

Aboriginal Participation in the
Vancouver/Whistler 2010 Olympic Games:
Consultation, Reconciliation and the New Relationship

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAW

in

The Faculty of Graduate Studies

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA
(Vancouver)

August 2010

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Abstract

This thesis investigates Aboriginal participation in the Vancouver/Whistler 2010 Winter Olympic Games to assess the manner in which Aboriginal peoples participated in the 2010 Games and the implications of this Aboriginal participation for the Olympics and Aboriginal participation in British Columbia and Canada more generally. This thesis employs two means for providing the context and developing guidelines from which to assess Aboriginal participation in the 2010 Games. The first considers Aboriginal participation in past Olympic Games, which provides historic examples to contrast against 2010 Games efforts, and describes the Olympic context in which the 2010 Games occurred. Review of past Olympic Games reveals little meaningful Aboriginal participation, but indicates the increasing importance that sustainability issues, such as Aboriginal participation, pose for the Olympic Games. The second consists of the examination of jurisprudence addressing how Aboriginal peoples are expected to participate in projects and decision making processes in light of the constitutional protection afforded to Aboriginal rights and title.

This jurisprudence review reveals that legal guidelines emphasize the need for meaningful Aboriginal participation to advance the purposes of recognition and reconciliation, that these purposes require greater consultation and accommodation of Aboriginal peoples, and that currently the Crown is struggling to structure positive responses to this judicial guidance. Following these two examinations, this thesis turns its attention specifically to Aboriginal participation in the 2010 Games. The utilization of the historic Olympic and Canadian legal contexts to assess the 2010 Games reveals that

the Aboriginal participation which occurred was largely successful and praiseworthy. Aboriginal participation in the 2010 Games far exceed that of previous Olympics, and marks a significant improvement on much of the efforts to pursue Aboriginal participation assessed by the judiciary. This indicates that Aboriginal participation in the 2010 Games holds significant lessons for both the Olympics, and those seeking more effective Aboriginal participation in British Columbia and Canada.

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List of Abbreviations

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|---------------------------|--|
| “2010 Games” | Vancouver/Whistler 2010 Winter Olympic and Paralympic Games Organizing Committee |
| “Agenda 21” | International Olympic Committee, <i>Olympic Movement’s Agenda 21: Sport for sustainable development</i> |
| “Bid” | Vancouver/Whistler 2010 Games International Bid |
| “Bid Book” | Vancouver 2010 Bid Corporation, <i>Vancouver 2010 Olympic Winter Games Bid Book Submission to the International Olympic Committee</i> |
| “Bid Corporation” | Vancouver 2010 Bid Corporation (Vancouver/Whistler 2010 Olympic and Paralympic Winter Games International Bid Corporation) |
| “Bid Society” | Vancouver/Whistler 2010 Olympic and Paralympic Winter Games Domestic Bid Society |
| “BCCA” | British Columbia Court of Appeal |
| “Crown” | Provincial and/or Federal Governments |
| “Cultural Centre” | Squamish Lil’wat Cultural Centre |
| “FHFN” | Four Host First Nations (Squamish, Lil’wat, Musqueam and Tsleil-Waututh First Nations) |
| “FHFN Protocol Agreement” | Agreement between FHFN made 2004 |
| “FHFNS” | Four Host First Nations Secretariat |
| “EAO” | British Columbia Environmental Assessment Office |
| “MOU” | Memorandum of Understandings between Bid Corporation and Musqueam, and Bid Corporation and Tsleil-Waututh |
| “MPA” | Agreement between British Columbia, Canada, City of Vancouver, Resort Municipality of Whistler, Canadian Olympic Committee, Canadian Paralympic Committee, Canadian Olympic Committee, and Vancouver 2010 Bid Corporation entitled Multi-party Agreement |

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|-------------------------|--|
| “Organizing Committees” | Bid Society, Bid Corporation and VANOC |
| “Protocol Agreement” | Agreement between Squamish Nation and Lil’wat Nation executed March, 2001 |
| “SCC” | Supreme Court of Canada |
| “Statement” | Statement of Principles Agreement between VANOC and FHFN |
| “SLA” | Agreement between Province of British Columbia, Bid Corporation, Squamish and Lil’wat entitled “Partners Creating Shared Legacies from the 2010 Olympic and Paralympic Winter Games” |
| “VANOC” | The Organizing Committee for the Vancouver/Whistler 2010 Olympic and Paralympic Winter Games |
| “WNC” | Whistler Nordic Centre |

Acknowledgments

My time in the Master of Laws program at UBC has been one of great joy and illumination, an enriching experience only possible with the support of many friends, family, colleagues, and mentors. I am constantly amazed by the good fortune I have had in the human resources department.

I would like to extend special thanks to Professor Joe Weiler, whose mentorship has meant the world. Your enthusiasm for this research was always infectious, your insights invaluable, and you motivated me to make the most of this year. You placed more energy into my success than I could have hoped for, and I am forever grateful. I must also thank Tom Isaac, who first introduced me to the world of Aboriginal law, and whose passion for the subject has always been a source of inspiration.

I also owe a debt of gratitude to Professor Karin Mickelson, without whom this year would not have been possible. I must also express my appreciation for Joanne Chung and her tireless ability to answer all my graduate studies questions. Thanks also to Professor Mary Liston, and the other students in the LLM program, who made my Thursdays extremely enlightening, and always entertaining.

Susie, Margie, Mum and Dad, you're stuck with me, yet you never seem to complain. I love you. You have all put up with my endless ability to discuss my thesis, and turn even the most interesting of conversations back to the subject of my research. I promise to be more interesting at family dinners, on long walks, and over the phone. Mum, I owe you special thanks for all your editing skills, your willingness to have long conversations on Aboriginal law, and your uncanny ability to get me back on track no matter how far I may have wandered (which was mostly around campus).

Thank you most of all to Clare, I love you. Your support and love made this year especially amazing, and I couldn't have asked for a better partner in adventure. Who else could move so gracefully from snorkeling to constitutional debate, and make a backpack look so good? You bore the brunt of my thesis musings, for which you probably deserve a graduate degree of your own. You made me laugh and smile the whole year through, and your cookies kept me fueled during the last hours. I really really promise to be more interesting over dinner. Did I mention I love you?

A last bit of thanks to Zeus, the Baron, and subprime mortgages, I couldn't have done it with you.

Chapter 1: Introduction

The Olympic Games have a unique ability to transform a host city, region or country not only physically and economically, but also socially and politically. This transformative power of the Olympic Games can have both positive and negative effects. The displacement of the homeless and impoverished, environmental degradation, restriction of civil liberties, legacies of rarely used Olympic facilities and substantial economic deficits all have their place in Olympic history. However, such negative outcomes do not preclude the potential for the Olympics to be a catalyst for significant positive change. In the case of the Vancouver/Whistler 2010 Olympic and Paralympic Games (the “2010 Games”), one of the greatest opportunities for redefining social policy was sparked by the 2010 Games organizers’ commitment to strengthening and promoting First Nations relationships both within the Aboriginal community and with the rest of society through the involvement of the Four Host First Nations¹ (the “FHFN”) as partners in the operation and management of the 2010 Games.

The historic relationship between Aboriginal people, the Crown and the private sector in Canada can hardly be described as positive. However, changes in constitutional law, advances in the common law, exertion of political pressure by Aboriginal groups, changes in governmental policies, and an increasing focus on corporate social responsibility have provided reason to believe that the marginalization of Aboriginal peoples may be addressed, and relationships based on mutual respect and understanding are within reach. As Canadian and Aboriginal policy makers set the stage for the twenty-first century, and the private sector continues to struggle with its role in Aboriginal

¹ Group comprised of the Lil’wat Nation, Musqueam Nation, Squamish Nation & Tsleil-Waututh First Nation.

relations, it is increasingly clear that structuring positive Aboriginal inclusion and participation into all forms of development is of paramount importance.

This paper seeks to examine the nature and content of Aboriginal participation in the context of the 2010 Games, and consider the implications of the 2010 Games for the Olympics more generally, and for the broader participation of Aboriginal peoples in British Columbia and Canada more generally. This examination will demonstrate that the participation of Aboriginal peoples in the 2010 Games far surpasses that of previous Olympics; but more importantly, the paper will focus on practical issues and solutions in regards to the implementation of the Crown's constitutionally mandated duties to consult and accommodate Aboriginal peoples.

To carry out a fulsome examination of Aboriginal participation in the 2010 Games, and consider its implications within the broader context of Aboriginal consultation and accommodation, this paper will focus on three broad subjects: a review of matters related to indigenous or Aboriginal participation in the previous Olympics; a consideration of the jurisprudence and legal doctrine surrounding Aboriginal participation in development projects; and finally a direct examination of the elements which have structured and influenced Aboriginal participation in the 2010 Games. Following these enquiries, further commentary will address the implications of the policies and practices employed by 2010 Games organizers for ensuring cooperative relationships with First Nations groups and the lessons learned for future Olympic hosts. We will also consider the implications of these policies and practices for broader provincial and industry efforts to incorporate Aboriginal participation within their projects.

Consideration of Aboriginal participation in past Olympics will include a review of scholarly writings on those experiences, as well as an examination of policy documents, jurisprudence, agreements or other legal material as relevant. Examination of such material will allow for a comparative approach of the 2010 Games to past Olympic experiences in order to determine which practices have produced either positive or negative outcomes in Aboriginal participation. Following the exploration of past Olympic experiences, we will examine the legal doctrine surrounding Aboriginal participation in order to put Aboriginal participation in the 2010 Games into context. In legal parlance, the participation of Aboriginal people in development projects is referred to as consultation and accommodation; therefore, the examination of jurisprudence will focus on the development of common law legal doctrine surrounding the obligation of the Provincial and Federal Governments (the “Crown”) and private sector project proponents to address Aboriginal participation within the implementation of their projects and objectives. This review of jurisprudence will serve the purpose of setting out judicially developed rules for assessing the quality of Aboriginal participation-consultation and accommodation. We will also consider the underlying legal principles which may serve to guide and suggest particular approaches to incorporating Aboriginal participation into all social and economic projects whether private or public. Additionally, scholarly writings on the legal doctrine surrounding Aboriginal participation will be reviewed in order to consider contrasting legal interpretations- those which see constitutional changes, development of common law interpretations, and policy changes as positive, and also deconstructionist approaches which examine these legal subjects as continuations of colonial or imperial policies that may further frustrate Aboriginal

peoples. This review of scholarly opinion will offer different perspectives as to how Aboriginal consultation and accommodation may be meaningfully carried out, and suggest structures for Aboriginal participation which meet Aboriginal, Crown, and project proponent needs.

With the historical and legal contexts firmly in place, our examination may finally turn to the nature and content of the consultation and participation of Aboriginal peoples in the context of the 2010 Games. This examination will rely upon primary documents from the City of Vancouver, Provincial and Federal Ministries, the Vancouver/Whistler Organizing Committee (“VANOC”) the Four Host First Nations, the Lil’wat Nation, the Musqueam Nation, Tsleil-Waututh Nation, and Musqueam Nations, additional Aboriginal organizations, media reviews, commentators, and the International Olympic Committee (the “IOC”). The 2010 Games have not been subject to much scholarly review to date; however, thesis work which has carried out interviews with those involved in Aboriginal participation in the 2010 Games will also be considered, and any further scholarly writing which becomes available. This review will explore the processes by which Aboriginal participation was pursued by the parties involved, the difficulties which they encountered, the solutions which were crafted to overcome such issues, and the outcomes which Aboriginal participation achieved. Indeed, this examination will seek to more closely consider the processes that governed the extent of Aboriginal participation in the 2010 Games. Close attention will be paid to the consultation, discussions, and negotiations utilized by the parties to guide Aboriginal participation in the 2010 Games. With this review in hand, a more fulsome exploration of the means through which meaningful Aboriginal participation may be pursued, and in

perhaps some cogent lessons and suggestions for broader contexts of Aboriginal participation can be elucidated. Below, a brief overview is provided of each of these sections, and their suggestions regarding the meaning and implications of Aboriginal participation in the 2010 Games.

1.1 History of Indigenous/Aboriginal Peoples and the Olympics

A review of indigenous/Aboriginal inclusion and participation in past Olympic Games reveals few, if any, lasting legacies for Aboriginal peoples. Largely, indigenous inclusion in the Olympic Games has focused on the utilization and representation of indigenous culture as part of Olympic ceremonies, symbols and emblems.² In many instances the inclusion of indigenous cultures has been without input from indigenous peoples, such as the utilization of Caucasian actors dressed as traditional Mohawk peoples in Montreal's opening ceremonies.³ Conversely, in the Sydney Games indigenous representations were guided by indigenous artists and representatives, and Cathy Freeman, an indigenous athlete, became a national hero as a result of her athletic performance and a symbol of Aboriginal success in Australia.⁴ Regardless, inclusion of Aboriginal groups has largely remained focused on cultural representations. Symbolic inclusion of Aboriginal culture is not without benefits; however, even the more positive Olympic experiences do not appear to have created any positive changes for Aboriginal

² See Janice Forsyth, "Teepees and Tomahawks: Aboriginal Cultural Representation at the 1976 Olympic Games" in K.B. Wamsley, R.K. Barney & S.G. Martyn (eds.). *The Global Nexus Engaged: Past, Present, Future Interdisciplinary Olympic Studies. Proceedings of the Sixth International Symposium for Olympic Research, 2002* at 71-76. See also G. Morgan, "Aboriginal Protest and the Sydney Olympic Games" *Olympika: The International Journal of Olympic Studies* Vol. XII 2003, 23-38.

³ *Ibid.*

⁴ C. Elder, A. Pratt, & C. Ellis, "Running Race: Reconciliation, Nationalism and the Sydney 2000 Olympic Games" (2006), *International Review for the Sociology of Sport* 41:2 181-200.

peoples.⁵ While these historical perspectives indicate the Olympics hold little potential to create meaningful progress in Aboriginal relations, it seems apparent that the lack of transformation stems largely from the lack of substantive inclusion of Aboriginal peoples in the development and management of the Games. Aboriginal groups have, prior to the 2010 Games, been consulted almost solely on cultural matters, and left outside of larger planning and development initiatives.

While consultation regarding cultural matters is significant in terms of ensuring that Aboriginal culture is accurately represented and treated with respect, it does not include discussions or negotiations around larger land use planning, facilities management, historical recognition of Aboriginal peoples place within a geography, or opportunities and benefits for Aboriginal peoples. These more substantive issues have more ramifications for the future of Aboriginal peoples, and these topics also spark the greatest debate between Aboriginal peoples, the Crown and larger society. Though the Olympics may provide an opportunity to engage in discussion with regards to many of these issues, such opportunities have not been acted upon in previous Olympic Games. Therefore, it is unclear whether more substantive participation in the Olympics will result in lasting, positive, transformative changes for Aboriginal peoples; however, it does seem clear that inclusion in the ceremonial or cultural aspects of the Olympics is not enough to ensure lasting and sustainable change for Aboriginal people and their communities.

⁵ *Ibid.*

1.2 Law Surrounding Aboriginal Relations: Jurisprudence and Policy

While a historic review of the Olympics reveals that hosting the Games is not guaranteed to improved circumstances for Aboriginal peoples and relationships between Aboriginals and government, an examination of recent jurisprudence and policy efforts in Canada would seem to indicate greater potential in the movement towards meaningful transformation of Aboriginal relationships. To date, much of Aboriginal participation has been structured by litigation by Aboriginal plaintiffs seeking to enforce and protect their constitutionally protected Aboriginal rights.⁶ Section 35(1) of the *Constitution Act, 1982*⁷ (“s.35 (1)”) has provided the legal means for Aboriginal people to assert and protect their rights. While the judiciary has provided legal interpretation which has protected not only rights associated with a traditional lifestyle such as fishing or hunting rights,⁸ but also those related to Aboriginal self-determination such as the right of Aboriginal people to be consulted and involved in decision making processes which may affect Aboriginal rights.⁹ Judicial recognition of overarching concepts such as reconciliation and the honour of the Crown provide principled guidance for Crown efforts in addressing Aboriginal concerns.¹⁰ The recognition of a Crown duty to consult and accommodate Aboriginal peoples when it contemplates action which may negatively affect Aboriginal rights or title establishes a legal framework for assessing the Crown’s

⁶ S. Lawrence & P. Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79 Can. Bar Rev. 252 at 254-55.

⁷ *The Constitution Act, 1982* Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 [*The Constitution Act, 1982*].

⁸ See *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 385 (S.C.C.) [*Gladstone*]. See also *R. v. Adams*, [1996] 3 S.C.R. 10, 138 D.L.R. (4th) 657 (S.C.C.) [*Adams*]. See also *R v. Marshall*, [1999] 3 S.C.R. 456, 179 D.L.R. (4th) 193 (S.C.C.) [*Marshall*].

⁹ See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*]. See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [2005] 3 S.C.R. 388.

¹⁰ Shin Imai, “Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes” (2003) 41 Osgoode Hall L.J. 587.

administrative approach to consideration and accommodation of Aboriginal concerns. These developments have provided Aboriginal peoples with legal means to protect their rights and title, and to advance a legal basis for greater inclusion in development. As a result, the Crown and private sector have been forced- through litigation or the threat and risk of litigation -to be more inclusive vis-à-vis Aboriginal peoples.¹¹

While many have viewed these changes in legal doctrine as positive, there are many who remain critical of these approaches to consideration of Aboriginal perspectives for continuing colonial practices of subjugating Aboriginal concerns to Crown desires.¹² Although some may balk at the notion that the judiciary's approach would be considered colonial, it is evident from the jurisprudence assessing the Crown's duty to consult and accommodate Aboriginal peoples that the judicial approach essentially creates parameters for Crown action, but does not ensure Aboriginal peoples will have the involvement they desire in development processes.¹³ The judicial approach emphasizes the role of the judiciary as assessing the reasonableness of the Crown's efforts in considering Aboriginal concerns, rather than determining how Aboriginal peoples, the Crown and the private sector can best work collaboratively.

In British Columbia, the Provincial Crown, in conjunction with the First Nations' Tribal Council, responded to such jurisprudence by creating new policies aimed at taking the Crown-Aboriginal relationships in positive directions, focusing on ensuring meaningful Aboriginal participation in decision making processes. The Province's

¹¹ J.E. Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 C.J.L.S.11.

¹² See Taiaiake Alfred, *Peace, Power and Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press Canada, 1999) See also Glen Coulthard, "Beyond Recognition: Indigenous Self-Determination as Prefigurative Practice" in Leanne Simpson ed, *Lighting the Eight Fire* (Winnipeg: Arbeiter Ring Publishing, 2008).

¹³ See e.g. *Haida Nation* *supra* note 9 at para. 42 "However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation."

articulation of this commitment in the New Relationship Discussion Paper¹⁴ indicated the Provincial Government's commitment to expressing greater respect for Aboriginal concerns, and focusing on collaboration and consensus in consultation efforts. However, since the release of *The New Relationship*, litigation and dispute between Aboriginal groups, the Crown and the private sector have continued, revealing a frequent inability of the Crown to take any of the substantive steps to consult Aboriginal groups as contemplated in *The New Relationship*.¹⁵ Indeed, though the Crown's duty to consult and accommodate Aboriginal peoples lies solely with the Crown, the emphasis is often on the private sector to carry out the substantive procedural steps to ensure appropriate consultation and accommodation of Aboriginal peoples.¹⁶ Though this emphasis may seem efficient and practical given that the private sector will be in direct control of a project, it also would seem to ensure that collaborative approaches amongst all the parties are rendered improbable.

The challenges and difficulties in determining an appropriate approach to addressing Aboriginal participation were made particularly apparent with the release of an additional discussion paper by British Columbia and First Nations' Tribal Council in 2009. The *Discussion Paper on Instructions for Implementing the New Relationship* contemplated a "*Recognition and Reconciliation Act*" to recognize and affirm Aboriginal

¹⁴ British Columbia, Minister of Aboriginal Relations and Reconciliation, *The New Relationship*, (British Columbia: online: The New Relationship <http://www.newrelationship.gov.bc.ca/shared/downloads/new_relationship.pdf>, 2005) [*The New Relationship*].

¹⁵ See e.g. *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110 [*Klahoose*].

¹⁶ See e.g. British Columbia, Environmental Assessment Office, *Environmental Assessment Office Users Guide*, (British Columbia: online: Environmental Assessment Office <http://www.eao.gov.bc.ca/pub/pdf/EAO_User_Guide_2009.pdf>, 2009) at 7, "The EAO provides a limited amount of funding to assist First Nations to participate in the review process...The EAO encourages proponents to provide First Nations with additional capacity funding to participate in other aspects of the environmental assessment, such as engagement with the proponent during studies and information gathering."

rights and title throughout the province, and provide for co-management of development processes in British Columbia.¹⁷ The reaction to this proposed *Recognition and Reconciliation Act* has been divergent and largely negative. Commentary from the private sector expressed concern that the *Recognition and Reconciliation Act* could create uncertainty in decision making processes by giving Aboriginal groups an ability to veto projects, and failing to address the coordination of consultation efforts among the Crown, private sector and Aboriginal groups.¹⁸ Conversely, Aboriginal groups have indicated there may not be enough consideration for Aboriginal perspectives in the same decision making processes, and that contemplated recognition of Aboriginal rights and title remains insufficient.¹⁹ Such polarized views indicate that the meaningful inclusion of Aboriginal peoples in the planning and development of projects affecting them remains fraught with conflict and hurdles. Different perspectives on the role that Aboriginal peoples, the Crown, and private sector should play in land use planning, management and development reveal that although the vast majority of participants believe Aboriginal inclusion must be improved, the manner in which to seek improvement is more contentious. The judiciary has consistently indicated that reaching reconciliation requires the efforts of Crown and Aboriginal participants to negotiate mutually acceptable outcomes. However, the means by which such mutually acceptable outcomes may be

¹⁷ British Columbia, Ministry of Aboriginal Relations and Reconciliation, *Discussion Paper on Instructions for Implementing the New Relationship* (British Columbia: online: Minister of Aboriginal Relations and Reconciliation

<http://www.gov.bc.ca/arr/attachments/implementing_the_new_relationship_0309.pdf>, 2009)

[“*Discussion Paper on New Relationship*”].

¹⁸ Tom Isaac. & Keith Clark, “Legal Observations Concerning the *Discussion Paper on Instructions for the Implementation of the New Relationship*”, Legislative Comment on *Discussion Paper on New Relationship* *ibid.* online: John Cummins M.P. Delta-Richmond East <<http://www.johncummins.ca/docs/>>.

¹⁹ Woodward and Co., “Aboriginal Rights Lawyers Respond to Proposed Recognition Legislation” Legislative Comment on *Discussion Paper on New Relationship* *ibid.* online: Woodward and Co. News Archives <http://www.woodwardandcompany.com/newsarchive.html>.

created remain elusive, as does the role that the Crown, private sector and Aboriginal peoples should take in crafting such outcomes.

1.3 Aboriginal Participation in the 2010 Games

In the context of the 2010 Games the consultation and participation of the Four Host First Nations appears to be taking the relationship between the Crown, private sector and these Aboriginal groups in a positive, cooperative direction. The parties involved have espoused the importance of developing partnerships between them in association with hosting the 2010 Games and stressed the positive changes which hosting has brought to their relationship.²⁰ The development of this Aboriginal-governmental relationship surrounding the 2010 Games may have far reaching implications for future relations in a wide range of substantive governance areas that are entirely unrelated to mega-event preparation and management. Creation of these Olympic partnerships and cooperative management systems may influence protocols for joint management of other resource developments in British Columbia, emerging governmental policy making, as well as more formal legislative efforts aimed at defining Aboriginal rights and co-management roles, and the perceived benefits and challenges of co-venturing with Aboriginal groups. Examining the processes which structured Aboriginal participation in the 2010 Games reveals a number of significant elements which defined the content and intended outcomes of Aboriginal participation throughout the planning, development and hosting of the Games. While these detailed aspects of Aboriginal participation are

²⁰ Catherine Hilary Dunn, "Aboriginal Partnerships for Sustainable 2010 Olympics and Paralympic Winter Games: A Framework for Cooperation" (M.R.M. Thesis, Simon Fraser University School of Resource and Environmental Management, 2007) online: Simon Fraser University Institutional Repository <<http://libir.lib.sfu.ca/bitstream/1892/9245/1/etd2940.pdf>> at 104-09.

certainly important, the research will demonstrate that the following elements are those which set the substantive structure of Aboriginal participation:

- i. early inclusion of Aboriginal participation in bid process;
- ii. coordination of efforts between Squamish and Lil'wat Nations through protocol agreement;
- iii. creation of Shared Legacies Agreement between Squamish and Lil'wat Nations, and the Vancouver Bid Corporation, and Provincial Government;
- iv. execution of a memorandum of understanding between the Musqueam and Lil'wat Nations and Vancouver Bid Corporation;
- v. creation of Four Host First Nations Society and Secretariat, coordinating the efforts between Squamish, Lil'wat, Musqueam and Tsleil-Waututh Nations;
- vi. creation of protocol agreement between the FHFN and VANOC;
- vii. creation of legacies protocol between the FHFN and Legacies Now; and
- viii. creation of Olympic Legacies Agreement between the Musqueam and Tsleil-Waututh and the Federal Government.

These above elements shared the structure of Aboriginal participation, but also formed the framework for the benefits and issues faced by Organizing Committees, the FHFN, and the Crown during the planning and organization of the Games. Benefits to the parties included: creation of an Aboriginal Youth Sport Fund; commitment to providing procurement and employment opportunities to FHFN members; co-venturing between Squamish and Lil'wat Nations with private sector companies to develop Nordic centre sites; creation of the Squamish/Lil'wat Cultural Centre; creation of a specific Aboriginal Licensing and Merchandising Program; provision of 300 acres of Provincial Crown land to Squamish and Lil'wat Nations in fee simple; provision of \$18 million CDN to the Musqueam and Tsleil-Waututh Nations for the purchase of lands to address issues in reserve size; and the strengthening and building of relationships internally amongst the FHFN and externally with the private sector and Crown.

Although these benefits have made Aboriginal participation in the 2010 Games largely a success, there have undoubtedly been a number of issues and challenges which

the parties also had to address. The inclusion of the Musqueam and Tsleil-Waututh occurred later than the Squamish and Lil'wat, and subsequent to the majority of the benefits for the Squamish and Lil'wat Nations being agreed upon. This required the Musqueam and Tsleil-Waututh to participate throughout the organization of the 2010 Games with a great deal of trust that VANOC and the Provincial and Federal Crowns would ultimately provide similar benefits to all the FHFN. Though the Federal Government ultimately produced on the promises of the Vancouver Bid Corporation and VANOC, this inequality amongst the FHFN did create a tension amongst the nations. Additionally, outside factors and agents such as "No 2010 Olympics on Stolen Native Land"²¹ and the Hudson's Bay Company²² have created controversies which have coloured the public's perception of Aboriginal participation in the 2010 Games, and posed serious challenges to the relationships between VANOC, the FHFN, and the Crowns. However, these issues, although posing difficulties, may also be seen as areas of success for the 2010 Games and Aboriginal participation. The FHFN have remained intact, coordinated, and successful despite internal tensions; the trust displayed by the Musqueam and Tsleil-Waututh was ultimately well-placed and rewarded, and external controversies have often been addressed by the FHFN to create positive resolutions.²³

²¹ No 2010 Olympics on Stolen Native Land, *Native Resistance Threatens Olympic Illusions*, online: No 2010 Olympics on Stolen Native Land <<http://no2010.com/node/936>>.

²² Sandra McCulloch & Lindsey Kines, "Olympic sweaters just knock-offs: Native artisans" *The National Post* (7 October 2009), online: *The National Post* <<http://www.nationalpost.com/news/story.html?id=2079294>>, "When Sawyer-Smith [Cowichan native artisan] saw the sweaters to be worn by the Canadian Olympic team and sold at retail outlets across the country, she felt she had been robbed, 'like they were taking something away from what was originally Cowichan's.' Cowichan Valley NDP MLA Bill Routley called the decision a 'tragedy.' He said Campbell [Premier of British Columbia] talks about a new relationship with Aboriginal people and about providing them with economic opportunities. 'Well, this is one that's been sadly missed...'"

²³ See Rob Mikelburgh, "A \$6 million symbol of a native partnership that will fully enrich the Olympics" *Globe and Mail* (11 December 2009) online: *The Globe and Mail* <<http://www.theglobeandmail.com/news/national/a-6-million-symbol-of-a-native-partnership-that-will-fully-enrich-the-olympics/article1392236/>> "Mr. Joseph [CEO of the FHFN] recently lashed out at self-

The efforts of the FHFN, the Organizing Committees and the Crown appear to have resulted in largely positive results not only for Aboriginal peoples, but also for VANOC and the Crown. The inclusion of the FHFN as official co-hosts of the Olympics has imbued the 2010 Games with cultural richness, and at least partially addresses some issues of social sustainability for which the Olympics are so often criticized. The level of participation goes far beyond the symbolic and cultural, with Aboriginal community members having had greater opportunities for training and employment, the Nations to garner exceptional experience in project management, the provision of direct economic benefits, and the inclusion of Aboriginal concerns and perspectives in all elements of hosting. This far surpasses previous Olympic efforts with regards to including Aboriginal peoples, and also appears to embody the form of consultation and collaboration the judiciary, Crown and Aboriginal peoples have been attempting to articulate.

1.4 Implications for Olympic and Aboriginal Participation Context

Given the dynamic nature of Aboriginal participation in larger development and decision making processes and the historic inability of the Olympic Games to illustrate a definitive ability to alter Aboriginal relations, expecting specific elements of the 2010 Games to transform larger contexts of Aboriginal participation can be considered highly

styled native "warriors" opposed to the Games, accusing them of wanting natives to 'remain forever the dime-store Indian, the lone figure at the end of a gravel road, trapped in the isolation of an inner-city nightmare.' Chief Williams [Squamish Nation] said those advocating 'No Olympics on Stolen Native Land' are misguided. 'They haven't researched their own history. What lands are they talking about? We know every inch of our traditional territory. No one has to tell us about stolen land. The point is what you create on the land.'" See also Daphne Bramham, "Cowichan, HBC meet over dispute [sic] Olympic sweaters" *The Vancouver Sun* (27 October 2009) online: The Vancouver Sun <http://www.vancouversun.com/Cowichan+meet+over+dispute+Olympic+sweaters/2152022/story.html> , "Tewanee Joseph, chief executive of the Four Host First Nations, helped arranged Tuesday's meeting after speaking to Hudson's Bay officials in Toronto last week."

tenuous. However, if one considers the trend towards the Crown and the private sector focusing more directly on achieving meaningful Aboriginal participation, the challenges in achieving such an objective, and the elements of Aboriginal participation in the context of the 2010 Games, it would seem there may indeed be implications for broader sectors and circumstances.

First, a greater emphasis on direct incorporation of Aboriginal concerns through the inclusion of Aboriginal peoples on management boards or advisory committees may become an expected approach, rather than mere consultation. Second, an increased focus on ensuring that Aboriginal peoples benefit from development which affects them, rather than simply ensuring that development considers Aboriginal perspectives, is almost certain to become a consistent aspect of development planning. Third, the Crown may take a more direct approach in collaborating with Aboriginal peoples and the private sector in determining how best to incorporate and accommodate Aboriginal concerns. The Olympics has illustrated the benefits of having the Crown, private sector and Aboriginal communities work in conjunction to determine how development may be directed to create such benefits; however, the inertia of current practices which so often see discussion and negotiation efforts fractured amongst the relevant parties may prove challenging to overcome, and require a complete re-appraisal of the role each plays in the decision-making processes. Fourth, the Olympics should provide a high profile example of the success that co-management of projects can obtain through the inclusion of Aboriginal partners. It appears that one of the current issues vocalized by the private sector is concern that Aboriginal communities may frustrate project efforts rather than enhancing them. The Olympics would seem to provide a clear indication that this is not

necessarily the case, and that partnering with Aboriginal communities can be highly successful, particularly when those communities share a common vision with their private sector and Crown partners. Fifth, and finally, the experiences of the 2010 Games may indeed signal a concerted shift in level of accommodation that Aboriginal groups may receive in relation to development project. This may suggest that Aboriginal peoples face new challenges and decisions within their communities regarding the manner in which they wish to participate in project development, and may suggest that Aboriginal peoples will face new pressures in relation to the manner in which they participate.

Chapter 2: History of Aboriginal Participation in the Olympic Games

2.1 Introduction

As discussed in brief during the introduction, Aboriginal peoples have had a significant history of participation in past Olympic Games. A review of these past Olympic experiences will provide context from which to assess the 2010 Games. Additionally, consideration of scholarly commentary on these past experiences may also reveal different perspectives and vantage points from which to assess Aboriginal participation, and in particular, highlight underlying issues in Aboriginal participation which are not be readily apparent during the flash and excitement of the Olympics. As will be revealed below, the story of Aboriginal participation in the Olympics is storied; touched by success, but perhaps marked more heavily by conflict and missed opportunities.

2.2 Founding of the Modern Olympics & Early Games

The modern Olympic Games began in Athens in the summer of 1896, when the Summer Olympic Games were held as part of the larger World's Fair.²⁴ This marked the culmination of years of effort on the part of Baron Pierre de Coubertin, the man who had initiated the revival of the Olympic Games. Prompted by the defeat of his country by the Germans in the Franco-Prussian war, Baron de Coubertin became convinced that the young men of France were lacking sufficient physical and mental fortitude.²⁵ Inspired by the more structured approaches to enhancing physical fitness in countries such as

²⁴ The Olympic Museum, *The Modern Olympic Games*, online: International Olympic Committee: The Olympic Museum <http://multimedia.olympic.org/pdf/en_report_668.pdf>.

²⁵ Kevin B. Wamsley, "The Global Sport Monopoly: A synopsis of 20th century Olympic politics" (2002) 57 Int'l J. 395 at 396.

Germany, Denmark, Sweden and Britain, Baron de Coubertin sought to develop a similar physical culture within French schools.²⁶ However, the Baron did not find much support for his suggestions in France, and this prompted him to consider alternative means to developing France's physical culture.²⁷ He again found inspiration abroad, but in this instance, his inspiration was the large sporting festivals such as the German Turnfests, Scottish Highland Games, and most importantly, the English Olympic Games at Much Wenlock and the Ancient Olympic Games which caught Baron de Coubertin's attention.²⁸ Baron de Coubertin saw such sporting festivals as a means of fostering the physical and mental fortitude of the country's young men, but he was equally struck by the popularity of world's fairs which routinely attracted millions of visitors, and the ability of such fairs to attract the public attention. A sporting event that could attract the same public attention would be truly influential.²⁹ Armed with such ideas, Baron de Coubertin gathered a group of wealthy sport leaders and enthusiasts at an 1894 conference in Paris with the intention of developing an international body to organize and operate an international sporting festival. The culmination of this conference was the development of the International Olympic Committee, which was founded not only as a committee to further amateur sport, but also to further the mandate of fair play and cooperation which would become the basis of "Olympism".³⁰

²⁶ *Ibid.* at 396-7.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid* at 397-8.

³⁰ *Ibid.*

The Olympic Charter, adopted by the International Olympic Committee, describes Olympism as follows:

“A philosophy that placed sport at the centre of a universal campaign for peace and international understanding. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy found in effort, the education value of good example and respect for universal fundamental ethical principles.

The goal of Olympism is to place sport at the service of the harmonious development of man, with a view to promoting a peaceful society concerned with the preservation of human dignity....”³¹

The grounding of the Olympics in such an ideology lent this event a unique quality not shared with comparable events, ensuring that the public’s perceptions and expectations of the Olympics would be intrinsically tied to successes and failures outside of the sporting arena.

While the early games following Athens were associated with world fairs in Paris, St. Louis and London, and did not attract significant public attention, the Olympics gained increasing notoriety as the 20th century continued, and quickly took on an increased social and political significance – a socio-political dimension that has only increased with each successive staging of the games. Indeed the history of the modern Olympics reveals it as an event which has been utilized as a tool for political gain, self-promotion, propaganda, protest, and nation building. Most prominently, the Nazi Games of 1936 saw Hitler use the Olympic Games to showcase the capacity and capabilities of post World War I Germany;³² the Munich Games of 1972 were marred by the death of

³¹ International Olympic Committee, *Olympic Charter, Fundamental Principles of Olympism*, online: International Olympic Committee <http://multimedia.olympic.org/pdf/en_report_122.pdf> at 11.

³² Arnd Kruger & William Murray, *The Nazi Olympics: Sport, Politics, and Appeasement in the 1930s* (Urbana: University of Illinois Press, 2003)

Jewish athletes, killed during the terrorist attacks;³³ and the Olympic Games of 1980 and 1984 saw boycotts carried out by the democratic and communist states against Games hosted by Russia and the United States respectively.³⁴ It is in this complex context that Aboriginal participation has occurred, and indeed, the historical involvement of Aboriginal and indigenous peoples throughout the modern Olympics undoubtedly reflect the complex charter of the Olympic Games.

The participation of Aboriginal peoples in the modern Olympic Games began early in Olympic history, and was typified by the participation of Aboriginal peoples as athletes, although in the first instance, this participation was more than dubious. The St. Louis Olympic Games in 1904, held in conjunction with the Louisiana Purchase Exposition, was closely associated with an event known as “Anthropology Days” in which:

“...three thousand indigenous men and women from all over the world who came to St. Louis to serve as demonstrators, educations, research subjects and entertainers...agreed to participate in athletic competitions and demonstrations of physical ability during the fair’s eight month tenure.”³⁵

These “Special Olympics”³⁶ were organized by the Anthropology Department of the Louisiana Purchase Exposition’s William McGee, and James E. Sullivan, head of the Department of Physical Culture and one of the most power figures in U.S. amateur sports, for the combined purpose of demonstrating the “many long chapters of human

³³ Richard Mandell, *The Olympics of 1972: a Munich Diary* (Chapel Hill: The University of North Carolina Publishing, 1991).

³⁴ Allen Guttman, “The Cold War and the Olympics” (1988) 43 *Int’l J.* 554.

³⁵ Nancy J. Parezo, “Chapter I A ‘Special Olympics’: Testing Racial Strength and Endurance at the 1904 Louisiana Purchase Exposition” in S. Brownell ed., *The 1904 Anthropology Days and Olympic Games: Sport, Race, and American Imperialism*, (Lincoln: University of Nebraska Press, 2008) at 59.

³⁶ *Ibid.*

evolution” and to illustrate that “...American athletes were the best in the world, superior to all other races and cultures.”³⁷

McGee took charge of recruiting the indigenous participants, gathering them from pavilions throughout the fair, as well as Native Americans from a nearby “Indian School”, paying them to participate in the Anthropology Days.³⁸ The indigenous participants then competed in contests such as “spear and baseball throwing, shot put, running, broad jumping, weight lifting, pole climbing and tugs-of-war”³⁹ and their performance was measured against existing records to determine the athletic comparability between the indigenous cultures and American.⁴⁰ When the indigenous participants performed far below the American records, Sullivan held this up as proof of the superiority of American and Caucasian athletes.⁴¹ While the use of the Anthropology Games as means to advance an agenda of “scientific racism” was clearly evident, at least one group of Aboriginal participants did not play the role in which they had been cast. The fair included a “Model Indian School” pavilion, which was attended by a girls’ basketball team from an Indian boarding school in Montana that had won the state’s first basketball championship.⁴² The Native American girls attending the Model Indian School played exhibition basketball games throughout the summer of the Louisiana Purchase Exposition, and following the defeat of the “Missouri All-Stars, alumnae of

³⁷ *Ibid.* at 60.

³⁸ Susan Brownell, “Introduction: Borides Before Boas, Sport before the Laughter Left” in S. Brownell ed. *The 1904 Anthropology Days and Olympic Games: Sport, Race, and American Imperialism*, (Lincoln: University of Nebraska Press, 2008) at 4.

³⁹ Parezo, *supra* note 35 at 59.

⁴⁰ Brownell, *supra* note 38. See also Lew Carlson, “Giant Patagonians and Hairy Ainu: Anthropology Days at the 1904 St. Louis Olympics” (2004) 12:3 *Journal of American Culture* 19.

⁴¹ *Ibid.*

⁴² Linda Peavy & Ursula Smith, “‘Leav[ing] the White[s]...Far Behind Them’: The Girls from Fort Shaw (Montana) Indian School, Basketball Champions of the 1904 World’s Fair” (2007) 24:6 *The International Journal of the History of Sport* 819 at 819.

Central High School in St. Louis”, the “...girls from Fort Shaw Indian School in Montana were ‘basket ball’ champions of the 1904 St. Louis World’s Fair”.⁴³

While the obvious over tones of racism in Anthropology Days are blatantly obvious now, even at that time they were viewed with distain by many, including de Coubertin who stated about the Anthropology Days: “Nowhere else but in America would anyone have dared to put such a thing in the program of an Olympiad.”⁴⁴ The success of the Forts Shaw Indian School girl’s basketball team may have marked a highlight of Aboriginal participation in relation to the 1904 Olympic Games, although the dubious nature of organizing a “Model Indian School” as a pavilion for the entertainment of fair goers certainly colours their exploits, leaving their success in basketball marred by its association with the Anthropology Days, and the Louisiana Purchase Exposition’s general presentation of indigenous cultures. While Anthropology Days and the Model Indian School may have been more closely associated with the Louisiana Purchase Exposition, and have been a greater reflection of the St. Louis fair organizers than the Olympic Games themselves, the link between Anthropology Days, and the girls of the Fort Shaw Indian boarding school, and the Olympics is nevertheless present, and marks an obviously dark chapter in the association of Aboriginal and indigenous peoples with the Olympic Games.

It would not be long; however, before Aboriginal athletes again featured prominently in the Olympic Games, most notably, highlighted by Jim Thorpe who won two gold medals for the United States of America in the Stockholm Games of 1912.⁴⁵ Thorpe, a

⁴³ *Ibid.* at 820.

⁴⁴ Brownell, *supra* note 38 at 48.

⁴⁵ Mark Dyreson, “Olympic Games and Historical Imagination: Notes from the Fault Line of Tradition and Modernity” in Barney R. et al. eds., *Global and Cultural Critique: Problematizing the Olympic Games*.

Sac and Fox Indian, was highlighted by the American press as “proof that the United States had no racial barriers in athletics”.⁴⁶ Though Thorpe may have been revered by the American Press,⁴⁷ his achievements were ultimately sullied when James E. Sullivan (of Anthropology Days notoriety) as head of the United States Amateur Athletic Union rescinded Thorpe’s amateur status for his participation in professional summer baseball leagues, which prompted the International Olympic Committee to strip Thorpe of his medals and records.⁴⁸ Thorpe’s participation in the summer baseball leagues earned him approximately two dollars a game, barely enough to cover his living expenses.⁴⁹ Ultimately, Thorpe would have his gold medals returned 70 years following the Stockholm Games, and 30 years after his death, on the basis of a technicality; that his professional participation was in a sport in which he did not compete as an Olympic athlete, a point which had been raised by numerous newspapers and commentators at the time of the Thorpe scandal.⁵⁰

While Thorpe was undoubtedly the best known Aboriginal athlete in the Olympic Games, he was not the only athlete to capture the attention and adoration of the public and press. Lewis Tewanima, a Hopi Indian, and one of the United States best distance runners at the 1908 and 1912 Olympic Games, was also highlighted by the American Press as a further indication of the racial harmony within American athletics.

Fourth International Symposium for Olympic Research (London, ON: University of Western Ontario International Centre For Olympic Studies, 1998) 21 at 25.

⁴⁶ *Ibid.*

⁴⁷ Mark Rubinfeld, “The mythical Jim Thorpe: Re/presenting the twentieth century American Indian” (2006) 23:2 *International Journal of the History of Sport* 167 at 171-72.

⁴⁸ *Ibid.* at 172.

⁴⁹ *Ibid.* at 173.

⁵⁰ *Ibid.* at 173-4.

Mark Dyreson in his discussion of the way in which history is depicted in an Olympic context elaborates:

“In 1908 in an archetypical photograph in the *New York Times*, the press made Tewanima a symbol of a supposedly race-blind society as the runner danced a Fourth-of-July jig for his teammates as the United States Olympic team steamed across the Atlantic to the London Olympics...Tewanima’s sport transformed traditional ritual into a modern rite for American patriotism. The press transformed traditional symbols into vehicles for selling modern visions.”⁵¹

Even at these earliest of Olympic Games, it was clear that the participation of Aboriginal peoples had implications far beyond the athletic events and venues. Numerous authors have noted that the Olympics has, almost from the outset, been imbued with a social and political character unlike any other global event, and it is evident from the stories above, that this element was particularly salient for Aboriginal participation in the early games.

Yet the participation of Aboriginal peoples in the Olympic Games remained largely in the realm of athletic events; “exotic” Aboriginal athletes might catch the attention of the public as did Thorpe and Tewanima. However, the Olympic Games were a rapidly changing event which increasingly caught the public’s attention as they gained in notoriety.⁵² The Olympics quickly moved outside of the world fair’s canopies, establishing itself as one of the global community’s premier events. There was a significant increase in the public attention garnered by the event, and an increase in the pomp, circumstance and ceremony. As Olympic hosting requirements expanded in scope, so to did the efforts of organizers, who sought to use the Olympics as a means to many ends, including the ever-present promotion of hosts as model political and cultural

⁵¹ Dyerson, *supra* note 46 at 27.

⁵² See Christine O’Bonsawin, “Construction of the Olympian First Sisters by the Canadian Press” in Wamsley, Barney & Martyn *supra* note 2, 193 (O’Bonsawin examines the treatment of Canadian cross-country skiers Sharon and Shirley Firth of the Loucheaux-Métis Indians of the Northwest Territories, and their participation in the 1972-1984 Winter Olympic Games).

systems in order to attract tourism and investment. As the Olympics changed, so did the context of Aboriginal participation in the Games, along with its meaning and implications for the Aboriginal and non-Aboriginal communities alike.

Aboriginal participation has featured prominently in four, relatively, recent Olympic Games: the 1972 Montreal Summer Games, 1988 Calgary Winter Games, 2000 Sydney Summer Games and the 2002 Salt Lake City Winter Games. Undoubtedly there were other Olympic Games hosted during that period in which Aboriginal people may have been expected to participate. However, an examination of those Olympics which sought to feature Aboriginal participation more prominently will reveal the successes and failures of past Olympics, and may provide points of contrast from which to assess the efforts of Vancouver 2010. In addition to the specific involvement of Aboriginal peoples in these four Olympic Games, it is also necessary to consider a significant milestone in the history of the International Olympic Committee, and the Olympic movement, namely, the adoption of Agenda 21⁵³ by the IOC and its meaning for Aboriginal peoples in subsequent Games.

2.3 Montreal Summer Olympic Games 1976

The Montreal Olympic Games in 1976 marked Canada's first Olympic hosting experience, and provided the impetus for two exceptionally different displays of Aboriginal culture in association with the Summer Games. The first was the development by the Kahnawake Mohawks of "Indian Days"; this event was staged by the Kahnawake to coincide with the 1976 Olympics, and was developed to attract Olympic

⁵³ International Olympic Committee, *Olympic Movement's Agenda 21: Sport for sustainable development* (online: International Olympic Committee Sport and Environment Commission <http://multimedia.olympic.org/pdf/en_report_300.pdf>) [Agenda 21].

spectators to the Kahnawake reserve community located some 40 km southwest of Montreal.⁵⁴ The second display saw the incorporation of Aboriginal culture into the Olympic closing ceremonies, which Olympic organizers described as honouring Canada's Aboriginal peoples.⁵⁵

The Indian Days organized by the Kahnawake took place over the same 17 days during which the Olympic Games were held in Montreal, with the goal of obtaining enough money from tourism to fund the construction of a new hospital wing.⁵⁶ The Kahnawake organizers originally sought to have Indian Days incorporated into the Olympic Arts and Culture Program of the Montreal Olympics, but the request was denied for a variety of reasons: fear of Aboriginal demonstrations; the organizing body for Indian Days was unofficial since it was not commissioned by the Montreal Olympic organizing committee; and the event was seen as too expensive to fund.⁵⁷ Unable to have their event officially incorporated into Olympic cultural programming, the Kahnawake developed Indian Days independently and sought to attract Olympic visitors to the Montreal Games to the Kahnawake reserve to teach visitors about their lives and culture.⁵⁸ Though the Kahnawake expected 125,000 visitors, they received far fewer visitors, and commentary on the failure to attract more visitors ranged from the lack of media attention, to the “unfriendly demeanor” of the Kahnawake to non-Aboriginal sightseers.⁵⁹ Additionally, Kahnawake community members expressed concern during Indian Days that their interactive cultural activities, intended to provide visitors with greater

⁵⁴ Forsyth, *supra* note 2 at 71.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 73.

⁵⁷ *Ibid.* at 72.

⁵⁸ *Ibid.* at 72-3.

⁵⁹ *Ibid.* at 73.

understanding of Kahnawake culture, were being ignored in favour of the displays which met with tourists' pre-conceived notions of Aboriginal culture obtained from movies, television, museums and novels.⁶⁰

While the Kahnawake Indian Days failed to garner the attention and success that the Kahnawake had hoped, the event was nevertheless organized by the Kahnawake community to properly represent their lives and cultures to Olympic visitors. On the other hand, the incorporation of Aboriginal culture into the closing ceremonies of the Montreal Games fell short of even this mark. Organizers of the 1976 closing ceremonies sought to depict Canada's multicultural nature, and in furtherance of this effort, chose to incorporate Aboriginal cultural elements.⁶¹ The Montreal organizers:

“...appropriated a multitude of popular Aboriginal images and arranged them in a vivid and dramatic display, compete with teepees, tom-toms, feathered headdresses, flags and buckskin outfits – all color-coordinated to match the five colors of the Olympic rings. For the final performance, the Aboriginal performers marched in arrowhead formation as they entered and paraded around the track, erected five massive teepees in the centre of the stadium, dispensed feathered headbands and beaded necklaces to the athletes and spectators, danced and played the drums – all to the tune of the *La Danse Sauvage*.”⁶²

Though this combination of symbolism and imagery associated with Aboriginal cultures can be seen as reinforcing stereotypes of Aboriginal culture, the more troubling aspect of the representation of Aboriginal culture in the Montreal closing ceremonies was the manner in which Aboriginal peoples were involved in its organization and execution. The display was developed entirely by the Olympic organizers without input or

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 71.

⁶² *Ibid.* at 72.

representation from Aboriginal peoples.⁶³ Additionally, the performers in the display of Aboriginal culture were only partly made up of Aboriginal peoples.⁶⁴

Indeed, the actual participants of Aboriginal heritage only made up approximately half of the actual performers, with the remainder comprised of non-Aboriginal peoples painted and dressed to look Aboriginal.⁶⁵ Closing ceremonies organizers provided the Aboriginal participants with only a single all-night practice for the ceremony, explaining this approach as being required due to funding limitations and the high cost of transporting the Aboriginal participants from their communities outside of Montreal.⁶⁶ Since the Aboriginal participants would not have sufficient time to train for the show, the “...organizing committee hired a professional Montreal dance troupe to train and practice for the show...non-Aboriginal performers dressed and painted to look like ‘Indians’ led the Aboriginal participants through their own commemoration”⁶⁷ Janice Forsyth, in her discussion of the Montreal Games, notes that the demeaning nature of this display was not such to prevent the Aboriginal participants from agreeing to perform. Forsyth proposes an explanation for the participation of the Kahnawake:

“In the case of the Mohawks of Kahnawake, some residents understood their participation in the Closing Ceremony as part their cultural identities, one that spoke to their involvement as ‘show Indians’ in the entertainment industry. Indeed, the Mohawks of Kahnawake had a long and proud tradition as Aboriginal performers in various Wild West shows, moves, word fairs and exhibitions, and sport tours...The Closing Ceremony thus provided Mohawk participants with a meaningful opportunity to connect with part of their heritage.

Some Mohawks viewed the Closing Ceremony as a means to promote and strengthen the presence of an emerging pan-Indian identity in Canada...Thus,

⁶³ *Ibid.*

⁶⁴ *Ibid.* at 71 “...approximately 200 Aboriginal peoples from nine different First Nations participated in the celebration, having consented to share centre stage with approximately 250 non-Aboriginal people dressed and painted to look like Indians.”

⁶⁵ *Ibid.* at 72.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

Mohawk participation was a symbolic show of a much larger movement of Aboriginal cultural persistence in Canada...

Still others saw the Ceremony as a unique diversion from their everyday lives. Here was an opportunity to take part in a massive celebration that would be broadcast worldwide and a rare chance to meet some of the best athletes in the world. So it was, when the Olympic Games came to Montreal, the Mohawks of Kahnawake welcomed the opportunity to participate in the show.”⁶⁸

Though the Kahnawake may have attempted to utilize the Olympics to better showcase and educate Olympic visitors and the viewing public about their culture, it is evident that the Montreal Games failed to provide meaningful participation to Aboriginal peoples, and indeed some may even describe the closing ceremonies experience was one which was actually damaging.⁶⁹ As Forsyth suggests, some of the Aboriginal participants may have viewed their participation in the closing ceremonies, or through Indian Days, as helping to advance notions of their culture, albeit within the restrictive boundaries created by the organizers of the Montreal Games. However, it seems readily apparent that the creation of such restrictive boundaries limited the possibility of Aboriginal participation within the Montreal Games as having any substantive, positive potential.

Though the experiences of the Montreal Games may simply be dismissed as indicative of their time and place in Canadian history, is notable that they came only 6 years prior to the granting of constitutional protection of Aboriginal rights and treaty rights under Section 35(1), and within a time of great debate surrounding Aboriginal rights and protection. The 1976 Games may seem a distant past, but they nevertheless

⁶⁸ *Ibid.* at 72.

⁶⁹ See Janice Forsyth & Kevin B. Wamsley, “‘Native to native...we’ll recapture our spirits’: The world indigenous nations games and north American indigenous games as cultural resistance” (2006) 23:2 *The International Journal of the History of Sport* 294 at 303 (describing J Wilton Littlechild’s, the person primarily responsible for the development of the North American Indigenous Games, reaction to seeing the 1976 closing ceremonies: “To Littlechild, the cultural display at 1976 Olympic Games was an affront to Aboriginal peoples everywhere, in that it emphasized their exclusion from positions of social, economic and political power...”).

provide a demonstration of the type of Aboriginal participation which has been associated with the Olympics, and importantly a Canadian hosted Olympics.

2.4 Calgary Winter Olympics 1988

While the participation of Aboriginal peoples in the Montreal Olympics can hardly be described as positive, the Calgary Winter Olympics in 1988 offered another opportunity for a Canadian hosted Olympic Games to incorporate Aboriginal participation and culture. Similarly to their Montreal counterparts, the Calgary organizers sought to incorporate Aboriginal culture in the ceremonies of the 1988 Olympics,⁷⁰ but unlike Montreal, Calgary Olympic organizers also sought to incorporate Aboriginal culture directly into the broader cultural Olympiad and representations of Calgary as a city.⁷¹

Aboriginal participation in the Calgary Olympic Games began at a much earlier stage than in Montreal, as Calgary organizers sought to incorporate Aboriginal culture as part of their representations of Calgary in their bid for the 1988 Games. Aboriginal dancers were included in the contingent from Calgary sent to Baden-Baden where the International Olympic Committee was set to determine the city which would secure hosting duties for the 1988 Winter Olympics.⁷² These Aboriginal performers saw themselves represent the Calgary bid alongside other “archetypal inhabitants of the

⁷⁰ Steven J. Jackson “The 49th Paradox: The 1998 Calgary Winter Olympic Games and Canadian Identity as Contested Terrain” in M.C. Duncan, G. Chick, G. Edward & A. Aycock eds. *Play & Culture Studies*, Vol 1. (Greenwich: Ablex Publishing Corporation, 1998) 191 at 202-4.

⁷¹ Julia D. Harrison & Bruce Trigger, “The spirit sings and the future of anthropology” (1988) 4:6 *Anthropology Today* 6 at 6.

⁷² K.B. Wamsley & Mike Heine, ““Don’t Mess with the Relay – It’s Bad Medicine’ Aboriginal Culture and the 1988 Winter Olympics” in Robert K. Barney et al. eds., *Olympic Perspectives: Third International Symposium for Olympic Research* (London ON: University of Western Ontario, 1996) 173-178 at 173.

west...” the Mounties and the cowboy.⁷³ Following the success of Calgary’s bid, the organizing committee sought to incorporate greater expressions of Aboriginal culture within the Calgary Olympics.

Aboriginal involvement in the Calgary opening and closing ceremonies included the incorporation of participants from a number of First Nation and Aboriginal communities around the Calgary area. However, rather than the highly choreographed approach in Montreal, and utilization of non-Aboriginal performers in place of Aboriginal participants, the Calgary opening ceremonies simply included Aboriginal participants in traditional dress “opening” the 1988 Games by entering the opening ceremony venue.⁷⁴ Additionally, the opening ceremonies also incorporated Aboriginal language into the singing of the Canadian National anthem, by recruiting Daniel Tlen, a Yukon Aboriginal to sign part of the anthem in Shoshonee.⁷⁵ Notably, the Calgary Stampede Board, perhaps playing to the stereotypical versions of western heritage which Calgary used to represent itself, suggested that an Indian attack and wagon-burning should be incorporated into the opening ceremonies.⁷⁶ This suggestion was generally met with criticism, and (thankfully) was not followed for the actual opening ceremonies.⁷⁷

This incorporation of Aboriginal culture into the Olympics’ biggest ceremonies was undoubtedly an improvement on the Montreal Games; however, the opening ceremonies were not the most significant, nor controversial, attempt at incorporating Aboriginal culture into the 1988 Games. Julia D. Harrison, the Curator of the Ethnology Department of the Glenbow Museum in Calgary described the exhibition *The Spirit*

⁷³ *Ibid.*

⁷⁴ Jackson, *supra* note 70 at 203-4.

⁷⁵ *Ibid.*

⁷⁶ Wamsley & Heine, *supra* note 72 at 173.

⁷⁷ *Ibid.*

Sings: Artistic Traditions of Canada's First Peoples as "...designed as an important vehicle to educate the Canadian people about the native heritage of their country and to bring the wealth of Canadian native materials held in foreign museums to light."⁷⁸ Initial work on the exhibition began in 1983, but funding was provided by Shell Oil Canada Limited, a corporation active in the development of Alberta's oil sands, far north of Calgary. As a result, in 1986 *The Spirit Sings* became a flashpoint of controversy for the Calgary Olympics and Aboriginal peoples.⁷⁹

The Lubicon Cree had advanced a claim of Aboriginal title to an area of northern Alberta, and unlike most of the other Aboriginal groups in Alberta, was not a party to any treaty, and therefore was without the settlement rights and reserve land provided under these agreements.⁸⁰ The Lubicon Cree had begun calling for a boycott of the Olympics as early as 1986, to combat the refusal of the federal government to negotiate a treaty with the Lubicon, and to attract attention to the destructive effect which development of the oil sands was having on the Lubicon's largely traditional hunting and substance economy.⁸¹ Shell Oil was one of the corporations pursuing oil production in close proximity to Lubicon communities, and the Lubicon protest strategy for the 1988 Games was to specifically target the events and elements of the Olympics sponsored by oil companies.⁸² *The Spirit Sings* was targeted by an international campaign organized by the Lubicon to encourage museums around the world not to transfer any artifacts to the exhibition.⁸³ The Lubicon received support from a number of European entities such as

⁷⁸ Harrison & Trigger, *supra* note 71 at 6.

⁷⁹ Wamsley & Heine, *supra* note 72 at 174.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

the European parliament,⁸⁴ while the Glenbow Museum sought the aid of diplomats in a number of countries, and initiated their own letter writing campaign, to combat the Lubicon boycott.⁸⁵

According to Harrison, the Glenbow Museum sought to include Aboriginal individuals and organizations in a Liaison Committee to help guide the development of *The Spirit Sings* exhibition, and the Lubicon did not respond to their invitation to participate.⁸⁶ The Native Liaison Committee drew its membership from some local bands, larger Aboriginal organizations, and government departments that had an Aboriginal component to their objectives and efforts.⁸⁷ The Committee suggested that the Glenbow Museum seek to meet directly with local bands, but an inability to “find mutually agreeable meeting times” rendered such attempts unsuccessful.⁸⁸ However, Glenbow representatives were able to meet directly with the Lubicon which, according to Harrison, revealed that the Lubicon had “no objection to the content of the exhibition but only to its sponsorship and association with the Calgary Olympics.”⁸⁹

The controversy surrounding *The Spirit Sings* escalated as the Lubicon sought to garner further public support for its boycott by encouraging Aboriginal communities and organizations across Canada to protest the torch relay.⁹⁰ This call for support was answered by a number of Aboriginal organizations. The Assembly of First Nations, the World Congress of Indigenous People, the National Congress of American Indians, the Indian Association of Alberta and other Aboriginal organizations endorsed the boycott,

⁸⁴ Harrison & Trigger, *supra* note 71 at 7.

⁸⁵ Wamsley & Heine, *supra* note 72 at 174.

⁸⁶ Harrison & Trigger, *supra* note 71 at 6.

⁸⁷ *Ibid.* at 6-7.

⁸⁸ *Ibid.* at 7.

⁸⁹ *Ibid.* at 7.

⁹⁰ Wamsley & Heine, *supra* note 72 at 175.

and the relay was indeed protested in several Canadian cities, including in Kahnawake Quebec. However, not all Aboriginal groups were swayed by the Lubicon protests, most notably, many of the Treaty 7 bands in Alberta who continued to seek opportunities for and involvement with the Calgary Olympics.⁹¹ The continued support for the Olympics provided by these Treaty 7 bands was due largely to the creation of a Native Participation Program by the Calgary Organizing Committee, which was developed while the Lubicon protest gathered momentum.⁹² The Native Participation Program “provided funding for, among other events, a Native trade show, a Native youth conference and pow wow competitions.”⁹³ The efforts of the Calgary Organizing Committee were viewed as a direct response to the negative publicity being generated by the Lubicon, and that without the Lubicon protest, no such participation program would have been developed.⁹⁴ The Aboriginal groups participating under the program described the program as positive, providing “...a forum for our people on an international stage.”⁹⁵, while the Lubicon described the Native Participation Program as the government ““throwing some money around to try and buy native support””.⁹⁶ Despite the boycott of the Lubicon, *The Spirit Sings* was ultimately a significant success, with the exhibition attracting its largest crowd (127,000),⁹⁷ and most significant Aboriginal representation amongst its visitors than any previous Glenbow exhibition.

Clearly, Aboriginal participation in the Calgary 1988 Olympics was of a very diverse nature. Some Aboriginal groups saw the Olympics as a forum which would

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* at 175 quoting Sykes Powderface, the Native liaison coordinator hired by the Treaty 7 bands to manage funds provided by the Calgary Organizers.

⁹⁶ *Ibid.* at 175 quoting *Calgary Herald*, Apr. 15 1987.

⁹⁷ *Ibid.* at 175.

provide greater exposure for positive representations of native cultural and traditions while the Lubicon and others took advantage of the international exposure sparked by the Olympics to draw attention to broader issues facing their communities. Yet even with regard to the direct participation of Aboriginal peoples in the Olympics, either through the Native Participation Program events, the Glenbow Museum's exhibition, or the opening ceremonies, there was concern that the participation was merely to placate and undermine protesters and critics. Central to this criticism is the issue, as articulated by Wamsley and Heine that the forms of Aboriginal involvement in the Calgary Games were "delineated...as often as not, by the organizers rather than by Native people themselves."⁹⁸

While the Calgary organizers did not "delineate" Aboriginal participation in the restrictive, and negative, manner as the Montreal organizers had, it was nevertheless clear that the form of Aboriginal participation within the Olympic Games was set by the organizers. By curtailing Aboriginal input into the manner in which their participation was to occur, and developing programs later in the organizational process, the Calgary Games efforts at Aboriginal involvement had the appearance of placating Aboriginal dissent rather than achieving meaningful involvement. While it seems apparent that Aboriginal participation in the Calgary Games was far more positive than in Montreal, a similar issue is raised, namely, that Aboriginal peoples were still unable to more directly influence the manner in which they could participate in the Olympic Games. Only minor attempts at developing a higher level of consultative or advisory role for Aboriginal peoples was made, and as Bruce Trigger notes in his response to Julia Harrison's assessment of the Glenbow's attempts to meet with local Aboriginal leaders, "...clearly,

⁹⁸ *Ibid* at 173.

more is involved than finding mutually agreeable meeting times.”⁹⁹ The Calgary Games may have marked a vast improvement in incorporating Aboriginal participation when compared to Montreal. However, the Calgary Games’ efforts were still plagued with contentious issues; most significantly, the structure of Aboriginal participation was still manufactured through organizing committee determinations rather than through collaboration with Aboriginal peoples. Even the protests of the Lubicon were unable to produce the desired outcome since they remain without a treaty or land recognition from the Province of Alberta or the Government of Canada.

2.5 The Olympic Movement’s Agenda 21 for Sustainable Sport

The Calgary Games were not unique Olympics in terms of protests, and indeed it was not long before another Winter Olympics was subject to similar demonstrations, albeit on a much different subject. The Albertville Games of 1992 saw the development of Olympic venues in a fashion which caused significant environmental concerns,¹⁰⁰ and the resulting outcry garnered significant public attention with regards to the impact that Olympic hosting may have on a city or region’s environment.¹⁰¹ These protests firmly placed the environment within the purview of Olympic host cities, and by contrast, the Sydney bid in 1993 included a strict set of environmental guidelines,¹⁰² and the Lillehammer Winter Olympics in 1994 saw their organizing committee join with environmental non-governmental organizations to develop alternative venue plans and

⁹⁹ Harrison & Trigger, *supra* note 71 at 10.

¹⁰⁰ Jean-Loup Chappelet, “Olympic Environmental Concerns as a Legacy of the Winter Games” (2008) 25:14 *The International Journal of the History of Sport* 1884 at 1891-2.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* at 1892-3.

considerations to address any environmental issues.¹⁰³ The efforts of Lillehammer and Sydney pushed the environment even further to the fore of the Olympic Agenda, and in 1994 the International Olympic Committee adopted the environment as the third pillar of Olympism,¹⁰⁴ and in 1995 the creation of the Sport and Environment Commission to oversee the inclusion of the environmental pillar in the Olympic movement.¹⁰⁵ Subsequently, the Commission hosted World Conferences on Sport and the Environment, Lausanne in 1995, Kuwait in 1997, and Rio de Janeiro in 1999 where the Sport and Environment Commission adopted Agenda 21.¹⁰⁶

The International Olympic Committee's Agenda 21 was inspired by Agenda 21 of the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, and although the rise of environmentalism spurred its creation, the environment is not its only subject. Rather, Agenda 21 addresses three broad subjects: strengthening socio-economic conditions, conservation and management of resources for sustainable development, and strengthening the role of major groups.¹⁰⁷ Within the latter subject, Agenda 21 specifically highlights indigenous populations as being one of the major groups whose participation within the Olympic movement should be strengthened.¹⁰⁸ More specifically, Agenda 21 states:

“Indigenous populations have strong historical ties to their environment and have played an important part in its preservation. The Olympic Movement endorses the UNCED [United Nations Conference on Environment and Development] action in favour of their recognition and the strengthening of their role.”¹⁰⁹

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Agenda 21, *supra* note 53 at 2-3.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* at 45.

In pursuit of an enhanced role for indigenous peoples within the Olympic movement, Agenda 21 prescribes more specifically that indigenous sporting traditions and indigenous access to sports participation be encouraged, both of which are logical inclusions for an Olympic document.¹¹⁰ More notably, Agenda 21 also calls for the Olympic movement to “contribute to the use of [indigenous] traditional knowledge and know-how in matters of environmental management in order to take appropriate action, notably in the regions where these populations originate.”¹¹¹

The specific highlighting of indigenous peoples as requiring further support for their inclusion within the Olympic movement is indeed notable, yet the full meaning of Agenda 21 has yet to be fully determined. The Sydney Games, as will be discussed below, were scheduled to occur only one year following the adoption of Agenda 21, while the Salt Lake City Games were only three years away, and neither city had developed their bid or organized their Games with the benefit of Agenda 21. However, Agenda 21 was developed right in the midst of the formulation of Vancouver/Whistler’s Olympic aspirations, and as will be seen, undoubtedly played a role in the development of Aboriginal participation in the 2010 Games. Though Agenda 21’s tenants are not overly prescriptive with regards to the manner in which indigenous participation should be incorporated into the Olympic movement, it seems evident that their inclusion in this guiding document is sure to influence the manner in which cities bid for Olympic hosting duties, and the emphasis they place on the inclusion of indigenous participation in their hosting agenda.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

At this juncture it may be worthwhile to briefly consider Agenda 21 from a non-Olympic context. Its implications outside the Olympic forum may be more challenging to conceptualize; however, it may be possible to consider its tenants as akin to the corporate social responsibility initiatives which are increasingly becoming part of the corporate landscape, particularly in the sectors participating in resource development.¹¹² What is notable, in this regard, is that the adoption of Agenda 21 creates a specific framework within which “sustainable” Olympic hosting should be planned and pursued. This framework is premised in United Nations developed policies, rather than a specific state’s laws or rules regarding Aboriginal or indigenous participation and consultation in development. These internationally accepted guidelines altered the manner in which the International Olympic Committee’s host cities pursued their hosting responsibilities, shaping their approach to Aboriginal participation in a manner which domestic rules and regulations do not. However, the role of Agenda 21 with regards to indigenous participation is still in its infancy within the Olympic movement, and its impact on host cities, regions or countries has yet to be seen. What is evident is that Agenda 21 marks an important moment for the Olympic movement, and the role of sustainability and indigenous people within this movement. Agenda 21 is certainly a far cry from the Anthropology Days of the St. Louis Games, and appears to signify the increasingly prevalence of sustainability within Olympic hosting duties.

¹¹² See e.g. David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington D.C.: Brookings Institution Press, 2005) (Chapter 1 where Vogel discusses the revival of corporate social responsibility).

2.6 Sydney Summer Olympics 2000

The Sydney Summer Olympics in 2000 were the first to be held following the adoption of Agenda 21; however, as noted above, the organization of the Sydney Games were well under way by the time Agenda 21 was adopted by the Sport and Environment Commission. Yet Sydney, much like Calgary, had sought to incorporate Aboriginal participation within its bid process, similarly using Aboriginal dancers within its bid presentations,¹¹³ but also taking more direct steps to include prominent Aboriginal athletes within the bid,¹¹⁴ and incorporate more direct statements and promises of Aboriginal cultural inclusion within the Sydney cultural Olympiad.¹¹⁵ Indeed, Sydney's Olympic bid emphasized that Aboriginal communities fully supported the bid.¹¹⁶ In total, Sydney's efforts served to "...aligning the nation ideologically, socially and politically with [the] philosophy of the Olympic movement."¹¹⁷

Following the success of the Sydney bid for the 2000 Games, the Sydney Organizing Committee was then charged with attempting to deliver on the promises of Aboriginal inclusion, and indeed the Sydney organizers incorporated far more significant Aboriginal participation than had been previously seen in Montreal or Calgary. As with its previous Canadian Olympic counterparts, the Sydney Games sought to include Aboriginal cultural within its broader cultural festival and ceremonies, but in the case of Sydney, the issue of Aboriginal guidance and control over cultural representations was

¹¹³ John Nauright, "Global games: culture, political economy and sport in the globalised world of the 21st century" (2006) 25:7 Third World Quarterly 1325 at 1328.

¹¹⁴ *Ibid.* at 1329 "...Aboriginal tennis great Evonne Goolagong Cawley [was] used in Sydney's formal presentation to the International Olympic Committee in 1993."

¹¹⁵ *Ibid.* at 1329.

¹¹⁶ *Ibid.*

¹¹⁷ Michelle Hanna, "Reconciliation and Olympism: The Sydney 2000 Olympic Games and Australia's Indigenous People" 148 in Tracy Taylor ed, *Papers from The First International Conference on Sports and Human Rights*, (Sydney: University of Technology, 1999) 148.

more directly addressed. The most significant inclusion of Aboriginal culture in the Sydney Olympics took place in *The Festival of Dreaming* which was staged in Sydney prior to the Olympic Games.¹¹⁸ *The Festival of Dreaming* included a number of exhibitions, dance and theatre productions, films, and literary presentations, with the intention of presenting “...contemporary Indigenous culture with respect to ancient traditions” which was viewed as “...a significant break from colonial representations of an ancient static Indigenous culture.”¹¹⁹

This cultural representation stands in stark contrast to *The Spirit Sings* exhibition in Calgary, which specifically emphasized the long history of Canada’s Aboriginal peoples, but more importantly, the planning of *The Festival* sought to extend greater control to the Aboriginal artists participating in the program. The Sydney Organizing Committee adopted a policy of “Authorship and Control” which stated that ““Authorship of the product, activity or event, and the control of its development and presentation, where possible and relevant, should be in indigenous hands””¹²⁰ A similar approach to the presentation of Aboriginal culture in the opening and closing ceremonies was taken by the Sydney organizers. Aboriginal participation was included in the development of the Aboriginal cultural representations in the ceremonies, and a “cultural custodian deed” was negotiated with the International Olympic Committee, under which, the cultural contributions of Aboriginal peoples in the Sydney Games could not be used for advertising or commercial purposes without the approval of the Aboriginal communities

¹¹⁸ *Ibid.* at 149.

¹¹⁹ *Ibid.* at 150.

¹²⁰ *Ibid.* at 150 quoting the Sydney Organizing Committee’s Policy of Authorship and Control.

involved.¹²¹ In addition to the increased sensitivity and understanding displayed with regards to the incorporation of Aboriginal culture within Sydney's cultural Olympiad, was the linkage of the torch relay to significant Aboriginal cultural sites and athletes.¹²²

These approaches to the planning of indigenous cultural representations within the broader cultural programming of the Sydney Olympics illustrated a significant advance from the Montreal and Calgary Games. The consultative model for Aboriginal participation and involvement in the Sydney Games addressed a significant shortcoming in Calgary's Aboriginal participation efforts, and obviously far surpassed the attempts of Montreal. However, the Sydney Organizing Committee also developed a more direct approach to incorporating Aboriginal participation within the larger development of the Sydney Games. The Sydney Organizing Committee developed an Aboriginal and Torres Strait Islander Relations Unit to deal with Aboriginal communities, and recruited Garry Ella, a former prominent Aboriginal rugby player to act as its program manager.¹²³ In addition, a National Indigenous Advisory Committee was created in 1998 in which a group of prominent Aboriginal Australians were asked to advise the Sydney organizers on matters impacting Aboriginal Australians.¹²⁴ Outside of the Sydney Olympic organizers, four Aboriginal Land Councils of Sydney used the Olympic Games to spur the negotiation of a treaty amongst the land councils to develop a more collaborative and cooperative approach to their general endeavors, but also to coordinate their efforts with

¹²¹ Tony Webb, *The Collaborative Games: The story behind the spectacle* (Melbourne: Pluto Press, 2001) at 195.

¹²² *Ibid.*

¹²³ Richard Cashman, *The Bitter-Sweet Awakening: The Legacy of the Sydney 2000 Olympic Games* (Sydney: Walla Walla Press 2000) at 223.

¹²⁴ Nauright, *supra* note 113.

regards to the Sydney Olympics.¹²⁵ Indeed the land councils were ultimately provided a right to erect a pavilion during the Sydney Games in which details of Australia's colonial treatment of Aboriginal peoples were narrated.¹²⁶ Though each of these pursuits served to indicate the improved role of Aboriginal peoples in the participation of the Sydney Olympics, the efforts were described by some as failing to accomplish any substantive incorporation of Aboriginal perspectives or peoples in the broader organization of the Games.¹²⁷ While such approaches to improving the incorporation of Aboriginal participation into the organization of the Games marked a substantive improvement on those made in Montreal and Calgary, the focus of the public and media surrounding Aboriginal participation in the 2000 Games centered largely upon two distinct topics. The first was Cathy Freeman, an Australian Aboriginal athlete, one of Australia's best medal hopes in track and field, and the focal point of discussions surrounding the Sydney Games as a symbol of reconciliation in Australia. The second subject was the fear of Aboriginal peoples using the Sydney Games as a forum for protest.

As the 2000 Olympics approached, Cathy Freeman, the gold medal favourite in the 400m event, quickly became the focus of the Australian and global media as the "poster-child" for the Sydney Games.¹²⁸ Cathy Freeman was an athlete whose identity had been previously associated with political contention surrounding the plight of Aboriginal peoples in Australia when she made a victory lap in the Commonwealth

¹²⁵ Genevieve Cashman & Richard Cashman eds. *Red, Black and Gold: Sydney Aboriginal People and the Olympics* (Sydney: Centre for Olympic Studies University of New South Wales, 2000) at 9-10.

¹²⁶ George Morgan, "Aboriginal Protest and the Sydney Olympic Games" (2003) 12 *Olympika: The International Journal of Olympic Studies* 23 at 28.

¹²⁷ Nauright, *supra* note 113 at 1329.

¹²⁸ Graham Knight et al., "The Weight of Expectation: Cathy Freeman, Legacy, Reconciliation and the Sydney Olympics – A Canadian Perspective" (2007) 24:10 *The International Journal of the History of Sport* 1243 at 1244.

Games held in Victoria, Canada initially carrying only an Aboriginal flag.¹²⁹ This demonstration caused a stir in Australia and “...cemented Freeman’s identification with the Aboriginal cause in political as well as cultural terms.”¹³⁰ It was in this context that Freeman became the focus of the public and media, and her participation in the Sydney Olympics became intrinsically lined with the broader process of reconciliation in Australia.¹³¹ Freeman’s place as a symbol of reconciliation during the Sydney Games was perhaps cemented when she was chosen to light the cauldron during Sydney’s opening ceremonies; Freeman became the centre of the opening ceremonies which was “...filled with the imagery of reconciliation.”¹³² If Freeman’s iconic lighting of the Sydney cauldron was insufficient to entrench her within the Australian and global conscience as a symbol of recognition, her gold medal winning run in the 400m run certainly did. Immediately following her victory Freeman’s sponsor Nike installed advertisements throughout Sydney bearing the slogan ‘Change the world 400 meters at a time’¹³³ while her performance was dubbed ‘400 m of national reconciliation’ by the leader of the Federal opposition party.¹³⁴ Such interpretations of the broader meanings of Freeman’s participation in the Olympic Games seem remarkably similar to those that were attached to Jim Thorpe some eighty years earlier, and indeed many commentators viewed the linkage of reconciliation to the Sydney Games to be as equally problematic as

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Catriona Elder, Angela Pratt & Cathy Ellis, “Running Race: Reconciliation, Nationalism and the Sydney 2000 Olympic Games” (2006) 41:2 *International Review For the Sociology of Sport* 181 at 182.

¹³² Morgan, *supra* note 126 at 28. Morgan describes other reconciliation images as including Aboriginal man in traditional Aboriginal dress and body paint walking hand in hand with a “curly haired, freckled faced, all-Australian girl”, the incorporation of Aboriginal creation scenes, and display of Aboriginal flag and symbols.

¹³³ Elder et al., *supra* note 131 at 181

¹³⁴ *Ibid.* at 182.

the American Press' interpretation of Thorpe's Stockholm Games participation as a signal of the United States colour blindness in the field of sport.¹³⁵

A second subject which garnered much public and media attention leading up to the Sydney Games was the concern that Aboriginal peoples would utilize the Sydney Olympics as an opportunity to protest and highlight their concerns and issues on a global stage. Concern regarding protest and the concept of the Sydney Games as a force of reconciliation were inextricably tied in the commentary on the Games. A central argument amongst commentators examining Aboriginal participation in the Sydney Games centered upon whether this participation actually constituted reconciliation, or merely a well crafted effort to subvert and silence Aboriginal protest. Concern surrounding Aboriginal protests and the Sydney Games had sprung to the fore of media and public discussions even before the success of the Sydney bid.¹³⁶ Following Sydney's success at the bid stage, several Aboriginal activists expressed their plans to stage protests during the Olympics to highlight the discrimination and social problems suffered by Australia's Aboriginal peoples.¹³⁷ Numerous commentators commented on the potential of Aboriginal protests to feature prominently in Sydney, with well know Aboriginal leader Charles Perkins stating "We are telling all the British people, please, don't come over. If you want to see burning cars and burning buildings, then come over.

¹³⁵ See e.g. Morgan, *supra* note 126 at 33-35 where he discusses the depiction of Cathy Freeman as a symbol of reconciliation and comments "By deploying the repertoire of symbolic Reconciliation, as expressed through the pageantry and symbolism of the Sydney Olympics, the state seeks to evade the responsibility to address the deeper questions of colonial power."

¹³⁶ *Ibid.* at 25 "Even before the bid to stage the Games in Sydney was successful, Aboriginal leaders were declaring their intention to use the event to raise international awareness of the plight of indigenous peoples. In October 1991 the NSW Aboriginal Legal Service called on the IOC to reject the Sydney bid for the Olympics on the grounds of Australia's appalling treatment of its Aboriginal citizens."

¹³⁷ *Ibid.* at 26.

Enjoy yourself”¹³⁸ and other commentators predicting similarly violent clashes between Aboriginal protesters and the police.¹³⁹ Indeed, a circle of Nyungah elders called on athletes, and in particular Cathy Freeman, to boycott the Sydney Games altogether, to protest the Australian government’s stance on Native Title.¹⁴⁰ Yet the predications of substantive Aboriginal protests marked by chaos and violence never materialized. Some small protests occurred just prior to and during the Sydney Olympics, but were “uneventful and attracted no media interest.”¹⁴¹ Indeed, the most prominent feature of Aboriginal protest was carried out by the band Midnight Oil who wore shirts emblazoned with the word “Sorry”, in reference to Prime Minister Howard’s refusal to apologize to the Aboriginal stolen generation,¹⁴² during their performance during the Sydney Games closing ceremonies.¹⁴³

This lack of Aboriginal protest has ultimately become more controversial than any of the prospective protests predicated by commentators and called for by some Aboriginal peoples and activists. Opinions as to the reasons behind the lack of Aboriginal protest are varied, from those who cite the inclusive nature of the Sydney organizing committee and efforts to incorporate Aboriginal participation as giving Aboriginal peoples reason to support the Games,¹⁴⁴ to those who viewed the iconic participation of Cathy Freeman as providing a reason for Aboriginal support,¹⁴⁵ and alternatively, that the efforts of the Sydney organizing committee had simply provided

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* at 27.

¹⁴⁰ *Ibid.*

¹⁴¹ Cashman, *supra* note 123 at 221.

¹⁴² Elder et al., *supra* note 131 at 189-90, Elder et al. provide an overview of the Aboriginal stolen generation and controversy.

¹⁴³ Morgan, *supra* note 126 at 28.

¹⁴⁴ Cashman, *supra* note 123 at 222.

¹⁴⁵ *Ibid.*

marginal participation and leveraged nationalist sentiment grounded in a love of sport to silence any Aboriginal dissent or protest.¹⁴⁶ Indeed a number of authors have accepted the latter view that Aboriginal dissent in relation to the Sydney Games was effectively silenced through the skillful efforts of Olympic organizers. As Morgan elaborates:

“The Olympic organizing bodies skillfully defused indigenous resistance by paying homage to the original owners in the major ceremonies, negotiating the involvement of some prominent Aboriginal people, and incorporating the imagery of reconciliation in the rituals of the Games.”¹⁴⁷

Such divergent views of the reasons underlying the relatively benign Aboriginal protests at the Sydney Games are indeed interesting, and reflect different perspectives on the efforts of the Sydney organizers in pursuing greater Aboriginal participation, and the meaningfulness of their accomplishments. Yet even those with more positive views of Aboriginal participation seemed to accept the notion that the Aboriginal participation was not truly capable of achieving the reconciliation described by the press and media.

Cashman comments on the Olympics as a catalyst for social change:

“It is extravagant to believe that an international sporting event could act as a change agent in any substantial way for such entrenched problems. It is naïve to expect that the cultural presentation in the opening ceremony, which had to be spectacular, entertaining and accessible to a diverse global audience, could also convey social and political messages which changed the way that people think.”¹⁴⁸

Indeed, it would appear that the Sydney organizers encountered an issue which was also faced in Calgary, that the motivations behind their efforts were questioned because of the suspicion that they were merely attempting to placate Aboriginal protestors. Such suspicion and criticism may be well founded. A review of Sydney’s efforts reveals a

¹⁴⁶ See Morgan, *supra* note 126 and Helen Lenskyj, *The Best Olympics Ever? Social Impacts of Sydney 2000*, (2002: University of New York Press, Albany) at 67-107.

¹⁴⁷ Morgan, *ibid.*

¹⁴⁸ Cashman, *supra* note 123 at 225.

much greater effort at incorporating Aboriginal culture in a more relevant and culturally sensitive manner, and that Aboriginal perspectives were incorporated into such cultural representations in a manner which was not even sought after in Montreal or Calgary. However, the incorporation of Aboriginal peoples largely emphasized the cultural, without much broader emphasis of inclusion. The development of advisory bodies was undoubtedly helpful, but their involvement was not designed to substantively engage in the larger organization of the Sydney Games. Indeed, even those Aboriginal representatives who were incorporated were largely prominent Aboriginal athletes, and though this does not impugn their ability or efforts in relation to the Games, this does not seem as significant as the inclusion of leaders from Aboriginal communities, chosen by those Aboriginal communities.

Therefore, while the Aboriginal participation in the Sydney Games may be seen as having greatly advanced from the efforts made in Montreal and Calgary, there remained similar difficulties and concerns that had appeared in previous Games. Indeed the elements of reconciliation much lauded by the media in relation to the Sydney Games fell short of creating any lasting effect. Cashman noted that following the Sydney Games there was a legacy of increased consumption of Aboriginal ideas and art, but there was no evidence of any advance in the reconciliation process, or fuller engagement with true Aboriginal life.¹⁴⁹ There was even evidence of a backlash against Midnight Oil for their t-shirt protest calling for a national apology to Australia's Aboriginal peoples.¹⁵⁰ Indeed,

¹⁴⁹ Cashman, *supra* note 123 at 73.

¹⁵⁰ *Ibid.* at 225.

this apology would not come until 2008, under a new Prime Minister and government.¹⁵¹

Though the inability to achieve national reconciliation does not render the Aboriginal participation in relation to the Sydney Games a failure, it does perhaps highlight the limitations of an Olympics, and most certainly, the ability of cultural inclusion and prominent Aboriginal athletes to effect such sweeping change.

2.7 Salt Lake City Winter Olympics 2002

While the Sydney Games of 2000 marked a substantive improvement (although still contentious) at incorporating Aboriginal participation within the Olympic Games, the Salt Lake City Winter Olympics in 2002 marked a regression. Salt Lake City is situated in close proximity to five Native American groups, the Goshutes, Utes, Navajo, Shoshoni and Pauite,¹⁵² and much like the Calgary and Sydney bids which came before, these Aboriginal groups formed part of Salt Lake City's bid to the International Olympic Committee, through the performance of traditional songs, dance and providing gifts of beadwork to IOC delegates.¹⁵³ However, the Salt Lake City bid did not emphasize the participation of Native American people in the same manner that Sydney had, and indeed, there was little evidence of any more substantive discussion during the organization of the Salt Lake City bid.

Following the success of the Salt Lake City bid, the Director of the Utah Division of Indian Affairs, himself a member of the Ute tribe, was included in the Salt Lake City

¹⁵¹ Rudd, K., Prime Minister of Australia, (13 February 2008) "Apology to Australia's Indigenous Peoples" Speech presented at Australian House of Representatives, online: Prime Minister's Office <<http://www.pm.gov.au/node/5952>>.

¹⁵² Dyerson, *supra* note 46 at 33.

¹⁵³ *Ibid.*

Organizing Committee.¹⁵⁴ An independent organization titled the Native American 2002 Foundation was developed to help ensure Native Americans were appropriately represented during the Games, with the goal of obtaining the support of Native American groups across the United States.¹⁵⁵ While four of Salt Lake City's Native American groups pursued their participation through this Foundation, the Navajo Nation opted to engage with the Salt Lake City organizers on their own behalf,¹⁵⁶ leaving an obvious gap in the Foundation's efforts to act as an appropriate representative of Native American interests. This issue seemed to be borne out when the Native American 2002 Foundation efforts at inclusion in the Salt Lake City's planning processes were ultimately rebuffed by "...Utah's governor, Salt Lake's mayor and the SLOC [Salt Lake City Olympic Organizing Committee].."¹⁵⁷

This fractured approach to engaging the Salt Lake City organizers ultimately frustrated efforts at incorporating greater Aboriginal participation in the Salt Lake City Games. The five Native American groups incorporated into the opening ceremonies of the Salt Lake City Games, were members of the five tribes and they "...danced into the stadium in traditional regalia followed by drummers who were positioned on plants...at the end of their performance, tribal representatives from the five Nations welcomed Olympians."¹⁵⁸ The Navajo were able to secure the right to develop a pavilion sanctioned by the Salt Lake City organizers entitled "Discover Navajo", while the other

¹⁵⁴ Utah Division of Indian Affairs, "Forest S. Cuch Biography" online: Utah Division of Indian Affairs <http://indian.utah.gov/about_us/executivedirector.html>.

¹⁵⁵ Lori Buttars, "Tribes Encountering Snags in Planning Olympics Role" *Salt Lake Tribune* (19 November, 2000) online: Salt Lake Tribune <<http://www.sltrib.com/>>.

¹⁵⁶ *Ibid.*

¹⁵⁷ Dyerson, *supra* note 46 at 33.

¹⁵⁸ Christine M. O'Bonsawin "'No Olympics on stolen native land': contesting Olympic narratives and asserting indigenous rights within the discourse of the 2010 Vancouver Games" (2010) 13:1 *Sport in Society* 143 at 146.

four Native American groups were unable to secure similar opportunities.¹⁵⁹ One of the more prominent examples of Aboriginal participation in Salt Lake City was the marketing of “traditional Indian crafts” in the Salt Lake City Olympic superstore.¹⁶⁰

From this account, the Salt Lake City games can undoubtedly be viewed as a regression from the level of Aboriginal participation achieved at the Sydney Games, and indeed, might even be viewed as falling short of the efforts put forth in Calgary fourteen years prior. Notably, there seemed to be little risk of Aboriginal protest in relation to the Salt Lake City Olympics, perhaps due in part to its close proximity to the events of September 11th, and the resulting outpouring of American nationalism which became fixated upon the Salt Lake City Games as a symbol of American resilience.¹⁶¹ It is arguable that without such a threat, the organizers of the Salt Lake City Olympics were not faced with any significant incentive to incorporate greater Aboriginal participation. Additionally, the fractured approach to engaging with the Salt Lake organizers appeared to heavily colour Aboriginal inclusion, with the more influential Navajo (as the largest and wealthiest of the Salt Lake City Native American groups) being the only entity which succeeded at participating substantively beyond the opening ceremonies. Though these difficulties may have been compounded by organizers who were simply disinterested in pursuing more Aboriginal participation (which is also problematic), it is clearly evident that the Native American groups were unable to effectively negotiate and overcome the disinterest to secure greater participation. Though the Aboriginal participation achieved

¹⁵⁹ Frances Bula, “First Nations planning large presence at 2010 Games” *The Vancouver Sun* (23 May 2007) online: Canada.com <<http://www.canada.com/vancouversun/news/story.html?id=121a41c5-cc83-4cfb-9912-6a9c0c16e0ad>> “The Navajo Nation had a Discover Navajo Pavilion, the only official sanctioned American Indian event during the Games, two blocks from the Olympic Medals Plaza.”

¹⁶⁰ Dyerson, *supra* note 46

¹⁶¹ Jackie Hogan, “Staging The Nation: Gendered and Ethnicized Discourses of National Identity in Olympic Opening Ceremonies” (2003) 27:2 *Journal of Sport and Social Issues* 100 at 117

in the Salt Lake City Games may not have been as troublesome as that in Montreal, it was hardly significant or substantial, and certainly a marked step backward from the achievements in Sydney.

2.8 Discussion

The above review indicates that the Olympics have a long association with Aboriginal peoples, and also, that this history is rife with highs, lows and a variety of opinions on the meaning of the Aboriginal participation which has taken place. While the content of Aboriginal participation has changed significantly from the St. Louis Olympics of 1904 to the Sydney Games of 2000, there remain some striking commonalities in the Aboriginal participation among the various Olympic Games. First, it is readily apparent that Aboriginal athletes often garner unique public attention, and are often seen as symbols of reconciliation and the possibility that racial barriers are being dismantled. Indeed such imaging of Aboriginal athletes appears to be as true at the start of the 21st century, as it was in the 20th. Second, the participation Aboriginal peoples have achieved outside of the Olympic events has been almost exclusively targeted at cultural representations of Aboriginal peoples, either in ceremonies, or inclusion in broader cultural festivals. Though such cultural inclusion is not negative, except perhaps in the case of Montreal, it is relevant to the most prevalent criticism of Aboriginal participation in the Olympics, which is that such participation is merely meted out as a way to subvert and silence Aboriginal dissent.

It would seem that such perspectives of Aboriginal participation in relation to the Olympics largely stems, at least in part, from the exclusion of Aboriginal participation in the more substantive aspects of organizing and hosting an Olympic Games. As Cashman

noted in his discussion of Aboriginal peoples in Australia, it is widely recognized that “...Aborigines were worse off materially, educationally and health-wise than the rest of the community”¹⁶² and indeed the protests voiced in Calgary and Sydney were largely in relation to these impacts felt by Aboriginal communities through their marginalization by wider society. In this context, inclusion within the cultural components of the Olympics may be seen as not being particularly associated with the issues which impact Aboriginal peoples most prominently. Certainly the incorporation of Aboriginal culture into the Olympics, and doing so in a respectful manner under the guidance of Aboriginal peoples, marks an important recognition and expression of Aboriginal culture within broader society. However, it is understandable that some would view such cultural recognition as hollow given the true state of Aboriginal affairs in most countries, and as a distraction from the recognition of this reality. Cashman’s statement that it would be “extravagant” to expect an Olympic Games to solve such problems is an insightful articulation of the practical limits of any single project; yet, it is also possible to suggest that the reason Aboriginal participation in these past Olympics fell short, and the reason they are most open to criticism, was that they did not take any steps towards substantive Aboriginal inclusion which would have at least addressed the typical Aboriginal marginalization from such projects.

More substantive Aboriginal participation from the outset in the various Olympic bids, and inclusion beyond the cultural realm, would almost certainly have indicated that the inclusion of Aboriginal peoples was not merely an afterthought or a means to placate radical elements within the Aboriginal community. Whether such participation was feasible or would have resulted in different outcomes is unclear. However, it is apparent

¹⁶² Cashman, *supra* note 123 at 223.

from the above review, that the Olympics do indeed have unique qualities which attract greater scrutiny of efforts at incorporating Aboriginal participation within Olympic efforts, and imports greater meaning to the success and failures of those same efforts.

The above review of previous involvement of Aboriginal peoples in the Olympic Games provides both a context and a comparison to the manner in which Aboriginal participation occurred in relation to the 2010 Games. These past Games may serve as markers to determine whether the Vancouver 2010 efforts have improved on the past, or suffered similar difficulties and issues that have previously occurred. Clearly the context surrounding each of the above Olympics is substantially different from any other Olympics, and the influences and impacts on Aboriginal participation for each of these Games are more complex than can be articulated in this relatively short historical overview. However, while the past efforts may not be understood in their entirety, it is nevertheless helpful to consider these past efforts to help anchor our examination of Vancouver 2010. The following chapter is intended to provide further context and more substantive means from which to assess the Aboriginal participation in the 2010 Games. The chapter will examine some of the major jurisprudence which sets out the legal rules surrounding the inclusion of Aboriginal participation within projects or undertakings which impact Aboriginal peoples. Consideration of this jurisprudence will accomplish two objectives. First, the jurisprudence will outline the legal doctrine surrounding Aboriginal participation (referred to as consultation and accommodation within the jurisprudence) which serves to describe the overarching principles and objectives behind the doctrine, and describes the manner in which Aboriginal participation is intended to occur. Second, examination of the jurisprudence will also reveal where efforts at

incorporating Aboriginal participation in non-Olympic contexts often goes astray, which will allow for a further discussion of the implications that the 2010 Games may have for future efforts at developing Aboriginal participation in British Columbia and Canada.

Chapter 3: *The Constitution Act, 1982*, and Aboriginal Participation

3.1 Introduction

As previously noted, the above review of Aboriginal participation in past Olympic Games provides context from which to assess the Vancouver 2010 Games, both through the comparison of Vancouver 2010 efforts in relation to historic Olympic Games, but also by providing the forum for scholars and commentators to provide perspectives on the meaning and content of such Aboriginal participation, which may help to more fully examine the 2010 Games elements. However, past Olympic experiences are not the only means through which context and perspectives for consideration may be found. Indeed, as discussed in the introduction, Canada has a significant legal doctrine, stemming from Section 35(1), which guides the participation of Aboriginal peoples in the development projects which affect them. The legal doctrine surrounding Aboriginal consultation and accommodation (jurisprudential terms for Aboriginal participation) prescribes underlying principles and objectives for such participation which provide additional suggestions as to the forms which Aboriginal participation should take, and outcomes to be achieved.

While consideration of the 2010 Games in relation to past Olympic experiences will help to illuminate the implications of 2010 Games for future Olympic Games, consideration of the legal context may indicate the implications of the 2010 Games for the future inclusion of Aboriginal peoples in development projects and initiatives in British Columbia, and perhaps other areas of Canada. Indeed, as will be discussed in greater detail below, the expanding legal doctrine under Section 35(1) clearly mandates more extensive Aboriginal participation in many development projects, and determining how such participation can be carried out effectively, and to the benefit of all parties

involved may be the most important legacy of the 2010 Games, if the lessons and implications of the 2010 Games are heeded, and acted upon. Indeed, as noted in the introduction, the Federal and Provincial Governments and Ministries have attempted to develop more formal Aboriginal consultation guidelines and policies in response to this developing legal doctrine. However, as recent reactions to the *Discussion Paper on the New Relationship* illustrate, the appropriate manner in which to structure such formal guidelines is far from settled.

One of the stated goals of this thesis was to consider the implications of the Aboriginal participation in the 2010 Games for broader Aboriginal consultation and accommodation in British Columbia and Canada.¹⁶³ By understanding the legal principles and objectives which underlie Section 35(1), in conjunction with the guidelines prescribing appropriate consultation and accommodation efforts, we may elucidate forms of Aboriginal participation, or consultation and accommodation, which further the purposes of Section 35(1). These principles and guidelines will outline the manner in which meaningful Aboriginal participation occurs, and may subsequently be applied to our examination of Aboriginal participation in the 2010 Games. This in turn will allow for the consideration of whether Aboriginal participation in the 2010 Games adheres to these legal principles, and also, what lessons the 2010 Games may hold for future circumstances in which Aboriginal consultation and accommodation is required.

Therefore, the following chapter must accomplish two main objectives. First, a review of the jurisprudence must identify the principles, objectives and guidelines developed pursuant to Section 35(1) which describe the purpose and content of such

¹⁶³ See Chapter 1, above, at 1-4 for discussion of purposes of this thesis. See also Chapter 1.2, above, introductory discussion of the legal context surrounding Aboriginal participation.

Aboriginal participation. As will be revealed below, judicial decisions surrounding the need for Aboriginal consultation and accommodation (again, the jurisprudential terms for Aboriginal participation) often stress the fact dependent nature of determining what scope of Aboriginal consultation and accommodation is required in specific circumstances. For example, there are significant differences in the levels of Aboriginal participation required in circumstances where Aboriginal rights are proven, versus specific treaty rights, to those in which they are unproven.

However, for the purposes of examining Aboriginal participation in the 2010 Games, the objective is not to outline and apply the strict legal guidelines to the Vancouver/Whistler Olympic context. Rather, the objective will be to more generally understand how judicial interpretation of Section 35(1) describes positive instances of Aboriginal consultation and accommodation, and use these to examine the 2010 Games. Indeed, much of the participation of Aboriginal peoples in the 2010 Games falls outside the specific subject matter of Section 35(1) and the resulting jurisprudence, and would therefore be challenging to consider from a strict legal standpoint. Yet, these additional elements may be considered in light of more general legal principles and provide valuable, broader lessons. These general principles will be obtained through the examination of SCC decisions which describe the relationship between the Crown, project proponents and Aboriginal peoples, as well as the purposes behind Section 35(1) and objectives of Aboriginal consultation and accommodation. The jurisprudence examined covers a wide range of circumstances, not all of which directly match those found in the 2010 Games context. However, this wider examination will allow us to more clearly ascertain those principles and objectives which are central to Section 35(1),

and may properly be relied upon in the subsequent analysis of Aboriginal participation in the 2010 Games, and consideration of the implications for broader contexts.

The second objective of this chapter is to briefly canvass the jurisprudence to determine how Aboriginal participation currently proceeds in other contexts, and to identify issues and barriers which tend to prevent more effective Aboriginal participation from occurring. While carrying out the first objective will provide the general principles which will assist in determining whether Aboriginal participation in the 2010 Games is effective and laudable, or quite the opposite. This second objective will provide a basis for understanding what the implications of the 2010 Games might be for broader efforts of Aboriginal participation in British Columbia in particular and throughout Canada. Indeed, as will be apparent, review of lower court decisions applying the rulings of the SCC to ongoing efforts of the Crown, project proponents and Aboriginal peoples illustrates the difficulty these parties have in structuring effective Aboriginal consultation and accommodation. This review will serve to contrast the Aboriginal participation in the 2010 Games, and more clearly illustrate the specific lessons to be learned from the Games.

As this chapter progresses, it is beneficial to consider the analogous roles of the various groups associated with the 2010 Games with those addressed in the jurisprudence. Clearly the Squamish, Lil'wat, Musqueam and Tsleil-Waututh Nations hold the role of the Aboriginal peoples whose claimed rights and title are at stake, and the Provincial and Federal Government's the Crown. However, it is important to recall that in the 2010 Games, the Bid Corporation, and VANOC are private entities and project proponents, and are not in the same position as the Crown. As will be revealed in the

examination of the jurisprudence, this distinction is central to understanding whom owes the ultimate duties and obligations to consult and accommodate Aboriginal people, and extrapolating the efforts of the 2010 Games organizers and Crown agents to larger constructs. Additionally, it is important to recall that the terms of consultation and accommodation are the legal terms which express the more pedestrian term “participation” which is used in this thesis to refer to the general inclusion of Aboriginal peoples in projects, rather than specific legally mandated duties.

3.2 Section 35(1), Recognition, & Reconciliation

As noted above, the first task which this chapter must accomplish is to canvass relevant jurisprudence for the principles and guidelines surrounding Aboriginal participation in development projects and initiatives. This review will provide guidance with regards to the overarching purposes and objectives of requiring Aboriginal consultation and accommodation, and more specific guidance on the detailed administration of incorporating Aboriginal participation meaningfully and effectively into the initiatives which impact Aboriginal peoples. At the outset, it is essential to note that jurisprudence surrounding the concept of Aboriginal participation has developed from Section 35(1). Judicial interpretation of Section 35(1) has developed the concept of Aboriginal consultation and accommodation in relation to circumstances in which a project or initiative poses the potential to negatively impact claimed, but not proven, Aboriginal rights or title. Consequently, the development of this doctrine can be differentiated from other Section 35(1) jurisprudence which has addressed the infringement of proven Aboriginal rights and title.

Through the discussion of both proven and claimed Aboriginal rights and title, the courts have developed a broad set of principles and guidelines which, in combination, serve to describe the objectives underlying Section 35(1), the need for Aboriginal participation (or consultation and accommodation) to achieve these objectives, and additional guidelines as to how such participation may be effectively carried out. Therefore, the jurisprudence review below is not intended to set out legal rules which will be strictly applied to the 2010 Games, but rather, to illuminate broader guidance which can be used to assess the meaning of Aboriginal participation in this context.

As noted, jurisprudence under Section 35(1) addressing the consultation and accommodation of Aboriginal peoples has developed rapidly in recent years. However, it is a concept which finds its beginnings, and guiding principles, in earlier jurisprudence. The concept of requiring the Crown to consult Aboriginal peoples saw initial mention in relation to Crown actions taken pursuant to the *Indian Act*.¹⁶⁴ However, the more relevant discussions of consultation were raised by the SCC in its assessment of Crown infringements of Aboriginal rights and title protected under Section 35(1).

The SCC first addressed the concept of Crown obligations to consult Aboriginal peoples in *R v. Guerin*, creating legal rules of obvious importance to both the Crown and Aboriginal peoples.¹⁶⁵ However, it was a trio of cases related to Aboriginal fishing rights,

¹⁶⁴ *Indian Act*, R.S., 1985, c. I-5 [*Indian Act*]. See *R. v. Guerin*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.) [*Guerin*] in which the SCC considered whether the Crown owed the Musqueam Indian Band fiduciary duties during the lease of reserve land pursuant to the *Indian Act*, R.S., 1985, c. I-5. The SCC determined that the Crown did indeed have fiduciary obligations to the Musqueam in this context, and that the Crown should have consulted more closely with the Musqueam before executing the lease. *Guerin* at 354-6 “In this case the Band surrendered the land to the Crown for lease on certain specified terms. The trial judge found as a fact that such a lease was impossible to obtain. The Crown's duty at that point was to go back to the Band, consult with it, and obtain further instructions. Instead of doing that it went ahead and leased the land on unauthorized terms. In my view it thereby committed a breach of trust...”

¹⁶⁵ See *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 (“*Sparrow*”) in which a Musqueam member, charged with breaching the *Fisheries Act*, R.S.C. 1970, c. F-14, challenged the relevant provisions

*R. v Van der Peet*¹⁶⁶, *R. v. N.T.C. Smokehouse Ltd.*,¹⁶⁷ and *Gladstone*¹⁶⁸ which provided greater clarification on the underlying purposes of Section 35(1), and the manner in which these purposes suggest Aboriginal peoples should participate in decisions and development impacting their constitutionally protected rights and title.

The elaboration provided in *Van der Peet*, *Gladstone*, and *Smokehouse* offer principles upon which to structure Aboriginal participation, and in particular, suggest the potential need for different approaches to Aboriginal participation depending on the nature of the infringing project or objective pursued. Consideration of this earlier jurisprudence forms the basis for a more complete interpretation of later jurisprudence which addresses Aboriginal consultation and accommodation directly and most clearly articulates the purposes and objectives that Aboriginal participation should strive to attain.¹⁶⁹

In each of *Van der Peet*, *Gladstone*, and *Smokehouse*, the SCC addressed the ability of the Crown to impose regulations which infringed an alleged Aboriginal right; in this instance, the right to of the Aboriginal applicants to sell fish.¹⁷⁰ In *Van der Peet*, the SCC addressed the basis for the legal doctrine of Aboriginal rights, describing the overarching purpose behind Section 35(1):

“More specifically, what s.35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledge and reconciled

as infringing his Aboriginal rights as protected under Section 35(1) . The SCC indicated that in order for the Crown to justify an infringement of Aboriginal rights it must first establish a valid legislative objective, and second, a legislative scheme or action which is consistent with the Crown’s fiduciary relationship toward Aboriginal peoples at 1110-11.

¹⁶⁶ [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 385 (S.C.C.) [“*Van der Peet*”].

¹⁶⁷ [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528 (S.C.C.) [“*Smokehouse*”].

¹⁶⁸ *Gladstone*, *supra* note 8.

¹⁶⁹ See Chapter 3.3 & 3.3.1, below, for discussion of this later jurisprudence.

¹⁷⁰ *Van der Peet*, *supra* note 166 at paras. 5-6. *Gladstone*, *ibid* at paras. 2-4. *Smokehouse*, *supra* note 167 at paras. 1-5.

with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”¹⁷¹

The identification of acknowledgment and reconciliation as being of fundamental importance to Section 35(1) is of clear significance. Indeed, further commentary from *Gladstone* indicated that weight which the SCC placed on the concept of reconciliation to imparting meaning to Section 35(1), noting that Crown objectives which may justify an infringement of Aboriginal rights or title are those “...directed at either the recognition of the prior occupation of North America by Aboriginal peoples or...at the reconciliation of Aboriginal prior occupation with the assertion of the sovereignty of the Crown”.¹⁷²

Clearly the concepts of recognition (or acknowledgment) and reconciliation are paramount to considering the guidance which Section 35(1) jurisprudence provides in determining the manner in which Aboriginal participation should be structured. The SCC stated more expressly that “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. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of Aboriginal societies with the rest of Canadian society may well depend on their successful attainment.”¹⁷³ This more detailed articulation is also significant as it recognizes the need to balance Aboriginal and non-Aboriginal interests. Additionally, the courts clearly differentiate between the economic and regional fairness objectives addressed in *Van der*

¹⁷¹ *Van der Peet*, *ibid.* at para 31.

¹⁷² *Gladstone*, *supra* note 168 at para. 72.

¹⁷³ *Ibid.* at para. 75.

Peet, Gladstone and Smokehouse, with the conservation objectives considered in *Sparrow*.¹⁷⁴

This differentiation is fundamental to examination of Aboriginal participation in the 2010 Games as it seems clear from these judicial comments that the appropriate manner through which the Crown might infringe Aboriginal rights and title for economic reasons, is different than the manner in which the Crown may infringe those same rights for conservation reasons. Though the context of the 2010 Games does not include the infringement of Aboriginal rights or title, this difference between economic and conservation objectives is still of importance, as the Olympics are clearly more properly understood as an economic endeavour, and therefore, consideration of how the Crown is expected to pursue economic objectives differently than conservation objectives may prove central to considering whether Aboriginal participation in the 2010 Games is positive or otherwise. For example, while *Sparrow* suggests that the Crown will face less scrutiny for the infringement of Aboriginal rights for conservation purposes, while *Van der Peet* and *Gladstone* suggest that where economic initiatives are at stake, the Crown will be asked to have taken greater account of Aboriginal interests. Indeed, as will be made apparent from the discussion below, the jurisprudence does suggest that to pursue economic objectives in a manner which furthers the purposes of recognition and reconciliation, the Crown should seek different forms of Aboriginal participation.¹⁷⁵ It

¹⁷⁴ *Sparrow*, *supra* note 165 at 1113 “The justification of conservation and resource management, on the other hand, is surely uncontroversial”. This language stands in stark contrast to the phrase “in the right circumstances” which was applied in relation to objectives of economic and regional fairness.

¹⁷⁵ See, below, at 68 – 72 for discussion of Aboriginal title and its implications for the manner in which Aboriginal peoples should participate in decision making processes and development. See also Chapter 3.2.1, below, at 72-76 for summary of early jurisprudence and the manner in which it suggests that Aboriginal participation be pursued. See also, Chapter 3.3.1, below, for further summary interpreting this earlier jurisprudence in light of more recent decisions.

will be with this judicial guidance that Aboriginal participation in the 2010 Games, and its broader implications, is considered in the following chapters.

Therefore, this jurisprudence review must give more direct consideration to the guidance which the judiciary has provided regarding “the right circumstances” which will ensure that the pursuit of economic objectives (which generally describe the projects of the Olympic Games) advance the purposes of recognition and reconciliation, and what this guidance suggests regarding the manner and means by which Aboriginal participation in such objectives should be effected. Lamer C.J. did not provide further guidance with regards to the “right circumstances” or the manner in which a Crown objective infringing an Aboriginal right may be seen to recognize or reconcile Aboriginal prior occupation.¹⁷⁶ However, given that the purposes of recognition and reconciliation have been consistently articulated as underpinning the existence of Section 35(1), we may logically surmise that “the right circumstances” are those which ensure the advancement of recognition and reconciliation.

In *Van der Peet*, Lamer C.J. expressly noted the importance of the inclusion of both Aboriginal and non-Aboriginal perspectives in pursuing the purposes of reconciliation pursuant to Section 35(1). Similarly, McLachlin J (as she then was) writing in dissent, noted that the reconciliation sought under Section 35(1) requires not only a way to reconcile claims of Aboriginal rights with Crown sovereignty, but “to reconcile

¹⁷⁶ This aspect of Lamer C.J.’s judgment was heavily criticized by McLachlin J. (as she then was) writing in dissent in *Van der Peet supra* note 166 para. 309 “‘In the right circumstances’...governments may abridge Aboriginal rights on the basis of an undetermined variety of considerations. While ‘account’ must be taken of the native interest and the Crown’s fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile Aboriginal and non-Aboriginal interests must pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed...This, with respect, falls short of the ‘solid constitutional base upon which subsequent negotiations can take place’ of which Dickson C.J. and La Forest J. wrote in *Sparrow*, at p. 1105”.

them in a way that provides the basis for a just and lasting settlement of Aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with Aboriginal peoples.”¹⁷⁷ Though in dissent, McLachlin J’s comments regarding the importance of recognizing the Aboriginal legal regime as an important aspect of reconciliation would seem to build upon Lamer C.J.’s comments regarding the importance of obtaining Aboriginal perspectives on determinations regarding Aboriginal rights to ensure the purpose of reconciliation underlying Section 35(1) is achieved.

In combination, the comments of the Chief Justices (both former and current) indicates that positive Aboriginal participation will see not only the incorporation of Aboriginal perspectives, but also that this incorporation seeks the greater reconciliation of Aboriginal and non-Aboriginal interests. In other words, “the right circumstances” may be achieved where the infringement of Aboriginal rights is tempered by the proper recognition and consideration of Aboriginal perspectives and interests.¹⁷⁸ This additionally suggests that Aboriginal participation should be seeking to address not only the specific actions or decisions which are set to impact Aboriginal rights or title, but also broader issues of reconciliation. Although these comments are made in relation to a specific factual context in which Crown action will infringe Aboriginal rights or title protected under Section 35(1), they are nevertheless important in considering the guidance which jurisprudence provides on how Aboriginal participation should best be pursued. Although the 2010 Games do not fit within the circumstances addressed by the

¹⁷⁷ *Ibid.* at para 230.

¹⁷⁸ See Kent McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified” (1997) 8 Const. F. 33 at 36. See also Garth Nettheim, Gary D. Meyers & Donna Craig, *Indigenous Peoples and Governance Structures*, (Canberra: Aboriginal Studies Press, 2002) at 79 (following articles for scholarly commentary on Aboriginal self-government, and the need for the incorporation of Aboriginal perspectives and governance in Government decision making processes to properly effect recognition).

SCC in *Van der Peet* or *Gladstone*, this judicial guidance provides meaningful contribution to determining what attributes laudable Aboriginal participation will demonstrate.

However, it is readily apparent from a review of this early jurisprudence, that far greater guidance from the judiciary was needed on the circumstances, elements or actions required to ensure that the purposes of recognition and reconciliation underlying Section 35(1) were achieved. While the SCC provided some further guidance in additional cases considering the Crown's efforts to justify an infringement of Aboriginal rights,¹⁷⁹ the most meaningful discussion came in the seminal case of *Delgamuukw v. B.C.*¹⁸⁰ In *Delgamuukw* the SCC provided important elaboration on Crown objectives which may justify an infringement of Aboriginal rights, the importance of Crown consultation to justification, and the nature of Aboriginal title.

This additional guidance is important to the objectives of this chapter because the elaboration on justifying infringements of Aboriginal rights and title, and nature of Aboriginal title itself provide an even clearer indication of the objectives Aboriginal participation should achieve, and the means by which these objectives should be pursued. *Delgamuukw* is of additional importance as claims of Aboriginal title are frequently the source of requiring the consultation and accommodation of Aboriginal peoples (as will be discussed below)¹⁸¹ and understanding this particular Aboriginal right is fundamental to interpreting the guidance provided by the judiciary which is applicable in our examination of Aboriginal participation in the 2010 Games. Indeed, the Squamish, Lil'wat, Musqueam and Tsleil-Waututh, similarly to the majority of Aboriginal groups in

¹⁷⁹ See e.g. *Adams*, *supra* note 8 & *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. 4th 385 (S.C.C.) ["*Côté*"].

¹⁸⁰ *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, [1999] 10 W.W.R. 34 (S.C.C.) ["*Delgamuukw*"]

¹⁸¹ See Chapter 3.3 & 3.4, below.

British Columbia, have claims to Aboriginal title throughout the region in which the 2010 Games occurred, and understanding the unique nature of Aboriginal title, and its implications for the structure and objectives of Aboriginal participation, is also key to a fulsome examination of the 2010 Games.

An aspect of *Delgamuukw* which is particularly central to obtaining guidance from Section 35(1) jurisprudence on how Aboriginal participation should be carried out is the SCC's elaboration of the very nature of Aboriginal title. Lamer C.J., again writing for the majority, described as follows:

“...Three aspects of Aboriginal title are relevant here. First, Aboriginal title encompasses the right to exclusive use and occupation of the lands; second, Aboriginal title encompasses the right to choose to what use 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, the lands held pursuant to Aboriginal title have an inescapable economic component.”¹⁸²

These unique features of Aboriginal title are central to considering how Aboriginal participation should be structured, as they describe the elements of Aboriginal title which must ultimately be reconciled with claims of Crown sovereignty, and non-Aboriginal interests. The SCC's description of Aboriginal title is fundamental to conceptualizing the manner in which the guidance in *Van der Peet* and *Gladstone* suggested that Aboriginal perspectives must be incorporated in an effort to attain greater reconciliation and lasting settlement. Though Aboriginal title may not have been at risk specifically in the context of the 2010 Games, the judiciary's discussion of Aboriginal title, and its implications for reconciliation, provide the clearest signals as to what Aboriginal participation should achieve for Aboriginal peoples.

¹⁸² *Ibid.* at para. 166.

The SCC elaborated on the implications of Aboriginal title for the Crown, should the Crown undertake an activity which would infringe Aboriginal title:

“For example, if the Crown’s fiduciary duty requires that Aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) both ‘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. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia, and that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of the Aboriginal title lands, that economic barriers to Aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.”¹⁸³

The concept that the exclusive nature of Aboriginal title required the prioritization of Aboriginal participation in development as an element of Crown justification for the infringement of Aboriginal title is particularly suggestive with regards to the means in which the purposes of recognition and reconciliation underlying Section 35(1) are to be pursued in relation to lands over which Aboriginal title is held. First, it would suggest that if the Crown is to give priority to Aboriginal interests over Aboriginal title lands, significant consultations would need to occur between Aboriginal peoples and the Crown in order to determine how Aboriginal priorities for title lands may be affected, and indeed given priority. Secondly, it implies that if the Crown seeks to pursue “economic objectives” as outlined by Lamer C.J., Aboriginal participation in economic development should also be facilitated by the Crown. Though these comments are provided in relation to infringements of Aboriginal title, they clearly hold broader implications. In particular, they would seem to suggest that meaningful Aboriginal participation should seek to

¹⁸³ *Ibid.* at para. 167.

identify and give priority to Aboriginal interests, and that special effort should be given to facilitate the ability of Aboriginal peoples to pursue their economic interests.

Lamer C.J. expanded on this economic characteristic to Aboriginal title land, noting that “compensation is relevant to the question of justification...”¹⁸⁴ and that infringements of Aboriginal title require fair compensation, with compensation varying “...with the nature and severity of the infringement and the extent to which Aboriginal interests are accommodated”.¹⁸⁵ This commentary is also notable, not only for its express recognition that infringements of Aboriginal title should be compensated, but also, that appropriate compensation is dependent, in part, on the level to which Aboriginal interests are otherwise accommodated. Read in conjunction with Lamer C.J.’s comments above regarding the exclusivity of Aboriginal title and its implications for the manner in which Aboriginal interests in title land must be given priority, it seems apparent that appropriate compensation for an infringement of Aboriginal title may come in many forms including Crown support of Aboriginal priorities for uses of Aboriginal title land, and insuring that Aboriginal peoples are able to realize on the inescapable “economic aspect” of their lands. Again, this suggests that Aboriginal participation, consistent with these comments, should pursue very specific objectives, which may again be considered in our examination of Aboriginal participation in the 2010 Games.

In conjunction with the SCC’s discussion of how Aboriginal interests in land are to be appropriately accommodated through prioritizing and compensation, the SCC also noted that an integral aspect of any Crown justification for an infringement of Aboriginal

¹⁸⁴ *Ibid.* at para. 169.

¹⁸⁵ *Ibid.*

title required the incorporation of Aboriginal involvement in the decision making processes of the Crown: Lamer C.J. elaborated:

“...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... 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 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.”¹⁸⁶

This statement is significant in a multitude of ways, but in relation to conceptualizing how Aboriginal participation should be incorporated into economic objectives, it offers two fundamental pieces of guidance. First, is the express recognition that a corollary of Aboriginal title is the right of Aboriginal peoples to exercise decision making power over that Aboriginal title land. Second, is the concept that an appropriate level of Aboriginal participation, much like compensation, should be commensurate to the level of infringement associated with an objective or project.

With regards to the first point of guidance, the judiciary again invoked the importance of incorporating Aboriginal perspectives through consultation where Crown activities would infringe an Aboriginal right. However, in *Delgamuukw* consultation was cited not only as a means through which Aboriginal perspectives could be reconciled with Crown objectives, but also as a necessary means through which the decision making rights associated with Aboriginal title could be properly recognized. The concept that

¹⁸⁶ *Delgamuukw*, *supra* note 180 at para. 168.

Aboriginal title invokes an associated right to decide is very suggestive regarding the level and nature of Aboriginal participation in projects impacting Aboriginal title, but also the objective of such Aboriginal inclusion. The purpose is not only to ensure Aboriginal perspectives are received, but also, to ensure proper recognition of prior Aboriginal occupation and the unique interests and needs of Aboriginal peoples.

The recognition that the consultation of Aboriginal peoples is intended to accomplish broader objectives of recognition and reconciliation in addition to gaining Aboriginal perspectives on the specific project, decisions or initiatives set to impact Aboriginal rights or title. Indeed, the judiciary's discussion of the very manner in which the Crown is expected to interact with Aboriginal peoples provides a further indication that such consultation is intended to further the overall objectives of Section 35(1).

Lamer C.J noted the importance of consultations proceeding in good faith, and stressed the importance of pursuing negotiated settlement to the purpose of reconciliation.¹⁸⁷

Once again, this guidance combines to suggest that meaningful Aboriginal participation proceeds in a very particular fashion, with the concepts of good faith, greater understanding and broader purposes of Section 35(1) at the fore.

3.2.1 Discussion of Early Aboriginal Consultation Jurisprudence

At this juncture it is worth pausing to re-consider the significance of the above jurisprudence, the legal rules they create surrounding Aboriginal rights, and the implications that judicial discussion surrounding the underlying purposes of Section 35(1) may hold for the consideration of how Aboriginal participation in the context of the

¹⁸⁷ *Ibid.* at para. 186 “...Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated...to be a basic purpose of s. 35(1) – ‘the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown’”.

2010 Games may be assessed, but also their implications for the development of more formal structures for pursuing the consultation and accommodation of Aboriginal peoples. Indeed, while the above jurisprudence creates a number of obvious legal rules with regards to the treatment and protection of Aboriginal rights under Section 35(1), it is perhaps more important to consider, as the judiciary suggests, the manner in which the above decisions may support the Crown and Aboriginal peoples in their efforts at consultation, accommodation and achieving recognition and reconciliation.

A review of the above jurisprudence reveals the key elements which should guide consultation and accommodation efforts. Courts have held that the primary purpose of Section 35(1) is the recognition and reconciliation of prior Aboriginal occupation with the assertion of Crown sovereignty. Indeed, the judiciary consistently indicates that these broader purposes of Section 35(1) should be pursued throughout all Crown interactions with Aboriginal peoples. This suggests that meaningful Aboriginal participation will seek to address not only the circumstances which specifically impact constitutionally protected Aboriginal rights or title, but also the broader need for recognition and reconciliation mandated by Section 35(1).

While the above jurisprudence has identified very broad objectives of Section 35(1), and therefore meaningful Aboriginal participation, guidance is also provided as to how these broad objectives should be pursued. The SCC indicated in *Van der Peet* and *Gladstone* that the Crown should seek to prioritize Aboriginal rights and title in its allocation of resources amongst Aboriginal and non-Aboriginal interests. This suggests that positive Aboriginal participation will demonstrate the prioritization of such Aboriginal interests. In *Delgamuukw* the SCC expanded on this concept in relation to

Aboriginal title, stating that the prioritization of Aboriginal interests in Aboriginal title land included the specific facilitation of Aboriginal economic interests. This suggests that meaningful Aboriginal participation, at least in relation to Aboriginal title land, will result not only in the prioritization of Aboriginal interests in maintaining access to lands and resources necessary to practicing what is often considered “traditional” Aboriginal rights such as fishing or hunting, but also the prioritization and facilitation of other Aboriginal economic objectives and goals.

In addition to these more specific objectives, the above jurisprudence also provided an early indication of the importance of obtaining Aboriginal perspectives, through consultation, are in furthering the objectives of recognition and reconciliation. Obtaining Aboriginal perspectives is necessary to allow the Crown to understand Aboriginal interests, and therefore properly accommodate, prioritize and facilitate such interests. However, obtaining Aboriginal perspectives is also one of the primary means of pursuing the objective of recognition. Therefore, meaningful Aboriginal participation will see not only the pursuit of Aboriginal perspectives, but also the pursuit of Aboriginal perspectives in a manner which properly recognizes the prior occupation of Aboriginal peoples. This may be demonstrated, at least in part, by the adherence to the further guidance which the judiciary provided on the manner in which Aboriginal perspectives should be obtained. Consultations are intended to be carried out in good faith, with the clear intention of addressing Aboriginal interests and concerns, and with the concept that negotiated settlement is the preferred means of reconciling Aboriginal and non-Aboriginal interests. Again, these elements should be evident if Aboriginal participation

is going to further the purposes of Section 35(1), and meet with judicial concepts of “positive” or “meaningful” participation.

To conclude this review of the above jurisprudence, it is worth restating the manner in which the above guidance was obtained, and its intended use in examining the 2010 Games. The above jurisprudence addresses the infringement of proven Aboriginal rights and title, protected by Section 35(1), in circumstances which do not match those Aboriginal groups involved in the 2010 Games, or indeed most Aboriginal groups, because their claims to rights and title remain unproven. Judicial consideration of Aboriginal participation in relation to unproven rights and title is discussed in the subsection below. Therefore, the legal rules discussed above are not strictly applicable to the 2010 Games. However, the above jurisprudence was examined not to articulate such strict legal rules, but rather to illuminate the more general guidance from the judiciary on how meaningful Aboriginal participation can be described. The Aboriginal participation in the 2010 Games may be examined to consider whether it meets the guidelines espoused by the judiciary above, and can be considered to have furthered the overall objectives of Section 35(1), or alternatively has fallen short of the same principles and standards. Therefore, the above guidance, although not applicable to the 2010 Games in a legally binding sense, will nevertheless aid us in our examination of Aboriginal participation in the 2010 Games.

Before delving into the seminal cases on Aboriginal consultation and accommodation, it is perhaps worth noting that within the 2010 Games context it may be notable that the reasons for judgment in *Delgamuukw* were released on December 11,

1997, just 4 days prior to a press conference held by Arthur Griffiths¹⁸⁸ and Tourism Vancouver officials discussing the potential of bringing the 2010 Games to Vancouver.¹⁸⁹ Though it is uncertain how this ruling may have immediately influenced the organizers behind Vancouver's plans to host the 2010 Games, *Delgamuukw* drew substantial media attention and was hailed by many as a landmark decision, and would almost certainly have informed those involved in the early planning of Vancouver's bid for the 2010 Games, and the newly recognized legal necessity of Aboriginal participation.

3.3 Consultation, Accommodation and Unproven Rights

While the above jurisprudence marked the SCC's early articulation of the purposes of Section 35(1), the meaning of Aboriginal rights and title, and the means by which Aboriginal rights, title and interests should be protected and furthered, there clearly remained a myriad of circumstances which required additional judicial guidance. Among the most important of these, was determining the obligations of the Crown and project proponents to consider Aboriginal perspectives in circumstances where Aboriginal rights and title remained unproven. In the seminal cases of *Haida Nation*¹⁹⁰, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*¹⁹¹ and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*¹⁹² the SCC would consider more directly the concept of consultation, the principles on which consultation

¹⁸⁸ Arthur Griffiths is the former owner of the Vancouver Canucks, a professional hockey team playing in the National Hockey League, a prominent business person within Vancouver, and one of the major proponents of Vancouver's bid for the 2010 Olympic Games.

¹⁸⁹ Legislative Library of British Columbia, "Timeline: The Road to the 2010 Winter Olympic and Paralympic Games" by B.K. Plant in *Background Brief 2009:2*, (British Columbia: online Legislative Library of British Columbia <http://www.llbc.leg.bc.ca/public/background/200902bb_olympicsupdate.pdf>, 2009) ["Legislative Library Olympic Timeline"] at 2.

¹⁹⁰ *Haida Nation*, *supra* note 9.

¹⁹¹ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.) [*Taku Tlingit*].

¹⁹² *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 [*Mikisew Cree*].

was based, and the need for consultation prior to proof of Aboriginal rights and title being granted. By examining the need for Aboriginal participation prior to proving Aboriginal rights or title, *Haida Nation*, *Taku Tlingit* and *Mikisew Cree* will provide rules and principles which can be seen as more directly correlating with the circumstances surrounding Aboriginal participation in the 2010 Games. As was noted above, the purpose of this jurisprudential review is not to set out strict legal rules, but rather to seek broader judicial guidance on what elements comprise meaningful or positive Aboriginal participation. By canvassing a wider breadth of Section 35(1) jurisprudence we may more clearly ascertain those principles and objectives which are fundamental to Section 35(1), and can therefore be more properly relied upon to assess Aboriginal participation in the 2010 Games. However, the review below will also highlight the more strict rules of Aboriginal consultation and accommodation, as a greater understanding of this legal doctrine will more clearly identify the implications of Aboriginal participation in the 2010 Games.

Haida Nation and *Taku Tlingit* are perhaps the most central cases in this discussion of the legal context surrounding Aboriginal participation in the 2010 Games. The SCC released its reasons for judgment in *Haida Nation* and *Taku Tlingit* on the same day in December of 2004. Both cases had already garnered significant attention at the British Columbia Court of Appeal (the “BCCA”) in 2002, with the BCCA articulating a duty on both the Crown and the private sector to consult Aboriginal peoples when their activities may negatively impact Aboriginal rights.¹⁹³ Although the specifics of the

¹⁹³ *Haida Nation v. British Columbia (Forests)*, 2002 BCCA 157, [2002] 6 W.W.R. 243, with supplementary reasons 2002 BCCA 462, 5 B.C.L.R. (4th) 33, aff’d in part, rev’d in part *Haida Nation v. British Columbia (Minister of Forests)*, 2004, SCC 73, [2004] 3 S.C.R. 511.

BCCA rulings will not be discussed here, it is worth noting that those rulings were rendered during the development of Vancouver's bid for the 2010 Games, as the plans for development in Whistler, and discussions surrounding Aboriginal participation in the 2010 Games were taking greater shape. *Mikisew Cree* was released in 2005, and is particularly important in elucidating judicial guidance, as it currently marks the only elaboration from the SCC on the emerging doctrine of Aboriginal consultation and accommodation.

In *Haida Nation*, and *Taku Tlingit* the courts were asked to assess whether the Crown and private sector were required to consult Aboriginal groups in relation to “unproven” Aboriginal rights.¹⁹⁴ Building on the concept of consultation which had been articulated in early jurisprudence, the SCC recognized the need for consultation and accommodation of Aboriginal peoples, even where rights and title were unproven. McLachlin C.J. in *Haida Nation* recognized that such consultation was indeed necessary to ensure the protection offered by Section 35(1) is not rendered irrelevant prior to negotiated settlement:

“...proving [Aboriginal] rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult

¹⁹⁴ *Haida Nation*, *supra* note 9 at para.1

with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.”¹⁹⁵

This recognition for a need to consult and accommodate Aboriginal peoples was clearly a significant jurisprudential development because it required Aboriginal participation even where Aboriginal rights or title were unproven, which describes the circumstances for most Aboriginal groups. This recognition clearly implied that much greater Aboriginal participation in Crown decision making processes was in store, and indeed, this expansion of the concept of consultation and accommodation is the primary reason (as will be made apparent below)¹⁹⁶ that Aboriginal participation in the 2010 Games may hold greater significance. This significance, as will be revealed, is two-fold. First, we will see from our examination of lower court jurisprudence that the Crown is struggling to appropriately respond to its duties to consult and accommodate, which clearly indicates that improved methods for effective and meaningful Aboriginal participation is required. Second, it will be evident that this legal doctrine was emerging as the 2010 Games developed, and this certainly influenced the parties in their efforts to structure Aboriginal participation.

While the expansion of the need for consultation and accommodation was of obvious significance, of equal importance was the further discussion of the principles underlying Section 35(1) necessitating Aboriginal consultation and accommodation.

Particularly notable was the affirmation that consultation and accommodation in relation

¹⁹⁵ *Ibid.* at paras. 26-27.

¹⁹⁶ See Chapter 3.4 & 3.4.1 & 3.5, below, in which lower court jurisprudence is examined and reveals troubling trends in the Crown’s response to judicial guidance in *Haida Nation* and other seminal cases; additionally, the implications of these decisions and their place within the examination of the 2010 Games is discussed.

to unproven rights and title must also be tied to broader processes of recognition and reconciliation mandated by Section 35(1). Indeed, the SCC expressed clearly that the reconciliation mandated by Section 35(1) is “...not a final legal remedy in the usual sense...[r]ather it is a process...” and that consultation and accommodation is similarly “...part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution...”¹⁹⁷.

These statements from the SCC clearly indicate that meaningful Aboriginal participation should further broader efforts at recognition and reconciliation. It seems apparent that consultation and accommodation which is required in relation to a specific set of circumstances does not take place in a “vacuum”, but rather, must be pursued with regard to the broader need for recognition and reconciliation.¹⁹⁸ This need to tie consultation and accommodation to such broader efforts reveals the importance of early jurisprudence such as *Van der Peet* and *Delgamuukw* as those rulings articulate the nature and meaning of proven Aboriginal rights and title, and therefore provide guidance as to how objectives of recognition and reconciliation may be effected during the process of consultation and accommodation.

For example, though prioritization of Aboriginal interests was not expressly mandated in *Haida Nation* or *Taku Tlingit* as it was in *Van der Peet*, or *Delgamuukw*, the connection of consultation and accommodation to broader recognition and reconciliation efforts suggests that discussions of prioritization of Aboriginal interests and facilitation of

¹⁹⁷ *Ibid.* at paras. 32-33.

¹⁹⁸ *Ibid.* “To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the ‘meaningful content’ mandated by the ‘solemn commitment’ made by the Crown in recognizing and affirming Aboriginal rights and title...It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.”

Aboriginal economic objectives mark meaningful Aboriginal participation even in circumstances where rights and title remain unproven. This reading of the jurisprudence is strengthened by the judiciary's recognition that the Crown should not exploit resources unilaterally, and in a manner that will effectively remove the ability of Aboriginal peoples to benefit from their resources once resolution to Aboriginal claims is finally attained.¹⁹⁹ When considered in light of earlier jurisprudence on how Aboriginal interests should be given priority, particularly in relation to Aboriginal title lands, this suggests that the Crown may best further the processes of recognition and reconciliation by determining how Aboriginal interests may be prioritized in relation to a specific objective or project through the processes of consultation and accommodation. In this manner, the duty to consult and accommodate in relation to a specific objective or project may advance broader recognition and reconciliation by initiating the prioritization of Aboriginal interests which would be expected to occur through broader negotiated settlement.

In addition to affirming and expanding upon the need to tie specific instances of Aboriginal consultation and accommodation to broader recognition and reconciliation processes, *Haida Nation* and *Taku Tlingit* also elaborated on the nature of the relationship between Crown and Aboriginal peoples, and its implication for the manner in which consultation and accommodation should proceed. McLachlin C.J. highlighted the principle of the “honour of the Crown” as underpinning much of the Crown’s responsibilities towards the appropriate consultation and accommodation of Aboriginal

¹⁹⁹ *Ibid.*

peoples.²⁰⁰ The use of the term “honour” in relation to Crown dealings with Aboriginal peoples is of particular interest, as it echoes the language of early jurisprudence surrounding recognition, reconciliation, negotiated settlement and the Crown’s fiduciary responsibilities. However, the term “honour of the Crown” also invokes very particular concepts of behavior for the Crown to pursue. Indeed, McLachlin C.J. noted that “the honour of the Crown is always at stake in its dealings with Aboriginal peoples...It is not a mere incantation, but rather a core precept that finds its application in concrete practices.”²⁰¹

This additional discussion of the principles and objectives underlying Section 35(1), and mandating consultation and accommodation of Aboriginal peoples, provides further guidance as to the goals and manner in which meaningful Aboriginal participation is to be pursued. Indeed, it seems apparent that the SCC in *Haida Nation* and *Taku Tlingit* largely affirmed the principles articulated in previous jurisprudence such as *Van der Peet* and *Delgamuukw*. Although this affirmation may seem redundant, this consistency in judicial guidance supports reliance on these principles in assessing the manner in which Aboriginal participation in the 2010 Games was carried out. However, *Haida Nation* and *Taku Tlingit* provided not only further guidance on such broad concepts, but also, the articulation of a more precise legal doctrine mandating the consultation and accommodation of Aboriginal peoples where their rights or title, even if unproven, were at risk. This legal doctrine provides even further detail on the manner in

²⁰⁰ *Taku Tlingit*, *supra* note 191 at paras. 23-4 “The duty of honour derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).”

²⁰¹ *Ibid.* at para. 16.

which consultation and accommodation are intended to proceed, and therefore further guidelines which may be applied to our examination. Yet it is important to note that the development of this legal doctrine in of itself is of great significance to considering the implications of Aboriginal participation in the 2010 Games. As will be discussed in greater detail below,²⁰² this new doctrine clearly requires far more instances of, and more substantial, consultation and accommodation of Aboriginal peoples. This in turn drives an obvious necessity to improve the discourse and understanding of how such Aboriginal participation may be made more meaningful and effective.

In articulating an expanded need for the consultation and accommodation of Aboriginal peoples in *Haida Nation* and *Taku Tlingit*, the SCC discussed what may best be described as the “administrative” guidelines describing when such consultation and accommodation is necessary, and the scope and form of these processes that intended to solicit and address Aboriginal perspectives. With regards to the issue of when the duty to consult and accommodate Aboriginal rises, the SCC noted that the duty will “...arise when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it”.²⁰³ The need for only constructive knowledge of a potential Aboriginal right, and possibility of adverse effects to that Aboriginal right clearly ensured that a broad range of Crown activities would be captured by the emerging doctrine of consultation and

²⁰² See Chapter 3.3.1, below, for discussion of the implications of the duty to consult and accommodate in relation to earlier jurisprudence. See also, Chapter 3.4 & 3.4.1, below, for discussion of lower court assessment of Crown efforts to consult and accommodate, which clearly reflect the need for greater Aboriginal consultation and accommodation.

²⁰³ *Ibid.* at para. 35.

accommodation. However, the SCC expressly indicated that the “...content of the duty...varies with the circumstances.”²⁰⁴

McLachlin C.J. expanded on this point, describing the scope and content of consultation and accommodate as “...proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”²⁰⁵ In response to the Crown’s concerns that prior to proof the content of the Aboriginal right can not be properly understood, the SCC held that “...it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement.”²⁰⁶ Indeed, in light of the historic marginalization of Aboriginal peoples, and relegation of Aboriginal claims to rights and title, it seems obvious that the objectives of recognition and reconciliation must begin with the Crown demonstrating an understanding of Aboriginal claims.²⁰⁷ This suggests that carrying out an assessment of an Aboriginal group’s claims in relation to the triggering of a duty to consult and accommodate is an important initial step in the recognition and reconciliation process, as it may provide important opportunities to gain greater understanding of Aboriginal claims and perspectives which must be addressed in larger negotiated settlement. Indeed, the SCC endorsed a scholarly definition of consultation which “...in its least technical definition is talking together for mutual

²⁰⁴ *Ibid.* at para. 37.

²⁰⁵ *Ibid.* at para. 39.

²⁰⁶ *Ibid.* at para. 36.

²⁰⁷ *Ibid.* at para. 37 “Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.”

understanding”²⁰⁸ Clearly meaningful Aboriginal participation must advance such mutual understanding.

Once the assessment of the strength of claim to rights or title is done, and the seriousness of the potential adverse effect upon these claims is carried through, the proportionality of the scope and content of the consultation and accommodation required may be determined. McLachlin C.J. described this proportionality as being best understood as a spectrum:

“At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice...At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required... Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light.”²⁰⁹

With consultation and accommodation requirements being so dependent on the particular nature and circumstances surrounding a project and effected Aboriginal peoples, it is readily apparent that this emerging legal doctrine is not strongly prescriptive. This is worthwhile noting in the context of examining the 2010 Games, as this aspect of the jurisprudence indicates that the judiciary is unlikely to provide precise answers as to how Aboriginal consultation and accommodation should be structured. Therefore, considering instances of Aboriginal participation, such as the 2010 Games context, may

²⁰⁸ *Ibid.* at para. 43 quoting T. Isaac and A. Knox, “The Crown’s Duty to Consult Aboriginal People” (2003), 41 *Alta. L. Rev.* 49, at 61.

²⁰⁹ *Ibid.* at paras. 43-45.

reveal important lessons for those struggling with this emerging legal doctrine within the practical confines of project implementation.

Though the courts clearly indicated that the required level of Aboriginal consultation and accommodation would vary substantially with the circumstances, they nevertheless provided suggestions regarding the manner in which Aboriginal perspectives should be solicited and addressed. The SCC described meaningful consultation as providing Aboriginal peoples the opportunity to make submissions to decision-makers, formal participation in decision-making processes, adoption of dispute resolution procedures, and provision of written reasons by decision makers. Inclusion of Aboriginal peoples in this manner would then illustrate how Aboriginal perspectives were considered, which in turn ensured that consultation and accommodation could be made more effective.²¹⁰ Similarly, the SCC provided more explicit commentary on the purpose and forms for accommodating Aboriginal interests, noting that “meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations.”²¹¹ The SCC elaborated that such accommodation requires “...taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim”.²¹²

Clarification on the appropriate means of consultation and accommodation was also provided in *Mikisew Cree*. In that ruling, the SCC clarified that even at the lower end of the consultation and accommodation spectrum, the Crown was “required to provide notice to the Mikisew and to engage directly with them.”²¹³ The judiciary noted

²¹⁰ *Ibid.* at para. 44.

²¹¹ *Ibid.* at para. 46.

²¹² *Ibid.* at para. 47.

²¹³ *Mikisew Cree*, *supra* note 192 at para. 64.

that reliance on the general public consultation process to meet the Crown's duty to consult and accommodation was inadequate.²¹⁴ Rather, meaningful Aboriginal engagement under this judicial directive includes the provision of information specifically regarding the project and its potential adverse impact on Mikisew interests, the direct solicitation of Mikisew perspectives and concerns, and a clear indication that attempts are made to minimize adverse impacts to Mikisew interests.²¹⁵ Notably, the judiciary found that the Crown should not unilaterally impose an accommodation method (in this case the alteration of a road course) because the decision was not made through the consideration or input of Mikisew perspectives.²¹⁶ Additionally, the SCC also noted that that "...there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to their concerns and suggestions, and to try to reach some mutually satisfactory solution."²¹⁷ .

Importantly, the SCC articulated that the "common thread" guiding Crown efforts is to substantially address Aboriginal concerns, and to ensure the process of consultation is meaningful. For Aboriginal peoples, the SCC highlighted the reciprocal obligations of Aboriginal claimants to engage with the Crown, to not frustrate the Crown's good faith attempts of consultation, and not adopt unreasonable positions to prevent the Crown from acting where meaningful consultation has occurred.²¹⁸ Such guidance again reaffirmed the emphasis which the judiciary placed on good faith negotiation as being the means through which conflicting interests should be reconciled, and again suggests that

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.* at para. 65.

²¹⁸ *Ibid.* at paras. 40-42.

negotiated settlement in instances of conflict remain the ideal solution within the context of reconciliation. Again, the judiciary emphasized the importance of attempting “...to harmonize conflicting interests and move further down the path of reconciliation...” through “...good faith efforts to understand each other’s concerns and moves to address them.”²¹⁹

While the SCC clearly articulated both when the duty to consult and accommodate Aboriginal peoples arose, and provided guidance as to how the scope and nature of consultation and accommodation obligations should occur, they also had to answer the question of who ultimately owed the duty to Aboriginal peoples. The SCC expressly limited the duty to consult and accommodate to the Crown alone because it “...flows from the Crown’s assumption of sovereignty...”²²⁰ It is important to note that the Crown’s responsibilities are triggered not only where the Crown is the primary agent carrying on an activity which may infringe a claimed Aboriginal right or title, but in any instances where the Crown is involved (such as through regulatory processes, licensing, or funding).²²¹

This restriction of the duty to consult and accommodate to the Crown left private actors without a similar legal obligation.²²² However, the SCC did note that the Crown may “delegate procedural aspects of consultation to industry proponents seeking a

²¹⁹ *Ibid.*

²²⁰ *Ibid.* at para. 53.

²²¹ See e.g. Chapter 4.3.4, below, for discussion of initial Olympic planning which would have triggered Crown duties to consult and accommodate. See especially Chapter 4.4.1.1, below, at 161-64 where more detailed consideration of Federal and Provincial environmental assessment legislation, and the regulatory triggers created in response to *Haida Nation* to ensure Crown properly consults and accommodates Aboriginal peoples are discussed.

²²² *Haida Nation*, *supra* note 9 at para. 53, “This theory provides no support for an obligation on third parties to consult and accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests...the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated”.

particular development”.²²³ This express recognition that the ultimate duty lies with the Crown, but that private project proponents may play central roles in consultation and accommodation procedures, is also of particular importance in considering the implications of Aboriginal participation in the 2010 Games. Indeed, as will be seen in Chapter 4 below²²⁴ the committees responsible for bidding on, organizing and hosting the 2010 Games, as proponents of 2010 Olympic projects, were significantly involved in the consultation and accommodation of Aboriginal peoples. This indicates that meaningful Aboriginal participation will often involve the effective coordination of not only the Crown and Aboriginal perspectives and interests, but also private parties. As will be revealed in Chapter 4, this tripartite involvement is a defining feature of much of the Aboriginal participation in the 2010 Games, and this renders the Olympic context increasingly relevant to those involved in future Aboriginal consultation and accommodation efforts in British Columbia and Canada.

Haida Nation, *Taku Tlingit* and *Mikisew Cree* mark a significant evolution of Section 35(1) jurisprudence of importance to this thesis not only for the additional guidance on how Aboriginal participation should be meaningfully carried out, but also for setting the legal context from which to consider the meaning of Aboriginal participation in the 2010 Games. The extension of consultation and accommodation duties to “pre-proof” circumstances greatly increases the number of instances in which Crown action will be required to solicit Aboriginal perspectives, and (if judicial guidance is followed) seek to forward the objectives of recognition and reconciliation. Support for this interpretation is provided by even a cursory examination of the areas of British

²²³ *Ibid.*

²²⁴ See especially Chapter 4.4.1.1 & 4.4.1.2, below.

Columbia currently subject to treaty negotiations amongst the Crown and Aboriginal peoples clearly demonstrates the growing prominence the consultation and accommodation of Aboriginal peoples will hold.²²⁵

Indeed, as will be revealed below,²²⁶ the lower courts have seen substantial applications from Aboriginal groups, private project proponents, and the Crown seeking judicial guidance and determinations on their efforts at meeting the standards prescribed above. These lower court decisions are relevant to our examination as they provide specific efforts of consultation and accommodation which have met with judicial scrutiny, and can be contrasted against Aboriginal participation in the 2010 Games. Additionally, and similarly to *Haida Nation*, *Taku Tlingit* and *Mikisew Cree*, these lower court decisions provide not only additional context, but also directly demonstrate the necessity for improved approaches to Aboriginal consultation and accommodation, which in turn influences the implications of the 2010 Games. If a review of such decisions revealed an overwhelming ability of the parties to reach negotiated settlement and advance recognition and reconciliation, then a laudable effort in the context of the 2010 Games would not necessarily be of great importance. However, an examination of this most recent jurisprudence will reveal quite the opposite.

Before this brief review of lower court decisions commences, it is worthwhile to pause once again to consider the guidance which the jurisprudence has provided thus far,

²²⁵ British Columbia Treaty Commission, *Treaty Negotiations In British Columbia Map* online: British Columbia Treaty Commission <<http://www.ainc-inac.gc.ca/ai/scr/bc/fnbc/mps/trynega-eng.pdf>>. (Produced by Professional & Technical Services under the Information Sharing Protocol for Treaties and Aboriginal Government, Indian and Northern Affairs Canada, and Integrated Land Management Bureau, Ministry of Agriculture and Lands for the Ministry of Aboriginal Relations and Reconciliation).

²²⁶ See Chapter 3.4 & 3.4.1, below.

but also, the need to carefully consider whether our interpretation of the jurisprudence has indeed provided an appropriate set of guidelines for our examination.

3.3.1 Discussion of Consultation and Accommodation

In the examination of *Haida Nation*, *Taku Tlingit*, and *Mikisew Cree* above, both the principles underlying the Crown's duty to consult and accommodate, as well as the more specific administrative and procedural guidance were considered, and some thought was given to how these elements combine to suggest particular forms for Aboriginal consultation and accommodation. However, more detailed thought was not given to potential criticisms of this emerging legal doctrine, and any issues such criticisms may raise regarding Crown or private sector efforts which adhere to this doctrine. The content of this criticism is worthy of far deeper consideration than it will receive here.

Nevertheless, the following examination will aid in a more fulsome assessment of Aboriginal participation in the 2010 Games, and the lessons it provides. Accordingly, it is worthwhile to consider this criticism in brief to ensure that an assessment of the 2010 Games which finds perfect adherence to the jurisprudence above is indeed laudable, and serves as a proper example to follow in other contexts.

In essence, there is debate amongst commentators as to whether the legal doctrine developed in *Sparrow*, *Van der Peet*, *Delgamuukw*, *Haida Nation*, *Taku Tlingit* and others develops a positive legal framework. Those who praise this emerging legal doctrine highlight “the potential of section 35 as a generative constitutional order”,²²⁷ which may create “...a new legal order that accommodates Aboriginal rights, through

²²⁷ Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005), 29 S.C.L.R. (2d) 433 at 440.

negotiation and agreement with the indigenous peoples affected.”²²⁸ Clearly, the interpretation provided in this thesis above is one which endorses such a potential of the Crown’s duty to consult and accommodate. However, several commentators are less positive on the “generative potential” of this jurisprudence and in sharp contrast, view the legal doctrine developed by the judiciary as better understood as merely a means by which Aboriginal rights and title may be infringed.

Gordon Christie articulates this criticism clearly, suggesting that the duty to consult may also be viewed as a further assimilative element which serves largely to advance the Crown’s agenda, reinforce Western understandings of land use and ownership, and ultimately maintain the status quo. This interpretation recognizes that while the duty to consult and accommodate curtails the untrammelled use of Crown decision making power, it will effectively do “...no more than potentially [shift] the exploitation into a slightly different form (this is the true underlying nature and extent of ‘accommodation’].”²²⁹ Under this critique, the duty to consult and accommodate is simply seen as a tool which, although it may afford some protection to Aboriginal interests, ultimately serves to offer the Crown alternative, legally defensible, means to its desired ends. Additionally, as Christie notes, there will be those Aboriginal groups who may view the concept of consultation and accommodation as simply a means through which modern colonial processes are continually propagated, as Crown understandings of Aboriginal interests as “proven” or “un-proven” will be thrust upon Aboriginal peoples if

²²⁸ *Ibid.*

²²⁹ Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39 U.B.C. L. Rev. 139 at 163.

they wish to set a platform for any consultation demands that will have legal effect in Canada.²³⁰

Those who view the jurisprudence as a positive influence, clearly support the notion that greater incorporation of Aboriginal perspectives in decision making processes will result in recognition and reconciliation. In contrast, those that are more critical of this legal doctrine point to the very broad list of objectives endorsed as justifying Section 35(1) infringements, the historic colonial and exploitative behaviour of the Crown, and upholding of the ultimate decision making authority of the Crown as signaling that “business as usual” should be expected in the practical application of consultation and accommodation efforts. These differing interpretations of the jurisprudence are far more nuanced than demonstrated by this simplistic distillation. However, it seems apparent that the chasm between these parties largely stems from divergent views as to how the Crown will actually respond to the guidance provided by the judiciary.

Though these different interpretations put varying faith in the Crown to respond appropriately to the guidance of the courts, and whether Crown responses will indeed be “honourable,” they nevertheless seem to share a substantial amount of agreement on what they view as desired outcomes of the Crown’s duty to consult and accommodate. Scholars and commentators on both sides appear to more universally endorse the concepts of recognition and reconciliation as articulated by the judiciary as the appropriate objectives which should underlie Section 35(1). Additionally, both interpretations recognize that the process of reconciliation requires both Aboriginal peoples and the Crown to negotiate in good faith to resolve outstanding Aboriginal land and rights claims. They also seem to equally recognize that such resolution will require

²³⁰ *Ibid.*

the transfer of at least some decision making authority to Aboriginal peoples over certain areas of land, and that some form of co-management of projects impacting lands covered by such negotiated resolution will almost certainly be required. The more general acceptance and endorsement of these broader purposes and objectives by scholars and commentators provides common ground regarding the manner in which Aboriginal participation should proceed. Accordingly, these aspects should be given special regard in assessing Aboriginal participation in the 2010 Games, and applying judicial guidance to this Olympic context.

In particular, this suggests that the guidance gleaned from the above jurisprudence should indeed emphasize the importance of the broader purposes and objectives of Section 35(1) rather than focusing upon the technical or strict requirements of the legal doctrine. In other words, in applying the judicial guidance to the 2010 Games context we must be more mindful of the “generative potential” which the jurisprudence may hold, considering whether the more universally accepted purposes of recognition and reconciliation have indeed been advanced, good faith applied, and the honour of the Crown upheld. Further to this point, we must specifically heed the judiciary’s consistent emphasis on the importance of negotiated settlement, the need for the prioritization and facilitation of Aboriginal interests and objectives, and the economic component of Aboriginal title land as paramount means of ensuring Aboriginal participation is meaningful, and advances the purposes of recognition and reconciliation. Subsequently, we may apply these guidelines in our assessment of Aboriginal participation in the 2010 Games to consider whether the 2010 Games mark an achievement in constructing meaningful Aboriginal participation, or whether the Games are best described as only

minimally fulfilling administrative requirements of consultation and accommodation. In this manner, the 2010 Games may serve as a practical illustration of the potential of the above legal doctrine, and provide valuable lessons to Aboriginal peoples, British Columbia and Canada.

In our analysis of the 2010 Games, we must be mindful of the criticism which the above jurisprudence has faced, and cognizant that what may appear at first blush to be exemplary examples of Aboriginal participation could also be interpreted as having darker implications. Again, it will be paramount to strive, as the judiciary suggests, to consider Aboriginal participation in the 2010 Games against the larger objectives and purposes of Section 35(1). Though this very brief discussion of the competing interpretations of Section 35(1) jurisprudence does not fully explore the intricacies of the arguments, nor attempt to resolve their differences, the recognition that criticism of the emerging legal doctrine exists is nonetheless important if we are to better understand our utilization of judicial guidance to assess Aboriginal participation in the 2010 Games. By being mindful of such criticism, our utilization of the judicial guidance provided above is less likely to provide incorrect praise, and better serve our purposes of undertaking a more meaningful examination of the 2010 Games, and its implications for structuring Aboriginal participation in other contexts.

However, before delving into our examination of the 2010 Games, it is worthwhile to consider a final aspect of the jurisprudence. Lower court decisions assessing efforts to respond to the above judicial guidance will reveal further guidance on the manner in which consultation and accommodation may be carried out meaningfully, but these decisions also provide insight into the current Aboriginal participation context

in British Columbia and Canada which will indicate whether the 2010 Games holds greater meaning and implications beyond the Olympic stage.

3.4 Judicial Review of Consultation and Accommodation Efforts

Following *Haida Nation* and *Taku Tlingit*, it was readily apparent that the articulation of a new duty on the Crown to engage Aboriginal peoples with regards to its activities would likely result in further litigation. Applications for such judicial review were required to examine the efforts of the Crown to meet its duties to consult and accommodate, to seek clarification on the precise nature of Crown conduct which would trigger the duty to consult and accommodate, the appropriate determinations of how much consultation was required in a given circumstance, and elaboration on concepts such as the “honour of the Crown” and “meaningful consultation”. This predictable wave of litigation has indeed come to fruition, with the majority of these decisions flowing from the lower and appeal branches of provincial and federal courts as they attempt to apply the *Haida Nation*, *Taku Tlingit* and *Mikisew Cree* rulings within the practical constructs of economic projects.

The following section will emphasize circumstances arising from British Columbian and federal efforts at consultation, as these are the most salient to a discussion of the consultation and accommodation processes occurring in relation to the 2010 Games, which involved substantial financial and regulatory support from both the British Columbia and federal government. However, consideration will also be given to litigation arising from the actions of other provincial governments where the reasons for judgment substantively add to the emerging doctrine of the Crown’s duty to consult and accommodate, or provide insights into the success and failures that particular approaches

to consultation may entail. In sum, these lower court decisions will provide additional guidance on how meaningful consultation and accommodation under Section 35(1) should be pursued. More importantly, they illustrate the difficulties which the Crown, project proponents and Aboriginal peoples have encountered in trying to realize on the generative potential of Section 35(1), which in turn may help to demonstrate the importance which the 2010 Games context holds for broader efforts to improve Aboriginal consultation and accommodation.

Two particularly relevant cases in this review stem from the British Columbia Supreme Court. *Gitanyow First Nation v. British Columbia (Minister of Forests)*²³¹ and *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*²³² examined British Columbia's use of Forest and Range Agreements to carry out the Crown's duty to consult and accommodate, which were the subject of dispute in relation to planned forestry operations taking place in areas subject to claims of Aboriginal rights or title by the Gitanyow First Nation and Huu-Ay-Aht First Nation respectively.²³³ The proposed agreements were intended to provide the affected Aboriginal groups, in this case the Gitanyow and Huu-Ay-Aht, with economic compensation and forestry tenures as compensation for any potential infringement of Aboriginal rights and title, and as the process through which the Crown would discharge its duty to consult and accommodate for the duration of the agreement.²³⁴

Both the Gitanyow First Nation and the Huu-Ay-Aht First Nation raised similar concerns with regards to the Crown's approach to consultation and accommodation

²³¹ 2004 BCSC 1734, 38 B.C.L.R. (4th) 57 [*Gitanyow*].

²³² 2005 BCSC 697, [2005] 3 C.N.L.R. 74 [*Huu-Ay-Aht*].

²³³ *Ibid.* at paras. 1-3 & *Gitanyow*, *supra* note 231 at paras. 1-14.

²³⁴ *Ibid.* at para. 20.

through the use of such agreements. First, the agreements were effectively presented as the only option through which consultation and accommodation may occur. Second, the level of compensation was not grounded in the rights and title claimed by the Gitanyow and Huu-Ay-Aht, or the impact of the proposed forestry operations might have on their claims. Rather, the Crown relied on population numbers as the means for determining compensation levels, effectively pre-fixing the level of compensation to be negotiated.²³⁵ Finally, the compensation was to cover any infringement of Aboriginal rights or title during the course of the agreement despite the parties being unsure of the specific forestry activities and outcomes which may occur during the course of the agreement.²³⁶

The judiciary noted in both *Gitanyow* and *Huu-Ay-Aht* that the Crown effectively treated the proposed forest and range agreements as standard form contracts, and negotiation attempts by the Gitanyow and Huu-Ay-Aht saw scant change in the draft agreements provided by the Crown, and the evidence indicated that few topics were actually open for negotiation.²³⁷ In both cases the judiciary noted that the approach adopted by the Ministry of Forests to negotiating the forest and range agreements was insufficient to meet the Crown's duty to consult. Dillon J. in *Huu-Ay-Aht* described the difficulties with this approach to consultation and accommodation, noting that an assessment of the Crown's consultation efforts must begin with an assessment of whether the Crown has correctly determined the strength of the Aboriginal claim and potential adverse effects implied by the Crown action,²³⁸ and therefore the failure of the Crown to undertake such an assessment ensured the "...complete failure of consultation based on

²³⁵ *Ibid.*

²³⁶ *Ibid*

²³⁷ *Ibid.* at para. 33-7. & *Gitanyow*, *supra* note 231 at para. 23.

²³⁸ *Gitanyow*, *ibid.* at para. 121.

the criteria that are constitutionally required for meaningful consultation.”²³⁹ In addition, Dillon J. characterized the negotiation tactics adopted by the Crown in *Huu-Ay-Aht* as “intransigent” and merely giving the appearance of considering the Huu-Ay-Aht concerns, rather than actually doing so.²⁴⁰

Huu-Ay-Aht and *Gitanyow* reveal that although the concept of negotiated settlement has been endorsed by the judiciary, not every form of negotiation, and negotiation behaviour, will meet with judicial approval. Rather, the purpose of pursuing the consultation and accommodation of Aboriginal peoples is to gain greater understanding of Aboriginal perspectives, interests, and claims to rights and title. The Crown approach in this instance effectively precluded the pursuit of greater mutual understanding, and although it may be viewed as recognizing the economic aspect of Aboriginal title, clearly does little to advance the purposes of recognition and reconciliation. The concept of using contracts to address consultation and accommodation requirements would seem to adhere with the judicial guidance that negotiation settlement and consent endorsed in Section 35(1) jurisprudence. However, *Gitanyow* and *Huu-Ay-Aht* illustrate that not every approach to contract negotiation will meet with judicial approval. Indeed, as Gordon Christie notes in his assessment of *Gitanyow* and *Huu-Ay-Aht*, the judiciary appears to indicate that although the Crown is free to construct consultation processes, such processes must be designed with regard to the Aboriginal interests at stake, which further suggests that consultation “structures for process are best designed not by Ministry officials working by themselves in Ministry

²³⁹ *Huu-Ay-Aht*, *supra* note 232 at para. 126.

²⁴⁰ *Ibid.* at paras. 127-8.

offices, but by Ministry officials working in concert with potentially affected Aboriginal nations.”²⁴¹

For the purposes of this thesis, *Gitanyow* and *Huu-Ay-Aht* are relevant in demonstrating the need to consider not only whether Aboriginal participation in the 2010 Games has generally pursued Aboriginal perspectives, and sought to create negotiated agreement on Aboriginal participation, but also whether such efforts have truly furthered mutual understanding, and advanced the processes of recognition and reconciliation. Additionally, *Gitanyow* and *Huu-Ay-Aht* illustrate that the Crown may indeed be struggling to develop meaningful approaches to Aboriginal consultation and accommodation, which suggests that Aboriginal participation in the 2010 Games may indeed hold much broader significance.

Another case which provides useful guidance is *Dene Tha’ First Nation v. Canada (Minister of Environment)*²⁴² which considered the appropriateness of a consultation and accommodation process developed by the Crown in relation to a significant pipeline project in the Northwest Territories and Alberta. The regulatory and environmental review of the pipeline required the input of a substantial number of Crown agencies, Aboriginal groups, and other parties.²⁴³ To coordinate this large number of parties, an initial cooperation plan was created by the parties to outline their approach to a coordinated regulatory and environmental review,²⁴⁴ while the development of a Joint Review Panel,²⁴⁵ the terms of reference for the environmental assessment,²⁴⁶ and a Crown

²⁴¹ Christie, *supra* note 229.

²⁴² 2006 FC 1354, [2007] 1 C.N.L.R. 1 [*Dene Tha’*].

²⁴³ *Ibid.* at paras 1-5.

²⁴⁴ *Ibid.* at paras. 20-3.

²⁴⁵ *Ibid.* at paras. 29-30

²⁴⁶ *Ibid.* at paras. 27-8 & paras. 31-6.

Consultation Unit were implemented to carry out the broader Aboriginal consultation and accommodation agenda.²⁴⁷ The Dene Tha' were not included in the development of cooperation plan, development of the Crown Consultation Unit, or the development of the terms of reference for the environmental review, and Dene Tha' involvement in the creation of the Joint Review Panel consisted of being provided twenty four hours notice to respond to plans which had been developed by the Crown agencies and other Aboriginal groups.²⁴⁸ The Dene Tha' felt that exclusion from the development of the regulatory and environmental review process amounted to a breach of the Crown's duty to consult and accommodate the Dene Tha'.²⁴⁹

The Federal Court agreed with the Dene Tha', and in reasons for judgment that echoed the implications in *Gitanyow* and *Huu-Ay-Aht*, criticized the Crown's failure to full its obligations under Section 35(1) to include the Dene Tha' in the development of its consultation process. The development of this cooperation plan was considered by the judiciary as an integral step in the development of the pipeline, and may be considered a form of strategic planning which may have significant impacts on Aboriginal rights and title.²⁵⁰ As in *Mikisew Cree*, the judiciary noted that the failure to include Dene Tha' perspectives in the development of the environmental and regulatory processes breached the Crown's constitutional duty, and restated that the Crown may not rely on public consultation processes to discharge its duties.²⁵¹ The federal court described the Crown's consultation in this efforts as failing to "even meet the obligations to give notice and

²⁴⁷ *Ibid.* at paras. 19-23.

²⁴⁸ *Ibid.* at para. 5.

²⁴⁹ *Ibid.* at para. 2.

²⁵⁰ *Ibid.* at para. 106 citing *Haida Nation*, *supra* note 9 at para 76.

²⁵¹ *Ibid.* at paras. 114-16.

opportunity to be heard which underlies the administrative law principle of fairness much less the more onerous constitutional and Crown duty to consult First Nations.”²⁵²

Dene Tha’ provides further support for the notion that the development of Crown consultation processes should be carried out with the incorporation of Aboriginal perspectives. In turn, this demonstrates the need for the consultation of Aboriginal peoples to begin at the very earliest stages of planning a proposed development. This judicial guidance provides additional information to apply to our analysis of the 2010 Games context, as it seems apparent Aboriginal participation will best meet emerging judicial standards, and be more meaningful, where Aboriginal perspectives are incorporated earlier. Furthermore, *Dene Tha’* suggests that is important that Aboriginal perspectives are incorporated throughout planning processes to ensure their perspectives are properly accounted for. This additional perspective may also be applied to our examination of the 2010 Games, to determine whether Aboriginal participation is more deeply embedded throughout the Olympic planning, development and hosting process, and would pass judicial scrutiny, or more limited in nature.

While *Gitanyow*, *Huu-Ay-Aht*, and *Dene Tha’* indicate that Aboriginal perspectives should be incorporated into the consultation processes of the Crown, *Brokenhead Ojibway Nation et al. v. the Attorney General of Canada et al.*²⁵³ clarifies that this does not automatically impugn any consultation process developed by the Crown. In *Brokenhead* a number of Treaty One First Nations, successors to the Ojibway First Nations under Treaty One,²⁵⁴ challenged the issuance by the National Energy Board

²⁵² *Ibid.* at para. 116.

²⁵³ 2009 FC 484, [2009] 3 C.N.L.R. 36 [*Brokenhead*].

²⁵⁴ *Ibid.* at para. 1.

(the “NEB”) of certificates for the construction of three pipeline projects.²⁵⁵ This court challenge was centered, in part, on an argument that the consultation process utilized by the NEB was incapable of addressing larger consultation and accommodation issues raised by the pipeline projects.²⁵⁶ In particular the Treaty One First Nations cited the inability of the NEB to consult and accommodate with regards to Treaty One First Nation land claims as constituting a failure of the Crown’s duty to consult and accommodate.²⁵⁷ The Treaty One First Nations suggested that while the NEB may be capable of addressing any project specific concerns raised, that larger issues related to the Treaty One First Nations’ land claims would remain unconsidered or addressed as they were beyond the purview of the NEB.²⁵⁸

Indeed, the Federal Court went on to state that the NEB consultation process was indeed well suited to address mitigation, avoidance and environmental issues which were site and project specific.²⁵⁹ However, the Federal Court also noted that the process was not designed to address the larger issue of unresolved land claims raised by the Treaty One First Nations,²⁶⁰ and as such, “...the NEB process may not be a substitute for the Crown’s duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.”²⁶¹ Although the judiciary found in *Brokenhead* that the Aboriginal applicants could not demonstrate any risk to treaty

²⁵⁵ *Ibid.* at paras. 2-5.

²⁵⁶ *Ibid.* at para. 15.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.* at para. 28.

²⁵⁹ *Ibid.* at para. 25.

²⁶⁰ *Ibid.* at paras. 25-26.

²⁶¹ *Ibid.* at para. 29.

negotiations or title claims,²⁶² it is nevertheless clear that consultation and accommodation must encompass such issues where there is risk to such broader processes taking place under Section 35(1).

Brokenhead clearly marks the reaffirmation of the important role which consultation and accommodation is intended to play in the larger processes of recognition and reconciliation. It is apparent that consultation and accommodation will be unlikely to pass judicial scrutiny where Aboriginal concerns regarding broader impacts to rights and title, and the influence may this have on larger reconciliation processes and negotiated settlement, go unaddressed. This clearly illustrates that for Aboriginal participation to advance the processes of recognition and reconciliation, it should include discussions surrounding the need for larger negotiated settlement, and broader impacts to claims of Aboriginal rights and title. This judicial guidance may be useful in our examination of the 2010 Games to determine whether Aboriginal participation in this context encompassed such discussions.

While the jurisprudence above addressed the consultation processes adopted by the Crown, and their reasonableness with regard to the circumstances in question, additional guidance from the judiciary has been brought to bear on another key element of consultation, namely, that consultation be carried out in a manner which is appropriately cognizant of the Aboriginal cultures in question. Two notable cases from British Columbia, and one from Newfoundland and Labrador are relevant to this question, and demonstrate the importance of the Crown not only carrying out an appropriate level of consultation, but also carrying out such consultation which is appropriate to the Aboriginal cultures and societies in question. This jurisprudence is

²⁶² *Ibid.* at para. 33-35.

also relevant to our examination of Aboriginal participation in the 2010 Games, as it provides specific guidance on how Aboriginal perspectives should be incorporated and which members of Aboriginal groups are the appropriate representatives. The question of appropriate representation may be particularly relevant in an Olympic context given its predilection for attracting competing opinions and perspectives within the host Aboriginal communities.²⁶³

*Wii'litwx v. British Columbia (Minister of Forests)*²⁶⁴ is the first of these cases, and addressed a complaint from the Hereditary Chiefs of the Gitanyow Nation that the Minister of Forests had failed in its duty to consult and accommodate the Gitanyow.²⁶⁵ The primary complaint of the Gitanyow was that the Crown had insufficiently incorporated was the Gitanyow understandings of territorial boundaries in its planning of forestry operations.²⁶⁶ The court agreed with the Gitanyow, "...the harvesting of timber from Gitanyow traditional territory without reference to Wilp boundaries could result in the effective destruction of individual Wilps in terms of both territorial and social considerations."²⁶⁷ Given the significance of the Wilp system to the Gitanyow, the court

²⁶³ See Chapter 2.7, above, for discussion of the Salt Lake City Games, which revealed internal conflicts amongst Aboriginal groups. See also, Chapter 4.4.3.6, below, in which discussion of Aboriginal participation in the 2010 Games is discussed, and the concept of who "properly" represents Aboriginal peoples is addressed by the FHFN.

²⁶⁴ 2008 BCSC 1139, [2008] 4 C.N.L.R. 315 [*Wii'litwx*].

²⁶⁵ *Ibid.* at para. 1.

²⁶⁶ *Ibid.* at para. 21 "Gitanyow is organized into eight matrilineal units, collectively called the Huwilp, and individually called Wilps, or Houses. Each Wilp has its own territory, and these collectively form Gitanyow traditional territory. The Huwilp are the social, political, and governing units of Gitanyow. They hold and exercise rights and title to the Gitanyow traditional territory on behalf of the Gitanyow people. Every Gitanyow person belongs to a Wilp. By Virtue of this membership, each person has rights to the territory and resources owned by his or her Wilp, under the direction of the Hereditary Chiefs of each Wilp".

²⁶⁷ *Ibid.* at para. 223.

found that the Crown's failure to include the Wilp system within its forestry operations planning amounted to a breach of the Crown's duty to consult and accommodate.²⁶⁸

Wii'litswx can be interpreted as offering further guidance on the manner in which consultation and accommodation processes may advance the purpose of recognition mandated by Section 35(1). The purpose of recognition is best furthered not only where Aboriginal involvement can be shown, but also where it can be demonstrably shown that consultation and accommodation efforts reflect the unique cultural and societal perspectives of the Aboriginal peoples involved. This is significant, because it would seem to indicate that the duty to consult and accommodate is indeed intended to be generative in requiring the Crown to alter its own conceptions of land use planning and organizing to incorporate and coincide with Aboriginal conceptions. Additionally, *Wii'litswx* appears to imply that where the Crown is carrying out consultation with Aboriginal peoples it may be insufficient to rely only on consultation through the governing structures created by the *Indian Act*, and that meaningful consultation may also require consultation with traditional decision-makers in Aboriginal society, particularly where such decision-makers, or decision making structures, are cited by the Aboriginal peoples in question as being integral to their culture.

This interpretation is bolstered by the decision of the Newfoundland and Labrador Court of Appeal in *Newfoundland and Labrador v. Labrador Métis Nation*²⁶⁹ which considered, among other subjects, whether the Labrador Métis Nation was an appropriate entity to bring a claim alleging a breach of the Crown's duty to consult and

²⁶⁸ *Ibid.* at para. 28.

²⁶⁹ 2007 NLCA 75, 288 D.L.R. (4th) 641 [*Labrador Métis Nation*].

accommodate.²⁷⁰ The Labrador Métis Nation is a corporate entity authorized by its members to pursue Aboriginal rights claim on their behalf, and to act as the agent of those members in relation to consultation with the Crown.²⁷¹ In assessing the appropriateness of the Labrador Métis Nation acting on behalf of its members, the Newfoundland and Labrador Court of Appeal stated: "...the LMN has the authority of its 6,000 members in 24 communities to take measures to protect Aboriginal rights... This is sufficient authorization to entitle the LMN to bring the suit to enforce the duty to consult in the present case."²⁷²

Though this assessment comes with regards to a corporate entity expressly obtaining the consent of its members to undertake consultation with the Crown, the implications appear to be clear. Namely, that the recognition of Aboriginal peoples' unique perspectives requires the engagement with those entities viewed by the Aboriginal community as appropriately representing that particular community. *Wii'litwsx* indicates that this may include traditional leadership structures, while *Labrador Métis Nation* indicates that corporate entities may require inclusion, yet the principle in both instances is the same, that meaningful Aboriginal participation must be premised from the recognition that Aboriginal peoples' perspectives on appropriate representatives and issues of importance are of equal value to non-Aboriginal or Crown perspectives, and must be given equal weight.

While *Wii'litwsx* and *Labrador Métis Nation* illustrate that appropriate recognition must be given to the decision making processes and appointed representatives

²⁷⁰ *Ibid.* at para. 1.

²⁷¹ *Ibid.* at paras. 3-4.

²⁷² *Ibid.* at paras. 46-47.

of Aboriginal peoples, *Red Chris Development v. Quock et al.*²⁷³ articulates more clearly the courts' view of whom from Aboriginal communities is capable of guiding participation. In *Red Chris* the British Columbia Supreme Court considered an application for an injunction by Red Chris Development against members of an Aboriginal community who had erected a blockade preventing the activities of the company.²⁷⁴ The Aboriginal community members who had erected the blockade were located more proximately to the Red Chris development site, and argued that they were owed a duty to consult and accommodate in addition to the larger Aboriginal community.²⁷⁵ In considering this aspect of the Aboriginal respondent's arguments, the British Columbia Supreme Court stated: "Their [the Aboriginal respondents'] position is that the local users of the land, or as they describe it, the families, should be consulted.... This is analogous to stating that elected representatives do not speak for the people who elected them."²⁷⁶

Red Chris makes it evident that consultation need not take place with every individual or group claiming a right to be consulted. Read in conjunction with *Wii'litswx* and *Labrador Métis Nation*, it would appear that what is required is to incorporate the leadership entities or organizations which are recognized as being part of the decision making process for the community as a whole. A clarifying piece of guidance on how to balance competing interests amongst Aboriginal representatives was provided by Sewell J. in *Nlaka'pamux Nation Tribal Council v. Griffin*²⁷⁷ where the court was faced with Aboriginal organizations taking conflicting stances on a proposed landfill. Sewell J.

²⁷³ 2006 BCSC 1472, [2006] B.C.J. No. 2206 [*Red Chris*].

²⁷⁴ *Ibid.* at para. 1.

²⁷⁵ *Ibid.* at para. 14.

²⁷⁶ *Ibid.* at paras. 15-6.

²⁷⁷ 2009 BCSC 1275, [2009] 4 C.N.L.R. 213 [*NNTC*].

noted that where the Crown is “faced with a diversity of putative representation on behalf of a First Nation”, it must take “...reasonable steps to ensure all points of view within a First Nation are given appropriate consideration.”²⁷⁸

The significance of *Wii'litswx*, *Labrador Métis Nation*, *Red Chris*, and *NNTC* is the guidance it provides the Crown, or those delegated the Crown's consultation responsibilities, regarding the Aboriginal representatives which must be included in consultation, but also the implications regarding the capacity of the duty to consult to indeed act as a generative doctrine. Clearly it will be necessary to obtain greater understanding of Aboriginal peoples and culture if consultation and accommodation is to be meaningful, and adhere to the judicially imposed guidelines. This would appear to ensure that the Crown's duty to consult is not just a minimal check on the Crown's authority, but is indeed a means through which the Crown must obtain Aboriginal perspectives and understandings of land use, which the Crown must then demonstrably account for in its own planning processes in order to fulfill its duties under Section 35(1). For the purposes of examining the 2010 Games, these cases provide important judicial guidance as to how Aboriginal participation in the Games should demonstrate that the objective of recognition is indeed being furthered. Additionally, it provides more specific guidance on which representatives from Aboriginal peoples should expect to participate in consultation and accommodation, and how conflicting organizations should be dealt with, both of which are often key issues in relation to how Olympic critics and criticism should be considered.

²⁷⁸ *Ibid.*

3.4.1 Discussion - Application of Consultation and Accommodation

The lower court jurisprudence discussed above represents a rapidly developing legal doctrine, which the judiciary will no doubt, expand, clarify, and perhaps over-turn in future rulings. Nevertheless, these cases provide both further guidance as to how the principles and guidelines in *Haida Nation* and *Taku Tlingit*, as well as earlier jurisprudence, should be considered and applied in specific situations, but also, an assessment of non-2010 Games approaches to Aboriginal participation. It is not surprising that judicial review often occurs in situations in which the Crown has breached its constitutional duties, as these situations are obviously more likely to give rise to Aboriginal concerns, and support the litigation which ultimately culminates in judicial reasons. Therefore, these cases should not be considered an exhaustive examination of Crown responses to its duty to consult and accommodate Aboriginal peoples. However, this lower court jurisprudence is nevertheless significant, as it reveals some troubling tendencies in contemporary Crown approaches, serves as a useful backdrop to contrast against Aboriginal participation in the 2010 Games, and provides the context from which to judge the potential implications of the 2010 Games to broader Aboriginal participation efforts.

Indeed it is this context which is perhaps most important to note at this juncture. This lower court jurisprudence reveals a troubling trend of conflict and difficulty stemming from much of the Crown efforts to meaningfully meet its duty to consult and accommodate Aboriginal peoples since the release of *Haida Nation* and *Taku Tlingit*. The case law above reveals instances where the Crown simply neglects to carry out any direct consultation of Aboriginal peoples altogether, or the process is fundamentally

flawed in that it proceeds without regard for the particular Aboriginal interests or perspectives in question. This phenomenon is similarly reflected in a number of other cases which, for space and time, are not examined such as: *Musqueam v. Minister of Sustainable Resource Management*,²⁷⁹ *Canada (Public Works and Government Services) v. Musqueam First Nation*²⁸⁰, *Kwikwetlem First Nation v. British Columbia Utilities Commission*,²⁸¹ and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*.²⁸² This trend revealed in this lower court jurisprudence clearly reveals that Aboriginal participation in the 2010 Games, if it is meaningful, and meets the standards articulated by the courts, may be particularly important to assisting all parties to realize the “generative potential” of Section 35(1).

An additional aspect of the above jurisprudence which was not discussed in detail but is also worth mention, is the remedy which the judiciary imposes on the Crown and Aboriginal peoples in circumstances where the duty to consult and accommodate has been breached. In almost every instance the judiciary simply requires the parties to continue with consultation and accommodation, guided by the reasons which the court has provided.²⁸³ This demonstrates the judiciary’s commitment to ensuring that consultation processes and accommodation outcomes are crafted by the Crown and Aboriginal peoples, and reveals how particularly wasteful the litigation processes is in such instances. If the ultimate remedy is simply for the Crown and Aboriginal peoples to continue with consultation and accommodation processes, albeit with an approach

²⁷⁹ 2004 BCSC 506, [2004] 3 C.N.L.R. 224.

²⁸⁰ 2008 FCA 214, 297 D.L.R. (4th) 349.

²⁸¹ 2009 BCCA 68, 89 B.C.L.R. (4th) 273.

²⁸² 2009 BCCA 67, 89 B.C.L.R. (4th) 298, leave to appeal to S.C.C. granted, 33132 (November 5, 2009).

²⁸³ See e.g. *Gitanyow*, *supra* note 231 at paras. 64-68. See also *Huu-Ay-Aht*, *supra* note 232 at para. 128. See also *Dene Tha’*, *supra* note 242 at para. 134.

amended by the judiciary, it seems patently obvious that all parties would be much better served by simply ensuring consultation and accommodation is meaningfully carried out in the first instance. This again demonstrates the importance of developing more successful and meaningful methods for Aboriginal participation (from the perspective of all parties), and provides further support that Aboriginal participation in the 2010 Games may have greater meaning beyond the Olympic realm.

3.5 Application of Legal Context to the 2010 Games Examination

As stated in the introduction to this chapter, the above review of jurisprudence set out to accomplish two main objectives. The first was to construct a set of judicial guidelines from which to assess Aboriginal participation in the 2010 Games. The second was to generally consider the current state of Aboriginal participation in non-Olympic contexts, and identify those barriers which appear to most consistently prevent more effective Aboriginal participation from taking place. Ultimately the jurisprudence has provided ample guidance on the purposes, principles, and manner in which effective Aboriginal participation may be achieved, but also clearly demonstrated the consistent difficulty that the Crown has had in effectively responding to judicial interpretation of Section 35(1) and its constitutional duties. As these two objectives were accomplished through a much detail above, it is worthwhile at this juncture to briefly re-state how this legal context is intended to contribute to the assessment of Aboriginal participation in the 2010 Games below, and consideration of the 2010 Games implications in a broader context.

At the outset, it is important to recall that the bidding, organization and hosting of the 2010 Games took place over a long period of time, eight years, and that the Aboriginal groups, and 2010 Games organizers were not operating in a fixed legal context. *Haida Nation* and *Taku Tlingit* had reached the British Columbia Court of Appeal stage by late 2002, and the decisions of that court would almost certainly have influenced the perceptions that both the Aboriginal groups, and organizers took of legally mandated Aboriginal participation in certain elements of the 2010 Games organizing, in particular development on lands where the Nations had strong claims of Aboriginal rights or title. Though the legal doctrine during the 2010 Games was ever-changing, the assessment of the 2010 Games below will effectively be carried out based on the current legal doctrine, as discussed above.

The reason for assessing Aboriginal participation in the 2010 Games from this legal context, although it did not exist in its entirety during the planning and organization of the Games, is to subject the 2010 Games to the more rigorous assessment available by applying the principles and standards that currently exist, but also to more clearly set out the 2010 Games implications for the legal doctrine in its current form. This clarification is important, as there may be instances in which the Aboriginal participation in the 2010 Games may not meet current legal standards, but would not have been considered a legal breach during that period of time. The assessment below will endeavour to clarify such instances.

The duty to consult and accommodate is triggered where the Crown is aware that its objectives may negatively impact a claimed Aboriginal right or title. Therefore, not all of the 2010 Games projects, nor much of the other important organization processes,

trigger a duty to consult and accommodate. For example, decisions surrounding Opening and Closing Ceremonies, development of merchandising opportunities, and other important administrative procedures in Olympic hosting, would be unlikely to negatively impact any claimed Aboriginal rights or title. However, such elements of Olympic hosting, and Aboriginal participation in them, form an integral part of Aboriginal participation in the 2010 Games, and can not be simply overlooked. Therefore, while the duty to consult and accommodate is targeted at very specific types of Crown activities, judicial guidance on the subject may nevertheless be considered in assessing these additional situations, and indeed, it is important to consider Aboriginal participation as a whole, in order to fully assess its nature, successes and failures in light of the above jurisprudence.

Furthermore, *Haida Nation* makes clear that necessary levels of consultation and accommodation are directly tied to the strength of claim to rights or title advanced by an Aboriginal group, and therefore the assessment of the 2010 Games should begin with a consideration of the claims to rights or title by the Squamish, Lil'wat, Musqueam, and Tsleil-Waututh. However, the information necessary to undertake a fulsome review of the claims of each First Nation is not readily available, and would indeed be a substantial addition to this research, and therefore the review of Aboriginal participation from a legal context will proceed more generally. Instead of undertaking this strict review, the assessment of Aboriginal participation in the 2010 Games will effectively proceed by considering whether such participation meets with the principles and guidelines provided by the judiciary more generally, rather than considering whether the participation in question was necessitated by the strength of the particular First Nation's claims.

Therefore, it will be more meaningful to assess Aboriginal participation in the 2010 Games has achieved greater meaning and furthered the processes of recognition and reconciliation.

By using the legal guidance outlined above, the meaning and implications of Aboriginal participation in the 2010 Games may be better understood. Again, the assessment which follows is not intended to strictly apply the legal guidelines, but rather to proceed more generally, and to consider whether the 2010 Games reflects the legal principles, guidelines and objectives. The more general approach will allow an assessment of the 2010 Games to determine whether Aboriginal participation meets with the principles and objectives highlighted by the judiciary, and to determine how the 2010 Games succeed or failed in relation to other efforts at consultation and accommodation. Obviously this assessment of the 2010 Games will be more useful by identifying not only whether Aboriginal participation adheres to judicial guidelines, but also, how Aboriginal participation met with success or failure. From there it will be possible to consider what the implications of the 2010 Games approaches may be for broader efforts at structuring consultation and accommodation processes.

Coupled with the historic review of the historic participation of Aboriginal peoples in the Olympic Games, this jurisprudence will provide a more fulsome means from which to explore and understand Aboriginal participation in the 2010 Games. Without providing such context, it is impossible to determine whether Aboriginal participation in the 2010 Games has been successful, disastrous, or something in between. As discussed more fully above, reliance on judicial guidance to assess Aboriginal participation in the 2010 Games may be criticized itself. However, the

rapidly developing jurisprudence on Section 35(1) clearly holds great significance for Aboriginal peoples, and though the wisdom of this emerging doctrine may be challenged, its importance, and relevance to the 2010 Games, can not.

Chapter 4: Aboriginal Participation in the 2010 Games

4.1 Introduction

The examination and discussion of the two previous chapters centering around the legal context of Aboriginal participation in project generally, and in the historical involvement of Aboriginal peoples in the Olympic Games more specifically, provides a basis from which the Aboriginal participation in the 2010 Games may now be assessed, and consideration of the implications of the 2010 involvement for the broader Olympic and legal context pursued. From the chapter on the historical involvement of Aboriginal peoples in the Olympic Games, it is clear that while such participation has vastly improved over the history of the Games, Aboriginal involvement has still failed to completely satisfy those Aboriginal peoples involved, or critics who have viewed such participation as simply a means to silence or placate Aboriginal dissent. Similarly, our examination of the jurisprudence surrounding Aboriginal participation reveals fractured opinion on the ability of the principles and guidance of this jurisprudence to effect meaningful inclusion of Aboriginal peoples in developments and project which affect them. However, conflicting views of the meaning of Aboriginal participation in the Olympic Games, or in development more generally, reveals both the need and potential for developing more structured approaches to Aboriginal participation which do indeed vault Aboriginal participation to more meaningful ground, and bring more clarity and certainty to the content of Aboriginal inclusion. Indeed, it is this potential for improvement which this research hopes to play a part in. As has been previously stated, the objective of this research is to illuminate and assess the content of Aboriginal participation in the 2010 Games, and consider the 2010 Games implications for future

endeavours at incorporating Aboriginal participation into Olympic Games and projects more generally. In doing so, this research hopes to suggest the means by which improved structure for Aboriginal participation may be achieved.

As noted, the first task in this endeavour is to examine and discuss the nature and content of Aboriginal participation in the 2010 Games. As is clear from the review of jurisprudence above, we must be concerned not only with the outcomes of Aboriginal participation, but also the processes which structured the outcome. Indeed, the most valuable lessons from the 2010 Games are almost certainly the processes pursued by the Aboriginal groups, organizers and Crown representatives, as such processes may be translated into non-2010 contexts, both Olympic and non-Olympic. Therefore, we will concern ourselves with the means and methods adopted in consultation, discussion and negotiation between the parties, in addition to the final products which those efforts achieved. In order to undertake a more fulsome and complete examination and discussion of Aboriginal participation in the 2010 Games, it will be integral to consider the lessons and suggestions of the previous two chapters throughout. While the final chapter will elaborate on the lessons of the 2010 Games, to understand what has taken place in the 2010 Games context, it will be necessary to compare and contrast the elements of Aboriginal participation both to past games, and jurisprudential guidance. In particular, it will be necessary to highlight where Aboriginal participation in the 2010 Games has succeeded (or failed) in relation to historical Olympics and Crown or private sector efforts at Aboriginal consultation and accommodation as assessed by the judiciary. With specific regard to the assessment of the 2010 Games from a legal context, it is worth noting that the efforts of parties are being assessed from the current state of the law

surrounding Aboriginal consultation and accommodation, despite the rapid development of this legal doctrine during the timeframe which encompasses the bidding, organization and hosting of the 2010 Games. Therefore it is worth recalling that the parties would not have been bounded and guided by all the jurisprudence discussed above. Although the Aboriginal participation in the 2010 Games may not have occurred entirely within the legal context that currently exists, undertaking the examination from this basis will best reveal the lessons and implications of Aboriginal participation in the 2010 Games.

In pursuing the above objectives, we will explore the context of the 2010 Games both chronologically, and by subject matter. To clarify, the following chapter is generally organized into three distinct phases of Games development. The first is the bid phase, which in this case takes place between 1998 and 2003. The second phase is the organizational phase, which encompasses all the efforts taking place between the success of the bid, and actual hosting of the Games. The third encompasses the actual hosting of the 2010 Games. The arrangement of our examination generally around these three periods of Olympic Games development provides a clear way to examine the progression of Aboriginal, Games organizer, and Crown relationships. However, it is obvious that during each of these periods of Games organizing, a myriad of consultations, negotiations, and planning efforts were pursued on a wide variety of subjects. Therefore, within each of these broad periods, our chronological examination will be broken further down to specific topics and subjects, so the negotiation of specific agreements or pursuit of particular objectives may be clearly outlined.

As outlined in the introduction, this review of Aboriginal participation in the 2010 Games is based largely around documents which are available from the parties involved

in the organization of the 2010 Games, as well as the thesis work of Dunn who carried out significant interviews with those individuals involved in developing Aboriginal participation in the 2010 Games. These accounts of the 2010 Games have been supplemented with additional newspaper articles and media commentary; however, it is evident that given the extremely recent occurrence of the 2010 Games, that additional relevant information will become available in the months and years that follow. Therefore, a limitation of this research is almost certainly the necessarily imperfect account of all the facets of Aboriginal participation in the 2010 Games. Nevertheless, the material which is relied upon provides a significant level of detail, and as will be demonstrated, provides ample fodder for our assessment and discussion.

Finally, it is worth noting that this review has also attempted to provide some account of the dissenting voices which were critical of the 2010 Games generally, and Aboriginal participation in particular. This account has been pursued through the examination of critical commentary from protest groups and other commentators; however, an obvious limitation in this regard is lack of evidence on any criticism that may have existed within the Musqueam, Tsleil-Waututh, Squamish or Lil'wat Nations. If such criticism existed, it was not apparent from an extensive search for commentary or documentation on the subject from members of the FHFN, but clearly further interviews with community members would be an ideal means to obtain a fulsome account of any dissenting opinion. Indeed, it may be a reflection of the success of the approaches taken by the Aboriginal groups, Games organizers and the Crown that more vocal dissenting opinion was not readily available.

As will be apparent, the emphasis of the review below is largely on the negotiation processes and agreements reached between the relevant parties, and the land use development issues which arose in relation to the Callaghan Valley. A primary reason for this is that more significant amounts of information were available on these subjects. However, this emphasis is also logical in relation to the objective of considering the implications of the 2010 Games for broader Aboriginal participation in development projects, as reaching agreement on land use planning and project implementation is at the very heart of such endeavours. Therefore, while our examination will attempt to do justice to the significant efforts that went into addressing issues related to cultural involvement, intellectual property use, and other extremely important matters, any disparity in breadth between subjects has been largely driven by the aforementioned points. Indeed, though the level of detail on these subjects may be less, they still have significant lessons to offer. As will be seen below, some of the most significant lessons and implications of Aboriginal participation in the 2010 Games were those related to the construction of effective partnerships, which allowed for meaningful Aboriginal participation. The importance of such partnerships is not limited to land use planning and development contexts, and therefore all facets of Aboriginal participation in the 2010 Games may offer important insights.

With the above in mind, we may now consider the nature and content of Aboriginal participation in the 2010 Games in the context of our historical and legal discussion, and its implication for future Olympic and non-Olympic Aboriginal inclusion efforts.

4.2 Overview of 2010 Olympic Games Hosting Process

Before delving into the specific elements of Aboriginal participation in the 2010 Games, it is worth providing a brief overview of the key processes in bidding, organizing and hosting an Olympic Games, so that the chronology of the 2010 Olympic process is clear. The process of planning and hosting an Olympic Games may be conceived as occurring in four distinct phases: bid; development; hosting; and post-Games legacies. The bid phase encompasses both the domestic bid and international bids of a prospective host city. The domestic bid is undertaken by a city to garner the support of its national Olympic committee, which is necessary in order for a city to be considered by the International Olympic Committee for hosting an Olympic Games. Domestic bids may include competition amongst a number of domestic cities, as was the case for Vancouver/Whistler who competed against Calgary and Quebec City.²⁸⁴ Domestic bids are generally operated by a bid society, whose sole purpose is organizing the domestic bid.

Once the domestic bid has been won, a prospective host city then competes against other cities internationally for the right to host the Olympics. The international bid process is typically run by a “bid corporation”, which is created following the success of the domestic bid, and is normally a different entity from the bid society which created the domestic bid. The International Olympic Committee awards the Games to one of three bid cities approximately seven years prior to the date at which the Games are held. Once the bid has been successful, the bid corporation is ended, and a new entity, the

²⁸⁴ *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, aff’d on other grounds *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522 [*Sagen*] at para. 9 (Court provides outline of 2010 Games bid process).

organizing committee, is created to oversee the development and hosting of the Olympic Games. Following the hosting of the Olympic Games, the organizing committee is eventually wound up, and at this stage there may be a legacies committee (as is the case in Vancouver/Whistler) or no specific entity tasked with following through on Olympic legacies. As the examination of the 2010 Games continues, it is helpful to consider this broad view of Olympic Games organization, in order to understand both the timeframe in which the Olympics are organized, but also how the games organizing entities shift during this time period. Though there may be significant overlap in the individuals who participate in the bid society, Bid Corporation, and organizing committee, the involvement of three entirely separate entities clearly suggests particular issues in developing relationships, participation structures and agreements. With this overview in mind, we may now proceed with the examination and discussion of the 2010 Games themselves.

4.3 Aboriginal Participation in the 2010 Games – The Bid Phase

4.3.1 The Domestic Bid

Canada's domestic bid process related to the 2010 Games was carried out in 1998, and pitted Vancouver/Whistler against Calgary and Quebec City for the right to bid internationally to the IOC.²⁸⁵ Vancouver/Whistler's bid was developed by the Vancouver/Whistler 2010 Bid Society (the "Bid Society"), a group developed on the initiative of local Vancouver businessman Arthur Griffiths, Vancouver Mayor Phillip Owens, and representatives of British Columbia's Minister of Small Business, Tourism

²⁸⁵ *Ibid.*

and Culture.²⁸⁶ The Bid Society developed preliminary plans for Vancouver/Whistler's hosting of the 2010 Games, and was responsible for creating a domestic bid book for submission to the Canadian Olympic Association, and obtaining the support of the municipalities of Vancouver and Whistler for hosting the 2010 Games.²⁸⁷

The Squamish and Lil'wat Nations expressed interest in participating in the Vancouver/Whistler bid from the outset.²⁸⁸ Recognizing that the 2010 Games would be taking place within their traditional territories, Chief Joe Mathias of the Squamish Nation, and Chief Allen Stager and Lyle Leo of the Lil'wat Nation approached the Bid Society to express their interest in participating in the bid process.²⁸⁹ These early efforts of the Squamish and Lil'wat did not result in their formal inclusion within the Bid Society,²⁹⁰ however, it was clear the Bid Society recognized the value of incorporating Aboriginal participation in the planning and hosting of the 2010 Games, through its referencing of Aboriginal participation throughout its domestic bid submissions.²⁹¹ In addition to these references the domestic bid book included a letter of support from the Squamish Nation, which expressed the desire of the Squamish to develop mutual opportunities to create legacies for Squamish people, and directly referenced involvement in cultural programming.²⁹²

This early inclusion of the Squamish and Lil'wat clearly reflected very early Aboriginal participation in contrast to past Olympic Games (which at this stage did not

²⁸⁶ Legislative Library Olympic Timeline, *supra* note 189.

²⁸⁷ City of Vancouver, Administrative Report RTS No: 00094, *Deputy City Manager Report to Standing Committee on City Services and Budgets Committee Regarding 2010 Olympic Bid: Issues and Current Status* (28 September, 1998), online: The City of Vancouver <<http://vancouver.ca/ctyclerk/cclerk/981008/csb2.htm>>.

²⁸⁸ Dunn, *supra* note 20 at 74 & 75.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.* at 75.

include the 2000 Sydney Games). However, the participation of the Squamish and Lil'wat was not particularly formal, and the supporting letter from the Squamish indicated that the emphasis of this early participation was largely based on cultural opportunities, which closely reflects the subject matter of previous Aboriginal participation in the Olympics. Nevertheless, it was clear that the Squamish and Lil'wat were seeking more substantive involvement than in past Olympics, and their early involvement reflected their desire, and the Bid Society's interest, in exploring greater Olympic opportunities for the two Nations. This early inclusion would also seem to reflect the guidance provided by the judiciary in *Haida Nation* and subsequent decisions which indicate the importance of incorporating Aboriginal perspectives from the outset of decision making processes. In this regard, the 2010 Games would seem to have succeeded where the Crown so often fails. However, at this early stage the Musqueam and Tsleil-Waututh were conspicuous by their absence, and in relation to these two Aboriginal groups, the domestic bid had not succeeded where past Olympics or Crown efforts had failed. This absence may have been based on early visions of how the 2010 Games would be developed, and an understanding that the majority of activity would take place in Squamish and Lil'wat traditional territories, rather than Musqueam and Tsleil-Waututh. This may be legally sound, based on the *Haida Nation* principles, it clearly reflects the limitations of the legal doctrine to incorporating Aboriginal participation. Nevertheless, the domestic bid reflected more substantive Aboriginal involvement than had previously been seen in an Olympic context, setting the stage for the development of the international bid.

On December 1, 1998, the Canadian Olympic Association chose Vancouver/Whistler to represent Canada internationally, in the competition to host the 2010 Olympic and Paralympic Games.²⁹³ The Bid Society was then replaced by the Vancouver/Whistler 2010 Winter Olympic and Paralympic Games Bid Corporation (the “Bid Corporation”) in June of 1999, which became responsible for the development of the Vancouver/Whistler international bid for the 2010 Games (the “Bid”).²⁹⁴

4.3.2 The International Bid

The Bid Corporation reaffirmed the commitment of the Bid Society to incorporating Aboriginal participation in the planning and hosting of the 2010 Games, stating that it was understood that having the support of Aboriginal peoples and active Aboriginal participation would enrich the Bid, and ultimately the Games themselves.²⁹⁵ Additionally, the early engagement of the Bid Society by the Squamish and Lil’wat indicated to the Bid Corporation the extensive level of participation desired by the Squamish and Lil’wat Nations.²⁹⁶ Furthermore, emerging jurisprudence articulating the existence of Aboriginal title,²⁹⁷ and the necessity for consultation of Aboriginal peoples during projects which may affect their constitutionally protected rights²⁹⁸ created a backdrop of legal risk regarding much of the necessary construction projects intended for the Sea-to-Sky corridor.²⁹⁹ Finally, at precisely the time during the Bid Corporation’s

²⁹³ Legislative Library Olympic Timeline, *supra* note 189 at 3. *Sagen*, *supra* note 285.

²⁹⁴ Legislative Library Olympic Timeline, *ibid.* at 4.

²⁹⁵ Dunn, *supra* note 20 at 75-6.

²⁹⁶ *Ibid.* at 77.

²⁹⁷ *Delgamuikw*, *supra* note 180.

²⁹⁸ *Haida Nation v. British Columbia (Forests)*, 2002 BCCA 157, [2002] 6 W.W.R. 243, with supplementary reasons 2002 BCCA 462, 5 B.C.L.R. (4th) 33, *aff’d in part, rev’d in part Haida Nation*, *supra* note 9.

²⁹⁹ Dunn, *supra* note 20 at 78. See also Vancouver 2010 Bid Corporation, Vancouver 2010 Bid Corporation, *Vancouver 2010 Olympic Winter Games Bid Book Submission to the International Olympic*

formation (June 1999), the IOC was adopting Agenda 21 as a guiding document for the Olympic movement, and its express statement recognizing the need for strengthened roles for indigenous peoples in the Olympic movement.³⁰⁰

This confluence of factors created a setting in which Aboriginal participation in 2010 Games could be viewed as an element which would enrich and add a competitive element to the Bid, but was also required from a legal and practical perspective given the level of construction and development taking place in Aboriginal traditional territory, in particular Squamish and Lil'wat claimed territories. The Bid Corporation, recognizing the importance of Aboriginal participation to the Bid and 2010 Games, conceptualized a dual approach to the inclusion of Aboriginal peoples in the 2010 Games.³⁰¹ The Bid Corporation viewed one element of incorporating Aboriginal participation as encouraging the broad inclusion of Aboriginal peoples throughout Canada in the 2010 Games.³⁰² The second, and more substantial element, of the Bid Corporation's approach to Aboriginal participation involved relationship building with the Nations, and structuring more direct involvement and benefits for the Nations in the planning and hosting of the 2010 Games.³⁰³

The development of this dual approach by the Bid Corporation again reflected a far more substantive approach to Aboriginal participation than had been seen in previous

Committee (Vancouver: online: Vancouver 2010 <http://www.vancouver2010.com/more-2010-information/about-vanoc/organizing-committee/bid-history/bid-book/bid-book_88094qM.html>, 2003) ["Bid Book"] at 128-9 (*Venues*).

³⁰⁰ International Olympic Committee, *Olympic Movement's Agenda 21: Sport for sustainable development* (Lausanne: online: International Olympic Committee Sport and Environment Commission <http://multimedia.olympic.org/pdf/en_report_300.pdf>, 1999) at s.3.3.3 "Indigenous populations have strong historical ties to their environment and have played an important part in its preservation. The Olympic Movement endorses the UNCED action in favour of their recognition and the strengthening of their role."

³⁰¹ Dunn, *supra* note 20 at 75-6.

³⁰² *Ibid.* at 76.

³⁰³ *Ibid.*

Olympic Games. Additionally, it clearly reflected a commitment to ensuring that Aboriginal participation would be more structured, and ongoing, which mirrors key guidance provided by the judiciary on developing appropriate consultation and accommodation processes. It is notable that the Bid Corporation's plans for Aboriginal participation were not overly rigid, but rather, were merely expressions of broad approaches to pursuing Aboriginal participation in the 2010 Games. The specifics how broad inclusion of Aboriginal peoples would occur, or the development of partnerships with local First Nations would be carried had not been determined or decided, which is the approach expressly approved by the judiciary. By adopting some formal outline to pursuing Aboriginal participation, but avoiding unnecessary (and unilateral) rigidity, the Bid Corporation effectively demonstrates an approach which pre-empts "unstructured", but also displays the necessary flexibility to ensure the issues indicated in *Gitanyow* are avoided, and consultation will still be meaningful. It is notable that the development of Aboriginal participation at this stage was entirely through the efforts of the Squamish, Lil'wat and the Bid Society and Corporation, and had not yet involved the Crown.

4.3.3 The International Bid – Broad Aboriginal Participation

The Bid Corporations' approach to encouraging the broad participation of Aboriginal communities outside of the Nations involved the development of an Aboriginal Participation Strategy (the "Strategy").³⁰⁴ The creation of the Strategy began with the hiring of Iain Tait as a Community Relations Director. Tait had previous experience in working with Aboriginal communities, specifically in the context of large sporting events such as the Victoria 1997 North American Indigenous Games, the

³⁰⁴ *Ibid.*

Winnipeg 2002 North American Indigenous Games, and the Cowichan 2008 Indigenous Games.³⁰⁵ Tait developed the Strategy for the Bid Corporation with the input of an Aboriginal Participation Work Group, which included representation from a number of Aboriginal organizations. The Strategy was developed with the intention of guiding the future (should the Bid prove successful) organizing committee's approach to broad Aboriginal participation.³⁰⁶ Specific details on the content of the Strategy were not obtained through the research efforts here, but as the examination of Aboriginal participation in the 2010 Games continues, the content of the Strategy will be made apparent.

As noted above, the development of the Strategy demonstrates the desire of the Bid Corporation, acting as project proponent, to ensure Aboriginal participation was formally pursued. That Aboriginal perspectives were incorporated into the development of the Strategy is also notable, and would seem to adhere to the guidance provided in *Dene Tha'* and *Brokenhead* which indicates the importance of including Aboriginal perspectives in the development of Aboriginal consultation and accommodation structures and strategies. However, the Strategy was not directly concerned with the impacts of the 2010 Games to those Aboriginal groups whose traditional territories the Olympics were to occur in. Rather, the Strategy was intended to pursue broader Aboriginal participation throughout Canada, and in this regard the Strategy was also unique as past Canadian Olympics had not sought such nation – wide inclusion.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.* See also Vancouver 2010 Bid Corporation, *Vancouver 2010 Preliminary Impact Assessment* (British Columbia: online: Legislative Library of British Columbia <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/361736/prelim_impact_assessment_ov.pdf>, 2003).

4.3.4 The International Bid – Local Aboriginal Participation

While the inclusion of broad Aboriginal participation would ensure that First Nations throughout Canada would have opportunities to participate in the 2010 Games, it was clear that the more significant aspect of Aboriginal participation for the 2010 Games would come through the involvement of Squamish, Lil'wat, Musqueam and Tsleil-Waututh First Nations, the Aboriginal groups within whose traditional territories the 2010 Games would occur. Though the Bid Corporation approached the broad participation of Aboriginal peoples through the development of a coordinated strategy, the Bid Corporation efforts aimed at developing relationships with the regional Aboriginal groups and incorporating their participation were not guided by a parallel, more formal strategy. Rather, the participation of these specific Aboriginal groups was pursued in a less structured fashion, with the Squamish and Lil'wat involvement coming earlier, and being largely separate from the involvement of the Musqueam and Tsleil-Waututh.

The early involvement of the Squamish and Lil'wat Nations in the domestic bid led to their inclusion on the Bid Corporation's Board of Directors. The Squamish and Lil'wat were each invited to fill a seat on the Bid Corporation's Board during its inception, with Chief Joe Mathias and later Chief Gibby Jacob representing the Squamish, while Band Councillor Lyle Leo represented the Lil'wat.³⁰⁷ Following the inclusion of the Squamish and Lil'wat representatives on the Bid Corporation's Board of Directors, an Aboriginal Secretariat was created within the Bid Corporation. The Secretariat was comprised of further Squamish and Lil'wat representatives, with

³⁰⁷ Dunn, *supra* note 20 at 77.

\$150,000 funding provided each by the Federal and Provincial Governments.³⁰⁸

Ultimately the Secretariat proved less than effective, with participants citing difficulties incorporating the Secretariat within the rest of the Bid Corporations activities.³⁰⁹ Though this is not entirely clear from the information available, it seems likely that any ineffectiveness of the Aboriginal Secretariat may have played a role in the less structured approach to pursuing the involvement of the host First Nations, and in particular, the Musqueam/Tsleil-Waututh.

Representatives of the Musqueam and Tsleil-Waututh were notably absent from this level of participation during the early stages of development of the Bid Corporation. This early emphasis on Squamish/Lil'wat participation was largely spurred by the significant number of developments which would be taking place within Squamish/Lil'wat traditional territory.³¹⁰ The proposed plans called for the construction of an entirely new Nordic centre and athletes' village on undeveloped, Crown held lands within Squamish/Lil'wat traditional territories.³¹¹ In contrast, the Olympic construction proposed within Musqueam/Tsleil-Waututh traditional territories was slated for development on privately held lands,³¹² which substantially weakens the claims of the Musqueam or Tsleil-Waututh to Aboriginal rights or title over those lands, and lessens the potential impacts of development to those claims.³¹³ As *Haida Nation* indicates, these

³⁰⁸ Canada, *Canada's Games: Aboriginal Participation*, online: Canada's Games <<http://www.canada2010.gc.ca/obj/pa-ap/040201-eng.cfm>>.

³⁰⁹ Dunn, *supra* note 20 at 77.

³¹⁰ *Ibid.* at 78 & 98.

³¹¹ Bid Book, *supra* note 299 at 128-29 (*Venues*), & 187 (*Olympic Village*), & 112-20 (*Communications and Media Services*) where Bid Corporation outlines new construction proposed for hosting the 2010 Games.

³¹² *Ibid.*

³¹³ See *Delgamuukw*, *supra* note 180 paras. 143-159 for discussion of proof of Aboriginal title and importance of exclusivity and continual use of land by Aboriginal claimants to the strength of their claims to Aboriginal title. *Delgamuukw* demonstrates that in circumstances where lands have been privately held

differences between strength of claim and potential impacts to claimed rights and title directly correlate to the level of consultation and accommodation required.³¹⁴ Therefore, it might be expected that the Squamish/Lil'wat involvement would be more substantial than the Musqueam/Tsleil-Waututh. However, the concept of a legal duty to consult and accommodate Aboriginal peoples had not fully crystallized at this time³¹⁵ and almost certainly the more substantial element which acted as a strong incentive to ensure meaningful participation of the Squamish and Lil'wat, was the very nature of the Olympics. Tight deadlines, global media attention, and the resulting potential for public relations disasters, are integral elements of hosting an Olympic Games, and the potential for conflicts with the Squamish and Lil'wat on many key Olympic projects was undoubtedly the more significant factor which provided the Squamish/Lil'wat Nations with increased leverage to pursue their 2010 Games participation.³¹⁶ Indeed, the importance of these factors must not be understated, as the “incentive” such factors create to develop mutually acceptable solutions may hold specific implications for the lessons flowing from Aboriginal participation in the 2010 Games.

While continuing their involvement with the Bid Corporation's board, and Aboriginal Secretariat, the Squamish and Lil'wat chose to formalize their joint efforts in

for significant periods of time, especially prior to the *Constitution Act, 1982* that Aboriginal claims will likely be much weaker. This largely describes the development proposed within the Cities of Vancouver and Richmond for the 2010 Games.

³¹⁴ See Chapter 3.3, above, at 82-85 for discussion of *Haida Nation* and jurisprudence describing the scope of the Crown's duty to consult and accommodate Aboriginal peoples.

³¹⁵ See Chapter 3.3, above, at 76-78 for description of the development of jurisprudence.

³¹⁶ See e.g. Dunn, *supra* note 20, at 97 quoting Terry Wright of VANOC, ““The IOC in its evaluation were very careful to independently interview the First Nations and make sure that in fact they were supportive and that they had believed they were fairly treated and those independent interviews affirmed what we were saying which was obviously important to the IOC's perception of the project.”” This quote indicates the IOC's interest in ensuring that purported Aboriginal support for the 2010 Games was legitimate, and reveals the importance which such issues hold in hosting an Olympic Games.

participating in the Bid and 2010 Games through the creation of a Protocol Agreement.³¹⁷ Signed during March of 2001, the Protocol Agreement identified common objectives of the Squamish and Lil'wat Nations, and identified the goals of exploring co-management and joint decision making among the two First Nations.³¹⁸ The Protocol Agreement identified three common objectives among the Squamish and Lil'wat Nations: first, to respect the historic and current presence of the Squamish and Lil'wat in the region; second to protect their respective Aboriginal rights and title; and third, to take advantage of economic opportunities, including the proposed 2010 Games.³¹⁹ In addition to identifying these objectives, the Protocol Agreement signaled the commitment of the Squamish and Lil'wat Nations to make and implement decisions concerning activities within their traditional territories jointly, and to "to examine the possibilities of shared jurisdiction and co-management."³²⁰

The identification of common objectives and exploration of joint decision making and co-management may not appear particularly significant, however, by coordinating their efforts, the Squamish and Lil'wat positioned themselves to exert greater leverage in their participation with the Bid Corporation, and obtain guaranteed benefits from their participation in, and support for, the Bid and future involvement in the development and hosting of the 2010 Games. Indeed, as was revealed in the review of Aboriginal participation in the Salt Lake City Games, the lack of coordination amongst Utah

³¹⁷ Squamish Lil'wat Cultural Centre, *Protocol Agreement*, online: Squamish Lil'wat Cultural Centre <<http://www.slcc.ca/about-us/tale-of-two-nations/protocol-agreement>>. See also British Columbia, Ministry of Aboriginal Relations and Reconciliation, *Squamish Nation: Other Activities*, online: Ministry of Aboriginal Relations and Reconciliation, BC First Nations, Squamish Nation <<http://www.gov.bc.ca/arr/firstnation/squamish/default.html>>.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ Squamish Lil'wat Cultural Centre, *ibid.* at para. 2.

Aboriginal groups served as a major barrier to success.³²¹ Additionally, the approach adopted by the Squamish and Lil'wat marks an interesting approach in light of the jurisprudence considering the Crown's duty to consult and accommodate. In several cases, such as *Dene Tha'* or *Brokenhead*, consultation processes involved a number of different Aboriginal groups, and it seems readily apparent that one of the difficulties the Crown has encountered in such situations is structuring effective consultation processes for all Aboriginal groups involved.³²² The approach of the Squamish and Lil'wat to coordinate their own efforts illustrates a unique approach by two Aboriginal groups to structure their own engagement, and as will be revealed below, developing such coordination significantly improved their ability to engage with their project proponents (the Bid Corporation) and the Crown. Indeed, the collaborative approach adopted by the Squamish and Lil'wat carries obvious lessons for structuring more effective Aboriginal participation efforts in the future, both in the Olympics, and more generally.

In August of 2002, as the Bid Corporation was finalizing the Bid Book for submission to the IOC,³²³ the Squamish and Lil'wat Nations indicated their expectations that they would see similar benefits from participation in the development and hosting of the 2010 Games as other partners and host communities.³²⁴ The Squamish and Lil'wat expressed this expectation shortly after The Resort Municipality of Whistler received a substantial package of benefits, including the addition of 300 acres of Provincial Crown land to its municipal boundaries, for its participation and support for hosting the 2010

³²¹ See Chapter 2.7, above, at 48-51 for discussion of issues encountered in Aboriginal participation in the Salt Lake City Games.

³²² See Chapter 3.4, above, at 98-102 for discussion of *Dene Tha'* and *Brokenhead*.

³²³ Legislative Library Olympic Timeline, *supra* note 189 at 4.

³²⁴ Dunn, *supra* note 20, at 78-9.

Games.³²⁵ These benefits, as well as Whistler's obligations, were formalized through the negotiation of a Multiparty Agreement (the "MPA").³²⁶ The MPA was negotiated amongst the Olympic partners supporting the Vancouver/Whistler Bid, namely the Federal Government, the Province of British Columbia, the City of Vancouver, Canadian Olympic Association, Canadian Paralympic Association, and the Bid Corporation, under which the responsibilities and benefits of each were clearly outlined.³²⁷ The Squamish and Lil'wat felt their continued support of the Bid warranted similar benefits and legal commitments, and approached the Bid Corporation with the intention of obtaining a formal agreement addressing their concerns.³²⁸

During these negotiations, and the Squamish and Lil'wat's expression of interest, the British Columbia Court of Appeal had released its ruling which preceded *Haida Nation* and *Taku Tlingit*, in which the Court of Appeal recognized the duty of the Crown to consult and accommodate Aboriginal peoples, but had also imparted this duty on private parties.³²⁹ Though these concepts had not fully crystallized, and the Court of Appeal's decision had been appealed to the Supreme Court of Canada,³³⁰ it was apparent to the Bid Corporation and the Province that the current consultation and accommodation

³²⁵ *Ibid.* See also, Whistler Host Mountain Resort, "Investing in the Dream: Whistler – Host Mountain Resort 2010 Olympic and Paralympic Games 2010 Winter Games Budget" (September 2008) online: <<http://www.whistler2010.com/pdf/investing-in-the-dream.pdf>>.

³²⁶ *Multiparty Agreement for the 2010 Winter Olympic and Paralympic Games*, Government of Canada represented by Minister of Canadian Heritage), Government of British Columbia (represented by Minister of Community, Aboriginal and Women's Services, City of Vancouver, Resort Municipality of Whistler, Canadian Olympic Committee, Canadian Paralympic Committee & Vancouver 2010 Bid Corporation, 14 November 2002, online: Canada's Games <<http://www.canada2010.gc.ca/role/gc/mpa/MPA-e.PDF>> ["MPA"].

³²⁷ *Ibid.*

³²⁸ Dunn, *supra* note 20 at 78-79.

³²⁹ See *Haida Nation* BCCA decision, *supra* note 298. Note, this aspect of the BCCA decision was overturned by the Supreme Court of Canada in *Haida Nation*, *supra* note 9. See Chapter 3.3., for discussion of *Haida Nation*, *Taku Tlingit* and *Mikisew Cree* for explanation of why duties to consult and accommodate apply only to the Crown.

³³⁰ *Ibid.* leave had been granted November 14, 2002.

afforded to the Squamish and Lil'wat would likely be inadequate under this emerging doctrine.³³¹ Additionally, it was apparent that Aboriginal support for the 2010 Games would be crucial to the success of the Bid, and organization of the 2010 Games.³³² Therefore, the Bid Corporation and Province of British Columbia committed to negotiating a benefits agreement for the Squamish and Lil'wat, embarking on an intense process of negotiations which culminated in the Shared Legacies Agreement (the "SLA"),³³³ a document which would shape much of the substantive opportunities for the Nations in the 2010 Games.

The SLA was executed on November 22, 2002, eight weeks after negotiations began, and eight days following the completion of the MPA. The SLA created a slate of benefits for the Squamish and Lil'wat Nations, some of which were guaranteed regardless of the success of the Bid, while others would be extended only should the Bid prove successful. Those benefits guaranteed to the Squamish and Lil'wat were:

- a. the transfer of 300 acres of fee simple land from the Province to the Nations to pursue economic development opportunities within their shared territories;³³⁴
- b. the development of a Skills and Training Legacy Project, to which the Province agreed to contribute \$2.3 million over three years;³³⁵
- c. a naming and recognition project which would see the Province and Nations collaborate to include Aboriginal names for places throughout the Callaghan Valley, the contribution of \$500,000 from the Province in support of the project; and³³⁶
- d. the provision of \$3 million from the Provincial government towards the construction of a proposed \$15 million Squamish and Lil'wat Cultural Centre.³³⁷

³³¹ Dunn, *supra* note 20, at 78-9.

³³² *Ibid.* at 97.

³³³ *Partners Creating Shared Legacies from the 2010 Olympic and Paralympic Winter Games*, Squamish and Lil'wat Nations, Vancouver 2010 Bid Corporation, & Province of British Columbia, 22 November, 2002, (British Columbia: Legislative Library of British Columbia, 2002). ["Shared Legacies Agreement" or "SLA"]

³³⁴ SLA, *ibid.* at 1.

³³⁵ *Ibid.* at 2.

³³⁶ *Ibid.*

³³⁷ *Ibid.* at 2-3.

In addition to these guaranteed benefits, the SLA also outlined an additional five “legacies” to be implemented if the Bid was successful.³³⁸

- a) the Squamish and Lil’wat Nations would be members of a Legacies Society which would own and operate the proposed Nordic Centre, Sliding Centre, and Athlete Centers’ (a combined estimated value of \$170 million),³³⁹
- b) the creation of a \$110 million endowment fund to be established by the Provincial and Federal Governments to assist with the operation of the aforementioned facilities and the proposed speed skating oval as contemplated in the MPA;³⁴⁰
- c) the provision of \$6.5 million by the Bid Corporation towards the construction of 50 moveable houses to form part of the Whistler Olympic Village and to be transferred to the Squamish and Lil’wat Nations for their use and benefit;³⁴¹
- d) a guarantee from the Bid Corporation that the Squamish and Lil’wat Nations would be given significant contracting opportunities in the Callaghan Valley;³⁴² and
- e) the creation of an Aboriginal youth sports legacy endowment fund for the use of all Aboriginal youth in British Columbia, and initial funding of \$3 million towards that fund by the Province.³⁴³

Along with these more specific legacies and benefits, the SLA also addressed the need for the Province to resolve separate agreements with the Nations with regard to the anticipated Sea to Sky Highway expansion,³⁴⁴ the responsibility of the Squamish and Lil’wat to seek the “support and endorsement [of] other First Nations, organizations and communities” for the 2010 Games,³⁴⁵ and a recognition from the parties that a more collaborative and coordinated approach to development in the Callaghan Valley was required.³⁴⁶

³³⁸ *Ibid.* at 3.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.* at 4.

³⁴² *Ibid.* at 5.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* at 4.

³⁴⁵ *Ibid.* at 5.

³⁴⁶ *Ibid.* at 6, “The Parties recognize the need for an enhanced management framework for the Callaghan Valley and will work together to determine both the issues for consideration and the structure of an appropriate body to accomplish this task.

While the SLA provided for a number of substantial benefits to the Squamish and Lil'wat, and outlined some significant responsibilities for both the Bid Corporation and the Provincial Government, the drafting of the SLA did not include details regarding the specific mechanisms or manners in which many of the benefits would be provided, or generally expected commercial agreement provisions related to dispute resolution, limitations of liability or other similar considerations. Indeed, the SLA, though creating significant obligations on the parties, left much of the execution and adherence of the agreement to the good faith dealings of the parties. For example, the Provincial lands to be provided to the Squamish and Lil'wat were to be "selected as several parcels in different areas or as one continuous parcel",³⁴⁷ and "the exact location and use of these lands [was to be] determined by the Nations jointly with the Province after consultation with the Nations' communities and after review of a feasibility study."³⁴⁸ The SLA continually employs the language of "best efforts" and "reasonableness,"³⁴⁹ indicating the parties' emphasis on working collaboratively to insure mutually desirable implementation of the SLA, rather than through strict, detailed and prescriptive contractual language. Reliance on such language demonstrates the extent to which the parties were willing to rely on their future interest and ability to pursue the spirit of the SLA and its provisions.

Though this approach to creating the SLA may have been necessitated by the brief period available for negotiation, and nebulous nature of planning for an event nearly

³⁴⁷ *Ibid.* at 1-2.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.* e.g. at 1, "The Province agrees to use best efforts to ensure that the transfer is done expeditiously and agrees to facilitate any and all processes, to which it has direct control, to ensure that the land can be beneficially used by the Nations in a timely manner."

7 years away,³⁵⁰ the tact taken and language used is nevertheless significant. This imprecision in language required the parties to place a significant level of faith in one another to adhere and implement the SLA in the spirit in which it was executed. The faith displayed by the Squamish and Lil'wat is particularly notable when one considers that the Bid Corporation was an entity whose existence was slated to end some 9 months later.³⁵¹ The Bid Corporation was intended only to facilitate the Vancouver/Whistler Bid, and following the awarding of the 2010 Games, successful or not, the Bid Corporation would be retired. Should the Bid prove successful an organizing committee would be created, and although there was expected to be substantial overlap in the individuals running the Bid Corporation to the operation of the proposed organizing committee,³⁵² this did not alter the essential reliance on a “dying” corporation convincing its successor to implement the SLA. This “un-detailed” nature of the SLA required the parties to continue to work closely and collaboratively on the benefits and obligations addressed, as reliance on the language within the agreement would be insufficiently prescriptive. From this vantage, this characteristic of the agreement may be seen not only as reflective of the circumstances in which the negotiations took place, but also as an element which would shape the relationship of the parties throughout the development of the 2010 Games.

While negotiating the SLA, the Squamish and Lil'wat Nations also participated in discussions related to the negotiation of the MPA. Though the Squamish and Lil'wat were not made parties to the MPA, their input resulted in their inclusion in the contemplated organizing committee through the provision of a jointly held seat on the

³⁵⁰ Dunn, *supra* note 20 at 79, “In many participants' words, ‘it was the fastest negotiation they had ever participated in’ as there was an incredible sense of urgency to reach an agreement prior to the Bid Book submission.”

³⁵¹ Legislative Library Olympic Timeline, *supra* note 189 at 5 and MPA, *supra* note 326.

³⁵² Dunn, *supra* note 20 at 115-7.

committee's board of directors.³⁵³ The MPA provided additional ticketing and accreditation benefits to all the Nations.³⁵⁴ Again, because the Squamish and Lil'wat were not official parties to the MPA (and it is unclear why this was the case) the enforceability of the provisions in the MPA could be cast in some doubt. As with the SLA, it was readily evident that adherence by the as-yet-to-be-formed organizing committee would rest significantly on the individuals involved in the organizing committee acting in accordance with the good faith commitments of the Bid Corporation.

Considering the SLA, and MPA, from the vantage of both historical Aboriginal participation in the Olympics, and the legal context outlined above, the significance of the SLA is made all the more clear. Past Olympic experiences had never involved the development of any comparable agreement, let alone during these early stages, and it was clear that Squamish/Lil'wat participation was set to go far beyond the cultural realm which had typified past Olympic experiences.³⁵⁵ Past Olympics had included direct Aboriginal input into cultural expressions, or ceremonies participation, but had certainly not incorporated Aboriginal participation into the most fundamental elements of Olympic hosting.³⁵⁶ Of particular note was the inclusion of the Squamish and Lil'wat in the organization responsible for carrying out the development and hosting of the 2010 Games, and their direct involvement in most challenging 2010 Games projects. This inclusion placed the Squamish and Lil'wat in a position where their participation was integral to 2010 Games success, and would seem to address many of the criticisms which

³⁵³ MPA, *supra* note 326 at 6 (Section 3.1(a)).

³⁵⁴ *Ibid.* at 11-12 (Section 16).

³⁵⁵ See Chapter 2.8, above, at 51-55 for summary of past Aboriginal experiences in the Olympic Games.

³⁵⁶ See e.g. Chapter 2.6, above, at 39-48 to contrast 2010 Games with Aboriginal participation in the Sydney 2000 Olympic and Paralympic Summer Games which marked what many considered the most successful example of Aboriginal Olympic participation prior to the 2010 Games.

had been leveled at past Olympic experiences.³⁵⁷ The Squamish and Lil'wat would indeed see cultural inclusion, but more significantly they would also have the opportunity to see economic benefits, develop employment opportunities, and pursue longer lasting collaboration on Olympic legacies. Though Cashman suggested in relation to the Sydney Games that it may not be reasonable to expect an Olympics to solve all issues facing Aboriginal peoples,³⁵⁸ it seems readily apparent that the SLA was at least a measured effort to use the 2010 Games as a catalyst on broader issues of marginalization. The economic participation, transfer of lands, and housing legacy at least spoke to the need within Squamish and Lil'wat communities for greater land resources, housing for community members, and creation of economic opportunities. Additionally, contemplation of continued participation in Olympic projects through the Whistler Legacies Society, and the need for greater planning in the Callaghan Valley demonstrate that thought was given to the further work necessary to ensure the 2010 Games would have longer lasting impact for Aboriginal participants. Cashman's assessment of the limitations of Olympic hosting may indeed be accurate, but the SLA at least represented a far more significant attempt to recognize the broader issues facing the Squamish and Lil'wat, and use the Olympics to pursue progress on their solution.

Consideration of the SLA and MPA from a legal context also indicates the significance of these agreements. As the jurisprudence reveals, negotiated agreement is the preferred means of addressing the Crown's duty to consult and accommodate,³⁵⁹ but

³⁵⁷ See e.g. Chapter 2.6, above, at 46-48 for discussion of criticism leveled at the Sydney Games.

³⁵⁸ *Ibid.* includes review of Cashman, *supra* note 123 in which Richard Cashman questioned the reasonableness of believing the Sydney Games could substantively address issues facing Aboriginal peoples.

³⁵⁹ See e.g. Chapter 3.2, above, at 71-74 & Chapter 3.3 86-67 for reference to negotiated settlement and its importance to Section 35(1) and the purposes of recognition and reconciliation.

there often seems to be difficulties in reaching such agreement at early stages of project planning, when many details of development remain unknown.³⁶⁰ This is perhaps particularly so in the case of Aboriginal participation, as the recent nature of the surrounding legal doctrine means there is little experience in how such agreements could be crafted in a commercial setting.³⁶¹ Both the SLA and MPA illustrate a potential solution to such issues, as they demonstrate how parties may produce preliminary agreement on broad objectives and plans, while leaving details and specifics for future consultation or negotiation. Such an approach is not typical in commercial settings,³⁶² but in the context of emerging Aboriginal consultation and accommodation, this broader and more flexible approach may prove valuable. Indeed, such approaches have utilized in other settings, such as natural resource development,³⁶³ but the SLA has the benefit of being more public than most commercial agreements.

The SLA also has an additional aspect which many of these commercial benefit agreements do not,³⁶⁴ namely, the inclusion of the Crown as a party to the agreement. As outlined in the discussion of *Haida Nation* and *Taku Tlingit* it is apparent that the duty to consult and accommodate should be integrated into broader pursuits at recognition and reconciliation, and utilized as a means to further these pursuits.³⁶⁵ This interpretation of

³⁶⁰ See e.g. Chapter 3.4, above, at 95-98 for discussion of *Gitanyow* and *Huu-Ay-Aht* where Crown attempted to rely on negotiating contracts to discharge its duties to consult and accommodate Aboriginal peoples, and a significant issue raised by the Aboriginal complainants was the Crown's desire to finalize settlement on any future claims raised prior to the parties fully understanding the forestry projects in question.

³⁶¹ *Ibid.* *Gitanyow* and *Huu-Ay-Aht* demonstrate this lack of expertise, and its impact on the ability of consultation and accommodation to effect meaningful and effective Aboriginal participation.

³⁶² See, above, at 133 & 136-37 to contrast approach adopted in MPA with that in SLA.

³⁶³ See Courtney Fidler & Michael Hitch, "Impact and Benefits Agreements: A Contentious Issue for Environmental and Aboriginal Justice" (2007) 35:2 *Environments Journal* 49 for discussion of the increasing prevalence of agreements comparable to the SLA for their approach to creating benefits for Aboriginal peoples in relation to development projects which impact their communities.

³⁶⁴ *Ibid.*

³⁶⁵ See Chapter 3.4.1, above, at 89-93.

the jurisprudence clearly suggests that the Crown's participation in the consultation and accommodation process is integral to ensuring these broader objectives are considered, as without Crown participation, the Crown can not gain the greater understanding of Aboriginal perspectives and interests necessary to pursue negotiated settlement, recognition and reconciliation. Additionally, jurisprudence such as *Dene Tha'* and *Brokenhead* indicate that consultation and accommodation processes must be designed to address the concerns raised by Aboriginal peoples, and that many concerns related to broader impacts on claimed rights and title are only within the purview of the Crown to address.³⁶⁶ At the same time, there are clear benefits to including project proponents in consultation and accommodation efforts, as alterations to the plans or incorporation of Aboriginal participation may be most efficiently carried out with project proponent input.³⁶⁷ In the SLA, the benefits of project proponent inclusion, and necessity of Crown involvement, was easily addressed through the negotiation of a tri-partite agreement.

This tri-partite approach allowed the parties to craft the manner in which the Bid Corporation, as project proponent, would carry out ongoing consultation, and project specific accommodation of the Squamish and Lil'wat, (provision of significant contracts, protection of culturally significant areas during development) while the Crown's involvement addressed the need for further discussions of broader regional planning in the Callaghan Valley, further consultation on contemplated projects (the Sea-to-Sky Highway Expansion), and provision of accommodation which was beyond the ability of the project proponent to provide (the 300 acres of land). The involvement of the

³⁶⁶ See Chapter 3.4, above, at 98-101 for discussion of *Dene Tha'* and *Brokenhead*.

³⁶⁷ See Chapter 3.3, above, at 87-88 for reference to *Haida Nation* and discussion of delegating procedural aspects of consultation and accommodation to the private sector, who is often the main project proponent in a proposed development which may impact Aboriginal rights or title.

Provincial Crown was clearly integral to the successful negotiation of the SLA, and it indicates that this Crown involvement did indeed result in the utilization of the Crown's duty to consult and accommodate to spur further, broader negotiations surrounding land use planning; the type of negotiations that characterize the furtherance of recognition and reconciliation processes mandated by Section 35(1).³⁶⁸ This would seem to be a clear example of the integration of a specific duty to consult and accommodate to broader efforts of negotiated settlement, and pursuit of greater recognition and reconciliation. Additionally, the inclusion of the Crown ensured that the honour of the Crown was tied to the general provisions of the SLA, and though the Bid Corporation would eventually dissolve, the Crown's attachment to the SLA may also be seen as imparting greater legal weight to its tenets.³⁶⁹

The provisions developed are also of interest in a legal context, as they too would seem to hold with judicial guidance as to the manner in which consultation and accommodation of Aboriginal interests should occur. In particular, the judicial guidance which emphasized that Aboriginal interests should be prioritized for title lands, and that an infringement of title lands should often be compensated, would seem to be reflected in the provision of 300 acres of Crown land to the Squamish and Lil'wat, of their own choosing, and that the uses to which they chose to put those lands would be supported and facilitated by the Crown. This would seem to closely correspond with the guidance provided in *Delgamuuw* surrounding appropriate means of justifying infringements of

³⁶⁸ See e.g. Chapter 3.2.1, above, at 72-75 & Chapter 3.3.1, above, at 89-93 for discussion of the broader Section 35(1) purposes of recognition and reconciliation.

³⁶⁹ See Chapter 3.3, above, at 87-88 for discussion of *Haida Nation* limiting the duties to consult and accommodate to the Crown because such duties flow from the Crown's assumption of sovereignty, and Section 35(1). Therefore, the "honour of the Crown" and its implications are ultimately applicable to only the Crown, which suggests that Aboriginal negotiations with the Crown may work differently than those with only a private party.

Aboriginal title lands. The consultation and accommodation which took place in this instance was not simply aimed at mitigating impacts to Squamish/Lil'wat claims, but also at furthering Squamish and Lil'wat interests and objectives within their traditional territories. It would be excessive to suggest the SLA provided a perfect solution to Squamish/Lil'wat claims, or that the furtherance of their interests in the SLA would be sufficient to address every issue facing those Nations. However, the SLA does provide an example of how the Crown's duty to consult and accommodate in relation to a specific project, can be used as a catalyst to make progress on furthering Aboriginal interests. This would appear to address concerns that consultation and accommodation processes may merely provide lip-service to recognition and reconciliation, and are more likely to simply rubber-stamp the Crown agenda.³⁷⁰

Yet the SLA was not the only significant agreement at work. The MPA reveals an approach to addressing the ongoing nature of consultation with Aboriginal groups, through the inclusion of the Squamish/Lil'wat on the committee responsible for the proposed project (the 2010 Games). This involvement can be differentiated from the inclusion of Aboriginal representatives within the Sydney bid and organizing committees, as the MPA provided Squamish and Lil'wat leadership with a right to choose their own representative, rather than the unilateral appointment of prominent Aboriginal persons who were not chosen, nor recognized leaders of any particular Aboriginal group or community.³⁷¹ As the Squamish and Lil'wat were only granted a single seat on the organizing committee's board, it is arguable that this may have been insufficient

³⁷⁰ See Chapter 3.3.1, above, at 89-93 for discussion of criticism leveled at *Haida Nation*, *Taku Tlingit* and *Mikisew Cree*, which highlights that this jurisprudence does not ensure the Crown will appropriately consider and account for Aboriginal perspectives and interests. See also Christie, *supra* note 229.

³⁷¹ See Chapter 2.6, above, at 42 for elaboration on Sydney's efforts to incorporate Aboriginal persons into decision making processes.

representation to ensure Squamish and Lil'wat perspectives and concerns were accounted for. However, such an assessment is not borne out by the research, and it seems likely that their position on the board would have at least partially addressed the need for the ongoing consultation of the Squamish and Lil'wat. Additionally, their inclusion within the organization responsible for the larger 2010 Games production, rather than simply one charged only with Aboriginal participation or development in the Callaghan Valley, ensured their inclusion in the broader decision making processes which would undoubtedly influence the manner in which Olympic projects were carried out, and the way in which the Squamish and Lil'wat would be able to participate. Inclusion at this high level is arguably a means to avoid the issues which developed in *Dene Tha'* where the Dene Tha' were excluded from such broader decision making processes, and consultation was subsequently found inadequate.³⁷²

Clearly the SLA and MPA held great significance for the Squamish and Lil'wat in their 2010 Games participation, and indeed the SLA had irrefutably set the stage for much of the major means through which the Squamish and Lil'wat would benefit from their participation. However, these agreements were not the only means through which the Squamish and Lil'wat were incorporated into the development of the Bid.

Additionally, the Squamish and Lil'wat had the opportunity to review and provide feedback on the Bid Book, which included reference to the participation of the Nations.³⁷³

³⁷² See Chapter 3.4, above, at 98-100 for discussion of *Dene Tha'*.

³⁷³ Bid Book, *supra* note 299 at 63 (*Special Sustainability Features: Environmental Protection and Meteorology*), "Local First Nations and urban Aboriginal organizations have worked with Vancouver 2010 to help bring the 2010 Games to Canada. A volunteer Aboriginal Participation Work Group has reviewed the involvement of Aboriginal peoples in past bids, Organizing Committees and Games and planning is underway for extensive involvement of Aboriginal people in the 2010 Games. A comprehensive agreement

In contrast to the early participation of the Squamish and Lil'wat, which began in 1999 at the inception of the international bid, the Musqueam and Tsleil-Waututh did not undertake similar engagement until mid-2002. At that time the Musqueam and Tsleil-Waututh were invited to sit on the Bid Corporation's Board of Directors.³⁷⁴ The Bid Corporation also ensured the Musqueam and Tsleil-Waututh were recognized in the Bid Book as local first nations alongside the Squamish and Lil'wat.³⁷⁵ The Musqueam and Tsleil-Waututh were also addressed in the MPA ticketing and accreditation provisions; however, they were not granted a seat on the contemplated organizing committee board of directors.³⁷⁶

The differential engagement of the Musqueam and Tsleil-Waututh was readily apparent to the Bid Corporation, the Musqueam and Tsleil-Waututh. The Bid Corporation recognized that such differential treatment of the Nations detracted from the Bid, and that pursuing further negotiated agreements was necessary to obtain the support of the Musqueam and Tsleil-Waututh, and that such support would ultimately strengthen the Bid.³⁷⁷ The Musqueam and Tsleil-Waututh also became aware of the SLA and the benefits it provided, and sought to secure similar outcomes for their Nations in exchange for their support and participation in the Bid and 2010 Games. The desire of both the Bid Corporation, and the Musqueam and Tsleil-Waututh to pursue a negotiated agreement spurred discussions in early 2003;³⁷⁸ however, the circumstances surrounding these negotiations set the stage for a far different outcome.

on shared legacies primarily in respect to the Callaghan Valley is being negotiated with the Squamish and Lil'wat First Nations, whose traditional territories overlap this area".

³⁷⁴ Dunn, *supra* note 20 at 80.

³⁷⁵ *Ibid.*

³⁷⁶ MPA, *supra* note 58.

³⁷⁷ Dunn, *supra* note 20 at 80-81.

³⁷⁸ Dunn, *supra* note 20 at 81.

As noted previously, the development proposed within Musqueam and Tsleil-Waututh traditional territory was largely designated for construction on privately held land, rather than Crown land.³⁷⁹ This element significantly altered the level of consultation and accommodation required under the emerging jurisprudence, as potential infringement of Aboriginal rights and title is far less significant on developed, privately owned lands.³⁸⁰ Additionally, with the Bid Book already submitted to the IOC, the urgency associated with a major Bid deadline had passed, and no longer served as a driver of negotiations.³⁸¹ Finally, the Province took the position with regard to the Musqueam and Tsleil-Waututh negotiations that its responsibility to ensure benefits flowed to Aboriginal peoples had been met with the SLA, and that the Federal Government had to share in the responsibilities to the Musqueam and Tsleil-Waututh by providing comparable benefits to those provided in the SLA.³⁸² These circumstances set a backdrop for negotiations which provided far less leverage to the Musqueam and Tsleil-Waututh, and far less initiative to reach agreement amongst the parties.

As a result, the Musqueam and Tsleil-Waututh remained without a written agreement, and comparable benefits to the Squamish and Tsleil-Waututh as the Bid wound towards its climax.³⁸³ Nevertheless, all the Nations participated in the IOC's visit to Vancouver/Whistler in March of 2003, with elected leadership from each of the Nations voicing their support for the Vancouver/Whistler Bid,³⁸⁴ and the IOC taking a

³⁷⁹ Bid Book, *supra* note 299.

³⁸⁰ See Chapter 3.3, above, at 82-83 for discussion of *Haida Nation* and the scope of consultation and accommodation requirements read in light of *Delgamuukw* *supra* note 180 paras. 143-159 discussing strength of claim for Aboriginal title.

³⁸¹ Dunn, *supra* note 20 at 80-1, and Legislative Library Olympic Timeline, *supra* note 189 at 5.

³⁸² Dunn, *ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

particular interest in the participation of the Nations in the Bid. Terry Wright of VANOC stated:

“The IOC in its evaluation were very careful to independently interview the First Nations and make sure that in fact they were supportive and that they had believed they were fairly treated and those independent interviews affirmed what we were saying which was obviously important to the IOC's perception of the project. And I think the IOC has always seen it as a very strong side that the First Nations were as involved and as integrated right from the start in our project and were inside as opposed to being on the outside screaming in as they had seen in other countries in the past.”³⁸⁵

The emphasis of the IOC on the Nations' participation in the Bid, and the developing relationship between the Bid Corporation and the Nations led to the Nations accompanying the Bid Corporation delegation to Prague in July of 2003 for the IOC's awarding of the 2010 Games to one of Vancouver/Whistler, Salzburg, or PyeongChang.³⁸⁶

Although negotiations over the preceding months had proved unsuccessful,³⁸⁷ on July 1, 2003 (the day before the 2010 Games were to be awarded) the Bid Corporation, Musqueam and Tsleil-Waututh Nations reached a non-binding memorandum of understanding outlining the Bid Corporation's commitment to ensuring the Musqueam and Tsleil-Waututh would see comparable benefits to the Squamish and Lil'wat should the Bid prove successful.³⁸⁸ The memorandum of understandings (“MOUs”, one each for the Musqueam and Tsleil-Waututh) stated the parties' desire to “establish an understanding for a productive working relationship that can be recommended to the

³⁸⁵ Dunn, *supra* note 20, at 96-7.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.* at 80-81.

³⁸⁸ *Memorandum of Understanding: Respecting a Cooperative Working Relationship Towards 2010 Olympic Winter Games and Winter Paralympic Games Participation and Legacies*, Tsleil-Waututh Nation & the Vancouver 2010 Bid Corporation, 1 June, 2003 in Dunn *ibid.* at 167 (Appendix D) [“MOU”, collectively “MOUs”] (Interpretation above relies on Tsleil-Waututh MOU alone, as Musqueam MOU not publically available at time of writing).

OCOG [proposed organizing committee] to address issues in a mutually satisfactory manner concerning the [Tsleil-Waututh and Musqueam Nations'] ongoing support, participation and legacy benefits related to the Games.”³⁸⁹

The MOUs identified a list of potential legacies and benefits the Tsleil-Waututh and Musqueam Nations wished to pursue and desired support from the Bid Corporation and the OCOG. Those benefits identified are:

- a) opportunities for venue construction and road building;
- b) opportunities for additional housing;
- c) opportunities for cultural interpretation and communication;
- d) opportunities to provide a service facility at Vancouver Athlete's Village;
- e) opportunities to establish a Heritage Interpretation Centre within an expanded Vancouver Convention and Exhibition Centre;
- f) opportunities to expand the Tsleil-Waututh Takaya Tours enterprise; and
- g) opportunities to expand the Inlallawatash Lands/Indian River Valley ecotourism and ecoforestry developments.³⁹⁰

The MOUs also addressed the inclusion of the Musqueam and Tsleil-Waututh in developing policies on ceremonial procedures,³⁹¹ their ability to appoint representatives to any committees or working groups established by the organizing committee,³⁹² and an invitation to the Nations to provide input into the organizing committee's cultural plan, procurement policy and participation policy.³⁹³ In addition to identifying desired legacies and articulating commitments to collaborative partnership, the MOUs also set forth the notion of responsibilities for the Musqueam and Tsleil-Waututh. The MOUs stated that the Tsleil-Waututh and Musqueam would be expected to support the Bid Corporation and

³⁸⁹ *Ibid.* at 168.

³⁹⁰ *Ibid.* 169-70.

³⁹¹ *Ibid.* at 168-9.

³⁹² *Ibid.*

³⁹³ *Ibid.*

the proposed organizing committee in their efforts to bid and host the 2010 Games.³⁹⁴ Of equal importance, the MOU stated that that Musqueam and Tsleil-Waututh:

“[agree] to participate in the development and operation of a Host Nations’ secretariat/committee...In which each Host Nation will, for the purpose of preparing for and hosting the Games, work cooperatively together with each other and the OCOG to ensure a successful Games.”³⁹⁵

This provision in the MOUs marked an important shift in the Bid Corporation and Nations relationship towards a coordinated approach to Aboriginal engagement which would encompass each of the Nations, and move the parties away from the divergent paths of participation for the Squamish/Lil’wat and the Musqueam/Tsleil-Waututh seen during the Bid.

The MOUs signaled the intention of the parties to develop legacies and benefits for the Musqueam and Tsleil-Waututh Nations that were comparable to those provided to the Squamish and Lil’wat in the SLA. However, the non-binding nature of the MOUs³⁹⁶ meant such commitments carried little legal weight or enforceability. As with the SLA, the Bid Corporation’s impending demise required the Musqueam and Tsleil-Waututh to place a great deal of trust in the Bid Corporation representatives to convince the proposed organizing committee to meet the contemplated obligations. Without the backing of the Federal or Provincial Government, these MOUs provided far less comfort than seen in the SLA. Jack Poole, CEO of the Bid Corporation, in discussing the negotiation of the MOUs, was quoted as saying:

“As we got a little more skilled and knowledgeable, we realized that there were Four Host First Nations. They (the two Nations that weren’t part of the SLA) chose to trust us, to sign the agreement (MOU) in Prague. They chose to trust us

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.* at 169

³⁹⁶ *Ibid.* at 170

that they would be treated similarly. Chief Leonard George said we've decided we're going to trust you. That puts a lot of pressure.”³⁹⁷

Unlike the SLA, the MOU did not carry specific commitments regarding the accommodation or participation of the Musqueam and Tsleil-Waututh, nor did it include the participation of either the Federal or Provincial Crown. In contrast to past Olympic Games, the MOU would indeed have been seen as significant, as such an agreement, however non-binding, had not been achieved.³⁹⁸ Yet what may have been seen as a success in light of previous Olympics seems far less significant in light of the SLA and the level of participation it provided to the Squamish and Lil'wat. The MOU also contemplated the inclusion of the Musqueam and Tsleil-Waututh in a far more substantive fashion than had been seen in previous Olympics, and importantly, the pursuit of substantive involvement in the planning of the Games, and development of economic opportunities and other legacies from 2010 Games participation. Indeed, the MOU also contemplated progress on broader issues facing the Musqueam and Tsleil-Waututh, providing the MOUs, like the SLA, with provisions speaking towards larger recognition and reconciliation processes.³⁹⁹ However, the MOU was simply not as concrete as the SLA, and therefore, it remained less clear whether its provisions would prove successful.

Considering this development from a legal context, the less significant MOU is arguably justified. The Crown's duty to consult and accommodate in relation to the Musqueam and Tsleil-Waututh would have been at the lower end of the spectrum, and there was little risk posed by the contemplated Olympic projects to the claims of the

³⁹⁷ *Ibid.* at 117.

³⁹⁸ See Chapter 2.8, above, at 51-55 for review of Aboriginal participation in past Olympiads.

³⁹⁹ See Chapter 3.2.1 & Chapter 3.3.1, above, for discussion on the purposes of recognition and reconciliation underlying Section 35(1).

Musqueam and Tsleil-Waututh.⁴⁰⁰ Therefore, the need for Musqueam and Tsleil-Waututh inclusion on the Bid Corporation's Board at an earlier stage, or the need for their inclusion on the contemplated organizing committee's board would arguably be unnecessary.⁴⁰¹ A similar assessment could be made regarding the need to provide the Musqueam or Tsleil-Waututh with accommodation.⁴⁰² Such an assessment clearly reveals the limitations of the duty to consult and accommodate to address the marginalization of Aboriginal people. Only in those instances where Aboriginal rights or title are at risk will the Crown be obliged to pursue Aboriginal perspectives and participation. Therefore, while Section 35(1) and resulting jurisprudence may have created an important tool in the movement towards recognition and reconciliation, the examination of the early participation of the Musqueam/Tsleil-Waututh in the 2010 Games provides a clear indication of its insufficiency in providing a complete answer to the marginalization of Aboriginal peoples.

Additionally, the disparities during the Bid between Squamish/Lil'wat success, and Musqueam/Tsleil-Waututh achievements would seem to provide a clear indication of just how significant the early inclusion of Aboriginal peoples, as required under the duty to consult and accommodate,⁴⁰³ can be to the outcomes of such consultation and accommodation. Though the earlier involvement of the Squamish and Lil'wat was not

⁴⁰⁰ See Chapter 3.3, above, at 82-85 for discussion of the scope of Crown duties to consult and accommodate Aboriginal peoples in *Haida Nation*.

⁴⁰¹ *Ibid.* See especially *Spar Haida Nation*, *supra* note 9 at para. 43, "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."

⁴⁰² *Haida Nation*, *ibid.* at paras. 44-45 "At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required"

⁴⁰³ See Chapter 3.4, above, at 98-100 for examination of *Dene Tha'* which provides discussion on importance of early inclusion to appropriately discharge the Crown's duty to consult and accommodate Aboriginal peoples.

the only difference amongst the Nations, it seems clear that this earlier involvement did indeed facilitate the parties' ability to craft concrete means of participation, and develop a more meaningful agreement. In this regard, the disparities between the SLA and MOU may serve as a clear example of the importance of the early consultation of Aboriginal peoples.

Despite the disparities between the MOU and SLA, the MOU was nevertheless significant, and indeed displayed some laudable traits. As with the SLA, the MOU represented some form of initial agreement on Musqueam and Tsleil-Waututh participation in the 2010 Games, and highlighted specific forms of participation and accommodation which the parties wished to pursue. This is also reflective of the judiciary's support for negotiated agreements,⁴⁰⁴ and can also be viewed as a unique way of reaching broad understandings in circumstances in which more detailed consensus is challenging to achieve.⁴⁰⁵ Additionally, the agreement contemplates the pursuit of specific Musqueam and Tsleil-Waututh priorities and interests as evidenced by the reference to established tourism enterprises of the Nations.⁴⁰⁶ Furthermore, the need for the continued consultation and participation of the Musqueam and Tsleil-Waututh was addressed. However, without the inclusion of the Crown, links to broader recognition and reconciliation efforts were not available, nor was the honour of the Crown directly engaged to ensure the principles of the MOU would be adhered to by any subsequent organizing committee. In other words, the MOU, though meaningful, left much work for

⁴⁰⁴ See e.g. Chapter 3.2, above, at 71-74 & Chapter 3.3 86-67 for reference to negotiated settlement and its importance to Section 35(1) and the purposes of recognition and reconciliation.

⁴⁰⁵ For example, the approach adopted in the MOUs is substantially different than those applied in *Gitanyow* and *Huu-Ay-Aht* discussed in Chapter 3.4, above, at 94-98 in which the negotiation process utilized by the Crown was characterized as overly rigid, and therefore breached the duty to consult and accommodate.

⁴⁰⁶ See Chapter 3.2, above, for discussion of the importance of prioritizing Aboriginal interests as evidenced by *Van der Peet*, and *Delgamuukw* to the objectives of recognition and reconciliation.

the Musqueam, Tsleil-Waututh, organizing committee, and Crown to carry out if benefits similar to those in the SLA were to be achieved.

The day following the execution of the MOUs, July 2, 2003, Vancouver/Whistler was awarded the 2010 Games by the IOC.⁴⁰⁷ It was clear to the Bid Corporation, that the support and participation of the Nations had been central to the success of the Bid. The IOC had specifically highlighted the importance of Aboriginal participation to the success of the Bid in its Evaluation Report of the Bid.⁴⁰⁸ This report noted that "one of the most significant legacies (if Vancouver were awarded the Games) is the involvement of the First Nations in the planning process and post-Games legacies."⁴⁰⁹ Again, Jack Poole was quoted as saying "if it hadn't been for the full support of the FHFN in our bid, we likely wouldn't be talking about Vancouver 2010 today."⁴¹⁰ The importance of Aboriginal participation to the success of the Bid may have been evident, but it was less clear whether the framework of relationships and understandings between the Bid Corporation, the Nations and other Olympic partners would indeed result in the meaningful participation and benefits envisioned by the Nations.

4.3.5 The Bid Phase: Discussion

While the elements which contributed to Aboriginal participation during the development of the Bid were outlined and discussed above, it is worth pausing to further consider the importance of this stage of Olympic hosting, before moving on to examine how the Nations, organizing committee, Federal and Provincial Crown implemented the

⁴⁰⁷ Legislative Library Olympic Timeline, *supra* note 189 at 5.

⁴⁰⁸ International Olympic Committee, *Report of the IOC Evaluation Commission for the XXI Olympic Winter Games in 2010*. (Lausanne: online: International Olympic Committee <http://multimedia.olympic.org/pdf/en_report_703.pdf>, 2003).

⁴⁰⁹ *Ibid.* at 43.

⁴¹⁰ Dunn, *supra* note 20 at 84.

SLA and MOU, and sought further means for Aboriginal participation in the 2010 Games. Of primary importance is the recognition of the importance the Bid Phase had in shaping Aboriginal participation in the 2010 Games, and the elements which contributed to this significance.

As noted above, the SLA and MOU both marked significant stages in the structuring of the participation of the Squamish/Lil'wat and Musqueam/Tsleil-Waututh respectively. The importance of these earlier agreements for the 2010 Games can not be over-stated, and their implications for both future Olympic Games and structures for Aboriginal consultation and accommodation are readily apparent. This suggests that for future Olympics, the incorporation of Aboriginal participation should occur at the bid stage, and indeed should inform the earliest stages of planning. Such an approach allows the parties the greatest opportunities to highlight opportunities for meaningful Aboriginal participation, and inclusion in the structures for organizing and development of an Olympics. Inclusion at later stages of Olympic planning makes such incorporation all the more challenging, as the structure of organizing committees and plans for Olympic projects become increasingly crystallized and more challenging to alter. Additionally, the SLA and MOU marked the participation of Aboriginal peoples in Olympic planning and projects far beyond the cultural realm, and again this suggests that if future Olympic Games hope to produce lasting legacies for Aboriginal peoples, participation in these more fundamental aspects to Olympic hosting should be pursued.

The implications are similar for structuring broader Aboriginal participation efforts, or consultation and accommodation processes. The disparities between the SLA and MOU provide a practical example of how legal principles requiring the inclusion of

Aboriginal peoples at the earliest stages of project planning may indeed produce real differences in the achievements of consultation and accommodation efforts. The earlier inclusion of the Squamish and Lil'wat clearly influenced their ability to engage in more fulsome consultation, which resulted in the negotiation of a substantive agreement addressing continuing needs for consultation, and specific accommodation in relation to Olympic projects within Squamish and Lil'wat traditional territories. Additionally, the earlier involvement of the Squamish/Lil'wat clearly influenced their greater incorporation into decision making structures and processes, which is reflective of the issues raised in *Dene Tha'*, and provides a practical example of such issues may be avoided in future. Clearly, these points illustrate that in broader contexts of Aboriginal participation, early inclusion must certainly be made a priority.

An additional difference between the MOUs and SLA which provides valuable insight was the inclusion of the Crown as a party to the SLA, and their noticeable absence from the MOUs. Though the differences between the MOUs and SLA are not entirely attributable to this characteristic, the review of the agreements above is clearly reflective of how the Crown's involvement in consultation can result in progress on broader recognition and reconciliation efforts. These agreements demonstrate how consultation and accommodation processes which occur in relation to a single project or initiative may be utilized to drive progress on broader recognition and reconciliation processes. This suggests that meaningful Aboriginal participation should seek to leverage the momentum which projects often create to pursue broader recognition and reconciliation processes. However, as the negotiation of the MOUs and SLA make plainly evident, it can be challenging at the earliest stages of a project to precisely determine what subjects should

be under discussion, or how broader Aboriginal interests may be pursued. Again, the MOUs and SLA provide an example of how flexible contractual language which emphasizes broad objectives and their good faith pursuit, may allow parties to develop sufficient consensus to allow projects to proceed, while ensuring Aboriginal participation remains meaningful.

These policies and practices of the parties clearly carry significant implications for both Olympic and non-Olympic contexts; however, it must be recognized that these approaches were not developed in a vacuum. Rather, the negotiation of the SLA, and MOUs were shaped by the nature of the Olympic process which surrounded them. The importance of such externalities should not be understated, and indeed, a comparison of the circumstances surrounding the MOUs and the SLA, and the resulting impact on the agreement are certainly worth notice. For example, the projects slated for development within Squamish and Lil'wat territories were large developments on undeveloped Crown lands, which under *Haida Nation* calls call for the greater consultation and accommodation of the Squamish and Lil'wat. However, from a more practical standpoint, these characteristics also made these Olympic projects among the most important to the success of the Bid and 2010 Games organization. Therefore, there were both legal and practical incentives to spur the Bid Corporation and Crown into addressing Squamish and Lil'wat concerns that were not similarly present for the Musqueam and Tsleil-Waututh, and the negotiation of the MOU. As noted above, this provides an indication of the limitations of the duty to consult and accommodate to address the marginalization of Aboriginal peoples, particularly those whose traditional territories lie in urban settings, or areas where there has been greater development of lands, or

privatization of lands. In such instances the duty to consult and accommodate simply does not provide the incentive to seek meaningful levels of Aboriginal participation, and therefore the marginalization of Aboriginal groups in such settings may have to be addressed through different means.

Another key factor which influenced the negotiation of the SLA in contrast with the MOU, was the tight deadline associated with the Bid Book submission. Coupled with the desire to address the concerns of the Squamish and Lil'wat on the key Olympic projects within their traditional territories, the Bid Book deadline clearly acted as a catalyst to spur the consultation and accommodation which was the SLA. The importance of such deadlines may indeed be significant in the consideration of what implications the 2010 Games have for structuring broader consultation and accommodation efforts, as the ability to create such deadlines around non-Olympic projects may strongly influence the achievements of such efforts. However, it is patently obvious that the Bid Book deadline was only a successful catalyst because of the importance all the parties placed on reaching agreement. Had the importance of reaching agreement been any less, it is doubtful that the tight deadlines would have acted to motivate the parties in their negotiations. Indeed, one could contemplate such deadlines being counter-productive if the parties involved in negotiations were satisfied even were agreement was not reached.

Finally, it is not readily apparent whether the collaboration between the Squamish and Lil'wat may have marked a significant difference in the outcomes between the SLA and MOU, but it is notable that separate agreements were required for the Musqueam and Tsleil-Waututh. It is not clear that had the Musqueam and Tsleil-Waututh collaborated in

their efforts at negotiating an agreement with the Bid Corporation they would have developed something comparable to the SLA. However, it is worth noting that in the case of the SLA, the Squamish and Lil'wat were able to overlook their conflicting Aboriginal title claims to obvious success. The significance of this collaborative approach of the Squamish and Lil'wat should indeed be recognized as such conflicting Aboriginal title claims could have resulted in significant dispute, and have served as a substantive barrier to their collaboration. The benefits of such collaboration appear to have been directly recognized in the MOU, as that agreement specifically spoke to the Musqueam and Tsleil-Waututh pursuing similar collaboration if the Bid proved successful.

Though the above commentary clearly describes the SLA as the more significant agreement, the MOUs should not be discounted as paltry achievements which do not also hold meaningful implications for future Olympics or consultation and accommodation efforts. Though the MOUs did not include the level of specific accommodation provided in the SLA, the MOUs did reflect a unique agreement which was driven almost exclusively by the good faith of the parties involved. The MOUs were completed just prior to the awarding of the 2010 Games, at a point where their completion would not carry significant weight in the determinations of the IOC, and therefore the principles and commitments in the MOU may be viewed as driven less by specific aspects of the Olympic agenda. Though the MOUs did not include the Crown, the Bid Corporation's pursuit of the MOUs may stand as an illustration of how the "honour of the Crown" is intended to guide consultation and accommodation efforts. The Musqueam and Tsleil-Waututh were more directly relying on the good faith efforts of the individuals in the Bid

Corporation to ensure they were afforded similar participation to that of the Squamish and Lil'wat. As will be revealed below, the Musqueam and Tsleil-Waututh were indeed able to achieve significant benefits, but their later involvement would undoubtedly colour the forms which their benefits took.⁴¹¹

What is patently obvious from a review of the Bid Phase of the 2010 Games, and the subsequent phases below, was the importance of the Bid Phase to structuring the meaningful inclusion of all the Nations. The SLA and MOUs served as preliminary agreements on the specific form that much of the Aboriginal participation would take, but in addition, the relationships developed and momentum created during the Bid Phase carried over to the organization and hosting of the 2010 Games, which was integral to actual implementation of the preliminary agreements. Though the parties had developed general concepts of how the Squamish, Lil'wat, Musqueam and Tsleil-Waututh would participate, their specific means of pursuing these generalities were yet to be developed. Below, the examination of Aboriginal participation in the 2010 Games continues, and reveals how the Nations, VANOC, Crown and private sector pursued the implementation of the SLA and MOUs, but also the methods and opportunities sought for structuring greater participation outside the tenets of those agreements.

4.4 Aboriginal Participation in the 2010 Games: The Organization Phase

The Organization Phase of the 2010 Games constitutes the most substantive time-period of Aboriginal participation with regards to the number of activities which took place. While the SLA and MOU had set the stage for Aboriginal participation in the 2010 Games, the parties had still to pursue their commitments in those agreements, and

⁴¹¹ See Chapter 4.4.2, below, at 232-37 for discussion on implementation of the MOUs.

also to respond to the invariably changing and challenging context which is Olympic Games organization. Following the success of the Bid, the Bid Corporation was dissolved, with only a small number of individuals remaining to function as bridge to the creation of the organizing committee.⁴¹² The Vancouver/Whistler Organizing Committee (“VANOC”) was created in September of 2003⁴¹³ and assumed responsibility for the SLA, MOU and engaging the Nations. In addition to pursuing the provisions of the SLA and MOU, the Squamish, Lil’wat, Musqueam, and Tsleil-Waututh also developed a collaborative body to act on all of the Nations’ behalf in relation to the 2010 Games.⁴¹⁴ The Four Host First Nations Society (the “FHFN”) then liaised with VANOC and other Olympic partners in pursuit of further opportunities for participation, which as will be seen, were of great significance. Clearly, the implementation of the SLA, MOU and development of the FHFN/VANOC efforts occurred simultaneously, but for ease of review, they will be discussed separately. Therefore the following section is divided into discussions which examine each of these topics individually. Within these discussions the subjects and issues which saw the attention of the parties will be individually addressed. This manner of presentation is intended to most clearly outline the elements which comprise Aboriginal participation in the 2010 Games, but to appreciate the significance of these efforts, it is important to recall that each of the achievements below occurred within the same seven year development process.

⁴¹² Dunn, *supra* note 20 at 84.

⁴¹³ Legislative Library Olympic Timeline, *supra* note 189 at 6.

⁴¹⁴ See Chapter 4.4.3.1, below, at 221-25 for discussion of creation of Four Host First Nations.

4.4.1 Organization Phase: The Implementation of the SLA

The provisions of the SLA were discussed in detail above, and encompassed a number of key objectives. The SLA provided for the transfer of land to the Squamish and Lil'wat, development of a skills and training project and funding, creation of a naming and recognition project throughout the Callaghan Valley, provision of support for the proposed Squamish/Lil'wat Cultural Centre, development of a housing legacy for the Squamish and Lil'wat, creation of an Aboriginal youth sport legacy fund (which will be discussed under the Section on The Four Host First Nations below), creation and inclusion of the society responsible for operating a number of Olympic projects after the 2010 Games, and most urgently (for VANOC) the creation of contracting opportunities in the development of Olympic projects in the Callaghan Valley. It was this final element of the SLA which was most pressing for VANOC to address, as the Olympic deadlines for venue construction required a brisk pace for the development of the Whistler Nordic Centre (the "WNC").⁴¹⁵

4.4.1.1 Implementing the SLA – Whistler Nordic Centre and Contracting Opportunities

While the development of the WNC was an urgent priority in the organization of the 2010 Games, this project was also the primary vehicle for pursuing the contracting opportunities promised to the Squamish/Lil'wat in the SLA, which were to serve as one of the more substantial means of providing economic opportunities and participation to those Nations. However, the SLA had not delved into any greater detail than the

⁴¹⁵ See Legislative Library Olympic Timeline, *supra* note 189 at -10 (Construction begins Fall 2004 with Sea-to-Sky Highway Expansion Project and ends with Whistler Olympic Park, the last of the Callaghan Valley Olympic projects to complete Fall 2009. Whistler Nordic Centre, Sea-to-Sky Highway Expansion Project, Whistler Sliding Centre, and Whistler Olympic Park are major Callaghan Valley Olympic projects completed in that time).

commitment to provide “significant” contracting opportunities, and clearly VANOC, Squamish and Lil’wat would be required to undertake far more detailed discussions to reach consensus on how the general commitment in the SLA was to be achieved. As noted above, the provisions of the SLA can be interpreted as being consistent with the principled guidance provided by the judiciary on Aboriginal consultation and accommodation, but this interpretation is ultimately an assessment of the potential which was held by the SLA.⁴¹⁶ If the potential of the SLA was to be realized, and the positive interpretation affirmed, it was clear that the parties would have to pursue the principles underlying the SLA, rather than a strict reading of its provisions. Indeed, though VANOC served as project proponent in the 2010 Games, the ability of VANOC to meet its general commitments may be viewed as a study in attempting to proceed with the implementation of the SLA in accordance with the “honour of the Crown”.⁴¹⁷ Additionally, if the SLA was to serve as a significant improvement on the historical participation of Aboriginal peoples in the Olympics, particularly with regards to pursuing meaningful inclusion in the more fundamental elements of Olympic hosting, the success of WNC development and adherence to the SLA’s contracting commitments was of the utmost importance.

Construction of the WNC was to take place on undeveloped Crown lands in the Callaghan Valley, and proposed plans were sufficient to require the completion of a screening process by the Canadian Environmental Assessment Agency (“CEAA”).⁴¹⁸ A

⁴¹⁶ See Chapter 3.3.1, above, at 89-93 for summary of jurisprudence principles on duty to consult and accommodate. In particular, note discussion of criticism as exemplified by Christie *supra* note 229, and the need to apply jurisprudence guidelines in a manner that ensures assessment of 2010 Games is based on the generative potential of the jurisprudence.

⁴¹⁷ See Chapter 3.3, above, at 80-81 for discussion of the term “honour of the Crown” as used in *Haida Nation*.

⁴¹⁸ Canadian Environmental Assessment Agency, “Notice of Commencement of Environmental

screening process is triggered under the *Canadian Environmental Assessment Act*,⁴¹⁹ when a federal authority is required to exercise its powers or perform certain duties or functions enabling a project to be carried out in whole or in part.⁴²⁰ In the case of the WNC, Heritage Canada (a federal authority) was slated to provide funding to assist in the construction of the WNC. Additionally the proposed design of the WNC suggested that Department of Fisheries and Oceans, and Transport Canada (also federal authorities) authorizations and approvals would be required under Section 35(2) of the *Fisheries Act*, and Section 5(1) of the *Navigable Waters Protection Act* respectively.⁴²¹ The screening process under the *Canadian Environmental Assessment Act* requires the appropriate federal authorities to review the proposed project to determine what environmental effects the project may have, necessary mitigation steps and actions which should be implemented, and whether further analysis of the project is required.⁴²² Screening processes are generally utilized in relation to projects which are expected to have lesser environmental impacts, while “comprehensive studies” are utilized on larger-scale projects such as mines or dams.⁴²³

Assessment: Whistler Nordic Centre” (2 June, 2005) in *Whistler Nordic Centre Environmental Screening* (Ottawa: online: Canada Environmental Assessment Registry <<http://www.ceaa.gc.ca/050/detailseng.cfm?evaluation=11440&ForceNOC=Y>>, 2005), “Under section 5 of the *Canadian Environmental Assessment Act*, an environmental assessment is required in relation to this project because Canadian Heritage may provide financial assistance to the proponent for the purpose of enabling the project and Transport Canada may issue an approval under paragraph 5(1)(a) of the *Navigable Waters Protection Act*.”

⁴¹⁹ *Canadian Environmental Assessment Act*, SC 1992, c.37 [CEAA]

⁴²⁰ *Ibid.* s.11(1).

⁴²¹ British Columbia, Environmental Assessment Office, “Whistler Nordic Centre Project Assessment Report” (February 2005) in *Whistler Nordic Centre Environmental Assessment*, (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Completed/Certified: EA Certificate Documentation <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1112899838809_e4d4e941f95e48b69b948f75dba7901d.pdf>, 2005) [“WNC Report”] at 2.

⁴²² CEAA s.16(1) & (2).

⁴²³ See *Regulations Prescribing Those Projects and Classes of Projects for Which a Comprehensive Study is Required*, S.O.R./94-638 & Canadian Environmental Assessment Agency, *The Basic Steps of Environmental Assessment* online: Canadian Environmental Assessment Agency <<http://www.ceaa.gc.ca/default.asp?lang=En&n=B053F859-1#comp>>.

While the WNC project triggered a review under the Canadian Environmental Assessment Act, the proposal was not similarly captured by the provisions of the *Environmental Assessment Act*.⁴²⁴ However, in February of 2004, VANOC requested under s.7 of the *Environmental Assessment Act* that the WNC be reviewed by the Environmental Assessment Office of British Columbia (“EAO”).⁴²⁵ Under s.7(2)(b) of the *Environmental Assessment Act*, such an application must provide reasons as to why the applicant wishes to have a project deemed reviewable. VANOC, in its letter to the Executive Director of the EAO, cited the inclusion of provincial funding for the WNC as a reason to incorporate provincial authorities and coordinate provincial and federal review, the increased opportunities for public participation mandated by provincial environmental assessments, and most importantly, the desire to have provincial environmental assessment timelines applied to review of the WNC.⁴²⁶ The British Columbia Environmental Assessment process has set timelines for reviewing and issuing approvals or disapprovals to reviewable projects.⁴²⁷ Under the *Prescribed Time Limits Regulation*, the EAO has a maximum of 180 days to review an application, prepare an assessment report and provide recommendations to the Minister regarding certification,⁴²⁸ and the Minister has a maximum of 45 days to review the report, recommendations and

⁴²⁴ *Environmental Assessment Act*, S.B.C. 2002, c.43 [*Environmental Assessment Act*].

⁴²⁵ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, “Whistler Nordic Centre Application for an Environmental Assessment Certificate Volume 1” (24 August, 2004) in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Application and Supporting Studies <http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_234_19151.html>, 2004) [“Application Vol. 1”] at 2-46 (Section 2 – Consultation Report).

⁴²⁶ Letter from Terry Wright of the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games to Joan Hesketh Deputy Minister of the Environmental Assessment Office (11 February, 2004) Archived: British Columbia, Project Information Centre (Letter was sent from Project Information Centre Upon Author’s Request) “...request designation of the Whistler Nordic Centre as a reviewable project under the BC *Environmental Assessment Act*”.

⁴²⁷ *Environmental Assessment Act*, *supra* note 424, s.24(1).

⁴²⁸ *Prescribed Time Limit Regulation*, B.C. Reg. 372/2002 [*Prescribed Time Limit Regulation*], s.3. & *Environmental Assessment Act*, *ibid.*, s.17(2).

issue a decision regarding certification.⁴²⁹ The *Canadian Environmental Assessment Act* does not include similar provisions prescribing strict time limits to review and certification decisions, and with the tight scheduling associated with organizing for the Olympics, the certainty provided by the provincial legislation provided obvious comfort to VANOC in its efforts to ensure WNC development could begin in a timely fashion.

However, “opting in” to the BC environmental assessment process provided not only some certainty regarding timelines for permitting and certification, but also linked the WNC to the legal requirements and obligations associated with the environmental assessment process. The legal requirements of environmental certification would have to be addressed by VANOC before certification could be issued, and development of the WNC could commence.⁴³⁰ From the perspective of Aboriginal participation, the legal element of greatest significance was the requirement that VANOC adhere to the 2002 Provincial Policy for Consultation with First Nations in preparing its Application.⁴³¹ Therefore, opting in to the Provincial environmental assessment process would provide VANOC with guaranteed time frames for certification and permitting, but the benefit of time certainty came with the acceptance of more stringent legal rules and policies with which to adhere. The Executive Director of the EAO granted VANOC’s request,⁴³² and a

⁴²⁹ *Prescribed Time Limit Regulation*, *ibid.* s.4.

⁴³⁰ WNC Report, *supra* note 421, “On February 11, 2004, the Proponent applied to the EAO Executive Director under Section 7 of the Act for the Project to be designated as a reviewable project. The Executive Director granted this application in writing on February 16, 2004, and on that date issued an order under section 10 of the Act, indicating that the Project would require an environmental assessment certificate, and that the Proponent may not proceed with the Project without an assessment”.

⁴³¹ British Columbia, Ministry of Aboriginal Relations and Reconciliation, *Provincial Policy for Consultation with First Nations*, October 2002 (British Columbia: online: University of British Columbia Faculty of Law <http://faculty.law.ubc.ca/mccue/pdf/2002%20consultation_policy_fn.pdf>, 2010). See also Application Vol. 1, *supra* note 425, at 2-34 (Section 2 – Consultation Report).

⁴³² British Columbia, Environmental Assessment Office, “Order under Section 10(1)(c) *Environmental Assessment Act* dated February 16, 2004 by Jan Hagen” (16, February 2004) in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Pre-Application: EAO Generated Documents <<http://a100.gov.bc.ca/appsdata/epic/documents/>>

plan for joint review of the project by federal and provincial authorities was implemented.⁴³³

Within the context of the examination of the 2010 Games and its implications for structuring broader Aboriginal consultation and accommodation efforts, the invocation of the British Columbia and Canadian environmental assessment processes in the construction of the WNC is indeed significant. These assessment processes, in this case carried out through a coordinated joint review, frequently serve as the forum for Aboriginal consultation and accommodation,⁴³⁴ and this also proved to be the case for the WNC in relation to the Squamish and Lil'wat. Therefore, examination of the WNC provides a unique opportunity to consider one of the existing structures for Aboriginal consultation and accommodation, and its influence on the ability of VANOC, the Crown, Squamish and Lil'wat to implement the SLA, and carry out further consultations and accommodation.⁴³⁵

The technical requirements of the joint review of the WNC by provincial and federal authorities would first require the development of a Terms of Reference which would outline the scope of the WNC assessment along with the particular environmental, social and other factors for VANOC to research further and address.⁴³⁶ The second step would see VANOC develop an application for certification through the execution of studies, consultations and discussions necessary to determine and address the potential

p234/1077236877961_9e02055e946a40e69365d93e2c3a9648.pdf>, 2004).

⁴³³ WNC Report, *supra* note 421 at 1-2.

⁴³⁴ See e.g. *Haida Nation*, *supra* note 9 at para. 53, "The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments".

⁴³⁵ See Chapter 3.4, above, for review of judicial examination of other Crown efforts to structure consultation and accommodation processes & Chapter 3.3, above, for discussion of *Haida Nation* which specially considered British Columbia's environmental assessment process.

⁴³⁶ Environmental Assessment Office Users Guide, *supra* note 16 at 20-21.

environmental and social effects of the WNC.⁴³⁷ The third step involved preliminary review of VANOC's draft application for completeness, the implementation of edits based on preliminary review, and re-submission of the final application.⁴³⁸ The fourth step would then involve in-depth federal and provincial review of VANOC's application, the development of a report describing VANOC's plans and efforts to address environmental, social, economic and other issues associated with the WNC, and the issuance of recommendations to the Ministers (in this case both federal and provincial) regarding the appropriateness of granting certification.⁴³⁹ The final stage is the issuance of approval, or denial, of certification by the Ministers.⁴⁴⁰

Both Provincial and Federal policy and legislation required the environmental assessment processes to include the consultation of Aboriginal groups,⁴⁴¹ and strict Olympic timelines for completion of venue called for construction on the WNC site to begin in earnest, as the Bid had contemplated construction beginning in 2004.⁴⁴² Therefore, it was plainly evident that the participation of the Squamish and Lil'wat throughout the environmental assessment and construction process was clearly integral to timely completion of the WNC. Recognizing the large number of parties to coordinate in the joint Federal-Provincial environmental review, a Project Working Group was established shortly after the EAO's approval of VANOC's application for review.⁴⁴³ The Project Working Group included representatives from the EAO, CEAA, local agencies,

⁴³⁷ *Ibid.* at 22-29.

⁴³⁸ *Ibid.* at 29-30.

⁴³⁹ *Ibid.* at 34-35.

⁴⁴⁰ *Ibid.*

⁴⁴¹ See *CEAA*, *supra* note 419 s.16.1 & *Environmental Assessment Act*, *supra* note 424 s.11(2)(f).

⁴⁴² Bid Book, *supra* note 299 at 135 (*Venues*).

⁴⁴³ WNC Report, *supra* note 421 at iii.

VANOC, and the Squamish and Lil'wat Nations (the "Working Group").⁴⁴⁴ The Working Group was created as the primary source for policy discussions amongst the parties, and provided a forum for information sharing and addressing Aboriginal concerns.⁴⁴⁵ Additionally, the Working Group served as an advisory group during the development of the Terms of Reference for the WNC review, which included the specific identification of "...issues to be addressed and the information that must be provided by the Proponent in its Application for an environmental assessment certificate..."⁴⁴⁶ With input from the Working Group, the Terms of Reference for the WNC were issued by the EAO on June 16, 2004, and identified several key subjects and issues related to the Squamish and Lil'wat which required the attention of VANOC in the Application:

- i. description of the "First Nations setting" of the WNC;⁴⁴⁷
- ii. description of the consultation process during the pre-application stage undertaken with First Nations, including record of information sharing, and meetings etc.;⁴⁴⁸
- iii. results of pre-application consultation with First Nations;⁴⁴⁹
- iv. plans for consultation with First Nations during the application review stage;
- v. documentation of processes aimed at resolving issues identified in the pre-application consultation process;⁴⁵⁰
- vi. First Nations' perspectives on the scope of the proposed assessment of the WNC;⁴⁵¹
- vii. consideration of First Nations' land uses within the WNC area, which includes the provision of summaries of any traditional use studies carried out by First Nations, emphasizing traditional uses, cultural heritage resources, and socio-economic conditions of First Nations communities;⁴⁵²

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid.*

⁴⁴⁶ British Columbia, Environmental Assessment Office, "Approved Terms of Reference for Whistler Nordic Centre Project (WNC)" (16 June, 2004) in Whistler Nordic Centre Environmental Assessment (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Pre-Application: Application Terms of Reference/Information Requirements <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1087600545322_4f0b086183c94cd49f2e818aa5c59bcb.pdf>.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.* at 19.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.* at 18.

⁴⁵¹ *Ibid.* at 19-23.

⁴⁵² *Ibid.*

- viii. description of potential impacts and effects of the WNC of First Nations (including land uses, socio-economic impacts, and Aboriginal rights/title);⁴⁵³ and
- ix. description of how First Nations' archaeological and other interests will be monitored during construction to enable resolution of issues which arise.⁴⁵⁴

Given the short timelines faced by the VANOC for venue construction, the Terms of Reference clearly served as an important framework for initiating and pursuing more detailed discussions regarding the perspectives and concerns of the Squamish and Lil'wat.

However, the Terms of Reference were significant not only as a framework for consensus building, but also because of the legal process of which they formed a part. While tight time frames associated with Olympic hosting undoubtedly served as an incentive to spur discussions amongst the parties, and reach consensus on any issues, those same timelines could have, if consensus had become difficult to achieve, prompted VANOC to proceed with construction without Squamish and Lil'wat consent. Indeed, as consultation between VANOC, the Squamish and the Lil'wat proceeded, and greater details regarding WNC development emerged, it became clear that despite the significant level of consensus achieved during the negotiation of the SLA, development of the WNC would pose significant issues for the parties to address. Therefore, opting in to the provincial environmental assessment process, the specific inclusion of Aboriginal issues in the Terms of Reference, and the requirement that VANOC address these issues (at least to the satisfaction of federal and provincial authorities) before approvals would be issued, and development could commence, helped to guard against the tight Olympic timeframes becoming an inhibitor to consensus building. However, legal assurance that

⁴⁵³ *Ibid.* at 24-8.

⁴⁵⁴ *Ibid.* at 29, Terms of Reference suggests adoption of "Archaeological Resources Monitoring Plan and Traditional Use Monitoring Plan" as examples of such monitoring plans.

tight timeframes would not subsume the need for Aboriginal participation was not a guarantee that the participation of the Squamish and Lil'wat would meet the expectations of the Nations, fulfill the spirit of the SLA, and address Squamish and Lil'wat concerns.⁴⁵⁵ Though the SLA and Terms of Reference had set the stage for consultation and accommodation to occur, the meaningfulness and success of Squamish/Lil'wat participation was still very much contingent on the parties' ability to proceed in good faith, and pursue the spirit of the SLA provisions. In considering the implications of the 2010 Games, it will be integral to consider how the environmental assessment process aided or hindered the parties' ability to succeed.

Clearly, the key element to proceeding under the Terms of Reference was the pursuit of greater information sharing amongst the parties. From VANOC, greater details regarding the specific plans for the WNC had to be communicated to the Squamish and Lil'wat, but additionally, greater information regarding the type of interest the Squamish and Lil'wat had in the Callaghan Valley was required in order to determine what type of impacts the WNC could be expected to have. Through the preliminary discussions of the Working Group, it was clear to VANOC, the Squamish and Lil'wat that greater information regarding traditional and current Aboriginal uses of the Callaghan Valley would be central to carrying out more detailed discussions.⁴⁵⁶ Additionally, draft Terms of Reference had been shared with all the parties prior to their final approval, and therefore it was evident to VANOC that studies determining Aboriginal interests in the Callaghan Valley would have to be completed to meet the expectations of federal and

⁴⁵⁵ See Chapter 3.3.1, above, for discussion of criticism of jurisprudence prescribing the Crown's duty to consult and accommodate, and see in particular discussion of Christie, *supra* note 229 who provides an interpretation of the jurisprudence which illustrates its potential to perpetuate colonialism.

⁴⁵⁶ See SLA, *supra* note 333 at 6, where the SLA identifies need for greater understanding and cooperation amongst the parties in developing the Callaghan Valley.

provincial authorities. Indeed, eight days prior to the Terms of Reference being approved by the EAO, VANOC the Squamish and Lil'wat entered into an agreement with VANOC whereby VANOC provided funding for Aboriginal Interest and Use Studies for both the Squamish and Lil'wat Nations.⁴⁵⁷ The Aboriginal Interest and Use Studies were to be supplemented by traditional use studies which had previously been carried out by the Lil'wat and Squamish,⁴⁵⁸ and archaeological impact assessment studies.⁴⁵⁹ In combination, these studies provided a basis from which the type and extent of Squamish and Lil'wat interest in the WNC project area could be described, and expectations for potential impacts assessed. From a larger legal context, it is arguable that the carrying out of such assessments is also an integral element of broader recognition and reconciliation and efforts at negotiated settlement, as obtaining greater understanding of specific Aboriginal interests is clearly a necessary element to such processes.⁴⁶⁰

The completion of the AIUS, early consultations between VANOC, the Squamish and Lil'wat, and preliminary meetings of the Working Group were carried out in pursuit of the objectives within the Terms of Reference specific to the consultation and accommodation of the Squamish and Lil'wat. In conjunction, these undertakings provided the basis for identifying and understanding Squamish and Lil'wat concerns.⁴⁶¹ Discussions revealed that the Squamish and Lil'wat were concerned that WNC construction could: (a) impact traditional uses of the area; (b) have broader implications

⁴⁵⁷ Application Vol. 1, *supra* note 425 at 2-42 (Section 2 – Consultation Report).

⁴⁵⁸ *Ibid.* at 5-237 (Section 5 – Project Setting).

⁴⁵⁹ *Ibid.* at 5-241 (Section 5 – Project Setting).

⁴⁶⁰ See Chapter 3.2.1, above, at 71-74 for discussion of jurisprudence demonstrating the need for Aboriginal interests to be understood and prioritized. See Chapter 3.2, above, at 77-80 for discussion of the scope of consultation and accommodation processes being tied to Aboriginal interests in question. See especially, Chapter 3.4, above, at 95-98 where discussion of *Gitanyow* and *Huu-Ay-Aht* demonstrate that where duties to consult and accommodate Aboriginal peoples are breached where the Crown does not attempt to first understand the Aboriginal interests, rights and title at stake.

⁴⁶¹ Application Vol. 1, *supra* note 425 at 2-40 (Section 2 – Consultation Report).

on traditional Aboriginal lifestyle due to increased settlement within Squamish and Lil'wat traditional territories; (c) contribute to continuing decreases in access to Squamish and Lil'wat traditional territories due to growth of the Whistler area and highway expansion; and (d) negatively impact water quality and wildlife through increased land use and development.⁴⁶² Additionally, the Squamish and Lil'wat expressed the specific need to be included in the decision making processes regarding the planning and development of the WNC, and that greater economic opportunities should be explored for the Squamish and Lil'wat within the region.⁴⁶³

In the initial application for environmental certification, VANOC identified the interests and concerns of the Squamish and Lil'wat, and potential measures for addressing the issues which were raised.⁴⁶⁴ The topics related to larger regional concerns regarding Aboriginal involvement in planning, decision making and economic opportunities were to be addressed through the creation of a master development plan for the Callaghan Valley,⁴⁶⁵ and the carrying out of an additional environmental assessment process for the proposed highway expansion.⁴⁶⁶ These further aspects of consultation were to be carried out by the Provincial Crown, as they were clearly beyond the ability of VANOC to provide.⁴⁶⁷ This approach appears to adhere to the guidance provided in *Dene Tha'* and *Brokenhead* which indicate that consultation processes must be tailored to address the concerns raised by Aboriginal groups, and suggest that this requires Crown

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.* at 2-34 – 56 (Section 2 – Consultation Report).

⁴⁶⁵ Application Vol. 1, *supra* note 425 at 5-191 (Section 5 – Project Setting).

⁴⁶⁶ British Columbia, Environmental Assessment Office, *Sea to Sky Highway Upgrade Project* online: Project Information Centre: Sea to Sky Highway Upgrade Project <http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_home_192.html>.

⁴⁶⁷ See Application Vol. 1, *supra* note 425 at 6-47 – 48 (Section 6 – Assessment of Project Impacts, Mitigation Requirements/Residuals).

participation in consultation to address those issues beyond the abilities of the project proponent.⁴⁶⁸ Additionally, the commitment of the Crown to pursue these broader issues was contemplated in the SLA,⁴⁶⁹ but may also be seen as the means through which its constitutional duties triggered specifically by the WNC would indeed be tied to the larger contexts of recognition and reconciliation.⁴⁷⁰

VANOC assumed responsibility for addressing the more specific impacts of the WNC on traditional uses, Aboriginal lifestyles, and economic opportunities in relation to WNC construction.⁴⁷¹ The significance of the Callaghan Valley to the Squamish and Lil'wat had not been in question during the Bid Phase,⁴⁷² however, it was clear from the pursuit of the AIUS greater details regarding the specific interests of the Squamish and Lil'wat were necessary to assess the impact that WNC development would have to claimed Squamish and Lil'wat Aboriginal rights or title. The AIUS revealed the strong historical ties the Squamish and Lil'wat⁴⁷³ had to the Callaghan Valley area.⁴⁷⁴ For example, the Squamish Traditional Use study was quoted as stating:

“While this is not an Aboriginal rights and title evaluation, the strong evidence within this vast network provides a preliminary indication that the Squamish Nation could demonstrate their Aboriginal rights and title to the Callaghan Creek drainage and surrounding areas. The study strongly established that people of the

⁴⁶⁸ See Chapter 3.4, above, at 98-101 for discussion of *Dene Tha'* and *Brokenhead*.

⁴⁶⁹ SLA, *supra* note 333 at 6.

⁴⁷⁰ See Chapter 3.3.1, above, for discussion of judicial guidance on tying instances of consultation and accommodation to the broader purposes of recognition and reconciliation mandated by Section 35(1).

⁴⁷¹ Application Vol. 1, *supra* note 425 at 6-45 – 49 (Section 6 – Assessment of Project Impacts, Mitigation Requirements/Residuals).

⁴⁷² See e.g. SLA, *supra* note 333 at 1-2, wording of Preamble reflects Callaghan Valley as part of traditional territories of the Squamish and Lil'wat, and importance of region to the Nations.

⁴⁷³ Application Vol. 1, *supra* note 425 at 5-237-8 (Section 5 – Project Setting), In reference to Lil'wat interests in the Callaghan Valley, the Lil'wat Traditional Use Study was quoted: “The review of these resources establishes a strong historic Lil'wat presence in the area surrounding the Callaghan Valley. No references to use within the watershed itself were located....The primary evidence is provided by nineteen Lil'wat language place names in the area surrounding Callaghan Creek. Place names are powerful indications of Aboriginal peoples' use of the land.”

⁴⁷⁴ *Ibid.* at 5-237.

Squamish Nation have a close tie to the land in and around the Callaghan Creek drainage.”⁴⁷⁵

Although the studies revealed strong historic ties of both the Squamish and Lil’wat to the Callaghan Valley, as hunting and gathering area for both Nations, and a specific “Wild Spirit Place” for the Squamish, it was nevertheless determined that the proposed construction of the WNC would not conflict with any traditional uses of the area.⁴⁷⁶ This determination was based largely on the lack of specific findings in the studies regarding current Squamish and Lil’wat uses of the WNC project area. For example, while the studies revealed that the Squamish and Lil’wat practiced seasonal fishing throughout the Callaghan Valley, they did not indicate that either group currently used the WNC project area for fisheries practices.⁴⁷⁷ Similarly, recognition of historical trapping uses of the area was tempered by findings in the studies of no modern continuations of those practices.⁴⁷⁸

The Application stated that the proposed WNC project would not influence traditional Squamish and Lil’wat uses of the area, yet there was recognition by VANOC that the WNC could negatively impact “culturally significant” resources,⁴⁷⁹ and could potentially harm claims to Aboriginal title of the area.⁴⁸⁰ Indeed, the specific elements of the WNC plans which held the most concern for the Squamish and Lil’wat were clearly identified by VANOC.⁴⁸¹ Plans for the construction of a recreational trails system in

⁴⁷⁵ *Ibid.* at 5-239 quoting the *Squamish Traditional Use Study* by Yumks and Reimer (2002).

⁴⁷⁶ *Ibid.* at 5-238-40.

⁴⁷⁷ *Ibid.* at 5-84.

⁴⁷⁸ *Ibid.* at 5-238& 5-240.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.* at 6-45 – 49 (Section 6 – Assessment of Project Impacts, Mitigation Requirements and Residual Impacts) where VANOC sets out concerns raised by the AIUS and through preliminary consultation of the Squamish and Lil’wat.

association with the WNC was highlighted as holding particular concern, as the trail system would traverse areas of cultural importance to the Squamish and Lil'wat.⁴⁸²

Having identified the interests and concerns of the Squamish and Lil'wat, VANOC proposed a number of mitigation measures; some of a broad nature, designed to address general needs for consultation and accommodation in relation to a project with the scope of the WNC, and others specifically aimed at addressing concerns related to the proposed legacies trail system.⁴⁸³ To address the broader interests of the Squamish/Lil'wat in the WNC development, VANOC proposed: carrying out investigating means for managing recreation levels in the Callaghan Valley resulting from the WNC; carrying out Squamish/Lil'wat community information and discussion sessions on the socio-economic and cultural impacts of the WNC; pursuing the contracting opportunities contemplated in the SLA; facilitating discussions with the Province regarding the implementation of Provincial obligations in the SLA; and carrying out ongoing consultations with the Squamish/Lil'wat regarding impacts the WNC may have on their traditional uses.⁴⁸⁴ In relation to addressing the specific concerns raised with regards to the legacy trails system, VANOC suggested a number of mitigation measures including the involvement of the Squamish and Lil'wat in clearing measures, provision of timber to the Nations at no cost, avoidance of any clearing on culturally

⁴⁸² *Ibid* at 6-46. For example the Application notes that: "The Lil'wat Nation is concerned that recreational trails connecting the WNC to trails in Callaghan Lake Provincial Park or other areas will impact old growth timber stands."

⁴⁸³ *Ibid.* at 2-42 (Section 2 – Consultation Report).

⁴⁸⁴ *Ibid.* VANOC proposed the following specific mitigation measures: "(i) Investigating recreation access management into the Callaghan Valley as a result of the WNC development; (ii) Organizing First Nations community presentations and workshops to discuss the socioeconomic and cultural impacts of the Whistler Nordic Centre; (iii) Participating in direct negotiations with First Nations over economic opportunities associated with WNC construction process; (iv) Facilitating further discussions with the Province on implementing the accommodation anticipated in the Shared Legacy Agreement as it relates to the Callaghan Valley; (v) Reviewing and discussing opportunities with First Nations to avoid, minimize or mitigate direct impacts associated with construction and operation of the WNC on First Nations traditional way of life."

significant ground or in old growth areas, emphasis on co-management, exploring compensation for any loss of Aboriginal title land, and the provision of alternative “replacement” lands to the Squamish and Lil’wat for the loss of culturally significant.⁴⁸⁵

VANOC believed that “the mitigation proposed by VANOC (above) should result in any residual adverse effects being of low magnitude and low significance.”⁴⁸⁶ From the proposal of these mitigation measures, VANOC was clearly articulating both its understanding of the risks which the WNC posed to Squamish and Lil’wat interests, but also the appropriate means of addressing their concerns. The mitigation measures proposed by VANOC placed significant emphasis on economic inclusion as a mitigation measure for any negative impacts to culturally significant areas, or traditional Aboriginal uses of the WNC project area. Similarly, such economic inclusion was similarly cited as means for addressing the economic aspirations of the Squamish and Lil’wat regarding WNC development.⁴⁸⁷ Further pursuit of the SLA through the negotiation of contracts,⁴⁸⁸ development of specific employment strategies for Squamish and Lil’wat members,⁴⁸⁹ exploration of including the Squamish and Lil’wat in benefiting from increased tax revenue streams,⁴⁹⁰ development of further joint venture efforts,⁴⁹¹ hiring of Squamish and Lil’wat business liaisons,⁴⁹² and pursuit of further studies regarding economic opportunities for the Squamish and Lil’wat⁴⁹³ were all cited as potential mitigation

⁴⁸⁵ *Ibid.* at 6-47 (Section 6 – Assessment of Project Impacts, Mitigation Requirements and Residual Impacts).

⁴⁸⁶ *Ibid.* at 6-48.

⁴⁸⁷ *Ibid.* at 6-44.

⁴⁸⁸ *Ibid.* at 6-45.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.* 6-63.

⁴⁹¹ *Ibid.* 6-45

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

measures which should be pursued to ensure the Squamish and Lil'wat saw economic benefits from the development of the WNC.

The difficulty with each of these proposals was that none had been specifically pursued prior to the development of the Application.⁴⁹⁴ Indeed, the Application noted that it was challenging to more precisely describe the economic benefits which would flow to the Squamish or Lil'wat. For example, the report noted that “construction of the WNC could have a positive economic effect on the Squamish and Lil'wat First Nations”,⁴⁹⁵ and that “with management measures discussed [those discussed above]...positive effects on First Nations are possible.”⁴⁹⁶ Therefore, while VANOC proposed many measures which would allow the Squamish and Lil'wat to benefit from the WNC, the lack of detail and certainty regarding those proposals left much room for interpretation regarding how the Squamish and Lil'wat would ultimately participate. This placed VANOC, the Squamish and Lil'wat in a position which was not substantially different than that achieved during the execution of the SLA. Economic opportunities were still clearly at the fore of discussions and interests of all the parties, but actual implementation of specific measures remained uncertain.

The Application was submitted for review by VANOC in late August 2004. During this phase, the Application would be reviewed not only by the EAO, but would also be open for general public commentary, while the specific perspectives of the Squamish and Lil'wat would be sought more directly.⁴⁹⁷ During the review of the

⁴⁹⁴ *Ibid.* at 2-36 – 39 (Section 2 – Consultation Report) for list of consultation initiatives carried out prior to the Application being submitted.

⁴⁹⁵ *Ibid.* at 6-46 (Section 6 – Assessment of Project Impacts, Mitigation Requirements, and Residual Impacts).

⁴⁹⁶ *Ibid.* at 6-44.

⁴⁹⁷ Environmental Assessment Office Users Guide, *supra* note 16 at 31.

Application, the EAO would receive the perspectives of these additional stakeholders and engage in discussions with the project proponent, in this case VANOC, to allow them to respond to concerns and questions raised during the review.⁴⁹⁸ In effect, VANOC's understanding of Squamish/Lil'wat interests, concerns and their proposed mitigation measures was to be reviewed as to their appropriateness not only by the EAO, but also the Squamish and Lil'wat. This initial step in the WNC certification process marked the first steps in VANOC efforts to implement the SLA, and though the Application held numerous references to the expanded efforts undertaken by VANOC, the Squamish and Lil'wat to identify and propose measures addressing negative impacts of the WNC, and specific commitments of VANOC to adhere to the SLA, it was evident from the outset that VANOC's Application failed to meet the expectations of either the Squamish or Lil'wat.

A letter from Squamish and Lil'wat legal counsel in October of 2004 to the EAO outlined the preliminary issues identified regarding VANOC's Application, and revealed that the Squamish and Lil'wat were far from satisfied with VANOC's understanding and approaches to addressing their interests.⁴⁹⁹ In particular, the Squamish and Lil'wat expressed great concern with regards to the inclusion of the legacy trails system, which had not been contemplated in the SLA, and the inactivity of both VANOC and the Crown on implementing the accommodation to the Squamish and Lil'wat agreed to in the

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Letter from Gregory McDade, Ratcliff & Co. as counsel for Squamish Nation and Lil'wat Nation, to Jon Bones, Environmental Assessment Office, and Terry Wright, Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (28 October, 2004) "Accommodation of Aboriginal Interests – Whistler Nordic Centre" in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Aboriginal Comments/Submission <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1099937_423079_eaa1d811555b41d6b36af7ecc3e7c50f.pdf>, 2004) ["Squamish/Lil'wat October 2004 Letter"].

SLA.⁵⁰⁰ The initial reaction of the Squamish and Lil'wat revealed that VANOC's consultations of the Squamish and Lil'wat, and participation in the AIUS, which formed the backbone of VANOC's Application, had not included sufficient detail sharing to allow for the Squamish and Lil'wat to properly determine potential detrimental impacts to Aboriginal rights, title and culturally significant areas.⁵⁰¹ Counsel for the Squamish and Lil'wat expanded on this point:

"The Aboriginal Interest and Use Studies prepared by the two First Nations outline in a general way how these facilities might impact their Aboriginal interests but without detailed information about the backcountry legacy facilities (the footprint of these facilities was not revealed until the Final Application) and a rigorous assessment of their impacts on the biophysical environment, it was impossible to fully quantify the impacts in the AIUS.

Our review of the Final Application submitted by the proponents indicates that it provides very preliminary information regarding the backcountry legacy facilities and the assessment of its impacts is very poor – and not based on any adequate data, research or studies. If these facilities are to be included in this project we would also require a much more rigorous environmental assessment of those impacts than seems to have been contemplated to this point.”⁵⁰²

Regarding the implementation of the SLA, the Squamish and Lil'wat raised issue with both the efforts of the Crown and VANOC to sufficiently pursue their commitments and obligations. With regards to the Crown, the Squamish and Lil'wat expressed specific concerns at efforts to address their desire for inclusion in broader land use planning within the Callaghan Valley.

"The planning processes promised in the Shared Legacy Agreement for the Callaghan Valley have not yet occurred. We note that the Sea to Sky LRMP has chosen not to involve our First Nations in an adequate way. We note that the Squamish Nation's *Xay Temixw* Land Use Plan has identified the upper Callaghan Valley as a Wild Spirit Place, and there has been no attempt to reconcile this proposal with the objectives of either First Nation. A proper Planning process for

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.* at 2.

this area, in co-operation with our First Nations must be undertaken before any approvals can be granted of this expanded project.”⁵⁰³

The LRMP referenced above refers to a land and resource management plan. These plans are developed by the Province, through the Integrated Land Management Bureau, as broad land use plans, which guide development efforts and initiatives, for the regions which they encompass.⁵⁰⁴ The Sea-to-Sky LRMP encompassed the Callaghan Valley, and therefore the traditional territories of the Squamish and Lil’wat, and as is clear from the above quotation, the Squamish and Lil’wat had not been integrated into the development of this important planning process.⁵⁰⁵ VANOC’s efforts with regards to the SLA were similarly impugned. In particular, the Squamish and Lil’wat expressed the belief that substantive efforts at implementing the SLA were required prior to the issuance of environmental certification for the WNC:

“The planning processes promised in the Shared Legacy Agreement for the Callaghan Valley have not yet occurred...The obligations discussed herein are separate from the outstanding obligations under the Shared Legacy Agreement that related to the ‘footprint’ of the Nordic Centre itself, which I understand both First Nations have clearly requested must also be implemented before an Environmental Assessment Certificate”⁵⁰⁶

It was clear from these comments that the Squamish and Lil’wat were entirely unsatisfied with the Application’s attempts to outline the means through which VANOC, and the Crown, intended to address their interests and concerns. The concerns voiced by the Squamish and Lil’wat were significant in a number of regards. First, though the SLA could clearly be described as a significant accomplishment with regards to the subjects it

⁵⁰³ *Ibid.*

⁵⁰⁴ See British Columbia, Integrated Land Use Management Bureau, *About ILMB*, online: <<http://www.ilmb.gov.bc.ca/about.html>>.

⁵⁰⁵ See British Columbia, Integrated Land Use Management Bureau, *Sea-to-Sky-LRMP: Coordinated Management Plan – Public Review Draft* (British Columbia: online: Legislative Library of British Columbia <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/441694/s2s_camp_public_review_draft_april2008.pdf>, 2008) at 5.

⁵⁰⁶ *Ibid.*

addressed, the level of participation it contemplated, and its collaborative approach through both project proponent and Crown efforts to carry out a more fulsome consultation and accommodation, it was clear evident by this stage that the SLA was the most preliminary of agreements, and far greater consultation and negotiation was required for its successful implementation. Second, it was evident that the Crown was potentially falling into the same difficulties in consultation described by the judiciary in *Dene Tha'*, and *Brokenhead*, which was the failure to address the broader rights and title claims issues raised by the Aboriginal groups.⁵⁰⁷ Third, it was also apparent that VANOC's understanding of the AIUS, and therefore Squamish and Lil'wat interests in the Callaghan Valley and WNC development area, was not necessarily commensurate with Squamish and Lil'wat understandings. This clearly set the stage for the divergent assessments of VANOC and the Squamish/Lil'wat of the suggested by WNC development. Fourth, it was clearly evident that the Squamish and Lil'wat believed that details and specific regarding the methods for SLA implementation were necessary before the project proceed through the certification process. This was likely reflective of concern that should certification be granted without further agreement on SLA implementation in place, VANOC might simply proceed with WNC development while ignoring its SLA commitments and obligations. Finally, and in furtherance to this fourth point, it was plainly obvious how significant the EAO process was to providing a forum for the Squamish and Lil'wat to raise these concerns. VANOC chose to opt-in to the British Columbia Environmental Assessment Process,⁵⁰⁸ and it is certainly possible that without the requirements of this process, the Squamish and Lil'wat may not have had an

⁵⁰⁷ See Chapter 3.4, above, at 98-101.

⁵⁰⁸ See 163-6, above, for discussion of *Environmental Assessment Act*, and VANOC's decision to opt-in to the environmental assessment process.

opportunity to express these concerns. Indeed, it was clearly obvious from this preliminary response of the Squamish and Lil'wat that a great number of concerns existed, and that the consensus achieved in the SLA negotiations was wholly insufficient to simply carry the parties throughout the development of the WNC.

While the letter from the Squamish and Lil'wat provided a clear indication that the Nations were unsatisfied with the Application, the disparity between the parties engaged in the certification process was laid bare by the EAO's initial response to the Squamish and Lil'wat:

“...The ToR [Terms of Reference] also confirm that within the Project facility footprint that is shown, the exact layout of some Project components, including trail routings, would continue to be refined, and final decisions would need to be deferred until a final design was in place...

The Aboriginal Interest and Use Studies prepared by the two First Nations also acknowledge the inclusion of legacy trails in the project scope, and, as your letter states, outline in a general way how these facilities might impact their Aboriginal interests. The Environmental Assessment Office (EAO) is not aware of the information that was provided by the proponent to the First Nations on legacy facility locations at the time of preparation of their studies, and such information was not identified in the studies, and so cannot comment on your statement that ‘the footprint of these facilities was not revealed until the Final Application.’

With respect to your comment that the proponent's application provides very preliminary information, the ToR (as mentioned above) did anticipate that such information would not necessarily be complete, and suggests that any environmental assessment certificate would have to provide an approval in concept, with provision for design and mitigation measures to be applied to the final, approved trail system by the approving agency.

The specific location and “footprint” of the proposed backcountry trails have, to this point in the review process, not been identified. At the most recent Working Group meeting of agencies and First Nations, the proponent pointed out that considerable efforts were being taken to revise the general location and design of legacy facilities to avoid potential effects, as such possible effects were being identified.

As to the adequacy of the proponent's assessment of impacts, EAO has only recently received from First Nations' representatives on our project working

group their detailed comments on the final application, and will be meeting to better understand their views on deficiencies in the Application.”⁵⁰⁹

These exchanges revealed the disparity between the parties in their interpretation regarding both the level of information which had been exchanged during the development of the Application, but also, the different expectations regarding the level of certainty and flexibility that was necessary before WNC construction could be commenced. For example, where the EAO was comfortable deferring the finalization of legacy trail plans by VANOC until later in the environmental review and certification process, the Squamish and Lil’wat saw only reason for concern, as the proposed plans were perceived as posing significant risk for Squamish and Lil’wat interests. Similarly, where the EAO expressed belief that the tenants of the SLA would be met as the certification and development process continued⁵¹⁰ the Squamish and Lil’wat voiced concern, as little progress had been made on SLA implementation. It is noteworthy that the EAO, and VANOC, did not seem to suggest that the concerns of the Squamish and Lil’wat were entirely unfounded, or inaccurate, but rather, that the concerns would essentially be addressed as the WNC proceeded through its development.

The disparity between the parties’ belief that this would occur may have been affected by a number of factors. However, it seems reasonable to interpret the Squamish and Lil’wat’s concern as driven in large part by their historic marginalization from development within their territories, and a resulting distrust of the Crown and project

⁵⁰⁹ Letter from Jon Bones, Environmental Assessment Office, to Gregory McDade, Ratcliff & Co. counsel for the Squamish and Lil’wat Nations, (23 November, 2004) “EAO Response to Oct 11 Letter from Squamish and Lil’wat” in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Aboriginal Comments/Submissions: Letter dated Oct28/04 from Gregory McDade <http://a100.gov.bc.ca/appsdata/epic/documents/p234/d19390/1101323030458_588f4be2ac30481696b0937022e0b833.pdf>, 2004).

⁵¹⁰ *Ibid.*

proponents to meet their commitments. The Squamish and Lil'wat would almost certainly have been driven by a desire to have greater certainty that the SLA would be implemented to their satisfaction, and that the WNC would not have unexpected impacts to their interests. From this vantage, the environmental assessment process clearly served as an important means through which the Squamish and Lil'wat could express their concerns, and push VANOC and the Crown to action.

This has notable implications both for the Olympics and for the structuring of Aboriginal participation more generally. Disputes surrounding the Salt Lake City Games effectively prevented any meaningful Aboriginal participation from occurring, and the existence of forum for dispute discussion, and resolution, may have had significant benefits.⁵¹¹ The implications for British Columbia and Canada are more obvious, particularly as the environmental assessment process is often relied upon to carry out duties of consultation and accommodation.⁵¹² Clearly such formal processes can indeed have significant benefits in ensuring Aboriginal peoples are given an opportunity to appropriately express their perspectives and concerns. However, it must be recalled that the British Columbia environmental assessment process only applied to the WNC due to VANOC's decision to opt-in to the environmental review under s.10(c) of the *Environmental Assessment Act*. These preliminary aspects of the environmental assessment clearly reveal that the WNC project posed significant concerns to the Squamish/Lil'wat, and yet the project would not have had the benefit of the Working Group, or formal review process, to aid the parties in their efforts to develop consensus and address disputes. This clearly indicates the importance of such formal consultation

⁵¹¹ See Chapter 2.7, above, for discussion of Salt Lake City Games and disputes amongst Aboriginal groups which frustrated their efforts to meaningfully participate.

⁵¹² See Chapter 3.3, above, for discussion of consultation and accommodation.

processes, and would seem to highlight a significant limitation in relying upon environmental assessment legislation to address Aboriginal concerns. However, the importance of the environmental assessment process in relation to the WNC would seem to suggest that a comparable forum may prove especially useful for those instances where projects remain outside environmental review, and guard against the trends displayed in the earlier review of lower court jurisprudence.⁵¹³

The Squamish, Lil'wat, VANOC and the EAO engaged in further discussions with regards to the general issues raised by the Squamish and Lil'wat.⁵¹⁴ During the review of the Application, the Working Group held two meetings,⁵¹⁵ while the EAO, VANOC, the Squamish and Lil'wat held additional meetings specifically to discuss the concerns and issues raised by the Nations.⁵¹⁶ Additionally, VANOC held a number of "open house" sessions to provide information to Squamish and Lil'wat members, and a forum for soliciting community opinions on the WNC.⁵¹⁷ This more detailed understanding revealed that the majority of specific Squamish and Lil'wat concerns

⁵¹³ See Chapter 3.4.1, above, for discussion of lower court decisions applying doctrine set out in *Haida Nation*, *Taku Tlingit*, and *Mikisew Cree* which demonstrates the difficulty which the Crown has had in creating appropriate consultation and accommodation structures.

⁵¹⁴ WNC Report, *supra* note 421 at pg X, WNC Report identifies some of the detailed concerns of the Squamish and Lil'wat "...archaeological impacts of the competition facilities and access roads; direct loss of land and resources through facility development; indirect loss of land and resources through increased access and recreational use; loss of opportunities for First Nation activities; economic inequalities and loss of opportunities; interpretation and implementation of the Shared Legacies Agreement; acceptance by government of First Nations land use plans; inability of provincial planning processes to address and resolve First Nations issues; impact of the issuance of new resource and land use tenures on treaty and other negotiations related to Aboriginal rights and title; and cumulative effects of development within the Sea to Sky corridor on Aboriginal interests."

⁵¹⁵ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, "Post-Application Information Distribution and Consultation Report" (15 December, 2004) in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Proponent Comments/Correspondence: Report on Consultation on Whistler Nordic Centre Project <http://a100.gov.bc.ca/appsdata/epic/documents/p234/d19469/1103138553848_710c340d1a4246149fdc963daa8f3693.pdf>, 2004) ["Post-Application Report"] at ii-iii.

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid* at ii.

remained around three key subjects: impacts to Aboriginal rights and title, impacts of the legacy trails system to culturally significant areas, and the certainty of reaching the economic inclusion contemplated under the SLA.⁵¹⁸ With the more detailed perspectives and concerns of the Squamish and Lil'wat laid bare through such consultations and perspective sharing, VANOC was then required to provide a formal report to the EAO outlining the outcome of these discussions, and plans for addressing the issues raised by the Nations.⁵¹⁹

VANOC filed its Post-Application Information Distribution and Consultation Report⁵²⁰ on December 15, 2004 (the "Post-Application Report") and an additional addendum, Responses to First Nations and Agency Post-Application Comments Associated with the Cumulative Effects Assessment,⁵²¹ on December 20, 2004 (the "First

⁵¹⁸ Letter from Chief Leonard Andrew, Lil'wat Nation, and Chief Bill Williams, Squamish Nation, to Jon Bones, Environmental Assessment Office (17 November, 2004) "First Nations Comments on Whistler Nordic Centre Environmental Assessment Application" in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Aboriginal Comments/Submissions <http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_234_19446.html>, 2004) at 2-3, "Our Nations are generally satisfied with the extent of investigation and analysis of data conducted for the footprint of the Olympic competition element of the WNC. We have concerns with respect to magnitude and significance ratings in several sections of the report that should be addressed...The level of assessment conducted for the legacy facilities is inadequate. The Terms of Reference clearly include the legacy facilities in the scope of the EA, yet the Application fails to present a complete assessment. The impacts of the legacy facilities are of great concern to our Nations, likely greater than the Olympic competition element of the WNC. We expect the legacy facilities' EA to be as complete and detailed as that conducted for the footprint of the Olympic competition element of the WNC...To date, none of the mitigation measures proposed in the application have been implemented, the Province has not commenced discussions regarding accommodation of Aboriginal interests, and there are outstanding obligations of both the Province and VANOC under the SLA. We are in discussions with VANOC regarding economic opportunities relating to the construction of the project. However, until our Nations, VANOC, and the Province settle these matters, we consider the WNC to have significant residual impacts on Aboriginal interests."

⁵¹⁹ Post-Application Report, *supra* note 515 at iv-vi, VANOC provides summary of the key consultation work to be continued.

⁵²⁰ *Ibid.*

⁵²¹ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, "Responses to First Nations and Agency Post-Application Comments Associated with the Cumulative Effects Assessment" (20 December, 2004) (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Proponent Comments/Correspondence <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1103739173741_ee45e14b788d43abb302d60a15b5391a.pdf>, 2004) [the "First Nations Addendum"].

Nations Addendum”). The Post Application Report and First Nations Addendum described the content of VANOC’s consultation and consensus building efforts with the Squamish and Lil’wat, but more importantly, outlined further mitigation measures based on the content of those discussions.⁵²² In the Post Application Report, VANOC addressed each of the issues raised by the Nations with regard to specific elements of WNC construction, and responded to the mitigation measures which had been suggested by the Nations.⁵²³ While the Squamish and Lil’wat raised issues including negative impacts to grizzly populations, and the loss of old growth forest to the construction of access roads to the WNC, the most significant issues raised remained centered upon the legacy trail system,⁵²⁴ appropriate determinations of impacts,⁵²⁵ broader implications regarding Aboriginal rights and title,⁵²⁶ and the implementation of the SLA.⁵²⁷ In relation to many of these issues the Nations proposed similar mitigation measures: greater inclusion in planning, seeking consent of the Nations before beginning construction, protecting culturally significant areas to the greatest extent possible, compensation for the infringement of Aboriginal rights and title, and provision of economic opportunities to the Nations in the development of the WNC. In response to most mitigation measures proposed by the Nations for each of these issues VANOC neither expressly accepted nor rejected the Nations proposals. Rather, VANOC merely restated throughout that, along with the Province, it would:

⁵²² Post Application Report, *supra* note 515 at 18-21, 27-35, & 66.

⁵²³ *Ibid.* at 27-35.

⁵²⁴ See Letter from Squamish/Lil’wat November 17, 2004, *supra* note 518 at 6-7.

⁵²⁵ *Ibid.* at 2, 8-9.

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.* at 2-3 & 6-8.

“...continue to consult with First Nations regarding the mitigation measures proposed by First Nations in the AIUSs and to negotiate the implementation of commitments under the Shared Legacy Agreement.”⁵²⁸

However, VANOC did provide more detailed explanations regarding the subjects and efforts of its continuing consultation with the Squamish and Lil’wat, through an extended list of commitments. These included specific commitments to work to “resolve socio-economic issues”, “participate in direct negotiations with First Nations over economic opportunities”, “keep First Nations informed”, “consider other mitigation measures proposed by the First Nations”, “mitigate effects of legacy facilities on land and land management based on mitigation measures recommended in the AIUSs”, and to work towards implementation of the SLA with the Nations and the Province.⁵²⁹

VANOC’s more express commitments provided in the Post Application Report and First Nations Addendum were clearly focused on addressing the concerns which had been raised by the Squamish and Lil’wat; yet once again, these commitments revealed that little progress had been made on developing concrete solutions to the issues facing the parties. Additionally, the Post Application Report and First Nations Addendum revealed that a continuing barrier to WNC development remained the broader land use planning and Aboriginal rights and title issues which the Crown had committed to address under the SLA.⁵³⁰ VANOC highlighted this issue in both documents, noting that many of the mitigation measures viewed as crucial by the Squamish and Lil’wat were

⁵²⁸ See e.g. Post Application Report, *supra* note 515 at 33, 34, 35, 37 & 68.

⁵²⁹ *Ibid.* at 36.

⁵³⁰ *Ibid* at 33-35. See also Letter from Squamish/Lil’wat November 17, 2004, *supra* note 518 at 7, “However, until agreement is reached with...the Province regarding...accommodation of aboriginal rights and title, our Nations are not ready to accept VANOC’s conclusion that the ‘Whistler Nordic Centre is not likely to cause significant adverse environmental, socioeconomic/community or other effects’”.

outside the scope of the WNC,⁵³¹ and beyond the capacity of VANOC to provide.⁵³² For example, mitigation measures to address impacts to Aboriginal title lands involved the transfer of Provincial Crown land,⁵³³ addressing broader regional economic development,⁵³⁴ involvement of Squamish and Lil'wat in regional planning and land use,⁵³⁵ and the formal protection of culturally significant areas were all viewed as measures which required Provincial action outside of the WNC environmental assessment.⁵³⁶

These issues were particularly challenging to address in the context of the environmental assessment, due to the very nature of the assessment process. VANOC bore the responsibility to develop the applications, reports, and other documents for submission to the EAO, and therefore remained the primary party carrying out consultation with the Squamish and Lil'wat.⁵³⁷ It was clear from both Squamish and Lil'wat submissions, and VANOC responses, that the WNC raised issues requiring the specific involvement of the Provincial Crown, but VANOC was not in a position to compel Provincial action. As noted in the jurisprudence review, consultation and accommodation processes must be capable of addressing the concerns raised by the Aboriginal groups involved,⁵³⁸ and indeed the Province had provided commitments in the SLA which seemed certain to avoid the difficulties encountered in *Dene Tha'* and

⁵³¹ See e.g. Post Application Report, *ibid.* at 34, VANOC provides extensive list of those mitigation measures for the Province to address, including pursuit of First Nations economic opportunities, and creation of co-management agreement for Callaghan Valley.

⁵³² *Ibid.* at 33 "The above noted mitigation measures involve allocation of provincial lands to First Nations which is not the responsibility of VANOC".

⁵³³ *Ibid.* at 34-5.

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.* at 19-21.

⁵³⁸ See e.g. Chapter 3.4, above, at 99-100 for discussion of *Brokenhead* which indicates that consultation and accommodation processes must be capable of addressing Aboriginal interests and concerns.

Brokenhead.⁵³⁹ Yet the environmental assessment process seemed to contain fundamental difficulties in aiding the implementation of the Province's commitments in the SLA; specifically, that this process was driven by VANOC as project proponent, and the Crown was not obliged to proactively respond and address Aboriginal concerns.

In further letters to the EAO, the Lil'wat expressly outlined their needs for greater Crown involvement in the ongoing consultation and accommodation efforts, and succinctly described the role which VANOC was being asked to play in meeting the concerns of the Squamish and Lil'wat:

“...if WNC and legacy facility development affects our land, people, and culture, then VANOC is responsible for mitigating those impacts. If British Columbia law states that providing us rights to our traditional territory requires action by the provincial government, then VANOC, as the project proponent, is responsible for getting the province to the table and supporting the proposed mitigation... VANOC has identified no fewer than sixteen items for which they feel the Province should assume responsibility for mitigation...To date, Province representatives have not been deeply involved in discussions regarding the WNC, nor have they shown great willingness to assign new land or land management responsibilities to the First Nations as accommodation for interests infringed by the WNC and legacy facilities.”⁵⁴⁰

Though the environmental assessment process was clearly adept at providing a means through which the Squamish and Lil'wat were able to express their concerns, the process was evidently not designed to ensure all of those concerns were considered and addressed. This placed VANOC, as highlighted by the Lil'wat, in a position where they were asked to pursue greater Crown involvement, which is most notable given that *Haida Nation* expressly provided that the duty to consult and accommodate ultimately rests with

⁵³⁹ *Ibid.* See also, SLA, *supra* note 333 at 5-6 where Province commits to addressing broader land use management planning in the Callaghan Valley.

⁵⁴⁰ Letter from Chief Leonard Andrew, Lil'wat Nation, to John Bones, Environmental Assessment Office, (21 December, 2004) “Lil'wat Nation Preliminary Comments on Post-Application Information Distribution and Consultation Report” in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Aboriginal Comments/Submissions <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1104967565352_81d87260976e41f4b482f079658a0628.pdf>, 2005) at 3-4.

the Crown.⁵⁴¹ As is evidence in the context of the WNC, the separation of Crown and project proponents' consultation efforts may leave Aboriginal groups in a position where the potential harms associated with a project are neither discussed nor addressed due to the nature of the administrative review. These challenges clearly frustrated the capacity of VANOC, the Squamish and the Lil'wat to craft mutually acceptable solutions to the issues identified. Certainly, the Post Application Report, First Nations Addendum, and the additional comments from the Squamish and Lil'wat revealed that further consultations were indeed aiding the parties in obtaining greater understanding of one another's perspectives, interests and concerns.⁵⁴² However, the timelines imposed under the *Environmental Assessment Act* loomed closer, and the parties faced even greater pressure to reach consensus.

VANOC, the Squamish and Lil'wat continued consultations in early 2005, and these efforts ultimately proved fruitful. On February 2, 2005 the parties entered into a Letter of Mutual Understanding (the "LMU") which set out, in greater detail, the commitments of the parties, and manner in which environmental certification could proceed with the support of the Nations. First, VANOC, the Squamish and Lil'wat agreed that the WNC project be considered as two distinct parts: the competition elements of the project, and the legacy trails.⁵⁴³ Under the LMU, VANOC would

⁵⁴¹ See Chapter 3.3, above, at 87-88.

⁵⁴² See e.g. Post Application Report, *supra* note 515 at 35. & Squamish Letter December 21, 2004, *supra* note 540 at 1.

⁵⁴³ *Letter of Mutual Understanding – Recreation Trails in the Callaghan Valley and Whistler Nordic Centre (WNC) Environmental Assessment (EA) Certification*, The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, Lil'wat Nation, and Squamish Nation, (2 February, 2005) in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Completed/Certified: Amendment-Legacy Trails-WNC: WNC Project Application Amendment-Appendix B <http://a100.gov.bc.ca/appsdata/epic/documents/p234/d23705/1174597897914_ea3e08ca6f5249d9b1b6d2be61a29bfc.pdf>, 2007) ["LMU"].

proceed with certification of the competition aspects of the WNC, while certification for the legacy trails would not be sought until the further conditions provided for in the LMU were complete.⁵⁴⁴

Under these provisions, VANOC and the Nations committed to jointly recommend to the EAO that certification for the competition aspects contain conditions which require VANOC to retain an archaeologist or a cultural technician selected by the Squamish and Lil'wat Nations to monitor construction activities, and to fulfill the commitment in the SLA to provide significant contracts in the Callaghan Valley. The commitments under the SLA were to be met through: (a) the signing of an agreement with the Nations for direct award of construction contracts for the WNC; (b) encouraging the Ministry of Transportation to enter into construction contracts with the Nations in its development of the access roads to the WNC; and (c) sign an agreement with the Nations related to the construction of the \$6.5 million housing legacy referred to in the SLA.⁵⁴⁵ Additionally, VANOC and the Nations agreed to develop a proactive First Nations' employment strategy for both the WNC, Olympic and post-Olympic events.⁵⁴⁶ Further to these elements, VANOC committed to meeting a number of conditions with regards to the construction and permitting of the legacy trails. VANOC agreed to: not construct trails through the aforementioned "Wild Spirit Place" unless the Nations agreed to such construction; share all relevant planning documents, involve and consult with the Nations during planning and certification of the legacy trails; provide funding (to a maximum of \$30,000) for an archaeologist or cultural technician to undertake an archaeological impact assessment of the legacy trails prior to construction and to monitor construction activities;

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.* at 1-2.

⁵⁴⁶ *Ibid.* 2.

and include representatives from both the Squamish and Lil'wat Nation in the design team for the planning and development of the legacy trails.⁵⁴⁷ In addition to these conditions related specifically to the elements of the WNC, the LMU also provided that VANOC would facilitate Bell sponsorship of \$3 million, and advocate for additional support, for the Squamish/Lil'wat Cultural Centre.⁵⁴⁸ In return for these commitments of VANOC, the Nations agreed to support the environmental certification and any additional permitting or tenure requirements of VANOC in relation to the competition elements of the WNC.⁵⁴⁹

Beyond the specific commitments of VANOC and the Nations, the LMU also outlined a specific consultation process to be adhered to in negotiating the aforementioned agreements, and developing mitigation measures and plans for the legacy trails.⁵⁵⁰ Under the consultation protocol the parties expressed their intention to negotiate resolutions to the identified issues by July 14, 2005 (this timeline could be extended by further agreement), to commence negotiations immediately following the execution of the LMU, to meet as often as required and coordinate meetings with Provincial representatives to ensure that issues beyond the scope of VANOC could be addressed.⁵⁵¹ Further to these provisions, funding for the Squamish and Lil'wat was contemplated to aid specifically in their participation in the legacy trails consultation process. VANOC committed to provide the Squamish and Lil'wat with either \$150,000 in funding, or \$75,000 depending on the Province's willingness to provide funds matching VANOC's

⁵⁴⁷ *Ibid* at 1-2.

⁵⁴⁸ *Ibid* at 3.

⁵⁴⁹ *Ibid* at 4.

⁵⁵⁰ *Ibid.* at 8-11.

⁵⁵¹ *Ibid.*

commitments. Importantly, the consultation process included a provision under which VANOC expressly committed to:

“...seriously consider modifying the proposed scope, location, design and operation of the current plans for the recreation legacy trails and facilities as necessary to implement the results of this Consultation Process and agrees that this may include not proceeding with construction of the recreation legacy trails and facilities or otherwise accommodating the interests of the Nations by VANOC or BC.”⁵⁵²

This recognition held even greater significance when read in conjunction with provision that provided that discussions and negotiations under the consultation process must be completed prior to the Province granting any land tenures in relation to the legacy trails.⁵⁵³ Though the LMU did not provide the specific solutions which would ultimately be necessary for the legacy trails system to proceed, the identification of a more detailed consultation structure, and stronger commitments to general forms of accommodation were indeed significant. It was clear such a stage in the development of consensus was necessary, to bridge the very general understandings which had been obtained through the negotiation of the SLA, with actual execution of the parties objectives, which would require significantly detailed plans. In particular, by identifying explicit agreements to negotiate, and specific support that VANOC could provide to the Squamish and Lil’wat in their pursuit of further Crown consultation, the LMU more precisely identified how the parties would implement the generalities of the SLA. Additionally, the more precise description of how the Squamish and Lil’wat would be incorporated into decision making processes in WNC development brought the necessary precision to the general commitments of incorporating the Squamish and Lil’wat in the SLA.

⁵⁵² *Ibid.* at 10.

⁵⁵³ *Ibid.*

Perhaps most significantly, the express recognition that the Squamish and Lil'wat could control how areas of cultural significance would be impacted by legacy trails, and that VANOC's plans would indeed be changed to reflect Squamish and Lil'wat desires, signaled an important shift in VANOC's understanding of Squamish and Lil'wat perspectives and interests. These aspects of the LMU, when considered in light of the earlier interpretations of the AIUS, reveal how significantly VANOC's perspectives and understanding of Squamish and Lil'wat interests and concerns had changed. This shift in VANOC's understanding would seem to encapsulate the concept of recognition, and the role the duty to consult and accommodate Aboriginal peoples in furthering recognition, that was described by the judiciary in *Haida Nation* and *Taku Tlingit*.⁵⁵⁴ Indeed, this would seem to clearly indicate that the Crown should be cautious with its delegation of consultation and accommodation duties to the private sector, as the benefit of obtaining greater understanding of Aboriginal perspectives and interests may accrue largely to a project proponent. Certainly, the Crown may be made aware of Aboriginal perspectives through regulatory processes such as environmental assessments; however, it seems plainly evident that the purposes of recognition and reconciliation would be done much greater service where the Crown improves its understanding of Aboriginal peoples directly.

Additionally, the LMU also illustrated the ability of VANOC, Squamish and Lil'wat to develop creative solutions to the issues which they encountered. The concept of splitting the WNC project into separate components, and allowing the uncontroversial elements to proceed with development, was certainly a novel solution to the tight

⁵⁵⁴ See Chapter 3.3.1, above, for discussion of role of consultation and accommodation in furthering purposes of recognition and reconciliation underlying Section 35(1).

timelines imposed by Olympic hosting and the environmental assessment process. By proceeding in this fashion, the competition elements of the WNC for the 2010 Games, which were clearly the most important aspects of the WNC, could be constructed within the tight deadlines associated with Olympic hosting. Additionally, by agreeing that the legacy trails system could not proceed until the SLA was implemented, and submitting the LMU to the EAO for approval, which would result in environmental certification being dependent on VANOC adhering to the LMU, ensured that VANOC could not simply walk away from its further commitments to the Squamish and Lil'wat once approvals for the competition elements of the WNC were complete. Indeed the articulation of relatively strict timelines for carrying out all the further negotiations and agreements outlined in the LMU would also ensure that pursuit of these objectives occurred in a timely fashion, and guarded against further delays in reaching consensus. In sum, the LMU represented a significant, and necessary, step in the parties' efforts to implement the SLA and address the new issues which had arisen.

However, while the LMU displayed a significant step amongst VANOC, the Squamish and Lil'wat, and could indeed have been seen as an important example of how consultation and accommodation could indeed lead to greater recognition and reconciliation, there remained the significant difficulty that of the need for the Provincial Crown's involvement to meet its obligations under the SLA, and address many of the concerns raised by the Squamish and Lil'wat. This shortcoming of the LMU was ultimately addressed through the provision of a letter by the Province to the Nations only days prior to the finalization of the LMU.⁵⁵⁵ This letter expressed Provincial support for

⁵⁵⁵ Letter from Doug Caul, Assistant Deputy Minister Ministry of Small Business and Economic Development, to Chief Leonard Andrew, Lil'wat First Nation, and Chief Bill Williams, Squamish First

VANOC's proposed approach under the LMU, and provided key assurances of the Province's "intent to continue to address key issues raised by First Nations." In that letter, the Province committed to addressing the issues to appear in the LMU, adhere to the timelines agreed to by Squamish, Lil'wat and VANOC, and addressing consultation funding in conjunction with VANOC and the Nations.⁵⁵⁶ Of particular importance, was the Province's suggestion that the Nations and the Province "immediately initiate discussions of a 'Sustainable Resource Management Plan' (SRMP) for the Callaghan Valley to ensure that we [the Province] meet the commitments of the Shared Legacy Agreement."⁵⁵⁷ This letter provided the necessary assurance to the Nations that the Province was also addressing the Nations concerns raised by the WNC, which was clearly significant given the number of concerns and mitigation measures which could only be addressed through Provincial involvement. Ultimately the EAO and Federal authorities⁵⁵⁸ accepted the proposal of VANOC and the Squamish and Lil'wat outlined in the LMU. The WNC was split into its competition and legacy trails components for the purposes of environmental certification, with the final certification for the competition

Nation (31 January, 2005) "Shared Legacy Agreement, Callaghan Valley Legacy Trails and First Nations Support for the Whistler Nordic Centre (WNC) Environmental Assessment (EA) Certification" in LMU, *supra* note 543 12-14 Schedule C.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Letter from Dave Carter, Canadian Environmental Assessment Agency, to John Bones, Environmental Assessment Office, (22 February, 2005) "Whistler Nordic Centre and separation of the Legacy Recreational Trails for the purposes of review under the Canadian Environmental Assessment Act" in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Under Review: Federal Submissions <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1113929198901_f3fb9fbe593b4cf5b1288732ee867ad7.pdf>, 2005), in which the Canadian Environmental Assessment Act does not provide for a means to do a "staged review" (the approach utilized under the British Columbia Environmental Assessment Act); therefore, the Federal authorities chose to allocate funding only to the competition venue for the initial certification, and under a provision of additional funding to the legacy trails, undertook a new environmental assessment process for the legacy trails.

venue being provided on April 5th, 2005.⁵⁵⁹ The certificate issued by the respective Federal and Provincial Ministers incorporated the conditions agreed to by VANOC, the Squamish and Lil'wat in the LMU,⁵⁶⁰ which ensured that its provisions would have binding effect as VANOC pursued construction of the WNC.

VANOC, the Squamish and Lil'wat quickly sought to carry out the tenants of the LMU. VANOC awarded two substantial construction contracts to Squamish and Lil'wat owned businesses, Newhaven Projects Limited Partnership (Squamish) and Resource Business Ventures (Lil'wat), in 2005.⁵⁶¹ Newhaven Projects Limited Partnership was formed by the Squamish Nation in conjunction with Newhaven Construction Ltd.⁵⁶² and was awarded contracts to construct the day lodge, technical and maintenance buildings at the WNC.⁵⁶³ Similarly, Resource Business Ventures was developed as a joint partnership between the Lil'wat and an established construction company, and was "retained to clear the site at the Whistler Nordic Venue".⁵⁶⁴ Following the successful execution of this initial site clearing contract, Resource Business Ventures was awarded a further site preparation contract, and an additional contract to build "major infrastructure at the Whistler Nordic Venue site, including the biathlon stadium, competition trails, roads, bridges, underground services and compounds."⁵⁶⁵

⁵⁵⁹ British Columbia, Environmental Assessment Office, "Environmental Assessment Certificate TD05-01 for Whistler Nordic Centre Project" (5 April, 2005) in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Completed Certified: EA Certificate Documentation <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1112899461759_e4d4e941f95e48b69b948f75dba7901d.pdf>, 2005).

⁵⁶⁰ *Ibid.* at Part 12 Schedule B.

⁵⁶¹ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games, *Sustainability Report 05-06* (Vancouver: online: Vancouver 2010: Sustainability Reports <http://www.vancouver2010.com/dl/00/12/12/sustainability-report-2005-06_66d-UT.pdf>, 2007) at 71.

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

In both instances, the partnering with established, existing construction companies was intended to provide the Squamish and Lil'wat with the "management expertise required to take on large civil construction projects."⁵⁶⁶ In addition to awarding these contracts, a First Nations employment strategy was created by the parties. Under this employment strategy, both Resource Business Ventures and Newhaven Projects were required to provide annual updates outlining how they provided employment opportunities and built capacity within their respective Nations.⁵⁶⁷ The value of these contracts related to WNC development have been reported as totaling \$33 million for Resource Business Ventures and creating 17 man-years of employment for Lil'wat members, and \$19 million for Newhaven Projects Limited Partnerships with the employment of 18 Squamish members.⁵⁶⁸

Through the awarding of these contracts, VANOC had fulfilled its obligations under the SLA, and LMU, to provide significant contracts to the Squamish and Lil'wat in the construction of the WNC. However, as outlined above, there remained other significant obligations for VANOC to meet with regards to WNC development. VANOC addressed the needs of the Squamish and Lil'wat to carefully monitor and control impacts to cultural significant areas by employing representatives of both Nations as cultural technicians to monitor construction progress. Additionally, through the encouragement

⁵⁶⁶ *Ibid.*

⁵⁶⁷ Letter from George McKay, the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, to Dave "Archie" Riddell (9 May, 2007) "Final Report on February 2, 2005 Letter of Mutual Understand" in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Amendment – Legacy Trails – WNC <http://a100.gov.bc.ca/appsdata/epic/documents/p234/d24017/1180997044598_e8698e46e29e449798f8d56d08e41075.pdf>, 2007).

⁵⁶⁸ Fraser Valley Treaty Advisory Council, *Fraser Valley Treaty Advisory Committee First Nations Media Monitor – Experts* (1 May, 2009) online: Fraser Valley Regional District Media Reports <<http://www.fvrd.bc.ca/AboutUs/FVTAC/Documents/FVTAC%20Media%20Monitor%20to%20May%201,%202009.pdf>>.

of VANOC, the Ministry of Transport entered into construction contracts valued at \$470,000 with First Nations companies for the “clearing, grubbing and traffic control work” associated with access road construction, and in conjunction with the Squamish and Lil’wat also developed a First Nation’s employment strategy for the Callaghan Valley.⁵⁶⁹

With regards to the planning and development of the legacy trails, VANOC included representatives of both the Squamish and Lil’wat on the design team, completed a full archaeological assessment on the proposed legacy trails, shared all planning documents with the Nations, and altered the legacy trails to avoid any development in the “Wild Spirit Place”.⁵⁷⁰ VANOC’s adherence to the LMU formed an essential aspect of its renewed application regarding the legacy trails system, and the resulting report and recommendations issued by the EAO.⁵⁷¹ On June 19, 2007, an amendment to VANOC’s environmental certificate was issued by the EAO incorporating the legacy trails, and allowing for construction to commence.⁵⁷²

By this time, the competition venue of the WNC had already been constructed and opened to the public.⁵⁷³ Though the environmental assessment process had revealed

⁵⁶⁹ Letter from George McKay, *supra* note 567.

⁵⁷⁰ British Columbia, Environmental Assessment Office, “Whistler Nordic Competition Venue Recreation Trails Assessment Report and Screening Report with Respect to the Review and Application for an Amendment to Environmental Certificate TD05-01” (26 June, 2007) in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Completed/Certified: Amendment to Certificate Documentation <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1182895829807_f4b2608abceb4ac88943f6e2220da383.pdf>, 2007) at 29-31.

⁵⁷¹ *Ibid.*

⁵⁷² British Columbia, Environmental Assessment Office, “Amendment #1 to Certificate TD05-01 Issued to Vancouver Organizing Committee for the 2010 Olympics and Paralympic Winter Games for the Whistler Nordic Centre Project” (19 June, 2007) in *Whistler Nordic Centre Environmental Assessment* (British Columbia: online: Project Information Centre: Whistler Nordic Centre: Completed/Certified: Amendment Certificate <http://a100.gov.bc.ca/appsdata/epic/documents/p234/1182895239542_f4b2608abceb4ac88943f6e2220da383.pdf>, 2007).

⁵⁷³ Legislative Library Timeline, *supra* note 189 at 8, “December 15, 2007 Whistler Park Opens”.

numerous difficulties and issues which required significant efforts of the Squamish, Lil'wat and VANOC to address, the development of the WNC was ultimately a success. VANOC had met its obligations to provide significant contracting opportunities to the Squamish and Lil'wat, and the Crown had also begun the process of addressing its obligations under the SLA, and Squamish and Lil'wat concerns raised in the WNC environmental assessment process. The Squamish and Lil'wat too had demonstrated their ability to be meaningful participants in the WNC construction, and to make substantive contribution to the manner in which planning and development occurred. The efforts of their respective construction companies were obviously central to the timely and successful completion of the WNC, and the creation of specific plans to ensure members of the Squamish and Lil'wat were employed and trained through these opportunities helped to ensure that the positive benefits of the SLA would be meaningful for individual community members, and more than just mere economic benefits.

The development of the WNC is the element of the 2010 Games which perhaps most closely mirrors the circumstances which tend to surround the objectives of the Crown which trigger the duty to consult and accommodate, as is revealed in the jurisprudence review above.⁵⁷⁴ The very nature of this jurisprudence review was to examine circumstances in which the parties involved reached some form of impasse, unable to reach consensus on the appropriate methods of progressing a project while addressing the concerns of the Aboriginal peoples involved.⁵⁷⁵ What the development of the WNC reveals is that even in circumstances where the parties reach successful outcomes, with little outward signs of disagreement, significant issues are bound to arise,

⁵⁷⁴ See e.g. *Haida Nation*, *supra* note 9, which explicitly involved an environmental assessment process

⁵⁷⁵ See Chapter 3.4, above, for discussion on relevant jurisprudence.

and substantive effort is required from all parties to craft mutually acceptable solutions. In the case of the WNC, it was the environmental assessment process which served as the forum for VANOC, the Squamish, Lil'wat, and the Crown to pursue the detailed consensus needed for successful development. However, as noted from the outset, this process was not required under the British Columbia legislation, and was only invoked for the WNC due to the decision of VANOC to opt-in to the process. This indicates that there may indeed be many objectives or projects which are not captured by environmental assessment legislation, but which would benefit from the creation of a more formal consultation and accommodation process. Additionally, it was also clear that the nature of the environmental assessment process meant that the broad concerns raised by the Squamish and Lil'wat did not have an obvious means of resolution, due to the reliance on the project proponent to carry out the majority of the procedural aspects of consultation and accommodation.⁵⁷⁶

Nevertheless, despite these difficulties, the parties were able to agree on the manner in which WNC development could proceed, and the project did indeed serve to expand the understanding of Squamish and Lil'wat interests in the Callaghan Valley, ensure their participation in the development of their traditional territories, preserve culturally significant aspects of those territories, provide economic benefits, and progress discussions on broader land use which are integral to recognition and reconciliation. Clearly the progression of the consensus amongst the parties, from the SLA, through negotiation of the LMU to completion of the WNC project were very much a product of the commitment of all parties to reaching mutually acceptable results. Again, the nature

⁵⁷⁶ See Chapter 3.3.1, above, for discussion of delegation of consultation and accommodation duties and its implications for Section 35(1) and recognition and reconciliation.

of the Olympic Games may have played a significant role in providing the correct incentives to facilitate interest in reaching consensus, and the desire to overcome challenging conflicts amongst the parties.

Yet, the development of the WNC represented only one aspect of the SLA and Aboriginal participation in the 2010 Games. While the parties worked through the challenges presented by the development of the WNC, the remainder of the SLA provisions were also pursued, and these to formed an integral part of the Squamish and Lil'wat inclusion in the 2010 Games. In particular, the development of the WNC had revealed the particular importance of the Province addressing the concerns surrounding broader land use planning in the Callaghan Valley, and these issues were further highlighted, and addressed, in the context of the Province pursuing its obligation to obtain separate agreements with the Squamish and Lil'wat regarding the expansion of the Sea-to-Sky Highway.

4.4.1.2 Implementation of the SLA – Separate Agreement for Highway Expansion

. While the majority of the Sea-to-Sky expansion was to take place within the traditional territories of the Squamish and Lil'wat, the traditional territories of the Tsleil-Waututh and Musqueam were also marginally impacted by the project.⁵⁷⁷ The Ministry of Transportation acted as project proponent for the highway expansion, and the Environmental Assessment Office began consultation efforts with each of the Nations during the pre-application stage of the environmental assessment.⁵⁷⁸

⁵⁷⁷ British Columbia, Environmental Assessment Office, "Sea-to-Sky Highway Improvement Project Assessment Report" (May 2004) in *Sea-to-Sky-Highway Improvement Project Environmental Assessment* (British Columbia: Project Information Centre: Sea-to-Sky Highway Improvement Project: Completed/Certified EA Documentation online:

The Ministry of Transportation appointed a First Nations Manager to “...assess the potential impacts that the project may have on First Nations interests by working with the First Nations and their representatives to identify and address issues and concerns relating to the planned Project”.⁵⁷⁹ Again, with the more extensive development taking place in Squamish and Lil’wat territory, consultative efforts were more substantial with those two Nations than the Tsleil-Waututh and Musqueam.⁵⁸⁰ Nevertheless, all of the Nations were invited to the meetings of two working groups, one responsible for Bio-Physical and Technical issues, the other Socio-Community.⁵⁸¹ Additionally, the Ministry of Transport and EAO had carried out formal discussions with each of the Squamish, Lil’wat, Musqueam and Tsleil-Waututh during the pre-application process.⁵⁸² As will be discussed in greater detail below, the Squamish and Lil’wat maintained a high level of engagement during the pre-application process, while the Tsleil-Waututh participated less substantively, and the Musqueam did not engage at all.⁵⁸³

The result of consultations during the pre-application process revealed a number of issues raised by the Squamish, Lil’wat and Tsleil-Waututh. Similarly to the development of the WNC, the Squamish and Lil’wat expressed concerns regarding the cumulative impacts on Aboriginal rights and title, as well as specific environmental and

<http://a100.gov.bc.ca/appsdata/epic/documents/p192/1086985596254_b135e98376224d92a621fce42c27c5b.pdf>, 2004) [“Sea-to-Sky Report”] at 18.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ British Columbia, Ministry of Transportation, “Application for Environmental Certification Sea-to-Sky Highway Improvement Project Volume 4: Section A – First Nations Consultation” (13 August, 2003) in *Sea-to-Sky Highway Improvement Project Environmental Assessment* (British Columbia: online: Project Information Centre: Sea-to-Sky Highway Improvement Project: Under Review: Application and Supporting Studies <http://a100.gov.bc.ca/appsdata/epic/documents/p192/d15549/1060801973567_1b24cb1895634660a78b96da1c2030c5.pdf>, 2003) [“Sea-to-Sky Application”] at 8.

⁵⁸⁰ Sea-to-Sky Report, *supra* note 577 at 18-9.

⁵⁸¹ Sea-to-Sky Application, *supra* note 579 at 8-9.

⁵⁸² *Ibid.*

⁵⁸³ Sea-to-Sky Report, *supra* note 577 at 19.

socio-economic issues specifically related to expansion of the Sea-to-Sky Highway.⁵⁸⁴ To address these issues the Province developed two separate forums for discussing the Squamish and Lil'wat concerns: the first would address those issues directly created by the highway expansion, while the second would concern itself more directly with addressing potential impacts to Squamish and Lil'wat rights and title.⁵⁸⁵ To ensure appropriate consultation with specific regards to the highway expansion, the Ministry of Transport entered into Memorandum of Understanding with both the Squamish and Lil'wat which helped to identify and define issues and concerns raised by the Nations, and set out cooperative frameworks for ongoing consultation through the application review and development of the highway⁵⁸⁶ (the "Sea-to-Sky MOU") The development of the Sea-to-Sky MOUs was akin in many respects to the negotiation of the SLA. Although the Sea-to-Sky MOUs did not expressly contemplate a similar number of accommodation subjects or benefits for the Squamish and Lil'wat, the MOU was similar in its general nature, and position as a guiding document for the parties as they proceeded through the environmental assessment process for the Sea-to-Sky Highway expansion.⁵⁸⁷

While the development of these agreements with the Ministry of Transport helped to address the concerns of the Squamish and Lil'wat linked to the highway expansion, negotiations between the Province and the Nations taking place between September 2003 and May of 2004 sought to address broader issues related to potential detrimental impacts to Aboriginal rights and title.⁵⁸⁸ These preliminary discussions satisfied the Nations during the Application process that their interests would be appropriately accommodated,

⁵⁸⁴ *Ibid* at 20.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Sea-to-Sky Application, *supra* note 577 at 10 & 15.

⁵⁸⁷ See Chapter 4.3.4, above, at 133-143 for discussion of the SLA.

⁵⁸⁸ Sea-to-Sky Report, *supra* note 577 at 20-1.

with the Squamish notifying the EAO that an “Accommodation Agreement in Principle” had been reached with the Province in March of 2004.⁵⁸⁹ Those these accommodation agreements were not finalized, in conjunction with the Sea-to-Sky MOUs' signed with the Ministry of Transportation, they were sufficient to satisfy the Squamish and Lil'wat's expectations of consultation with the Crown, and both Nations provided letters of support for the project to the EAO.⁵⁹⁰ The pre-application consultation efforts between the Ministry of Transport and the Tsleil-Waututh had revealed less substantial concerns, notably no direct issues related to Aboriginal rights or title, than those raised in the WNC environmental assessment process.⁵⁹¹ Though less significant issues were raised, a Protocol Agreement was still negotiated between the Ministry of Transport and Tsleil-Waututh to again develop a cooperative framework for ongoing consultation, and which directly identified Tsleil-Waututh interest in seeing employment and contracting opportunities made available to their members.⁵⁹² With the support of the Squamish, Lil'wat and Tsleil-Waututh, environmental certification for the expansion of the Sea-to-Sky Highway was granted in June of 2004.⁵⁹³

As discussed above, Aboriginal employment and contracting opportunities on the highway expansion project were identified by each of the Squamish, Lil'wat and Tsleil-Waututh as being of primary interest. Developing these opportunities was largely pursued through the creation of the employment initiatives through the Aboriginal Skills

⁵⁸⁹ *Ibid.* at 21.

⁵⁹⁰ *Ibid.*

⁵⁹¹ Sea to-Sky Application, *supra* note 579 at 12-3.

⁵⁹² *Ibid.*

⁵⁹³ British Columbia, Environmental Assessment Office, “Environmental Assessment Certificate T04-01 for the Sea-to-Sky Highway Improvement Project” (4 June, 2004) in *Sea-to-Sky Highway Improvement Project* (British Columbia: online: Project Information Centre: Sea-to-Sky Highway Improvement Project: Completed/Certified: EA Certificate Documentation <http://a100.gov.bc.ca/appsdata/epic/documents/p192/1086986806434_b135e98376224d92a621fce42c27c5b.pdf>, 2004).

and Employment Partnership,⁵⁹⁴ which developed a specific training strategy in relation to 2010 Games construction projects, including the Sea-to-Sky Highway Expansion (“VanASEP”).⁵⁹⁵ Additionally, the Ministry of Transport was required to provide quarterly reports to the EAO outlining, among others, the ongoing consultation efforts between the Ministry and the Nations, as contemplated by the Sea-to-Sky MOUs, were being adhered to and carried out by the project proponent.⁵⁹⁶ The pursuit of the VanASEP initiative, and ongoing consultation amongst the Ministry of Transport, Squamish, Lil’wat and Tsleil-Waututh ensured that the project specific concerns which could be addressed by the project proponent were indeed addressed.

The Squamish and Lil’wat had raised additional concerns regarding to detrimental impacts to Aboriginal rights and title created through the increased development of the Callaghan Valley.⁵⁹⁷ The Crown had clearly adopted a more proactive approach to addressing these broader Aboriginal concerns with regards to the Sea-to-Sky Highway expansion than WNC development, perhaps prompted by the more prominent role a Government Ministry was playing (as project proponent) in the Sea-to-Sky Expansion. However, there had been little significant or successful negotiations on the larger land use planning which the Squamish and Lil’wat desired, and the separate

⁵⁹⁴ Human Resources and Skills Development Canada, *Aboriginal Skills and Employment Partnership*, online: Aboriginal Skills and Employment Partnership (ASEP) <http://www.hrsdc.gc.ca/eng/employment/Aboriginal_training/about_asep/fact_sheet.shtml>.

⁵⁹⁵ Human Resources and Skills Development Canada, *VanASEP 2010 Olympic Construction Project* online: Aboriginal Skills and Employment Partnership: Projects <http://www.hrsdc.gc.ca/eng/employment/aboriginal_training/projects/project_profiles/04-09/pv2010oc.shtml>.

⁵⁹⁶ British Columbia, Environmental Assessment Office, *Sea-to-Sky Highway Improvement Project Compliance Reports*, online: Project Information Centre: Sea-to-Sky Highway Improvement Project: Completed/Certified: Post Certificate Documentation <http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_doc_list_192_c_xaa.html> (Folder within Sea-to-Sky Highway Improvement Project documents provides compliance reports dating from September 2004, until June 2009.)

⁵⁹⁷ See Chapter 4.4.1.1, above, where examination of the WNC environmental assessment process discusses the issues raised by the Squamish and Lil’wat regarding Aboriginal rights and title in the Callaghan Valley.

agreement contemplated in the SLA had yet to be implemented.⁵⁹⁸ As was demonstrated in the examination of the WNC development, progress on broader land use planning remained slow during the initial phases of the development in the Callaghan Valley, and this lack of progress was clearly a source of frustration for the Squamish and Lil'wat.⁵⁹⁹

Despite the initial frustration of the Squamish and Lil'wat, the Crown ultimately met its commitments under the SLA, entering into four separate agreements, two each for the Squamish and Lil'wat. The agreements focused on providing accommodation to the Squamish⁶⁰⁰ and Lil'wat⁶⁰¹ for any negative impacts caused by the Sea-to-Sky Highway Expansion to their claimed Aboriginal rights and title.⁶⁰² The agreements created broader land use planning arrangements, creating conservancy zones, cultural sites and other management areas for both the Squamish,⁶⁰³ and Lil'wat.⁶⁰⁴ The execution of these agreements amongst the Crown, Squamish and Lil'wat were indeed significant, particularly in light of the difficulties and conflicts which surrounded the WNC, and the particular frustration expressed by the Squamish and Lil'wat at the Crown's conspicuous

⁵⁹⁸ SLA, *supra* note 333 at 6.

⁵⁹⁹ See Chapter 4.4.1.1, above, at 178-189 for more detail on issues raised by the Squamish and Lil'wat in relation to implementation of the SLA and addressing concerns related to land use planning and impacts to Aboriginal rights and title posed by development of the Callaghan Valley.

⁶⁰⁰ British Columbia, Ministry of Transportation and Infrastructure, News Release, 0072-001387, "B.C. and Squamish First Nation Sign Sea-to-Sky Agreement" (12 September, 2008) online: Ministry of Transportation and Infrastructure <http://www2.news.gov.bc.ca/news_releases_2005-2009/2008TRAN0072-001387.htm> ["Squamish Sea-to-Sky Agreement"].

⁶⁰¹ British Columbia, Ministry of Transportation, News Release, 00045-001522, "B.C. and Lil'wat First Nation Sign Sea-to-Sky Agreement" (15 December, 2006) online: Ministry of Transportation <http://www2.news.gov.bc.ca/news_releases_2005-2009/2006TRAN0045-001522.htm> ["Lil'wat Sea-to-Sky Agreement"].

⁶⁰² *Ibid.* & Squamish Sea-to-Sky Agreement, *supra* note 600.

⁶⁰³ *Agreement on Land Use Planning*, Squamish First Nation and British Columbia (Represented by Minister of Agriculture and Lands), (26 July, 2007) (British Columbia: online: Legislative Library of British Columbia <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/418343/squamish_nation_lup_agr.pdf>, 2007) ["Squamish Land Use Planning Agreement"].

⁶⁰⁴ *Land Use Planning Agreement*, Lil'wat Nation, British Columbia (Represented by Minister of Agriculture and Lands), (11 April, 2008) online: Legislative Library of British Columbia <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/437472/lilwat_agreement_final.pdf> ["Lil'wat Land Use Planning Agreement"].

absence during the WNC environmental process.⁶⁰⁵ These agreements may provide an example of how wayward consultation and accommodation processes may ultimately be corrected, and the objectives of the parties reached. However, it is important to consider the significant level of effort and good faith the parties, particularly the Squamish and Lil'wat, displayed in overcoming conflicts and reaching agreement despite the added pressure of Olympic Games timelines and scrutiny.

The agreements addressing the Sea-to-Sky Highway Expansion and its potential impact to the rights and title of the Squamish and Lil'wat were described as providing the Crown with assurance that the Sea-to-Sky Highway would be free of any Aboriginal rights and interests claims, and to secure tenure where the highway and expansion project crossed the reserve land of either the Squamish or Lil'wat.⁶⁰⁶ In return for securing such tenure and certainty regarding any interests or rights claims to the highway, the Province granted both the Lil'wat and Squamish benefits packages which included parcels of land and funding for employment and training.⁶⁰⁷

The Lil'wat Sea-to-Sky Agreement between the Lil'wat and the Province was completed in December of 2006 and provided 600 acres of Crown land valued at \$9.5 million, an option to purchase a further 600 acres within 10 years at 2006 market value, and the provision of \$1 million towards employment training and advice on joint ventures to the Lil'wat Nation.⁶⁰⁸ The agreement between the Squamish and the Province was signed nearly two years later in September of 2008, and also provided 600 acres of Crown land (valued at \$7.2 million in 2004 dollars), the right to purchase a further 600

⁶⁰⁵ See Chapter 4.4.1.1, above, at 178-188 for discussion of WNC and Squamish/Lil'wat concerns regarding Crown involvement in the WNC environmental assessment process.

⁶⁰⁶ Lil'wat Sea-to-Sky Agreement, *supra* note 601 & Squamish Sea-to-Sky Agreement, *supra* note 600.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Lil'wat Sea-to-Sky Agreement, *ibid.*

acres within five to ten years at the 2004 appraised value of \$4.6 million and the provision of \$1.25 million for training, employment and advice on joint ventures.⁶⁰⁹ However, the Squamish agreement also provided an additional \$9.75 million to the Nation for use in land acquisition and as compensation for any “direct impacts of the highway upgrade to First Nations lands along the route”.⁶¹⁰

These agreements had met the obligation of the Crown under the SLA to provide the Squamish and Lil’wat with separate agreements for the Sea-to-Sky Highway expansion,⁶¹¹ and in conjunction with the VanASEP initiative, the benefits provided to the Nations again may be seen as matching the guidance provided by the judiciary in *Delgamuukw* with regards to the appropriate accommodation of infringements of Aboriginal title lands (although the claims of all the Nations remain outstanding).⁶¹² The provision of training and employment opportunities within the highway expansion project helped to ensure Aboriginal peoples benefitted directly from the pursuit of Crown objectives within their traditional territories. Additionally the provision of additional lands and economic compensation are also reflective of the economic component of Aboriginal title,⁶¹³ and coupled with the specific funding related to the Squamish and Lil’wat interests in seeking advice and guidance on development and joint-venture projects, provide an example of how Aboriginal interests in relation to a development project may be supported.

⁶⁰⁹ Squamish Sea-to-Sky Agreement, *ibid*.

⁶¹⁰ *Ibid*.

⁶¹¹ SLA, *supra* note 333 at 6.

⁶¹² See Chapter 3.2, above, at 69-71 for discussion of *Delgamuukw*, the nature of Aboriginal title, and the appropriate accommodation of infringements of Aboriginal title. See also, Chapter 3.2, above, at 82-85 for discussion of *Haida Nation*, the scope of the Crown’s duty to consult and accommodate where claims to Aboriginal title are strong, and the risk posed high.

⁶¹³ See Chapter 3.2, above.

One might argue that the opportunities and benefits provided to the Squamish and Lil'wat in relation to the Sea-to-Sky Highway Expansion were largely dictated by the nature of the project chosen; in other words, a large construction project naturally affords opportunities for employment and training in the construction field. Consequently, one might interpret the benefits negotiated by the Squamish and Lil'wat as simply reflective of the options presented to them, rather than representative of the Nations larger priorities and interests in land use planning and economic development. Indeed, this interpretation may be quite correct, and this clearly suggests that it is important to think more cautiously about whether the Sea-to-Sky Agreements are indeed in furtherance of the recognition and reconciliation discussed in the jurisprudence review above.⁶¹⁴ A possible answer to such concern is to consider the Sea-to-Sky Agreements in the larger context in which they were negotiated; a context which saw the transfer of land to the Squamish and Lil'wat, the Crown facilitation of Squamish and Lil'wat uses of these lands, and the negotiation of broader land use planning agreements. From this vantage the Sea-to-Sky Agreements may be more properly seen as an element of the overall attempts to prioritize Squamish and Lil'wat interests, and further the objectives of recognition and reconciliation. The material available does not provide perfect clarity regarding the motivations of the Squamish or Lil'wat, and therefore it is impossible to conclusively determine whether the benefits provide truly prioritize Squamish and Lil'wat interests. Indeed, one might also suggest that even if the Squamish and Lil'wat simply pursued those options made available to them, that this is may still reflect the Nations' economic interests, as those interests (like most societies) shift in response to the trends and

⁶¹⁴ See Chapter 3.2.1 and Chapter 3.3.1, above, for discussion of how jurisprudence suggests the objectives of recognition and reconciliation should be pursued.

opportunities presented by the wider world. Again, this interpretation might be considered an apology for what another might term colonialism. Though it is challenging to choose amongst these interpretations based on the evidence currently available, the divergent views of the Sea-to-Sky Agreements are worth noting simply as an illustration of the complexity of pursuing recognition and reconciliation, and ensuring Aboriginal participation is indeed meaningful.

While considering the potential larger implications of the Sea-to-Sky Agreements may provide interesting fodder for debate, it is also worthwhile to consider their meaning from a more strict application of the judicial guidance. In particular, it is notable that the provision of the Sea-to-Sky Highway Expansion benefits to the Squamish and Lil'wat, and not the Tsleil-Waututh and Musqueam, can be justified based on the spectrum outlined in *Haida Nation*⁶¹⁵. This is evident when one considers that the Sea-to-Sky Highway expansion largely took place within Squamish and Lil'wat territories. Similarly to the SLA, these Sea-to-Sky Highway agreements provide a further example of the limitations of the duty to consult and accommodate to address the marginalization of Aboriginal peoples.

Clearly the duty to consult and accommodate is capable of spurring the development of significant economic benefits, employment and training opportunities, and even the transfer of land to affected Aboriginal peoples. However, in instances where an Aboriginal groups traditional territories have been privatized, developed or transferred (as is the case with Vancouver in relation to the Musqueam and Tsleil-Waututh) impacts of a proposed project are likely so low they do not warrant the transfer

⁶¹⁵ See Chapter 3.3, above, at 82-85 for discussion of *Haida Nation* and scope of Crown's duties to consult and accommodate Aboriginal peoples.

of significant benefits.⁶¹⁶ Additionally, if there are simply no projects which take place within an Aboriginal group's traditional territories, they similarly will be unable to obtain any benefits under the Crown's duty to consult and accommodate. This leaves an obvious gap of Aboriginal groups and peoples who can not reasonably expect the duty to consult and accommodate to substantively address issues of marginalization, or the pursuit of greater recognition and reconciliation.

This issue is particularly significant, and not simply because of the benefits which may be provided in direct relation to a project. Indeed, as suggested by Gordon Christie, the transfer of benefits for impacts to Aboriginal rights and title, claimed or otherwise, may even be viewed as a modern colonial practice. As was made evident in the jurisprudence review, if the duty to consult and accommodate is to be designed to ensure it is not simply a colonial practice, the duty must be tied to greater efforts of recognition and reconciliation. From our review of the jurisprudence, and areas of consensus amongst commentators, this includes pursuing negotiated settlement of Aboriginal claims, progressing Aboriginal input into land use planning, prioritizing of Aboriginal interests, and protecting Aboriginal rights and title against further encroachment.⁶¹⁷

Although the Sea-to-Sky Highway expansion agreements, and the SLA, had made progress on the provision of benefits to the Squamish and Lil'wat, and even the prioritization of their interests, the broader land-use planning and Aboriginal rights and title discussions with the Crown had remained unaddressed. However, as the WNC and

⁶¹⁶ See *Delgamuukw*, *supra* note 180 at 143-159 for discussion of proof of Aboriginal title and importance of exclusivity and continual use of land by Aboriginal claimants to the strength of their claims to Aboriginal title. *Delgamuukw* demonstrates that in circumstances where lands have been privately held for significant periods of time, especially prior to the *Constitution Act, 1982* that Aboriginal claims will likely be much weaker.

⁶¹⁷ See, Chapter 3.3.1, above, for discussion on judicial guidance and commentary surrounding reconciliation and recognition under Section 35(1)..

Sea-to-Sky Highway development continued, the Crown, Squamish and Lil'wat finalized land use agreements encompassing the Callaghan Valley. These agreements sought to further define areas of cultural and environmental significance, which would in turn provide greater certainty in the planning of further development within the Sea-to-Sky Land and Resource Management Plan area.⁶¹⁸ The Squamish and Province entered their land use agreement in July of 2007, which identified:

- a) two new conservancies;
- b) twenty two cultural sites totaling 3,063 hectares in which the priority is to protect Squamish cultural areas;
- c) cultural management areas within three Squamish "wild spirit places" which requires any resource development to adhere to specific rules to conserve wildlife habitat and cultural features;
- d) wildland zones within two Squamish "wild spirit places" in which commercial recreation and mining is permitted but no commercial forest harvesting is permitted;
- e) wildlife focus areas to create habitat management for wildlife; and
- f) collaborative fish and wildlife management protocols and plans.⁶¹⁹

The Lil'wat and Province finalized their land use agreement in April of 2008, identifying:

- a) six new conservancies;
- b) the expansion of Duffy Lake Provincial Park to nearly double its original size;
- c) 204,000 hectares of wildland zones;
- d) 47,000 hectares of cultural management areas
- e) Fifty-nine Lil'wat "spirited ground areas" to be protected, which includes cultural resources such as village and archaeological sites, spiritual places, and gathering areas;
- f) Environmentally sensitive old growth forest management areas to be protect to address Lil'wat concerns about logging in old growth ecosystems, rare ecosystems, and ecosystems that support traditional and cultural uses;
- g) Measures to ensure visual quality management;
- h) Plans for management of floodplains and riparian management areas;
- i) the offer of a lease and license of occupation to the Lil'wat Nation to facilitate the development of cultural education facilities; and

⁶¹⁸ British Columbia, Integrated Land Management Bureau, *Sea-to-Sky LRMP Background*, online: <<http://www.ilmb.gov.bc.ca/slrp/lrmp/surrey/s2s/index.html>>.

⁶¹⁹ See British Columbia, Ministry of Agriculture and Lands, Backgrounder, AL0036, "Details on Squamish Agreements" (27 July, 2006), online: Ministry of Agriculture and Lands <http://www2.news.gov.bc.ca/news_releases_2005-2009/2007AL0036-000961-Attachment1.htm>, for overview of Squamish Land Use Agreement. See especially Squamish Land Use Agreement, *supra* note 603 at 1-9.

- j) the desire to provide opportunities to the Lil'wat to develop commercial recreation ventures in the Land Resource Management Plan area.⁶²⁰

Notably, these land use planning agreements included conflicting assertions from both the Province and the Nations regarding their perspectives on Aboriginal rights, title and Crown title over the Sea-to-Sky Land Resource Management Plan area.⁶²¹ Despite differing positions on Provincial and First Nation jurisdiction over the region, the parties nevertheless were capable of agreeing to the creation of conservation and culturally significant areas, and also defining the appropriate means for pursuit of future development within the traditional territories of each of the Nations.

In addition to defining specific land management areas, the agreements also identified broad objectives for the various land designations,⁶²² the need for collaborative management of the areas encompassed by the land use agreements,⁶²³ and the requirement that the Province engage in full consultation and provide appropriate accommodation for any development activities taking place within the land management area.⁶²⁴ The ability to develop collaborative management plans in spite of the significant barrier posed by outstanding claims of Squamish and Lil'wat rights and title within the Callaghan Valley may be reflective of the progression of Squamish, Lil'wat and Crown relationships from the very preliminary understandings obtained through the negotiation of the SLA, to the more detailed understandings and resulting land use planning arrangements contained in the land use agreements, with the eventual hope that

⁶²⁰ See British Columbia, Ministry of Agriculture and Lands, News Release, "Province and Lil'wat Sign Historic Land Use Agreement" (11 April, 2008) online: Ministry of Agriculture and Lands <http://www2.news.gov.bc.ca/news_releases_2005-2009/2008AL0014-000516.htm>, for overview of Lil'wat Land Use Agreement. See especially Lil'wat Land Use Agreement, *supra* note 604.

⁶²¹ See Lil'wat Land Use Agreement, *ibid.* at 2 & Squamish Land Use Agreement, *supra* note 603 at 2.

⁶²² See e.g. Lil'wat Land Use Agreement, *ibid.* at Schedule B & C. See e.g. Squamish Land Use Agreement, *ibid.* at 4-5.

⁶²³ Lil'wat Land Use Agreement, *ibid.* at 7. Squamish Land Use Agreement, *ibid.* at 7.

⁶²⁴ See e.g. Lil'wat Land Use Agreement, *ibid.* at 22. See e.g. Squamish Land Use Agreement, *ibid.* at 7-8.

negotiated settlement of Squamish and Lil'wat claims occurs. Indeed, the evolution of Crown understanding of Aboriginal interests, relationship development, and increased Aboriginal participation in land use planning and economic development would seem to be a perfect reflection of the judiciary's characterization of the purposes of recognition and reconciliation, mandated by Section 35(1) as being best understood as processes.⁶²⁵

Though the announcement of these agreements did not reference the development of the WNC, or negotiation of the SLA, which had spurred discussions between the Province, Squamish and Lil'wat Nations regarding cumulative impacts to Aboriginal rights and title, one would expect that negotiations in relation to the highway expansion would have been informed by WNC development. This would seem all the more likely given that such agreements were not developed in relation to the WNC, despite the Province specifically taking responsibility to address Squamish and Lil'wat concerns surrounding impacts to Aboriginal rights and title and land use planning in the environmental assessment of the WNC.⁶²⁶

Indeed, it would appear that the development of the Callaghan Valley, spurred by the Olympics, played a significant role in the negotiations and discussions between the Province, the Squamish and Lil'wat regarding land resource management planning. Though the Province has certainly entered similar agreements in relation to other land resource management plans, and developments,⁶²⁷ and in this regard the Squamish and Lil'wat experiences may not have been unique, it is certain that the hosting and

⁶²⁵ See Chapter 3.3, above, at 78-79 for *Haida Nation* discussion on the processes of recognition and reconciliation.

⁶²⁶ See Letter from Doug Caul to Chief Leonard Andrew and Chief Bill Williams, *supra* note 555. See Chapter 4.4.1.1, above, at 196-7 for discussion of Crown commitments to Squamish and Lil'wat in relation to WNC.

⁶²⁷ For example, see British Columbia, Integrated Land Management Bureau, *First Nations Agreements* online: Integrated Land Management Bureau
<<http://www.ilmb.gov.bc.ca/content/documents/2010/02/19/first-nations-agreements>>.

organizing of the 2010 Games influenced the context, and manner in which the land use plans were developed. As noted above, it is the negotiation of such agreements which renders the duty to consult and accommodate with greater significance, and ensures it is tied to broader efforts of recognition and reconciliation.⁶²⁸ The concept of recognition and reconciliation as being processes was provided most explicitly by the judiciary in *Haida Nation*, and indeed the development of the Callaghan Valley would seem to provide a practical reflection of this theory.⁶²⁹ These projects spurred the Crown to greater understandings of Aboriginal perspectives, provided opportunities for Aboriginal involvement in the economic development of their traditional territories, aided the parties in the development of more collaborative relationships, and provided the incentives necessary to negotiate challenging land use planning agreements. Each of these occurrences were highlighted by the SCC from *Van der Peet* and *Delgamuukw* to *Haida Nation* as being central features to the actualization of Section 35(1), and characterize the generative potential this section may hold for Aboriginal peoples.⁶³⁰ Although the specific benefits provided to the Squamish and Lil'wat in relation to both the WNC and Sea-to-Sky Highway expansion, such as employment and transfer of funds, were also of great significance, it is undoubtedly these broader processes of recognition and reconciliation which signify the most important impact of these 2010 Games projects. From this perspective, the WNC, and Sea-to-Sky Highway expansion, spurred by 2010

⁶²⁸ See Chapter 3.3.1, above, for discussion of jurisprudence outlining Crown's duty to consult and accommodate and its role in progressing the purposes of recognition and reconciliation mandated by Section 35(1).

⁶²⁹ *Ibid.* See especially *Haida Nation*, *supra* note 9 at paras. 32-33.

⁶³⁰ See Chapters 3.2.1 & 3.3.1, above, for summary of relevant SCC jurisprudence and judicial guidance on the meaning of Section 35(1) and the manner in which it suggests Aboriginal peoples should participate in development projects, and decision making processes, and the purposes of recognition and reconciliation.

Games hosting, may be properly interpreted as projects which served to further the processes of recognition and reconciliation mandated by Section 35(1).

In combination, both the WNC and Sea-to-Sky Highway expansion had demonstrated the manner in which the general provisions of the SLA, channeled by the deadlines and incentives associated with the 2010 Games, and assisted by the use of regulatory processes as a forum for ongoing consultation and conflict resolution, could be implemented to meet the expectations of the parties and advance the processes of recognition and reconciliation. These projects were amongst the most significant projects to take place in relation to the 2010 Games; however, there were numerous further commitments in the SLA which required the efforts of the Province, VANOC, Squamish and Lil'wat's attention.

4.4.1.3 Implementation of the SLA – Housing Legacy

An additional commitment of VANOC under the SLA was to provide \$6.5 million in funding towards a housing legacy to the Squamish and Lil'wat,⁶³¹ and VANOC had re-committed itself to this objective in the execution of the LMU, negotiated during the WNC environmental assessment process.⁶³² The LMU had expressed the commitment of VANOC, Squamish and Lil'wat to reaching an agreement on the implementation of this housing legacy during the first half of 2005.⁶³³ The \$6.5 million was to be initially applied toward the construction of fifty moveable houses at the Whistler Olympic Village, which would then be transferred to the Squamish and Lil'wat

⁶³¹ SLA, *supra* note 333 at 5.

⁶³² LMU, *supra* note 543.

⁶³³ *Ibid.*

after the 2010 Games.⁶³⁴ While the development of the Whistler Olympic Village did include the construction of such moveable homes,⁶³⁵ the Squamish, Lil'wat and VANOC struggled to determine how these movable homes could be best located to, and utilized by, the Squamish and Lil'wat communities. Ultimately it was determined that the use of the movable houses for the Squamish and Lil'wat was not necessary for the fulfillment of the provisions of the SLA, and instead the parties settled on a direct transfer of the funds to the Squamish and Lil'wat, with each Nation given \$3.25 million.⁶³⁶

It is unclear what the specific barriers to the implementation of the original housing legacy plans were, nor whether the Squamish and Lil'wat have specifically utilized those funds for housing projects within their communities. However, as was readily apparent during the development of the WNC, the implementation of general plans can be fraught with difficulties. In the case of the housing legacy it seems apparent that the difficulties associated with implementation were sufficient to require the parties to adopt an entirely different method of satisfying their expectations. Though the Squamish and Lil'wat ultimately received the financial equivalent of the promised housing legacy, it remains unclear whether the 2010 Games and SLA were able to actually improve housing issues amongst the Nations' communities.

⁶³⁴ *Ibid.*

⁶³⁵ BC Housing, News Release, "Province and VANOC Partner to House the Homeless in BC" (21 October, 2008) online: BC Housing
<http://www.bchousing.org/news/news_releases/2008/10/21/5590_0810211624-798?pageNumber=2>.

⁶³⁶ Lil'wat Nation, Newsletter, Volume 6 Issue 1, "Olympic Legacies Agreement" (January 2010) online: Lil'wat Nation: Multimedia: Newsletter Archive
<http://www.lilwat.ca/imageUploads/MCBNewsletter_Vol6Issue1_Final.pdf> at 17.

4.4.1.4 Implementation of the SLA – Cultural Centre

While the provision of employment, contracting, housing and land use planning benefits to the Squamish and Lil'wat were of obvious significance, the Province had also committed to addressing a key issue of cultural importance to the Squamish and Lil'wat through the provision of \$3 million dollars in funding towards the construction of the Squamish and Lil'wat Cultural Centre ("the Cultural Centre").⁶³⁷ Additionally, the SLA had committed VANOC, the Province, and the Nations to seek additional contributions from other sources.⁶³⁸ In furtherance of this commitment, VANOC had committed under the LMU to assist in procuring an additional \$3 million dollars from Bell, to assist in the management of the Cultural Centre construction, and recommitted to seeking additional funding for the Cultural Centre.⁶³⁹ Bell's formal sponsorship was obtained February 3, 2005 (one day after completion of the LMU),⁶⁴⁰ while the remainder of the funding was obtained from the Federal Government of Canada, the Resort Municipality of Canada, Western Economic Diversification, Terasen Gas, and the Squamish and Lil'wat Nations.⁶⁴¹ Total costs for the development of the Cultural Centre were \$33 million,⁶⁴² more than originally budgeted, with the construction carried out by the Squamish owned

⁶³⁷ SLA, *supra* note 333 at 3.

⁶³⁸ *Ibid.* at 4.

⁶³⁹ LMU, *supra* note 543 at 3-4.

⁶⁴⁰ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, News Release, "Squamish Lil'wat Cultural Centre receives \$3million funding commitment" (2 February, 2005) online: Vancouver 2010: News < [http://www.vancouver2010.com/olympic-news/n/news/squamish-lil%E2%80%99wat-cultural-centre-receives-\\$3-million-funding-commitment_36106Tn.html](http://www.vancouver2010.com/olympic-news/n/news/squamish-lil%E2%80%99wat-cultural-centre-receives-$3-million-funding-commitment_36106Tn.html)>.

⁶⁴¹ See Resort Municipality of Whistler, *First Nations Cultural Centre*, online: Resort Municipality of Whistler <http://www.whistler.ca/index.php?option=com_content&task=view&id=46&Itemid=401>. & See also, Lil'wat Nation Newsletter, *supra* note 636. "...\$4.7 million from INAC and an additional \$3 million from the Provincial Economic Measures Fund..."

⁶⁴² Lil'wat Nation Newsletter, *ibid.*

Newhaven Projects Limited Partnership.⁶⁴³ The Cultural Centre opened to the public July 10, 2008.⁶⁴⁴

The development of the Squamish/Lil'wat Cultural Centre, though perhaps not as involved a process as the construction of the WNC and Sea-to-Sky Highway, also marked a significant accomplishment for Aboriginal participation in the 2010 Games. The construction of the Cultural Centre illustrates the potential legacies of Squamish/Lil'wat involvement in WNC construction, as it seems likely that Newhaven Projects Limited Partnership would not have had the expertise to construct the Cultural Centre without the previous experiences obtained through its participation in WNC construction. Though it is too soon to say with certainty that such projects will definitely create a meaningful legacy within the Squamish and Lil'wat Nations, the Cultural Centre does provide an example of how Aboriginal participation in one project may be used to catalyze the development of skills and expertise necessary to pursue further priorities and interests. Indeed, from an economic standpoint, the development of the Cultural Centre may have provided not only a means for creating short-term employment and training opportunities, but also the creation of a tourist attraction which may continually contribute to the financial welfare of the Squamish and Lil'wat.

Also, it is notable to contrast the development of the Cultural Centre in association with the 2010 Games, with the Glenbow museum exhibit, *The Spirit Sings*,

⁶⁴³ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Business Ventures*, online: Vancouver 2010: Aboriginal Participation: Success Stories <<http://www.vancouver2010.com/more-2010-information/aboriginal-participation/success-stories/business-ventures/>>.

⁶⁴⁴ Squamish & Lil'wat Cultural Centre, *Event Gallery*, online: Squamish and Lil'wat Cultural Centre <<http://www.slcc.ca/host-an-event/event-image-gallery>>.

created in relation to the 1988 Calgary Games.⁶⁴⁵ *The Spirit Sings*, as described in the review of historical participation of Aboriginal peoples in the Olympics, was the target of protests and boycotts by the Lubicon, who sought to draw greater public attention to the issues facing their Nation.⁶⁴⁶ Though *The Spirit Sings* was not subject to protest due to the nature of the exhibit,⁶⁴⁷ it is notable that where *The Spirit Sings* was designed to exhibit historic artifacts of Aboriginal culture almost exclusively by the Glenbow Museum, the Cultural Centre is envisioned and developed by the Squamish and Lil'wat themselves. Though this research does not consider scholarly commentary on the significance this might hold, it seems apparent that the support of opportunities for Aboriginal peoples to craft their own representations in broader society, and demonstrate the continued vibrancy of their cultures may be seen as an important part of progressing recognition and reconciliation. Indeed, it is arguable that the identification and support of this cultural priority of the Squamish and Lil'wat in the SLA may be viewed as an example of how the judicial guidance provided in *Van der Peet, Delgamuukw* surrounding the prioritization of Aboriginal interests should be pursued.⁶⁴⁸ Rather than simply facilitating the interests of the Squamish and Lil'wat specifically in relation to the Crown activities, such as the employment, contracting and compensation which were provided, the parties also identified unrelated Squamish/Lil'wat interests to pursue and facilitate. As discussed above, one might criticize the benefits provided to the Squamish/Lil'wat in relation to the WNC and Sea-to-Sky Highway Expansion as being

⁶⁴⁵ See Chapter 2.4, above, at 32-34 for discussion of *The Spirit Sings* exhibition developed in relation to the Calgary Olympic Games.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*, recall that the Lubicon were protesting development within their traditional territories, and the failure of the Crown to recognize Lubicon claims to Aboriginal rights and title.

⁶⁴⁸ See Chapter 3.2.1, above, at 73-74 for discussion of judicial guidance on prioritizing Aboriginal interests where the Crown infringes Aboriginal rights or title. In particular note discussion of *Delgamuukw* which indicates the Crown should seek to facilitate Aboriginal interests within Aboriginal title lands.

driven only by the nature of the projects, and not truly seeking to prioritize Squamish/Lil'wat interests. Yet, the additional pursuit of initiatives such as the Cultural Centre would seem to address this potential deficiency, and provide an example of how the Crown, project proponents and Aboriginal peoples may use a development project to spur pursuit of broader Aboriginal interests. In this light, the Cultural Centre may hold the potential to be far more than an economic or tourism legacy, although its success ultimately remains to be seen.

4.4.1.5 Implementation of the SLA – Shared Ownership of Facilities & Endowment Fund

While, the Cultural Centre clearly holds economic and tourism potential for the Squamish and Lil'wat, yet it was not the only means through which the Nations were expected to pursue these subjects in relation to the 2010 Games. The SLA provided for the inclusion of the Squamish and Lil'wat in the proposed Whistler Legacies Societies, which, under the MPA, would be charged with operating “the Whistler Nordic Centre, the Bobsleigh, Luge and Skeleton Track in the resort municipality of Whistler, [and] the Whistler Athletes’ Centre.”⁶⁴⁹ The MPA also committed the Provincial and Federal governments to providing \$55 million each to an endowment fund which would help in the continued operation of the aforementioned facilities, operated by the Whistler Legacies Society, as well as the Richmond Oval (which was not controlled by the Whistler Legacies Society).⁶⁵⁰

The “Games Operating Trust” was created and funded by the Federal and Provincial Governments, with 40% of the Trust’s funds committed to operation of the Richmond Oval, 40% to the facilities operated by the Whistler Legacies Society, and the

⁶⁴⁹ MPA, *supra* note 326 at Section 36.

⁶⁵⁰ *Ibid.* at Section 34.

remaining 20% being held in contingency.⁶⁵¹ The Whistler Legacies Society was established as a non-for-profit organization by the Canadian Olympic Committee, Canadian Paralympic Committee, the Province, the Resort Municipality of Whistler, VANOC, the Squamish and the Lil'wat and formally named the Whistler 2010 Sports Legacies Society.⁶⁵² The Board of Directors includes representation from both the Squamish and Lil'wat First Nations, and incorporated the goal of inspiring First Nations involvement as one of its key aims.⁶⁵³ More broadly, the Whistler Legacies Society's objectives are to operate their facilities for sports tourism purposes, which would clearly provide the members in the Whistler Legacy Society with opportunities to benefit directly from such tourism.

The development of the Whistler Legacies Society provides a notable opportunity for the Squamish and Lil'wat to collaborate with other parties with significant interests in the management of the Callaghan Valley, which is within the traditional territories of the Nations, for tourism purposes. Though the Whistler Legacies Society is not charged with the management of tourism for the entire region, its control of significant facilities creates the potential for the Society to be of significant importance, which in turn may provide incentives for the Society members to foster cooperative relationships and perhaps pursue further opportunities for collaboration. As will be discussed further below in the discussion of the transfer of land to the Squamish and Lil'wat under the SLA, there is evidence that such cooperation and collaboration may indeed be occurring.

⁶⁵¹ British Columbia, Office of the Premier, News Release, 0066-000643, "Fund Ensures Legacies for British Columbia and Canada" (22 May, 2007) online: Office of the Premier <http://www2.news.gov.bc.ca/news_releases_2005-2009/2007OTP0066-000643.htm>.

⁶⁵² Whistler 2010 Sports Legacies Society, *About Us*, online: Whistler 2010 Sports Legacies Society <<http://www.whistler2010sportlegacies.com/about/tabid/169/Default.aspx>>.

⁶⁵³ *Ibid.*

The inclusion of the Squamish and Lil'wat in the Whistler Legacies Society provides the Nations with greater inclusion in the economic projects occurring within their traditional territories, and the opportunity to gain greater expertise in facilities management and tourism. However, it may be the opportunity to establish meaningful relationships amongst parties who may have been historically combative, or continually combative regarding certain subjects (such as claims to Aboriginal rights and title), which hold the greatest potential for the 2010 Games to further the processes of recognition and reconciliation.⁶⁵⁴

4.4.1.6 Implementation of the SLA – Transfer of Lands for Development

Perhaps the Province's most significant obligation under the SLA was the transfer of 300 acres to the Squamish and Lil'wat, and indeed, this transfer was no straightforward task. Though the SLA clearly provided the 300 acres to the Squamish and Lil'wat, there remained substantial negotiations and discussions to determine where those 300 acres would fall within the Callaghan Valley.⁶⁵⁵ Though the SLA stated that the parties intended the land transfer to take place by April of 2005,⁶⁵⁶ the negotiations between the Province, Squamish and Lil'wat did not progress as quickly as originally anticipated. The Squamish and Lil'wat expressed frustration during the environmental assessment process of the Whistler Nordic Centre at the inability of the Province to meet the deadlines contemplated under the SLA,⁶⁵⁷ yet the final transfer of the lands would not

⁶⁵⁴ See Chapter 3.2.1 and Chapter 3.3.1, above, for discussion of Section 35(1) and the purposes of recognition and reconciliation.

⁶⁵⁵ SLA, *supra* note 333 at 2.

⁶⁵⁶ *Ibid.* at 3.

⁶⁵⁷ See e.g. Squamish/Lil'wat October 2004 Letter, *supra* note 499.

occur until 2007.⁶⁵⁸ One of the challenges to reaching agreement was posed by the very nature of some of the parcels sought by the Squamish and Lil'wat. The Squamish and Lil'wat sought land which would provide lasting economic benefits, and therefore chose land within the municipal boundaries of the Resort Municipality of Whistler.⁶⁵⁹ Of particular significance was a parcel of land zoned for residential development which was one of the only remaining such areas in Whistler.⁶⁶⁰ The selection of these lands added Whistler as an additional party to consider in the negotiations between the Province, Squamish and Lil'wat. Though this could have caused substantial difficulties for the Squamish and Lil'wat, Whistler agreed to support the transfer of the parcels chosen by the Nations in exchange for the Nations support for the expansion of Whistler's municipal boundaries.⁶⁶¹ Whistler and the Nations entered into a formal "Legacy Lands Agreement" under which the lands chosen by the Nations would be transferred, Whistler agreed to consider a development application for the parcel zoned for residential development and an additional industrial region, and the parties agreed that development on the Nations' newly acquired land would be governed by Whistler's larger community development plans.⁶⁶²

The Province transferred the lands to a company jointly owned by the Squamish and Lil'wat in fee simple, and in 2009 the Squamish and Lil'wat announced the development of a partnership with the Bethel Lands Corporation to develop the

⁶⁵⁸ Resort Municipality of Whistler, News Release, "Council approves Legacy Lands Agreement with First Nations" (10 May, 2007) online: Resort Municipality of Whistler <http://www.whistler.ca/index.php?option=com_content&task=view&id=254&Itemid=338>.

⁶⁵⁹ Resort Municipality of Whistler, Administrative Report 07-50, "Chief Administrative Officer Recommendation to Endorse First Nations Legacy Agreement" (7 May, 2007) online: Resort Municipality of Whistler <http://www.whistler.ca/images/stories/PDF/Admin/first_nations_legacy_agreement.pdf>.

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*

⁶⁶² *Ibid.*

residential lot obtained under the Legacy Lands Agreement.⁶⁶³ The partnership developed with Bethel Lands Corporation was structured to provide the Squamish and Lil'wat immediate funds to address debts accrued by the Nations in the construction of the Squamish/Lil'wat Cultural Centre, and ongoing funds throughout the development of the parcel.⁶⁶⁴ Development of the lands is intended to provide employment for Squamish and Lil'wat members and may provide additional contracting opportunities for Newhaven Projects Limited Partnership and Resource Business Ventures.⁶⁶⁵ Though construction has yet to begin on the residential or industrial lands obtained by the Squamish and Lil'wat, it would seem likely that the experiences of the Squamish and Lil'wat in partnering with the private sector during the development of the WNC would provide important knowledge and expertise which may prove crucial to the successful development of the residential and commercial lands. The transfer of lands under the SLA appears to provide an example of the manner in which consultation and accommodation in relation to a one project may be used to facilitate broader Aboriginal interests, and further the processes of recognition and reconciliation.⁶⁶⁶ Indeed, the development of skills and expertise within the Squamish and Lil'wat communities which may be continually applied to address the economic marginalization of their members would seem to encapsulate a practical reality which must occur if the concept of reconciliation is to be meaningful for Aboriginal communities.

⁶⁶³ Alison Taylor, "First Nations strike deal to develop Alpine legacy lands" *The Pique News Magazine* (24, June, 2009), online: The Pique News Magazine <http://www.piquenewsmagazine.com/pique/index.php?cat=C_News&content=Alpine%20north%20deal%201626>.

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

⁶⁶⁶ See Chapter 3.2.1 and 3.3.1, above, for discussion of judicial guidance on prioritization of Aboriginal interests and processes of recognition and reconciliation.

Similarly to the development of the WNC, the execution of the land transfer contemplated under the SLA raised a number of specific challenges and issues beyond those addressed by the parties in their initial agreement. The complexities which could have arisen in the transfer of land within Whistler's municipal boundaries to the Squamish and Lil'wat, either legal or political, could have rendered the land selections by the Nations a source of significant conflict. However, the Province, Whistler, Squamish and Lil'wat were able to avoid such difficulties by identifying mutual benefits which could be best realized through negotiated consensus. The transfer of land resources to the Squamish and Lil'wat which would best meet their needs was achieved through the provision of land in close proximity to, and therefore governed by, Whistler, while the expansion of Whistler's municipal boundaries and land holdings undoubtedly triggered the duty to consult vis-à-vis the Squamish and Lil'wat.⁶⁶⁷ Both the Nations and Whistler required the support of the other to achieve their desired outcomes, and without the collaborative approach taken it is likely that neither Whistler nor the Nations would have achieved the benefits they sought. Again, this reveals the importance of another piece of judicial advice regarding approaches to Aboriginal participation; namely, that negotiation and good faith from all parties is the preferred means of resolution.⁶⁶⁸

As was also mentioned in the examination of Cultural Centre, the interest of the Squamish and Lil'wat in developing their own properties, with their own companies, is

⁶⁶⁷ See Chapter 3.3, above, for discussion of *Haida Nation* in which the Crown articulated the trigger for the Crown's duty to consult and accommodate. See specifically, *Haida Nation*, *supra* note 9 at para. 35 the duty to consult and accommodate Aboriginal people will "...arise when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect [claimed Aboriginal rights or title]."

⁶⁶⁸ See Chapter 3.3, above, at 85-87. See also *Delgamuukw*, *supra* note 180 at para. 186 "...Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated...to be a basic purpose of s. 35(1) – 'the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown'".

undoubtedly reflective of the skills and expertise the Nations developed through their participation in the WNC and other 2010 Games associated projects. Though the Squamish and Lil'wat may have developed such experience independently, it appears that the 2010 Games did act as a catalyst for the Squamish and Lil'wat to develop expertise in construction, and pursue further development opportunities. Additionally, the provision of land within the boundaries of Whistler to the Squamish and Lil'wat ensures they will now be able to participate in the most significant development within their traditional territory; namely, the Resort Municipality of Whistler itself.

As noted in the discussion of the Whistler Legacies Society, the implementation of the SLA required the Squamish, Lil'wat and Whistler to develop more cooperative and collaborative relationships in order for the parties to attain their respective objectives. It was postulated above that the development of such relationships in relation to the 2010 Games may serve as a catalyst to the pursuit of additional opportunities for cooperation, and indeed this seems to be the case amongst the Squamish, Lil'wat and Whistler. These parties have recently created a joint management system for a portion of forest within Whistler which sees the parties share responsibility for the stewardship of the area, and requires their collaboration to determine how the region should be managed.⁶⁶⁹ This would seem to provide a clear example of such further cooperative opportunities, and may mark the beginning of the development of lasting relationships which will prove among the most significant of 2010 Games legacies. Once again, it is arguable that the development of such relationships is among the most fundamental aspects to furthering the purposes of recognition and reconciliation, and the ability to harness the momentum

⁶⁶⁹ Resort Municipality of Whistler, *Community Forest*, online: Resort Municipality of Whistler <http://www.whistler.ca/index.php?Itemid=427&id=598&option=com_content&task=view>.

provided by projects such as the 2010 Games may prove particularly important as the Crown, Aboriginal peoples, and the private sector continue to interact under the requirements of Section 35(1).

4.4.1.7 Implementation of the SLA – Skills and Training Legacy Project

The final provision of the SLA which required implementation was the creation of the Skills and Training Legacy Fund. The Province was required under the SLA to provide \$2.3 million dollars for skills and training development for the Squamish and Lil'wat Nations.⁶⁷⁰ The Province provided half the funds each to the Squamish and Lil'wat for their use in developing skills and training initiatives within their communities.⁶⁷¹ The Lil'wat utilized their portion of the skills and training funding for the support of the Lil'wat Employment Agency, the Ts'zil Learning Centre for Training and Employment, business development initiatives and to support negotiations with VANOC and Federal Government.⁶⁷² Greater information on the Squamish Nation's utilization of its skills and training funds was not available at the time of writing. However, it is worth recalling that the Sea-to-Sky Highway expansion included the creation of the VanASEP plan to create employment and training opportunities for Aboriginal peoples as well.⁶⁷³ It is difficult to ascertain at this stage how significant an impact these skills and training programs might have on the Squamish, Lil'wat or other Aboriginal communities, but it seems apparent that the creation of such opportunities was an obvious attempt at ensuring that Aboriginal participation in the 2010 Games could create lasting legacies for individual Aboriginal community members.

⁶⁷⁰ Lil'wat Newsletter, *supra* note 636.

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid.*

⁶⁷³ VanASEP, *supra* note 595.

Though the development of the Skills and Training Fund was not of overwhelming significance, it is worth noting that this initiative had not been seen in previous Olympics.⁶⁷⁴ The development of such a fund seems relatively minor in contrast to the development of the WNC and Sea-to-Sky Highway expansion, the creation of a permanent cultural legacy, or the transfer of lands to the Squamish and Lil'wat. However, the Skills and Training Fund is nevertheless unique in relation to past Olympics, and though it may not be of supreme importance in the context of the 2010 Games, it nevertheless contributed to the legacies of Aboriginal participation in the 2010 Games, and signaled the commitment of the parties to ensure such legacies went beyond the cultural imagery and symbolism which marked previous Games.⁶⁷⁵

4.4.1.8 Implementation of the SLA – Summary

Given the lengthy discussion required to encapsulate this subject, a summation of the general concepts discussed above is worthwhile. What seems plainly evident from the implementation of the SLA, is the extensive efforts which were required to determine the specifics and details necessary for the SLA's general provisions to prove successful. This demonstrates the importance of ongoing consultation amongst project proponents, the Crown and Aboriginal peoples to meeting their objectives. Further to this point, it also seems clear that such ongoing consultations can see significant benefit from the creation of specific forums and deadlines for consultation, negotiation and agreements.

However, the implementation of the SLA also demonstrates the importance of early inclusion of Aboriginal participation, and the early identification of specific opportunities for Aboriginal peoples, to the success of a proposed project. Though much

⁶⁷⁴ See Chapter 2.8, above, for summary of past Aboriginal participation in the Olympic Games.

⁶⁷⁵ *Ibid.*

work was required to implement the SLA, it is equally apparent that without the SLA to ground the parties' consultation and accommodation efforts, much of the Squamish and Lil'wat participation would not have occurred. Additionally, the success of the SLA demonstrates the importance of including both Crown and project proponent participation in consultation and accommodation efforts. Without the tripartite nature of the SLA, many of the concerns raised by the Squamish and Lil'wat would not have been addressed, and much potential may have gone unfulfilled.

Indeed, it seems evident from the implementation of the SLA, that the 2010 Games were able to act as a catalyst for the improvement of relationships amongst the Squamish, Lil'wat and other Olympic partners. The tight deadlines associated with Olympic hosting, coupled with the mutually desired incentives of hosting a successful Olympics, served to guide the parties towards consensus and their final achievements. While the implementation of the SLA can be seen as successful, both from a historic and legal context, it was not the only element of Aboriginal participation in the 2010 Games. Indeed, the Bid Corporation had committed to pursuing the development of comparable benefits for the Musqueam and Tsleil-Waututh under their respective MOUs, and all the parties were additionally seeking the means by which to better coordinate the participation of the Squamish, Lil'wat, Musqueam and Tsleil-Waututh, and pursue the participation of Aboriginal peoples throughout Canada.

4.4.2 The Implementation of the MOU

While the Squamish and Lil'wat had received substantial benefits under the SLA, the Musqueam and Tsleil-Waututh had not received comparable commitments through their participation in the Bid.⁶⁷⁶ As previously noted, the Provincial government had expressed the opinion that its obligations to support Aboriginal participation in the 2010 Games had been met through its involvement in the SLA, and their expectation that the Federal government, take responsibility for addressing the participation benefits of the Musqueam and Tsleil-Waututh.⁶⁷⁷ However, the MOUs entered into by the Bid Corporation and the Musqueam and Tsleil-Waututh⁶⁷⁸ had expressed the intention of the Bid Corporation to pursue similar benefits for the Musqueam and Tsleil-Waututh as obtained by the Squamish and Lil'wat, and the Musqueam and Tsleil-Waututh expected these promises to be fulfilled.

VANOC demonstrated its commitment to the MOUs largely by supporting the Musqueam and Tsleil-Waututh in their efforts to reach agreement with the Federal Government on a package of benefits which was comparable to the SLA. With substantially less development taking place within Vancouver than the Callaghan Valley, the ability of VANOC to provide comparable contracting opportunities, which were some of the most significant terms in the SLA, were not as readily available. VANOC provided SPAL General Construction, a joint venture between the Tsleil-Waututh and Tsawwassen First Nation, a contract for paving work worth approximately \$600,000, but,

⁶⁷⁶ See Chapter 4.3.1, above. See also, Chapter 4.3.4, above, at 144-8.

⁶⁷⁷ See Chapter 4.3.4, *ibid.*

⁶⁷⁸ MOUs, *supra* note 388.

the extensive contract opportunities obtained by the Squamish and Lil'wat remained elusive for the Musqueam and Tsleil-Waututh.⁶⁷⁹

However, in June of 2008, the Federal Government entered into the Olympic Legacy Agreements with the Musqueam and Tsleil-Waututh. Under these Olympic Legacy Agreements, the Federal Government provided the Musqueam and Tsleil-Waututh each with approximately \$17 million for the acquisition of lands, capacity building, business development, skills enhancement and other economic development opportunities.⁶⁸⁰ The Olympic Legacy Agreement payments were made into trust funds which can be accessed by the Nations.⁶⁸¹ The signing of the Olympic Legacy Agreements was of substantial significance, as they did much to address the disparity between the Squamish/Lil'wat and the Musqueam/Tsleil-Waututh which had persisted since the conception of hosting the 2010 Games. The Musqueam and Tsleil-Waututh had put a significant level of trust in the Bid Corporation, and subsequently VANOC, to deliver on its promises under the MOUs. While this trust was ultimately repaid, the Musqueam and Tsleil-Waututh clearly had to exercise considerable patience in the 5 years in which it took to reach agreement with the Federal Government. Indeed this extended period of time, in which the Squamish and Lil'wat would have been realizing substantial benefits, could have served to create a significant rift between the Nations and frustrate their collaborative efforts through the FHFN. It is almost certainly a testament to the relationship developed amongst the Nations that this disparate treatment did not

⁶⁷⁹ FVTAC Media Monitor, *supra* note 568.

⁶⁸⁰ Canada, News Release, 2-3054, "Canada and First Nations Partner In An Olympic Legacy Agreement" (13 June, 2008) online: Indian and Northern Affairs Canada <<http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2008/2-3054-eng.asp>>.

⁶⁸¹ *Ibid.*

result in substantial difficulties to their efforts through the Four Host First Nations (discussed in greater detail below).

However, while the Olympic Legacy Agreements may have provided a comparable monetary sum to the benefits provided to the Squamish and Lil'wat in the SLA, it is equally clear that the implementation of the SLA saw the pursuit of many benefits which were not expressly contained in the SLA's provisions. For example, the inclusion in WNC and Sea-to-Sky Highway development provided opportunities for the Squamish and Lil'wat to obtain greater expertise in construction and development, pursue employment and training opportunities for their members, and perhaps most importantly, develop broader land use planning arrangements with the Province, which may be seen as furtherance of the process of recognition and reconciliation. Indeed, it was not the monetary value of the SLA which was most important, but the nature in which the benefits to the Squamish and Lil'wat were accrued, and the necessity of improving relationships and understanding between the Nations, the Crown, Whistler, and even private sector project proponents which were perhaps most significant. Indeed, even the transfer of land to the Squamish and Lil'wat was not a straightforward conveyance, as this required significant collaboration amongst the Crown, Whistler and the Nations to ensure the priorities and interests of the Squamish and Lil'wat could be achieved.

By contrast the Olympic Legacy Agreements, though clearly lucrative, do not appear to provide these additional benefits. The Tsleil-Waututh and British Columbia did reach an agreement in 2005 to develop a land resource management plan encompassing a portion of Tsleil-Waututh traditional territories, which may be comparable to the

Squamish and Lil'wat Land Use Planning Agreements.⁶⁸² Additionally, the Musqueam and Province did agree to the transfer of lands comprising the University of British Columbia golf course following litigation surrounding its transfer (without consultation), however that agreement was largely spurred by the Province's desire to settle three separate lawsuits which the Musqueam had brought against the Province.⁶⁸³ However, the extensive opportunities provided by the SLA for relationship development amongst the Squamish, Lil'wat, Crown, and even the private sector, appear to be the far more valuable benefit arising from the SLA, and these opportunities were simply impossible for the Musqueam and Tsleil-Waututh to obtain, as there were no specific initiatives which provided the impetus to carry out more meaningful discussion of Musqueam/Tsleil-Waututh interests and perspectives.

The Olympic Legacy Agreements are again an illustration of the limitations of the duty to consult and accommodate to wholly address the marginalization of Aboriginal peoples and advance their aspirations and interests. As was noted above, the later involvement of the Musqueam and Tsleil-Waututh, and development of a less significant agreement can be defended on the basis of spectrum articulated in *Haida Nation*, and applied in subsequent jurisprudence.⁶⁸⁴ Indeed, the significant sums provided to the Musqueam and Tsleil-Waututh may arguably be far in excess of that needed to properly

⁶⁸² *Partnership Agreement to develop An Integrated Land and Resource Management Plan for the Indian River Watershed*, Tsleil-Waututh Nation and British Columbia (represented by Integrated Land Management Bureau of the Ministry of Agriculture and Lands), (16 December, 2005) online: Legislative Library of British Columbia

<http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/418344/tsleil_final_partnership_agr20051216.pdf>.

⁶⁸³ British Columbia, Office of the Premier, News Release, 0173-001447, "Reconciliation Agreement Reached With Musqueam" (9, November 2007) online: Ministry of Aboriginal Relations and Reconciliation <http://www2.news.gov.bc.ca/news_releases_2005-2009/2007OTP0173-001447.htm>.

⁶⁸⁴ See Chapter 3.3 & 3.4, above, for discussion of *Haida Nation* and the "spectrum" of consultation and accommodation, which suggests that less consultation is required where the strength of a claim to Aboriginal rights and title is low, and where the risk of infringement is low.

meet the Crown's obligations to consult and accommodate in relation to 2010 Games projects. However, it seems plainly evident that the benefits achieved by the Squamish and Lil'wat, particularly those obtained through the implementation and pursuit of their SLA and its benefits, are the sort which are of particular importance to furthering recognition and reconciliation, and more meaningfully addressing the marginalization of Aboriginal peoples.⁶⁸⁵ This seems readily apparent from the jurisprudence review above, and it is painfully clear that similar opportunities at improving understanding and relationships amongst the parties were precluded by the nature of the agreement pursued. This clearly indicates that a different basis is needed for pursuing the inclusion of Aboriginal peoples in circumstances where their claimed territories are in a state of development which ensures that impacts to their claims will almost always be at the lower end of the spectrum, or where the pursuit of projects within their territories is unlikely.

The pursuit of the MOUs ultimately proved successful in providing the Musqueam and Tsleil-Waututh significant financial benefits, yet was less successful in achieving much of the relationship development, expertise and skill building, and creation of specific opportunities for the Musqueam and Tsleil-Waututh to pursue their interests. However, the MOUs were not the only means through which the Musqueam and Tsleil-Waututh participated in the 2010 Games. As will be discussed in greater detail below, the development of the Four Host First Nations provided the Musqueam and Tsleil-Waututh, along with the Squamish and Lil'wat, further opportunities to participate in the 2010 Games. As will be revealed below, the Four Host First Nations served as the

⁶⁸⁵ See Chapter 3.2.1 & 3.3.1, above, for discussion of judicial guidance on manner in which purpose of recognition and reconciliation should be pursued.

collective participation entity for the Nations, and played a significant role in the structure and achievements of Aboriginal participation in the 2010 Games.

4.4.3 The Four Host First Nations

While the implementation of the SLA and MOU address the manner in which the Squamish/Lil'wat, and Musqueam/Tsleil-Waututh independently developed their participation in the 2010 Games, and benefits derived there from, the subject matter of both agreements was wholly insufficient to address all of the subjects invoked by the 2010 Games. The SLA had identified specific projects which the Squamish and Lil'wat wished to pursue, and general concepts of inclusion in VANOC and the decision making processes related to the games. Conversely, the MOU had simply identified the desire to provide similar benefits to the Musqueam and Tsleil-Waututh as afforded in the SLA. Neither the SLA nor MOU had not set out in detail how further opportunities for Aboriginal participation would be pursued, nor the ways in which the inclusion of the Squamish, Lil'wat, Musqueam and Tsleil-Waututh could best be effected during the organization of the 2010 Games.

The Squamish, Lil'wat, Musqueam and Tsleil-Waututh, with the interest and support of Games organizers, developed the Four Host First Nations Society and Secretariat (the "FHFNS") to structure their ongoing communication with VANOC and other Olympic parties, but also to coordinate the efforts of each of the Nations in seeking meaning participation in the 2010 Games. This section of Chapter 4 explores the development and role of the FHFNS in Aboriginal participation in the 2010 Games. This section will begin by examining the agreements which led to the development of the FHFNS, and its relationship with VANOC, before exploring the specific actions of the

FHFNS in developing Aboriginal participation in the 2010 Games. Again, it is worthwhile noting that the development of the FHFNS and its initiatives occurred simultaneously with the implementation of the SLA and MOU. As with the discussion of the SLA above, the following section is broken down by subject matter, and each individual subject will be explored chronologically.

4.4.3.1 The Four Host First Nations – Development of the Four Host First Nations

The concept of developing a coordinated approach amongst the Nations had been raised throughout the Bid. Most formally, the SLA and the MOU included specific reference to the desirability of having the Nations seek cooperative relationships among themselves.⁶⁸⁶ A lack of coordination had caused significant difficulties for the Native American groups involved with the Salt Lake City Winter Games, and resulted in substantively less participation than those Aboriginal groups had desired. Additionally, the jurisprudence review, particularly *NNTC*, illustrate the difficulties which can arise from internal conflict amongst Aboriginal groups during consultation and accommodation efforts.⁶⁸⁷

Recognizing the importance of coordinating their participation efforts, the Nations began discussions and negotiations surrounding the creation of a joint representative organization. Developing mutually acceptable terms for such an organization was not a straightforward process. The Nations claimed traditional territories overlapped substantially, which obviously holds the potential to create significant conflict amongst the Nations in their competing claims to Aboriginal rights and title. Additionally, the

⁶⁸⁶ Dunn, *supra* note 20, at 82.

⁶⁸⁷ See Chapter 2.7, above, for discussion of Salt Lake City Olympics & Chapter 3.4, above, at 106 for note on *NNTC*.

Squamish and Lil'wat had obtained far more substantial participation and committed benefits during the Bid Phase than the Musqueam and Tsleil-Waututh, and though the MOUs provided some comfort that the Musqueam and Tsleil-Waututh would eventually obtain similar benefits, such disparities could again create barriers to developing cooperative relationships and consensus.

Yet despite these barriers, the Squamish, Lil'wat, Musqueam and Tsleil-Waututh did pursue the collaboration which had been contemplated during the Bid Phase. With funding support from 2010 Legacies Now ("Legacies Now"), and the Province, the Nations created the Four Host First Nations Board and Secretariat.⁶⁸⁸ The Nations entered into the Four Host Nations Protocol Agreement in November of 2004, which committed the Nations to continue their participation in the 2010 Games collectively, and outlined their joint objectives and methods for proceed.⁶⁸⁹ The Protocol agreement established the Four Host Nation Board, to be comprised of two representatives from each Nation, with the notion of creating "co-chairs" or "rotating chairs" to manage the affairs of the Board.⁶⁹⁰ The Protocol Agreement also identified the following overarching purposes of the Board:

- a) pursuing a common approach to maximizing the involvement of their communities in the 2010 Games and creating an environment of respect, cooperation and mutual recognition amongst the Nations;
- b) cooperating as Host Nations to the Games;
- c) welcoming the world to their shared traditional territories as Host Nations;
- d) promoting the rich cultural and historical traditions of their communities;
- e) expressing their mutual respect for each other's historic presence in the region, and to obtain a better understanding of each other's communities;

⁶⁸⁸ *Four Host Nations Protocol Agreement*, Lil'wat Nation, Musqueam First Nation, Squamish Nation, Tsleil-Waututh Nation, (24 November, 2004) online: Legislative Library of British Columbia <http://www.llbc.leg.bc.ca/public/pubdocs/docs/455969/4hn_protocol_final_nov_24.pdf> ["FHFN Agreement"].

⁶⁸⁹ *Ibid.* at 1-2.

⁶⁹⁰ *Ibid.* at 3.

- f) demonstrating to visitors to the 2010 Games that the Nations have a positive vision for their future and welcome business opportunities from around the world; and
- g) encouraging each of the Nations individually or in combination with each other to pursue ventures related to the 2010 Games without fear or concern of interference from other Nations.⁶⁹¹

In pursuit of these purposes, the Nations agreed to the notable caveat that “benefits arising from this agreement will be shared equally among the Parties, unless otherwise agreed, or having resulted from agreements/commitments entered into previously by the Nations.”⁶⁹²

In combination, these provisions developed a unique setting for the Nations to pursue their collective efforts. The structure of the Board demonstrated the commitment of the Nations to creating an egalitarian approach to their operations, with the concept of co-chairs and rotating chairs being a particularly novel way of ensuring that the operations of the Board would not be consistently dominated by a single Nation.⁶⁹³ However, the inclusion of the provisions protecting the benefits negotiated by the Squamish and Lil’wat in the SLA, also indicated that the collective efforts of the Nations would not over-take their individual autonomy in relation to the 2010 Games.⁶⁹⁴ Indeed, this approach to agreeing to collective effort, while retaining a level of autonomy is particularly notable as this clearly served as the stumbling block in Salt Lake City Games,⁶⁹⁵ but also appears to be an issue in developing collaboration amongst Aboriginal groups which appeared in *NNTC* and appeared to be a potential difficulty in other cases

⁶⁹¹ *Ibid.* at 2-3.

⁶⁹² *Ibid.* at 4.

⁶⁹³ *Ibid.* at 3.

⁶⁹⁴ *Ibid.* at 2-3.

⁶⁹⁵ See Chapter 2.7, above, for discussion of Salt Lake City Games.

such as *Dene Tha'*, and *Brokenhead*.⁶⁹⁶ The adoption of a novel approach to working collaboratively, while maintaining the flexibility to pursue individual objectives, may provide an effective solution to the conflicts and difficulties seen in both the Olympic and jurisprudence review.

The provision protecting the individual benefits previously obtained by the Nations clearly solidified the need of the Musqueam and Tsleil-Waututh to pursue a similar negotiated agreement to garner similar benefits.⁶⁹⁷ Finally, the identification of broad purposes and objectives for the Board clearly served to provide a general framework in which the Nations could develop their plans for participating in the 2010 Games. Development of such a framework was almost certainly integral to the achievements of the FHFN, as the 2010 Games were less than 6 years away, and significant efforts would clearly be required to maximize the opportunities presented by Olympic hosting. An illustration of the time constraints facing the FNFN is to consider the creation of the Protocol Agreement in relation to construction of the WNC, which at this time, was over half way through its environmental assessment process, and potentially mired in the lack of consensus amongst the Squamish, Lil'wat, VANOC and the Crown.⁶⁹⁸

The Board's most crucial task was to create the Secretariat, which was to serve as the operating arms of the Board in the 2010 Games, and determine the mandate and tasks for the Secretariat to carry out.⁶⁹⁹ The initial tasks developed by the Board for the

⁶⁹⁶ See Chapter 3.4, above, for discussion of *Dene Tha'*, *Brokenhead*, and *NNTC*.

⁶⁹⁷ *Ibid.* at 2.

⁶⁹⁸ See Chapter 4.4.1.1, above, for review of the WNC development.

⁶⁹⁹ FHFN Agreement, *supra* note 688 at 3-4.

Secretariat included the development of a number of administrative and operating plans, but notably, the Board also charged the Secretariat with more specific tasks:

- a) representing the Nations in dealings with VANOC;
- b) communicating and liaising with other First Nations, Métis and Inuit organizations;
- c) monitoring developments and obtaining information related to the Games;
- d) developing a “solid working relationship” between VANOC and the Four Host Nations;
- e) participate in discussions regarding procurement opportunities, ceremonial procedures and accreditation for the Games;
- f) develop a coordination and communication plan/process between the Four Host Nations; and
- g) work to ensure the Aboriginal youth are provided with more opportunities and a greater capacity to participate in sports.⁷⁰⁰

The emphasis on ensuring coordinated approaches to relationship development internally amongst the Nations, and externally with VANOC, Olympic partners and other Aboriginal communities would prove to be of particular importance not only to the content of the Nations engagement in the 2010 Games, but also the ability of other Aboriginal organizations to participate in the Games, and indeed VANOC’s ability to address issues related to Aboriginal participation generally.

4.4.3.2 The Four Host First Nations – Formal Relationship with VANOC

One of the most significant tasks assigned to the FHFNS was relationship development with VANOC, which included supporting the Nations efforts to develop a concurrent agreement with VANOC to provide a more formal framework to the participation of the Nations and FHFNS during the organization phase.⁷⁰¹ This goal was achieved in November of 2005, with the execution of a document entitled “A Statement of Principles: A protocol governing the relationship between the Vancouver Organizing

⁷⁰⁰ *Ibid.* at 6-7.

⁷⁰¹ FHFN Protocol Agreement, *ibid.* at 8-9.

Committee for the 2010 Olympic and Paralympic Winter Games and the Four Host First Nations and the Four Host First Nations Society (the “Statement”).⁷⁰² The Statement articulates the intention of the parties to identify principles and commitments to ensure the Nations and VANOC establish a “mutually beneficial working relationship to enable the Four Host First Nations to participate meaningfully in the planning, staging and hosting of the Games.”⁷⁰³ The Statement did not create legally binding obligations on the parties; however, it expressly noted that the Statement did create “expectations for best efforts by all Parties.”⁷⁰⁴ These best efforts included the identification of some key commitments for each of the parties. VANOC’s commitments included:

1. recognizing that “the Aboriginal peoples of British Columbia and Canada have a distinct legal, historical and cultural status” and committing to work with these Aboriginal peoples;
2. recognizing that the “Games will be held within the asserted traditional and shared territories of the Four Host First Nations”;
3. assisting the FHFNS’ participation in the Games organizing process by providing information and ensuring the inclusion of the FHFNS into relevant planning groups;
4. seek the counsel of the FHFNS to ensure the 2010 Games appropriately address and honour the cultures of the Nations;
5. use its best efforts to assist the FHFNS to secure the necessary resources for the Nations to fulfill their role as ‘Host Nations’;
6. recognition of the Nations role in the organizing process; and
7. recognizing and respecting the SLA and MOUs.⁷⁰⁵

The Statement also provided an express statement by the Nations that they were responsible, through the FHFN Board and FHFNS, for representing their respective communities and their communities’ involvement in assisting VANOC in the planning,

⁷⁰² *Statement of Principles: A Protocol Governing the Relationship Between the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, Four Host First Nations, and Four Host First Nations Society*, (30 November, 2005) in Dunn, *supra* note 20 at 180 (Appendix F) [the “Statement”].

⁷⁰³ *Ibid.* at 183.

⁷⁰⁴ *Ibid.* at 182-83.

⁷⁰⁵ *Ibid.* at 184-85.

staging and hosting of the 2010 Games.⁷⁰⁶ This express recognition emphasized the importance of the FHFNS with regards to representing the Nations, and the ability of VANOC to rely on the FHFNS as the appropriate representative of the Nation's interests in the 2010 Games. Indeed this element of the Statement is particularly important in light of *Labrador Métis Nation*, and *Red Chris* as each of those cases illustrates the difficulties which can arise from a lack of clarity surrounding which entities should be included in consultation efforts.⁷⁰⁷ *Labrador Métis Nation* is of particularly importance in this regard, as it suggests that where Aboriginal groups appoint an entity such as the FHFNS to consult on their behalf, the Crown and project proponents should indeed engage with these entities and may rely on their representation to discharge the duty to consult and accommodate.⁷⁰⁸ Additionally, while the Squamish and Lil'wat had been provided representation on the VANOC Board, the Musqueam and Tsleil-Waututh had not been provided a similar form of representation, and the formalization of the FHFNS role with VANOC would prove to be their primary means of engagement with broader 2010 Games planning.⁷⁰⁹

While the Statement solidified the role of the FHFNS in the ongoing consultation associated with the organization of the 2010 Games, the Statement also identified a number of specific commitments for the FHFNS, including:

- i. acting as the focal point for VANOC, and single voice of the Nations in regard to VANOC's efforts to organize the 2010 Games;
- ii. assisting VANOC and its partners to manage relationships with the FHFNS;

⁷⁰⁶ *Ibid.* at 185.

⁷⁰⁷ See Chapter 3.4, above, at 104-06 where discussion of *Labrador Métis Nation* and *Red Chris* encompasses discussion of who may properly represent a First Nation or Aboriginal community.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ See Chapter 4.3.4, above, at 144-152 & Chapter 4.4.2, above, at 235 for discussion of Musqueam and Tsleil-Waututh specific activities and engagement in the 2010 Games.

- iii. informing VANOC of the Nations' view on any Aboriginal rights and title issues which may affect or impact the 2010 Games;
- iv. working with VANOC to coordinate the FHFN participation in major events and international visits;
- v. ensuring that the Nations take advantage of economic, social and cultural benefits available during the Games;
- vi. raise public awareness about the presence of the Nations in areas designated for 2010 Games activities; and
- vii. ensuring that the Nations or the FHFNS do not develop an Olympic-related marketing, sponsorship or communication program without the prior review and approval of VANOC to ensure compliance with VANOC's obligations under its marketing plan with the IOC.⁷¹⁰

The development of such specific commitments demonstrated the FHFNS relationship with VANOC was not simply designed as a means for pursuing direct benefits for the Nations, but also required the FHFNS to play a significant role in the organization and hosting of the 2010 Games. Perhaps most importantly, the FHFNS were clearly charged with assisting VANOC in the development of relationships with Aboriginal groups broadly, and the management of ongoing relationships with the individual Nations.⁷¹¹

As was revealed in the implementation of the SLA (particularly the WNC development), and the implementation of the MOUs, there were certainly issues which could have presented serious difficulties to maintenance of cooperative relationships amongst the parties, and had these relationships substantively devolved, there may have been severe detrimental impacts to the 2010 Games. Clearly past Olympic experiences would have greatly benefited from the inclusion of an entity tasked with managing relationships amongst Aboriginal participants. Additionally, it is plainly obvious from the jurisprudence review that in many instances, Crown oversights which result in a lack of inclusion of Aboriginal groups, lack of understanding of Aboriginal concerns, and inability to effectively coordinate consultation and accommodation efforts amongst

⁷¹⁰ Statement, *supra* note 702.

⁷¹¹ *Ibid.* at 186.

Aboriginal groups are issues which could likely be addressed by the creation and utilization of a FHFNS-like entity.⁷¹²

The FHFNS' role to facilitate communications amongst the parties was clearly integral to the success of the 2010 Games, but the FHFNS was also charged with ensuring the Nations seized the opportunities which presented themselves.⁷¹³ Further to this general objective, the Statement outlined specific benefits and strategies for creating benefits for the Four Host First Nations which the parties intended to pursue. The parties identified the showcasing of Aboriginal culture and art, respecting the intellectual property rights of the First Nations involved, increased skills and development training, employment opportunities, and the creation of a sport youth legacy fund (the one originally contemplated in the SLA) as specific goals.⁷¹⁴ Strategies to achieving these goals emphasized Aboriginal inclusion and participation in specific areas of planning and organizing the 2010 Games such as: arts festivals, medal ceremonies, opening/closing ceremonies, education programs, education initiatives, marketing, procurement, and hospitality contracting.⁷¹⁵

With the identified goal of achieving “unparalleled Aboriginal participation in the hosting of the Games”, the Statement provided, as with many of the other agreements, a number of areas for agreement and collaboration, but few binding commitments, and little detail regarding the means by which the commitments would be achieved.

Provisions recognizing the importance of ethical, good faith behaviour may be seen as

⁷¹² See Chapter 3.4, above, for discussion of jurisprudence examining other Crown consultation and accommodation efforts.

⁷¹³ Statement, *supra* note 702 at 186.

⁷¹⁴ *Ibid.* at 188-89.

⁷¹⁵ *Ibid.*

atypical for comparable agreements between other Olympic partners,⁷¹⁶ yet such language consistently took central roles in the drafting of agreements involving the Nations. There may have been a number of reasons for this particular approach of the parties when developing more formal frameworks for Aboriginal participation, but a central issue identified by the parties was the lack of precedents or templates on which to structure Aboriginal involvement:

“One of our greatest challenges is that Indigenous participation is relatively new to the Olympic Movement. There is no template we can follow, no clear indicators for how we measure our success. Indigenous participation in past Games, such as Calgary and Salt Lake City, has focused primarily on ceremonies and cultural programs. We plan to go beyond that, to set the bar higher, with the hope that future Organizing Committees can be inspired and learn from our experience.”⁷¹⁷

Without more formal experience on which to reference in structuring Aboriginal participation in the 2010 Games, the parties would have been charged with creating frameworks for participation without the benefit of knowing whether such frameworks had proven successful in the past. This characteristic may have placed the parties in a position where creating more detailed or formulaic structures for Aboriginal participation would be undesirable, and perhaps even detrimental to the efforts of the parties. Emphasizing flexibility in the arrangements and agreements of the parties may have been a key characteristic to ensuring the FHFNS, Nations, and VANOC were able to respond more aptly to changes and issues which confronted them. Alternatively, the tight time constraints on the parties may simply have necessitated the construction of less detailed

⁷¹⁶ See e.g. the MPA, *supra* note 326. A review of the MPA does not reveal similar language to the Statement, SLA or MOUs with regards to the commitment of the parties to develop relationships through best efforts and good faith.

⁷¹⁷ Dunn, *supra* note 20, at 113 quoting Gary Youngman of VANOC.

agreements, as obtaining consensus on such detail may have been impossible without previous experiences and results on which to rely.

Regardless of the influences and intentions of the parties, the Statement created a basic structure for the participation of the Nations as a collective, through the FHFNS, in the organizing of the 2010 Games. In a manner similar to the SLA, the Statement was merely capable of setting the groundwork for the future efforts of the FHFNS and VANOC. Additionally, the FHFNS was guided by the general objectives in the Protocol Agreement, and those created by the Four Host First Nations' Board for the Secretariat. The specific implementation of the broad objectives in the Statement and Protocol Agreement would clearly require the development of more specific initiatives. However, the Statement and Protocol Agreement generally emphasized opportunities for economic development, cultural awareness and education, and promotion of Aboriginal youth in sport as being of primary importance.⁷¹⁸ An additional subject which also requires specific examination is the role of the FHFNS in the development and management of relationships with other Aboriginal groups, and outside organizations more generally. This role was one which clearly held particular importance in the negotiation of the Statement, and indeed, proved to be one of the most significant areas pursued by the FHFNS. The participation of the FHFNS in the 2010 Games will be examined through the exploration of each of these subjects.

⁷¹⁸ Protocol Agreement, *supra* note 317 & Statement, *supra* note 702.

4.4.3.3 *The Four Host First Nations: Economic Development*

Throughout the Bid and Organization Phase of the 2010 Games, each of the Nations had expressed their intention to leverage the 2010 Games to create economic opportunities for their members.⁷¹⁹ While the Squamish and Lil'wat had obtained a number of economic benefits through the implementation of the SLA (discussed above), and the Musqueam and Tsleil-Waututh remained reliant on the promises set out in the MOU to provide a similar set of benefits (at the time the Statement was executed the Olympic Legacy Agreements had not been negotiated), the FHFNS sought to create formal arrangements with VANOC which would create economic opportunities for their members.

The efforts of VANOC and the FHFNS emphasized developing strategies to create employment and contracting opportunities through the creation of an Aboriginal Recruitment Strategy and Aboriginal Procurement Strategy,⁷²⁰ and marketing opportunities for Aboriginal intellectual property through the development of an Aboriginal Licensing and Merchandising Program.⁷²¹ However, the efforts of the FHFNS did not focus on VANOC alone. In addition to the opportunities pursued through VANOC, the FHFNS also entered into strategic agreements with the First Nations

⁷¹⁹ See e.g. Protocol Agreement, *ibid.* & MOUs, *supra* note 388.

⁷²⁰ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Aboriginal Procurement*, online: Vancouver 2010: Aboriginal Participation: Economic Development <<http://www.vancouver2010.com/more-2010-information/Aboriginal-participation/economic-development/procurement/>>, discussed in greater detail below.

⁷²¹ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *The Vancouver 2010 Aboriginal Licensing and Merchandising Program*, online: Vancouver 2010: Aboriginal Participation: Economic Development: Licensing and Merchandise <http://www.vancouver2010.com/more-2010-information/aboriginal-participation/economic-development/licensing-and-merchandise/the-vancouver-2010-aboriginal-licensing-and-merchandising-program/the-vancouver-2010-aboriginal-licensing-and-merchandising-program_109356wj.html>, discussed in greater detail below.

Employment Society to take greater advantage of employment opportunities,⁷²² as well as Canadian Tourism Commission⁷²³ and Aboriginal Tourism Association of British Columbia⁷²⁴ to best utilize the exposure associated with the Olympics to increase interest in Aboriginal tourism. Additionally, the FHFNS planned the development of an Artisan Village and Business Showcase to provide a specific platform for Aboriginal artists and businesses during the 2010 Games.⁷²⁵

Employment and contracting opportunities pursued collaboratively by FHFNS and VANOC came through the aforementioned Aboriginal Recruitment Strategy and the Aboriginal Procurement Strategy. Under the Aboriginal Recruitment Strategy, VANOC carried out continuing engagement with the FHFN and other Aboriginal employment organizations to identify employment opportunities both within VANOC, and externally with other Olympic partners and employers.⁷²⁶ The Aboriginal Procurement Strategy entailed a more detailed agenda of encouraging the hiring of Aboriginal peoples and use of Aboriginal businesses through the development of a specific purchasing program.⁷²⁷ Key elements of the Aboriginal Procurement Strategy purchasing program included the use of questionnaires for prospective suppliers “outlining their sustainability and Aboriginal participation initiatives...as part of their bid package”,⁷²⁸ the use of limited

⁷²² Four Host First Nations, *Partners*, online: Four Host First Nations: Partners <<http://www.fourhostfirstnations.com/partners/>>.

⁷²³ *Ibid.*

⁷²⁴ *Ibid.*

⁷²⁵ Four Host First Nations, *Fact Sheet: Aboriginal Artisan Village and Business Showcase*, online: Four Host First Nations: Media Centre <<http://www.fourhostfirstnations.com/assets/Media-Kit-english/002FactSheetAboriginalShowcaseFeb10.pdf>>.

⁷²⁶ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Sustainability Report 08-09* (Vancouver: Vancouver 2010 Sustainability Reports <http://www.vancouver2010.com/dl/00/27/14/chapter-4-Aboriginal-participation-and-collaboration_56d-DQ.pdf>, 2010) at 7.

⁷²⁷ VANOC Aboriginal Procurement, *supra* note 720.

⁷²⁸ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Fact Sheet: Vancouver 2010 Buysmart: The Sustainability and Aboriginal Participation Purchasing Program*,

competitive bids where only qualified Aboriginal, inner city or environmental firms would be invited to bid,⁷²⁹ and the use of direct award contracts to qualified companies to ensure fulfillment of Aboriginal participation commitments.⁷³⁰ Additionally, VANOC developed an “Aboriginal Opportunities Requirement” tool for use in select procurement opportunities to “encourage non-Aboriginal businesses to devote a portion of their bid’s total contract value to supporting initiatives that benefit the Aboriginal community “...[which] may include employment and training programs, sub-contracting opportunities, contributions to youth legacy programs or other programs described by the business.”⁷³¹

While these strategies would allow VANOC to formally incorporate Aboriginal participation into its process of purchasing and contracting, it was also necessary to communicate the availability of Aboriginal peoples and businesses for employment and contracting opportunities. The Aboriginal Procurement Strategy included the development of an Aboriginal Business Database to serve as a resource for the identification of Aboriginal businesses which qualified for contracting opportunities,⁷³² while the hosting of an Aboriginal Recruitment and Procurement Symposium (which attracted 50 participants) and Aboriginal Business Summit (which had 470 attendees) through the coordinated efforts of the FHFN, Province and Federal Governments served

online: 2010 Commerce Centre <http://www.2010commercecentre.com/StaticContent/documents/080211_BUYSMART_FactSheet.pdf> at 1.

⁷²⁹ *Ibid.*

⁷³⁰ *Ibid* at 2.

⁷³¹ VANOC Aboriginal Procurement, *supra* note 720.

⁷³² *Ibid.*

to communicate the availability and importance of including Aboriginal peoples within Olympic employment and contracting opportunities.⁷³³

While these events, held in 2007, helped to highlight the importance of Aboriginal participation and employment in the 2010 Games, the FHFN hosted an additional hiring fair in July of 2009 to provide Aboriginal people with direct opportunities to obtain Olympic related employment.⁷³⁴ The hiring fair brought three corporations forward to present their 2010 Games related employment opportunities to Aboriginal participants who were then able to apply and interview for the available positions.⁷³⁵ The three corporations were: NBC, an official Olympic broadcaster; Sodexo which had contracts to provide catering, housekeeping, laundry and hospitality services to the Whistler and Vancouver athletes villages; and PTI which had a \$30.2 million contract to assemble modular housing and supportive structures to accommodate the Canadian Forces personnel providing security.⁷³⁶ The hiring fair was reported to offer 1,500 positions, a number far in excess of the available workforce of the Nations communities.⁷³⁷ Recognizing this, the FHFN partnered with the First Nations Employment Society which has a membership encompassing ten First Nations⁷³⁸ (including the Musqueam, Squamish, Lil'wat and Tsleil-Waututh) to widen the number of communities from which

⁷³³ 2010 Winter Games Secretariat, *The Games Effect Report 2: Impact of the 2010 Olympic and Paralympic Winter Games on British Columbia and Canada: 2003-2007*, (British Columbia: online: 2010 Winter Games Secretariat <<http://www.2010wintergamessecretariat.com/StaticContent/images/file/PWC/2010%20Winter%20Games%20Impact%20Report%202003%20-%202007%20English.pdf>>, 2009) at 32

⁷³⁴ D. Bramham, "For first nations, an unprecedented crack at jobs" *The Vancouver Sun* (10 July, 2009) online: The Vancouver Sun <<http://www.vancouversun.com/Cowichan+meet+over+dispute+Olympic+sweaters/2152022/story.html>>.

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ *Ibid.*

⁷³⁸ First Nations Employment Society, *Member Nations*, online: First Nations Employment Society <http://fnes.ca/member_nation> "Homalco Nation, Klahoose Nation, Musqueam Nation, Mount Currie Nation, N'Quatqua Nation, Sechelt Nation, Sliammon Nation, Squamish Nation, Tsawwassen Nation, Tsleil-Waututh Nation".

Aboriginal participants would be drawn.⁷³⁹ Aboriginal participants in the hiring fair were supported through the provision of resume and interviewing advice, as well as the provision of transport to and from the hiring fair.⁷⁴⁰

Though the majority of efforts were focused on creating employment and business opportunities within the context of the 2010 Games, the FHFN also pursued opportunities to promote Aboriginal business internationally. In May of 2008, the FHFN let a delegation to Beijing to promote both Aboriginal business and culture.⁷⁴¹ The delegation consisted of 37 participants representing the Four Nations, the Assembly of First Nations, Inuit Tapiriit Kanatami, Métis Nation British Columbia, the Nisga'a Nation, and Aboriginal artists, performers and businesses.⁷⁴² The delegation participated in the opening of the British Columbia – Canada Pavilion for the Beijing Olympic Games, and hosted a business reception to promote trade and investment opportunities.⁷⁴³

Additionally, it is worth recalling the development of the VanASEP (Vancouver Aboriginal Skills and Employment Partnership) program, noted in the Sea-to-Sky Highway expansion discussion above.⁷⁴⁴ VanASEP was created through the Federal Government's Aboriginal Skills and Employment Partnership,⁷⁴⁵ which developed the VanASEP 2010 Olympic Construction Project to create employment and training opportunities for Aboriginal peoples in relation to development projects taking place in

⁷³⁹ Brahmah, *supra* note 734.

⁷⁴⁰ *Ibid.*

⁷⁴¹ Canada, *The Four Host First Nations Society* online: Canada 2010 <<http://www.canada2010.gc.ca/invsts/hnationsh/030402-eng.cfm>>.

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ See Chapter 4.4.1.2, above, for discussion of VanASEP program in relation to the Sea-to-Sky Highway Improvement Project.

⁷⁴⁵ ASEP, *supra* note 594.

Vancouver during the organizational phase of the Games.⁷⁴⁶ Incorporated in March 2005 as a non-profit society⁷⁴⁷ VanASEP sought to create pre-employment training for up to 1,000 Aboriginal people, as well as a minimum of 250 apprenticeship positions, and 550 employment opportunities for Aboriginal people.⁷⁴⁸ These training and employment opportunities were sought in the construction of the Sea-to-Sky Highway Expansion (discussed in greater detail below), the Vancouver Trade and Convention Centre, Richmond-Vancouver Canada Line and Delta Port Expansion.⁷⁴⁹

VanASEP partnered with the “First Nations Employment Society, Aboriginal Community Career Employment Services Society, the Métis Provincial Council of British Columbia, the Tsawwassen First Nation, the Spo7ez Society - representing the Squamish Nation and Lil'wat Nation, the BC Construction Association, the Vancouver Regional Construction Association, the Vancouver Port Authority, PCL Construction Ltd., Houle Electric Co., Lockerbie & Hole, Peter Kiewit & Sons, and the Province of British Columbia” in pursuing these initiatives.⁷⁵⁰ VanASEP has reported that approximately 1200 Aboriginal people participated in the Project, and as result, over 300 Aboriginal peoples had registered as trade apprentices,⁷⁵¹ and that VanASEP would continue its efforts by examining opportunities for Aboriginal peoples in relation to the development of independent power projects, and those stemming from the expanded Delta Port and surrounding “supply chain”.⁷⁵² The projects targeted by VanASEP for creating employment and training opportunities for Aboriginal peoples were not officially

⁷⁴⁶ VanASEP, *supra* note 595.

⁷⁴⁷ Vancouver Aboriginal Skills and Employment Partnership, *About VanASEP Training Society*, online: <<http://www.vanasep.ca/about.php>>.

⁷⁴⁸ Canada, *supra* note 134.

⁷⁴⁹ *Ibid* & VanASEP *supra* note 135.

⁷⁵⁰ *Ibid.*

⁷⁵¹ *Ibid.*

⁷⁵² *Ibid.*

considered “Olympic” projects,⁷⁵³ which may explain the absence of direct partnerships with the FHFN and VANOC. However, from the very title of the project it is evident that the Federal Government used the 2010 Games as an incentive to pursue the specific development of employment and training opportunities for Aboriginal peoples.

The above initiatives demonstrate the significant employment and training opportunities developed through the efforts of the FHFNS, VANOC, the Federal and Provincial Governments, but also the private sector engaged in the 2010 Games projects. As was noted in the jurisprudence review, meaningful consultation and accommodation of Aboriginal peoples may be best affected through the inclusion of both Crown and project proponents, and the implementation of the above employment and training opportunities would seem to illustrate the benefits of meaningful project proponent participation. While the employment and training strategies developed amongst the FHFN, VANOC and the Crown were indeed praiseworthy, without the commitment of the numerous businesses involved in 2010 Games construction, the strategies would not have been effectively implemented. The development of incentives such as the Procurement Strategy to employ Aboriginal peoples clearly provides the impetus for the private sector to meaningfully participate; however, the achievements of the employment and training efforts above plainly demonstrate the importance of creating effective relationships amongst project proponents and Aboriginal peoples if Aboriginal participation in such projects is to be meaningful and effective. Additionally the creation of the employment and training programs provides a further example of how the Olympics may indeed be used as a catalyst for pursuing broader legacies for Aboriginal peoples, beyond the cultural and ceremonial expressions which typified previous

⁷⁵³ See Bid Book, *supra* note 299 for description of official “Olympic construction projects”.

Olympic experiences.⁷⁵⁴ Indeed, one might characterize such initiatives as providing an effective response to those questioning the capacity of the Olympics to address issues of substance.⁷⁵⁵

While a number of parties emphasized the development of employment, training and contracting opportunities for Aboriginal peoples in the 2010 Games, the FHFN also took the initiative to pursue the development of specific economic sectors for Aboriginal peoples, most notably, in the area of Aboriginal tourism. The FHFN partnered with both the Canadian Tourism Commission and the Aboriginal Tourism Association of British Columbia in an effort to work collaboratively to leverage opportunities stemming from the 2010 Games.⁷⁵⁶ For example, the Canadian Tourism Commission had identified, in conjunction with Aboriginal Tourism Canada, the Provinces, and Territories, twenty-nine “Canadian Aboriginal Cultural Tourism Experiences” from across Canada which the Canadian Tourism Commission wished to promote in conjunction with the FHFN through the 2010 Games.⁷⁵⁷ The FHFN and Canadian Tourism Commission agreed to collaborate on communications and media relations, the distribution of marketing collateral, and inclusion of the Canadian Aboriginal Cultural Tourism Experiences in tourism showcases within the Aboriginal Pavilion and participation of the Canadian Tourism Commission in the delegation to Beijing.

⁷⁵⁴ See Chapter 2.8, above, for summary of past Olympic experiences. This review illustrates that Aboriginal participation was largely limited to the cultural aspects of Olympic hosting.

⁷⁵⁵ See e.g. Cashman, *supra* note 123.

⁷⁵⁶ *Statement of Cooperation*, Four Host First Nations, and Canadian Tourism Commission, (2009) online: Canadian Tourism Commission: Media Centre <http://mediacentre.canada.travel/system/files/Statement_of_Cooperation-CTC_indd.pdf>, The FHFN signed a Statement of Cooperation with Aboriginal Tourism Association of British Columbia on November 13, 2007 and with the Canadian Tourism Commission in 2009.

⁷⁵⁷ *Ibid.*

Through these partnerships, the FHFN incorporated broader provincial and national Aboriginal tourism initiatives within the 2010 Games. A key element in this incorporation was the Aboriginal Pavilion (discussed below) which served as the primary vehicle through which the FHFN and other Aboriginal groups were able to leverage the exposure associated with the Olympics to promote the Aboriginal tourism sector. However, coupled with the development of the Cultural Centre, it is clear that the expansion of Aboriginal tourism was central to the Nations plans for leveraging long lasting economic legacies from participation in the 2010 Games. Though this thesis does not delve into the intricacies surrounding the meaning and implications of utilizing cultural tourism for developing economic benefit, it seems evident that there is potential for such tourism to also play a larger role in advancing the recognition of Aboriginal peoples.⁷⁵⁸ Conversely, the use of culture for economic benefit may pose some risk for Aboriginal peoples, as the “commodification” of culture might serve to weaken the significance of that culture for the Aboriginal peoples in question.⁷⁵⁹ As with most issues surrounding Aboriginal participation in development or economic initiatives, the ultimate result will likely be based on the manner in which greater Aboriginal tourism opportunities are pursued, and at this stage it remains uncertain what role Aboriginal tourism may have in the economic development of the FHFN and other Aboriginal groups.

While the above initiatives focused largely on the creation of employment, contracting, business and investment opportunities, the FHFN also pursued the

⁷⁵⁸ See e.g. Richard Butler & Tom Hinch eds., *Tourism and Indigenous Peoples: Issues and Implications* (Oxford: Butterworth-Heinemann, 2007), for numerous articles discussing the impacts of cultural tourism on indigenous peoples.

⁷⁵⁹ *Ibid.*

development of direct economic benefits through the marketing of Aboriginal intellectual property. The FHFN sought to utilize the marketing and merchandising opportunities available through the Olympics by negotiating a Licensing and Merchandising agreement with VANOC.⁷⁶⁰ Under the Aboriginal Licensing and Merchandising Program, specific Aboriginal designs, arts and products were included as part of the official merchandise of the 2010 Games, signaling the first time that an “Olympic Organizing Committee... partnered with Indigenous people in creating an official licensed merchandising program”.⁷⁶¹

Under the Aboriginal Licensing and Merchandising Program, VANOC was able to access authentic Aboriginal designs for use in merchandising efforts, while the FHFN obtained one third (1/3) of the royalties received by VANOC from the merchandising of those products covered by the Program for use in an Aboriginal Youth Legacy Fund.⁷⁶² The Program included the use of hand-made Aboriginal art and products such as hand-carved inuksuit provided under an agreement between VANOC and the Nunavut Development Corporation, the commission of graphics from a Coast Salish artist for use in a variety of products, the use of the FHFN logo as a design for products, and the use of Aboriginal themes and icons for specific use in pins.⁷⁶³ The FHFN logo was also used as a mark on all products sold under the Aboriginal Licensing and Merchandising Program to signal the product as being of authentic Aboriginal design;⁷⁶⁴ however, criticism was

⁷⁶⁰ Aboriginal Licensing and Merchandising Program, *supra* note 721

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.* See also SLA, *supra* note 333.

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.*

directed at VANOC and the FHFN for misrepresenting the “authenticity” of the Aboriginal products utilized under the Licensing and Merchandising Program.⁷⁶⁵

Many of the products created utilized Aboriginal designs and graphics, but were manufactured overseas.⁷⁶⁶ Concerns were raised that using the term “authentic” misrepresented the level of Aboriginal involvement in the creation of the product, and would also damage those Aboriginal artists and creators that created their products entirely by hand.⁷⁶⁷ Whether such criticism was valid or not, the Aboriginal Licensing and Merchandising Program clearly illustrates the contention regarding the means through which Aboriginal culture should be used for economic gain. As also noted in the discussion surrounding Aboriginal tourism, the appropriate means by which Aboriginal culture may be used for economic gain is one which is fraught with divergent views, and will undoubtedly continue to invoke much debate within Aboriginal communities.⁷⁶⁸ Indeed such debate of the greatest necessity within Aboriginal communities, as the means through which Aboriginal interests should be pursued, particularly with regards to economic initiatives, is central to determining how Aboriginal interests may be prioritized, and Aboriginal perspectives properly recognized and reconciled in accordance with Section 35(1).⁷⁶⁹ The development of solutions to debates surrounding how Aboriginal culture, or rights and title, should be used for economic advantage must clearly come from within Aboriginal communities. However, it would be naive to

⁷⁶⁵ Canadian Broadcasting Corporation, “Native artisan raps VANOC’s ‘authentic’ Aboriginal art” *CBC News* (25 December, 2009) online: CBC News < <http://www.cbc.ca/canada/british-columbia/story/2009/12/24/bc-aboriginal-art-protest.html>>.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*

⁷⁶⁸ See e.g. Gerald Taiaiake Alfred, “Colonialism and State Dependency” (2009) Nov. 2009 *Journal of Aboriginal Health* 42.

⁷⁶⁹ See Chapter 3.2 & 3.2.1, above, for discussion of prioritizing Aboriginal interests, particularly in *Van der Peet* and *Delgamuukw*. See also Chapter 3.3.1, above.

believe that Aboriginal communities, or Aboriginal peoples more generally, are homogenous in their views on such subjects, and clearly a significant test to the processes of recognition and reconciliation will be the Crown's ability to adapt to the varying perspectives and interests of different Aboriginal peoples.

Though the various initiatives pursued by the FHFN, VANOC and their partners ranged widely in their focus and emphasis, they shared the common feature of requiring significant collaboration and partnership with either the private sector, or other Aboriginal and governmental organizations. Neither VANOC nor the FHFN would have been capable of achieving their respective goals, nor would the entities such as the tourism commissions or First Nations Employment Society have been able to pursue their particular initiatives, if not for the ability to develop partnerships and collaborative efforts in relation to the 2010 Games. With differing areas of expertise and interests, these organizations clearly required the support of one another to properly develop opportunities in relation to the 2010 Games. Although the final success of the above initiatives has not yet been revealed, it is nevertheless evident that the development of effective partnerships amongst multiple Aboriginal, governmental and private sector organizations was integral to the pursuit of Aboriginal economic development goals of the FHFN and VANOC. The formation of such effective partnerships may prove to be one of the most important lessons stemming from Aboriginal participation in the 2010 Games, as efforts to address the marginalization of Aboriginal peoples almost surely requires coordinated approaches from all sectors.

Indeed, though these partnerships were formed in contexts far removed from land use planning or resource development, which are frequently the initiatives which trigger

the need for consultation and accommodation of Aboriginal peoples, may nevertheless hold implications as significant as those posed by the manner in which the WNC and Sea-to-Sky Highway Expansion occurred. In each instance it is clearly evident that the success of the parties, regardless of their objectives, is based largely on their ability to develop effective, mutually beneficial arrangements and partnerships. Regardless of the context, it is readily apparent that the ability to collaborate and cooperate effectively is central to the outcomes achieved, and the qualities of an effective partnership are not exclusive to a particular type of endeavour. Throughout, the parties demonstrated the ability to identify mutually beneficial objectives, communicate effectively, and address conflicts which arose. The value of these lessons is not insignificant, as a review of both past Olympic Games, and relevant jurisprudence reveals how challenging it can be to foster such aspects in a relationship.⁷⁷⁰

4.4.3.4 The Four Host First Nations: Cultural Awareness and Education

In addition to the development of economic benefits from participation in the 2010 Games, one of the paramount goals of the Four Host First Nation Board, and FHFNS was to “promote the rich cultural and historical traditions of their communities.”⁷⁷¹ Additionally, both VANOC and the FHFN wished to raise awareness and education of the significant contributions that the FHFNS and the individual Nations had made to the organization of the 2010 Games. In combination, these efforts would serve to create greater understanding both of the history and culture of Aboriginal

⁷⁷⁰ See Chapter 2.8, above, for summary of Aboriginal participation in the Olympic Games and difficulties that arose. See Chapter 3.4 & 3.4.1, above, for review of lower court jurisprudence which identifies issues between the Crown, project proponent and Aboriginal peoples in their effort to carry out effective consultation and accommodation.

⁷⁷¹ FHFN Agreement, *supra* note 688 at 2.

peoples, particularly the Squamish, Lil'wat, Musqueam and Tsleil-Waututh, but also to demonstrate that Aboriginal peoples continue to play significant roles in society, and that the involvement of the FHFNS and individual Nations was integral to the success of the 2010 Games.

The promotion of greater cultural awareness and education was pursued through a number of initiatives between the FHFN and VANOC. With specific regards to Aboriginal cultural expressions, the FHFN and VANOC developed the Vancouver 2010 Venues Aboriginal Art Program,⁷⁷² the inclusion of Aboriginal artists in the broader Cultural Olympiad,⁷⁷³ the use of Aboriginal design for medals,⁷⁷⁴ and the participation of Aboriginal peoples in the opening and closing ceremonies.⁷⁷⁵ While these initiatives provided opportunities for the inclusion of Aboriginal artists and culture throughout the 2010 Games, the FHFN also developed plans for the creation of an Aboriginal Pavilion to serve as the centre for promoting broader awareness and education of Aboriginal peoples and culture during the hosting of the 2010 Games.⁷⁷⁶ Finally, and perhaps most importantly, the FHFNS and VANOC obtained the support of the IOC to recognize the formal involvement of the Squamish, Lil'wat, Musqueam and Tsleil-Waututh as official

⁷⁷² The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Venues Aboriginal Art Program*, online: Vancouver 2010 <<http://www.vancouver2010.com/more-2010-information/aboriginal-participation/cultural-involvement/venues%E2%80%99-aboriginal-art-program/>>.

⁷⁷³ Four Host First Nations, *Cultural Involvement*, online: Four Host First Nations <<http://www.fourhostfirstnations.com/cultural-involvement/>>.

⁷⁷⁴ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, New Release, "Vancouver 2010 medals each a one-of-a-kind work of contemporary Aboriginal art" (15 October, 2009) online: Vancouver 2010 <http://www.vancouver2010.com/olympic-news/n/news/vancouver-2010-medals-each-a-one-of-a-kind-work-of-contemporary-aboriginal-art-_170092ID.html>.

⁷⁷⁵ Four Host First Nations, News Release, "Aboriginal youth from across Canada gather to celebrate, take part in Vancouver 2010 Olympic Winter Games" (2010) online: Four Host First Nations <<http://www.fourhostfirstnations.com/aboriginal-youth-from-across-canada-gather-in-british-columbia-to-celebrate-take-part-in-vancouver-2010-olympic-winter-games>>.

⁷⁷⁶ Four Host First Nations, News Releases, "2010 Aboriginal Pavilion to showcase First Nations, Inuit and Métis peoples during 2010 Winter Games" (2 February, 2009) online: Four Host First Nations <<http://www.fourhostfirstnations.com/2010-Aboriginal-pavilion-to-showcase-first-nations-inuit-and-m-tis-peoples-during-2010-winter-games-3>>.

“host nations” in the 2010 Games,⁷⁷⁷ to ensure the Nations were duly recognized for their role in organizing the 2010 Games.

The most visible examples of Aboriginal cultural involvement for the public viewing the 2010 Games came through the Vancouver 2010 Venues Aboriginal Art Program, the inclusion of Aboriginal artists within the Cultural Olympiad, and the use of Aboriginal designs for 2010 Games medals. The Venues Aboriginal Art Program saw the placement of over thirty pieces of Aboriginal art at the fifteen Olympic and Paralympic venues.⁷⁷⁸ Each piece of art was envisioned as a welcome “...to the traditional and shared traditional territories of the FHFN, on which the Games are being held”, though the Aboriginal artists involved included those from the FHFN and other First Nation, Métis and Inuit communities.⁷⁷⁹ In total, the Program transferred approximately \$2 million in commissions to over 90 artists participating in the Program, and also provided youth mentorship opportunities to young Aboriginal artists.⁷⁸⁰ Additional Aboriginal artists were included in the broader Cultural Olympiad in a variety of forms, including live theatre, song, visual arts, literary arts, and circus.⁷⁸¹

While this inclusion of Aboriginal art and culture in Olympic venues and the Cultural Olympiad helped to promote Aboriginal artists and art, and imbue the 2010 Games throughout with Aboriginal culture, the use of Aboriginal design in medals and involvement in the opening and closing ceremonies served to ensure that the defining moments of the 2010 Games would be marked through expressions of Aboriginal culture.

⁷⁷⁷ FHFN Cultural Involvement, *supra* note 773 & The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Four Host First Nations*, online: Vancouver 2010 <<http://www.vancouver2010.com/more-2010-information/Aboriginal-participation/partnerships-and-collaboration/four-host-first-nations/>>.

⁷⁷⁸ VANOC Sustainability Report 08-09, *supra* note 726.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ *Ibid.*

⁷⁸¹ FHFN Cultural Involvement, *supra* note 773.

The design of each bronze, silver and gold medal for the 2010 Games came from a small section of two larger designs by Aboriginal artist Corrine Hunt (of Kornyoe and Tlingit heritage).⁷⁸² The design for the Olympic medals was based on a design depicting an orca, while the Paralympic medals included sections of a larger piece illustrating a raven.⁷⁸³

Yet the most important means through which Aboriginal culture was to be presented during the 2010 Games was through the planning and development of an Aboriginal Pavilion. The FHFN partnered with VANOC, the Federal and Provincial Governments to construct a temporary pavilion for use during the 2010 Games to “showcase the diversity of Aboriginal art, business, culture and sport from across Canada.”⁷⁸⁴ The FHFN would operate the Aboriginal Pavilion and be responsible for its program, ensuring the Nations would be able to more directly control their representation to the public during the 2010 Games.

Significantly, the Aboriginal Pavilion would not showcase only the FHFN, but Aboriginal organizations and groups across Canada.⁷⁸⁵ The FHFN sought partnerships with large representative groups such as the Assembly of First Nations, and Inuit Tapiriit Kanatami, as well as individual communities, bands and Nations.⁷⁸⁶ Through these arrangements the partner Aboriginal groups were each given a day in which they would be responsible for the programming at the Aboriginal Pavilion.⁷⁸⁷ The FHFN’s

⁷⁸² VANOC Medals News Release, *supra* note 774.

⁷⁸³ *Ibid.*

⁷⁸⁴ British Columbia, Office of the Premier, News Release, 0019-00140, “2010 Aboriginal Pavilion to Showcase First Nations Inuit and Métis Peoples During 2010 Winter Games” (2 February, 2009) online: Office of the Premier <http://www2.news.gov.bc.ca/news_releases_2005-2009/2009OTP0019-000140.htm>.

⁷⁸⁵ *Ibid.*

⁷⁸⁶ Four Host First Nations, *Fact Sheet: Aboriginal Pavilion*, online: Four Host First Nations <<http://www.fourhostfirstnations.com/assets/Media-Kit-english/001FactSheetPavilionFeb10EN.pdf>>.

⁷⁸⁷ Kim Pemberton, “2010 Olympics Aboriginal Pavilion showcases unprecedented partnership” *The Vancouver Sun* (9 February, 2010) online: The Vancouver Sun

development of the Aboriginal Pavilion as a forum for the inclusion of Aboriginal cultures and communities from across Canada can be viewed as an initiative which helped the FHFN to carry out its objectives, and responsibilities, to liaise with other Aboriginal organizations under the Statement. In contrast to the Salt Lake City Olympics, which included the development of a pavilion by the Navajo, the Aboriginal Pavilion in the 2010 Games was inclusive of all the local Aboriginal groups associated with the 2010 Games, and indeed served as a forum for Aboriginal representations from across Canada. This collaboration stands in stark contrast to the disputes which mired Aboriginal efforts in relation to the Salt Lake City Games.⁷⁸⁸

While the awareness and education initiatives described above were largely expected to advance education and awareness during the actual hosting of the 2010 Games, a number of additional efforts pursued by the FHFN and VANOC during the organization stage of the 2010 Games emphasized creating greater awareness of the actual manner in which the FHFN and other Aboriginal communities had participated in the organizing of the 2010 Games. To this end, the FHFN and VANOC pursued a number of initiatives, including the development of a media centre, image and video gallery and feature stories sections to the Four Host First Nations website,⁷⁸⁹ the distribution of a joint newsletter which targeted to communities with limited internet access,⁷⁹⁰ and the holding of community meeting and events within the FHFN

<<http://www.vancouver.sun.com/sports/2010+Olympics+Aboriginal+Pavilion+showcases+unprecedented+partnership/2538765/story.html>>, "The Aboriginal Pavilion...will be the site of special "theme day performances"...celebrating different Aboriginal groups from across Canada."

⁷⁸⁸ See Chapter 2.7, above, for discussion of Salt Lake City Games.

⁷⁸⁹ Four Host First Nations, *Fact Sheet: Unprecedented Aboriginal Participation February 2010*, online: Four Host First Nations <http://www.fourhostfirstnations.com/assets/Media-Kit/english/004FactSheetAccomplishments_Feb10EN.pdf>.

⁷⁹⁰ *Ibid.*

communities, Vancouver's urban Aboriginal community, and other Aboriginal communities across Canada.⁷⁹¹

However, the most important element in advancing awareness and education of the roles the Nations had in the organization of the 2010 Games, was the designation of the FHFN as official "Host Nations" in 2006 by the International Olympic Committee.⁷⁹² The recognition of the Squamish, Lil'wat Musqueam and Tsleil-Waututh as official host nations of the 2010 Games served as an important symbolic recognition of the importance of Aboriginal participation to the 2010 Games, and the significant role which the FHFN were seen to fill in organization and hosting. Though this recognition may have seemed inconsequential to some, the Statement of Principles between the FHFN and VANOC, and the Protocol Agreement of the FHFN consistently echoed the importance of recognition and respect to the success of Aboriginal participation in the 2010 Games. For example, the Statement of Principles included specific statements that VANOC would "recognize the Four Host First Nations role in the organizing process",⁷⁹³ and "treat representatives and guests of the Four Host First Nations in a manner befitting their office and on a basis no less favourable than comparable representatives of the other levels of government at the Games."⁷⁹⁴ Similarly, the Protocol Agreement noted that the Nations would "...express their mutual respect for each other's historic presence..."⁷⁹⁵ and "...welcome the world to their shared traditional territories as 'Host' Nations".⁷⁹⁶

Such statements would seem to demonstrate the significance which the FHFN placed on

⁷⁹¹ *Ibid*, "...Other examples of community outreach include the 2007 visit to Canada's three northern territories by a VANOC team, including CEO John Furlong. The group met with Aboriginal and government leaders, schools and community groups".

⁷⁹² VANOC Four Host First Nations, *supra* note 777.

⁷⁹³ Statement, *supra* note 702 at 184.

⁷⁹⁴ *Ibid*.

⁷⁹⁵ FHFN Agreement, *supra* note 688 at 4.

⁷⁹⁶ *Ibid* at 3.

the elements of respect and recognition in their participation in the 2010 Games, and the result importance which official “hosting” designation from the IOC would have.

The recognition of the Nations by the IOC provided a clear signal of the importance of the FHFN and Aboriginal participation to the success of the 2010 Games, and served to demonstrate that the FHFN were indeed partners in the organization and hosting processes.⁷⁹⁷ Indeed, during the closing ceremonies of Torino in 2006, the FHFN performed a traditional witnessing ceremony and presented medallions depicting the FHFN emblem to the spectators and athletes in attendance as part of Vancouver’s receiving of the Olympic hosting responsibilities from its predecessor.⁷⁹⁸ This inclusion of the FHFN in this symbolic transfer of Olympic hosting responsibilities was clearly intended to demonstrate that the Squamish, Lil’wat, Musqueam and Tsleil-Waututh were playing a central role in the hosting of the 2010 Games. The role which the Nations were playing in the 2010 Games was far more substantial than had been seen in previous Olympics, and the recognition of the Nations by the IOC arguably addressed a criticism leveled at past Olympics, in which Aboriginal representations were often viewed as portraying Aboriginal cultures as static, failing to indicate the vibrancy of modern Aboriginal peoples and their continuing perspectives, contributions, and aspirations.⁷⁹⁹ Though arguably the IOC’s recognition of the Nations is merely symbolic and without

⁷⁹⁷ Statement, *supra* note 702 at 188.

⁷⁹⁸ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Torino 2006: An Invitation to the World*, online: Vancouver 2010 <<http://www.vancouver2010.com/more-2010-information/Aboriginal-participation/success-stories/torino-closing-ceremony/>>.

⁷⁹⁹ For example, see O’Bonswain *supra* note 52 at X where she discusses how Aboriginal representations could have been improved in the Salt Lake City Games.

substantive effect, it is recognition nonetheless, and as indicated by the judiciary, recognition lies at the heart of Section 35(1).⁸⁰⁰

However, it should be noted that during this organizational phase, there were some instances of Aboriginal cultural expression, or utilization that were not entirely praiseworthy. Indeed, Christine O'Bonsawin raises two key issues related to Aboriginal cultural expressions during this time.⁸⁰¹ The first, is the utilization of an Inuit inukshuk as the symbol of the 2010 Games,⁸⁰² and the second, was the representation of Aboriginal culture in the Torino Closing Ceremonies.⁸⁰³ O'Bonsawin describes the selection of an Inuit symbol as the representation for an Olympics occurring with the Squamish, Musqueam, Lil'wat and Tsleil-Waututh traditional territories, as "deeply offensive to many", noting that "adoption of this entity [the Inukshuk] as a principal symbol of the 2010 Games is offensive to both the FHFN as well as the Inuit inhabitants of the Arctic areas whose culture has been appropriate and removed from its traditional context."⁸⁰⁴ Similarly, in describing Aboriginal participation in the Torino Closing Ceremonies, O'Bonsawin characterized the use of Aboriginal peoples and imagery as reflecting Aboriginal cultures as being in a "...prehistoric age of barbarism and savagery".⁸⁰⁵

Clearly, the cultural representation of Aboriginal peoples was far from perfect during the organizational phase of the Games, and noting the criticisms of O'Bonsawin is critical to ensuring that the overall picture of success and cooperation seen in the FHFN

⁸⁰⁰ See Chapter 3.3.1 & 3.4.1, above, for summary of judicial discussion of the significance of recognition to Section 35(1).

⁸⁰¹ Christine O'Bonsawin, "The Conundrum of 'Ilanaaq' – First Nations Representation and the 2010 Games" in Crowther, N.B., Barney, R.K., & Heine, M.K. eds. *Cultural Imperialism in Action: Critiques in the Global Olympic Trust. Proceedings of the Eighth International Symposium for Olympic Research*, (London, ON: University of Western Ontario International Centre For Olympic Studies, 2006) 387.

⁸⁰² *Ibid.* at 388.

⁸⁰³ *Ibid.* at 391.

⁸⁰⁴ *Ibid.* at 389.

⁸⁰⁵ *Ibid.* at 391.

participation in the 2010 Games does not overshadow instances where mistakes were made, or efforts fell short. Indeed, the examples noted by O'Bonsawin above are likely a clear illustration of the lack of understanding of Aboriginal cultures, and the importance of certain imagery or symbolism to Aboriginal peoples. It is arguable that in many instances where use of Aboriginal culture or imagery is offensive to Aboriginal peoples, those relying upon the Aboriginal symbols are simply ignorant of their misuse. This is not to excuse such errors; however, it would seem to provide a clear indication of how far understandings of Aboriginal peoples and cultures must progress. Indeed, one might suggest that if VANOC, an organization which placed such high emphasis and indeed achieved so much success in Aboriginal participation, can make such errors, then clearly there is a substance distance to travel to obtain true recognition and reconciliation for Aboriginal peoples.

4.4.3.5 The Organizational Phase – FHFN: Aboriginal Youth in Sport

As noted above, the SLA provided for the development of an Aboriginal Youth Sport Legacy Fund which was to receive funding from the Provincial Government, and subsequent funds through the Aboriginal Licensing and Merchandising Program.⁸⁰⁶ Though the fund was developed under the SLA, its creation was intended to provide funding to Aboriginal communities beyond the Squamish and Lil'wat, and even the FHFN.⁸⁰⁷ At the request of the Squamish and Lil'wat, 2010 Legacies Now manages the fund, which has been used to support initiatives such as Aboriginal Youth Talent

⁸⁰⁶ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Aboriginal Sports Youth Legacy Fund*, online: Vancouver 2010, <http://www.vancouver2010.com/more-2010-information/Aboriginal-participation/sport-and-youth/Aboriginal-youth-sport-legacy-fund/Aboriginal-youth-sport-legacy-fund_108666WM.html>.

⁸⁰⁷ *Ibid.*

Identification events, a High-Performance Athlete Assistance Grant, a post-secondary scholarship program, and the First Nations Snowboard Team.⁸⁰⁸

Additional initiatives saw the development of a poster campaign highlighting emerging Aboriginal athletes,⁸⁰⁹ the signing of a Statement of Cooperation between VANOC and the Aboriginal Sports Circle to use the 2010 Games to promote sport amongst Aboriginal communities,⁸¹⁰ and the development of a travelling Aboriginal Sport Gallery which visited Aboriginal communities throughout British Columbia,⁸¹¹ and a permanent gallery in the BC Sports Hall of Fame.⁸¹² The purpose of each of these initiatives was to increase Aboriginal participation and involvement in sport, as VANOC, the FHFN and partners such as the Aboriginal Sports Circle viewed the promotion of sport as offering a means for “promoting health and wellness in Aboriginal communities and strengthening the emotional, mental, physical and spiritual aspects of Aboriginal life.”⁸¹³

4.4.3.6 The Four Host First Nations – Communication and Relationship Development

As noted above, the FHFNS sought the development of relationships with other Aboriginal organizations in a number of facets. Employment and training initiatives sought to include Aboriginal organizations working within those fields, the development of tourism initiatives included the development of formal relationships with Aboriginal tourist organizations, and the planning for the Aboriginal Pavilion included a clear

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Ibid.*

⁸¹⁰ *Ibid.*

⁸¹¹ 2010 Legacies Now, *Aboriginal Sports Gallery*, online: 2010 Legacies Now <<http://www.2010legaciesnow.com/Aboriginalgallery/>>.

⁸¹² *Ibid.*

⁸¹³ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *Sport and Youth*, online: Vancouver 2010 <<http://www.vancouver2010.com/more-2010-information/Aboriginal-participation/sport-and-youth/>>.

emphasis on providing opportunities for Aboriginal groups across Canada to participate in the 2010 Games. However, the role of the FHFNS in response to its obligations under the Statement to serve as the primary body which would support VANOC in its efforts to development relationships with Aboriginal groups, and communicate the achievements of Aboriginal participation in the 2010 Games are perhaps best illustrated by two key subjects, the planning of Aboriginal participation in the Torch Relay, and responding to criticism and conflicts surrounding Aboriginal participation in the 2010 Games.

One of the primary means through which VANOC and the FHFNS sought to develop broad Aboriginal participation in the 2010 Games was through the development of the Vancouver 2010 Olympic Torch Relay Aboriginal Participation Program. VANOC sought to develop a specific plan for Aboriginal participation in the Torch Relay, which included the hiring of consultants to carry out preliminary research on strategies for pursuing Aboriginal participation.⁸¹⁴ Through collaboration with the FHFNS, and other Aboriginal groups, the Torch Relay Aboriginal Participation Program saw the Olympic torch pass through 119 Aboriginal communities, with members of each community carrying the torch, the inclusion of 12 Aboriginal youth to serve as flame attendants, and the inclusion of honorary elder fire keepers in each community to perform a welcoming ceremony for the torch when it enters the community.⁸¹⁵ The Aboriginal communities identified by VANOC and the FHFNS were chosen to ensure that each major Aboriginal linguistic group would be represented during the torch relay,⁸¹⁶ and each

⁸¹⁴ VANOC, Sustainability Report 08-09, *supra* note 726 at 78.

⁸¹⁵ VANOC, News Release, "Aboriginal youth, elders to play special roles in Vancouver 2010 Olympic Torch Relay", (6 March, 2009) online: Vancouver 2010 >http://www.vancouver2010.com/dl/00/14/36/Aboriginal-newrelease-final-eng_30d-Cz.pdf>, at 1-3.

⁸¹⁶ *Ibid.*

community was consulted in advance to ensure they were willing to receive the Torch Relay, and their traditional customs would be appropriately respected.

The extent to which VANOC and the FHFN were committed to ensuring that Aboriginal communities were properly consulted in developing the torch relay program was most clearly demonstrated in Kahnawake, Quebec where community members on a Mohawk reserve indicated the torch relay would not be allowed to proceed through the reserve due to the Royal Canadian Mounted Police escort for the torch.⁸¹⁷ Historical clashes between the RCMP and members of the Mohawk reserve in Kahnawake threatened to derail the torch relay; however, through the efforts of Tewanee Joseph, the Chief Executive Officer of the FHFNS, a solution was developed which saw the FHFN accompany the torch to the Kahnawake community and the Mohawk Peacekeepers take responsibility for torch security on reserve.⁸¹⁸ The Statement had spoken to the importance of having the FHFN work collaboratively to ensure broader Aboriginal participation in the 2010 Games. The efforts of the FHFNS in Kahnawake demonstrated the importance of that organization to pursuing effective, broad Aboriginal participation, and demonstrated the significance of the FHFN Protocol and Statement of Principles to the ultimate execution of the 2010 Games. Indeed, coupled with the achievements of the FHFNS to establish relationships, agreements and collaboration with Aboriginal groups on a number of fronts (such as tourism initiatives, and participation in the Aboriginal Pavilion), it is plainly evident that the FHFNS was particularly accomplished in its efforts

⁸¹⁷ Stephanie Levitz, "First Nations: Pride not Money is Olympic Legacy", *The Canadian Press*, (9 January, 2010) online: The Canadian Press <<http://www.ctvolympics.ca/about-vancouver/news/newsid=25259.html>>.

⁸¹⁸ Four Host First Nations, News Release, (8 December, 2009) "Update: Four Host First Nations to bring Olympic Flame for a ceremonial visit to Kahnawake today" online: Four Host First Nations <<http://www.fourhostfirstnations.com/update-four-host-first-nations-to-bring-olympic-flame-for-a-ceremonial-visit-to-kahnaw-ke-today-3>>.

to establish cooperative relationships with Aboriginal groups that extended the positive impacts of Aboriginal participation in the 2010 Games.

Yet the role of the FHFNS in addressing Aboriginal issues related to the 2010 Games was not confined to the establishment of relationships with other Aboriginal groups, or fostering their participation in the 2010 Games and VANOC. The FHFNS also adopted a significant role in addressing conflicts and criticism which arose in relation to Aboriginal participation in the 2010 Games, with some of these efforts most squarely aimed at addressing awareness and education of the role which the Nations had played in the organization of the 2010 Games. In particular, the FHFNS addressed those who criticized the 2010 Games for taking place on lands which remained under claim by the Squamish, Lil'wat, Musqueam and Tsleil-Waututh. Most notably, the organization No Olympics on Stolen Native Land⁸¹⁹ voiced opinions such as:

“It appears as if Natives support the Olympics due to the exploitation of Native culture, as well as the efforts of Native collaborators (such as the 4 Host First Nations, which is made up of Indian Act band councils). These Native artists, business & political groups are either ignorant about what the Olympics are really about, or just plain greedy. It should be remembered that the band councils were imposed by the government as a means to control & assimilate Native peoples. They lack popular support and only exist because of government funding.”⁸²⁰

It would seem that in many respects, the FHFN and VANOC desired to confront such opinions through the awareness and education initiatives, and in particular to communicate that the involvement of the FHFN was as full partners in the organizing of the 2010 Games, and that the majority of the Aboriginal community supported the 2010

⁸¹⁹ No Olympics on Stolen Native Land, *Home*, online: No Olympics on Stolen Native Land <<http://no2010.com/>>.

⁸²⁰ No Olympics on Stolen Native Land, *Frequently Asked Questions*, online: No Olympics on Stolen Native Land <<http://no2010.com/node/336>>.

Games. For example, in VANOC's sustainability report from 2008-2009 the criticisms of protestors were addressed:

"While protests are ordinarily conducted by a small number of individuals, they can be reported widely in the media, which can lead to the misperception that dissent is more widespread than it actually is. As documented elsewhere in this section, VANOC and the FHFN have been communicating with Aboriginal groups and communities across Canada since the Games were awarded to Vancouver in 2003. Having engaged with tens of thousands of individuals and groups in this period, our experience has been that the large majority of Aboriginal peoples in Canada are supportive and excited about the 2010 Winter Games."⁸²¹

However, the FHFNS was more consistent in its efforts to answer criticism of the 2010 Games, consistently voicing the opinion that their participation in the 2010 Games was meaningful and motivated by opportunities to create greater awareness of Aboriginal culture, and to develop opportunities for members of the FHFN communities. In a speech from Tewanee Joseph, Chief Executive Officer of the FHFN, the following statements were offered:

"...As earlier mentioned, we are full and active partners in every aspect of the Games. No longer window dressing, Dime Store Indians or an after thought in a headdress trotted out at Opening and Closing Ceremonies...

...some of protesters are just plain wrong. Perhaps they don't understand, that Aboriginal people, respecting each other's territory as we do, would *never* barge onto their land and hold a protest...

...Then, too, I suspect some of the protestors have not done their homework. Perhaps they don't realize just how much Aboriginal people are, and will benefit, directly and indirectly, from the Games...

...Do these protesters really want us to remain forever the Dime Store Indian, the lone figure at the end of a gravel road, trapped in the isolation of an inner city nightmare?

Do these protesters not realize they are forcing, yet again, Aboriginal people into a dreadful mould, a stereotype that takes us back to a shameful chapter in Canadian history?

⁸²¹ VANOC, Sustainability Report 08-09, *supra* note 726 at 84.

No. No. And no again. We fought to participate in the Games. As full partners. We fought for the jobs. We fought for respect. That is why few Aboriginal people are likely to be being swayed by salvos of warmed-over, anti-corporate rhetoric. That is yesterday's news for the Aboriginal people of this country.⁸²²

From such exchanges between critics of the 2010 Games, VANOC and the FHFN, it is evident that awareness and education initiatives aimed at addressing public understanding of the role of Aboriginal participation in the hosting and organization of the 2010 Games held particular importance. The comments of Tewanee Joseph appear to directly correspond to the previously expressed FHFN desire to "...show visitors to the Games that the Nations have a positive vision for their future and welcome business opportunities from around the world."⁸²³

In this light, the awareness and education initiatives pursued by the FHFN and VANOC highlighting the significance of their participation in the 2010 Games appear aimed at ensuring that the FHFN were able to use their Olympic platform to demonstrate their proficiency as partners in economic enterprise. The disparity between critics of Aboriginal participation in the 2010 Games and the message of the FHFN and VANOC may be viewed as simply a product of differing interests in the 2010 Games and perspectives on the Olympics more generally; however, it would also seem to be reflective of the challenging debates facing Aboriginal communities more generally as they confront various economic development opportunities. Debates within Aboriginal communities regarding the desirability of pursuing or seeking economic opportunities occurring within traditional Aboriginal territories, while land claims and Aboriginal

⁸²² Tewanee Joseph, "Tewanee Joseph: Vancouver games mean no more Dime Store Indians", *The National Post*, (29 October, 2009 online: The National Post <<http://network.nationalpost.com/np/blogs/fullcomment/archive/2009/10/20/tewanee-joseph-vancouver-games-means-no-more-dime-store-indians.aspx>>.

⁸²³ FHFN Agreement, *supra* note 688 at 3.

rights issues remain unresolved, are often at the fore of any discussions regarding proposed development affecting Aboriginal communities. Such conflict highlights the challenges facing Aboriginal communities in their efforts to chart a course toward economic development.

4.4.3.7 The Four Host First Nations: Summary

While the SLA and MOU had been developed during the Bid Phase of the 2010 Games, the development of the FHFN, its relationship with VANOC, and the initiatives they pursued occurred entirely within the Organization Phase of the 2010 Games. The breadth of initiatives and issues which were addressed by the FHFNS during this period illustrates the significant role which this entity had in structuring Aboriginal participation in the 2010 Games. The development of the FHFN Board and Secretariat was itself a significant achievement, creating a collaborative, flexible approach to participating in the 2010 Games despite the existence of potential conflicts and barriers to establishing such collective efforts.

The establishment of the FHFNS clearly allowed for the development of effective communications amongst the Nations, VANOC and other Olympic partners. As was clearly demonstrated by the Salt Lake City Games, and much of the jurisprudence reviewed above, the establishment of such communication is integral to the establishment of meaningful Aboriginal participation in any project. Though the development of an entity similar to the FHFNS may not be possible in every circumstance, and indeed may not be desired by the Aboriginal groups involved, it nevertheless stands as an example of how the creation of such collaborative approaches may enable Aboriginal groups to best realize on the opportunities which present themselves in relation to a project. Indeed,

such collaboration may prove even more significant in the broader context of Aboriginal consultation and accommodation, as frequently a proposed project will impact a number of Aboriginal groups, and their ability to collaborate may ultimately correlate to their ability to most effectively engage with project proponents and the Crown. Additionally, in circumstances where Aboriginal groups have overlapping claims to the same territory, the ability to develop collaborative approaches to management of this territory may also prove central to claims resolution, as such instances almost certainly require resolution not only with the Crown, but also amongst the Aboriginal groups.

Indeed the FHFNS proved itself remarkably adept at developing initiatives for Aboriginal participation in the 2010 Games, not only for itself, but also Aboriginal groups throughout Canada. Initiatives which ranged from the economic to cultural displayed the ability of the FHFNS, and the interest of the Squamish, Lil'wat, Musqueam and Tsleil-Waututh, in pursuing a number of different opportunities for its members. This again provides an illustration that the Olympics may provide opportunities for Aboriginal peoples that go well beyond the cultural realm, and indeed, may provide the opportunity for Aboriginal peoples to pursue their own interests, initiatives and Olympic legacies.

4.4.4 The Organization Phase – Discussion

While the Bid Phase set the stage for much of the significant aspects of Aboriginal participation in the 2010 Games, the Organization Phase provided the opportunities for the Squamish, Lil'wat, Musqueam, Tsleil-Waututh, FHFNS, VANOC and the Federal and Provincial Crowns to implement their general plans. Indeed the Organization Phase of the 2010 Games provides a clear indication of the significant effort

which is required to actually realize desired results. Regardless of the level of consensus which is reached during the planning of a project, unforeseen issues and hurdles will require the parties to continue consultations, seek consensus, and alter perspectives and plans.

The implementation of the SLA provides the most clear indication of how preliminary plans must often be appraised during their actual implementation, but the pursuit of many of its provisions, particularly the WNC and Sea-to-Sky Highway construction also demonstrate that consultation and accommodation developed in relation to specific projects may indeed play a role in the progress of broader recognition and reconciliation. VANOC, and most importantly the Provincial Crown, were required to gain far greater understandings of Squamish and Lil'wat interests and concerns in the Callaghan Valley in pursuing their Olympic projects, and though this understanding did not come quickly, it ultimately resulted in more meaningful participation for the Squamish and Lil'wat, and the negotiation of broader land use planning arrangements which signal progress towards greater recognition and reconciliation. The success of these projects, and the implementation of the SLA more generally, illustrate the importance of the early participation of the Squamish and Lil'wat in the planning of 2010 Games, the benefits which come from including project proponents in consultation and accommodation, the necessity of Crown inclusion, the benefits of establishing a forum for consultation and accommodation, and the incentives which project deadlines can provide to reaching consensus.

The significance of these lessons from the implementation of the SLA is only heightened when contrasted with the implementation of the MOUs. Though the MOUs

ultimately resulted in the provision of significant financial benefits to the Musqueam and Tsleil-Waututh, the most substantial benefits obtained through the SLA were those which are impossible to put into agreement. The advancement of recognition and reconciliation clearly requires the establishment of positive relationships amongst the Crown and Aboriginal peoples, and the creation of lasting legacies surrounding the marginalization of Aboriginal peoples from the development of their traditional territory is perhaps best obtained through the pursuit of collaboration and inclusion in projects themselves. Though it would be inaccurate to describe the Olympic Legacy Agreements as insignificant, and indeed, they are testaments to the commitment and good faith of VANOC, the Musqueam and the Tsleil-Waututh to pursuing the principles of the MOUs, it is also obvious that the preferred approach would seek to develop benefits which would indeed further the processes of recognition and reconciliation.

While the implementation of the SLA and MOU provide an indication of how different planning processes may manifest ultimately manifest themselves, the establishment of the Four Host First Nations provides perhaps the clearest indication of the successes which collaboration may bring. In a short time span the FHFNS was able to establish numerous partnerships, relationships and initiatives that would likely have been impossible without the collective efforts of the Squamish, Lil'wat, Musqueam and Tsleil-Waututh. Though the establishment of such collective entities may not be possible, or desirable, in every circumstance the achievements of the FHFNS stand as a clear example of how such cooperation may prove particularly beneficial.

Collectively, the elements which comprised Aboriginal participation in the Organization Phase demonstrated that the plans which had been established during the

Bid Phase had indeed been realized, and that the 2010 Games would succeed where past Olympics had not. While much of the success of the Organization Phase was completed far in advance of the actual hosting of the 2010 Games, the event which had served as a catalyst throughout had finally arrived, and the plans for Aboriginal representation during the hosting of the 2010 Games required implementation.

4.5 Hosting the 2010 Games

As is readily apparent from the discussion of the Bid and Organization Phases above, the vast majority of the efforts and issues which together encapsulate Aboriginal participation in the 2010 Games occurred long before the Olympic flame wound its way to Coal Harbour and the Olympic Cauldron, and the 2010 Games were officially opened. Yet it is the weeks surrounding the Olympic and Paralympic Games which attract the greatest public attention, and the events and experiences which occur within those weeks are often those which are deemed the most significant, despite the years of planning and effort which precede. Though the 2010 Games have finished months ago, there is little material to assess, and the parties involved (FNFN, the individual Nations, VANOC, the Province and Federal Government) have yet to provide greater detail to the descriptions provided by the media and news releases surrounding the hosting of the 2010 Games. Therefore, what follows below is a necessarily brief description of what this author perceived to be the key elements of Aboriginal participation in hosting the 2010 Games, followed by a correlating discussion considering the Hosting Phase of the 2010 Games from a historical and legal context.

4.5.1 The Hosting the 2010 Games – Aboriginal Representation During the 2010 Games

The opening ceremonies which marked the start of the 2010 Games took place on February 12, 2010, and began with an official welcome from each of the Squamish, Musqueam, Lil'wat and Tsleil-Waututh.⁸²⁴ Following the official welcome of the FHFN, "...more than 300 young First Nations, Inuit and Métis performers danced in an unprecedented gathering of Aboriginal youth from every region and language family within Canada, sharing their rich and diverse culture amongst themselves and with the world."⁸²⁵ The Aboriginal performers welcomed the athletes as they entered the ceremonies, while the leadership of the FHFN sat along representatives of VANOC, the IOC, Canada's Governor General and other elected leadership.⁸²⁶ Though determining the awareness of Aboriginal peoples created by Aboriginal participation in the opening ceremonies, Aboriginal culture certainly featured prominently, as did the FHFN as partners and hosts of the 2010 Games.

As the 2010 Games proceeded the FHFN operated the Aboriginal Pavilion and Artisan Village and Business Showcase for those attending the Games in person. The Pavilion was introduced to the public with the arrival of the Olympic Torch on February 12, where approximately 60,000 people awaited its arrival.⁸²⁷ As the 2010 Games continued, the Pavilion attracted more than 242,000 people during the 2010 Games, while

⁸²⁴ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, Canada unveils its 'landscape of dreams' to welcome athletes and world at the Opening Ceremony of the Vancouver 2010 Olympic Winter Game, online: Vancouver 2010 <http://www.vancouver2010.com/olympic-news/n/news/canada-unveils-its-landscape-of-dreams_274410qj.html>.

⁸²⁵ *Ibid.*

⁸²⁶ *Ibid.*

⁸²⁷ Four Host First Nations, News Release, "2010 Aboriginal Pavilion Drew Huge Crowds; Symbol of Success for Aboriginal Peoples of Canada" online: Four Host First Nations <<http://www.fourhostfirstnations.com/2010-Aboriginal-pavilion-drew-huge-crowds-symbol-of-pride-and-success-for-Aboriginal-peoples-of-canada/>>.

610 Aboriginal performers took place in 224 shows.⁸²⁸ Meanwhile, the Artisan Village and Business Showcase provided 30 Aboriginal business and more than 150 Aboriginal artists a forum to promote their work to more than 85,000 people.⁸²⁹

While the FHFN touted the success of the Aboriginal Pavilion, Artisan Village and Business Showcase, they were also involved in two more controversial subjects. First, protests against the 2010 Games continued to emphasize the concept of “stolen native land”,⁸³⁰ and second, the Russian ice-dance team planned to perform a program which relied on “indigenous imagery” that had attracted criticism for being culturally insensitive.⁸³¹ In response to the protests, the FHFN released an official statement condemning the protesters for claiming to represent the Aboriginal people of the region.⁸³² The statement expressed the opinion that the protesters actions were “deeply disrespectful to Indigenous Peoples and [FHFN] sacred protocols.”⁸³³ Similarly to the comments provided by the FHFNS during the organization of the 2010 Games in response to criticism of the Games and Aboriginal participation, the FHFN cited their participation as a story of success, and that Aboriginal participation in the 2010 Games had developed in Aboriginal communities a “...newfound sense of pride that can only be described as transformative...” Though protests during the Games were not so substantial as to overwhelm the other stories of Aboriginal participation, they

⁸²⁸ *Ibid.*

⁸²⁹ *Ibid.*

⁸³⁰ Robert Matas, “Two police officers injured in Olympic protest” *The Globe and Mail* (13, February, 2009) online: The Globe and Mail <<http://www.ctvolympics.ca/news-centre/newsid=39626.html>>.

⁸³¹ Maclean’s, “Controversial Russian Aboriginal ice dance program” *Maclean’s* (26 February, 2010) online: Maclean’s <<http://www2.macleans.ca/2010/02/28/top-10-worst-moments-at-the-vancouver-olympic-games/vancouver-olympics-3/>>.

⁸³² Four Host First Nations, News Releases, “Statement from the FHFN Chiefs- Protocols and Traditional Territories” online: Four Host First Nations <<http://www.fourhostfirstnations.com/statement-from-the-fhfn-chiefs-protocols-and-traditional-territories/>>.

⁸³³ *Ibid.*

nevertheless marked a perspective both within Aboriginal communities and larger Canadian society regarding the nature of Aboriginal title in British Columbia which formed an element of the 2010 Games dialogue. While the FHFN responded only in a statement to protests, criticism of the Russian ice-dance program drew the attention of the FHFN and resulted in a meeting between the FHFNS, the Russian ice-dance team, Russian Olympic Committee and the Figure Skating Federation of Russia.⁸³⁴ The parties issued a joint statement in which the FHFN described their official welcoming of the Russian team to their traditional territory, while the Russian ice dancers explained their intention to honour the South East Asia region with their program.⁸³⁵ The Russian ice dance team ultimately proceeded with their program, but in response to criticism, altered their costumes to remove “brown body suits meant to imitate the skin colour of Aborigines.”⁸³⁶

With the closing ceremonies of the Paralympic Games on March 19, 2010, the hosting of the 2010 Games had come to completion. The closing ceremonies took place in Whistler, and were launched again through an expression of Aboriginal culture with Lil’wat Nation hoop dancers portraying “the story of the creation of life” through a combination of drum and dance.⁸³⁷ The opening and closing of the 2010 Games had been marked by expressions of Aboriginal culture, and although the most significant aspects of

⁸³⁴ Four Host First Nations, News Releases, “Joint Statement from the Four Host First Nations, Russian Olympic Committee, the Figure Skating Federation of Russia” online: Four Host First Nations <<http://www.fourhostfirstnations.com/joint-statement-from-the-four-host-first-nations-russian-olympic-committee-the-figure-skating-federation-of-russia/>>.

⁸³⁵ *Ibid.*

⁸³⁶ Maclean’s, *supra* note 831.

⁸³⁷ The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, *With Glowing Hearts: Paralympic Closing Ceremony a community celebrating paying tribute to sport, perseverance and triumph*, online: Vancouver 2010 <http://www.vancouver2010.com/paralympic-games/news/with-glowing-hearts--paralympic-closing-ceremony-a-community-celebration-paying-tribute-to-sport--perseverance-and-triumph_314388qy.html>.

Aboriginal participation in the 2010 Games had occurred months, or even years, prior to this span from February to March in 2010, such ceremonies provided some symbolism of the significant efforts which had been put forth, although it remains unclear what public perceptions of the 2010 Games and Aboriginal participation may be.

4.5.2 Hosting the Olympic Games – Discussion

What is most evident from a review of the actual hosting of the 2010 Games is the relatively insignificant role which it plays in the entire context of Aboriginal participation in the 2010 Games. The most significant elements which structured Aboriginal participation in the 2010 Games occurred during the Bid and Organization Phases, and yet it is the events which occur during the Olympics themselves which tend to capture the public's attention. This is perhaps most clearly illustrated if one contrasts the 2010 Games with the Sydney Games. As was revealed during the discussion of the Sydney Games above, Aboriginal participation was perceived to be a significant accomplishment following Cathy Freeman's lighting of the Olympic cauldron. This event caught the public's imagination, and was quickly lit upon as a symbol of the significance which Aboriginal participation played in the Sydney Games. Indeed, the Sydney Games had succeeded in creating far greater Aboriginal participation than had been seen in Olympic Games to that date.

If one contrasts the Sydney Games to the hosting stage of the 2010 Games one might not perceive significant differences between them. Aboriginal culture was represented in many ceremonies, Aboriginal culture was clearly integrated into many facets of the Olympics, Aboriginal peoples had a specific pavilion or forum to pursue cultural awareness and education, and there were even concerns that protests surrounding

Aboriginal issues may be a defining feature of the Games. The 2010 Games did feature Aboriginal participants more prominently, and the Squamish, Lil'wat, Musqueam and Tsleil-Waututh were given official Host Nation status, and sat amongst the IOC, Federal, Provincial, City and VANOC representatives as equals; however, this subtly may not have registered significantly with the public.

Yet the difference between Aboriginal participation in the two Olympics is clearly monumental. The Squamish, Lil'wat, Musqueam and Tsleil-Waututh were able to obtain far more substantial participation in the 2010 Games than was seen by Aboriginal peoples in the Sydney Games, but most of their successes were those that occurred long before the Olympic Cauldron was lit, and the world's attention rested on Vancouver/Whistler and the Host Nations. It is these earlier accomplishments which hold the greatest significance, and the implications which will be the subject of the concluding chapter of this thesis.

Chapter 5: Conclusion - Implications of Aboriginal Participation in the 2010 Games

This thesis began by noting the ability of the Olympic Games to transform host cities, and to act as a catalyst for social, economic and environmental change when host cities compete to win the bid to stage this prestigious global event. In large part, this thesis has explored this transformative aspect of the Olympic Games, examining Aboriginal participation in the 2010 Games to assess what successes and failures were obtained, how outcomes were produced, and finally what implications the policies and practices of the participants have for future Olympics, and Aboriginal engagement in British Columbia and Canada. To carry out this examination, we first developed context and guidelines to aid in our examination. First, we considered the participation of Aboriginal peoples in past Olympic Games,⁸³⁸ and emerging Canadian legal rules surrounding the necessity of Aboriginal participation in decision making processes and projects mandated by the *Constitution Act, 1982*.⁸³⁹ With this guidance and context in hand, we then explored the 2010 Games themselves to describe the Aboriginal participation which took place, and assess how this participation contrasted with previous Olympic experiences, and met with judicial guidance surrounding meaningful approaches to Aboriginal participation. The final objective of this thesis was to consider the implications which Aboriginal participation in the 2010 Games may have within the Olympics themselves, and for efforts to improve the engagement and participation of

⁸³⁸ See Chapter 2, above, at 17-55 for discussion of Aboriginal participation in past Olympic Games. See especially Chapter 2.8, above, at 52-55, which summarizes Chapter 2 discussion.

⁸³⁹ See Chapter 3, above, at 56-113 for discussion of relevant jurisprudence. See especially Chapter 3.5, above, at 109-13 for discussion of how judicial guidance was to be applied to the examination of Aboriginal participation in the 2010 Games.

Aboriginal peoples in British Columbia and Canada more generally. It is this final purpose which is the subject of this conclusion.

5.1 Implications for the Olympic Games

To consider the implications which Aboriginal participation in the 2010 Games may hold for future hosts of the Olympic Games, it is first necessary to review our historical examination of Aboriginal participation in the Olympics. As indicated in Chapter 2, previous Aboriginal participation in the Olympics had been of little lasting significance, and left few enduring legacies for Aboriginal peoples.⁸⁴⁰ Indeed, in some instances, Aboriginal participation in the Olympics could best be characterized as leaving negative legacies,⁸⁴¹ clearly leaving much room for improvement. Aboriginal groups prior to the 2010 Games were consulted almost solely on cultural matters,⁸⁴² and though this involvement was commendable in many respects, our historic review revealed that this involvement produced little lasting change for Aboriginal peoples.⁸⁴³ The lack of Aboriginal involvement in more substantive Games organization process clearly limited the ability of Olympic hosting to create opportunities to address more pressing issues of social, economic and political marginalization of Aboriginal peoples. Though such issues may have seemed beyond the purview of the Olympic Movement, the adoption of Agenda 21 and its emphasis on the specific need to improve Aboriginal participation in

⁸⁴⁰ See especially Chapter 2.6, above, at 40-49 which discusses Aboriginal participation in the Sydney Olympic Games, which incorporated the greatest Aboriginal participation prior to the 2010 Games.

⁸⁴¹ See especially Chapter 2.3, above, at 25-30 which discusses Aboriginal participation in the Montreal Olympic Games, where portrayal of Aboriginal culture in closing ceremonies was arguably offensive.

⁸⁴² See e.g. Chapter 2.6, above, at 40-41.

⁸⁴³ See Chapter 2.8, above.

the Games revealed the importance which the 2010 Games may have for future Olympic hosts.⁸⁴⁴

Yet our review of past Olympic Games revealed not only the role which Aboriginal participation held specifically, but also, indicated an overall trend in the importance of sustainability issues (such as issues of inclusion) to the Olympics more generally. The IOC has clearly embraced the concept of sustainability within the Olympic Movement, as evidenced by initiatives such as the adoption of Agenda 21, the inclusion of greater sustainability factors within the bid process, and creation of specific sustainability reporting requirements for host cities. However, the importance of sustainability to the Olympic Movement is not evidenced solely by the internal machinations of the IOC, but also, by a review of the criticism which is leveled at the Games. As illustrated by commentators critiquing the environmental record of the Olympics,⁸⁴⁵ Aboriginal participation in past Olympic Games,⁸⁴⁶ and most clearly in the 2010 Games context by the media attention garnered by organizations such as “No Olympics on Stolen Land”,⁸⁴⁷ the Olympics are increasingly being judged on impacts to issues of sustainability. This indicates the importance of sustainability achievements to the continued relevance of the Olympic Movement, and illustrates that such sustainability efforts must meet not only internal IOC standards, but also the expectations of the public and Olympic critics.

⁸⁴⁴ See Chapter 2.5, above, at 36-40 which discusses the IOC’s adoption of Agenda 21, and its provisions pertaining to Aboriginal people and their involvement in the Olympics.

⁸⁴⁵ *Ibid.* Notes the environmental issues in Albertville which drew criticism from environmentalist and played a significant role in prompting the adoption of Agenda 21.

⁸⁴⁶ See e.g. Chapter 2.6, above, at 45-49 for review of criticism leveled at Aboriginal participation in the Sydney Olympic Games.

⁸⁴⁷ See Chapter 4.5.1, above, at 279-83 for discussion of criticism drawn during the hosting of the 2010 Games.

As was plainly revealed in contrasting Aboriginal participation in the 2010 Games with these earlier Olympiads, there were innumerable improvements made in the inclusion of Aboriginal peoples. Indeed, for Vancouver/Whistler, Aboriginal participation became the cornerstone of Olympic sustainability success, and the benchmarks set by Games organizers, the FHFN, and other Olympic partners clearly hold a number of implications and lessons for future host cities, and the Olympic Movement. The development of Aboriginal inclusion in broader Olympic organizational processes,⁸⁴⁸ negotiation of participation agreements,⁸⁴⁹ emphasis on Aboriginal interests and objectives in Olympic hosting opportunities,⁸⁵⁰ creation of economic inclusion and opportunities,⁸⁵¹ development of collaborative partnerships,⁸⁵² and inclusion of the FHFN as official hosts of the Olympic Games⁸⁵³ placed the level of Aboriginal participation in the 2010 Games far beyond the symbolic and cultural. Though these initiatives may not address all issues of social importance to Aboriginal participants, these more substantive policies and practices allowed the Olympics to progress Aboriginal issues surrounding employment, land use planning, economic opportunities, relationship development amongst Aboriginal peoples, the Crown and the private sector, and creation of organizational management expertise amongst Aboriginal participants.

⁸⁴⁸ See Chapter 4.3.1, above, at 120-3, which illustrates Squamish/Lil'wat participation in the Domestic Bid, and incorporation into Bid Corporation. See 4.3.4, above, which discusses participation of all Nations during the Bid; see particularly 136-37 which discusses Squamish/Lil'wat incorporation into VANOC. See also Chapter 4.4.3.2, above, for discussion of the Statement, which more formally incorporated the FHFNS into VANOC decision making processes.

⁸⁴⁹ See Chapter 4.3.4, above, for discussion of the negotiations of the SLA and MOU. See Chapter 4.4.3.2, above, for discussion of negotiation of the Statement.

⁸⁵⁰ See e.g. Chapter 4.3.5, above, for discussion of the manner in which the SLA may be seen as prioritizing Squamish/Lil'wat interests.

⁸⁵¹ See e.g. Chapter 4.3.4 & 4.4.1 for discussion of the negotiation and implementation of the SLA. See also Chapter 4.4.2 for discussion of the implementation of the MOUs. See also Chapter 4.4.3.3, above, for discussion of economic opportunities developed by the FHFNS.

⁸⁵² See e.g. Chapter 4.4.3.1, above, for discussion of the establishment of the FHFN and FHFNS.

⁸⁵³ See Chapter 4.4.3.5 above, at 265 for discussion of the involvement of the FHFN as official Olympic hosts.

Such impacts clearly indicated the significant improvement which Aboriginal participation in the 2010 Games had made on past Olympic experiences. However, these successes also illustrate that the Olympics may indeed have positive effects on sustainability issues, which in turn demonstrates that future Olympic hosts may be expected to achieve (or at least pursue) similarly lofty objectives in their Games organization. Though some commentators may suggest that such topics are beyond the purview of the Olympics to address, and beyond the ability of a single event to address, the 2010 Games provide a clear indication that significant progress on issues of social or environmental importance may indeed be spurred by Olympic hosting. Aboriginal participation in the 2010 Games is demonstrative of the substantial achievements which can be prompted by Olympic hosting, and these successes imply that future Olympics may have to pursue comparable sustainability goals, and achieve equivalent results, if an Olympic Games are to be deemed a success. The efforts of the parties responsible for the success of the 2010 Games reveal that such success may not be easily recreated, and that future hosts will have to place equal emphasis and importance on subjects of sustainability if they are to meet the standard set in 2010.

While Aboriginal participation in the 2010 Games may suggest that future Olympics will be pushed to achieve sustainability success more generally, one would hope that it is especially persuasive for the continued involvement and meaningful participation of indigenous and Aboriginal peoples in the Olympic Games. It is premature to judge whether the sports legacy funds and other initiatives pursued by the FHFN, 2010 Games organizers, and the Crown will have their intended effect of increasing Aboriginal representation amongst Canadian Olympic athletes. However, if

Aboriginal participation in the 2010 Games is to have a more lasting Olympic legacy, it may not be within Canada's Aboriginal groups that it is felt, but internationally amongst other indigenous populations. One might be forgiven for assuming that the importance of such Aboriginal participation is limited to a few select countries. However, the United Nations Permanent Forum on Indigenous Peoples states that there are approximately 370 million indigenous people across the globe in nearly 90 countries.⁸⁵⁴ These statistics indicate that the marginalization of indigenous peoples is not limited to Canada, Australia and the United States. Indeed, they suggest that the 2010 Games successes in Aboriginal engagement can be, and indeed should be, pursued in many future Olympic cities.

Yet, upcoming Olympic Games in Sochi, Russia and Rio de Janeiro, Brazil reflect far less emphasis on the participation of their own indigenous populations.⁸⁵⁵ However, one might postulate that these Olympiads were launched before the successes of the 2010 Games, and before the possibilities and meaning of significant Aboriginal participation in the Olympics was realized by the IOC. Perhaps these host cities also have other sustainability mandates which they feel are more pressing. Yet this is one of the particular difficulties faced by indigenous populations and their ability to meaningfully participate in society generally, let alone the Olympics. Too often the larger benefits of Aboriginal participation in economic and development initiatives are overlooked, yet the Olympics seem to serve as an ideal setting to correct such oversight, and it is perhaps in

⁸⁵⁴ United Nations Permanent Forum on Indigenous Peoples, *State of the World's Indigenous Peoples*, online: United Nations < <http://www.un.org/esa/socdev/unpfii/en/sowip.html> >.

⁸⁵⁵ See e.g. Rio 2016, *Bid Book*, online: Rio 2016 <http://www.rio2016.org.br/sumarioexecutivo/default_en.asp> & Sochi 2014, *Legacy*, online: Sochi 2014 <<http://sochi2014.com/en/legacy/>>.

this regard that Aboriginal participation in the 2010 Games may create a legacy of particular importance to the Olympic Movement.

While the 2010 Games may ultimately hold such broad implications for the Olympic Games and future host cities in their planning both for sustainability generally, and for Aboriginal inclusion specifically, our examination also revealed some more detailed lessons which these parties would do well to heed. The incorporation of Aboriginal peoples from the earliest stages of the bid, seeking ways to pursue objectives through numerous facets of Games organization and hosting, commitment to fostering relationships, and ability to bring multiple parties together to pursue objectives all played significant roles in the successes seen in relation to Aboriginal participation in the 2010 Games. These contributors to 2010 Games success reveal the significant efforts required to achieve the sustainability objectives of the IOC, a host city, and its populace. This in turn illustrates the need for the IOC to increasingly emphasize the importance of sustainability to the Olympic Movement, and in particular, to place similar emphasis on sustainability objectives as that afforded to the traditional economic and sporting elements encompassed by Olympic hosting. Indeed, it was stated that without the support of the FHFN, the Vancouver/Whistler Bid would never have been a success, and without such IOC emphasis, it is possible that Aboriginal participation in the 2010 Games may not resulted in the same achievements and successes, and consequently, the 2010 Games as a whole would have shone less brightly.

5.2 Implications for Aboriginal Participation, Consultation and Accommodation

While Aboriginal participation in the 2010 Games may hold significant implications for the Olympic Games themselves, the above research indicates that the more significant lessons may be for the Crown and Aboriginal peoples in their efforts to construct more effective Aboriginal participation in other contexts. Our review of jurisprudence interpreting Section 35(1) reveals the emergence of a legal doctrine which is vastly influencing the manner in which Aboriginal peoples are able to participate in the development projects and decision making processes which effect their constitutionally protected lands and rights. The judiciary's articulation of the objectives of recognition and reconciliation, the importance of honourable, good faith engagement, emphasis on negotiated settlement, the necessity of prioritizing Aboriginal interests, and the increased requirements of consultation and accommodation of Aboriginal interests would all appear to indicate that the legal context within Canada is set to prompt significant improvement in the marginalization of Aboriginal peoples in mainstream economic and political settings within British Columbia and Canada.⁸⁵⁶

Yet this same jurisprudence has come under criticism for doing little to significantly alter the decision making authority of the Crown, and for placing too much emphasis on economic and non-Aboriginal interests to ensure the constitutional protection afforded under Section 35(1) is properly realized.⁸⁵⁷ Indeed, our review of lower court decisions assessing Crown responses to this emerging constitutional legal

⁸⁵⁶ See Chapter 3, above, for discussion of jurisprudence surrounding Aboriginal participation in Canada. See especially Chapter 3.3.1, 3.4.1 & 3.5.1, above, for summary of key jurisprudence topics.

⁸⁵⁷ See Chapter 3.3.1, above, for discussion of this subject.

doctrine revealed numerous difficulties in the current approaches taken towards the consultation and accommodation of Aboriginal peoples.⁸⁵⁸ Indeed, as was noted in the introduction, even where a prominent Aboriginal organization such as the First Nations Leadership Council has developed guidelines in conjunction with the Crown such as the *Discussion Paper on Instructions to Implement the New Relationship*, difficulties may still follow. In sum, this review of the jurisprudence reveals that while Section 35(1), and the ever growing jurisprudence applying it, may hold significant potential for Aboriginal peoples, there remain difficulties in realizing this potential.

This legal context surrounding the 2010 Games clearly illustrates the significance which Aboriginal participation occurring within this context may have for larger efforts to construct and improve approaches to greater Aboriginal participation in British Columbia and Canada. Indeed, when examined in light of Section 35(1) and its subsequent judicial guidance, Aboriginal participation in the 2010 Games demonstrates a number of key approaches to Aboriginal inclusion which are particularly relevant to those attempting to craft appropriate responses to the Crown's duty to consult and accommodate Aboriginal peoples, and those concerned with the marginalization of Aboriginal peoples more generally.

The successes achieved by Aboriginal participation in the 2010 Games were directly correlated to the early involvement of Aboriginal peoples, and although the judiciary has provided direct guidance on the importance of such early inclusion,⁸⁵⁹ the 2010 Games stand as a very practical example of how such early inclusion may significantly influence the outcomes of consultation and accommodation. However, such

⁸⁵⁸ See Chapter 3.4, above, for the examination of lower court decisions.

⁸⁵⁹ See Chapter 3.4, above, for SCC decision outlining the Crown's duty to consult and accommodate in which necessity of early involvement of Aboriginal peoples is discussed.

early involvement would almost certainly have been insufficient to create many of the achievements, of the 2010 Games had Aboriginal participation at this early stage not encompassed inclusion of Aboriginal peoples at the highest levels of project planning.

The impact of having such early and substantial involvement on outcomes for Aboriginal peoples is perhaps most clearly displayed by the benefits which the Squamish and Lil'wat obtained through the SLA.⁸⁶⁰ The identification of key objectives and commitments of the Crown, Bid Corporation, and the Squamish/Lil'wat were central to ensuring consensus was developed regarding the manner in which the Squamish/Lil'wat would participate in the Olympic development occurring within their traditional territories. Without this early consensus, it is doubtful the Squamish and Lil'wat would have achieved the same outcomes. The success of the SLA demonstrates that early identification of Aboriginal groups impacted by a proposed project, the formal inclusion of Aboriginal peoples in advisory and decision making bodies, and the provision of opportunities for Aboriginal peoples to participate and benefit in the economic benefits flowing a project are critical elements in creating meaningful and lasting legacies for Aboriginal peoples.

Yet the importance of the negotiation of the SLA is only truly understood when one considers the Olympic development of the Callaghan Valley, which provided further lessons and implications for the structuring of consultation and accommodation processes.⁸⁶¹ The execution of the SLA provisions relied heavily on the environmental assessment processes to carry out much of the ongoing discussions and negotiations amongst the Squamish/Lil'wat, VANOC, and the Crown. Review of this environmental

⁸⁶⁰ See Chapter 4.3.4 & 4.4.1, above, for discussion of the negotiation and implementation of the SLA.

⁸⁶¹ See Chapter 4.4.1.1 & 4.4.1.2, above, for elaboration on the implementation of the SLA in relation to the development of the WNC and Sea-to-Sky Highway.

assessment process revealed the importance of effective communication amongst the parties to ensure the successful completion of their objectives. In particular, the environmental assessment process provided particular insight into the importance of developing effective means of communication amongst private sector, the Crown and Aboriginal peoples if Aboriginal participation is to be effective. This clearly demonstrates the need for utilizing and developing such formal forms for discussion, to ensure effective communication occurs, and conflicts and issues are addressed.

Additionally, the development of the Callaghan Valley reveals some fundamental lessons regarding the delegation of consultation and accommodation responsibilities to the private sector (in this case, the Bid Corporation and its successor VANOC). The Squamish and Lil'wat consistently voiced concerns regarding the impacts of Olympic development to Aboriginal rights and title, and broader issues of land use planning; issues which were simply beyond the capacity of VANOC to address. Clearly the delegation of consultation and accommodation responsibility to a project proponent has the benefit of ensuring the project specific concerns may be addressed most efficiently and directly. However, the ultimate purpose of consultation and accommodation is to further purposes of recognition and reconciliation, and it seems clear that these purposes can not be addressed, if larger issues of recognition and reconciliation (such as those raised by the Squamish/Lil'wat) go unanswered. This clearly indicates the need to develop consultation processes in which the Crown plays an active role in addressing Aboriginal concerns; yet, there is also an obvious need for the involvement of the project proponent to ensure Aboriginal concerns and interests specific to the project are fully addressed.⁸⁶²

⁸⁶² See Chapter 3.3 at 84-88 for discussion of delegation of consultation and accommodation duties by the Crown.

Again, the SLA provides a novel solution to the need for both Crown and project proponent in consultation and accommodation processes, and the tripartite nature of this Agreement may prove to be an important template for future parties to consider.

Of course, this implication of Aboriginal participation in the 2010 Games is only relevant if the incorporation of such a tripartite approach is ultimately at advancing recognition and reconciliation.⁸⁶³ Once again, the development of the WNC and Sea-to-Sky Highway would appear to indicate that this is the case. The involvement of the Squamish and Lil'wat, Crown, and VANOC throughout this development process allowed for the Squamish and Lil'wat to participate directly in the development occurring within their traditional territories, the recognition and facilitation of Squamish and Lil'wat economic and land use interests, and the negotiation of a detailed land use plan between the Nations and the Crown.⁸⁶⁴ These outcomes would appear to illustrate that Aboriginal participation in project specific consultation and accommodation may indeed further the purposes of recognition and reconciliation mandated by Section 35(1). The parties moved from very broad understandings and consensus during the SLA to far more detailed knowledge and agreement in the actual implementation of the SLA commitments, and negotiation of further agreements like the LMU and Land Use Planning Agreements.⁸⁶⁵ This illustrates the manner in which recognition and reconciliation may indeed function as processes, and the significant role which project specific consultation and accommodation may play in furthering these processes.

⁸⁶³ See Chapter 3.2.1 & 3.3.1, above, for discussion of the importance of recognition and reconciliation to Section 35(1) & Chapter 3.5, above, for discussion of how the concepts of recognition and reconciliation were to be applied to Chapter 4 examination of the 2010 Games.

⁸⁶⁴ See Chapter 4.4.1.1 and 4.4.1.2, above.

⁸⁶⁵ *Ibid.*

While the success of the Squamish/Lil'wat achieved through the negotiation of the SLA may demonstrate the manner in which a specific development project may indeed further purposes of Section 35(1), it also serves to illustrate the importance of bargaining strength of Aboriginal peoples to the negotiation of such outcomes. This illustration is made clear when the outcomes specific to the Squamish/Lil'wat are contrasted to the Musqueam and Tsleil-Waututh, who were unable to accrue the same type of benefits provided in the SLA. Certainly the Musqueam and Tsleil-Waututh received significant compensation for their participation in the 2010 Games; compensation which was deemed to match the financial value of that received by the Squamish and Lil'wat. However, what is plainly evident is that some of the most significant benefits which flowed to the Squamish and Lil'wat were not economic, but the less tangible elements which resulted in the furtherance of the larger objectives of recognition and reconciliation which have remained elusive in the Crown and Aboriginal peoples' pursuit of *The New Relationship*.

The specific outcomes for the Musqueam and Tsleil-Waututh were directly correlated to the less substantial development proposed within their traditional territories, and the subsequent lack of bargaining power which this provided the Musqueam/Tsleil-Waututh in their early engagement of the 2010 Games organizers. This indicates not only the importance of earlier and more substantial Aboriginal participation, but also the limitations of the Crown's duty to consult and accommodate to address the marginalization of Aboriginal peoples. The disparities between the Squamish/Lil'wat and Musqueam/Tsleil-Waututh clearly reveal that those Aboriginal groups whose rights and title, whether claimed or otherwise, are not impacted by proposed projects are not

granted the incentive which forces the Crown to engage.⁸⁶⁶ This clearly illustrates that the recognition and reconciliation mandated by Section 35(1) can not be achieved by relying on instances where the Crown's duty to consult and accommodate is invoked. Rather, the Crown and Aboriginal peoples must continue to strive toward these purposes irrespective of the potential which the Crown's duty to consult and accommodate may offer.

Perhaps unsurprisingly, Aboriginal participation in the 2010 Games offers implications on this subject as well. Though a significant portion of the examination of the 2010 Games emphasized the development and planning of land, which is frequently the subject of instances in which the Crown's duty to consult and accommodate Aboriginal peoples is triggered, a number of other initiatives including tourism and intellectual property exploitation opportunities were developed to leverage the 2010 Games.⁸⁶⁷ A common feature of many of these initiatives was the importance of collaboration and cooperation amongst Aboriginal organizations themselves, and again this feature of the 2010 Games holds unique implications for Aboriginal peoples.

The importance of such collaborative relationships is perhaps most clearly illustrated by consideration of the significant accomplishments of the Four Host First Nations Secretariat, which resulted from the formal collaboration of the Squamish, Lil'wat, Musqueam and Tsleil-Waututh in relation to the 2010 Games. Without such collaboration it is quite likely that many of the successes achieved by the Secretariat would not have been realized by the Nations individually. Additionally, the FHFN was

⁸⁶⁶ See Chapter 3.3, above, at 85-88 for discussion of when the Crown's duty to consult and accommodate is triggered, and the scope of the Crown's duties.

⁸⁶⁷ See Chapter 4.4.3.3 for discussion of additional economic opportunities developed by the FHFN in relation to the 2010 Games.

able to foster a number of other cooperative efforts with Aboriginal organizations across British Columbia and Canada, the importance of which is perhaps best illustrated by the Olympic Torch Relay and Aboriginal Pavilion. Though the significance of Aboriginal collaboration was not limited to these initiatives, they demonstrate a particularly important and unique aspect of Aboriginal participation in the 2010 Games. The importance and success of this collaboration implies that such approaches to coordinated Aboriginal engagement and initiative development may become the standard rather than the exception.

Indeed, when one considers the jurisprudence reviewed, the issues in Olympic Games such as Salt Lake City, and the success obtained by the FHFN, it seems evident that greater collaboration amongst Aboriginal groups may become a central feature of Aboriginal participation, and one which allows Aboriginal peoples to obtain far greater benefits and participation in projects which impact their communities. The participation of the FHFN demonstrates the effectiveness of such collaborative approaches amongst Aboriginal groups when partnering with the private sector and Crown. Collaborative Aboriginal groups may be capable of exerting more political pressure certainly, and as noted above, bargaining power may play a central role in the benefits which Aboriginal peoples are able to obtain in relation to a project. However, the 2010 Games also reveal that such collaboration allows for efficient and effective partnerships to be developed. The FHFN were capable of executing such a large number of agreements, and developing a wide range of initiatives, because their combined efforts ensured they were working constructively towards mutual objectives, rather than in conflict or contrast to one another. It is not challenging to imagine the difficulty that VANOC or the Bid

Corporation may have encountered had separate agreements been required in each instance for the Squamish, Lil'wat, Musqueam and Tsleil-Waututh. Though such collaboration may not always be feasible in every circumstance, the successes obtained by the FHFN in relation to the 2010 Games reveal the benefits which flow from collaboration, and suggest the importance of ensuring the Crown, and others, support such cooperative efforts of Aboriginal peoples.

Finally, the experiences of the 2010 Games may signal a concerted shift in level of accommodation that Aboriginal groups may receive in relation to development projects. The sums received by the Squamish, Lil'wat, Musqueam and Tsleil-Waututh in relation to their participation in the 2010 Games were quite significant,⁸⁶⁸ and the provision of such compensation suggest that Aboriginal peoples may face new challenges and decisions surrounding the appropriate balance of economic benefit with preservation of other Aboriginal interests. Indeed, the opportunity for such economic benefit may be viewed as posing significant risks to Aboriginal cultures and communities, which may find themselves less marginalized from projects and decision making, but increasingly pressured to pursue economic benefits for initiatives which may hold unexpected or unintended consequences. The marginalization of Aboriginal peoples from economic development has been well documented, and their exclusion from such development would no doubt have increased dissent amongst Aboriginal peoples regarding the exploitation of their traditional territories. However, as Aboriginal participation in such development becomes more prevalent, and indeed sought, the pressures to obtain economic benefits to address issues of poverty and development amongst Aboriginal

⁸⁶⁸ See Chapter 4.3.4, 4.4.1, 4.4.2, and 4.4.3.3, above, for discussion of economic benefits accruing to the FHFN both jointly and severally.

communities will indeed run high. In such instances, Aboriginal peoples may face more challenging questions, in an attempt to strike a balance acceptable to their peoples and culture between economic exploit, and preservation of traditional lands and practices.

The Olympic Games are an event with unparalleled global prominence, and although some debate the value of the Olympics, it is plainly evident that the Olympics will continue to exert its weighty influence, and transformative potential, on host cities around the world. That the Olympics have such a transformative potential seems apparent, but to what end such potential is directed, is clearly the subject of ongoing debate. Aboriginal participation in the 2010 Games stands as evidence that the Olympics may indeed spur meaningful action on issues of social importance, and that the catalytic potential of the Olympics may be turned to positive means. However, like any catalyst, the Olympic Games are incapable of generating transformations on their own, and the lasting impacts of the 2010 Games will ultimately be determined by those involved on subjects of sustainability, and Aboriginal issues, and the uses which they make of these Olympic lessons. The potential for positive change for both the Olympics and Aboriginal participation exists, and the 2010 Games may ultimately prove to be an important contributor to their evolution. However, it is premature to place final verdicts on the implications and meaning of the 2010 Games, and it remains to be seen what legacies will ultimately result from Aboriginal participation in Vancouver/Whistler's Olympics.

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