

I. INTRODUCTION

First Nations¹ regard the earth as sacred. Our culture is based on respecting the earth. Traditionally, we measure our progress by the extent to which we are able to co-exist with all of creation. As First Nations, we have a spiritual responsibility to take care of the earth. Prior to contact, our systems of justice were based on highly evolved principles of Natural Law².

My paper will begin with an overview of the content, meaning and limitations of Aboriginal title, as described by the Supreme Court of Canada in *Delgamuukw v. British Columbia*³. In order to understand the limitations of Aboriginal title, I will discuss the nature of First Nations' attachment to their lands, citing traditional values, world view and philosophy regarding the land. As I recognize the uniqueness of each First Nation, I will utilize my own Haudenosaunee⁴ culture to illustrate traditional Haudenosaunee perceptions of property. I will then discuss two case studies involving two Haudenosaunee Nations⁵ to illustrate my view on when current economic development activities will likely be perceived by Canadian courts as irreconcilable with the nature of the Haudenosaunee's attachment to our lands. The paper will

¹ I use the words "First Nations", "Aboriginal" and "Indian" to refer to the original peoples of North America. It must be kept in mind that all First Nations are unique. Each Nation has its own laws, government, language and culture. I use the term First Nations in my paper to reflect my own perspective as a Seneca woman and a lawyer.

² The principles of Natural Law that I am referring to are defined in Six Nations Iroquois Confederacy, "The Haudenosaunee [People-of-the-Longhouse] Declaration of the Iroquois," passed on April 17, 1979; published in *Akwesasne Notes*, Spring, 1979 which discusses a way of life based on a spiritual path of righteousness and reason to ensure a harmonious existence between all peoples and other beings of this planet. The Declaration refers to a spiritual consciousness as the path to survival of humankind and that our duty as human beings is to preserve the life that is here for the benefit of the generations yet unborn.

³ [1997] 3 S.C.R. 1010.

⁴ "Haudenosaunee", means, "People of the Longhouse". The Haudenosaunee Confederacy is comprised of the Seneca, Oneida, Onondaga, Tuscarora, Cayuga and Onondaga Nations. Throughout my paper, I will use the Haudenosaunee people as an example because that is the culture that I am a part of and I was fortunate to be raised with the traditional teachings of the Haudenosaunee. Therefore my combined knowledge base comes both from the oral history of the elders who raised me as well as from my legal education. I do not however, purport to speak on behalf of the Haudenosaunee Confederacy.

⁵ The case studies are for illustration purposes only. Any similarities to one of the actual Haudenosaunee Nation communities or corporations are coincidental.

conclude with providing practical options for First Nations when pursuing economic development on Aboriginal title lands.

II. ABORIGINAL TITLE

Aboriginal title arises from the prior occupation by Aboriginal peoples of the land now known as Canada. The content of Aboriginal title is described by the Court in *Delgamuukw* as follows:

First, Aboriginal title encompasses the right to exclusive use and occupation of 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.¹

Clearly, the Supreme Court of Canada has recognized and affirmed the content and meaning of Aboriginal title and Aboriginal economic rights:

It is not a mere collection of rights to pursue activities on the land that were integral to the distinctive cultures of the Aboriginal peoples before Europeans appeared on the scene, as British Columbia and Canada argued. Instead, Aboriginal title encompasses a full range of uses that need not be linked to past practices. So Aboriginal nations can engage in mining, lumbering, oil and gas extraction and so on, even if they did not use their lands in those ways in the past.²

The Court however, did impose the following limitation on Aboriginal title lands:

Accordingly, in my view, lands subject to Aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to Aboriginal title in the first place....For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims Aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).³

¹ *Delgamuukw*, *supra* note 3 at 1112.

² K. McNeil, "Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right? (Paper presented at the Robarts Lecture, 25 March 1998) at 5 [unpublished].

³ *Delgamuukw*, *supra* note 3 at 1089.

The Court compared the above limitation on Aboriginal title to the concept of equitable waste at common law: “Under that doctrine, persons who hold a life estate in real property cannot commit “wanton or extravagant acts of destruction” or “ruin the property”.⁴

Notwithstanding this limitation, the Court clearly stated:

This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on Aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the Aboriginal title in that land.⁵

Arguably, the limitation on Aboriginal title is a continuation of colonial oppression. It is patronizing to presume that Canadian courts should have the ability to determine when First Nations are utilizing their lands in a manner which affects their relationship with the land. Implicit in this limitation is the presumption that First Nations are incapable of protecting their lands and resources, notwithstanding that First Nations co-existed with the natural world, with prosperous economies for thousands of years before contact with Europeans.

Despite the foregoing, if First Nations are to “comply” with the limitation on their Aboriginal title lands as set out by the Supreme Court of Canada, First Nations must have a clear understanding of the nature of the attachment to their lands. When discussing the source of Aboriginal title, the Court stated:

. . .the source of Aboriginal title appears to be grounded both in the common law and in the Aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.⁶

⁴ *Ibid.* at 1090.

⁵ *Ibid.* at 1091.

⁶ *Ibid.* at 1099-1100.

Therefore, to question closely this limitation on Aboriginal title, it is necessary to analyse both the nature of First Nations' attachment to their lands and pre-existing systems of Aboriginal law.

III. OUR HOME AND NATIVE LAND

a) Nature of Attachment to Lands

In order to best defend their economic use of their Aboriginal title lands, it is absolutely critical for First Nations to understand the nature of their attachment to their lands that give rise to Aboriginal title and their pre-existing legal systems. Essentially, First Nations must know their history and their traditional laws:

. . . .since First Nations laws continue to give meaning and content to all Aboriginal rights and form a part of the laws of Canada, reference to these laws in Canadian law is a foundational and unifying principle in Aboriginal rights jurisprudence. As these First Nations laws have "always constituted an integral part of their distinctive culturefor reasons connected to their cultural and physical survival," they constitute a principled reference point in the interpretive framework of Aboriginal rights, a foundation upon which other Aboriginal rights lie. First Nations laws are integral to the exercise of all Aboriginal rights; they must be part of the courts' interpretation of those rights.¹

In my view, if First Nations are challenged on their land use, inevitably the courts must analyse First Nations' laws in order to determine if the land use is irreconcilable with the nature of First Nations' attachment to their lands. As stated above, the Court held that the source of Aboriginal title appears to be grounded both in the common law and in the Aboriginal perspective on land, with the latter including, but not being limited to Aboriginal systems of law. If both legal systems must be taken into account in establishing the proof of occupancy, then both legal systems should be taken into account when determining whether the limitation has been breached. When referring to land use and First Nations' laws, this inevitably leads to the issue of self-government.

a) Self-Government as a Solution

¹ J. Borrows, "First Nations Law in Canada" [1996] 41 M.L.J. 631 at 645.

Ultimately, self-government is the only viable solution for addressing the limitation to which Aboriginal title lands can be used, as expressed by Kent McNeil:

. . . self-government provides a solution to the dilemma created by the inherent limitation Chief Justice Lamer placed on Aboriginal title. As we have seen, that limitation prevents Aboriginal lands from being used in ways that are inconsistent with an Aboriginal nation's connection with the land. But the nature of that connection must be allowed to change over time so that Aboriginal nations are not made prisoners of their own pasts. Canadian courts should not sit in judgment over social change in Aboriginal communities, deciding what is and what is not necessary for their cultural preservation. That kind of paternalism is self-defeating because it destroys the autonomy that is necessary for Aboriginal communities to thrive as dynamic cultural and political entities. Any internal limitations on Aboriginal title in the interests of cultural preservation should be determined by Aboriginal nations themselves through the exercise of self-government within their communities - they should not be imposed by Canadian courts.¹

As stated by Kent McNeil, it is paternalistic for Canadian courts to sit in judgment in determining any limitations in how First Nations can use their lands, when the very nature of Aboriginal title arises from prior occupation of the lands, which pre-dates the Canadian legal system. The limitation also presumes that the nature of the First Nations' relationship to their lands did not change prior to contact. Although fundamental principles of resource management and preservation of land and resources for coming generations remained the same, First Nations' economies and uses of their lands was constantly changing prior to contact.

As such, the limitation cannot be used to "freeze" Aboriginal uses of land in a modern day context, or as Kent McNeil states, First Nations will become prisoners of their past. For example, if an aboriginal or treaty right affirms the inherent right of First Nations to hunt and fish on their traditional territories, this should be interpreted to mean that First Nations have the right to earn a livelihood from all of the resources on their territories, not specifically through hunting and fishing alone. First Nations should be free to continue to pursue economic activities on their lands in a manner which they decide is consistent with their own laws.

Aboriginal title cannot be discussed intelligently without also addressing self-government. First Nations have remained self-governing since time immemorial and arguably

¹ McNeil, *supra* note 7 at 9-10.

that right should now be constitutionally protected and it should be First Nations themselves who have the sole jurisdiction to determine limitations on use of Aboriginal title lands. In my view, to discuss self-government from a Haudenosaunee perspective, it is necessary to discuss sovereignty.

a) **Sovereignty from a Haudenosaunee Perspective**

The Haudenosaunee Confederacy Council has continually asserted its sovereignty and continues to govern themselves according to the Great Law.² Oren Lyons, Faithkeeper of the Turtle Clan, Onondaga Nation, summarizes his definition of sovereignty as follows:

I note that sovereignty is probably the most used and misused word as it relates to Indian nations. Self-recognition, that's first. Self-determination, the ability and right to govern oneself, exercising national powers in the interest of the nation and its peoples, is fundamental to sovereignty. This, along with the jurisdiction over the lands and territories that we live and exist on, is sovereignty. Simply put, sovereignty is the act thereof. It is a state of mind and the will of the people. No more, no less. That is sovereignty, as we understand it, and as we understand it, sovereignty is freedom. Sovereignty as I heard the word, is responsibility. . . .

The Haudenosaunee are a separate, sovereign nation. We have our own passport, and we travel about the world independently. That is an act of sovereignty. We didn't go to the federal government and ask them, "Can we have a passport?" We issued it, and we travelled. And we continue to do so. It's hard work, but we do it.³

As mentioned above, one of the essential aspects of sovereignty is responsibility. This responsibility is pervasive and affects every aspect of an individual's life. Responsibility begins with taking care of oneself and being respectful towards oneself. This responsibility then extends outwards to one's family, community, Nation and the universe:

In order to be a self-determining nation, you must have self-disciplined individuals. You must have individuals who understand who they are and how

² The Great Law is the traditional form of government of the Haudenosaunee. It is based on consensual decision-making. There are 50 condoled chiefs from each of the original five nations, which includes the Seneca, Cayuga, Onondaga, Oneida and Mohawk Nations. Each of the condoled chief titles are matched with a condoled clanmother's title. It is the clanmother who has the power to choose chiefs and demote chiefs, if necessary. See for example J. Gibson, *Concerning the League*, ed. J. Nichols, eds. and trans. H. Woodbury, R. Henry & H. Webster (Winnipeg: Algonquian and Iroquoian Linguistics, 1992) and videotapes of a recitation of the Great Law by Jacob Thomas, Iroquoian Institute, Six Nations of the Grand River for an in-depth discussion of the Great Law.

³ O. Lyons, "The Native American Struggle: Conquering the Rule of Law: a Colloquium Speech" 20 N.Y.U. Rev. L & Soc. Change 209 (Publication page references are not available for this document).

to carry themselves. . . . What must be understood then is that the Aboriginal request to have our sovereignty respected is really a request to be responsible.⁴

From this perspective, it is clear that at the time of contact, the Haudenosaunee had an in-depth understanding of responsibility as evidenced by their success in living in harmony with Mother Earth.

It is difficult for the Haudenosaunee to doctrinally separate law from politics; spirituality; family life; lands; resource management; justice etc. because the Great Law is based on the holistic philosophy of Natural Law, which states that all things in creation are related and interdependent. At the time of contact, it was in keeping with the Great Law for the Haudenosaunee to want to co-exist with the newcomers, because they were viewed as part of creation.

It became clear, however to the Haudenosaunee after limited contact with the Dutch that the value base upon which each Nation based its laws was irreconcilable. For example, a property system based on individual ownership of land was foreign to the Haudenosaunee perspective of being collective spiritual caretakers of the land. The Dutch had their own religion, which was foreign to the Haudenosaunee spiritual and cultural beliefs and ceremonies. As such, the Haudenosaunee entered into a treaty with the Dutch in the early 1600s, evidenced by the Two Row Wampum Belt (the “Two Row”):⁵

The two rows of purple beads represent the Red Man and the White Man living side by side in peace and friendship forever. The white background is a river. On that river of life you travel in your boat and we travel in our canoe. Each of us is responsible for our own government and religion and way of life. We don't interfere with each other. The rows are parallel. One row is not bigger. We're equal. We don't call each other 'Father' or 'Son', we call each other 'Brother'.⁶

⁴ P. Monture-Angus, “Journeying Forward Dreaming First Nations’ Independence” (Halifax: Fernwood Publishing, 1999) at 36.

⁵ Wampum belts are sacred to the Haudenosaunee Confederacy, as they are our only method of recording history, laws and treaties. Many of the belts were sold by individuals who did not have the right to sell them because the belts were communally owned by the Haudenosaunee Confederacy. See also W. Fenton, *Return of Eleven Wampum Belts to the Six Nations Iroquois Confederacy on Grand River, Canada* (1989) 36 Ethnohistory 392.

⁶ S. Wall & H. Arden, “Oren Lyons” in, White Deer of Autumn, ed., *Wisdomkeepers Hillsboro: Beyond Words Publishing, 1990*) at 69.

From a Haudenosaunee perspective, as outlined by Lyons above, it is clear that the Two Row Wampum Belt provides for the recognition of mutual sovereignty by the Dutch and the Haudenosaunee. It is a Western construct that there can only be one sovereign over a particular land base. From a First Nations' perspective, "Sovereignty (or self-determination) . . . is not about "ownership" of territory in the way that Canadian politicians and lawyers would define those words."⁷ As stated above, sovereignty is about responsibility. Prior to contact, First Nations were able to co-exist as sovereign Nations over all of North and South America, as each of these Nations were responsible for their own well-being and continued existence as a people. Similarly, each of the Nations that comprise the Haudenosaunee Confederacy are also sovereign Nations.

The Royal Proclamation of 1763⁸ was established due to the growing hostilities as the influx of settlers continued to appropriate First Nations' lands. The military threat posed by First Nations to the "colonies" was very real, as evidenced by the wording of the Proclamation, "And where it is just and reasonable, and essential to our Interest, and the security of our Colonies. . . ."⁹ As a result, "The British perceptively realized that alleviating First Nations' "Discontent" required that Native people believe that their jurisdiction and territory were protected; however, the British also realized that the colonial enterprise required an expansion of the Crown's sovereignty and dominion over the "Indian" lands."¹⁰ As such, the Proclamation was an attempt to reconcile the interest of First Nations in their lands, with the growing need for more land for the settlers. Clearly, without the assurance of protection of their jurisdiction and territory, this would have been the impetus for First Nations to wipe out the colonies through massive warfare.

⁷ Monture-Angus, *supra* note 16.

⁸ R.S.C. 1985, App. II, No. 1 (hereinafter, "The Proclamation").

⁹ *Ibid.* at 127.

¹⁰ J. Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28(1) U.B.C. L. Rev. 1 at 17.

It is important to note that at the time the Proclamation was affirmed by the First Nations, the Two Row was pledged to reflect their understanding of the Proclamation, being the mutual respect for sovereignty of the British and the First Nations, over their respective citizens and territories. As history has unfolded, there have been diverse interpretations of the Proclamation when deciding critical issues of sovereignty and land title in the Canadian courts, but those interpretations do not accurately reflect the First Nations' interpretation. Given the historical relationship of European dependence on First Nations that existed at the time of the Proclamation, the inference can be drawn that the First Nations' understanding of the Proclamation is as reflected in the Two Row:

That's the way it's supposed to be between us 'for as long as the grass grows and water flows and the sun shines'. Those words come from this treaty. We still believe them. We're waiting for the White Man to live up to his side.¹¹

Extrinsic evidence is required in defining a treaty relationship, as per the recent Supreme Court of Canada decision in *R. v. Marshall*:¹²

Having concluded that the written text is incomplete, it is necessary to ascertain not only by reference to the fragmentary historical record, as interpreted by the expert historians, but also in light of the stated objectives of the British and Mi'kmaq in 1760 and the political and economic context in which those objectives were reconciled.¹³

The Court went on to conclude that, "While I do not believe that in ordinary commercial situations a right to trade implies any right of access to things to trade, I think the honour of the Crown requires nothing less in attempting to make sense of the result of these 1760 negotiations".¹⁴ As such, the Two Row can be cited as extrinsic evidence to reflect the First Nations' understanding of the Proclamation. The Two Row can be used as evidence of the

¹¹ Wall & Arden, *supra* note 18.

¹² [1999] 177 D.L.R. (4th) 513 (S.C.C.).

¹³ *Ibid.* at 539.

¹⁴ *Ibid.* at 541.

political and economic context of both the British and the First Nations when the Proclamation was entered into. As well, the honour of the Crown requires that the Two Row be given equal consideration as the wording of the Proclamation in reflecting the First Nations' understanding of the Proclamation.

Therefore, it is arguable that the treaties that were entered into with European Nations are evidence that at the time of contact, the Haudenosaunee had complete sovereignty. They were capable of entering into foreign relations and trade with other Nations. They had a land base over which they asserted complete jurisdiction. The Haudenosaunee's understanding of treaties such as the Two Row and the Proclamation guarantee the Haudenosaunee's right to inherent sovereignty, which arguably has not been extinguished and should now be constitutionally recognized.

Under section 91(24) of the *Constitution Act, 1867*¹⁵ however, the Powers of Parliament include the right to pass legislation respecting, "Indians, and Lands reserved for the Indians." The power to pass legislation regarding "Indians" provides the framework for an oppressive relationship. Section 91(24) was the impetus for the *Indian Act*¹⁶, which contains extensive limits on First Nations' abilities to pursue meaningful economic development. For example, section 89 of the *Indian Act* states:

89.(1) Restriction on mortgage, seizure, etc., on property on reserve - Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.¹⁷

The implication of section 89 of the *Indian Act* has been that financial institutions are reluctant to finance economic development projects on reserve lands. When considering land use rights of the Haudenosaunee, what must be resolved is how to reconcile the Haudenosaunee's right to

¹⁵ (U.K.), 30 & 31 Vict. c. 3.

¹⁶ R.S.C. 1985, c. I-5.

¹⁷ *Ibid.*

inherent sovereignty with section 91(24) of the *Constitution*, the *Indian Act* and Canadian jurisprudence such as *Delgamuukw* which sets out limitations on Aboriginal title lands. I will now discuss some of the difficulties which will arise in this reconciliation process by first discussing the differences in world views of property between Western society and First Nations and then specifically the Haudenosaunee world view of property .

d) Differences in World View of Property

The differing conceptions of property between Western society and First Nations must be understood in order to understand the nature of First Nations' attachment to their lands. A Nation's rules regarding property clearly reflect the value base of its society:

Property law is a system of rules that governs legal relations between peoples. The development and content of the system are dependent upon the social context within which the system is formed. In this way, the law of property is not "objective" or value neutral, nor does it exist as a fixed or static system. Rather, the social mores and priorities of a given society affect the formulation and reformulation of property rules and the court's willingness to grant ownership rights to one person (or group) over another.¹

The social mores in Western society regarding property emphasize the individual ownership of land:

Underlying this system is the philosophy of economic liberalism which encourages exploitation of resources owned by individuals and minimal interference by the state. An inherent assumption of economic liberalism is that the welfare of individual owners as well as the community prospers with a "free market", and the law of supply and demand ensures proper regulation of price, production, and purchase of goods.²

In contrast:

Unlike Europeans, Native Americans long ago achieved a profound intellectual apprehension that human progress must be measured as an integral aspect of the natural order, rather than as something apart from and superior to it. Within this structure, elaborated and perfected through oral tradition and codified as "law" in ceremonial and ritual forms, the indigenous peoples of this hemisphere lived

¹ C. Bell, "Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate" (1992-1993) 17(2) Am. Indian L. Rev. 457 at 460.

² R. Strickland, "Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony" (1992) 24 Ariz. St. L.J. 175 at 183.

comfortably and in harmony with the environment, the health of which they recognized as an absolute requirement for their continued existence.³

Based on this philosophy, prior to contact, First Nations' economic development could not occur without interference from the Nation's government. The welfare of the Nation as a whole was perceived as more important than individual prosperity. As such, provided First Nations are pursuing economic development according to their own traditional laws, the limitation on Aboriginal title lands set out in *Delgamuukw* should not be problematic. As stated earlier however, it must be emphasized that it is the First Nation itself that should have the right to determine when lands are being used in a manner that is irreconcilable with the nature of its attachment to its lands.

I will now provide two Haudenosaunee case studies to illustrate my view on when current economic development activities will likely be perceived as irreconcilable with the nature of the Haudenosaunee's attachment to our lands, beginning with a discussion of traditional Haudenosaunee perceptions of property.

IV. HAUDENOSAUNEE CASE STUDIES

a) Haudenosaunee World View of Property

Each Nation has its own traditional perceptions of property and traditional laws that govern economic development on their lands.⁴ There are however similar philosophies among many First Nations regarding concepts of property. For example, individual ownership is often a foreign concept to First Nations. Land is usually held communally through families, clans or the entire Nation. Many First Nations also view themselves as spiritual caretakers of their territories and make decisions regarding land use based on protecting the interest of future generations.

³ W. Churchill, *Struggle for the Land* (Toronto: Between the Lines, 1992) at 17.

⁴ See for example P. Knudtson & D. Suzuki, *Wisdom of the Elders*, (Toronto: Stoddart Publishing Co. Limited) and Wall & Arden, *supra* note 18.

As I am most familiar with Haudenosaunee culture, I will discuss traditional Haudenosaunee perceptions of property. As a matrilineal society by traditional law, our bloodline is followed on our mother's side, which means that our children take their mother's clan and Nation. Traditionally, land was held communally by the women of each clan. It was felt that because women bring new life into the world, they were in the best position to take care of the earth, who is also regarded as the mother of all living things. When decisions were made regarding the land, the women had to consider the effects the decision would have on the children seven generations into the future. Essentially, the women held the land in trust for future generations. Our people were allowed to use the land in a manner that would preserve it for generations to come; they did not own the land. Only the Creator can have true ownership of the land.

The Haudenosaunee believe that we have a spiritual duty to take care of the earth. Ceremonies are centered around giving thanks and honouring our Mother Earth. Before important gatherings of the Haudenosaunee, a Thanksgiving Speech is given to acknowledge and give thanks to everything in creation. Audrey Shenandoah, a Clan Mother for the Onondaga Nation provided a short translation into English of the Thanksgiving Speech, which she gave as part of her address to the Global Forum on Environment and Development for Survival, held in Moscow in January 1990:

Now our words we direct to our Mother Earth, who supports all life. We look to the shortest grasses, close to the bosom of our Mother Earth, as we put our minds together as one mind. We include all the plant life, the woodlands, all the waters of Earth, the fishes, the animal life, the bird life, and the Four Winds. As one mind our acknowledgment, respect, and thanksgiving move upward to the Sky World: the Grandmother Moon, who has a direct relationship to the females of the species of all living things; the sun and the stars; and our Spiritual Beings of the Sky World. They still carry on the original Instructions in this great Cycle of Life. With one mind we address our acknowledgment, respect and gratefulness to all the sacred Cycle of Life . . . ¹

¹ "Audrey Shenandoah, Onondaga", *supra* note 18 at 24.

Accordingly, the nature of Haudenosaunee attachment to our lands would be akin to the love, respect and gratitude one has for one's mother. The Haudenosaunee relied on the resources of Mother Earth to provide both for our subsistence needs and to utilize the resources of the land to engage in responsible economic development. For the Haudenosaunee, our economies were not just based on subsistence.

For example, the Haudenosaunee were renowned for our agricultural abilities. As such, once our own subsistence was provided for, we commercially traded our agricultural products in extensive trade networks with other First Nations throughout North America. All of our economic development was pursued to the extent that it was done in harmony with the environment and the land and resources were preserved for coming generations.

a) **Haudenosaunee Case Study A**

A Haudenosaunee community owns a very profitable pharmaceutical company. There is an international demand for the pharmaceutical products, as they are derived from traditional herbal medicines, unique to the Haudenosaunee, which are gathered on Haudenosaunee Aboriginal title lands. This Haudenosaunee community is solely governed by its Hereditary Chiefs who follow the Great Law. In order to understand the complexity of pursuing economic development in this context, I will provide a brief overview of the political decision-making process of the Great Law.

The Peacemaker, who brought the Great Law to the Haudenosaunee people divided the five original Haudenosaunee Nations into moieties that are related to one another as fathers (the Mohawk, Onondaga, and Seneca) and sons (the Oneida and the Cayuga). He decided on the seating arrangements in the Confederacy Council, such that the chiefs of the Mohawk Nation and the Seneca Nation sit to the right of the Onondaga Nation. The chiefs of the Oneida Nation and the Cayuga Nation sit to the left of the Onondaga Nation. Thus, the Mohawk and the Seneca sit on one side of the council fire, the Oneida and Cayuga on the other side, and the Onondaga, as fire-keepers, sit at the head of the fire, between the two groups of chiefs.

The Peacemaker outlined the following procedures to be used in council:

The Mohawk are to consider an issue first; when they reach consensus, their speaker announces the decision, and passes the issue to their moiety brothers, the Seneca, who must also reach consensus and attempt to consolidate their decision with that of the Mohawk. If the two groups agree, they appoint a speaker for the moiety, who moves the issue 'across the fire' to the Oneida. When the Oneida have reached consensus, they hand on the issue to their moiety brothers, the Cayuga, and if the two groups in that moiety reach consensus, the issue is passed back across the fire to the Mohawk, who present the outcome to the firekeepers, the Onondaga. The Onondaga then consider the issue, and if they agree with the consensus reached by the other four nations, then they ratify the opinion. If the two moieties differ in their opinions, the Onondaga have the power to choose to support one of the moieties, or the Onondaga can tell both moieties to reconsider the issue again in an attempt to reach consensus. If the two moieties still differ, the Onondaga have the decision-making power to decide which moiety they will support.²

This venture created much debate among the Chiefs, due to the great regard the Haudenosaunee have for the spiritual healing powers of the medicines. Eventually, the Chiefs reached consensus to move forward with the venture, provided the planting and harvesting of the medicines were supervised by the women of each clan to ensure sustainability of both the medicines and the soil. Most importantly, all of the profits from the venture had to be placed in a trust fund to be used specifically for the preservation of language and culture for the use and benefit of all Haudenosaunee citizens.

The land where the pharmaceutical company is situated and where the medicines are harvested are situated on territory which was part of a land claim settlement. Prior to settling the land claim, the Haudenosaunee were involved in litigation in which they asserted an Aboriginal title interest in the lands. During the litigation process, the Haudenosaunee entered a wealth of oral history evidence that the lands were traditionally used for hunting, gathering and most importantly because of the abundance of herbal medicines. Competitors are attempting to shut the Haudenosaunee company down on the basis that the lands where the medicines are gathered are subject to Aboriginal title and are being put to such uses as may be irreconcilable with the

² See Gibson, *supra* note 14 at 440-444 for the original translation. As it is very difficult to provide an English translation of the Great Law, for ease of reference, I have provided a paraphrase of my understanding of the original translation.

nature of the occupation of that land and the relationship that the Haudenosaunee community has had with the land which together have given rise to Aboriginal title in the first place.

In order to successfully defend this claim under the Canadian legal system, the Haudenosaunee would have to prove that the harvesting of the medicines for commercial purposes was not irreconcilable with the nature of our occupation of that land and our relationship with the land. In my view, the Haudenosaunee would have to prove that it was utilizing the land in a manner which respects our traditional laws and traditional practices. In order to do so, the Haudenosaunee would have to establish clear evidence that our traditional laws were being followed throughout this economic development initiative.

In the alternative, the Haudenosaunee could argue that they have the inherent right to sovereignty, which is constitutionally protected and as such the Great Law supercedes the limitation on Aboriginal title set out in *Delgamuukw*. This position is more consistent with the Haudenosaunee's understanding of sovereignty:

Sovereignty - it's a political word. It's not a legal word. Sovereignty is the act. Sovereignty is the do. You act. You don't ask. There is no limitation on sovereignty. You are not semi-sovereign. You are not a little sovereign. You either are or you aren't. It's simple.³

The difficulty with this position is that the Canadian courts have been unwilling to "recognize" First Nations' sovereignty:
The denial of Aboriginal self-determination arises because people are afraid that Aboriginal sovereignty will mess up their territory (the lines they have arbitrarily drawn around and in Canada). Canada and Canadians do not want us to pull the country apart acre by acre. The debate, when it is expressed in this way, becomes grounded in western notions of individualized property rights (and I would reiterate that what Aboriginal Peoples are more interested in is land rights).⁴

From a Haudenosaunee perspective of sovereignty, it would be a difficult decision to turn to a foreign Nation or foreign judicial system to "recognize and affirm" its sovereignty. As stated by

³ O. Lyons, "The Iroquois Perspective on Political Reality" (Address to the Montreal Conference on Indian Government, 1979) in R. Hill, "Continuity of Haudenosaunee Government" (1987) IV Northeast Indian Quarterly (page numbers unavailable for this publication).

⁴ Monture-Angus, *supra* note 16 at 35.

Oren Lyons above, sovereignty is a political word, not a legal word and in my view, is likely best resolved through a political process rather than the legal process. As such, I will proceed with the case study on the basis that the Haudenosaunee are proving that they have not breached the limit on Aboriginal title as set out by the Supreme Court of Canada.

The Haudenosaunee were known for our excellence at horticulture. We engaged in commercial trade of our horticultural products, including tobacco, one of our traditional medicines in extensive trade networks with other First Nations throughout Mexico, the United States and Canada. In the recent case, *Mitchell v. M.N.R.*,⁵ the plaintiff, a Mohawk and descendant of the Mohawk Nation located in the Mohawk Valley attempted to bring into Canada goods which he described as personal and community goods. He claimed Aboriginal and treaty rights to exemption from duties or taxes on the goods and a right to trade freely across the border with other First Nations. Comprehensive expert historical and anthropological evidence, as well as oral history evidence were relied on to prove the existence of the Aboriginal and treaty rights to trade by the Haudenosaunee, part of which was provided by Professor Johnston:

Well, let's put it this way, trading and making war came as easily to the Iroquois as living and breathing. When they weren't making war, they were usually engaged in trading. Trading was certainly one of the customs, ritualized customs and activities of the Iroquois. When you talk about Iroquois, you have to talk about trade and commerce. It's central to their soul, just as war was. War, of course, stemmed out of trade and trade came out of war. So to say that the Iroquois were not trading with their southern brethren is to suggest that they had dispensed with one of the basic features of their culture. They'd just trade to live.⁶

In *Mitchell*, Justice McKeown further relied on the earliest recorded observations of Mohawk life and traditions found in the diaries of the Dutch explorer, Dr. van den Bogaert⁷:

Three women came here from the Sinnedens [a general Dutch term often referring to an Iroquois living west of the Mohawks, as well as to the "Senecas" proper] with some dried and fresh salmon . . . They also brought much green

⁵ [1997] 4 C.N.L.R. 103 (F.C.T.D.).

⁶ *Ibid.* at 154.

⁷ See Van den Bogaert, Dr., 1634 diary of, in Harmen Meyndertsz van den Bogaert, *A Journey into Mohawk and Oneida Country 1634-1634* (Syracuse, New York: Syracuse University Press, 1988).

tobacco to sell, and had been six days underway. They could not sell all their salmon here, but went with it to the first castle [that is, a Mohawk village further east].⁸

Based on the anthropological expert evidence and oral history evidence, Justice McKeown held:

It is significant that trade was considered to be so fundamental to the Iroquois that they referred to it in their earliest treaties with the Europeans, and indeed insisted that clauses related to trade be inserted. From this evidence I conclude, in conformity with the tests set out by the Supreme Court of Canada in *Gladstone* and *Van der Peet*, *supra* that trade was an integral part of the distinctive culture of the Iroquois in general and the Mohawks in particular. Since the Mohawks were part of the Iroquois league at that time, trade must have been an integral part of their distinctive culture.⁹

This finding was upheld by Justice Saxton in the Federal Court of Appeal, “In my view, the evidence of pre-contact trade supported the finding of the trial judge that the respondent’s Aboriginal right included the right to duty-free trade with other First Nation Communities on a non-commercial scale.”¹⁰

Although this is a positive ruling, one of the difficulties is the Court’s ruling that the duty-free trade is to be on a non-commercial scale, yet the Court does not define what it means by “commercial”. As with the term “sovereignty”, “commerce” has a different meaning for Haudenosaunee people. Commerce in the Canadian economy is about maximizing profit for the wealth of individual shareholders that invest in businesses, often at the expense of the environment. Commerce for Haudenosaunee people however, is about maximizing the standard of living for the collective, always measured against the fundamental principle that land and resources must be preserved for future generations.

It is significant to note that the plaintiff in *Mitchell* described the goods as “personal and community goods”. Therefore the Court held that the right being claimed by the plaintiff could not be characterized as “commercial”, as the quantity of goods demonstrated that the right

⁸ *Mitchell*, *supra* note 38 at 133.

⁹ *Ibid.* at 141.

¹⁰ *Mitchell v. M.N.R.* (1998), 167 D.L.R. (4th) 702 at 709 (F.C.A.).

claimed was best characterized as a right to pass and repass freely across the Canada-U.S. border with goods for personal and community use and also to bring the goods across the border for small, non-commercial trade with other First Nations. In my view, this leaves unanswered the question of whether the Haudenosaunee have an Aboriginal and treaty right to be exempt from duties or taxes on goods that they intend to trade on a commercial scale, with commercial being defined in Haudenosaunee terms, across the Canada-U.S. border with other First Nations.

The Haudenosaunee could rely on the evidence in *Mitchell* to argue that we also engaged in trade on a commercial scale prior to contact. The Haudenosaunee would then have to show evidence of compliance with our own laws regarding harvesting of herbal medicines to prove that we were not in violation of our attachment to the land. As stated above, the Haudenosaunee world view of property requires us to respect Mother Earth and to ensure that any use of the land is done in harmony with nature and carefully considers the interests of the next seven generations. We are allowed to utilize the resources of the land for sustainable development only. For example, the Haudenosaunee rotated our crops to ensure that the nutrients in the soil would have an opportunity to regenerate.

Therefore, in order for the pharmaceutical company not to be in violation of Haudenosaunee laws, it must harvest the herbal medicines in a manner that ensures sustainability. The Haudenosaunee could cite the fact that the women from each clan were in charge of overseeing the entire planting and harvesting of the medicines, as evidence of compliance with traditional laws. As well, the Haudenosaunee could state that as part of the women's supervision of the planting process, they made certain that the crops were being properly rotated to ensure that the soils nutrients were being preserved and that there was always sufficient seeds in storage to plant the medicines. Provided the Haudenosaunee could provide evidence of the foregoing, it should be able to successfully defend its position.

If however, this Haudenosaunee Community had lost its traditional horticultural knowledge of crop rotation and sustainability, it would have a difficult time defending its position. For example, what if the community was solely driven by a need to surpass last year's

profit margin and in so doing decided to harvest the medicines in such a manner that if continued, there would not be any medicines left beyond five to ten production years? Clearly, this type of economic development is contrary to Haudenosaunee attachment to the land.

This approach evidences a complete lack of respect for the medicines, as earning a profit has been prioritized over sustainability. Arguably, in this scenario, the Haudenosaunee company would be at risk of being shut down, as it has been utilizing its lands in a manner that is inconsistent with the nature of the attachment to their lands. As per *Delgamuukw*, the Haudenosaunee would likely have to surrender their lands to the Crown in order to continue operating the company:

Finally, what I have just said regarding the importance of the continuity of the relationship between an Aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that Aboriginal title is limited in the way I have described. If Aboriginal peoples 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.¹¹

The Haudenosaunee however, would have to determine whether a surrender of land to the Crown was in their best interest, given that the medicines needed to sustain the company were already being depleted to the point where extinction was foreseeable in this generation.

a) **Haudenosaunee Case Study B**

A Haudenosaunee Nation has settled a land claim and has recovered several square miles of its traditional territory. There is a mine, Goldco currently situated on the territory which still has approximately 10 years of production left. Goldco has been in compliance with all Canadian regulatory approvals and licenses throughout its operations. The Nation intends to assert an ownership interest in the minerals in the ground where Goldco is situated and seek compensation from the Crown and/or Goldco. In good faith, the Nation has offered to negotiate with Goldco for compensation, a guaranteed number of jobs for its citizens and a number of education

¹¹ *Delgamuukw*, *supra* note 3 at 1091.

scholarships for its youth. Goldco has refused to negotiate with the Nation. The Nation brings a judicial review application to review all of the regulatory permits and approvals that have been issued to Goldco for a declaration that they are void on the basis that the government and Goldco failed to consult with the Nation at any stage of Goldco's mining operations.

Goldco defends the judicial review application on the basis that the Aboriginal title lands must be surrendered by the Nation before it can seek any monetary benefit from Goldco, as the lands are being used in a manner which is contrary to the Nation's traditional uses of the land. There is a large tailings pond from the mine, which has killed much of the deer in the area. The tailings from the pond have also infiltrated some of the nearby water systems, killing the fish in those waters.

The limit on Aboriginal title set down by the Court does not sufficiently address this type of scenario, where lands are already being used by third parties in a manner which affects the First Nations' attachment to their lands. Arguably, in this scenario, the Nation should not have to surrender its Aboriginal title to lands where resource development has already occurred in order to benefit from the resources from their lands. Furthermore, where there have been infringements on their Aboriginal title and ability to exercise their Aboriginal and treaty rights due to the environmental degradation, at a minimum, the First Nation should be able to receive monetary compensation and secure employment for its citizens.

If however, the Nation discovered the minerals after it had settled the land claim, the scenario is more uncertain. This would again give rise to the paternalistic analysis of whether the Nation was using its lands in a manner which was irreconcilable with the nature of its attachment to its lands. The Court gave conflicting messages regarding the limits on Aboriginal title. On one hand, the land cannot be used for strip mining if that land was traditionally used for hunting. Yet, the limitation cannot restrict the use of the land to those activities that have been traditionally carried out on it. It would seem that a case by case analysis will have to be used to determine if a particular economic development project is in fact infringing Aboriginal title.

For many First Nations, it will be difficult to establish when economic development is in violation of the nature of the attachment to their lands which gave rise to Aboriginal title, especially if they have lost their traditional knowledge and laws. The legal landscape remains unclear regarding when economic development infringes the limitation on Aboriginal title. As such, First Nations need to have a clear sense of what their options are to assert their Aboriginal and treaty rights and Aboriginal title. First Nations cannot afford to work their way through the litigation process, especially as resource companies continue to remove valuable resources from their traditional territories. The last section of my paper will provide an outline of some practical options for First Nations on a go forward basis.

V. PRACTICAL OPTIONS

a) **Codifying Traditional Laws**

As Canadian courts increasingly give weight to oral history of First Nations and consideration to First Nations' laws, it becomes increasingly important for First Nations to consider codifying their traditional laws. Given that many First Nations have customarily taught their laws by oral tradition, some First Nations may take offense at the idea of codifying their traditional laws. In my view however, this is crucial for a number of reasons.

What I have been taught by elders is that the meaning of our traditional law is retained in our language and that inevitably we lose some of the meaning of our laws in the translation to English. Yet, indigenous languages in Canada are becoming extinct at an alarming rate and our elders are passing on before the younger generations have had the opportunity to learn our Indigenous languages and all that is contained within those languages being, laws, ceremonies, dances, songs etc.

It is unrealistic to expect our younger generations to simply begin learning their languages, due to the extent of internalized cultural shame which remains unhealed in our communities. The concept known as "ethnostress" describes the negative impact of contact on First Nations:

Ethnostress occurs when the cultural beliefs or joyful identity of a people are disrupted. It is the negative experience they feel when interacting with members

of different cultural groups and themselves. The stress within the individual centers around this self image and sense of place in the world.¹

Ethnostress has increased rapidly for First Nations from contact to the present day:

By all measurements of the human condition, indigenous people lead in the statistics of suicide, alcoholism, family breakdown, substance abuse etc. These conditions are prevalent within indigenous communities in both Canada and the United States. . . .The present negative conditions existing in the indigenous world are both individual and collective reactions to the accumulated effects of 400 years of contact with non-indigenous peoples.²

Residential schools have been one of the single greatest contributors to ethnostress, as it is directly responsible for the loss of indigenous languages and culture:

The only effective road to English or French, however, and thus a necessary precondition for moving forward with the multi-faced civilizing strategy, was to stamp out Aboriginal languages in the schools and in the children. The importance of this to the department and the churches cannot be overstated. In fact, the entire residential school project was balanced on the proposition that the gate to assimilation was unlocked only by the progressive destruction of Aboriginal languages. With that growing silence would come the dying whisper of Aboriginal cultures.³

Therefore, to state that we should simply learn our indigenous languages is trite, as there are generations of ethnostress to heal from in order to do so. I have been taught that it takes seven generations for a family to heal from one of the above “symptoms” of ethnostress. Our people are not fortunate enough to have seven generations to wait to learn our indigenous languages and traditional laws. It is for these reasons that I believe we must codify our traditional laws before our elders have passed on.

a) **Justification and Consultation**

As it is costly and timely for a First Nation to litigate a claim for Aboriginal title, it is essential that First Nations be cognizant of what their Aboriginal and treaty rights and Aboriginal

¹ R. A. Antone, D.L. Miller & B.A. Myers, *The Power Within People* (Southwold: Vision Press, 1986) at 6-7.

² *Ibid.*

³ Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol. 1 (Ontario: Canada Communication Group Publishing, 1996) (Commissioners: G. Erasmus, R. Dussault, P. Chartrand et al.) at 341.

title claims are at present, as well as the limitations on those rights in order to effectively negotiate with resource companies that already exist on their traditional territories. Aboriginal rights, including Aboriginal title are not absolute, however, neither are they “frozen” in time. First Nations’ cultures have continuously evolved over time, before contact, through to today. In order to infringe Aboriginal rights and title, the infringements must meet the test of justification, which includes a duty to consult with the First Nation whose rights and/or title are being infringed.

The justification test for infringing Aboriginal rights was established in *R. v. Sparrow*¹ and as per *Delgamuukw*, also applies to Aboriginal title. The justification test involves two steps. First, the court must inquire whether the legislation alleging the infringement of Aboriginal rights and/or Aboriginal title was a valid legislative objective of Parliament. In *Sparrow*, conservation and resource management were cited as examples of valid legislative objectives.

If a valid legislative objective is found, the test proceeds to analysing whether the honour of the Crown in dealing with Aboriginal peoples has been upheld. In *Sparrow*, the Court outlined some of the factors to be considered in this analysis:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. The Aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.²

In *R. v. Gladstone*,³ the justification test was further developed. The Court held that:

In the context of objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these

¹ [1990] 1 S.C.R. 1075.

² *Ibid.* at 1119.

³ [1996] 2 S.C.R. 723.

purposes is that the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by Aboriginal peoples or - and at the level of justification it is this purpose which may well be most relevant - at the reconciliation of Aboriginal prior occupation with the assertion of the sovereignty of the Crown . . .

Although by no means making a definitive statement on the issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard.⁴

In *Delgamuukw*, Chief Justice Lamer elaborated on the types of objectives that might be aimed at reconciling prior occupation of North America by Aboriginal peoples and Crown sovereignty:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title.⁵

Even if a compelling and substantial objective is found, the Crown must prove that it has upheld its fiduciary obligation to the Aboriginal nation in question prior to infringing Aboriginal title. One of the crucial elements of the decision was the ruling that in order for the Crown to uphold its fiduciary obligations to Aboriginal peoples, there is always a duty to consult the Aboriginal nation when the Crown is considering infringing Aboriginal title. Chief Justice Lamer stated:

First, Aboriginal title encompasses within it a right to choose to what ends a piece of land can be put . . . This aspect of Aboriginal title suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified, in the same way that the Crown's failure to consult an Aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be

⁴ *Ibid.* at 774-775.

⁵ *Delgamuukw, supra*, note 3 at 1111.

taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.⁶

⁶ *Ibid.* at 1113.

Since *Delgamuukw*, there have been several cases that have come down from the British Columbia courts on the duty to consult with First Nations.¹ In *Halfway River First Nation*, a judicial review application was brought concerning use of lands for logging in an area immediately adjacent to reserve lands. The Applicants were successful in having Cutting Permit 212 (“CP 212”) issued to Canadian Forest Products Limited quashed on the basis that the issuance of the permit and the logging it would allow infringed their hunting rights under Treaty 8, and that such infringement could not be justified by the Crown. The Applicants had an outstanding Treaty Entitlement Claim against the federal Crown and lands recoverable in that claim may be located in the area covered by CP 212. The chambers judge, Dorgan J. held:

The MOF submits that the duty to consult does not arise until the Aboriginal group has established a *prima facie* infringement, citing *Sparrow*, where consultation is not considered until the second stage of the infringement test. In my view, this approach is inconsistent with the cases referred to and is inappropriate given the relationship between the Crown and native people.

Based on the *Jack, Noel*, and *Delgamuukw* cases, the Crown has an obligation to undertake reasonable consultation with a First Nation which may be affected by its decision. In order for the Crown to consult reasonably, it must fully inform itself of the practices and of the views of the Nation affected. In so doing, it must ensure that the group affected is provided with full information with respect to the proposed legislation or decision and its potential impact on Aboriginal rights²

Therefore, a First Nation does not have to establish a *prima facie* infringement of an Aboriginal or treaty right before the duty to consult arises.

The British Columbia Court of Appeal in *Halfway River First Nation* upheld the findings of the chambers judge. Finch, J.A. made a number of findings on “adequate meaningful consultation”:

¹ See for example *Halfway River First Nation v. British Columbia (Minister of Forests)*, (1997) 39 B.C.L.R. (3d) 227 (B.C.S.C.), upheld by the British Columbia Court of Appeal (1999) 64 B.C.L.R. (3d) 206, *Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines)* [1999] 3 C.N.L.R. 126 (B.C.S.C.), *Cheslatta Carrier Nation v. British Columbia*, (1998) 53 B.C.L.R. (3d) 1(B.C.S.C.), and *Kitkatla Band v. British Columbia (Minister of Forests)* [1999] 2 C.N.L.R. 156 (B.C.S.C.), appeal dismissed [1999] 2 C.N.L.R. 170 (B.C.C.A.).

² *Ibid.* at 256.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action There is a reciprocal duty on Aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.³

In *Halfway River First Nation*, Finch J.A. restated that the following reasonable opportunities to consult were denied to Halfway:

- (a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.
- (b) The Report "Potential Impact to Fish & Wildlife Resources" was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.
- (c) There was no real opportunity to participate in the Cultural Heritage Overview Assessment.
- (d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.

³ *Ibid.* at 251.

These findings, particularly (b) and (c) support the conclusion that the Crown did not meet the first and second parts of the consultation test referred to, namely to provide in a timely way information the Aboriginal group would need in order to inform itself on the effects of the proposed action, and to ensure that the Aboriginal group had an opportunity to express their interests and concerns.¹

Based on the above findings, Finch J.A. held:

As laid down in the cases on justification, the Crown must satisfy all aspects of the test if it is to succeed. Thus, even though there was a sufficiently important legislative objective, the petitioners rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, justification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.²

Halfway River First Nation provides some useful parameters regarding “adequate meaningful consultation”. First Nations must be provided with information in a timely manner in order to inform themselves of the effects of the proposed action and to have an opportunity to express their interests and concerns. As well, First Nations have a reciprocal duty to express their interests and concerns after they have had an opportunity to consider the information provided and cannot frustrate the consultation process. Moreover, if the Crown has failed to adequately consult with First Nations, it will fail the justification test for infringing Aboriginal and treaty rights and Aboriginal title.

Although the duty to consult is with the government, the courts will consider any consultations that the resource industry has done with First Nations that the government was cognizant of, as evidence of consultation. From an industry standpoint, it is in the industry's best interest to undertake consultations with First Nations independently of government consultations, as it will begin the process of establishing trust with the First Nation and building a cohesive business relationship. In *Kelly Lake Cree Nation*, two of the four First Nations involved, being the Saulteau First Nation and the Kelly Lake Cree Nation sought judicial review of provincial

¹ *Ibid.* at 251-252.

² *Ibid.* at 252.

ministry decisions permitting Amoco Canada Petroleum Company Ltd. to drill an exploratory gas well in north-eastern B.C. The First Nations argued that the exploration activities would affect their Aboriginal, treaty (Treaty 8) and constitutional rights and that the Ministries breached a duty owed to the First Nations to consult with them in a meaningful way prior to making the decisions. The Ministries' position was that a consultation process did occur. At issue was whether there had been procedural fairness in the decision making process and whether the issuance of the permit affected the First Nations' religious freedom because the permit had been granted in an area of spiritual significance to the First Nations.

The consultation process had included a co-management advisory committee, funding of a traditional use study by the government, the undertaking of a broader traditional use study, a seminar by the Ministry of Energy and Mines, creation of various committees which the First Nations were invited to join, an environmental assessment, an archaeological impact study, and on-site meetings by Amoco. Amoco had also engaged independently in dialogue with the First Nations affected. Justice Taylor held:

There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing. I have set forth the factual matrix upon which decisions were made in some detail. It is my view that a consideration of the question of consultation must take into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications but also the consultation between First Nations people and Amoco that were known to the government to have occurred. The process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.³

The Court held that the consultation process had been adequate and there was no breach of procedural fairness or bias in the decision making process. The Court also held that there was no breach of the First Nations' constitutional right to freedom of religion. It should be noted that

³ *Kelly Lake*, *supra* note 54 at 157.

two of the other First Nations, the West Moberley and Halfway River First Nations expressed satisfaction with the consultation process. This highlights the difficulties that industry may face with overlapping Aboriginal claims. From the industry standpoint, it must be certain that it is negotiating in good faith with all of the affected First Nations.

In *Kitkatla Band*⁴, the British Columbia Supreme Court heard the first application for an interlocutory injunction since *Delgamuukw*. The Kitkatla Band was a member nation of the Tsimshian Tribal Council, an umbrella organization organized for treaty negotiation purposes. The Kitkatla Band claimed a declaration of existing Aboriginal title to the Kumealon watershed and that there had been a lack of consultation respecting the issuance of certain cutting permits. They sought an order restraining International Forest Products Limited (“Interfor”) from logging a number of cut blocks in the Kumealon watershed. This case also involved overlapping Aboriginal claims from other member nations of the Tsimshian Tribal Council, who had participated in consultations with Interfor.

Hutchinson J. denied the injunction and upheld the granting of the permit to Interfor on the following basis:

....the balance of convenience. . .seems to me to favour the permit at this stage. There is much to be litigated, and the overlapping claims are going to have to be dealt with. And, if they cannot be worked out between the participants themselves, it may well be the court will have to finally decide the matter. But should, in the meantime, all commerce in the area stop? And what I have decided is that it should not.⁵

The decision was upheld on appeal. The Court of Appeal further held:

To the extent that there was oral history evidence tendered on this application it was considered by the chambers judge. As to the duty of the Crown to consult the judge quite properly recognized this as a serious question to be tried. The judge appears to have accepted that there is a duty on the Crown to consult where Aboriginal title and rights are asserted but yet to be established. Whether there was a failure of consultation is a question which the judge says was one to be tried.⁶

⁴ *Kitkatla Band*, *supra* note 54.

⁵ *Ibid.* at 168.

⁶ *Ibid.* at 174.

Therefore, based on the decisions since *Delgamuukw*, a number of conclusions can be drawn. The government has a legal duty to consult First Nations even where Aboriginal title and rights are asserted but yet to be established. There does not have to be a *prima facie* infringement of an Aboriginal right or title prior to the duty to consult arising.

The recent developments in the case law support First Nations entering into negotiations with resource companies that already exist or that are proposing developments on their traditional territories to become joint venture partners in those industries. Alternatively, First Nations can assert their rights to compensation for infringement of their Aboriginal and treaty rights and Aboriginal title with both industry and government. If negotiations breakdown or resource companies and government representatives are unwilling to negotiate, First Nations have the option of seeking judicial review of various permits and approvals granted to resource companies by provincial and federal governments or seeking injunctive relief to stop further development on their traditional territories. It is clear however, from the cases that have come down since *Delgamuukw*, First Nations are more likely to be successful in a judicial review application as opposed to seeking injunctive relief, as the courts often find that the balance of convenience weighs in favour of not stopping commercial development.

c) **Compensation**

In *Delgamuukw*, Chief Justice Lamer specifically stated the following on compensation:

The economic aspect of Aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of Aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.⁷

⁷ *Delgamuukw*, *supra* note 3 at 1113.

Chief Justice Lamer went on to state that as the issue of damages was severed from the principal action, determining the appropriate level of compensation for infringements of Aboriginal title was “best that we leave those difficult questions to another day”⁸. Precedents for appropriate levels of compensation will take time, as First Nations litigate and/or reach settlements with resource companies.

As stated earlier, First Nations have a different world view of property. Due to the nature of our attachment to our lands, it is arguably impossible for First Nations to quantify the value of our Aboriginal and treaty rights and Aboriginal title. For instance, if a mine is extracting minerals on our territories and creates a tailings pond that will kill all wildlife in the area, which is part of our traditional hunting area, how do we quantify what our compensation should be? Depending on the severity of the infringement, in my view, there will be some instances where no amount of monetary compensation can remedy the infringement. In these instances, the only viable alternative may be for the federal government to set aside an alternative land base that can be used as a new hunting area.

In another instance, a First Nation may have several hunting areas and only one area will be adversely affected by a mine. The infringement is arguably not as severe and there is flexibility to negotiate with the mining company to reap the economic benefits of the minerals from the lands, either through a joint venture or direct compensation from the company and/or the provincial and federal governments in the form of financial compensation; scholarship funds for youth and a targeted percentage of jobs at the mine. Clearly, the amount of compensation is directly related to the degree of the infringement.

The Court clearly stated that Aboriginal title lands cannot be used in a manner that is irreconcilable with the nature of our attachment to those lands. The issue that arises is what about resource companies that have already been extracting resources from our territories? Are

⁸ *Ibid.* at 1114.

those uses irreconcilable with the nature of our attachment to our lands? As stated by Albert

Peeling:

In the absence of a surrender, this can have one of two consequences. The first possibility is that no one can put the land to uses incompatible with the connection of Aboriginal people to the land. This is because such a use, which destroys the connection of Aboriginal people to the land, is tantamount to extinguishment, is forbidden by the constitution. Damages put people in the position they would have been in if the damage had not happened, but if that connection is destroyed, Aboriginal people have lost something the law says is irreplaceable. This surely must have a dramatic effect on the way the resources on that land are managed. In fact, if to destroy that connection is tantamount to extinguishment, it is a limit on provincial legislative power under the constitution. The second possibility is, of course, that for activities incompatible with Aboriginal title the damages in compensation must be very high. One illustration of this is an incompatible use which went on for a very long time so that a generation or more of Aboriginal people were unable to exercise their Aboriginal title. For those generations it would be as if their title was extinguished, and the loss to them would be immeasurable . . . Damages must be commensurate with the degree of consultation and accommodation of Aboriginal title. If justification is to be more than a matter of form, the failure to accommodate and consult with Aboriginal people should result in damages payable to them.⁹

The issue of compensation will likely be resolved on a case by case basis and will vary with each lower court decision and each negotiated agreement with a resource company. To ensure consistency in consultations, negotiations and compensation, First Nations should work together to form resource management bodies that will monitor resource developments on their territories and that can serve as the official liaison with government and industry.

VI. CONCLUSION

The future shall determine whether *Delgamuukw* has in fact opened a new era of economic development. The limitation on Aboriginal title is arguably a continuation of colonial oppression and an unwillingness to believe that First Nations are capable of responsible economic development. It would appear that Canadian courts do not yet fully understand that as First Nations, we have a spiritual responsibility to take care of Mother Earth:

We were instructed to create societies based on the principles of Peace, Equity, Justice, and the Power of Good Minds. Our societies are based upon great

⁹ A. Peeling, "Compensation for Infringement of Aboriginal Title" January 1998 at 6-7 [unpublished].

democratic principles of the authority of the people and equal responsibilities for the men and the womenOur leaders were instructed to be men of vision and to make every decision on behalf of the seventh generation to come; to have compassion and love for those generations yet unborn.¹⁰

As we begin to renew our economic relationship with Mother Earth, we must remember to assert our sovereignty, which means to be responsible and not forget our original instructions from the Creator. Affirmation from the Canadian courts cannot make us sovereign. Our sovereignty lives in our language, culture, traditions and ceremonies, which has never been extinguished.

¹⁰ O. Lyons, Opening Speech for “The Year of the Indigenous Peoples” (Address to the United Nations, 1993) [unpublished].

**THE IMPLICATIONS OF DELGAMUUKW
TO ECONOMIC DEVELOPMENT ON ABORIGINAL TITLE LANDS**

Kimberly A. Thomas
Aird & Berlis
Barristers and Solicitors
BCE Place
Suite 1800
181 Bay Street
Toronto, Ontario
M5J 2T9