. This enables the Province and First Nations to conduct more meaningful consultation on activities that are particularly critical to both parties.

## Using the Pre-Consultation Assessment

### *How do you determine if a particular type of activity requires consultation?*

By examining the nature of the decision or activity in relation to the factors outlined on the following pages, government agencies may be able to provide a “general assessment” of whether consultation is necessary. This general assessment can be used to determine whether consultation may be unnecessary before proceeding with decision making processes, or to confirm that consultation should be pursued.

Examples of factors which can be considered prior to initiating consultation are outlined on the following pages. The clear presence of a number of the factors may provide decision makers with an indication that consultation is not necessary.

### **IMPORTANT**

**It is NOT likely that a single factor would overrule the need for consultation, except in very specific cases. However, a combination of these factors could illustrate that an activity may not require consultation.**

**In situations where decision makers are unsure whether an activity warrants consultation, ALWAYS use caution and initiate the steps of consultation in Section F. The following factors are reserved for use in cases where it is EXTREMELY clear that consultation may not be necessary.**

## **E. ASSESSMENT FACTORS**

Extreme caution must be used when applying these factors, as the presence of one or more of the factors below does not preclude the potential existence of aboriginal title.

A combination of the following factors may illustrate that consultation is not required for a particular type of activity. The factors are grouped by the general headings of: Nature of Activity, Nature of Land, and Additional Factors.

**Nature of Tenure, Permit, Activity, Decision**

- **Tenures which do not convey a right to actually operate on the ground (formalize an interest in an area without affecting the land).**
- **Tenure/permit renewals with no changes.**
- **Minor tenure/permit amendments.**
- **Utility rights of way (hydro, gas, sewer, water, telephone, cable, etc.) of short length that serve existing domestic private property or subdivision.**
- **Prior or current involvement of First Nation in the activity or project (note - must be First Nation involvement, not just involvement of First Nation individuals).**
- **Permits, tenures, other approvals which are subsequent to previously consulted upon plans (e.g., cutting permit subject to forest development plan) with no change to the permit.**
- **Short term, or temporary, activities (e.g., public event)**
- **Situations where land can be easily reclaimed (e.g., campsites, recreation sites).**
- **Tenures issued pursuant to an option to purchase.**
- **Transfer of administration and control of land to federal government.**
- **Conversion of tenures/permits provided consultation was conducted prior to the issuance of the current tenure/permit, and permit was specifically discussed. (e.g., conversion of Section 14 *Land Act* permits to leases, licenses, rights of way).**
- **Survey work.**
- **Activities on private land.**
- **Administrative changes to land designations within government.**
- **Activities which reclaim land or restore lands to their original condition.**
- **Seasonal use of land (in some cases).**

## **Nature of Land**

- Small amount of land, especially where land is inaccessible (e.g., mountain top communication sites).
- Not near known traditional or archaeological site where archaeological or Traditional Use Studies have already been conducted.
- Land within a municipal/city boundary or within urbanized areas where the level of development on adjoining properties precludes the maintenance of aboriginal interests on the subject property.
- Land that has been previously developed in a manner that precludes the maintenance of aboriginal interests on the subject property.
- Low land value (economic or intrinsic).
- Removal, replacement of, or improvements to, existing infrastructure.
- No known aboriginal use or interests, based on significant efforts to obtain information on aboriginal use. (Not restricted to traditional use.)

## **Additional Factors**

- Emergency measures.
- Public safety.

*After you apply the preassessment factors, and determine that consultation is necessary, carry out the process on the following pages.*

## **F. CONSULTATION PROCESS**

In situations where consultation with First Nations is required, the four-step process outlined in this section should be applied.

It is important for decision makers to recognize and use a continuum of appropriate consultation mechanisms. The following steps provide the basis for selecting the appropriate consultation method, and questions appropriate for consideration during consultation.

## **STEP 1 INITIATE CONSULTATION**

### **STEP 1(a) CONSULTATION ACTIVITIES**

Through consultation, decision makers need to make an initial determination on the **POTENTIAL** for aboriginal rights and title.

Of course, actual consultation methods (such as phone calls, meetings, exchanges of information) will vary from situation to situation, depending upon ways in which your agency has consulted with aboriginal groups in the past, the preferences of the First Nation, the type of information needed and other specific factors.

Regardless of the method used for consultation, it is important that decision makers select the means most appropriate for gathering information needed to consider the possible existence of aboriginal rights and/or title in their decision making processes.

Where consultation does not produce adequate information, decision makers need to rely on other sources of information (archaeological studies, traditional use studies, local knowledge, archival studies etc.), to make an initial determination of whether aboriginal interests in the area give rise to potential aboriginal title issues.

### **IMPORTANT**

**In carrying out consultation activities, it is important that staff do NOT explicitly or implicitly confirm the existence of aboriginal title. The question before decision makers is to identify the **POTENTIAL** for aboriginal title in the area in question.**

<p style="text-align: center;"><b>STEP 1(b)</b> <b>ASSESSING THE POTENTIAL FOR ABORIGINAL TITLE</b></p>
---

In addition to consulting on aboriginal rights, decision makers need to undertake an “assessment” of whether aboriginal title may exist. Remember, decision makers are not to confirm or verify the existence of aboriginal title. The real question is to find out the potential of aboriginal title for the area in question.

A number of general “indicators” of aboriginal title can be used to assist in determining whether aboriginal title is a likely consideration. Decision makers should use these indicators in conjunction with information gathered through consultation and from other sources.

**Indicators for the Potential of Aboriginal Title**

A combination of the following may indicate the potential for existence of aboriginal title, and may indicate a need to increase the level of consultation:

- Title to the land has been continuously held in the name of the Crown.
- Indicators of aboriginal interests in the land, such as:
  - (a) land near or adjacent to a reserve or former settlement or village sites;
  - (b) land in areas of traditional use or archaeological sites;
  - (c) land used for aboriginal activities;
  - (d) notice of interest/aboriginal title from a First Nation; and
  - (e) land subject to a specific claim.
- Undeveloped land such as parcels outside an urban area and close to known fishing, hunting, trapping, gathering or cultural sites.

If a decision maker encounters a number of the indicators above during the consultation process, they need to consider the POTENTIAL for aboriginal title in their decision making processes.

Similarly, there are a number of indicators that can point out that aboriginal title may not be a consideration in decision making processes.

### **Indicators Against the Potential of Aboriginal Title**

A combination of the following may reduce the likelihood of existence of aboriginal title, and can indicate that lower levels of consultation are necessary:

- Land alienated to third parties (length of occupation, and use and development by others will be important).
- Land alienated on a long term lease to third parties.
- Land within an area subject to an existing treaty (i.e., Treaty 8, Douglas Treaties).
- Land developed.
- Land distant from reserves or settlement areas with no known aboriginal interests.
- Land within an urban area, or surrounded by development lands.
- No indication that an aboriginal group has maintained a substantial connection or special bond with the land since 1846.

***Decision makers must now make the following decision:***

#### **STEP 1 DECISION**

**⇒If there is a potential of aboriginal title issues, go to Step 2.**

**⇒If there is little or no likelihood of aboriginal title issues, make decision to proceed.**

If decision makers determine there is no likelihood for aboriginal title, they must remember that the consideration of ABORIGINAL RIGHTS issues must STILL be part of decision making processes. Refer to your agency's procedures with regard to aboriginal rights.

**STEP 2**  
**DETERMINE IF THE ACTIVITY WILL INFRINGE  
OR INTERFERE WITH ABORIGINAL TITLE**

This step involves reviewing the details of the proposed activity. Decision makers must determine whether the proposed activity is likely to infringe or interfere with the identified potential for aboriginal title.

Considerations for this process include:

- Does the proposed activity interfere with aboriginal activities on the land? (*This would not be limited to traditional activities.*)
- Will the activity change or damage the nature of the land, *and to what extent?*
- If there is proposed resource extraction, is the resource renewable or non-renewable?
- Will any of the land be sold to third parties as part of this activity?
- Will long term leases or tenures be provided to third parties?
- Are the leases or tenures renewable?

*Decision makers must now make a decision with respect to the potential for infringement:*

**STEP 2 DECISION**

⇒ If there is a likelihood of infringement, go to Step 3.

⇒ If there is little or no likelihood of infringement, make decision to proceed.

Again, if decision makers determine there is no likelihood for infringement, they must remember that the consideration of aboriginal rights issues must still be part of decision making processes.

### **STEP 3**

## **DETERMINE IF THE INFRINGEMENT CAN BE JUSTIFIED**

The Supreme Court of Canada outlined the following test to justify infringement of aboriginal title. Decision makers must ensure that factors under **both** 1 and 2 below are considered and met:

**1. *Is the infringement in furtherance of a legislative objective that is compelling and substantial?***

Compelling and substantial objectives are those which are directed at one of the purposes underlying the recognition and affirmation of aboriginal rights contained in s. 35 of the *Constitution Act, 1982*. In other words, this is a requirement that the legislative objective be compelling and substantial, and provides for a recognition of the aboriginal right in issue and seeks to reconcile that right with broader community interests.

The Supreme Court of Canada specifically stated that the development of agriculture, forestry, mining, hydroelectric power, the general economic development of the Province, protection of environment or endangered species, the building of infrastructure, and the settlement of foreign populations are the kinds of objectives that meet this test. Other court decisions have identified conservation, public safety, historical reliance on a resource by non-aboriginal people and regional economic fairness as valid legislative objectives.

**2. *Did the Crown meet its fiduciary obligation?***

The Supreme Court of Canada stated that fiduciary relationship between the Crown and aboriginal people may be satisfied by the involvement of aboriginal people in the decisions taken with respect to the land. The nature and scope of the duty to consult will vary with the circumstances, ranging from mere consultation to consent in some cases.

The Supreme Court was clear that in most cases that aboriginal involvement in decision making had to be greater than “mere

consultation.” The consultation must be in good faith and with the intention of substantially addressing the First Nations concerns regarding infringement.

### **Factors to Consider:**

In order to assist the decision maker in determining if a proposed development activity may justifiably infringe an identified potential for aboriginal title, it is recommended that they carefully analyze the details of the project in the following context. Be sure to document and describe all of the factors weighed during consideration.

- Extent of infringement: There is a range of the types of justifiable infringements to aboriginal title (e.g., development with no chance of reclaiming land to its natural state vs. development of renewable resources). Types and levels of justifiable infringement may depend on the aboriginal connection to the land (e.g., infringement of potential title over a village site may have greater ramifications for government than infringement of potential title arising on hunting grounds).
- Extent to which the fiduciary duty has been fulfilled: Has there been significant consultation and substantial effort to address any identified First Nations’ concerns? Again, every effort to minimize infringement is required.

*The decision for Step 3 follows. For anything other than minor infringements, decision makers should consult with senior level ministry personnel, and where necessary, Legal Services Branch, Ministry of Attorney General.*

#### **STEP 3 DECISION**

⇒If the infringement is not justifiable, go to Step 4.

⇒If the infringement is justifiable, make decision to proceed.

**STEP 4**  
**LOOK FOR OPPORTUNITIES TO ACCOMMODATE**  
**ABORIGINAL INTERESTS,**  
**OR NEGOTIATE A RESOLUTION**

If it is likely that the infringement examined during Step 3 is not justifiable, decision makers need to attempt to negotiate a resolution of the issue with the First Nation, or find a way to accommodate the interests of the First Nation, allowing the project to proceed.

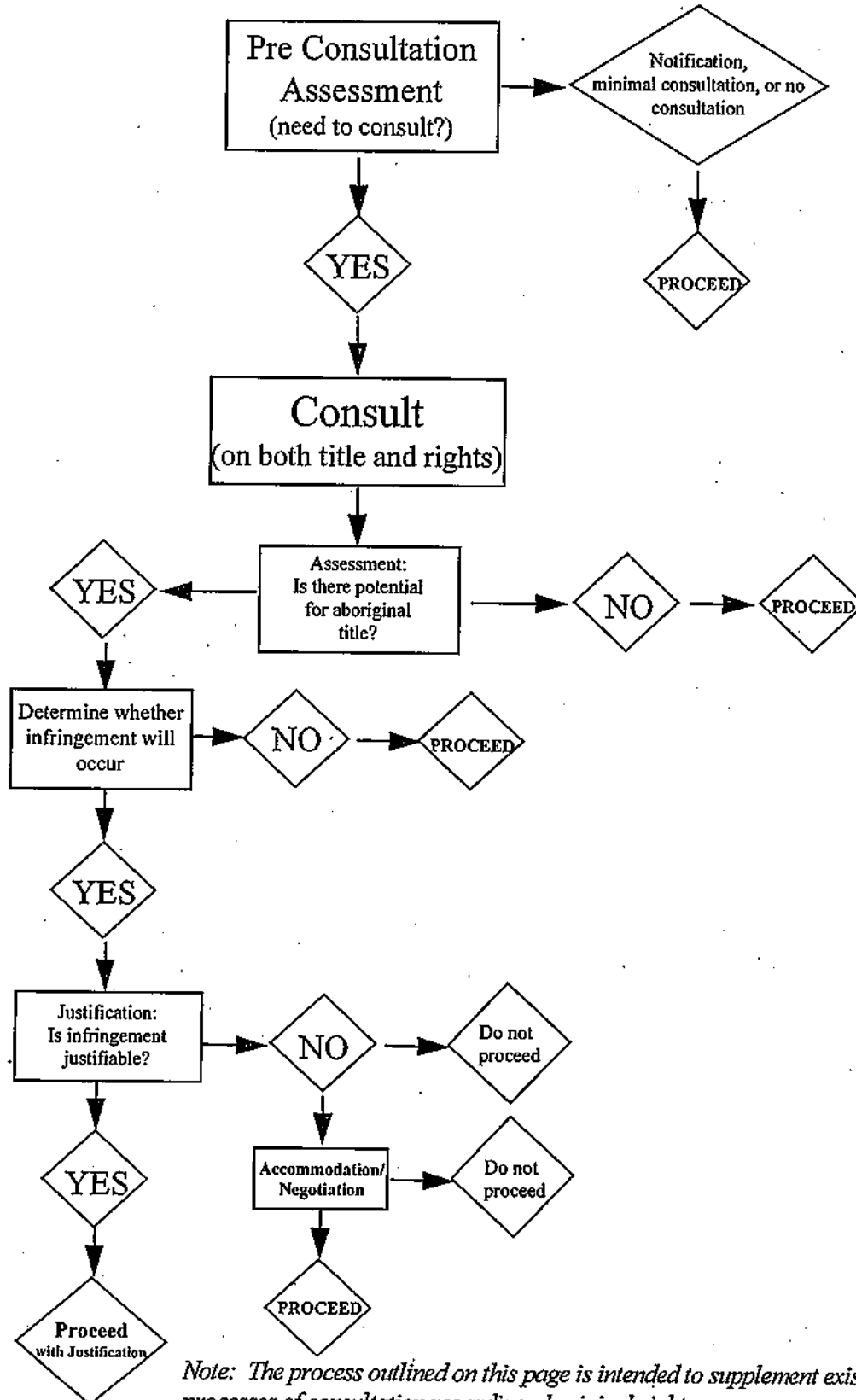
This step may involve the use of interim measures, programs, training, economic development opportunities, etc. The range of activities that can be carried out in terms of coming to a negotiated resolution vary greatly from situation to situation, and according to agency policies and abilities.

In exceptional circumstances, this step may also involve seeking First Nations' consent. Seeking consent should be reserved for situations where the proposed activity is of critical economic importance to the Province and the indicators of aboriginal title are strong. Consent should only be sought after senior level review is completed in conjunction with legal advice.

**STEP 4 DECISION**

- ⇒ If accommodation or negotiation successful, make decision to proceed.**
- ⇒ If resolution cannot be gained at this stage through negotiation, accommodation or other methods, it may be necessary to reevaluate the project.**

## Title Consultation Flowchart



*Note: The process outlined on this page is intended to supplement existing processes of consultation regarding aboriginal rights.*

## **Appendix A**

### **Crown Land Activities and Aboriginal Rights Policy Framework**

## **Appendix B.**

### **Consultation Principles**

## CONSULTATION PRINCIPLES

- As the onus to prove aboriginal title lies with First Nations staff must not explicitly or implicitly confirm the existence of aboriginal title when consulting with First Nations.
- The province must assess the likelihood of aboriginal rights and title prior to land or resource decisions concerning Crown land activities.
- Consultation should be carried out as early as possible in decision making.
- Consultation is the responsibility of the Crown.
- Statutory decision makers should take steps to ensure consultation activities contain proper representation from all potentially affected aboriginal groups.
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- The consultation process will inform the First Nation(s) of the potential "on the ground" effect of a proposed activity. Information should be provided in a manageable and understandable format, with adequate time for review.

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# Delgamuukw: A Year in Reflection

Dr. Frank Cassidy

**GOLDEN CITY RESTAURANT**

721 Fisgard Street

January 20, 1999 / 11:45 am to 1:15 p.m.

The Delgamuukw judgement was handed down in December 1997. The Supreme Court of Canada's Judgement was a historic landmark confirming that Aboriginal title is a constitutionally protected right. The Judgement has critical ramifications for the British Columbia Treaty process as well as the future relationship of Aboriginal People and Canada.

In this presentation, Dr. Cassidy will focus on the economic and political implications of the Delgamuukw Judgement in past year.

Dr. Frank Cassidy is a member of the faculty of the School of Public Administration of the University of Victoria. He was the Founding Director of the Schools program in the Administration of Aboriginal Governments. He was a Senior Research Fellow with the Royal Commission on Aboriginal Peoples and has been a Visiting Fellow at the Australian National University.

Dr. Cassidy is currently the Treaty Advisor to the Wet'suwet'en Hereditary Chiefs. He is the editor of *Aboriginal Title in British Columbia: Delgamuukw v. the Queen, Aboriginal Self Determination and Reaching Just Settlements*. Dr. Cassidy has an MA and PhD in political theory and Public Administration from Stanford University.

Dr. Cassidy has a long history of working with Aboriginal Peoples, is the conference chair of "Delgamuukw: One Year After" conference to be held at the Victoria Conference Centre, February 17, 18 and 19. You may find the conference website an interesting one (<http://uvcs.uvic.ca/conference/>).

**Menu:** Golden City will provide a pleasant assortment of Chinese Food without MSG for vegetarians and non-vegetarians.

**Note:** Space is limited. Please register early. Regrettably, due to reservation obligations, cancellations with less than 48 hours prior to the event or "no-shows" will be required to cover the ticket price. Please indicate if a vegetarian meal is required.

**RSVP:** Nicole Jeannotte (Event Registrar)

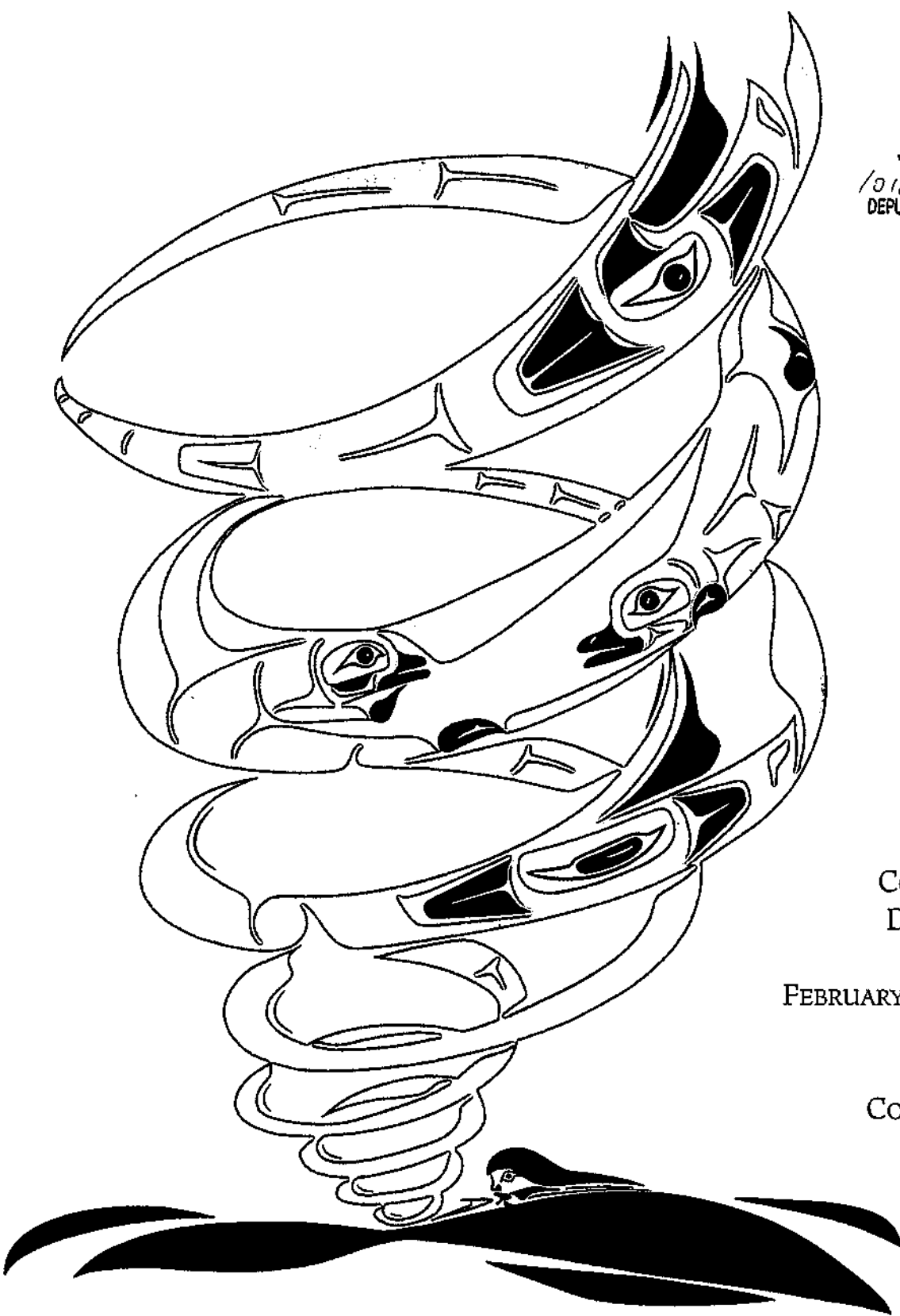
Phone 658 - 8753 Email: [njeannotte@inetex.com](mailto:njeannotte@inetex.com)

Web Registration: <http://www.islandnet.com/~ipac>

**Cost:** Members \$12.00, Students \$12.00, Non-members \$15.00

Please visit and bookmark the IPAC Victoria web site at  
<http://www.islandnet.com/~ipac/> for information on upcoming events.

# "Delgamuukw: One Year After"



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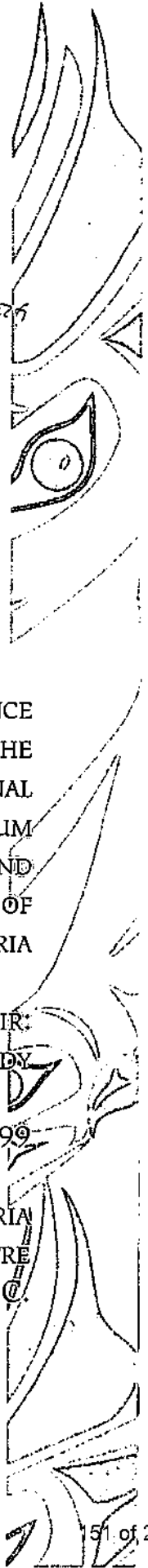
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DEPUTY ATTORNEY GENERAL

A CONFERENCE  
SPONSORED BY THE  
ABORIGINAL  
POLICY FORUM  
AND  
UNIVERSITY OF  
VICTORIA

CONFERENCE CHAIR:  
DR. FRANK CASSIDY

FEBRUARY 18 AND 19, 1999

VICTORIA  
CONFERENCE CENTRE  
VICTORIA, B.C.



## Conference Objectives

The Conference participants will explore and discuss:

- The general impact of the Supreme Court of Canada's Delgamuukw judgment in the year since this judgment was rendered;
- The influence of Delgamuukw on the law and the legal system;
- The implications of Delgamuukw for treaty-making in Canada;
- The responsibilities of the Crown to Aboriginal peoples with regard to lands and resource development;
- The nature of compensation for infringements on Aboriginal title;
- The uses of oral histories by the courts;
- The possibilities of Aboriginal self-government after Delgamuukw;
- The meaning of Aboriginal title.

## Preliminary Conference Schedule

### WEDNESDAY, FEBRUARY 17, 1999

6:00 PM- 9:00 PM Registration and  
Opening Reception

### THURSDAY, FEBRUARY 18, 1999

8:00 AM Registration and Coffee/Tea/Muffins

9:00 AM Welcome

9:15 AM Introduction—"Delgamuukw:  
Understanding the Decision and its  
Legacy"—Frank Cassidy, University  
of Victoria, Conference Chair

9:45 AM Panel—"The First Year:  
An Assessment by the Key Parties"

10:45 AM BREAK

11:00 AM "The First Year":  
Audience Q & A with Panel

11:45 AM LUNCH—Free time

1:00 PM "Changing the Legal Landscape"

2:30 PM Workshops, Session 1  
Session A

"Respecting Oral Histories"

Session B

"Defining Meaningful Consultation"

3:45 PM BREAK

4:00 PM Workshops, Session 2  
Session C

"Providing Just Compensation"

Session D

"Recognizing Aboriginal  
Self-Government"

5:15 PM Adjourn for the day.

### FRIDAY, FEBRUARY 19, 1999

8:15 AM Coffee/Tea/Muffins

8:30 AM Opening

9:15 AM Panel—"Rethinking Treaty-Making"

10:30 AM BREAK

10:45 AM "Rethinking Treaty-Making" (cont'd)

11:45 AM LUNCH—Free time

1:00 PM Youth Forum  
"Delgamuukw and the Future"

2:30 PM BREAK

2:45 PM Panel  
"The Meaning of Aboriginal Title"  
Audience Q & A

4:30 PM Conference Conclusion

#### The Logo:

#### WHIRLPOOL (FROG & RAVEN)

"This Whirlpool of wind is a significant sign to the Indian Medicine Man to tell him when his healing power is good or successful. It (the Whirlpool) appears as a sign and is very small; if a man isn't aware or on his toes, he could miss the sign. The designs of the Frog & Raven show that the Frog & Raven family (clan) song was used to do the particular healing."

#### The Artist:

#### Robert Sebastian

Robert is a member of Hagwilgate Village and is of Gitksan/Carrier ancestry. Born in 1952, he studied at the Gitanmaax School of Northwest Coast Indian Art ('Ksan). He is a member of the 'Ksan dancers of Hazelton and maintains an active role in the culture of his people. Robert developed his own distinctive style which has been widely exhibited across North America. He presently lives and paints in Prince George, BC.

## Proposed Speakers

Frank Cassidy, University of Victoria, Chair  
Gerald Alfred, University of Victoria  
Leslie Brown, University of Victoria  
Carol Corcoran, Indian Claims Commission  
Hamar Foster, University of Victoria  
Dan George, Office of the Wet'suwet'en  
Herb George, Assembly of First Nations  
Lydia Hwitsum, Chief, Cowichan Band  
Edward John, First Nations Summit  
Alfred Joseph, Wet'suwet'en Hereditary Chief  
Mary Koyl, Province of British Columbia  
Gerry Lampert, Business Council of British  
Barbara Lane, Victoria  
John Langford, University of Victoria  
Evert Lindquist, University of Victoria  
Joanne Lysyk, Blake Cassels & Graydon  
Medeek, Wet'suwet'en Hereditary Chief;  
Kent McNeil, York University; Osgoode Law School  
Louise Mandell, Mandell Pinder  
Ron McDonald, COFI  
Maria Morellato, Blake Cassels & Graydon  
Doreen Mullins, Canada  
Gary Patsy, Gitksan Treaty Office  
Tony Penikett, Province of British Columbia  
Wendy Porteous, Federal Treaty Negotiation Office  
Miles Richardson, British Columbia Treaty Commission  
Don Ryan, Gitksan Treaty Office  
Gordon Sebastian, Gitksan  
Brian Smith, BC Hydro  
Jim Tully, University of Victoria  
Gillian Trumper, Mayor, Port Alberni  
Ardyth Wilson, Gitksan Treaty Office

## Co- Sponsors:

Assembly of First Nations  
Department of Political Science, University of Victoria  
Federal Treaty Negotiation Office, Department of  
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Indigenous Government Program,  
University of Victoria  
Ministry of Aboriginal Affairs,  
Province of British Columbia  
Office of the Wet'suwet'en  
School of Public Administration,  
University of Victoria

For more information and updates please go to the  
Conference Web Site:

[WWW.UVCS.UVIC.CA/conf/delgamu2/](http://WWW.UVCS.UVIC.CA/conf/delgamu2/)

For faxed information please contact:

Conference Management,

Division of Continuing Studies

University of Victoria,

PO Box 3030 STN CSC,

Victoria BC V8W 3N6 Canada

Phone: 250 721 8703; Fax: 250 721 8774;

E-mail: [vemery@uvcs.uvic.ca](mailto:vemery@uvcs.uvic.ca)

Courier Address: University Centre Building,  
2nd Floor, Room A277

## Accommodation

A special conference rate has been negotiated for delegates at the following downtown hotels and a suburban hotel. All rooms are subject to 10% hotel tax and 7% GST. Please make your own reservations and remember to identify yourself as a participant in the *Delgamuukw : One Year After* conference in order to obtain the special conference rates. Quote the reservation number.

### Empress Hotel

721 Government Street

Victoria, BC, V9W 1W5 Canada

Phone: (250) 384-8111 (ask for reservations);

Fax: (250) 381-5959

Reservations number: 1-800-441-1414

Rate: \$110.00 Single or double rooms

[HTTP://VVV.COM/EMPRESS/](http://VVV.COM/EMPRESS/)

Hotel is adjacent to the Victoria Conference Centre

### Chateau Victoria Hotel

740 Burdett Avenue

Victoria, BC V8W 1B2

Phone: (250) 382-4221; Fax: (250) 380-1950

Reservations: 1-800-663-5891

Single/Double Standard Room: \$72.00 CDN

Single/Double Suites: \$85.00 CDN

Quote Reservation #414119

Four diamond hotel with indoor pool, whirlpool,  
non-smoking rooms available.

Located across the street from the Conference Centre.

### Executive House Hotel

777 Douglas Street

Victoria, BC, Canada V8W 2B5

Phone: (250) 388-5111; Fax: (250) 385-1323

Reservations: 1-800-663-7001

Single/Double Superior Room: \$70.00 CDN

Single/Double Deluxe One Bedroom Suites: \$85.00

CDN; Additional Person \$15.00, plus tax

Located across the street from the Conference Centre.

### Oak Bay Beach Hotel

1175 Beach Drive

Victoria, BC, Canada, V8S 2N2

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# "Delgamuukw: One Year After"

February 18 & 19, 1999

Victoria Conference Centre

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REGISTRATION DEADLINE: FEBRUARY 12, 1999

CODG600-1999S1

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(for namebadge) (first) (last)

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(for namebadge)

Address: \_\_\_\_\_  
(suite number/street/RR#)

\_\_\_\_\_  
(city) (province/state) (zip/postal code) (country)

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Yes, I have **SPECIAL NEEDS**: (please provide details)

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Full Fee \$347.75 (\$325.00 + \$22.75 GST) \$ \_\_\_\_\_

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Signed: \_\_\_\_\_ Date: \_\_\_\_\_

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A processing fee of \$50.00 will be withheld for any cancellation prior to February 12, 1999. No refunds will be given for cancellations received after February 12, 1999. Refunds will be mailed after the conference.

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**"Delgamuukw: One Year After"** c/o Conference Management, Division of Continuing Studies

University of Victoria, PO Box 3030 STN CSC, Victoria BC V8W 3N6 Canada

Phone: (250) 721-8703; Fax: (250) 721-8774 Email: register@uvcs.uvic.ca

**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, January 11, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**RECEIVED**  
N/E  
JAN 08 1999  
201-33 108  
DEPUTY ATTORNEY GENERAL

**AGENDA**

1. Interim Measures:
  - Mandate for Corporate Co-ordination and Financing of Interim Measures
  - Draft Toolbox Letter
  - Land Set-Asides Paper
2. Report from December 17-18, 1998, and January 6-8, 1999, Tripartite Meetings
3. Items for December Report to Cabinet
4. Regular Reports:
  - Interim Measures Update
  - *Delgamuukw* Accounts Receivable
  - Schedule of Upcoming Events
5. Bridgepoint Project
6. BCTC Interim Report: Strengthening First Nations for Treaty Purposes
7. Referral Processing
8. Other Business:
  - Next Meeting

**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, January 25, 1999**  
**9:30 AM TO 11:00AM**  
**CABINET CHAMBERS**

RECEIVED  
JAN 21 1999  
201-30/05  
DEPUTY ATTORNEY GENERAL

**AGENDA**

1. Report from January 14 - 15, 1999, Tripartite Meetings
  - Obstacles to Progress Report
2. Mandate for Corporate Co-ordination and Financing of Interim Measures – Draft Cabinet Document
3. Items for January Report to Cabinet
4. Regular Reports:
  - Interim Measures Update
    - Gitksan IMA Negotiations
  - Delgamuukw Accounts Receivable
  - Schedule of Upcoming Events
5. Report on Implementation of Consultation Guidelines
6. Referral Processing
7. BCAL Correspondence
8. Water Use Planning
9. Other Business:
  - Next Meeting

## I N T E R O F F I C E   M E M O R A N D U M

**Created:** 04-Feb-1999 03:39pm PST  
**Sent:** 04-Feb-1999 03:40pm PST  
**From:** Nancy Lane of AG  
NLANE  
**Title.** Executive Coordinator/Deputy AG'  
**Dept:** Ministry of Attorney General  
**Tel No:** 387-1578

**TO:** Sandi Krenbrink ( Sandi.Krenbrink@gems2.gov.bc.ca@G

**Subject:** DDC meeting - February 8th, 1999

Maureen Maloney will not be able to attend the meeting on February 8th, 1999.

**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, February 22, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**RECEIVED**  
N/E  
FEB 19 1999  
201-30/DE  
DEPUTY ATTORNEY GENERAL

**AGENDA**

1. Tulsequah Chief Mine Update
2. MAA Treaty Priority List
3. Consultation Guidelines Progress Report and Implementation Recommendations
  - Use/Placement of FTEs
4. MCF Strategic Plan
5. Items for February Report to Cabinet
6. Regular Reports:
  - Interim Measures Update
  - *Delgamuukw* Accounts Receivable
  - Schedule of Upcoming Events
7. Tripartite Review Report
8. Other Business:
  - Next Meeting

**Subject: DMC on Delgamuukw**

**Date:** Tue, 02 Mar 1999 14:48:20 -0800

**From:** nancy lane <nancy.lane@ag.gov.bc.ca>

**Organization:** Ministry of Attorney General

**To:** Sandi J Krenbrink <Sandi.Krenbrink@gems2.gov.bc.ca>

Would you please e-mail a list of the membership for this committee - or  
fax 7-6224.

Thanks!!!!!!!!!!!!!!

Del Mar.

forwarded to Debbie Mar

**DELGAMUUKW DEPUTIES COMMITTEE**

	Telephone Number	Fax Number
John Allan Deputy Minister Ministry of Forests	356-5012	387-7065
Don Avison Deputy Minister Crown Corporations Secretariat	952-0759	952-0777
Claire Dansereau Associate Deputy Minister Ministry of Transportation and Highways	387-3280	387-6431
Cassie Doyle Deputy Minister Ministry of Environment, Lands and Parks	387-5429	387-6003
Charles Kang Deputy Minister Ministry of Employment and Investment	952-0102	952-0600
Jack Ebbels Deputy Minister Ministry of Energy, Mines and Petroleum Resources	952-0227	952-0269
Maureen Maloney Deputy Attorney General Ministry of Attorney General & Responsible for Multiculturalism, Human Rights & Immigration	356-0149	387-6224
Lawrie McFarlane Secretary to Treasury Board	387-3184	356-9054
Catharine Read Deputy Minister Ministry of Agriculture and Food	356-1800	356-8392
Philip Steenkamp Deputy Minister Ministry of Aboriginal Affairs	387-6838	387-6073
Chris Trumpy Deputy Minister Ministry of Finance and Corporate Relations	387-6206	387-9099

Bill Valentine Deputy Minister Ministry of Fisheries	387-3190	387-3291
Sheila Wynn Deputy Minister Environmental Assessment Office	356-7475	356-7477
Brenda Edwards Assistant Deputy Minister Office of the Premier	356-2206	356-7258
Tony Penikett Deputy Minister, Negotiations	387-0234	387-6687
Lorne Seitz Chair, President and Chief Executive Officer British Columbia Assets and Land Corporation	952-6247	952-6237
Judy Cavanagh Assistant Deputy Minister Intergovernmental Relations Secretariat	387-0752	387-1920

*Last Updated: December 10, 1998*

**Subject:** DDC

**Date:** Thu, 04 Mar 1999 11:36:00 -0800

**From:** "Krenbrink, Sandi J NEG:EX" <Sandi.Krenbrink@gems2.gov.bc.ca>

**To:** "Lane, Nancy AG:EU" <nancy.lane@ag.gov.bc.ca>

> Please find enclosed the Agenda for the March 8, 1999, Delgamuukw Deputies  
> Committee meeting. If your Deputy is unable to attend, please contact me  
> as no alternates are to attend.

>

>

<<March 8.doc>>

Sandi

Sandi Krenbrink

Senior Executive Administrative Assistant

Negotiations Project Team

3rd Floor, 468 Belleville Street

Victoria, BC V8V 1X4



March 8.doc

**Name:** March 8.doc

**Type:** Winword File (application/msword)

**Encoding:** base64

**DELGAMUUKW DEPUTIES COMMITTEE**

**Meeting**

**Monday, March 8, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**



**AGENDA**

1. MAA Priority List
2. Update on Post-Delgamuukw Financing Negotiations
3. Items for Report to Cabinet
4. Regular Reports:
  - Interim Measures Update
  - *Delgamuukw* Accounts Receivable
  - Schedule of Upcoming Events
5. Other Business:
  - Next Meeting

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resource" FTEs, such as those recommended for the Ministry of Attorney General, and/or the Archaeology Branch. Members of the inter-ministerial committee have also restated this suggestion in reviewing FTE requests from Ministry of Attorney General and Archaeology Branch.

**Option B:**

**Allocate 12 FTEs in order of priority, dropping off a single "low priority" agency.** The FTE assigned the least relative priority by the inter-ministerial committee (Archaeology Branch) would be omitted. This would reduce the recommended FTEs (13) to the original allocation amount (12).

**Option C:**

**Formalize sharing arrangements between eligible agencies.**

Three of the participating agencies (Ministry of Fisheries, Ministry of Environment, Lands and Parks and BC Assets and Land Corporation) noted that they could share an FTE if their original allocation requests could not be met.

A sharing arrangement between two or more agencies (such as BCALC, MELP and Fisheries for aquaculture tenures) could provide a collective resource if DDC decides to reallocate the MAA FTE amounts. This, however, would create administrative difficulty while not fully meeting the needs of individual ministries.

**Recommended Option****Option A:**

**Use MAA FTE(s) to supplement for one or more of the "collective resource" FTEs.**

Pending discussions regarding the role and use of the 4 FTEs originally allocated to the Ministry of Aboriginal Affairs, this is a plausible option for one or more of the "collective resource" FTEs, notably those recommended for Ministry of Attorney General.

**Subject: FW: Degalmuukw Deputies Committee meeting**


**Date:** Thu, 18 Mar 1999 11:47:49 -0800

**From:** "Krenbrink, Sandi J NEG:EX" <Sandi.Krenbrink@gems2.gov.bc.ca>

**To:** "Lane, Nancy AG:EU" <nancy.lane@ag.gov.bc.ca>

Sandi Krenbrink  
Executive Administrative Assistant  
Negotiations Project Team  
3rd Floor, 468 Belleville Street  
Victoria, BC V8V 1X4

> -----  
> **From:** Krenbrink, Sandi J NEG:EX  
> **Sent:** Thursday, March 18, 1999 11:46 AM  
> **To:** Adrienne Greene; Andrea de Lestard; Carrol Derksen; Chris Cliff;  
> Denise Durand-Hutchinson; Diane Roberts; Felicity Adams; Gloria Woods;  
> Judy Huff; Liz Kenny; Marlene Patton; Nancy Lane; Nancy Murray; Sunny  
> Collier; Susan Evans; Teri Collins  
> **Subject:** Degalmuukw Deputies Committee meeting  
> **Importance:** High  
>  
> Please find enclosed the Agenda for the Monday, March 22, DDC meeting.  
> Please note that the meeting time has been changed to 8:00 am - 10:00 am  
> due to the scheduling of a Deputy Ministers' Council meeting.  
>  
> Thanks  
> Sandi  
>  
> <<Agenda.doc>>  
> Sandi Krenbrink  
> Executive Administrative Assistant  
> Negotiations Project Team  
> 3rd Floor, 468 Belleville Street  
> Victoria, BC V8V 1X4  
>

 March 22.doc	<b>Name:</b> March 22.doc <b>Type:</b> Winword File (application/msword) <b>Encoding:</b> base64 <b>Description:</b> Agenda.doc <b>Download Status:</b> Not downloaded with message
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**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, March 22, 1999  
8:00 AM TO 10:00AM  
CABINET CHAMBERS**

**AGENDA**

1. Expedited Treaty – Presentation
2. Report on the Implementation of Consultation Guidelines
  - Implementation Recommendations
  - Use/Placement of FTEs
  - Letter to First Nations Summit confirming agreement on Consultation Policy
3. Mandate for Corporate Co-ordination and Financing of Interim Measures:
  - Update on Post-Delgamuukw Financing
  - Tuc Inlet Presentation
4. Other Business:
  - Next Meeting

FEED FAX THIS END

<b>FAX</b>	
To: <u>Del</u>	
Dept.: _____	
Fax No.: _____	
No. of Pages: <u>2</u>	
From: <u>Nancy</u>	
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Company: _____	
Fax No.: _____	
Comments: _____	
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**DELGAMUUKW DEPUTIES COMMITTEE**

**Meeting**

**Tuesday, April 6, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**AGENDA**

1. Update on Post-*Delgamuukw* Financing Negotiations
2. Consultation:
  - Letter to First confirming agreement on Consultation Policy (Deferred)
3. Items for Report to Cabinet
4. Regular Reports:
  - Interim Measures Update Nations Summit
  - *Delgamuukw* Accounts Receivable
  - Schedule of Upcoming Events
5. Other Business:
  - Future of DDC
  - Next Meeting

**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, April 19, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**AGENDA**

1. Update on Post-*Delgamuukw* Financing Negotiations
2. Background on Tenure System
3. Consultation:
  - Use/Placement of FTEs
4. Items for Report to Cabinet
5. Gitanyow Decision - *Jill & Rob will attend @ 10:15 AM*
6. Regular Reports:
  - Interim Measures Update
  - *Delgamuukw* Accounts Receivable
  - Schedule of Upcoming Events
7. Other Business:
  - Principals' Meeting
  - Next Meeting

201-30/PE

**Subject: Next Delgamuukw Meeting**

**Date:** Thu, 29 Apr 1999 10:30:44 -0700

**From:** "Krenbrink, Sandi J NEG:EX" <Sandi.Krenbrink@gems2.gov.bc.ca>

**To:** Adrienne Greene <Adrienne.Greene@gems1.gov.bc.ca>,  
Andrea de Lestard <Andrea.DeLestard@gems5.gov.bc.ca>,  
Bobbi Plecas <Bobbi.Plecas@gems9.gov.bc.ca>,  
Carrol Derksen <Carrol.Derksen@gems9.gov.bc.ca>,  
Chris Cliff <Chris.Cliff@gems2.gov.bc.ca>,  
Diane Roberts <Diane.Roberts@gems4.gov.bc.ca>,  
Felicity Adams <Felicity.Adams@gems3.gov.bc.ca>,  
Judy Huff <judy.huff@gems5.gov.bc.ca>, Liz Kenny <L.Kenny@vines.gems.gov.bc.ca>,  
Marlene Patton <Marlene.Patton@gems3.gov.bc.ca>,  
Nancy Murray <Nancy.Murray@gems5.gov.bc.ca>, nancy.lane@ag.gov.bc.ca,  
Sunny Collier <Sunny.Collier@gems1.gov.bc.ca>,  
Susan Evans <Susan.Evans@gems6.gov.bc.ca>,  
Teri Collins <Teri.Collins@gems9.gov.bc.ca>

**CC:** "Williamson, Linda PREM:EX" <Linda.Williamson@gems7.gov.bc.ca>



The May 10 meeting has been canceled. The next meeting will take place on May 17, 9:30 - 11:00 am, in Cabinet Chambers. Please note that effective May 3, 1999, Tony will be working out of the CPCS Offices, 4th Floor, 617 Government Street and can be contacted at 387-1337. As I will no longer be working with Tony after April 30, please contact him directly regarding DDC.

Sandi

Sandi Krenbrink  
Executive Administrative Assistant  
Negotiations Project Team  
3rd Floor, 468 Belleville Street  
Victoria, BC V8V 1X4

## FACSIMILE COVER SHEET

MINISTRY OF ATTORNEY GENERAL  
LEGAL SERVICES BRANCH  
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V8V 1X4

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DEPUTY ATTORNEY GENERAL

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DATE: May 12, 1999

TO:	Philip Steenkamp	7.6073	Jack Ebbels	2.0269
	Maureen Maloney	7.6224	Sheila Wynn	6.7477
	John Allan	7.7065	Catharine Read	6.8392
	Bill Valentine	7.3291	Chris Trumpy	7.9099
	Cassie Doyle	7.6003	Lawrie McFarlane	6.9054
	Claire Dansereau	7.6431	Bobbi Plecas	6.7258
	Don Avison	2.0777	George Ford	6.7258
	Lorne Seitz	2.6237		
	Charles Kang	2.0600		

FROM: Elizabeth Argall  
Barrister & Solicitor  
Legal Services Branch  
Victoria, British Columbia V8V 1X4  
Telephone: (250) 356.5365  
Facsimile: (250) 356.8939

Number of pages transmitted, including fax cover memo: 02

**MESSAGE:** Attached: Delgamuukw Deputies Ctee. Agenda for May 17, 1999

Operator: Sue Barnes  
Phone Number: (250) 387.4207

## **DELGAMUUKW DEPUTIES COMMITTEE**

### **Meeting**

**Monday, May 17, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

### **AGENDA**

1. Update on Post-*Delgamuukw* Financing Negotiations
2. *Gitanyow* Decision – Guidelines for Negotiators
3. Ski Hills presentation – Cayoosh
4. Consultation:
  - Use/Placement of FTEs
  - Consultation Guidelines – impact of *Gitanyow*
5. MoF: **(Deferred)**
  - Timber Tenure System – Discussion
  - Update re Haida – Interim Measures
6. Regular Reports:
  - Interim Measures Update
  - *Delgamuukw* Accounts Receivable (**enclosed**)
  - Schedule of Upcoming Events
7. Items for Report to Cabinet
8. Other Business:
  - Principals' Meeting (April 15<sup>th</sup>) Statement on Aboriginal and Crown Title
  - Next Meeting

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# Environmental Assessment Office

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MAY 12 1999

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DEPUTY ATTORNEY GENERAL

MAILING ADDRESS:  
PO Box 9426 Stn Prov Govt  
Victoria BC V8W 9V1

LOCATION:  
836 Yates Street  
Victoria BC V8V 1X4

## Facsimile Cover Sheet

**Date:** May 12, 1999  
**To:** Delgamuukw Deputies Committee Members  
**Organization:**  
**Fax:**  
**From:** Sheila Wynn, Deputy Minister  
**Telephone:** (250) 356 - 7475  
**Fax:** (250) 356 - 7477  
**Confidential:** Yes  
**Urgent:** Yes  
**Original to Follow:** No  
**Total Pages** 7  
**(Including this page)**

**Comments:** This paper is in preparation for the DM's of Delgamuukw Committee meeting on May 17, 1999.

Name	Ministry	Fax	Name	Ministry	Fax
John Allan	Ministry of Forests	387 - 7065	Don Avison	Ministry of Education	952 - 0777
Claire Dansereau	Ministry of Transportation and Highways	387 - 6431	Cassie Doyle	Ministry of Environment, Lands and Parks	387 - 6003
Charles Kang	Ministry of Employment and Investment	952 - 0600	Maureen Maloney	Ministry of Attorney General	387 - 6224
Lawrie McFarlane	Secretary to Treasury Board	356 - 9054	Catharine Read	Ministry of Agriculture and Food	356 - 8392
Philip Steenkamp	Ministry of Aboriginal Affairs	387 - 6073	Chris Trumpy	Ministry of Finance and Corporate Relations	387 - 9099
Bill Valentine	Ministry of Fisheries	387 - 3291	Eloise Spitzer Bobbi Plecas George Ford	Office of the Premier	356 - 7258
Judy Cavanagh	Intergovernmental Relations Secretariat	387 - 1920	Tony Penikett	Negotiations	387 - 6070
Lorne Seitz	BC Assets and Land Corporation	952 - 6237	Jack Ebbels	Ministry of Energy and Mines	952 - 0269

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## ENVIRONMENTAL ASSESSMENT OFFICE &amp; BC ASSETS AND LAND CORPORATION

## FIRST NATIONS SKI RESORT ISSUES

## SUMMARY

BCAL Role:

- Accept ski resort proposals for review under the Commercial Alpine Ski Policy (which leads to a Master Development Agreement and tenure under the *Land Act*).
- Cabinet has directed BCAL to take a lead role in coordinating and streamlining the involvement of relevant agencies with respect to ski resort development projects that do not fall under the *Environmental Assessment Act*.
- BCAL's review will have to reflect negotiations between EAO, proponents and First Nations that involve use of Crown land for projects subject to review under the *Environmental Assessment Act*.
- Before issuing final land dispositions, BCAL must ensure government's obligation to consult First Nations to avoid infringement on rights and title has been met.

EA Statutory Requirements:

- Must meet requirements of government's Post-Delgamuukw Policy as well as provisions under the *Environmental Assessment Act* to involve affected First Nations in the EA review process.
- BCEAA also stipulates specific requirements for the proponent to provide information on the potential impacts of the proposed development on affected First Nations.
- EAO coordinates government's consultation with First Nations through the EA review process to ensure that constitutional and statutory obligations are met, minimizing risk of litigation.

## DEPUTIES' ADVICE AND CONFIRMATION ON DIRECTION IS REQUIRED AS FOLLOWS:

General Direction:

To address coordination on First Nations issues:

- BCAL will have representation on EA Project Committees
- BCAL Inter-Agency Ski Resort Coordinating Committee will include EAO representation
- EAO will involve BCAL and other interested agencies in discussions related to assessing (and addressing) potential infringements, and will specifically consult with BCAL on Step 3 – Step 4 decisions (Delgamuukw Consultation Guidelines)
- EAO will invite BCAL to help address First Nations issues
- EAO will share MAG's legal opinions re. potential infringements with BCAL

Melvin Creek/Cayoosh Ski Resort:

1. The situation requires negotiation with one or more First Nations.
2. An Inter-agency Committee, co-chaired by EAO and BCAL be established to coordinate negotiations [EAO, MoTH, BCAL, MAA, MAG, BCTFA].
3. Successful negotiations will require a toolkit to address:
  - road issues with Mount Currie and other FNs [MoTH, EAO, BCAL, BCTFA, proponent];
  - Crown land alienation [BCAL, EAO, MAA]; and
  - economic benefits [proponent].

Garibaldi at Squamish Ski Resort:

1. Proceed to develop effective working relationship with proponent and resolve outstanding issues identified to date; and
2. Use Cayoosh experience to inform future direction.

ENVIRONMENTAL ASSESSMENT OFFICE & BC ASSETS AND LAND  
CORPORATION

**BRIEFING NOTE FOR DELGAMUUKW DEPUTIES COMMITTEE  
FOR ADVICE AND CONFIRMATION OF APPROACH**

**ISSUE:** Consultation obligations and resolution of First Nation issues raised by ski resorts under review by the EAO.

**BACKGROUND/DESCRIPTION:**

Commercial alpine ski resorts are multi-faceted developments that require statutory approvals from various agencies and which may be reviewed under the *BC Environmental Assessment Act* if threshold indicators are exceeded.

Three ski resort projects are currently under review by the EAO:

- Jumbo Glacier (Invermere/KKTC)
- Melvin Creek/Cayoosh (Lillooet-Pemberton/Mount Currie, N'Quatqua and the Sta'at'imc Nation).
- Garibaldi at Squamish (Squamish/Squamish).

Both the EAO and BCAL are involved in reviewing such projects through different processes. The latter agency has delegated authority under the *Land Act* to negotiate a Ski Area Master Plan and Master Development Agreement with the proponent and then to tenure the approved land-use, and manage the tenure thereafter. Cabinet has also recently directed BCAL to take a lead role in coordinating and streamlining the involvement of relevant agencies with respect to ski resort development projects that do not fall under the *Environmental Assessment Act*. This will be achieved through a standing Inter-Agency Coordinating Committee chaired by BCAL, with representation from all relevant provincial agencies.

The existence of two simultaneous review/negotiation processes led by EAO and BCAL respectively has prompted discussions to clarify roles and responsibilities on:

- the relationship between EAO First Nations consultation processes and BCAL's role in facilitating and streamlining the approval process;
- ensuring that provincial obligations to consult with First Nations regarding aboriginal rights/title are met during the course of the EA review; and
- improving coordination between EAO and BCAL on the outcome of First Nations consultation (as negotiation outcomes may affect simultaneous or subsequent land dispositions made by BCAL).

## DISCUSSION:

### Role of BCAL

As the primary tenuring authority for commercial alpine ski developments, BCAL receives and evaluates project proposals under the Commercial Alpine Ski Policy (CASP). When an expression of interest is received from a potential proponent, it is then reviewed and advertised for public comment. If the concept is to proceed, BCAL initiates a proposal call and selects a proponent to proceed with concept development. An interim agreement is signed with the successful proponent to prepare a Ski Area Master Plan and obtain all necessary approvals from other regulatory agencies. A Master Development Agreement is then negotiated and signed with the proponent to establish tenure term, conditions of use and other requirements under the *Land Act*.

If a ski resort project meets or exceeds the thresholds set out under the *BC Environmental Assessment Act*, an EA review will also be required, which is generally initiated after an interim agreement has been signed.

With respect to First Nations issues, BCAL is required to meet government's consultation obligations to avoid unjustifiable infringement on aboriginal rights and/or title prior to issuing Crown land dispositions.

### EAO Responsibilities

In addition to government's standard obligation to consult First Nations on land and resource use, the *BCEAA* also contains specific statutory provisions regarding First Nations' involvement, as follows:

- proponent to consult with FNs [identify, prevent & mitigate impacts] [s. 7];
- FNs which assert title are invited to sit on project committees [s. 9];
- proponent's consultation assessed by project committee [s.14];
- Project Reports prepared by proponents may be required to address:
  - potential impacts on the exercise of aboriginal rights [s. 22 (g)];
  - the existing cultural, heritage conditions that may be affected by the project [s.22 (c)]; and
  - First Nation consultation plans [s.23 (b)].

During the EA review process, statutory and common law consultation obligations tend to be operationally integrated:

- Huckleberry and AMOCO cases support proponent role in fulfilling common law consultation obligations;
- *BCEAA* requires proponent consultation in order to fulfil statutory obligations;
- EAO consultation includes - meetings, information distribution, requests for First Nations to identify evidence to support any claim to rights and title, requests for "sign-off" on project committee recommendations reports, discussion/negotiation of unresolved issues;

- Proponent consultation includes - meetings, information distribution, requests for First Nations to identify impacts to "interests", studies (baseline, cultural, heritage, wildlife, etc.), prevention/ mitigation of potential adverse impacts.

Advice to proponents must reflect the standards and requirements set out in the BCEAA, in addition to government's Post-Delgamuukw Policy. As noted above, coordination with BCAL is also important to ensure both consistency in discussions with proponents and coordination on any aspects which may affect current and future land dispositions. This includes an assessment of the potential for infringement on Aboriginal rights and title. In determining the efforts required by proponents to resolve any FN issues raised, the EAO assesses the risk of litigation and, ultimately, seeks MAG advice on the likelihood of infringement and of successful litigation (based on the adequacy of consultation) prior to making referral to ministers<sup>1</sup>.

The EAO has certified 30 projects. First Nations have pursued litigation on three projects. No project has been prevented from proceeding to construction. This is due to:

- the statutory framework for "meaningful" consultation (First Nations are part of an "inter-governmental" review committee), and this contributes to the ability to withstand litigation; and
- preventing litigation from occurring by addressing First Nation issues [environmental - through review process; economic - through Impact Benefit Agreements with proponents or with the province; legal - thorough "meaningful" consultation].

When the BCEAA was proclaimed, it was agreed that, because the Certificate represents a "green light" to proponents to proceed with their projects and that subsequently, other permits would follow, the government's common law consultation obligations would be fulfilled by the EAO. Permitting agencies' consultation obligations would be limited to further detail on issues which would have been addressed during the review process (e.g. ROW re-vegetation, pipeline placement within route alignment).

FN consultation undertaken during the EA review should therefore continue to be managed by the EAO to ensure meeting both BCEAA and other consultation requirements to avoid infringement, and to ensure a streamlined approach for other approving agencies with respect to post-certification activities.

---

<sup>1</sup> To date, the Tulsequah Chief mine is the first project requiring a "Step 4" negotiation. Step 4 negotiations likely will be necessary on the Cayoosh and Garibaldi Ski Resorts and the Prosperity mine project this year. These negotiations will likely involve "non-project" issues.

**Direction for DDC Confirmation:**

To address coordination on First Nations issues, BCAL and the EAO have agreed on the following strategic direction:

- BCAL will have representation on EA project committees
- BCAL Inter-Agency Ski Resort Coordinating Committee will include EAO representation
- EAO will involve BCAL and other interested agencies in discussions related to assessing (and addressing) potential infringements, and will specifically consult with BCAL on Step 3 – Step 4 decisions
- EAO will invite BCAL to help address First Nations issues
- The EAO will share MAG's legal opinions re potential infringements with BCAL

**CAYOOSH SKI RESORT**

- Has been identified as a high government priority and, of the three projects, is the most advanced in the environmental assessment process.

**Issues**

- road trespasses (Highway 99) in Lillooet (Cayooshe and Lillooet Bands)
- 1036 road issues Highway 99 at Mount Currie
- Treaty AIP with N'Quatqua separate from the rest of the St'at'imc Nation
- Delgamuukw interpretation issues [Co-management, revenue sharing, consent and compensation issues] and UBCIC/Six Nations Alliance discussions

**Strategic Approach**

- Withstand litigation on statutory and common law obligations by having one or more First Nations actively participating in the review and support the project [EAO-St'at'imc Impact Study with all 11 St'at'imc Bands; First Nations participation on Project Committee, community decision-making process]
- Prevent litigation by having one or more First Nations support the project [economic agreements, resolve road issues]
- Meet provincial obligations regarding avoiding unjustifiable infringement on aboriginal rights and title

**Status**

- 9 of 11 St'at'imc chiefs have agreed to participate in both the Impact Study [final sign off expected shortly] and the review committee
- draft terms of reference and budget completed with respect to studies and First Nation participation in the environmental assessment review
- funding identified to assist proponent in completing socio-economic study

- proponent agrees to enter into Impact Benefit Agreement – EAO assisting proponent with facilitation and identifying complimentary resources
- Mount Currie has indicated that on the road, they would be prepared to negotiate for something less than a new road.

#### Direction for DDC Confirmation:

1. The situation requires negotiation with one or more First Nations.
2. An inter-agency committee, co-chaired by EAO and BCAL, be established to co-ordinate negotiations [EAO, MoTH, BCAL, MAA, MAC, BCITFA].
3. Successful negotiations will require a toolkit to address road issues with Mount Currie and other FNs [MoTH, EAO, BCAL, BCITFA, proponent].
4. Crown land alienation [BCAL, EAO, MAA], and economic benefits [proponent].

## 2. GARIBALDI SKI RESORT:

### Issues

- Poor proponent/Squamish First Nations relationship
- Pre-treaty land alienation in the Lower Mainland area
- potential infringements on Squamish First Nations rights and title [goats, medicines, spiritual values]
- trapline

### Strategic Approach

- Develop proponent-Squamish relationship [EAO]
- Collect First Nations information [Proponent]
- Economic benefit agreement [proponent]
- Develop strategy regarding assessment of potential for infringement [BCAL, proponent, Squamish]
- Resolve trapline [proponent]
- Political discussions [Minister Wilson & Chief Mathias if necessary]

### Status

- EAO facilitating the building of the proponent-First Nations relationship
- Chief and Council to decide on participation shortly
- EAO meeting with proponent to discuss an agreed upon approach

#### Direction for DDC Confirmation:

1. Proceed as outlined above (strategic approach).
2. Use Cayoosh experience to inform future direction.

**Subject: RE: Availability**

**Date:** Tue, 30 Mar 1999 14:54:29 -0800

**From:** "Krenbrink, Sandi J NEG:EX" <Sandi.Krenbrink@gems2.gov.bc.ca>

**To:** "Lane, Nancy AG:EU" <nancy.lane@ag.gov.bc.ca>

It will remain bi-weekly for now. It is up for discussion at the next meeting - I will keep you posted as to the outcome.

Sandi Krenbrink

Executive Administrative Assistant

Negotiations Project Team

3rd Floor, 468 Belleville Street

Victoria, BC V8V 1X4

> -----

> From: Lane, Nancy AG:EU

> Sent: Tuesday, March 30, 1999 2:11 PM

> To: Krenbrink, Sandi J NEG:EX

> Subject: Re: Availability

>

> So - does this mean these meetings are still happening every two weeks -

> 9:30 to 11:00 am in Chambers??

>

> "Krenbrink, Sandi J NEG:EX" wrote:

> >

> > Could you please let me know if your Deputy Minister will or will not be

> > attending the April 6, 1999, DDC meeting.

> >

> > Thanks

> > Sandi Krenbrink

> > Executive Administrative Assistant

> > Negotiations Project Team

> > 3rd Floor, 468 Belleville Street

> > Victoria, BC V8V 1X4

>

Re: Availability

**Subject: Re: Availability**

**Date:** Tue, 30 Mar 1999 14:11:25 -0800

**From:** nancy lane <nancy.lane@ag.gov.bc.ca>

**Organization:** Ministry of Attorney General

**To:** "Krenbrink, Sandi J NEG:EX" <Sandi.Krenbrink@gems2.gov.bc.ca>

So - does this mean these meetings are still happening every two weeks - 9:30 to 11:00 am in Chambers??

"Krenbrink, Sandi J NEG:EX" wrote:

>

> Could you please let me know if your Deputy Minister will or will not be attending the April 6, 1999, DDC meeting.

>

> Thanks

> Sandi Krenbrink

> Executive Administrative Assistant

> Negotiations Project Team

> 3rd Floor, 468 Belleville Street

> Victoria, BC V8V 1X4

**Subject: Availability**

**Date:** Mon, 29 Mar 1999 08:27:40 -0800

**From:** "Krenbrink, Sandi J NEG:EX" <Sandi.Krenbrink@gems2.gov.bc.ca>

**To:** Adrienne Greene <Adrienne.Greene@gems1.gov.bc.ca>,  
Andrea de Lestard <Andrea.DeLestard@gems5.gov.bc.ca>,  
Bobbi Plecas <Bobbi.Plecas@gems9.gov.bc.ca>,  
Carrol Derksen <CDERKSEN@EXECUTIVE.env.gov.bc.ca>,  
Chris Cliff <Chris.Cliff@gems2.gov.bc.ca>,  
Diane Roberts <Diane.Roberts@gems4.gov.bc.ca>,  
Felicity Adams <Felicity.Adams@gems3.gov.bc.ca>,  
Judy Huff <judy.huff@gems5.gov.bc.ca>, Liz Kenny <LKenny@vines.gems.gov.bc.ca>,  
Marlene Patton <Marlene.Patton@gems3.gov.bc.ca>,  
Nancy Murray <Nancy.Murray@gems5.gov.bc.ca>, nancy.lane@ag.gov.bc.ca,  
Sunny Collier <Sunny.Collier@gems1.gov.bc.ca>,  
Susan Evans <Susan.Evans@gems6.gov.bc.ca>,  
Teri Collins <Teri.Collins@gems9.gov.bc.ca>

Could you please let me know if your Deputy Minister will or will not be attending the April 6, 1999, DDC meeting.

Thanks

Sandi Krenbrink

Executive Administrative Assistant

Negotiations Project Team

3rd Floor, 468 Belleville Street

Victoria, BC V8V 1X4

**Subject: Meeting Confirmation**

**Date:** Wed, 31 Mar 1999 13:13:35 -0800

**From:** "Krenbrink, Sandi J NEG:EX" <Sandi.Krenbrink@gems2.gov.bc.ca>

**To:** Adrienne Greene <Adrienne.Greene@gems1.gov.bc.ca>,  
Andrea de Lestard <Andrea.DeLestard@gems5.gov.bc.ca>,  
Bobbi Plecas <Bobbi.Plecas@gems9.gov.bc.ca>,  
Carrol Derksen <CDERKSEN@EXECUTIVE.env.gov.bc.ca>,  
Chris Cliff <Chris.Cliff@gems2.gov.bc.ca>,  
Diane Roberts <Diane.Roberts@gems4.gov.bc.ca>,  
Felicity Adams <Felicity.Adams@gems3.gov.bc.ca>,  
Judy Huff <judy.huff@gems5.gov.bc.ca>, Liz Kenny <LKenny@vines.gems.gov.bc.ca>,  
Marlene Patton <Marlene.Patton@gems3.gov.bc.ca>,  
Nancy Murray <Nancy.Murray@gems5.gov.bc.ca>, nancy.lane@ag.gov.bc.ca,  
Sunny Collier <Sunny.Collier@gems1.gov.bc.ca>,  
Susan Evans <Susan.Evans@gems6.gov.bc.ca>,  
Teri Collins <Teri.Collins@gems9.gov.bc.ca>

I am writing to confirm Tuesday's Delgamuukw Deputies Committee meeting.  
The meeting will take place from 9:30 a.m - 11:00 a.m., in Cabinet Chambers.  
Agenda will follow shortly.

Sandi

Sandi Krenbrink  
Executive Administrative Assistant  
Negotiations Project Team  
3rd Floor, 468 Belleville Street  
Victoria, BC V8V 1X4

**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, May 17, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**AGENDA**

- ✓ 1. Update on Post-Delgamuukw Financing Negotiations
- ✓ 2. Gitanyow Decision – Guidelines for Negotiators
- ✓ 3. Ski Hills presentation – Cayoosh
4. Consultation:
  - Use/Placement of FTEs
  - Consultation Guidelines – impact of Gitanyow
5. MoF:
  - Timber Tenure System – Discussion
  - Update re Haida – Interim Measures
6. Regular Reports:
  - Interim Measures Update
  - Delgamuukw Accounts Receivable (*enclosed*)
  - Schedule of Upcoming Events
7. Items for Report to Cabinet
8. Other Business:
  - Principals' Meeting (April 15<sup>th</sup>) Statement on Aboriginal and Crown Title
  - Next Meeting

*Kaufman wants to  
conclude by June  
Cabinet October*

**(Deferred)**

**Reminder: If presenting material please bring copies for distribution.**

**FACSIMILE COVER SHEET****MINISTRY OF ATTORNEY GENERAL  
LEGAL SERVICES BRANCH  
VICTORIA, B.C.  
V8V 1X4**

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**DATE:** May 12, 1999

<b>TO:</b>	<b>Tony Penikett</b>	<b>7.6070</b>	<b>Charles Kang</b>	<b>2.0600</b>
	<b>Philip Steenkamp</b>	<b>7.6073</b>	<b>Jack Ebbels</b>	<b>2.0269</b>
	<b>Maureen Maloney</b>	<b>7.6224</b>	<b>Sheila Wynn</b>	<b>6.7477</b>
	<b>John Allan</b>	<b>7.7065</b>	<b>Catharine Read</b>	<b>6.8392</b>
	<b>Bill Valentine</b>	<b>7.3291</b>	<b>Chris Trumpy</b>	<b>7.9099</b>
	<b>Cassie Doyle</b>	<b>7.6003</b>	<b>Lawrie McFarlane</b>	<b>6.9054</b>
	<b>Claire Dansereau</b>	<b>7.6431</b>	<b>Bobbi Plecas</b>	<b>6.7258</b>
	<b>Don Avison</b>	<b>2.0777</b>	<b>George Ford</b>	<b>6.7258</b>
	<b>Lorne Seitz</b>	<b>2.6237</b>		

**FROM:** Elizabeth Argall  
Barrister & Solicitor  
Legal Services Branch  
Victoria, British Columbia V8V 1X4  
**Telephone:** (250) 356.5365  
**Facsimile:** (250) 356.8939

Number of pages transmitted, including fax cover memo: 02

**MESSAGE:** Attached: Delgamuukw Deputies Ctee. Agenda for May 31, 1999

**Operator:** Jane Carlson  
**Phone Number:** (250) 356-6851

**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, May 31, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**RECEIVED**  
~E  
MAY 26 1999  
201-30106  
DEPUTY ATTORNEY GENERAL

**AGENDA**

1. Update on Post-Delgamuukw Financing Negotiations
2. Consultation:
  - Use/Placement of FTEs
  - Consultation Policies
3. MoF:
  - Timber Tenure System – Discussion
  - Update re Haida – Interim Measures
4. Regular Reports:
  - Interim Measures Update
  - Schedule of Upcoming Events
5. Items for Report to Cabinet
6. Other Business:

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**FACSIMILE COVER SHEET**

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**DATE:** June 10, 1999

<b>TO:</b>	<b>Tony Penikett</b>	<b>7.6070</b>	<b>Charles Kang</b>	<b>2.0600</b>
	<b>Philip Steenkamp</b>	<b>7.6073</b>	<b>Jack Ebbels</b>	<b>2.0269</b>
	<b>Maureen Maloney</b>	<b>7.6224</b>	<b>Sheila Wynn</b>	<b>6.7477</b>
	<b>John Allan</b>	<b>7.7065</b>	<b>Catharine Read</b>	<b>6.8392</b>
	<b>Bill Valentine</b>	<b>7.3291</b>	<b>Chris Trumpy</b>	<b>7.9099</b>
	<b>Cassie Doyle</b>	<b>7.6003</b>	<b>Lawrie McFarlane</b>	<b>6.9054</b>
	<b>Claire Dansereau</b>	<b>7.6431</b>	<b>Bobbi Plecas</b>	<b>6.7258</b>
	<b>Don Avison</b>	<b>2.0777</b>	<b>George Ford</b>	<b>6.7258</b>
	<b>Lorne Seitz</b>	<b>2.6237</b>		
<b>CC:</b>	<b>Rose Heinz</b>	<b>6.7258</b>		

**FROM:** Elizabeth Argall  
Barrister & Solicitor  
Legal Services Branch  
Victoria, British Columbia V8V 1X4  
Telephone: (250) 356.5365  
Facsimile: (250) 356.8939

Number of pages transmitted, including fax cover memo: 02

**MESSAGE: Attached: Delgamuukw Deputies Committee  
Agenda for June 14, 1999.**

**Operator:** Jane Carlson  
**Phone Number:** (250) 356-6851

**DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, June 14, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**RECEIVED**

JUN 16 1999

201-30/05  
DEPUTY ATTORNEY GENERAL**AGENDA**

1. Update on Post-*Delgamuukw* Financing Negotiations
2. Consultation:
  - Use/Placement of FTEs
  - Consultation Policies
    - Ministry of Forests
    - BC Assets and Land Corporation
3. Gitxsan – BC Consultation Protocol
4. Regular Reports:
  - Interim Measures Update
  - Schedule of Upcoming Events
5. Items for Report to Cabinet
6. Other Business:

**\*\*\* Reminder: If presenting material  
please bring copies  
for distribution.**

**\*\*\***

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VICTORIA, B.C.  
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**DATE:** June 24, 1999

**TO:** Tony Penikett 7.0718  
Philip Steenkamp 7.6073  
Maureen Maloney 7.6224  
John Allan 7.7065  
Bill Valentine 7.3291  
Cassie Doyle 7.6003  
Claire Dansereau 7.6431  
Don Avison 2.0777  
Lorne Seitz 2.6237

Charles Kang 2.0600  
Jack Ebbels 2.0269  
Sheila Wynn 6.7477  
Catharine Read 6.8392  
Chris Trumpy 7.9099  
Lawrie McFarlane 6.9054  
Bobbi Plecas 6.7258  
George Ford 6.7258

**CC:** Rose Heinz 6.7258

**FROM:** Elizabeth Argall  
Barrister & Solicitor  
Legal Services Branch  
Victoria, British Columbia V8V 1X4  
Telephone: (250) 356.5365  
Facsimile: (250) 356.8939

Number of pages transmitted, including fax cover memo: 02

**MESSAGE:** Attached: Delgamuukw Deputies Committee  
Agenda for June 28, 1999.

**Operator:** Jane Carlson  
**Phone Number:** (250) 356-6851

**FINAL DELGAMUUKW DEPUTIES COMMITTEE****Meeting**

**Monday, June 28, 1999  
9:30 AM TO 11:00AM  
CABINET CHAMBERS**

**RECEIVED**  
JUN 28 1999  
201-30/05  
DEPUTY ATTORNEY GENERAL

**AGENDA**

1. Update on Post-Delgamuukw Financing Negotiations
2. Consultation:
  - Use/Placement of FTEs
  - Consultation Policies
    - Ministry of Transportation & Highways
    - Crown Corporations
  - First Nations' Protocols on Consultation
3. Regular Reports:
  - Interim Measures Update
4. Items for Report to Cabinet
5. Other Business:

**\*\*\*****Reminder:**

**If presenting material  
please bring copies  
for distribution.**

**\*\*\***



Ministry of  
Aboriginal Affairs

Office of the  
Deputy Minister

## MEMORANDUM

To: Deputy Ministers' Committee on Land Use August 9, 1999

File No. 60100-20/DELG1

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95893

AUG 11 1999

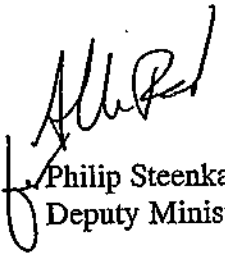
Re: Delgamuukw Consultation FTEs

10120-20/MSUS/delg.

As you know, not all of the Delgamuukw Consultation FTEs have been allocated for the remainder of this fiscal year. Based on Treasury Board's approval, decision making for future FTE allocation and funding will come from a sub-committee of the Deputy Ministers' Committee on Land Use. I would like to recommend that the attached 3 proposals submitted by Municipal Affairs, Small Business Tourism and Culture and the Environmental Assessment Office receive approval.

Please review and advise me of your decisions by Monday, August 16th. If we do not receive your response by that date, we will assume we have your approval to proceed with the funding.

I also wish to advise you that we hope to continue funding Delgamuukw Consultation FTEs in the next fiscal year, and look forward to your continued support for this work. The major criteria for receiving future funding will be the reports submitted by the ministries that received approval for this year's funding. The Ministry of Aboriginal Affairs' Aboriginal Relations Branch is currently developing procedures to manage the Delgamuukw Consultation FTE allocation and funding process for next year, and once completed a draft will be sent to you for review.

  
Philip Steenkamp  
Deputy Minister

Attachment

Deputy Ministers' Committee on Land Use  
Distribution List

Derek Thompson  
Deputy Minister  
Ministry of Environment, Lands and Parks

Lee Doney  
Deputy Minister  
Ministry of Forests

Jack Ebbels  
Deputy Minister  
Ministry of Energy and Mines

Catharine Read  
Deputy Minister  
Ministry of Agriculture and Food

Charles Kang  
Deputy Minister  
Ministry of Employment and Investment

Sheila Wynn  
Deputy Minister  
Environmental Assessment Office

Claire Dansereau  
Deputy Minister  
Ministry of Transportation and Highways

Bill Valentine  
Deputy Minister  
Ministry of Fisheries

David Kelly  
Deputy Minister  
Ministry of Small Business, Tourism and Culture

Suzanne Veit  
Deputy Minister  
Ministry of Municipal Affairs

Maureen Maloney  
Deputy Minister and Deputy Attorney General  
Ministry of Attorney General

## **Consultation Funding Request**

**Requesting Agency:** Environmental Assessment Office (EAO)

**Topic:** Funds to Undertake Consultation with the St'at'imc Nation on the Melvin Creek/Cayoosh Resort project.

### **Justification:**

The Melvin Creek/Cayoosh Project is an important economic initiative of the province. However, because of its geographic location and other factors, a number of difficult First Nation issues, such as unresolved road issues (both trespass and OIC 1036), require extensive consultation to resolve. The EAO and NGR Inc., the proponent of the Melvin Creek/Cayoosh Resort project, with the assistance of the Town of Lillooet and HRD Canada, need to undertake consultations with the St'at'imc Nation on the socio-economic impacts of the project. These consultations will be used to supplement the overall consultation record of the EAO and provincial agencies, as well as by the proponent, in negotiating an impact benefit agreement with the St'at'imc Nation. They will contribute directly to the success of the overall consultation strategy of the province designed to prevent and withstand litigation by the St'at'imc Nation. The overall consultation process and study plan are being funded by DIAND, the proponent and the EAO according to the agreement reached by the EAO, after several months, with all eleven St'at'imc Chiefs.

### **Impact if not funded:**

Insufficient consultation funding may jeopardize the overall agreement and result in the failure of negotiations and potential litigation.

### **Output/Product:**

Baseline and impact prevention/mitigation information; recommendations; impact benefit agreement consultations; completion of consultation record; consultation as per Step 4 of post- Delgamuukw Guidelines.

**Timeframe:** August-December 1999.

**Budget (5 months):** \$35,000

---

Sheila Wynn, Deputy Minister

**Prepared by:**  
Martyn Glassman

**Consultation Funding Proposal: Community Liaison Outside the Lower Mainland**  
**Submitted by Ministry of Municipal Affairs**

**Purpose**

- A specialist in local government issues should be hired to meet with elected officials and opinion leaders in resource-dependent communities to determine their interests, exchange information, clarify how Delgamuukw related initiatives, interim measures and treaties could coincide with the goals of the community, and generally allay their fears in regard to local issues.

**Justification**

- Elected officials in communities outside of the lower mainland have expressed concern that the impacts of aboriginal claims of rights and title since Delgamuukw, as well as interim measures and uncertainty about the outcome of negotiations around aboriginal title claims, will imperil their already troubled economies. They anticipate significant and ongoing negative changes in the local economy. Communities which are heavily dependent on the forestry industry, in particular, perceive themselves to be at risk.
- Politicians in the lower mainland have been particularly vocal about their concerns relating to the processes to resolve claims to rights and title. Government has responded by directing resources to address these concerns. To date, less attention has been paid to issues in communities outside of the lower mainland.
- Requirements for consultation with First Nations after Delgamuukw have increased the timeframe for approvals. As industries are forced to delay activities, financing arrangements become more costly, workers are laid-off, and local resource-dependent communities are impacted. Local politicians in these communities do not believe their concerns are being heard and understood.

**Impact if Not Funded**

- In a climate of uncertainty, levels of anxiety and fear may well escalate and some elected officials may make statements and take actions in opposition to the Province's goals with respect to issues concerning aboriginal claims to rights and title. Relations between aboriginals and non-aboriginals may deteriorate.
- Fear levels in resource-dependent communities will continue to escalate. Elected officials in those communities will be pressured to take action.
- Public support for government policy in relation to aboriginal issues will be eroded due to perceptions of negative impacts.

**Product/Output**

- A report to government recommending specific actions to address these concerns in communities outside of the lower mainland.
- Particular focus would be on communities which are heavily dependent on the forest sector, given that they receive a substantial proportion of their tax base from that industry. For example, 78% of Quesnel's tax base comes from the forestry sector.

**Timeframe**

- Four months

**Budget**

- Contract: \$50,000

## **Consultation Funding Request**

**Requesting agency:** MAA/MSBTC

**Topic:** Pilot Project Coordinator - S.4 of Heritage Act

### **Justification:**

Recent amendments to the Heritage Conversation Act, included Section (S.)4, provide an ability for the Province to enter into Agreements with First Nations about heritage sites and objects that represent their heritage. This provision was proclaimed when the Heritage Act was amended, but has never been used as there is no guiding policy nor any resources to negotiate and administer S.4 Agreements in Small Business, Tourism & Culture (SBTC). First Nations have been lobbying for these Agreements. Some members of the non aboriginal community have concerns about the potential for First Nations to control activities off reserve (and potentially on fee simple lands). The Province may be seen as giving up regulatory authority for heritage resources.

Delgamuukw Consultation guidelines acknowledge the importance of having First Nations identify their interests in land. The ability to negotiate agreements around specific parcels of crown land identified by First Nations will address needs identified in the Delgamuukw guidelines. In addition, successful agreements will define where heritage interests are of such significance that they merit specific recognition. This would demonstrate the Province's commitment to full consultation, while ensuring that such important decisions are achieved under the guidance of a clear negotiating mandate.

### **Impact if not funded:**

The ability to negotiate S.4 Agreements would provide the Province with more flexibility to deal with heritage-related concerns raised by First Nations both within and outside of the treaty process. Without this tool, more confrontations can be expected.

The ability to negotiate S.4 Agreements could be seen as a demonstration of government's commitment to undertaking meaningful consultation and real participation with First Nations over the protection, management, use, and development of important heritage resources in First Nations traditional territories. Without this tool the Province may be seen as failing to meet the provincial obligations in relation to Delgamuukw. First Nations are now mounting a concerted campaign to challenge provincial processes in regard to heritage issues. The ability to complete S.4 Agreements in areas of high sensitivity may serve to reduce the overall pressure in this area.

### **Output/Product:**

Develop policy for the implementation of S.4 Agreements, which will include development of a negotiating mandate that incorporates input from line ministries.  
Negotiate a pilot S.4 Agreement with a First Nation.

**Timeframe:** Immediate - jointly resourced by SBTC and MAA.

**Budget:**

\$30,000 plus FTE (\$100,000 in total)

**Exec. Director/ADM's Initials**

Catherine Panter

Allison Bond

Handwritten initials of Catherine Panter and Allison Bond.

**Prepared by:**

Milt Wright

Negotiator

356-5272

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**Philip Steenkamp, Deputy Minister**

10/20-20/11/US/  
delg.

# NEWS RELEASE

Ministry of Aboriginal Affairs

For Immediate Release September 29, 1998

## Province Releases First Nations Consultation Guidelines for Government Staff

VICTORIA - The government released today operational guidelines that will assist provincial ministries and agencies in their consultations with First Nations on land and resource issues in B.C.

The operational guidelines were developed by the province following the Supreme Court of Canada's *Delgamuukw* decision in December 1997. The court's ruling established a number of principles about aboriginal title and identified a duty by the Crown to consult with First Nations on Crown land activities that may infringe aboriginal title. However, the court did not make a determination that any First Nation in British Columbia has title.

The guidelines will assist provincial staff in their consultations with First Nations, without making a determination as to whether aboriginal title exists. The onus for proving aboriginal title rests with First Nations.

The guidelines will be used by government staff in conjunction with the province's existing Crown land activities and aboriginal rights policy, which was established in 1995 in response to earlier court decisions that identified aboriginal rights.

Aboriginal Affairs Minister Dale Lovick said the new guidelines will help the government meet the *Delgamuukw* requirements to consult with First Nations on proposed Crown land activities that may infringe aboriginal title.

"We believe the guidelines meet the consultation requirements that were established by the Supreme Court of Canada," said Lovick. "The guidelines represent a fair and balanced approach that ensures we have an effective process in place for consulting with First Nations and making land and resource use decisions that will benefit the B.C. economy."

"This is not the province's comprehensive response to *Delgamuukw*. We will continue to discuss the consultation requirements of the *Delgamuukw* decision with First Nations organizations and the federal government. In the meantime, the guidelines will give direction to government staff, especially in the land and resource ministries, on how to meet the *Delgamuukw* requirements."

The guidelines are being distributed to government staff through training sessions that began Sept. 18. The training sessions will be held in eight locations throughout B.C. over a one-month period.

The operational guidelines - and the province's Crown land activities and aboriginal rights policy - are both available on the Ministry of Aboriginal Affairs Internet web site (<http://www.aaf.gov.bc.ca/aaf/>), or by calling toll-free (1-800-880-1022)

-30-

PROVINCE OF  
BRITISH COLUMBIAMinistry of  
Aboriginal Affairs  
P.O. Box 9100 Stn Prov Govt  
Victoria BC V8W 9B1

## Facsimile Transmission

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Ministry of Aboriginal Affairs  
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Ministry of  
Aboriginal Affairs

Office of the  
Deputy Minister

## MEMORANDUM

To: Attached Distribution List

February 11, 2000

File No. 45000-90/dfte

Re: Delgamuukw Consultation FTE Allocation

Further to our meeting on February 3, 2000, I am writing to advise that the Deputy Ministers Committee on Aboriginal and Land Use Issues (DMCALU) has approved the Delgamuukw Consultation FTE Allocation Process (attached).

We now require the completion of the detailed reporting form for the approved 1999/00 allocations and the completion of the proposal forms for fiscal year 2000/01 allocations (forms attached to Allocation Process document). Please return your forms to Catherine Panter, Senior Negotiator, Aboriginal Relations Branch, MAA, by Friday, February 18, 2000. The tight time frame was suggested so that reports and proposals can be submitted to the DMCALU meeting on February 24 for review and approval. This will ensure allocations and funds are secured for fiscal year 2000/01.

Please note that DMCALU also approved setting aside four FTEs for an Aboriginal Economic Initiatives Office to be established by the Ministry of Energy and Mines. A formal proposal for this Office will be reviewed at the next meeting of DMCALU.

Philip Steenkamp  
Deputy Minister

Attachment

cc: Catherine Panter  
Senior Negotiator

# Delgamuukw Consultation FTEs Allocation Process

## Step 1: January 19, 2000

Preliminary assessment completed on the approved FTE allocations and funding for fiscal year 1999/00.

## Step 2: February 3, 2000

Deputy Ministers Committee on Aboriginal and Land Use Issues (DMCALUI) to review preliminary assessment regarding fiscal year 1999/00 approved FTE allocations and funding. DMCALUI to make decisions regarding the application process for Delgamuukw Consultation FTE allocations and funding for fiscal year 2000/01.

## Step 3: approximately February 8, 2000

Based on the DMCALUI decision regarding the allocation process for fiscal year 2000/01 allocations, letters sent to ministries and government agencies requesting completion of the detailed reporting form (attached) for approved 1999/00 allocations and the completion of the proposal form (attached) for fiscal year 2000/01 allocations.

## Step 4: February 18, 2000

Reporting forms for 1999/00 FTE allocations and proposals for 2000/01 allocations completed and returned to MAA.

## Step 5: February 24, 2000

Proposals for 2000/01 allocations and reports on the approved 1999/00 allocations submitted to DMCALUI for approval.

## Step 6: approximately February 28, 2000

Letters sent to ministries and government agencies advising of approved 2000/01 FTE allocations.

## Ongoing:

Advise and provide support to ministries and government agencies on the work of the Delgamuukw Consultation FTEs.

1999/2000  
DELGAMUUKW CONSULTATION FTE ALLOCATIONS  
REPORTING FORM

Approved Funding:

Funding Use (eg. FTE, Auxiliary, Contracts, etc.) and start date:

Approved Proposal:

Describe the work that was undertaken and completed, listing all accomplishments:

What are the total funds to be recovered from MAA at the end of the fiscal year?

Describe any work that was not completed and/or unexpected, and why:

What resources and how much time would be required to finish the project?

Impact if not funded:

Contact Person:

Phone #:

2000/2001  
DELGAMUUKW CONSULTATION FTE ALLOCATION  
PROPOSALS

Date:

Requesting Agency:

Proposal Topic:

Description / Justification:

Output/Product:

Impact if not funded:

Budget/FTEs Required:

Did your ministry/agency receive approved Delgamuukw Consultation funding last fiscal year?  
(please circle one)

Yes

No

If yes, were the objectives of the project met?

Yes

No

If no, why?

Prepared by:

Approved by Deputy Minister:



Ministry of  
Aboriginal Affairs

Office of the  
Deputy Minister

## MEMORANDUM

To: Attached Distribution List

March 24, 2000

File No. 45000-90/DELG1/FTE

Re: Delgamuukw Consultation Funding

Further to our meeting on March 9, 2000, I am writing to advise that the Deputy Ministers' Committee on Aboriginal and Land Use Issues (DMCALU) has approved the Delgamuukw Consultation funding for fiscal year 2000/01.

The DMCALU reviewed the proposals at the February 24<sup>th</sup> meeting and decided to strike a sub-committee to make funding decisions. The sub committee met on March 1<sup>st</sup> and included Philip Steenkamp, Claire Dansereau, Derek Thompson and Jim Crone. A chart is attached listing approved projects and funds.

The following questions were considered in the 2000/01 allocations:

- What is the priority and volume of consultation activity?
- What is the potential for litigation?
- Why was the project not completed in fiscal year 1999/00?
- Could the project be completed with fewer funds than indicated?
- Could the project be completed using fewer FTEs and/or possibly sharing FTEs with other ministries?
- Does the ministry requesting have existing resources (staff and \$\$) to carry out the consultation activities? If yes, will these positions be supplementing existing roles?

The approvals are subject to the following conditions:

- Funding may be used for FTEs, auxiliary staff, or contracts, at the discretion of the Deputy Minister.
- Funding must be used for the purposes identified in the approved proposal.
- Quarterly progress reports on projects will be submitted to the Line Ministry Support Unit, Ministry of Aboriginal Affairs.

.../2

We hope to continue to fund consultation work in the future and look forward to your continued support.

A handwritten signature in black ink, appearing to read 'Philip Steenkamp', written in a cursive style.

Philip Steenkamp  
Deputy Minister

Attachment

cc: Catherine Panter  
Senior Negotiator

**DEPUTY MINISTER COMMITTEE ON ABORIGINAL AND LAND USE ISSUES  
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Suzanne Veit, Deputy Minister Ministry of Municipal Affairs	387-7973
Catharine Read, Deputy Minister Ministry of Small Business, Tourism and Culture	387-1420
Claire Dansereau, Deputy Minister Ministry of Transportation and Highways	387-6431
Cassie Doyle, Chair and President B.C. Assets and Land Corporation	952-6237
David Johns, Assistant Deputy Minister Land Use Coordination Office	953-3481

**DELGAMUUKW CONSULTATION ALLOCATIONS FOR FISCAL YEAR 2000/01**

<b>MINISTRY</b>	<b>PROPOSAL</b>	<b>FUNDING</b>
Agriculture and Food	Consultation on grazing enhancement projects - reduce conflict between ranchers and FNs	\$50,000
BC Assets and Land Corporation	Aboriginal Interest Assessment procedures and consultation agreements	\$100,000
Energy and Mines	Aboriginal Economic Initiatives Office	\$400,000
Environment Lands and Parks	• Consultation for protected area acquisitions - Vancouver Island Land Use Plan	\$75,000
	• Consultation on wildlife consultation protocols Gitxsan and Gitanyow	\$50,000
	• Consultation with Vancouver Island FNs, TUS related to fish and wildlife and negotiate agreements	\$50,000
	• Parks Management agreements with Gitxsan and consultation with other FNs	\$50,000
Fisheries	Development of operational consultation policy	\$50,000
Forests	• Consultation policy implementation	\$75,000
	• Archaeological/heritage issues related to aboriginal title (requires liaison with SBTC)	\$75,000
Small Business, Tourism and Culture	• Consultation and development of common definitions and understanding of significant sites and identification of sites and options for protection measures	\$75,000
	• Pilot project with FN to develop an agreement to list and protect agreed upon sites	\$25,000
Transportation and Highways	Consultation and archaeological information on gravel issues	\$125,000
	<b>TOTAL</b>	<b>\$1,200,000</b>