

Recognition and Reconciliation: The British Columbia Experience

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I. INTRODUCTION

I have been asked to speak on recent developments in British Columbia with regard to Aboriginal title cases, consultation and accommodation, treaties, recognition legislation, and the future direction of reconciliation. In the time allotted for this discussion it is not realistic to cover all of these topics. I propose to focus on the issues of the B.C. treaty process, consultation, accommodation and the future direction of reconciliation. However, in order to do so, it is important to place those developments in the historical context of B.C. and in the context of treaty making in British Columbia.

A. Brief Historical Context

Ever since the *Calder* case was initiated for the recognition of Aboriginal title in British Columbia in 1969,² British Columbia has been one of the jurisdictions in which there has been an extensive focus on legal challenges as to the meaning, scope and content of Aboriginal title in Canada. Jurisdictions between British Columbia and Quebec have focused on the implementation of treaty rights based on the historic treaties made from Ontario to the Rockies. While there has been litigation in Quebec, a strong focus since the *James Bay and Northern Quebec Agreement* has been on treaty and government-to-government agreements within Quebec.

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² *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

In British Columbia, the goal of reconciliation, which was mandated by the Supreme Court of Canada certainly since *Sparrow* (1990)³ and *Delgamuukw*⁴ (1997), has been an ongoing struggle and challenge for the Crown and Aboriginal Nations. There have been a significant number of court decisions in British Columbia since *Delgamuukw* which have found that the Crown has failed to fulfill its constitutional obligations to Aboriginal Nations to consult and accommodate their Aboriginal rights prior to alienating their lands and resources.

Within the geographic boundaries of British Columbia there are more Aboriginal Nations with distinct languages than across the rest of Canada combined. One of the results of this unique feature in British Columbia is that the Aboriginal Nations of British Columbia often take distinct and unique positions.

Another feature that is unique to British Columbia as a western jurisdiction, but shared with Quebec, is the failure to enter into treaties in historic times. There are notable exceptions to this which the provincial Crown has, until recently, had difficulty addressing. Those exceptions are the Treaty 8 Nations in the northeast (the wealthiest gas and oil producing area in the province) and the Douglas Treaty Nations on Vancouver Island. For example, in the BC Treaty Process⁵ the provincial Crown attempted to have the Douglas Treaty Nations enter into new treaty negotiations for “modern treaties”.

Before discussing the issues of recent legal decisions in British Columbia and their impact across the country and the issue of reconciliation, I will discuss the Treaty Negotiation Process.

³ *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075.

⁴ *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010.

⁵ The B.C. Treaty Process was created in 1990 as a result of an Agreement between British Columbia, Canada and the First Nations Summit representing a number of Aboriginal Nations and the subsequent creation by statute of the B.C. Treaty Commission.

B. B.C. Treaty Process: Dream or Reality?

(1) Territorial Scope

Another distinctive feature of B.C. Treaty negotiations since the initiation of the BC Treaty Negotiation Process (1990) has been a growing concern over what is known as territorial “overlaps”. In fact, territorial overlaps reflect the historical reality that Aboriginal Nations in British Columbia did not operate on the basis of strictly delineated boundaries. The BC Treaty Process required the drawing of lines on a map to initiate the treaty negotiation process.⁶ As a result, Aboriginal Nations, in order to protect their own interests and prior to the legal analysis and research required to show the detail of their traditional territory over which they held Aboriginal title, relied on mapping of larger rather than smaller geographic areas. This position was further encouraged by the British Columbia policy that treaty settlement lands would be no greater than 5% of the claimed SOI Territory.

For those few Aboriginal Nations which have come close to the completion of a treaty, the front end of the treaty process has led to extreme frustration and disputes between Aboriginal neighbours as Nations come closer to treaty. One of the fundamental reasons for this is the policy of British Columbia and Canada that SOI Territory did not require the type of proof that Canada required in its original comprehensive claims process initiated after the *Calder* case.⁷

However, at the end of the treaty process for the purposes of exercising unextinguished Aboriginal rights such as hunting and fishing, the SOI Territories have been relied upon as the geographic extent of those rights. The effect of this has been that there is a presumption that the treaty-protected rights over the SOI Territory may overshadow the unextinguished Aboriginal title of those Aboriginal Nations which border the Aboriginal territory. The effect of this has led to serious legal conflicts with neighbouring Aboriginal Nations who, until the treaty process, had been able to exercise their

⁶ This process led to the creation of Statement of Intent maps [“SOI Territory”].

⁷ Unlike the federal Comprehensive Claims Policy which required an analysis to show the strength of claim before treaty negotiations were commenced, the B.C. Treaty Process specifically set out that negotiations could proceed with no proof of the strength of claim or the basis for the territorial claim.

Aboriginal jurisdiction and to share the lands and resources with minimum boundary disputes. The effect has been that neighbouring Aboriginal Nations have not been consulted, much less accommodated, with respect to the decisions of Canada and British Columbia regarding a final treaty that recognizes Aboriginal rights within their territory. This has led to several Court cases in which neighbours have had to challenge the treaty signing.⁸ In these cases, the B.C. Supreme Court has, thus far, refused to make orders that will have the effect of delaying those few treaties that are almost completed under the B.C. Treaty process.⁹

(2) Unilateral Crown Positions

One of the most significant problems for the Treaty process has been the unilateral Crown positions that were stated after the commencement of treaty negotiations.

Firstly, within the BC Treaty Process, British Columbia and Canada unilaterally decided that the land base which nations would be offered would be no more than 5% of their original land base. Secondly, the Crown parties decided that no private lands would be alienated for the purpose of treaty settlements unless there was a “willing buyer, willing seller”. Thirdly, both Canada and British Columbia required a “certainty” provision which, although not the traditional “extinguishment” language, translated all section 35 Aboriginal rights into treaty rights.

These unilateral preconditions have frustrated almost every one of the 47 treaty negotiation processes in British Columbia that have carried on since approximately 1994. Combined with the elevation of the SOI Territory to lands relied upon for confirmation of rights in the treaty, there have been extreme frustrations with the Treaty Process generally.

⁸ Eg. *Gitanyow First Nation v. Canada*, [1999] B.C.J. No. 659; 66 B.C.L.R. (3d) 165 (subnom *Luuxhon v. The Queen*); *Cook v. Canada (Minister of Aboriginal Relations and Reconciliation)*, [2007] B.C.J. No. 2556; 2007 BCSC 1722.

⁹ The only treaty finalized under the B.C. Treaty process thus far is the *Tsawwassen Treaty*. Although the *Nisga'a Final Agreement* was signed in 1999, it was made outside the B.C. Treaty Process.

I refer to the three conditions as “unilateral” because at the time of the entry into the Treaty Negotiation Process there was an agreement and terms of the Treaty Process agreed to by representatives of Aboriginal Nations, Canada and British Columbia. These terms did include certain clear exceptions. For example, Canada stated clearly that it would not enter into a treaty in which international treaties or national defense would be up for negotiation to share jurisdiction. This was a fair and proper approach in that the Crown parties put the restrictions up front and then Aboriginal Nations could decide whether they still wished to engage in the Treaty Process. However, none of the aforementioned “unilateral conditions” were included in these terms. Those unilateral conditions were imposed as a part of the treaty mandate to treaty negotiations **after** an Aboriginal Nation decided to enter into the Treaty Negotiation Process.

As it was recognized that these conditions were impeding the treaty process, a Common Table of forty-seven Aboriginal Nations in the Treaty process was established to address these issues. The objective was to negotiate an alternative to address the problems arising from Canada and British Columbia’s unilateral conditions and therefore allow the treaty process to advance. In the summer of 2009, twelve months after the Aboriginal Nations tabled a proposed solution, Canada and British Columbia tabled their response which was no substantive change to these conditions.

Although the unilateral conditions may be justified as reasonable negotiation positions, they have frustrated successful treaty negotiations because they fail to take into account the disparate histories of Aboriginal Nations in British Columbia. For example, because of certain historic events going back to 1884, the vast majority of the land on the southern part of Vancouver Island had been alienated and privatized for the purposes of the National Railway in the 1880s. This has had a major impact on treaty negotiations with the Hul’qumi’num as a result of the intransigence of the Crown on the aforementioned positions.

C. International American Commission Review of B.C. Treaty Process

The Hul'qumi'num Treaty Group went to the Inter-American Commission on Human Rights ["Inter-American Commission"] and their case has been declared admissible.¹⁰ The language in the Inter-American Commission is of interest.

The Hul'qumi'num peoples had been engaged in treaty negotiations under the BC Treaty Process since 1994. In their submission to the Inter-American Commission they pointed out that these negotiations were contingent on them "not filing lawsuits based on any issue which was the object of the negotiations while the negotiations are being conducted or after a treaty has been ratified". (par. 12) They also argued that a court action in Canada for recognition of their "aboriginal title" would have little chance of success because Canadian legal precedent indicates the state has never recognized the existence of Aboriginal title of an indigenous people to their ancestral lands. One of the key arguments made by Canada in this case was that the Hul'qumi'num had not exhausted their domestic remedies. However, Article 31(2)(c) of the Rules of the Commission states that exhaustion of remedies of the domestic legal system does not apply where "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." Furthermore, the international legal system in the Inter-American Commission "clearly indicates that only those remedies that are suitable and effective, if pertinent, in resolving the matter in question, must be exhausted". (par. 31)

Because the BC Treaty Process did not allow negotiations on the subject of restoration, restitution or compensation for Hul'qumi'num ancestral lands in private hands which make up 85% of their traditional territory, the Inter-American Commission found that there was no effective remedy or due process of law to protect the property rights of the Hul'qumi'num to their ancestral lands. After referring to the decisions in *Delgamuukw v.*

¹⁰ *Hul'qumi'num Treaty Group v. Canada* (2009), Inter-Am. Comm. H.R., Report No. 105/09, Petition 592-07 (Admissibility).

British Columbia,¹¹ *Haida Nation v. British Columbia*,¹² and *Tsilhqot'in Nation v. British Columbia*¹³ the Inter-American Commission stated:

The Commission notes that the judgments cited by the State recognize the existence of the aboriginal title, the communal nature of indigenous property and the right to consultation in the Canadian legal system. But, the *amicus* briefs show that **none of those judgments has resulted in a specific order by a Canadian court mandating the demarcation, recording of title deed, restitution or compensation of indigenous peoples with regard to ancestral lands in private hands.** (par. 39) (emphasis added)

The Inter-American Commission also stated:

The Commission notes that the legal proceedings mentioned above do not seem to provide any reasonable expectations of success, because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds to lands of indigenous peoples, and, therefore, in the case of HTG, those remedies would not be effective under recognized general principles of international law. (par. 41)

These findings of the Inter-American Commission demonstrate the critical reality that notwithstanding the right of Aboriginal Nations in Canada to take their case of Aboriginal title to court and notwithstanding the recognition in the *Delgamuukw* decision of the principle that Aboriginal title has not been extinguished, no Canadian court to date has provided enforcement of Aboriginal title of ancestral lands in private or Crown hands.

In summary, the BC Treaty Process and the consultation and accommodation of Aboriginal rights and title in British Columbia have been severely constrained by the refusal of the Crown to address the very clear possibility that Aboriginal title may exist on “private lands” or lands held in fee simple. The failure to address any accommodation for the alienation of large sections of Aboriginal title lands has now become an issue before the Inter-American Commission. British Columbia and Canada have thus far

¹¹ *Delgamuukw*, *supra*.

¹² *Haida Nation v. British Columbia* [2004] 3 SCR 511 [“*Haida*”].

¹³ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 17 [“*Tsilhqot'in*”].

refused to address this very significant gap in how to deal with accommodation of Aboriginal title.

D. Aboriginal Title on “Private” Lands

In a recent case involving consultation, *Ke-Kin-Is-Uqs v. British Columbia*¹⁴, Madam Justice Smith of the BC Supreme Court considered the very issue about the existence of Aboriginal title on private lands. The “Removed Lands” to which she makes reference were part of the lands which had been privatized in 1884.

Madam Justice Smith in the *Hupacasath* case canvassed the issue of the state of the law with respect to Aboriginal title on private lands. She certainly made clear that it was inappropriate for the Crown to assume that in consultation and accommodation discussions that Aboriginal title did not exist on fee simple lands. Because this is a significant statement as to the state of the law as of 2008 with respect to the relationship between private lands and Aboriginal title, I have set it out below:

[216] The Crown argued forcefully that its duty with respect to the Removed Lands did not extend to accommodation, and it was supported in that position by Island Timberlands. Both respondents suggested that the private ownership of the Removed Lands means that the claimed aboriginal rights over the Removed Lands have so little weight that only consultation in the sense of meeting and listening to concerns was required, and argue that what the Crown did between December 2005 and January 2008 greatly exceeded that minimal requirement.

[217] They point to certain language in the 2005 Decision at para. 249, which I repeat for convenience:

249 On the existing state of the law, the petitioners' aboriginal rights with respect to the Removed Lands are at best highly attenuated. Prior to the removal decision, the owners of the lands could have decided to exclude the Hupacasath from access to the lands at any time, subject to possible intervention by the Crown through its power to control activities on the land under the TFL. Their claimed aboriginal title, if it has not been extinguished, seems very unlikely to result in the Hupacasath obtaining exclusive possession of the Removed Lands in the future. The authorities indicate that the possible availability of the land to satisfy future

¹⁴ *Ke-Kin-Is-Uqs v British Columbia* [2008] BCSC 1505 [“*Hupacasath*”].

land claims or treaty settlements is an important consideration in determining the extent of the Crown's duty.

[218] The reference to “the existing state of the law” in the 2005 Decision was deliberate. As described in that decision (paras. 170-200), the law has not yet yielded any definitive answer to the question of what remains of aboriginal rights, including aboriginal title, after lands have become privately owned through conveyance of fee simple.

[219] In *Tsilhqot'in Nation*, at para. 997, Mr. Justice Vickers of this Court stated that the Province has no jurisdiction to extinguish aboriginal title and such title was not extinguished by a conveyance of fee simple title. He added at paras. 998 – 1000:

998 Thus, regardless of the private interests in the Claim Area (whether they are fee simple title, range agreements, water licences, or any other interests derived from the Province), those interests have not extinguished and cannot extinguish Tsilhqot'in rights, including Tsilhqot'in Aboriginal title.

999 **What is not clear from the jurisprudence are the consequences of underlying Aboriginal rights, including Aboriginal title, on the various private interests that exist in the Claim Area. While they have not extinguished the rights of the Tsilhqot'in people, their existence may have some impact on the application or exercise of those Aboriginal rights.** This conclusion is consistent with the view of the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2001] 1 C.N.L.R. 56 (Ont. C.A.).

1000 Reconciliation of competing interests will be dependant on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure, and the existing land use. Such a task has not been assigned to this Court by the issues raised in the pleadings.

[220] Counsel at the hearing advised that all parties have appealed the *Tsilhqot'in Nation* decision, and it may be that the Supreme Court of Canada, in an appeal from that case or in some other context, will clarify the law within the foreseeable future. However, this decision cannot await that event and, as with the 2005 Decision, it must be made in a manner that takes into account the uncertainty in the law.

[221] I do not overlook the history of the Removed Lands at issue in this case. The Dominion of Canada received the lands from the British Columbia Government in 1884 under the *Settlement Act* and the lands were part of the "Railway Lands" transferred from the Dominion of Canada to the Esquimalt and Nanaimo Railway Company in 1887. Thus, the chain of title is not straightforwardly a matter of provincial transfer of fee simple and, possibly, the

circumstances in this case are distinguishable from those upon which Vickers J. commented. I have not been asked to reach a conclusion on the issue and refrain from doing so.

[222] The point remains that the law has not yet been clarified as to the inter-relationship, in the absence of treaties, between aboriginal rights and title on the one hand and fee simple title on the other.

[223] Referring again to para. 249 in the 2005 Decision, the assessment that the Hupacasath's "claimed aboriginal title, if it has not been extinguished, seems very unlikely to result in the Hupacasath obtaining exclusive possession of the Removed Lands in the future" was based on two factors: the existing uncertain state of the law; and the Province's position in treaty negotiations -- that privately-held lands are not available for settlement of claims except on a willing seller/willing buyer basis. I have not been advised of any change in that position, which was described at para. 164 of the 2005 Decision:

164 Under the terms of the British Columbia Treaty Process, the petitioners will not be able to obtain title to any private lands, except on a willing seller/willing buyer basis, and the Crown relies on that fact as further support for its position that there is a fundamental incompatibility between aboriginal title and fee simple title. The Crown's position is that it does not recognize aboriginal title to lands that are privately held and that it does not have jurisdiction to provide privately held land if it is claimed.

[224] Thus far in this section I have been referring to the legal aspect of the Hupacasath's claim. Indeed, the submissions of both respondents emphasized that side of the equation. However, in making a preliminary assessment of the strength of an Aboriginal people's claim, the Court must take account of both the law and the facts. Here, it is important to note that the factual side of the HFN claim seems strong. The Crown did not dispute that the Hupacasath had used the Removed Lands prior to the arrival of Europeans in the intensive and varied ways described by the HFN elders in their affidavits. Thus, the alleged strong connection of the HFN with the Removed Lands basically went unchallenged by the Crown, except for the evidence it led as to the existence of overlapping claims by other First Nations. In that regard, the findings of fact in the 2005 Decision included the finding that about 40% of the area of the Removed Lands is not subject to any competing claim from other First Nations. [emphasis added]

E. How to Achieve Reconciliation after a Court Determination of the Failure to Consult and Accommodate

When one looks at the decision by the Supreme Court of Canada in which consultation and accommodation were first addressed regarding non-treaty lands in *Haida*, it in fact

addressed the impact of a change in a forest licence from one private company to another company and the requirement of the Minister's approval for that transfer to occur.

The Supreme Court has recognized in section 35 that there are two jurisdictions whose reconciliation must be negotiated, that of Aboriginal Nations and also that of the Crown.

As McLaughlin, C.J. stated in *Haida*:

Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation [par 20].

Contrary to the position taken by the Crown thus far with respect to minimization of Aboriginal title, the Provincial Crown must recognize Aboriginal title and rights in order to engage in honorable reconciliation.

In *Delgamuukw*, the Chief Justice stated:

The manner in which the fiduciary duty operates with respect to the second stage of the justification test – both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take – will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of the land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.¹⁵

Despite these very clear remarks, the Provincial Crown has refused to recognize Aboriginal title.

There has certainly been extensive guidance by the BC Supreme Court, the BC Court of Appeal and the Supreme Court of Canada with respect to the test for infringement of Aboriginal title or rights. The ongoing alienation of lands and resources by the

¹⁵ *Delgamuukw v. The Queen*, [supra], par. 166.

Provincial Crown without the recognition of Aboriginal title and often without justification has failed to meet these tests of reconciliation.

Some elements of the legal requirements for justification have been addressed as follows:

The duty to consult is triggered whenever there is the potential for impact of third party interests on claimed Aboriginal lands.

Koenigsburg J. in *Squamish Indian Band v. British Columbia*¹⁶ (par. 73)

. . . S[ection] 35(1) requires that those infringements satisfy the test of justification . . . The test of justification has two parts . . . First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. . . The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.

Lamer C.J. in *Delgamuukw, supra* (pars. 160 – 162)

What is required is that the government demonstrate . . . “both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest” of the holders of aboriginal title in the land.

Lamer C.J. in *Delgamuukw, supra* (par. 167)

Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. . . .

Binnie J. in *Mikisew Cree First Nation v. Canada (Minister of Heritage)*¹⁷ (par. 54)

British Columbia must also demonstrate that “there has been as little infringement as possible in order to effect the desired result”.

Vickers J. in *Tsilhqot'in, supra* (par. 113)

The timing of consultation and engagement is critical and must not be postponed to the last and final point in a series of decisions.¹⁸

¹⁶ *Squamish Indian Band v. British Columbia*, [2005] 1 C.N.L.R. 347.

¹⁷ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [“*Mikisew*”].

Furthermore, as Justice Binnie set out in *Mikisew*, unilateral Crown action is the antithesis of reconciliation and mutual respect.¹⁹ Unfortunately, notwithstanding the guidance provided by the courts as to how the honour of the Crown is to be upheld in the consultation and accommodation process, British Columbia, with very few treaties finalized, has continued to minimize the obligation to consult.

The courts in British Columbia in several cases have given declarations that the Crown has failed to consult.²⁰

The difficulty has been that even after such an order it has taken an extensive period of time to come to an agreement and often the Aboriginal Nation has been required to go back to the court.²¹

A key objective to achieve reconciliation is how to move from the recognition of the requirement for accommodation to a constructive result.

It is suggested that one remedy is the utilization by the court system of alternate dispute resolutions and compelling the Crown to engage in those ADR resolutions. This is what occurred in the second *Hupacasath* decision in which the court made an order to appoint a mediator to address the consultation and accommodation.²²

In the second decision, the Petitioners asked the court to direct that an independent mediator be appointed to assist with further consultation and accommodation between the Petitioners and the Respondent.²³

¹⁸ *Squamish*, *supra*, par. 74.

¹⁹ *Mikisew*, *supra*, par. 49.

²⁰ E.g. *Gitksan and other First Nations v. British Columbia (Minister of Forests)*, 2002 BCSC 1701; *Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734 [“Gitanyow”], *Squamish*, *supra*; *Hupacasath*, *supra*.

²¹ *Ke-Kin-Is-Uqs v British Columbia* [2008] BCSC 1505 [“*Hupacasath*”] and *Gitanyow*, *supra*.

²² *Hupacasath*, *supra*, November 4, 2008 See also Order of Madam Justice Smith, attached.

²³ *Hupacasath*, *supra*, par. 1.

Madam Justice Smith of the BC Supreme Court accepted the argument of the Petitioners that a third party mediator was required.²⁴

However, she also addressed the issues of what the mediator would address and set out those requirements (par. 256).

What is relatively unique in this case is that the court recognized that even during the course of mediation, the parties or the mediator may need the assistance of the court to ensure that the mediation proceeded.

With respect to the relation of this consultation and accommodation on the private lands, the court declined to extend conditions that it had imposed in 2005. However, the court did rely on the assurance of counsel for the private company that conditions imposed by the Minister remain in effect. Furthermore, the court relied on Affidavit evidence provided by Island Timberlands in which assurances were provided that the Hupacasath would continue to have access to sacred sites “as long as operations and safety conditions permit”. Justice Smith made an unusual order in which she required that the company would be obligated to inform the Petitioners if they took a change of position from what was presented to the court. At that time the Petitioners would have the right to return to the court to seek further order.

What is unique about the *Hupacasath* case is that it is the first case in which the Crown obligation to accommodate with respect to asserted Aboriginal title on private lands has been recognized. Secondly, the court has started to engage the use of outside ADR processes (mediation) to ensure that there is a constructive result as a result of the court orders. Because of the nature of the *Haida* decision, the courts have been left not to determine what is an appropriate accommodation, but rather to require the Crown to fulfill its obligations. Up to this point in time the courts have not imposed an

²⁴ *Hupacasath, supra*, par. 255.

accommodation although they have certainly looked at the accommodation to determine whether or not the consultation was proper.²⁵

F. Conclusion

The British Columbia experience demonstrates a number of features with respect to the failure of Crown policy on Aboriginal relations in the post *Delgamuukw* world. Firstly, Crown policy that requires treaty negotiations to be based on a template with no modification to take into account unique circumstances has been heavily criticized at the Inter-American Court on Human Rights as leading to no effective remedy for Aboriginal Nations.

Although *Delgamuukw* laid the framework for the recognition of Aboriginal title, the courts have been reluctant to give that final recognition to Aboriginal title when the issue has been placed centrally before them (*Tsilhqot'in Nation*). Thirdly, although the obligation to consult and seek meaningful accommodation in a pre-proof of Aboriginal title situation appeared to lead to a further advance in Aboriginal relations, the resistance of the Crown parties to engage in meaningful consultation even after court orders demonstrating that they have failed to properly accommodate has necessitated the courts to look at other means to accomplish successful accommodations for Aboriginal Nations.

The role of the mediator and the independence of the mediator in a court directed process is a matter that will be a critical development to the future success of accommodation of the Aboriginal rights and Aboriginal title of the Nations of British Columbia with the Crown's decisions related to the resources within the Aboriginal territories of British Columbia.

The original vision created by the New Relationship in 2005 has yet to be implemented on the ground in a real and demonstrable way which will respect ongoing Aboriginal title, negotiations of truly beneficial treaties for the Aboriginal peoples of British Columbia and for the Aboriginal Nations of British Columbia and the recognition that

²⁵ *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139.

Accommodation Agreements or treaties are a critical element of the fabric of the Canadian nation to recognize that Aboriginal Nations are true founding nations and partners in Canada.

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