STARBOARD OR PORT TACK?
NAVIGATING A COURSE TO
RECOGNITION AND RECONCILIATION OF
ABORIGINAL TITLE TO OCEAN SPACES

by

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ABSTRACT

In British Columbia, fifty-one First Nations have filed Statements of Intent signifying their interest in negotiating a treaty with Canada and the Province of British Columbia since the establishment of the British Columbia Treaty Commission in 1993. Twenty-seven of these First Nations participants claim ocean spaces within their traditional territories. Academic research and writing over the last decade has focussed on Aboriginal title to land, with little, if any reference, to ocean spaces. The concept of Aboriginal title was recently recognized by the courts in Delgamuukw v. British Columbia.

My research will explore what information and legal principles could be utilized to recognize Aboriginal title to ocean spaces within the Canadian legal context, and therefore provide some bases for First Nations in substantiating their claims. My analysis will begin with a review of international law principles surrounding title to and jurisdiction over ocean spaces. Following which, I will delineate the sources available for recognizing such a theory, starting with a review of the concepts of Aboriginal title as determined in Delgamuukw and their applicability to ocean spaces.

Delgamuukw has affirmed Aboriginal perspectives are an integral part of the investigation of Aboriginal title, and voices of members of two particular First Nations being the Haida Nation and the Tsawwassen First Nation, with whom I visited, will be included. Rounding out the sources will be a review of comparative legal concepts drawn from the United States and Australian experiences, and the principles espoused within international human rights
Having established the avenues for recognition of this concept, I then turn to discussion of its reconciliation within the Canadian legal context by reviewing theories of co-management and examining a number of settlement instruments that have yielded some degree of reconciliation between the federal government and the particular First Nation or Province involved. Comments from First Nations in respect of the obstacles that hold back reconciliation will be noted.

In conclusion, my research will deduce Aboriginal title to ocean spaces is a viable legal concept in Canada, and First Nations have the resources necessary to substantiate their claims. Comments about the possibilities that may result at the treaty table or in the courts upon recognition of this concept will also be discussed.

This analysis is timely and important as many First Nations are nearing the stage of the treaty process where discussions will be directed towards what territories these First Nations groups will retain and what ownership, jurisdiction and rights they will enjoy as to ocean spaces and resources. Such issues directly relate to the continued way of life, culture, and sustainable economic growth and stability of First Nation communities into the twenty-first century.
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DEDICATION

As one gathers years on the face of this earth, there are numerous people and experiences that play a part in the path one's life takes. Having now completed the writing of this thesis, I have a chance to reflect upon the many people who have had a hand in all of this. To those who I have forgotten to name personally, I sincerely apologize. From my years within the law on the East Coast of Canada, I thank the Honourable Judge John D. Comeau for acting as my principal and starting me on my career. I am deeply grateful to the Honourable Justice Charles E. Haliburton for the opportunity of working with him, and for his continued sage advice. I learned much about the intrigue and creativity of the law appearing before the Honourable Judge John R. Nichols. My sincerest thanks to the Public Trustee of Nova Scotia, M. Estelle Theriault, Q.C., for her support in my pursuit of further education in management and the law, as well as the support of Professor Brian Bruce of the University of New Brunswick and Dr. Joyce Kennedy of Mount Saint Vincent University.

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This work is dedicated to you all, and to the Nations of the Haida and Tsawwassen Peoples, with my love and heartfelt thanks.

- C. Rebecca Brown, January 2000
The Haida Legend

The Raven and the First Human Beings

One evening after the great flood waters had receded, the Raven found a gigantic clamshell half buried in the sand at Rose Spit. Inside this shell were little creatures cowering in terror at the sight of the enormity of Raven’s shadow. The Raven coaxed, cajoled and coerced these little creatures to come out into his wonderful shiny world. Eventually, one little shell dwellers appeared, soon followed by the others.

The Raven eyed these little creatures with interest. They were two legged like him but that was where the resemblance ended. The creatures had no glossy feathers, nor thrusting beak, rather they were pale of skin, with black hair atop their heads with thin stick like appendages rather than wings, that waved and fluttered constantly. These tiny shell dwellers discovered by the Raven that evering were” the original Haidas - the first humans”...

No timid shell dwellers these children of the wild coast, born between the sea and the land to challenge the strength of the stormy north Pacific and wrest from it a rich livelihood. Their descendants would build on its beaches the strong, beautiful homes of the Haidas and embellish them with powerful heraldic carvings that told of the legendary beginnings of the great families, all the heroes and heroines, the gallant beasts and monsters that shaped their worlds and destinies. For many, many generations they grew and flourished, built and created, fought and destroyed, lived according to the changing seasons and the unchanging rituals of their rich and complex lives.

It’s nearly over now. Most of the villages are abandoned and in ruins. The people who remain are changed. The sea has lost much of its richness and great areas of the land itself lie in waste. Perhaps it’s time that the Raven or someone found a way to start again.

CHAPTER ONE

INTRODUCTION

1. Overview

First Nations have resided along the rugged ocean swept shores of the Pacific Northwest since time before memory. Their lives and cultures have been shaped by the ebb and flow of those waters and the resources found therein. Today, one can bear witness to this intrinsic link with the ocean as evidenced in the gathering activities on the beaches, in the river estuaries and on the open waters offshore. These ocean spaces provide the very sustenance of life for coastal First Nations through the food resources produced, the economic livelihoods derived from ocean activities, and the various cultural and community relationships, and sacred and spiritual dimensions that emanate from such ocean connections. For many First Nations, their very creation emerges from the ocean depths. Should these bonds to ocean spaces be placed in jeopardy, the very existence of many First Nations cultures would be tossed into peril.

During the last few decades, much of the academic discussion in Canada on First Nations issues has centered around the concept of Aboriginal title with a definite focus on land and earth. Our Supreme Court of Canada determined in 1997 that Aboriginal title continues to exist in Canada, yet, the Court provided no comments on how such a concept interacts with ocean spaces. In British Columbia, many First Nations have expanses of ocean within their traditional territories. The question then becomes is it possible to recognize the concept of Aboriginal title to ocean spaces, and reconcile the dimensions of such a concept within the
Canadian legal context? A simple question in the asking, yet complex and elaborate in the answer. Such then is the focus of this work about ocean cultures and First Nations of British Columbia.

My interest in this subject flows from my introduction to the 1989 article of Billy Garton and his discussion of Aboriginal title to the territorial sea off the west coast. Upon further examination, I noted how little academic attention had been focused in this direction. Canadian natural resources literature by scholars including Claudia Notzke, Michael Asch, and Richard Bartlett contain few if any references of substance to First Nations and their relations with ocean spaces or the resources found therein. Much is written on fishing and the Aboriginal right to the fisheries due to the proliferation of fisheries prosecutions, and the Supreme Court of Canada cases during the early to mid-1990s.

After completion of the research for this work, I find there has been little discourse on Indigenous claims to ocean spaces. Countries like Australia whose development of


2 R. v. Sparrow (1990), 70 D.L.R. (4th) 385 (S.C.C.) [herein Sparrow] determined that an Aboriginal right to the fishery at a specific site existed. The definition of Aboriginal rights was expanded and refined in R. v. Van der Peet (1996), 137 D.L.R. (4th) 289 (S.C.C.) [hereinafter Van der Peet]. Another important fishing case is R. v. Gladstone (1996), 137 D.L.R. (4th) 648 (S.C.C.) [hereinafter Gladstone] where an Aboriginal right to a commercial fishery was determined. The case of Claxton v. Saanichton Marina Ltd., [1989] 3 C.N.L.R. 46 (B.C.C.A.) [hereinafter Claxton] discusses the right of First Nations on Vancouver Island, who held fishing rights by a Douglas Treaty, to protection of their fisheries from interference. The decision prevented the construction of a marina in the area where the First Nations fished, based upon evidence that the construction and use of the marina would lead to degradation of the habitat both on shore and in the sea. The case does not state that First Nations have a claim to the sea but does hold that where Aboriginal rights exist there is a guarantee of protection of such rights so that the rights, being an activity such as fishing, will continue.
Indigenous title predates our own, have only recently started to produce discussion on this topic.\(^3\) Dr. Nonie Sharp, a leading Australian anthropologist, suggests this lack of discussion has been due to the predomination of European society with land and its historic and present characterization as a commodity of economic value,\(^4\) and the perception Aboriginal groups are solely land-based. Canada with its multitude of fishing rights cases which deal with the right to catch fish for both food and commercial purposes have never strayed into the issue of title to the ocean. Title cases have only examined land interests.

What is interesting and rather perplexing in all of this, is that Indigenous populations, both here and in Australia, view land and ocean with no distinction and actually construct them “into a seamless web of cultural landscape”.\(^5\) The beginning story from the Haida Nation about Rose Spit and the creation of mankind tells of this innate bond with the ocean. Our

\(^3\) Australia developed the concept of Aboriginal title some five years before Canada, and presently has numerous sea claims before the tribunals and courts. For discussion on sea claims see Nonie Sharp, “Reimagining Sea Space: From Grotius to Mabo” in Nicholas Peterson & Bruce Rigsby, *Customary Marine Tenure in Australia* (Sydney: University of Sydney, 1998) [hereinafter Sharp] at 49; Bryce Barker, “Use and Continuity in the Customary Marine Tenure of the Whitsunday Islands” in Nicholas Peterson & Bruce Rigsby, *Customary Marine Tenure in Australia* (Sydney: University of Sydney, 1998) [hereinafter Barker] at 89 where he notes since the proclamation of the *Native Title Act 1993*(Cth) there has surprisingly been little discussion “about the status of sea-rights in regard to native title”; and Sandra Pannell, “The Promise of Native Title and the Predicament of Customary Marine Tenure” in Nicholas Peterson & Bruce Rigsby, *Customary Marine Tenure in Australia* (Sydney: University of Sydney, 1998) [hereinafter Pannell] at 232 where she knows the anthropology literature of Australia up until the laet 1970s was mute on references to the sea, and provides specific reference to the Kimberley region of Western Australia. Here she also concludes at 235 that “the lack of information about Aboriginal maritime cultures is a product of European perceptions and orientations” which focused on more land-based economic activities.

\(^4\) Ibid. Sharp at 49.

\(^5\) Ibid. at 49 - 50. Dr. Sharp notes Reverend Dave Passi explaining how he could not sell his land because it was part of himself and his family line. The rights to the land and the responsibility for the land includes the obligation to care for the land, to receive its gifts, and to share the land and its gifts with those on whose behalf one acts as a landholder today and for future times and people. She also notes Yolngu elders saying how their feelings for sea territory were part of their body and blood forcing them to defend it.
voyage forward from this point through the research and analysis will clearly illustrate the
strength and commitment of this bond.

In the preliminary stages of this research, I had occasion to discuss this topic with a number
of First Nations in British Columbia who informed me they do have claims to ocean spaces
within their traditional territories which are those areas they "have owned, used, cared for,
protected and exercised authority over since time immemorial". 6

From this initial exploration, I concluded research of the concept of Aboriginal title to ocean
spaces was a worthwhile endeavour, and I set myself upon a voyage of discovery. Being a
practitioner of some years at the Bar, it was most important to engage a pragmatic approach
to this research with the ultimate goal being to provide First Nations and the legal community
with arguments and strategies which could be utilized in the advancement, support and
substantiation of claims for title to ocean spaces before the courts and the British Columbia
Treaty Commission.

The research and analysis of this work is not only grounded in the law. It also contains much
historic and anthropological information which aids in providing a more complete
understanding of the sources from which Aboriginal title is derived. It is not purely from the
common law nor from the Aboriginal culture. Therefore, I have included a fairly extensive,

Making].
yet by no means exhaustive commentary from two First Nations in British Columbia. This Introduction Chapter includes information about the treaty process going on in British Columbia to give some perspective on the land and sea scapes present today. Chapter Two delves into the history of oceans law with examination of the international law of the sea principles and specific decisions regarding ocean spaces within Canada. I also discuss the federal and provincial government ideologies on ocean spaces and First Nations as gleaned from their policies in the treaty process.

Chapter Three explores three specific mediums for sources from which to draw recognition of Aboriginal title to ocean spaces. The approach I have employed is rather unique in that one section provides some Aboriginal perceptive from two First Nations in the Province. This is a direct result of my invitation to met and participate with members of these communities during the past year. This information is a mere glimpse of their cultures and ideologies, and it is my hope that having been entrusted with such information I have accurately set it to paper.

Another source for exploration in respect of recognition is that of the common law, and in such discussion I have provided analysis of the context and cases touching on Aboriginal title as found in Canada. Rounding out this exploration for sources, is the international arena and the utilization of international and foreign materials as interpretative aids to inform the Canadian domestic law. I have included theories and cases from two foreign jurisdictions, as well as human rights materials from the international community.
In the final analysis, I conclude that Aboriginal title to ocean spaces is a concept recognizable within the Canadian legal context, and the arguments and strategies that I have examined will add leverage to the advancement and support of claims by First Nations to title of ocean spaces at both the treaty table, and in future litigation.

My discussion does not end with this determination, for in keeping with a pragmatic approach, it was important to consider the reconciliation of the concept within our legal system. In this respect, I have reviewed theories of co-management and specific precedent documents involving First Nations and land claims in Canada.

The final Chapter is my short summation of conclusions derived from my research and analysis, with some suggestions as to where the treaty process in British Columbia on issues of ocean spaces may be headed.

Before commencing on our voyage through these various topics, a short discussion on the present day treaty process is useful to provide some insight into the importance and timeliness of this research.

2. The Legal “Seascape” of Claims to Ocean Spaces in British Columbia

(a) The British Columbia Treaty Commission Process

The Government of Canada made a commitment in 1973 to resolution of Aboriginal land claims with the establishment of the comprehensive claims policy of the Department of Indian
Affairs and Northern Development. From this emerged over the next twenty years, a number of agreements in Canada's North and Quebec.

The Province of British Columbia historically held the position that there was no Aboriginal title within the Province, and thus did not join in such negotiations. Even with the proclamation of the Constitution Act, 1982, the Province still continued to deny the existence of Aboriginal title, and would not negotiate with First Nations. However, during the 1980s with the growth of First Nations' activism, support of the general public for Aboriginal issues, and the Supreme Court of Canada decisions recognizing Aboriginal rights, the Provincial government became more responsive. In 1989, the Premier's Council on Native Affairs and the Ministry of Aboriginal Affairs were created.

One recommendation from the Premier's Council advised British Columbia should move quickly to establish a process for the settlement of Aboriginal land claims. In August 1990, the Province agreed to be a partner in negotiations with the federal government and the First Nations.

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8 The comprehensive claim settlements concluded since 1973 include: the James Bay and Northern Quebec Agreement (1975), the Northern Quebec Agreement (1978), the Inuvialuit Final Agreement (1984), the Gwich'in Final Agreement (1992), the Tungavik Federation of Nunavut Final Agreement (1993), and the Council for Yukon Indians Umbrella Final Agreement (1993) and four Yukon First Nations Final Agreements. These are all set out in Elliott ibid. at 168 and following.


10 Ibid. Task Force at 14.
Nations, and entered into the negotiations already underway between the Nisga'a and the federal government.\textsuperscript{11}

A Task Force was created later that year by the two levels of government and the First Nations of British Columbia to recommend the negotiation process that should be employed.\textsuperscript{12} The report dated 28 June 1991 described the six stage negotiation process that has now been incorporated into the B.C. Treaty Commission mandate.\textsuperscript{13}

The Task Force presented recommendations on a number of issues including "land, sea and resources", and noted these issues have always been sources of contention between the three parties.\textsuperscript{14} The importance of the land, sea and resources is acknowledged as a foundation "of the Aboriginal spiritual, philosophical and cultural views of the world". The land, sea and resources have supported First Nations families, communities and government over the centuries and the Task Force acknowledged these three elements will provide the foundation of new economic opportunities.\textsuperscript{15} It is interesting to note that the Task Force foresaw that the sea would be part of the negotiation process as they state in their report "[i]nterim

\begin{itemize}
\item \textsuperscript{11} Ibid. at 15.
\item \textsuperscript{12} Ibid. at 1.
\item \textsuperscript{13} British Columbia Treaty Commission Agreement, 21 September, 1992 (Vancouver: The Commission, 1992) at para. 7.1(g) [hereinafter Agreement].
\item \textsuperscript{14} Supra Task Force at note 10 at 24.
\item \textsuperscript{15} Ibid. at 24 - 25.
\end{itemize}
measures may affect the management and use of lands, sea and the creation of new interests".  

Negotiations on the matters of the land, sea and resources must address the certainty of ownership and jurisdiction, and coordination of management schemes to ensure efficient and effective resource development and sustainability.  

A study performed by KPMG consultants noted that First Nations increased control over lands and resources would increase their self-sufficiency and independence.

The British Columbia Treaty Commission Agreement was signed on 21 September 1992, as a result of the Task Force. The Commission's role is "to facilitate the negotiation of treaties and, where the Parties agree, other related agreements in British Columbia". Enabling legislation on the part of both governments was implemented, and the Commission began receiving Statements of Intent from First Nations in December, 1993.

It was determined that those First Nations who signed the Douglas Treaties on Vancouver Island in the mid-

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16 Ibid. at 63.

17 Ibid. at 26.


19 Supra Agreement at note 13 at para. 3.1.


1850s could also be part of this modern day process.\textsuperscript{22}

The Treaty Commission's position is that of facilitator of negotiations between the three parties, and not to negotiate the treaties. The six stage treaty process is designed to enable the process of negotiation to go forward ensuring that all the parties are ready to participate. The six stages are as follows: stage 1, \textit{statement of intent} is filed by First Nation indicating the desire to begin negotiations; stage 2, \textit{preparation for negotiations} are undertaken by all the parties and the Commission assesses if the parties are ready to commence negotiations; stage 3, \textit{negotiation of a framework agreement} which sets out what issues will be on the table; stage 4, \textit{negotiation of an agreement in principle} where the major points of agreement being the basis of the treaty are determined; stage 5, \textit{negotiations to finalize a treaty} which formally sets out the principles which are the basis for the treaty and will include the implementation plan; and stage 6, \textit{implementation of the treaty} sets out the details of the carrying out of the treaty and the implementing legislation.\textsuperscript{23}

It is important to remember that this is a negotiation process between the three parties, so the law and its rules will not necessarily be strictly adhered to. The very term “negotiations”

\textsuperscript{22} There were fourteen treaties signed between a number of First Nations and Governor James Douglas of the Hudson Bay Company, as representative of the British Crown, for about one-fortieth of the area of Vancouver Island during the period of 1850 - 1854. These treaties included eleven treaties at Victoria, one at Nanaimo, and two at Fort Rupert (Port Hardy). See Hamar Foster. "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title" (1989) 23:3 U.B.C. L. Rev. 629 at 630-634. The Task Force recommended that all First Nations be included in the new treaty process whether they had previously signed Douglas Treaties or not; see supra Task Force at note 10 at 48-49. This was approved by the B. C. Treaty Commission; see supra Annual Report at note 21 at 6.

\textsuperscript{23} \textit{Ibid.} Task Force at 14-15.
denotes a process of give and take on all sides. The parties at the table determine what are the important factors to consider in relation to territory area, resources, social and economic matters unique to the groups involved. In this way, consideration is given to the social and economic values and ideals of the parties.

The area described as "traditional territory" in the Statement of Intent as filed by the First Nation at the table is a starting place for the negotiations that is envisioned to lead to settlement of the actual territory that will be owned by that First Nation. If the parties are not satisfied, they may leave the treaty table at any time and proceed to the courts where the standards and rules of law will be enforced.

There are 197 First Nations bands in British Columbia with 112 of them being included within the fifty-one filed Statements of Intent. This represents more than 70% of the First Nations population in the Province. As of 20 March 1999, the Sechelt Indian Band became the first group under the process to reach stage 5, negotiations to finalize a treaty, having negotiated an agreement in principle late in 1998. There are thirty-seven other First Nations groups presently at stage 4, negotiation of an agreement in principle; twelve at stage 3, negotiation of a framework agreement; and one at stage 2, preparation for negotiations.


25 This information was obtained on 14 October, 1999. Information about the participants and their progress may be obtained directly from the B. C. Treaty Commission office via their website at <www.bctreaty.net>. The recently finalized Nisg'ala Final Agreement (see note 820) which will be discussed later in Chapter Four is not a party to this process.
There is much optimism that this process will be successful in determining treaties between the parties and thus resolving the issues between First Nations and the governments. The present Chief Commissioner of the Commission is Miles Richardson, who has extensive knowledge on the treaty process and what it endeavours to achieve. The then Honourable Minister of Indian Affairs, Jane Stewart, said of his appointment: “he has been one of the main proponents of the creation of an independent treaty commission in BC...” Having been very involved during the creation and evolution of the treaty process, it would appear Chief Commissioner Richardson believes strongly in the process as a viable route to settling land claims and providing First Nations with lands and resources which in turn will enable them to become self-supporting.

Chief Commissioner Richardson identifies “two major challenges facing the treaty process being that of keeping the public informed, and invigorating the treaty tables.” He feels certain that when people think about the options that are available to deal with land claims issues, he knows that they will choose negotiations over any other options. He goes on to note that “[T]here is a lot of frustration with progress on the substantive issues, land...governance...and all that entails.” He then notes that there is clear direction form the

26 British Columbia Treaty Commission, “Update February 1999” (Vancouver: Commission, 1998) at 2. Chief Commissioner Richardson was the first President of the Council of the Haida Nation from 1984 - 1996, and was nominated by the First Nations Summit to the Commission with his appointment commencing in October 1995. He became the Chief Commissioner in November 1998 for a three year term. He was also a member of the British Columbia Task Force set up in 1990.

27 Ibid. at 2.

28 Ibid. at 1.
courts in this country with the case of *Delgamuukw* and that the treaty process must be adapted to reflect the realities of the case.\(^{29}\)

(b) Claims of First Nations to Ocean Spaces

Of the fifty-one filed Statements of Intent, twenty-two Statements include ocean spaces within the described "traditional territory".\(^{30}\) Most of these Statements when filed in December 1993 included a map depicting the traditional territory. There are various ocean spaces described in these documents. The Ditidaht First Nation, situate about midway on the western side of Vancouver Island, show ocean spaces within their traditional territory depicted between lines running out into the Pacific Ocean with the wording “Traditional Territory extends seaward to where Vancouver Island no longer visible from a canoe”.\(^{31}\) This ocean space would run to seaward about seventy-five miles offshore. The Oweekeno Nation,

\(^{29}\) *Ibid.* at 1.

\(^{30}\) Burrard Indian Band (Tsleil Waututh); Ditidaht First Nation; Council of the Haida Nation; Homalco Indian Band; Heiltsuk Nation; Hul'qum'i'num Treaty Group representing six groups being: the Cowichan Tribes, Chemainus Band, Lyackson Band, Penelakut Tribe, Halalt Band, and Lake Cowichan Band; Klahoose Indian Band; Kwakiutl Laich-Kwil-Tach Council of Chiefs representing five First Nations being: the Campbell River (Wei Wai Kum Nation), Cape Mudge (We Wai Kai Nation), Kwakah, Tlowitsis-Mumtaglia, and Mamalelekala-Qwe-Qwa-Sot-Enox; Nanaimo First Nation; Musqueam Nation; Nuu-Chah-Nulth Tribal Council representing thirteen nations being: Ahousaht, Ehattesaht, Hesquiaht, Huu-ay-aht, Ka'yu:'k't'h'/Che:k'tles7et'h', Mowachaht/ Muchalaht, Nuchatlaht, Opetchesaht, Tla-o-qui-aht, Toquaht, Tseshahat, Uchucklesaht, and Ucluelet; Oweekeno Nation; Pacheedaht Band; Quatsino First Nation; Sechelt Indian Band; Sliammon Indian Band; Squamish Nation; Te'Mexw Treaty Association representing five First Nations being: Beecher Bay, Malahat, Nanoose, Songhees and T'Sou-ke First Nations; Tsimshian Nation representing over fourteen tribes including: Gidzalaal, Ginaxangik, Gisp'axlo'ots, Gitandoyiks, Gitlax, Gilutsau, Gitwilgysot, Git'andoo, Git'atsis, Git'ga'at, Kitasoo, Kitkatla, Kitselas and Kitsumkalum, and others; and Tsawwassen First Nation. These Statements of Intent are on file with the British Columbia Treaty Commission office at 203-1155 West Pender Street, Vancouver, B.C., and available to the public.

located along Hecate Strait on the mainland of British Columbia, set out in their Statement of Intent that "sea claims will...extend to the two hundred mile limit at sea". The Council of the Haida Nation describes its ocean space as follows:

"Haida Gwaii" (being the Queen Charlotte Islands), the surrounding waters, the air space and the Kaigainaa Archipelago. The waters include the entire Dixon Entrance, half of the Hecate Straits, halfway to Vancouver Island and westward into the abyssal ocean depths.

The map of traditional territories for the Tsawwassen First Nation includes ocean spaces within Boundary Bay, the Strait of Georgia, channels and passes in the Gulf Islands and Boundary Pass. As one can see, descriptions of ocean spaces within traditional territories vary greatly, partly attributable to the uses of these ocean spaces by the First Nation involved.

There are a variety of reasons that underlie First Nations claims to specific ocean spaces which include access to their traditional fisheries, both those on or close to the foreshore and those fisheries well offshore, protection of the fisheries from over-exploitation by others and their habitats from destruction, protection of gathering areas and the lands they inhabit from environmental damages, access to and protection of the sacred and spiritual places in and around the ocean, and the potential economic gains to be had from controlling exploitation of

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34 Tsawwassen First Nation Statement of Intent to British Columbia Treaty Commission (16 December 1993 filed with Commission; revised on 29 June 1994) [hereinafter TFN Statement].
the sea bed and subsoil.

Ultimately First Nations are seeking Aboriginal title to the ocean spaces included within their traditional territory, as Aboriginal title is more valuable than any entitlement to rights for specific activities in a specific area. The granting of ownership would give the First Nation involved the right to use ocean spaces for modern purposes as discussed in the case of *Delgamuukw* which include mining, and oil and gas exploitation rather than just the traditional uses of hunting, fishing and gathering.  

Having ownership of such offshore resources provides opportunities for economic well-being and self-reliance for First Nations peoples, which are some of the goals sought via the treaty process.

In my initial exploration of this topic, I had the occasion for discussion with a number of First Nations who had filed Statements of Intent. As I expanded my work and research, I had extensive discussions with some members of the Haida Nation and the Tsawwassen First Nation which will be shared and expanded upon in Chapter Three. From the initial information I collected from various First Nations within the process during May 1998, it became clear the basis of most claims is traditional use and occupation following the principles of *Delgamuukw*. Some suggested that an analogy could be made between the

35 The ability to use the land for modern purposes is one of the principles determined in *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.), rev'd and ord'g new trial in part (1993), 104 D.L.R. 470 (B.C.C.A.) at paras. 119 - 123 [hereinafter *Delgamuukw*]. The case will be discussed in more detail in Chapter Three, Part A.

36 First Nations Summit, (paper presented to the Select Standing Committee on Aboriginal Affairs, 4 December 1996) at 11 - 12; and Task Force at note 10 at 24 - 25.
utilization of ocean spaces as fishing banks with use and occupation of the sea bed area as they fished the bottom feeding fish such as halibut. Many of these First Nations hunted whales far out to sea. Many claim jurisdiction over ocean spaces to ensure their ability to manage the resources upon which they depend. Others suggest their claim to ocean spaces is the natural progression and evolution of their traditional uses into modern day uses.

A copy of the Nuu-Chah-Nulth Declaration and Claim dated 16 October 1980 states they are the “sovereign occupants and users of the lands and waters” depicted on the map “being the west coast of Vancouver Island, adjacent islands, and surrounding waters”. Such Declaration goes on to say that:

[for thousands of years, without break, we have traditionally occupied and used these lands and waters to sustain our way of life. Our Aboriginal interest in these territories and their natural resources has never been extinguished... 37]

Chief Simon Lucas, a member of the Nuu-Chah-Nulth Tribal Council, related his knowledge of his people fishing for humpback whales within the traditional territory they claim. As an elder, Chief Lucas is responsibility to recount his peoples' history which is often done through story and song. During a workshop of the British Columbia Aboriginal Fisheries Commission when asked about the ocean spaces his people claim, he related a traditional song which describes such spaces of the Nuu-Chah-Nulth being “several times past the horizons after the mountains disappear”. 38

37 This Declaration is one of the documents included with the Nuu-Chah-Nulth Tribal Council Statement of Intent to British Columbia Treaty Commission (15 December, 1993, filed with Commission).

38 British Columbia Aboriginal Fisheries Commission, (CD Rom recording of Delgamuukw Workshop at their Annual General Meeting held in Kelowna, March 1998) at part 2 at 1:20:51 minutes.
(c) Observations and Comments

As the majority of First Nations involved in the British Columbia Treaty Commission process are at stage 4, they will be negotiating and discussing the topics, including determination of their land areas, at this time. As many of the described traditional territories include ocean spaces, the topic of Aboriginal title to such spaces can not be ignored. Oral histories, detailed in songs and stories, relate the First Nations' use and occupation of the sea areas since time immemorial as evidenced by Chief Lucas' song and the Nuu-Chah-Nulth Declaration.

There is no denying the fact that historically the Crown has recognized the vital importance of fishing and access to ocean spaces to the coastal First Nations of British Columbia, during the signing of the Douglas Treaties in the 1850s, and in the Crown policy of creation of smaller reservations based upon the reasoning that First Nations on the west coast needed access to the fishery to be self-sufficient. These past acknowledgments by the Crown coupled with the recent and consistent recognition by the courts of the integral connection between the First Nations and fishing, can not today be overlooked during treaty negotiations.

negotiations. To do so, could place the honour of the Crown in jeopardy.40

3. Methodology and Data Collection

This work incorporates a number of approaches in its examination of the concept of Aboriginal title to ocean spaces. There is review of the Canadian case law on Aboriginal title and the international law of the sea so that we have some basis of understanding the principles inherent in both these areas of law.

To augment this review, I have included a comparative approach by drawing in foreign cases from both Australia and the State of Alaska, in the United States. These decisions involve issues of Aboriginal title and provide insight into other jurisdictions development of this legal concept. The Alaskan cases are examples of what an Indigenous claim to ocean spaces has entailed, and what the court has found of importance in its deliberations. There are other jurisdictions that could be examined and many of their decisions found useful; however, the intent was not to produce an exhaustive work but rather research and analysis that would aid First Nations and legal counsel with fleshing out arguments and strategies that could support and advance the recognition of the concept.

I have undertaken some exploration of the arena of international human rights as it embodies the developing global ideals in relation to Indigenous Peoples, their territories and resources.

40 Supra Delgamuukw at note 35 at para. 186 discusses that the honour of the Crown must be upheld in its deliberations with First Nations.
Reference to recent academic writings from Australia also provides some detail on the processing of Indigenous claims before the courts and tribunals there. These articles also review some of the colonial ideologies inherent in the systems of Australia, and in turn Canada, which in the new world order may be viewed as discriminatory and inappropriate.

This thesis has not limited its focus to just the law and legal materials but has also incorporated a somewhat interdisciplinary approach with the inclusion of historical and anthropological information about First Nations in British Columbia. The law does not change and develop in a purely legal environment. Often discourse from other disciplines are the driving force behind legal change. In the area of First Nations’ issues, these two disciplines have been integral to the issue of Aboriginal title to land, and will play a large part in the discourse of such title to ocean spaces.

The final medium, and by far one of the most important, that I have utilized in this work is the discourse of members of the First Nations themselves. To produce a full and through discussion of this topic, there must be inclusion of comments and ideologies from all who are party to the issue. In order to learn about and understand First Nations and their relations to ocean spaces, I spent some time with the Haida Nation, and with the Tsawwassen First Nation. It is from those privileged experiences that my comments and information are drawn. Appendix “A” sets out those First Nations members with whom I had the opportunity to speak, and the details of such interviews.
This work has been over a year and a half in the research and production phases, and during this voyage of discovery, I have not been able to make passage through every reach that beckoned. This is but an introductory discussion of the concept of Aboriginal title to ocean spaces which will hopefully facilitate discussion and development of this very concept for use at the negotiation table, and in the possible court challenges ahead.

4. Terminology

(i) “Aboriginal”, “First Nations” and “Indigenous”

I have used the term “Aboriginal” in most instances as the adjective to describe rights and or title as in keeping with the courts in Canada. I have used “First Nations” to describe the Indigenous Peoples of British Columbia. Many use the terminology Aboriginal Peoples. “Indigenous” I have utilized in writing about other countries first peoples. Use of one term or another does not in any way suggest one has a lesser meaning than the others.

One point I do want to stress is that I have not followed the usual trend of non-capitalization of the term “Aboriginal” as is so evident within the vast majority of decisions from the courts of Canada. When quoting such decisions, I have used the spelling as “[A]boriginal”, as this is an adjective derived from a proper noun deserving of capitalization. Such non-capitalization is in my opinion a display of disrespect, as all adjectives derived from the proper names of the colonizing European countries receive capitalization as a matter of

41 This first became apparent to me after reading John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997/98) 22 American Indian Law Review 37 (hereinafter Borrows).
(ii) "Claims" and "Interests"

The term "claims" has caused me some concern for its use automatically suggests First Nations must provide evidence and prove their right to title. That is in essence what the Supreme Court of Canada has stated; yet, when one studies First Nations' issues and spends time in First Nations communities, one comes to question this premise, and understand the comment by some First Nation members that it is they who have the right to title, and the Crown is the party who should be put to proving their interests. By using the term claims I do not suggest that First Nations have no interests presently within their territories. At times I have utilized the term "interests" as it denotes a real and present involvement with the right or territory being dealt with.

(iii) "Ocean", "Offshore" and "Sea"

I have used these terms interchangeably.

(iv) "Land"

Chapter Three, Part B. will discuss in detail the concept of land and how it is defined within the common law and within the First Nations ideologies. For simplicity at this point, it is a holistic term with First Nations inclusive of all elements of the biosphere including earth, water, oceans, air and resources. With the common law it truly only denotes earth and *terra firma*. 
(v) "Aboriginal Rights" and "Aboriginal Title"

"Aboriginal rights" includes "Aboriginal title", and through this work there will be reference at times only to "Aboriginal rights" which should be read to include "Aboriginal title".

With this background information on the importance of this topic to First Nations and the treaty process in British Columbia, and the framework of our examination, we are now ready to put to sea, so to speak, and commence our voyage of discovery in search of the concept of Aboriginal title to ocean spaces and its recognition within the Canadian common law.
CHAPTER TWO

OCEAN SPACES IN BRITISH COLUMBIA

1. Introduction

Two-thirds of the western boundary of British Columbia is washed by the waters of the Pacific Ocean. This vast expanse of ocean frontage has provided those who reside along it shores, First Nations and non-First Nations, with a history of deep and abiding connections to specific ocean spaces.

In this chapter, I will review briefly the history of maritime law dating from the 1600s, and its evolution into the code of international law as set out in the United Nations Convention on the Law of the Sea of today. The applicability of these principles in Canada, how ocean boundaries are created and who has jurisdiction over ocean spaces are some of the topics that will be canvassed. A thorough discussion in respect of Aboriginal title to oceans spaces includes some review and examination of the principles that regulate the sea. As with any proposition made for recognition of a legal concept, one must deal with all the areas of law that touch upon the topic. In the case of Aboriginal title to ocean spaces, the laws that pertain to the ocean spaces must be canvassed. These principles establish the foundation of Canada’s concepts on ownership and jurisdiction of the ocean waters off her coasts. Armed with this information, our examination and analysis of the topic of Aboriginal title and its

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recognition within the legal framework of Canada becomes stronger and becomes more credible. Governments involved in the treaty process, and those parties involved in possible future court applications on this topic will be arguing law of the sea principles, and that such do not incorporate Aboriginal title to ocean spaces. Therefore, it is most important that our discussion on this topic includes some insight into this area of the law.

The final area to be reviewed in this chapter will be the present perspective of the two government parties presently at the treaty table in British Columbia in respect of Aboriginal title to ocean spaces. This discussion provides some insight on what arguments one can contemplate the governments to make when they are faced with an application by a First Nation for recognition of its title to specific ocean spaces whether in treaty negotiations, or in a court action. So, let us begin with a review of the origins of the rules of ocean spaces, and their evolution to today’s regime under UNCLOS.

2. Brief History of Boundaries and Jurisdiction of Ocean Spaces

UNCLOS has been termed the “modern international Constitution for the world oceans” which account for seventy-one per cent of the world’s surface. The debate surrounding many of the issues addressed in UNCLOS started some 400 years ago with the infamous chapter written by the Dutch jurist, Hugo de Groot, (known as Grotius) entitled *Mare Liberum* published in *De Jure Praedae*, a book dedicated to the topics of booty and prizes in

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43 Words of Norwegian lawyer Jens Evensen as quoted in Clyde Sanger, *Ordering the Oceans: The Making of the Law of the Sea* (Toronto: University of Toronto Press, 1987) at 3, and also termed by Tommy T. B. Koh, President of the Third UNCLOS over a two year period, at 6 [hereinafter Sanger].
1604. 44 Even though Grotius expounded the theory of “freedom of the seas”, his treatise
was in essence a justification for the Dutch East Indian Company’s seizure of a Portuguese
ship in the Straits of Malacca.

For some one hundred years following Grotius’ essay, debate was waged between
international jurists about various law of the sea topics including sovereignty, exclusive zones
for fishing, “the right of innocent passage” 45, freedom of the seas, and a coastal state’s right
to claim a territorial sea. In 1617, John Seldon, an English jurist wrote in defence of
England’s seizure of Dutch ships in his Mare Clausum: the Right and Dominion on the Sea.
Further arguments on these issues arose again with the dissertation, De Dominio Maris, in
1703 by Cornelius van Bynkershoek.46 Resolution of these issues was not fully settled until
the last twenty years of this century with UNCLOS in 1982. In our quest for recognition of
Aboriginal title to ocean spaces, we will review this code of principles and its impact on this
concept.

(a) Today’s Authority - United Nations Convention on the Law of the Sea

In this century there have been three world conferences convened to discuss the law of the
sea under the name the United Nations Convention on the Law of the Sea. The forerunners

44 Ibid. at 12.

45 This concept permits the passage of ships through the territorial sea of a coastal state as long as
such ships are there without aggressive intentions against the coastal state It is often denied to warships. It is
fully described in supra UNCLOS at note 42 at Part II., Article 17. The concept of territorial sea will be
discussed shortly.

46 Supra Sanger at note 43 at 11.
of these UNCLOS conventions was the Hague Codification Conference of 1930 involving mainly European states who had come together to try to reach an agreement on the standard limits/widths of territorial seas. At that time, there were as many different limits as there were maritime countries claiming territorial waters.

The concept of the territorial sea is the product of the theory first proposed by Grotius, and later modified by Pontanus, whereby a coastal state is recognized as having control and authority over, and title in the sea that touched its shores.47 By the mid-nineteenth century, this concept had become well recognized as a three mile band of sea adjacent to all coastal states, with the distance of “three miles” being attributable to the historical range of cannon ball fire.48

The different widths of territorial sea limits claimed by various coastal states in this century is directly related to the individual purposes being sought by such coastal states. Some asserted jurisdiction over an area of their coast for national security, others for control of fisheries, some for customs purposes, and lastly some for general civil and criminal jurisdiction.49 The Hague Convention in the end neither clarified or adapted any international standard for the


49 *Supra* Sanger at note 43 at 13.
territorial sea.\textsuperscript{50}

The topic of territorial sea limits arose again at the United Nations conference, known as UNCLOS-1, during 1958. Many years of preparatory work on some seventy-three draft articles preceded the convention which saw approval by the majority of the eighty-six countries participating.\textsuperscript{51} Some issues though were not resolved including fishing zones and the limits of the territorial sea. These were again tackled by UNCLOS-2 during a two month schedule of meetings in 1960. The eighty-eight delegate countries almost succeeded in their aim to codify the law of the sea.\textsuperscript{52}.

By this time, coastal states had come to realize that the oceans held tremendous wealth of resources including fish and minerals,\textsuperscript{53} and were in grave need of being protected by a code of conduct. And thus in 1967, Ambassador Arvid Pardo, a scholar and lawyer, determined to see this mission through, made a historic speech to the United Nations General Assembly whereby he proposed creating a framework for the management of the world’s oceans. That speech coined the phrase “the Common Heritage of Mankind”, \textsuperscript{54} and led to coastal states once again gathering and finally successfully producing the constitution for the world oceans.

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\textsuperscript{50} \textit{Ibid.} at 14.

\textsuperscript{51} \textit{Ibid.} at 15.

\textsuperscript{52} \textit{Ibid.} at 17.

\textsuperscript{53} \textit{Ibid.} at 13.

\textsuperscript{54} \textit{Ibid.} at 18.
under the title UNCLOS-3.

The Law of the Sea Convention of 1982 saw a number of new concepts introduced into international law including: an exclusive economic zone (known as EEZ), an archipelagic state, rights of access for landlocked states, rights and responsibilities in matters of pollution, the sea bed as “the common heritage of mankind” and the continental margin being an extension of the continental shelf to include the slope and rise just before the ocean floor. The Convention also dealt with issues of: the extent and nature of coastal state jurisdiction over specific ocean spaces and the living resources therein; freedom of marine scientific research; navigation and overflight rights on the high seas, territorial seas, in straits and archipelagos; mechanisms for the peaceful settlement of disputes; and the delimitation of boundaries between states. Explicit definitions of various ocean spaces such as the territorial sea, continental shelf, exclusive economic zone, to name a few are also included within the convention.

There were 119 countries that signed UNCLOS at Montego Bay, with a number of major countries such as the United State, Great Britain and the former West Germany, abstaining mainly on the grounds of the contentious issue of Deep Seabed Mining set out in Part XI. The Convention stayed open for two years for signatures, with 159 countries as signatories

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55 Ibid. at 6.

56 The importance and controversies surrounding sea bed mining have diminished since Montego Bay as it is not economically feasible; see Ibid. at 5. The United States has however still not signed on.
by the deadline of December 1984.

Canada was an original signatory at the convention, but has not as yet ratified the Convention due to international issues in respect of fisheries, in particular straddling stocks.\textsuperscript{57} Even though we have not ratified UNCLOS, Canada still relies upon its principles in many instances as the customary law for determining issues on international law of the sea. The jurisdiction for settling disputes under UNCLOS lies with the International Court of Justice at the Hague. In 1994, Canada removed itself and matters of fisheries disputes from the compulsory jurisdiction of the Court, based upon grave concerns for conservation measures in respect of the Atlantic’s fish stocks.\textsuperscript{58} Thus, Canada’s involvement in any international

\textsuperscript{57}Ibid. at 200. Straddling stocks are those fish species which have migratory paths that take them into two or more jurisdictions being coastal states’ 200 mile EEZs during their travels, and thus raise the question of who owns these fish. Many coastal states are most concerned about management and conservation policies to ensure the sustainability and return of straddling fish stocks to their jurisdictions. Canada has had in this regard disputes with Spain and Portugal for their alleged over-fishing of the Grand Banks off Newfoundland beyond Canada’s 200 mile EEZ. This lead to the “Turbot War” in 1995; see next note.

The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was completed as a final agreement in 1995, (see U.N. Doc. A/CONF. 164/37 (1995) [hereinafter U.N. Conference on Straddling Fish Stocks] and was open for signatures as of 4 December 1995. It created a regulatory scheme that promotes a sustainable use of fish stocks as a whole rather than allowing them to be exploited by individual states. For further information see Donald M. Grzybowski, ed. “A Historical Perspective Leading Up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks” (1995) 13:1 Pace Environmental L. Rev. 49.

\textsuperscript{58}See Andrew Schaefer. “1995 Canada-Spain Fishing Dispute (the Turbot War)” (1995/96) 8:2 Georgetown Int’l E. L. Rev. 437. As the International Court of Justice draws its authority from the will of the states before it, the withdrawal by Canada from the Court’s jurisdiction in 1994, was the reason the action filed by Spain was dismissed in the Fisheries Jurisdiction Case (Spain v. Canada), [1998] I.C.J. Rep. 96. Spain claimed that Canada had exceeded its jurisdiction in legislating regulations whereby Canada could exercise jurisdiction over foreign fishing vessels outside its EEZ, and that Canada had literally committed “piracy” by its violation of the rules of international law of the sea. The action arose from the boarding and arrest of the Spanish fishing vessel, Estai, some 245 miles off Canada’s east coast, in the high seas, for what Canada alleged was illegal fishing under the new conservation regulations brought in under the Northwest Atlantic Fisheries Organization (NAFO) that year to which Spain was a party by its inclusion within the European Union.

The “turbot war” as this incident became known was successfully concluded by negotiations between
fishing dispute is not reviewable by any world court. So, it appears that Canada avails itself of the provisions of UNCLOS when it is advantageous for it to do so, and yet in other circumstances, Canada takes full advantage of not having this international law regime on its books.

There are a number of definitions within UNCLOS which have been incorporated by Canada into its legal framework which have bearing on our discussion. The first is the definition of the territorial sea as described at Part II, Section 2., Article 2 which provides: “the sovereignty of a coastal state extends beyond its land territory and internal waters ... to an adjacent belt of sea described as the territorial sea”. This sovereignty extends also to the airspace above such waters, and to the sea bed and subsoil of the territorial sea. The breadth of this sea is set at up to “12 nautical miles”, as per Article 3. The only exception to this ownership and jurisdiction by the coastal state is the right of innocent passage for foreign shipping as provided for in Articles 17-26.59


59 Supra UNCLOS at note 42.
Canada has a twelve mile territorial sea off all its coasts,\textsuperscript{60} and the federal government thereby claims jurisdiction and ownership of these waters and all the living and non-living resources found therein pursuant to the provisions of UNCLOS.\textsuperscript{61}

By definition “state” within UNCLOS are those states which have consented to be bound by the Convention.\textsuperscript{62} It does not provide any further description as to what is necessary to categorize a state. In Canada, by the division of powers set out within the Constitution Act, 1867, the federal government is seized with the jurisdiction for ocean waters and international matters rather than the provinces.\textsuperscript{63} Therefore, Canada was the signatory of UNCLOS and not the provinces. Yet, under our scheme of federalism, UNCLOS to be ratified and fully effective, many believe, must be approved by all the provinces and not just the federal Parliament.\textsuperscript{64}

\textsuperscript{60}Canada originally claimed a three mile territorial sea which was extended to twelve nautical miles in 1970 by the Territorial Sea and Fishing Zones Act, R.S.C. 1970, later included in the amended Act by the same name in R.S.C. 1985, c.T-8, s. 3(1). This was repealed by the Oceans Act, S.C. 1996, c. 31 which sets out at section 4 (a) that the territorial sea of Canada is of a width of twelve nautical miles. See also Cullen 2 at note 48 at 297. Our twelve nautical mile territorial sea is consistent with most world coastal states; see Robert Smith. "Global Maritime Claims" (1989) 20:1 Ocean Dev.& Int'l L. 83 at 94[hereinafter Smith].

\textsuperscript{61}Ibid. Smith at 83 where he notes that even though Canada has not ratified UNCLOS, it is still able to avail itself of its provisions.

\textsuperscript{62}Supra UNCLOS at note 42 at Part 1, Article 1, section 2. (1) which sets out the definition.

\textsuperscript{63}See Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 91(24) (formerly known as the British North America Act 1867) [hereinafter Constitution Act, 1867] at section 91(12) for "Sea Coast and Inland Fisheries" and at 91(10) for "Navigation and Shipping", and other general provisions at the beginning of section 91.

\textsuperscript{64}The federal executive has the power to sign treaties that are binding on Canada within international law; however, implementation of such treaties by Parliament can only be to the extent that the matters the treaty touches upon are within the federal heads of power. If the treaty interferes with provincial matters, then to be effective the provinces must ratify and implement the treaty as well. For more discussion
There are suggestions that the actual Nations of our First Nations peoples are able to qualify as "states" in these types of situations.\(^{65}\) Certainly, the Haida Nation has some exceptional circumstances, as we shall note in Chapter Three, which strongly suggest it is indeed a sovereign state and thus has the capacity to sign such an international convention. It is interesting to note that the Haida Nation did give Canada its support when the federal government declared a 200 nautical mile exclusive economic zone, not as acquiescing in Canada's jurisdiction but rather as the one way to conserve and protect the fish stocks the Haida depended upon.\(^{66}\)

The one other definition that has bearing on this examination, is that of the exclusive economic zone, or EEZ, pursuant to Part V of UNCLOS. This zone is the expanse of sea up to 200 nautical miles from the baselines used to determine the territorial sea.\(^{67}\) Within this

\(^{65}\) International law is the product of the relationship between states. As to what constitutes a state, the definition most widely referred to is that found within the Montevideo Convention on Rights and Duties of States (1936), 165 L.N.T.S. 19; (1934) 28 AJIL Supp. 75. Article 1 prescribes a state "should possess ... a permanent population; a defined territory; a government and capacity to enter into relations with other States." For a more complete commentary on the determination of a state in international law see Rebecca M.M. Wallace, International Law, 2\(^{d}\) ed. (London: Sweet & Maxwell, 1992) at 58 - 67; and Hugh M. Kindred et al, International Law Chiefly as Interpreted and Applied in Canada, 5\(^{th}\) ed. (Toronto: Edmond Montgomery Publications Ltd, 1993) at 13 - 27 and 247 - 279.

\(^{66}\) Personal interview with Chief Reynold Russ, Ijawass, Eagle Clan, hereditary chief of Old Massett, Haida Gwaii, on 28 January 1999 [hereinafter Russ Interview].

\(^{67}\) Supra UNCLOS at note 42 at Part V, Article 57.
ocean space, the bordering coastal state has the sovereign rights to explore and exploit, conserve and manage all the natural resources. As with the territorial sea, there are rights afforded all other states, even land-locked, for purposes of navigation, overflight, laying of cable and pipelines, and other international uses of the sea. The rights afforded the coastal state in respect of the EEZ is of a lesser degree than the territorial sea. Yet, one can see the great importance both these ocean spaces have for a coastal state like Canada. These provisions of UNCLOS provide Canada with the ability to control and manage ocean spaces of a breath of over 200 miles offshore.

Canada is the owner of the territorial sea, its sea bed and resources within off its British Columbia coast. Can this title be encumbered so to speak by the concept of Aboriginal title to such an ocean space? As we shall see in Chapter Three, Aboriginal title to land is indeed an encumbrance on Crown land title in British Columbia if sufficient proof of use and occupation at the time of sovereignty, 1846, is demonstrated. By way of analogy, it is possible to say that Aboriginal title to the territorial sea is also an encumbrance upon

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68 Ibid. at Article 56.

69 See Ibid. at Article 58.

70 The territorial sea under the international law regime is owned, including its sea bed and subsoil, by the coastal state to which it is adjacent. The coastal state's sovereignty of the territorial sea must only yield to the innocent passage of ships through such waters; see Part II, Section 3 of supra UNCLOS at note 42. A coastal state is seized with the territorial sea that lies off its shores, while on the other hand, to demonstrate sovereignty over an EEZ, a coastal state must announce its intention and specific how large an area is included. The coastal state only has jurisdiction over the resources found within its EEZ, with no ownership of the water column, or sea bed and subsoil, as with the territorial sea. See Part V. of UNCLOS.

71 See Delgamuukw supra at note 35 at paras. 111 and 143.
Canada's assertion of its ownership of such an ocean space. The theory of ownership of the territorial sea is, as we have noted, well documented throughout the last 400 years of antiquity. Thus it is a concept to which Aboriginal title could attach. There are suggestions that as the EEZ and even the nine miles between the ancient three mile territorial sea and the newer twelve mile territorial sea are such recent legal principles that Aboriginal title could not attach, as the First Nations were not exercising their title or rights to these ocean spaces at the time these principles were solidified in the international arena.

It is not appropriate to terminate an argument based on the premise that as there were no discussions about or thought put to the concept of Indigenous title to ocean spaces during the deliberations on the law of the sea, and such does not appear within the code of UNCLOS. Lack of recognition of a concept does not mean it is non-existent; it just lacks recognition. Canada at the date of signing of UNCLOS had not as yet recognized Aboriginal title to land, let alone even thought about the concept in relation to ocean spaces. If Aboriginal title had attached to some ocean spaces, then Canada can only apply the principles of UNCLOS to what it has, which could be in some ocean spaces no title at all.

One must be cognizant of the impetus behind the law of the sea discussions down through the ages. It was indeed fuelled by the colonizing and trading European countries for their use and benefit alone most often to the detriment of those new world lands and seas they

72 See Peter Kilduff & Neil Lofgren, "Native title fishing rights in coastal waters and territorial seas" (1996) 3:81 Aboriginal Law Bulletin 16 at 17. They state that native title rights are present within the total 200 mile EEZ claimed by Australia.
explored.  

With the recent change in attitude on issues of the rights of Indigenous Peoples, courts, academic writings and the international conscience, have started to condemn the discriminatory and racist attitudes and policies employed by the colonizing countries of the last two centuries. This development provides some basis for the possibility that Aboriginal title to ocean spaces can be determined as a concept in Canada’s waters compatible with the principles of international law of the sea.

(b) The Federal and Provincial Struggle Over Ocean Spaces

Within Canada, historically there has been tension between the provinces and the federal government over who had the authority to manage the offshore. The federal government has traditionally argued provincial ownership of natural resources ends at the low water mark based upon the English common law as determined in the case of \( R. v. Keyn \) and confirmed by the Supreme Court of Canada in the 1967 case of *Reference Re Ownership of Off-Shore Mineral Rights* which concluded the federal government had jurisdiction over the territorial sea off the coast of British Columbia. The matter was important to the provinces as there loomed possibilities of great sources of future revenues generated by the exploitation of whatever amounts of mineral deposits lay offshore. The outcome of the

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73 This argument is more fully developed in Chapter Three, Part C., International Perspectives, in regards to some of the Australian academic writing, and in particular supra Pannell at note 3.

74 These sources will be noted in Chapter Three, Part C., International Perspectives, later in this work.

75 *R. v. Keyn* (1876), 2 Ex.D. 63, 13 Cox C.C. 403 (Crim. App.).

Offshore Reference did little to quiet the debate with other provinces, and the federal government attempted to negotiate a multi-provincial settlement with no success.77

In the late 1970s, the newly elected Progressive Conservative federal government stated its intention to transfer "ownership" of all offshore mineral resources to the provinces. Discovery of natural gas near Sable Island, off Nova Scotia, and reserves of oil at the Hibernia site off Newfoundland, coupled with a world oil pricing crisis, and the election of Brian Peckford as Premier of Newfoundland (having campaigned adamantly for his province's right to control the mineral resources off its coast), all added pressure for resolution.78

The defeat of the Progressive Conservative government in its second year of office in 1980, did not stop the momentum for resolution. The new Liberal government finalized the Nova Scotia Agreement in 1982 which placed the ultimate offshore management with the federal government while all direct offshore revenues flowed to the province until such time as its per capita fiscal capacity was above the national average.79 Newfoundland, under Peckford, would have no part of such a deal. It argued its economic and historical links to the sea unequivocally gave the Province the authority over the minerals situate in the offshore. Two court challenges ensued, both of which were unsuccessful for Newfoundland.80 The new

77 Supra Cullen 2 at note 48 at 298 - 299.

78 Ibid. at 299.

79 Ibid.

80 Ibid. at 300.
federal government under the Progressive Conservatives settled the Newfoundland issue by enactment of the Atlantic Accord in 1985. Such legislation set up an offshore management scheme steered by the Province, with provincial access to all direct offshore oil and gas related revenues without any cap (as had been the case in the Nova Scotia Agreement), and a commitment to entrench the Atlantic Accord within the constitution. In time, Nova Scotia renegotiated its Agreement to provide for much the same scheme as Newfoundland.

This brief discussion of the history of the Canadian east coast offshore debate provides good illustration of the federal government’s position in regards to the sovereignty of the offshore of Canada. It is evident that it is squarely within their grasp. Yet at the same time, the federal government as noted, has seen fit to negotiate with the provinces on provisions of control and allocation of benefits arising from ocean spaces. These Agreements and their outcomes will be revisited later in this work in the discussion of reconciliation instruments in Chapter Four.

For the purposes of this work, the important points to take away from this review of international law of the sea principles is that the territorial sea which Canada claims at twelve nautical miles off all her coasts and the EEZ which is 200 miles offshore are viewed as being

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81 Ibid. at 301.
82 Ibid.
83 Ibid.
84 Ibid.
under the control and authority of Canada. Yet, as I have noted, there are possible arguments that Aboriginal title can intrude on this jurisdiction. There is another dimension to add to this discussion of jurisdiction of Canada’s ocean spaces. The actual delimitation of the baselines of the territorial sea off British Columbia’s coast may well bring British Columbia into play within this whole discussion.

(c) Internal Waters and British Columbia’s Jurisdiction

Even though we have seen how Canada derives its jurisdiction over the ocean spaces off British Columbia’s coast, there is an added dimension to this principle. The Supreme Court of Canada in the *Offshore Reference* determined the territorial sea started at the outward limits of the "internal waters". What then are "internal waters", what part do they play in this analysis, and who has ownership of these?

Part II, Section 2, Article 8 of UNCLOS describes internal waters as "...waters on the landward side of the baseline of the territorial sea..." Great discussion has ensued over the words "internal" and "inland" waters with many concluding the terms are not synonymous. For the purposes of this work, these varying points of view have little bearing. Suffice it to say, in international law, internal waters are those that are inside or landward of the baseline or beginning line of the territorial sea and are owned by the coastal state.

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85 *Supra* Cullen at note 47 at 58 for the arguments involved with this point.

86 Peter Finkle and Alastair Lucas. "The Concept of the British Columbia Inland Marine Zone" (1990) 24:1 U.B.C.L. Rev. 37 at 40 [hereinafter Finkle]. This is also set out in the *Oceans Act, supra* at note 60, at section 6 which states that "the internal waters of Canada consist of the waters on the landward side of the
British Columbia in 1981 by Order in Council \(^{87}\) declared a provincial Inland Marine Zone over all its adjacent submerged land and waters. Such a zone covered all the ocean waters located to the east of a boundary line demarcated from a point commencing in the south at the Canada - United States border in the Juan de Fuca Strait, continuing north along a bearing consistent with the western most headland of Vancouver Island along the western coast of Vancouver Island, to the north end of Vancouver Island, continuing in a straight line across Queen Charlotte Sound to the southwest tip of the Queen Charlotte Islands, then continuing north along the Islands at a bearing consistent with the western most headland to Dixon Entrance, and continuing in a straight line across the Entrance until it intersects the United States border off Alaska.\(^{88}\) This British Columbia coastal zone would thereby take in all ocean spaces of Juan de Fuca Strait, the Strait of Georgia, Johnstone Strait, Queen Charlotte Strait and Sound, Hecate Strait and one half of Dixon Entrance, as well as a stripe of ocean spaces along the western shores of Vancouver Island and the Queen Charlotte Islands.

This line of demarcation has also been described as the baseline for the start of the territorial sea of Canada as noted in the *Territorial Sea Geographical Coordinates Order* made

\(^{87}\) British Columbia Order in Council 1347, June 4 1981, made under s. 87(g) of the *Petroleum and Natural Gas Act*, R.S.B.C. 1979, c.323.

\(^{88}\) *Supra* Finkle at note 86 at 37.
pursuant to the *Oceans Act*. This agreement of description of the location of the line though does not indicate the federal government concedes the ocean spaces to the east or landward of that line belong to British Columbia. On the contrary, most likely Canada would claim these waters are within federal jurisdiction if involved in litigating this issue. By positioning the baselines in this way, Canada retains control over more ocean waters both near her shores, and pushes her 200 mile EEZ further out to sea.

There are experts who suggest British Columbia has good arguments to advance on a claim to these internal waters as described. A review of these arguments and their merits is not necessary here, other than to note, that the Province's claim of 1981 coupled with the decision in the *Strait of Georgia Reference* in 1984, makes a rather compelling argument that this inland marine zone all along the British Columbia coast is owned by the Province.

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89 *Territorial Sea Geographical Coordinates Order*, C.R.C., c. 1550, made pursuant to the *Oceans Act*, supra at note 60, sections 4 and 5.

90 *Supra* Finkle at note 86 at 52.


92 There are differing opinions about whether this claim by British Columbia could stand. Dr. Charles Bourne, Professor Emeritus at the Faculty of Law, the University of British Columbia, is of the opinion that it is not a valid argument under the rules of international law. However, there is the principle of "historic bays" in international law of the sea which might be able to be utilized by First Nations to show certain bays, harbours or inlets of the sea as part of their traditional territories. There have been a number of cases of the Supreme Court of the United States on the issue of historic bays including *United States v. Louisiana*, 394 U.S. 11 (1969), *United States v. Alaska*, 422 U.S. 184 (1975), *United States v. Louisiana et al.*, 105 S. Ct. 1074 (1985), and *United States v. Maine et al.*, 106 S.Ct. 951 (1986). The Courts in these cases review the principles and evidence necessary for a state to prove its ownership of the sea area by historic use and control. See also the discussion in William T. Burke, *International Law of the Sea, Documents and Notes* (Lansing, Michigan: Lupus Publishing, Ltd, 1997) at 5-69 - 5-81.
Such a decision would thus include the Province as a major player in the question of First Nations' claims to ocean spaces lying east and landward of the baseline of the territorial sea. And as previously noted, there are many First Nations in this area who claim ocean spaces within their traditional territories. For the purposes of this work, the Haida Nation claims ocean spaces within this area claimed by British Columbia, while the Tsawwassen First Nation claims ocean spaces within the Strait of Georgia whose sea bed is owned by British Columbia, and in the Juan de Fuca Strait which is claimed by the Province.

In light of this, it would appear that both levels of government would be involved in negotiations, and litigation in respect of title to ocean spaces. It should be noted that Aboriginal interests in ocean spaces was never discussed by the courts in either the Offshore Reference or the Strait of Georgia Reference cases. The Oceans Act, interestingly, does include in section 2.1 that "nothing in the Act shall be construed so as to abrogate or derogate from any existing [A]boriginal or treaty rights of the [A]boriginal peoples of Canada under section 35 of the Constitution Act, 1982." One might argue that this section signifies the federal government's recognition of First Nations' rights and title to the ocean spaces; yet on the other hand, the provision is most likely only the federal government's reaction to the Supreme Court of Canada's findings of Aboriginal fishing rights in specific areas of the sea.

Having noted that both government levels may well be involved as interested parties within the determination of Aboriginal title to ocean spaces, I now will review some of the public

93 Oceans Act supra at note 60 at section 2.1.
policy information produced by both governments for use in negotiations under the British Columbia Treaty Commission process which clearly demonstrate title to ocean spaces is not a topic open for discussion.

3. The Federal Perspective

The starting point for the federal policy on the treaty process is found in the Comprehensive Land Claims Policy in 1986, which made a pledge that the government would negotiate concerning Aboriginal participation in not just terrestrial but also offshore environmental management schemes and resource revenue-sharing arrangements.

The Government of Canada stated in its 1996 policy paper on the British Columbia treaty process that the treaties produced would recognize the rights of all residents of the Province to benefit from the natural resources, which would in turn benefit the aspirations of the First Nations for sustainable communities and self-reliance. The federal government clearly notes its preference for negotiation over litigation on Aboriginal issues. The end result


contemplated by successful negotiation throughout the country, is the abolition of the 
Department of Indian Affairs and the *Indian Act*, with First Nations taking charge of their 
futures.\(^7\)

These are pragmatic goals, and suggest a determination on the part of the federal government 
to negotiate all Aboriginal issues and finalize treaties. As to natural resources, the federal 
position suggests a balancing act between achieving certainty, promoting First Nations self-
reliance, ensuring conservation of resources, and integrating and coordinating land and 
resources management. \(^8\) They do not speak of ownership of the sea, and the silence on this 
issue suggests the federal government views the sea and its resources as federal territory.

Under the heading of "resources" within the federal position paper are included 
"fish, ..., offshore areas and ocean management". The exclusive power for fisheries resources 
is retained by the federal government in keeping with its historical control of the resource. 
The reasons set forth for such federal control are the conservation and integration of the 
management of all fisheries. \(^9\)

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\(^9\) The federal jurisdiction for fisheries is found in *supra Constitution Act, 1867* at note 63 at section 91(12). This is discussed at *ibid. Federal Perspective* at 18. The federal government has recently started to hand over some control and management of fisheries to local groups under co-management schemes. Such schemes note the ultimate responsibility for fisheries policy and management still rests with the federal government. A good and recent example is the *Aboriginal Fishing Strategy* (AFS) a 1992 policy creation of Department of Fisheries and Oceans in response to *Sparrow, supra* at note 2. AFS provides regulations for an Aboriginal fishery, monies for the purchase of licenses and boats by First Nations, pilot projects for the Aboriginal commercial sale of salmon in British Columbia, and programs to ensure First Nations are part of
An interesting point mentioned in the federal policy is that treaty provisions will be made in the context of a coast-wide strategy,\footnote{Supra Federal Perspective at note 96 at 18.} suggesting that the federal government will be at the treaty table armed with its overall plan for the fisheries off the British Columbia coast, and First Nations will be expected to fit into that plan. This stance does not suggest much ability to negotiate on the issues of fisheries or ocean management.

As to the matter of "offshore areas and ocean management", the federal policy is extremely short, comprising all of two paragraphs, stating Canada supports negotiations on offshore topics that deal with wildlife, protected areas, artifacts and the environment. In the last paragraph, the federal government states that it will "seek to preserve its (Canada's) ability to safeguard the nation's self-sufficiency of ocean resources, particularly those that are non-renewable such as minerals (including hydrocarbons) and geothermal resources."\footnote{Ibid. at 21.} This present policy in regards to the British Columbia Treaty Commission process strongly suggests that Canada will not be negotiating a treaty that would see First Nations with ownership or authority over ocean spaces or the mineral, or oil and gas resources that lie therein.

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the management of the fisheries. \textit{Canada Department of Fisheries and Oceans, Aboriginal Fishing Strategy} (Ottawa: Fisheries and Oceans, 1992-1994) [hereinafter AFS].
\end{flushright}
4. The Provincial Perspective

In 1991, the provincial government accepted the recommendations made by the Task Force and joined with the federal government and the First Nations Summit in creating the British Columbia Treaty Commission process. The Province may have been slow to get involved yet they have been most prolific in publication of their policies and vision for the Province vis-a-vis the treaty process.

In regards to natural resources, the Province's main objective is for treaties to create "economic certainty" by ending the questions over the ownership and use of Crown lands and resources, and thus encourage continued development in the province. John Cashore, the then Minister of Aboriginal Affairs, stated in 1995 that "any proposed treaty which doesn't support regional economic development will be rejected by Cabinet and sent back for more work." 

The Province and the First Nations both agree that only Crown land is being considered in treaty negotiations, not lands of third parties. The Province has stated the target for land transfer to First Nations is five per cent being representative of their population within the

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102 Province of British Columbia, Ministry of Aboriginal Affairs, "Quick Facts About Treaties" undated [hereinafter "Quick Facts"].

103 Ibid.

104 Ibid.

105 Ibid. for the British Columbia position. The agreement of the First Nations Summit is found in the remarks Chief Joe Mathias on behalf of the First Nations Summit in British Columbia Treaty Commission, "Key Questions" (video produced by the Commission, 1995).
province. 106 This position, like the federal government's coast-wide strategy for fisheries, suggests that there is little room for negotiation.

The literature produced by the Province has no mention of the sea and its resources; the words employed are strictly those of "land". This is understandable as the common law recognizes the sea from the low water mark to be owned by the federal government. 107 However, as previously mentioned, the Strait of Georgia and its sea bed and subsoil was determined to be property of the Province. 108 It is essential then that British Columbia articulate its stance on title to ocean spaces as numerous First Nations have included specific ocean spaces within their traditional territories.

The Province sets out it will negotiate with a view towards producing clearly-defined rights for the First Nations "to land and resources in a manner that fits with contemporary realities of economics, law and property rights in British Columbia, and treaties that respect the rights and interests of all British Colombians" and provide the basis for sustainable economic and social development. 109 The Province does note that "hunting and fishing rights of First

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106 Ibid. "Quick Facts".

107 Supra Offshore Reference at note 76.

108 Supra Strait of Georgia Reference at note 91.

Nations people" will be included in treaties. 110

The identification by First Nations of their traditional territory on the initial Statement of Intent will serve as a starting point for negotiation of territory. The Province has stated "[t]he area of Treaty Settlement Land to be included in a treaty will represent only a small part of the traditional territory", and will not be calculated on a percentage of the traditional territory. 111 The Province does acknowledge the interests of each First Nation and non-Aboriginal communities will aid in determining the actual area of land. 112 The Province has unequivocally stated "[o]wnership of Treaty Settlement Land will also include ownership of subsurface resources by First Nations." 113 One has to ask if this policy extends to the Strait of Georgia as it is Crown Land.

The Province has expressed the opinion that for treaties to be meaningful in a contemporary world, they will not be based solely on the evidence from the past, and that negotiations will focus on current and future interests of the parties. 114 It may be that the Province will agree to First Nations having only specific rights for certain activities over large areas of what they


111 Ibid. at 2.

112 Ibid.

113 Ibid.

114 Supra "B.C. Approach" at note 109 at 3.
claim as their traditional territories. Achieving co-operative management and land use planning for both land and resources with First Nations by their participation in the present structures and regimes that exist is an ideal expressed by the Province.\footnote{Ibid, at 6.}

Under the Memorandum of Understanding between Canada and British Columbia Respecting the Sharing of Pre-Treaty Costs, Settlements Costs, Implementation Costs and the Costs of Self-Government, or Cost Sharing MOU, the primary responsibility for the cash portions of the treaty settlements rests with the federal government and the provision of Crown lands with the provincial government.\footnote{Ibid, at 7, and see Province of British Columbia, Ministry of Aboriginal Affairs, "Federal-Provincial Cost-Sharing for Treaties", November 1997.} This joint statement by the governments suggests the formula for cost-sharing will play an important role in the positions of the government at the treaty table in respect of recognition of First Nations' interests in ocean spaces.

5. Summation

In this Chapter, we have reviewed the history that has lead to the principles we have today in respect of the international law of the sea, and Canada’s position of sovereignty to the ocean spaces off British Columbia’s coast. The Courts have seen fit to apportion some of the sea bed of the British Columbia offshore to the Province which then brings the Province into discussions about title to ocean spaces that are being claimed by First Nations as part of their traditional territories. We have also canvassed some of the materials produced by each
government in respect of policies and positions they will advocate during treaty negotiations to have some idea what may transpire in discussions about Aboriginal title to ocean spaces.

Let us now examine a number of sources that can be cited and utilized to recognize this concept within the legal framework in Canada, starting with the common law.
CHAPTER THREE

THE SOURCES FOR RECOGNITION OF THE CONCEPT

Overview

In this Chapter, I will explore various areas of the law that touch on Aboriginal title, and will examine how those sources could be formulated and incorporated into building the foundation for recognition of Aboriginal title to ocean spaces. First, I will begin with reviewing the common law in Canada and the origins of Aboriginal title. This discussion will start with the Royal Proclamation, 1763, and lead on through some of the Supreme Court of Canada cases of the last twenty years where the Court often in its discussion of rights has made comments about title, ending with a full examination of the principles delineated in Delgamuukw in 1997.

The principles and elements set out in Delgamuukw will be analysed with a view to demonstrating how these can be utilized to substantiate First Nations claims to ocean spaces. As well within this section, I will incorporate ideas from the legal discourse on title and comment on how Aboriginal title to ocean spaces may develop.

Chief Justice Lamer writing for the majority in Delgamuukw stated at paragraph 112 that “reference to both common law and [A]boriginal perspectives” must be made in order to

117 The Royal Proclamation of 7 October 1763, R.S.C., 1985, App. II, No.1, also text found at <www.bloorstreet.com/200block/rp1763.htm> [hereinafter Proclamation].

118 Supra Delgamuukw at note 35.
understand Aboriginal title and its characteristics. With this as a guiding principle from the first decisive pronouncement on Aboriginal title, I determined that to have a full and comprehensive discussion of this topic, I needed to learn about the Aboriginal perspectives. I therefore, spent time gathering comments and information from two First Nations of British Columbia, and present their voices within Part B. of this Chapter. This section is a lengthy commentary which begins by setting the stage both in a geographical and historical sense to provide some appreciation of the ocean cultures embodied in both these Nations. Actual data and sources of information about the use and occupation of ocean spaces is provided through the First Nations voices and other mediums. In conclusion, I provide some suggestions about how this information can be utilized to strengthen and support their title to ocean spaces.

The third and final source of materials for use in recognizing Aboriginal title to ocean spaces is found within the global forum in both case law of other countries and international human rights materials. The Supreme Court of Canada will when facing new concepts and questions of law often refer and consider cases that have dealt with such matters from other countries. I will review a number of cases and some academic literature from Australia and the United States whereby issues of Indigenous title to areas of the ocean have been discussed. As Canada is a member of the United Nations, the human rights documentation that has developed and which is still evolving is important to this research and discussion for it is the global conscience illuminating the direction the world is taking in respect of Indigenous issues.
All of these sources provide ways and means of developing and validating the theory of Aboriginal title to ocean spaces within the Canadian legal context. This is especially important, for as previously noted, there are over twenty First Nations groups involved in the British Columbia Treaty Commission process who have included within their traditional territories various configurations of ocean spaces.

Let us turn then to a review of the Canadian common law and the development of the concept of Aboriginal title.

PART A. THE CANADIAN COMMON LAW

1. Introduction

The theory of Aboriginal title is not a recent development within the body of Canadian law. It was first mentioned by the colonial government of Britain about the time that the Pacific coast was first explored by the Europeans, and has since then been sporadically mentioned. The defining year of this concept came with Delgamuukw in 1997 when for the first time, the Court delineated the actual characteristics and elements that make up Aboriginal title. The following section chronicles this passage from pronouncement of the theory to its definition.

2. The History of Aboriginal Title in Canada

The inaugural discussion of Aboriginal title in Canada is found in the Royal Proclamation, 1763. The British having defeated the French in North America produced this document with the intention of setting out Britain’s scheme of governance and colonial settlement of the
continent. The British also wanted to assure the Indians that the dishonesty and exploitation to which they had been previously subjected would be halted.\textsuperscript{119}

The \textit{Proclamation} specifically acknowledges that there are lands of the "Nations" and "Tribes of Indians" within the British Dominions that have not been ceded to or purchased by Britain, and further states the possession of these lands is not to be interfered with. These lands are "reserved" to the Indians as "their Hunting Grounds"\textsuperscript{120}, and thus the \textit{Proclamation} sought to stop colonization beyond the western boundary of the Mississippi River and the Great Lakes.\textsuperscript{121}

The document provides a number of other safeguards for the Indian population by first recognizing the "great Frauds and Abuses" that has transpired with previous purchases of land from the Indians by colonists. All colonists were forbidden to enter into any type of negotiations with the Indian population in respect of land. The only entity that had authority to purchase Indian lands should they decide to sell, was the Crown. As well, any colonists inhabiting lands of the Indians were directed to remove themselves immediately.\textsuperscript{122} The \textit{Proclamation} had good intentions, yet in the end it did not deter westward settlement into

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\begin{itemize}
\item \textsuperscript{119} Bill Henderson, "A Brief Introduction to Aboriginal Law in Canada" at 1 found at <www.bloorstreet.com/200block/brintro.htm>.
\item \textsuperscript{120} \textit{Supra Proclamation} at note 117; see specifically the section entitled "The Indian Provisions".
\item \textsuperscript{121} \textit{Ibid.} Note the beginning paragraphs where the actual four distinct and separate governments and territories of Quebec, East and West Florida, and Grenada are described as ceded by the French to Britain.
\item \textsuperscript{122} \textit{Ibid.} All these provisions are found within the section "The Indian Provisions".
\end{itemize}
the "reserved" Indian lands. The Proclamation is referred to within section 25 of the Canadian Charter of Rights and Freedoms thus incorporating this historic document into our Constitution.

The next mention we find of the concept of Aboriginal title is within the Privy Council decision in St. Catherine's Milling and Lumber Co. case of 1888, where the Court described Aboriginal title as a "personal and usufructuary right" As to what this terminology means, Chief Justice Lamer notes in Delgamuukw that courts have wrestled with this phrase since 1888 attempting to explain the boundaries of the concept with no real satisfactory conclusion. It has been described as involving "the right to use something owned by someone else, as long as that use does not destroy the thing or interfere with the rightful ownership." St. Catherine's Milling acknowledged the existence of Aboriginal title and noted its origins came from the Proclamation. It further noted that Aboriginal


125 St. Catherine's Milling and Lumber Co. v. R. (1888), 14 A.C. 46 (P.C.) [hereinafter St. Catherine's Milling].

126 Ibid. at 54.

127 Supra Delgamuukw at note 35 at para. 112.


129 Supra St. Catherine's Milling at note 125.
title was “dependent upon the good will of the Sovereign”.\textsuperscript{130} It is from this questionable meaning set out in 1888 that courts have since made their comments on Aboriginal title. As there were few treaties signed with the First Nations in British Columbia,\textsuperscript{131} and the Province maintained the view that Aboriginal title did not exist,\textsuperscript{132} the question of Aboriginal title was bound to be discussed before the courts.

The case of \textit{Calder}\textsuperscript{133} in 1973 brought the issue into full view when the Supreme Court of Canada wrestled over whether Aboriginal title still existed in respect to areas of the Nass River Valley in northern British Columbia as claimed by the Nisga’a Nation. The issue of title had been silenced with the passing of the provision that outlawed the raising of funds or retaining counsel to advance a First Nations’ claim between 1927 and 1951.\textsuperscript{134}

In \textit{Calder}, the Court recognized Aboriginal title as a legal right derived from the occupation and possession by the First Nations of their ancestral lands. The Court split evenly on the question of whether Aboriginal title had been extinguished by the various general land enactments in the Province. Three justices determined that Aboriginal title had not been

\textsuperscript{130} Ibid. at 54.

\textsuperscript{131} There were fourteen treaties negotiated on the southern part of Vancouver Island called the Douglas Treaties, and for the eastern slope of the Rockies with Treaty No. 8.

\textsuperscript{132} The Province maintained that the \textit{Royal Proclamation} did not apply to lands of British Columbia, and thus there was no underlying Aboriginal title to deal with. \textit{Supra Proclamation} at note 117.


\textsuperscript{134} \textit{Indian Act}, R.S.C., 1927, c. 98, section 141 brought in this provision. It was repealed by the \textit{Indian Act}, S.C. 1951, c. 29, section 123 (2).
extinguished and that the *Proclamation* did extend to British Colombia, while the other justices agreed the *Proclamation* did not apply and that colonial legislation prior to Confederation had effectively ended the existence of Aboriginal title within the province. The seventh justice on the Court did not rule on the issue and rather dealt with the matter of whether the Crown had granted permission to have the action commenced against itself.

As a result of the *Calder* decision, the federal government declared it would commence dealing with land claims even though there had been no definitive formulation of Aboriginal title by the courts, or set out within legislation. Thus commenced the era of “comprehensive land claims” which produced many of the modern day treaties which will be reviewed in the Chapter Four of this work.

The next discussion of Aboriginal title is found within the judgment of Dickson, J., as he then was, in the 1985 Supreme Court of Canada case of *Guerin v. R.* 135 The Court was asked to rule on the question of whether the Musqueam Band could recover damages from the federal government who had acted on their behalf in negotiating a lease of their lands for use as a golf course. In reviewing this issue, the Court noted the existence of “Indian title” and found this interest in land was a pre-existing legal right that was not created by the *Royal Proclamation* or any other legislation such as the *Indian Act*. 136 The Court found previous cases that had discussed Indian title had been somewhat inconsistent in their description of

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136 *Ibid.* at 336. This followed the reasoning of Hall, J., in *Calder, supra* at note 133 at 390. *Indian Act supra* at note 97.
the concept due to their use of different terminology. To put this inconsistency to rest, Dickson, J., defined title as a 
"sui generis" interest with distinct characteristics. Such title was only able to be alienated to the Crown, and the Crown owed a fiduciary obligation to First Nations in its dealings with such lands (a concept that will be expanded upon later in this Chapter). Use of this term denotes the uniqueness and difference of Aboriginal rights and title, as literally translated it means "of its own kind or class". In coining this term, "sui generis", the Court found a way to reconcile the Aboriginal system of laws and principles with that of the Crown and its assertion of sovereignty.

The Supreme Court of Canada cases that followed Guerin into the next decade dealt mainly with Aboriginal rights issues that revolved around fishing and hunting, until 1997 with the decision in Delgamuukw. The next section will explore the judgment in some detail by reviewing the characteristics of title as outlined by the Court, and the elements required for substantiating title. The principles delineated in this case will then be analysed for use as tools in asserting and substantiating Aboriginal title to ocean spaces.

\[137\] Ibid. Guerin at 339.

\[138\] The development of the term and doctrine "sui generis" is related in an article by John Borrows and Leonard I. Rotman where they conclude the doctrine is a balance between the common law and Aboriginal perspectives. The authors suggest this doctrine can aid the common law by recognizing and accommodating cultural differences, and reconcile Aboriginal issues within the framework of the common law. See "The Sui Generis Nature of Aboriginal Rights: Does It Make A Difference?" (1997) 36:1 Alta. L. Rev. 9 [hereinafter Borrows & Rotman].

\[139\] Ibid. at 21.
3. *Delgamuukw* \(^{140}\)

This judgment of the Supreme Court of Canada case has been hailed as a landmark decision for First Nations in their pursuit for recognition of title to their traditional territories. It represents a paradigm shift in the landscape of title to land in British Columbia, and has created a degree of uncertainty within the resources sector of the Province. Now government granted leases and licenses for resource extraction are viewed with suspicion for they may well be fraught with and encumbered by issues of Aboriginal title.

The determination of the case is being relied upon by many of the First Nations involved in the British Columbia Treaty Commission process to substantiate their title to their traditional territories as demonstrated by their use and occupation of such areas. \(^{141}\) At present, a number of First Nations in British Columbia, not involved in the treaty process, are also making use of *Delgamuukw* as the authority for them to proceed to fell trees on their traditional territories to ensure the economic well-being of their communities without timber licenses or other government issued permits. \(^{142}\)

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\(^{140}\) *Supra Delgamuukw* at note 35.

\(^{141}\) Many of those First Nations I initially spoke with in the preliminary stages of my research advised me that *Delgamuukw* was being relied upon by them to validate title to their territories.

\(^{142}\) The Westbank Tribal Nation commenced logging operations on the area claimed as their traditional territories, near Kelowna, on 7 September 1999 without any authorization from the Provincial government. The Chilcotin Nation and the Okanagan Band are poised to follow this lead, which has been supported by the First Nations Summit at a meeting held on 15 September 1999. See Kim Pemberton, “More Indian Bands poised to defy logging order” *The Vancouver Sun* (22 September 1999) B7c. See also Jim Beatty with Kim Pemberton, “Defiant Westbank band begins logging Crown land” *The Vancouver Sun* (8 September 1999) A1; Kim Pemberton with Gordon Hamilton, “Native defiance in the woods pressures B.C. to take action” *The Vancouver Sun* (16 September 1999) A1; Kim Pemberton, “Interior natives launch logging ad campaign” *The Vancouver Sun* (17 September 1999) A6c; and “Westbank band sets up camp on claimed land” *The Vancouver Sun* (18 September 1999) A9.
The court history of *Delgamuukw* started with its filing in 1984 in the Supreme Court of British Columbia. Thirty-nine hereditary chiefs of the Gitksan Nation and twelve hereditary chiefs of the Wet'suwet'en Nation requested an order declaring ownership of and jurisdiction over some 58,000 square kilometres of land in northern British Columbia.

The trial before Chief Justice McEachern took some 374 days over a period of three years. At trial, the contemporary practices of the Elders and evidence of oral histories dating back to time immemorial were presented. Evidence in the forms of sacred stories, songs and plays as presented through the adaawk of the Gitksan houses and the kungax of the Wet’suwet’en houses was also included. These sources all told of the relationship of these Nations with their traditional territories. Expert evidence was led in the areas of archaeology, anthropology, linguistics, genealogy and many other disciplines. Historical documents, in particular the diary of a Hudson Bay trader in 1820 who made the first contact with the Gitksan, were entered.

The judgment rendered by McEachern, C.J., found the Nations had subsistence rights such as hunting and fishing in these territories, but there was no title to the lands. Included in this decision were a number of very disparaging remarks about the evidentiary value of the oral

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144 *Supra Delgamuukw* at note 35 at paras. 5 and 6; and para. 89 as to numbers of witnesses, affidavits filed, and like information.

histories of the Gitksan and Wet'suwet'en Nations that had been presented. McEachern, C.J., found them to be unreliable sources of evidence as they contained myth, romance, metaphor and other like elements. He further discounted evidence from the anthropologists on the basis their long association with the two Nations made their testimony biassed.

The Gitksan and Wet'suwet'en Nations were undeterred, and they appealed to the British Columbia Court of Appeal. The Crown cross-appealed. In 1993, the decision of the Appeal Court confirmed the finding of lack of Aboriginal title, on a three - two split of the Court. The minority, however, found there was indeed evidence to substantiate Aboriginal title to the territories claimed based upon the historic information presented which conclusively demonstrated occupation.

The matter eventually made its way to the Supreme Court of Canada in June 1997 with over twenty-five lawyers on the record representing the Appellant, the Crown and a number of interveners. The issue before the Court became transformed into a claim for Aboriginal title over the lands originally described.  

146 British Columbia sought a declaration that the Gitksan and Wet'suwet'en Nations had no right or interest in and to the territory, or in the alternative, that their cause of action lay with the federal government on the issue of compensation.  

147 It must be noted at the outset of this discussion that the territory claimed included no ocean

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146 Ibid. at para. 7.

147 Ibid. at para. 7.
spaces as the traditional territories are located well inland. The arguments before the Court and its decision dealt solely with a claim for territories made up of land, waters of lakes and rivers and the air space above.

On 11 December 1997, the Supreme Court of Canada rendered a unanimous determination that the trial judge had erred in law. The weight he had attached to the evidence of oral histories, and the adaawk and the kungax 148 was not appropriate in light of the principles set out in Van der Peet, 149 and thus a new trial was ordered. The remainder of the decision which for the first time describes the characteristics, content and elements of Aboriginal title is obiter dicta of a most persuasive nature. 150

Lamer, C.J., in writing the majority decision noted that Aboriginal rights to land were of three different types. The first two categories due to lack of substantial information about occupation only gave rise to Aboriginal hunting, fishing and other sustenance rights in the first situation over general tracts of land, and in the second instance to specific areas. The third category was actual Aboriginal title as occupation could be established. 151

The Court

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148 The adaawk is an oral history of the Gitksan Nation. The kungax is an oral history of the Wet'suwet'en Nation. They are described in Delgamuukw ibid. at para. 93 as the “sacred official litany, or history, or recital of the most important laws, history, traditions and traditional territories of a House”.

149 Ibid. at paras. 93 - 108. Supra Van der Peet at note 2.


151 Supra Delgamuukw at note 35 at para. 138.
noted the main characteristics of Aboriginal title as encompassing the right to exclusive use and occupation of the lands held under Aboriginal title with the right to determine the uses of such lands within certain described boundaries.\(^{152}\)

The majority decision opens with discussion about the significance and use of oral history; following which it proceeds to discuss the principles of Aboriginal title under the following headings: the content of Aboriginal title, the test for proving Aboriginal title, the scope of constitutional protection that is afforded to Aboriginal title, and the limitations on extinguishment of Aboriginal title by government actions. In my examination and analysis of the decision, I will discuss the Court's comments on each of these areas, some in more detail then others, and provide some suggestions as to how the principles illuminated by the Court can be utilized to prove Aboriginal title to ocean spaces.

(a) The Content of Aboriginal Title

The Court commences its discussion of the substance of Aboriginal title by noting the definition as found in *St. Catherine's Milling*.\(^{153}\) The Court again makes use of the term *sui generis* when describing Aboriginal title, and notes this is the one principle which unifies all characteristics of title.\(^{154}\) Aboriginal title is characterized as being a concept that must be viewed from both the common law and Aboriginal perspectives, as it is not purely a concept

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\(^{152}\) *Ibid.* at para. 117.

\(^{153}\) *Supra St. Catherine's Milling* at note 125 where the Court described Aboriginal title as a “personal and usufructuary right”.

\(^{154}\) *Supra Delgamuukw* at note 35 at para. 112 - 113.
from the Aboriginal legal systems or the common law. ¹⁵⁵ There must be equal weight given to both these ideologies. ¹⁵⁶ The Court further notes the source of Aboriginal title is not legislation or grant of the Crown, such as the Royal Proclamation, but rather it flows from the original occupation of the land by the Aboriginal peoples. ¹⁵⁷ Other characteristics delineated by the Court included that of the inalienability of Aboriginal title to only the Crown,¹⁵⁸ and its communal nature in that it is a collective right held by all members of an Aboriginal Nation.¹⁵⁹

Delgamuukw tells us that Aboriginal title is more than a mere right to engage in specific activities upon a specific parcel of land ¹⁶⁰ as held in many of the previous fishing cases.¹⁶¹ Aboriginal title goes a step further and confers the right to the land itself, ¹⁶² which is the right to exclusive use and occupation of such land. As noted in the beginning of this section, Aboriginal title permits land to be used for a variety of purposes, and not necessarily those


¹⁵⁶ Supra Delgamuukw at note 35 at para. 81.

¹⁵⁷ Ibid. at para. 114.

¹⁵⁸ Ibid. at para. 113. This characteristic was mentioned in Guerin supra at note 135.

¹⁵⁹ Ibid. at para. 115.

¹⁶⁰ Ibid. at para. 111.

¹⁶¹ See supra Sparrow, Gladstone and Van der Peet, all at note 2; as well as R. v. N.T.C. Smokehouse Ltd. (1996), 137 D.L.R. (4th) 528 (S.C.C.). In all of these cases, the Supreme Court of Canada is engaged in reviewing a claimed specific Aboriginal right at a specific location.

¹⁶² Supra Delgamuukw at note 35 at para. 138.
that originate from Aboriginal practices, customs and traditions. There are, however, inherent limitations to such land uses based upon the premise that the uses do not separate the land from the nature of the Aboriginal group's attachment to it, nor destroy it for use by future generations.\textsuperscript{163} For example, if the land claimed had been used by the First Nations as a hunting area, they could make use of those lands as a game reserve or farm, open it to other members of the public, even charge admission, yet they could not build a shopping mall complex upon the lands, as such a use would detach the nature of the Aboriginal attachment, being hunting, with those lands.

Aboriginal title includes the right to choose how the land will be used subject always to the limitation as just noted.\textsuperscript{164} Mineral rights are included within Aboriginal title, and lands are open to be exploited for such purposes even though mineral exploitation is not a traditional use.\textsuperscript{165} The inherent limitation as previously noted is the only qualification on this right of mineral exploitation.\textsuperscript{166} From the standpoint of First Nations the right of exploitation of minerals provides a new source of possible economic benefits and social independence. This inclusion also demonstrates some degree of evolution in the Court's thinking beyond Aboriginal rights having to be tied to First Nations' historic traditions.

\footnotesize
\textsuperscript{163} \textit{Ibid.} at para. 117.
\textsuperscript{164} \textit{Ibid.} at para. 168.
\textsuperscript{165} \textit{Ibid.} at paras. 122-124.
\textsuperscript{166} \textit{Supra} Slattery at note 155 at 3.10.
One can see from the delineation of these characteristics of Aboriginal title by the Court that it is not a familiar concept within the Canadian common law. Its true meaning is to be derived from a blending of two cultures and their ideologies. How then does one prove title to First Nations’ territories?

(b) Proof of Aboriginal Title

Courts prior to 1997 have mentioned Aboriginal title in passing as we have noted, but until Delgamuukw there was little discussion of its characteristics. There have been comments by courts about the proof of Aboriginal title being problematic partly due to the antiquity from which it originates and partly due to its very nature. In 1978, Dickson, J., stated “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations”. These factors made it difficult for courts to review and determine title based upon what was viewed as sketchy and unreliable evidence sources. The Haida legend about the clamshell dwellers, as noted at the beginning of this work, and the several stories that will be related through the First Nations voices included in Part B. of this Chapter, stem from those sources as noted by Dickson, J., being Aboriginal history, legends, customs and beliefs. In further comments, Dickson, J., noted:

[i]f the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not as a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.  

This very guiding principle has been restated by the Supreme Court of Canada on a number

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168 Ibid. at 109.
of occasions. \(^{169}\) It also is reiterated in *Delgamuukw* when the Court directs Aboriginal title is to be viewed from the two ideologies, being the common law and Aboriginal perspectives.\(^ {170}\) Inclusion of Aboriginal perspectives brings into consideration those very elements of which Dickson, J., spoke, being the facts pertinent to the Band and the land. Inclusion of these factors may well place a different definition to “occupation” than what the common law states. \(^ {171}\)

For First Nations to substantiate their Aboriginal title to specific lands, the Court enumerated certain criteria that must be shown. There are two elements that must be established: (a) the First Nation occupied the land prior to sovereignty being 1846 in British Columbia, (b) the occupation at the time of sovereignty was exclusive to the First Nation claiming such land, and if present day occupation is relied upon as proving occupation at 1846, (c) there must be continuity between these two periods of occupations.\(^ {172}\) In allowing this last rule of evidence, the court has recognized there could be situations where a lapse or disruption has occurred in the chain of occupation.

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\(^ {170}\) *Supra Delgamuukw* at note 35 at para. 147. This follows along the lines of *Sparrow*, when the Court spoke of being careful not to apply the traditional common law concepts of property when dealing with Aboriginal rights; see *supra Sparrow* at note 2 at 411.

\(^ {171}\) Keith Lowes. "Proving Aboriginal Title: The *Delgamuukw* Test" (Paper presented to the Pacific Business & Law Institute conference, 12 February 1998, Vancouver) at 5.3.

\(^ {172}\) *Supra Delgamuukw* at note 35 at para. 143.
Evidence as to the issue of occupation can be established through two different methods. First the most usual source is that of the common law freehold land system which is oriented in elements that show actual physical possession. The second method is from the Aboriginal perspectives which demonstrates occupation more often as a communal system. When a court is examining title, it must take into account the activities that have taken place on the lands, and how the lands have been used by the particular First Nations group claiming them. The inclusion of the First Nations ideologies of land holding and use are in keeping with the words of Dickson, J., for these are the “facts pertinent to the Band and to the land”.

Louise Mandell, a lawyer on behalf of Gitksan Hereditary Chiefs, notes the Court did not endorse the government's theory that occupation must be shown by proof of “intense occupation” such as village sites and cultivation. Instead activities such as housing, cultivation, regular use of the lands for hunting, gathering of resources, were determined as elements of reliable evidence of occupation. Other facts of which a court must be mindful are the group's size, manner of life, material resources, technological abilities and the character of the lands claimed.

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173 Ibid. at para. 147.

174 Ibid. at para. 128.

175 Louise Mandell,"The Delgamuukw Decision" (Paper presented to Aboriginal Title Update, Continuing Legal Education conference, 25 March 1998, Vancouver) at 7.2.18.

176 Supra Delgamuukw at note 35 at para.149.

177 Ibid. at para. 149.
It is not an easy exercise for a claimant to produce evidence for over one hundred and fifty years of use and occupation as the relationship with the lands claimed may have changed from the time of sovereignty in 1846 to this modern day. In recognition of that fact, the Court adopted the reasoning of the High Court of Australia in *Mabo v. Queensland*\(^\text{178}\) which provides that as long as there is a substantial maintenance of the connection between the lands so claimed and the people claiming them, then occupation is proven.\(^\text{179}\)

The manner of proving occupation is by no means definitively set out in the comments of Chief Justice Lamer, and will most likely be shaped as courts deal with these issues in time to come. Some suggest that these issues will be determined by exploring questions of what kind of presence on the land did the First Nation enjoy - was it casual, seasonal, sporadic or permanent; further was that presence an aspect of the traditional way of life and was it central to that way of life.\(^\text{180}\)

The second point that the Court requires is proof of Aboriginal title is exclusivity of occupation. In some situations, the Court noted there could be evidence of two or more groups using and occupying the same area. Exclusivity by one group could be demonstrated by the intention and the recognition of that intention of having exclusive control and


\(^{179}\) *Supra Delgamuukw* at note 35 at para. 154.

\(^{180}\) *Supra* Lambert at note 150 at 258 - 259 where he notes this is “a very large question” that emerges from the decision.
 Often, one Aboriginal group would occupy lands and allow others to use their lands with permission. As we shall see in the information about the Haida Nation, their territories including ocean spaces were used by other First Nations after permission had been granted, and those other First Nations always viewed the Haida as the occupiers of such territories.

The Court did recognize that there could arise instances where an area was actually used and occupied by a number of First Nations, and related the reasoning set out in United States v. Sante Fe Pacific Railroad Co. This case determined that there could be joint and shared exclusivity of a parcel of land by a number of Aboriginal groups. As to the finer points of what would be involved in proving joint Aboriginal title, the Court left such matters to another day.

The two further matters discussed in Delgamuukw that have some bearing on the issues of Aboriginal title and have some possible impact on this particular analysis in relation to ocean spaces are justifiable infringement and the ability of the Crown to extinguish title.

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181 Supra Delgamuukw at note 35 at para. 156.


183 Ibid. Delgamuukw at para. 158.
(c) Constitutional Protection and Justifiable Infringement by Government

Having established Aboriginal rights and/or title, section 35(1) of the Constitution Act, 1982, guarantees their constitutional protection from arbitrary extinguishment. However, a determination of Aboriginal title to a specific area coupled with its subsequent protection under s. 35(1) does not provide absolute protection from federal or provincial government infringement.

The matter of justifiable infringement was first discussed in Sparrow in 1990 by the Supreme Court of Canada. There the Court found that priority right to fish of the Musqueam Nation was still susceptible to regulation made in respect of conservation measures. The Court laid out a process for determining if an infringement was justifiable. The individual or group challenging the regulation carries the onus of proving there is a *prima facie* infringement.

To determine if there is a *prima facie* infringement, the first question is be reviewed is whether the legislation interferes with an existing Aboriginal right. In determining this, one must investigate a number of other matters that include whether the limitation set out in the regulation is unreasonable, whether the regulation imposes undue hardship and whether it

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184 Supra Constitution Act, 1982 at note 9. In Delgamuukw, the Court determined that Aboriginal title was an "existing Aboriginal right" as described in the Constitution, see ibid. Delgamuukw at para. 137.

185 Supra Sparrow at note 2 at 414.

186 Ibid. at 411 - 417.

187 Ibid. at 411.
denies the holders of the right their preferred means of exercising that right. If the answers to these questions lead to the conclusion that the purpose or effect of the regulation unnecessarily infringes the interest protected by the right, then there is a *prima facie* infringement of section 35(1) of the *Constitution Act*.188

Once a *prima facie* infringement is determined, the analysis then turns to the issue of justification and whether this is legitimate regulation of a constitutionally protected Aboriginal right.189 In dealing with this issue, the court will first review whether there is a valid legislative objective to the regulation. In reviewing this issue, the Court in *Sparrow* determined that regulation of an Aboriginal right to fish due to conservation was valid as it sought as its objective the sustainability and management of the resource.190

If a valid legislative objective is determined then the Court must also review whether the Crown has upheld its fiduciary duty owed to the First Nation involved.191 This analysis is undertaken by looking at whether there has been as little infringement as possible in order to put effect to the desired legislative objective, and if not, if there is fair compensation available, and whether there was consultation with the First Nation so infringed upon.192

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191 *Ibid.* at 413.

Court in *Sparrow* does note that the issue of justifiable infringement places a heavy burden on the Crown.\(^{193}\) It further notes that the list of factors as noted by it to be considered on the assessment of justification is not exhaustive, and that courts must be sensitive to and respectful of the rights of First Nations.\(^{194}\)

*Sparrow* determined conservation to be a valid legislative objective, and thus a justifiable infringement. Since that decision, the area of justifiable infringements has been expanded. In 1996, the Supreme Court of Canada in *Gladstone* added the legislative objectives of economic and regional fairness and the recognition of the historical reliance upon and participation within the fishery by non-Aboriginal groups that could be justified.\(^{195}\) The recent case of *Seward*,\(^{196}\) was an appeal heard by the Supreme Court of British Columbia brought by the Crown in respect of the acquittal of First Nations respondents on charges of hunting deer at night with rifles and with the use of a light. The Court reviewed the justifiable infringement test laid down by *Sparrow* and concluded that there was no infringement by the legislation of the Aboriginal hunting rights.\(^{197}\) The Court did add though

\(^{193}\) *Ibid.*

\(^{194}\) *Ibid.* at 417.

\(^{195}\) *Supra* *Gladstone* at note 2 at para. 75.


\(^{197}\) The Court dealt with the issue of hunting at night and whether such was a separate and distinct right to be claimed, and if such right was subject to the provisions of the *Wildlife Act*, R.S.B.C. 1996, c.488; see para. 29 *ibid.* *Seward*. The respondents contended that night hunting was a method of hunting included within their Aboriginal right to hunt. They further suggested there was no basis upon which to limit the exercise of their hunting rights; see para. 44. It is from this point that the Court commences its examination of the justifiable infringement as set out in *Sparrow supra* at note 2 at paras. 53 - 85, and concludes that the evidence lead at trial produced nothing that suggested the Respondents being prevented
that if there was an infringement, it was justifiable as the legislative purpose was based solely upon safety concerns for all people. 198

These justifiable infringements as noted in Sparrow and Gladstone were focussed on public standards of conservation, sustainability and protection of the public. In Delgamuukw, we see the Court moving away from justifiable infringements that are based on global ideals. New matters with a focus on regional economic development are added, which include:

- the development of agriculture, forestry, mining, and hydroelectric power,
- the general economic development of the interior of British Columbia,
- protection of the environment of endangered species,
- the building of infrastructure and the settlement of foreign populations to support those aims. 199

There are a number of paternalistic based principles provided for in Delgamuukw that lessen some of the sting of these noted justifiable limits. The Court found that the Crown must consult with First Nations on such projects, accommodate the involvement of First Nations in the development of the resources and pay compensation when an unjustifiable infringement has been made by government on Aboriginal title. 200 The principles laid down in Delgamuukw do facilitate the process of proving Aboriginal title, yet at the same time, provide a broader basis for the Crown to make a case for justifiable infringement.

from hunting at night imposed an undue hardship upon them. Further, the Court found no night hunting was a reasonable limitation having regard to the obvious dangers of the use of firearms in the dark; and the fact the Respondents had not disputed that safety was one of the motives behind the legislation. In the end, the Court found conservation and safety as valid legislative objectives, and convictions were entered. See paras. 82 - 86.

198 Ibid. Seward at para. 80.

199 Supra Delgamuukw at para. 165.

200 Ibid. at para. 167-169.
The Supreme Court of Canada does not provide much guidance in respect of the topics of consultation and compensation, and leaves open the questions of how much consultation is enough, and how to calculate compensation. These are presently important topics of legal discussion for those representing First Nations in the treaty process.  

From this analysis of *Delgamuukw* about the justifiable infringement test and Court approved infringements, we are left wondering what impact this may have on a claim for Aboriginal title to ocean spaces. I will touch on that within the Conclusions at the very end of this work.

The last area of *Delgamuukw* that requires some comment is that of the relationship of British Columbia to the issue of Aboriginal title.

(d) Limits on the Crown's Power to Extinguish Aboriginal Title

The Court firmly laid to rest any question of the ability of the Provinces to extinguish Aboriginal rights prior to the *Constitution Act, 1982*, in holding that the federal government was the only entity that had the power to legislate in relation to "Indians and Lands Reserved..."
for Indians" pursuant to section 91(24) of the *Constitution Act, 1867*. Thus, British Columbia has not through any of its legislation extinguished what Aboriginal title may exist within its boundaries.

One is left to ask the question of whether the federal government has by its legislation extinguished any and all rights that First Nations have, including Aboriginal title, in the territorial sea. The answer lies within *Sparrow* which described the criteria for extinguishing legislation. The legislation must show a clear and plain intention to extinguish Aboriginal rights. Conducting a review of the federal legislation touching on the territorial sea, there is no mention of Aboriginal rights or title until the recent *Oceans Act* which specifically states “Aboriginal rights are not abrogated or derogated”.

Even though the fisheries legislation which was the topic of review in *Sparrow* was noted as lengthy and complex with regulations that had been in place for well over a century, it was determined that it included no clear and plain intention of extinguishing Aboriginal rights to fish. A review of Canada’s ocean related legislation reveals no clear and plain intention of extinguishing Aboriginal rights in regards to ocean spaces in the territorial sea.

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202 *Supra* the *Constitution Act, 1982* at note 9, and the *Constitution Act, 1867* at note 63. Also *supra Delgamuukw* at note 35 at para. 175.

203 *Supra Sparrow* at note 2.

204 *Supra Oceans Act* at note 60 at section 2.1.


206 *Supra Sparrow* at note 2.
As we can see from our review of the elements set out in *Delgamuukw*, the concept of Aboriginal title is still evolving. Let us now turn our analysis to actually applying these delineated principles and elements to the concept of Aboriginal title to ocean spaces.

4. Application of the Principles of Use and Occupation to Ocean Spaces

Our starting point for this analysis is the meaning of “land”.207 Is it just ground, earth and soil, as appears to be the case in *Delgamuukw*? From the First Nations perspectives which will be explored in some detail in Part B. of this Chapter, land does not refer to the element of land alone, but rather includes the whole environment made up of the earth, water, airspace, seas, and resources.208 The Court as noted has directed that Aboriginal perspectives be a source of reference in determining issues of Aboriginal title. This statement leads us to

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207 In reviewing Henry Campbell Black, *Black’s Law Dictionary, revised 4th ed.* (St. Paul, Minn.: West Publishing Co., 1968) at 1019 [hereinafter *Black’s*], the various meanings included for land make no reference to the ocean. There is included the words “waters” which refer to those waters found upon the earth and soil such as rivers, streams, lakes, etc. Interesting enough though land is noted as including all things above and below its surface.

208 The Report on the Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply & Services, 1996) [hereinafter *RCAP Report*] at 448 where the Commission notes land has a broad meaning including the whole biosphere. The First Nations Summit in their pamphlet *Treaty Making supra* at note 6 at 1 state “[o]ur territories include lands, resources, waters, sea, and air.” In the federal policy, *supra Federal Perspective* at note 96, it is evident that the federal government uses the narrow view of land as they have placed “offshore areas and ocean management” as a separate section from “land”. The publications by the Province suggest that lands are of the narrow meaning and ocean spaces are not included. In fact, the “Glossary of Treaty-Related Terms” does not include definitions of land. It does refer though to “traditional territory” as the geographic area identified by a First Nation to be the area of land which they and/or their ancestors traditionally occupied or used; see Province of British Columbia, Ministry of Aboriginal Affairs, “Glossary of Treaty-Related Terms” 1997 at 14. The term traditional territories is mentioned at *Supra Task Force* at note 10 at 42 where it is suggested one of the first steps in the treaty negotiation process is for a First Nation to identify the general geographic area of its traditional territory when filing its Statement of Intent. This recommendation was accepted by the three parties involved in the treaty process, and is part of the notice form. This suggests that the parties to the treaty process were cognizant that territories would include other areas than just the ground, earth and soil.
conclude the wider, more encompassing meaning of land as defined within First Nations’ ideologies is appropriate. As the First Nations voices in the next section will relate, land in their view denotes their whole territories, not one element separated from the whole environment.

The words of “ocean”, “sea”, “offshore”, or “coast” are not mentioned in the Delgamuukw decision as there were no ocean spaces included within the traditional territories of the Gitksan and Wet’suwet’en Nations. Lack of such terms does not mean the principles of the case are not transportable to issues of Aboriginal title to ocean spaces. Certainly, any future court considering the topic of Aboriginal title to ocean spaces will make use of these principles found in Delgamuukw. The most widely recognized common law dictionary states “land is the same above or below the water”, thus suggesting those principles as defined for land above the water, will be a source of principles for the land below the water. It is of note that in the Offshore Reference case discussed in Chapter Two, the questions proposed to be answered by the Supreme Court of Canada were framed in terms of lands underneath the water.

The next step in our analysis is the application of the two elements required to demonstrate Aboriginal title. These two elements as noted in Delgamuukw are: 1. occupation at a specific

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209 Supra Black’s at note 207.

210 Supra Offshore Reference at note 76.

211 Ibid. at 356. The actual question was framed in terms of “lands including mineral and other natural resources of the sea-bed and subsoil”.

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date, and 2. exclusivity by the group claiming such occupation. So by use of analogy, let us take these two elements and apply them in respect of an ocean space to demonstrate Aboriginal title.

The sources of evidence and information for matters of Aboriginal title have been expanded to include both the common law and those of Aboriginal perspectives. In particular, the Court in Delgamuukw confirmed oral histories of First Nations as worthwhile and appropriate sources for courts to consider in their deliberations. The Court actually directed that the rules of evidence be adapted so that Aboriginal perspectives "are given due weight by the courts". Aboriginal perspectives were characterized by the Court as including practices, customs, traditions and the relationship of the First Nations and their lands. First Nations sources will most likely be of the oral history variety which the Court noted will include legends, stories and accounts handed down from one generation to another.

In the aftermath of Delgamuukw, there has been some discussion about the information that will be employed. Some practitioners suggest illustrations of types of occupation or factors tending to prove title which directly relate to specific aboriginal land tenure systems and aboriginal laws governing land use will be of value. Professor Slattery states that occupation in accordance with Delgamuukw must be established by reference to two factors:

212 Ibid., at para. 85.

213 Ibid. at para. 85.

214 Maria Morellato, "Proving Aboriginal Title: the Delgamuukw Test" (Paper presented to the Pacific Business & Law Institute conference, 12 February 1998, Vancouver) at 6.5 [hereinafter Morellato].
actual physical occupation, and the aboriginal laws relative to that area which is claimed.\textsuperscript{215}

Other comments suggest oral histories relating the nature and centrality of the relationship between the traditional territory and the First Nation will be insightful for the court.\textsuperscript{216} Brian Thom provides some insight into how anthropological information needs to be developed for presentation to courts on matters of Aboriginal title.\textsuperscript{217}

As Canadian courts to date have not made comments on First Nations' claims to ocean spaces, when faced with such an issue may seek out information from the international law of the sea. In determining possession and occupation issues of sea areas, foreign courts have resorted to reviewing the dependence of the sea upon the land domain and the close geographical relationship between the sea areas and land formations and economic interests peculiar to the region involved.\textsuperscript{218}

In such cases most often there is a date in time that becomes critical to proving occupation. As we have seen in the Aboriginal rights cases, the Supreme Court of Canada has established a certain time frame at which the right whether it be to fish at a specific site, or Aboriginal title to land, must refer. In the case of Aboriginal rights, the applicable date is the time of first

\textsuperscript{215} \textit{Supra} Slattery at note 155 at 3.15 - 3.16 discussing para. 147 of \textit{Delgamuukw supra} at note 35.

\textsuperscript{216} \textit{Supra} Morellato at note 214 at 6.5.

\textsuperscript{217} Brian Thom, "Aboriginal Rights and Title in Canada After \textit{Delgamuukw}: Anthropological Perspectives" (January 1999) [submitted for publication to Native Studies Review] at 17 - 22 found at <http://home.istar.ca/%7Ebthom/rights.htm>.

\textsuperscript{218} \textit{Supra} Brownlie at note 48 at 186-190.
contact as noted in *Van der Peet* 219, and with Aboriginal title, the applicable date is less stringent being at the date sovereignty was asserted which for British Columbia is 1846.220

In considering Aboriginal title to ocean spaces, a court would need to determine a date from which use and occupation can be viewed. It will no doubt be a date attached to something relevant and cogent to the facts and acts prior to the date of the claim, as has been the usual course held in the law of the sea cases.221 I have noted the variation made by the Supreme Court of Canada in the time frame reference necessary for establishing Aboriginal title in *Delgamuukw* as opposed to that required for Aboriginal rights in *Van der Peet*. This change illustrates the Court's continuing progress in defining the standards of proof and reasoning, as it develops Aboriginal issues. From these past rulings, it would appear that a future court would be mindful that the standard of proof must be of a reasonable nature, and would set a time frame accordingly. Most likely the date would not be earlier than the assertion of sovereignty as in *Delgamuukw*; yet that may not be the time frame determined.

International cases that have involved the question of possession and occupation of ocean spaces have defined "occupation" as synonymous with possession in the private law sense. As there are usually no title registries for ocean spaces, the court emphasis the presence of an

219 *Supra Van der Peet* at note 2.

220 *Supra Delgamuukw* at note 35 at para. 143. This is the date of the Oregon Boundary Treaty signed by Britain and the United States which delimited the border between what is now British Columbia and the State of Washington.

221 *Supra Brownlie* at note 48 at 133.
interest worth protection under the law.\textsuperscript{222} State activity in the form of administrative acts has been viewed as an important factor. Interestingly, the lack of settlement and physical holding has been of little consequence in these cases.\textsuperscript{223} The objective facts of state activity have been found to be of great importance.\textsuperscript{224}

As we have previously noted, the Court in \textit{Delgamuukw} steered away from using intense occupation denoted by settlements and cultivation as the overriding criteria for proof of Aboriginal title, and instead included these with other factors as reliable evidence of occupation. The adoption of this multi-dimensional approach to proof of title is much in keeping with the international view on occupation, and thus suggests that a court dealing with title to ocean spaces would most likely follow the \textit{Delgamuukw} line of evidentiary information.

How then do these factors utilized in the international arena to establish possession and occupation translate into a claim by First Nations in Canada to ocean spaces? Use and occupation of an ocean space is not as easy visible as that of land. Delineation of boundaries by fences or sign posts is near impossible. Landmarks as boundaries are less distinguishable, yet often landmarks on the coastline are utilized in such a manner as will be discussed in the next section. The ocean waters off British Columbia do not freeze, and thus does not provide

\begin{itemize}
\item \textsuperscript{222} \textit{Ibid.} at 141.
\item \textsuperscript{223} \textit{Ibid.} at 142.
\item \textsuperscript{224} \textit{Ibid.} at 143.
\end{itemize}
land-like characteristics as the ice packs found in the North where people can through out the winter live, hunt and traverse, and thus exhibit more visible evidence of use and occupation.

Some sources available to First Nations in their quest to demonstrate their title to ocean spaces will include those usual information works that courts have been comfortable in previously depending upon in Aboriginal rights cases. These sources include written historical accounts and records of colonists, the works of anthropologists and historians, the qualified testimony of these experts, and the other forms of data that we as lawyers have always termed as the best evidence.

Now though, there will be a new area of valid and informative data that can be utilized being that found within the First Nations community. These sources will include histories, songs and stories that tell of the territories they claim, most of which are of the oral tradition. The highest Court's recognition of these accounts as good evidence 225 will in future permit First Nations to establish their title to ocean spaces. Grand Chief Edward John of the Tl'azt'en Nation relates First Nations know the names and stories of all the different areas of their territories including mountains, streams and lands from time immemorial. 226 As we will see, the Haida Nation and Tsawwassen First Nation possess many histories and stories ripe with genealogical information about the use and occupation of their territories.

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225 *Supra Delgamuukw* at note 35 at para. 87.

First Nations in British Columbia can specifically provide evidence of their use and occupation of various ocean spaces by the activities carried on within their traditional territories, including information about: the fishing for groundfish offshore while fishing for salmon within river estuaries, the digging and gathering of sedentary shell fish found in the intertidal areas and along the foreshore, the gathering of seaweed and other types of sea plants, the travels by canoe and boats, and the spiritual and sacred ocean spaces their culture hold dear. At the beginning of this work, the story of the beginning of mankind at Rose Spit is indeed an information source from the Haida perspective that must be considered and viewed as a valid medium for showing Haida use and occupation of the ocean space at this location.

As to the second element that must be shown, being that of exclusivity, Delgamuukw is clear such can be demonstrated by the acts of the First Nation to ensure the ocean space was under their control, and solely used by them or those to whom they granted access. This is analogous to the aforementioned international law concept of state activity in the form of an administrative act.

The Court’s comments about what constitutes exclusivity are by no means definitive. In Australia where they have been dealing with claims for territories under both the Aboriginal Land Rights (Northern Territory) Act 1976 and the Native Title Act 1993, there has been

227 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), and the Native Title Act 1993 (Cth) [hereinafter Native Title Act].
much discussion within the anthropology community about what first constitutes identity of people to the group claiming the territory and what are the modes of belonging to that land.\textsuperscript{228} The concepts of occupation and exclusivity of occupation as seen by Aboriginal Peoples are not necessarily the norms courts are familiar with. Anthropologists and historians involved in drawing out the evidence to be used on such claims are grappling with issues of belonging and identity, for they have found great diversity within the Aboriginal communities in relation to these notions from which occupation occurs.\textsuperscript{229}

In respect of the notion of exclusivity, it may appear to those of us schooled in the freehold land system as a characteristic easy to prove. Yet, when dealing with territories of First Nations, boundaries are not just lines drawn to demarcate areas. It has been observed by Professor Nicholas Peterson in writing about the Australian experience that boundaries are difficult to define for rarely will there be true closure in terms of people and land.\textsuperscript{230} There will always be questions surrounding membership of the community claiming territory, the intrusion and access rights by neighbouring communities, coexistence of non-Aboriginal usage, and other factors that when all added up provide less than satisfactory evidence of exclusive occupation. In fact, there is suggestion that “the only true exclusive possession

\textsuperscript{228} See generally Francesca Merlan, “Formulations of claim and title: a comparative discussion” in Julie Finlayson & Ann Jackson-Nakano, eds. \textit{Heritage and Native Title: Anthropological and Legal Perspectives} (Canberra: Australian Institute of Aboriginal & Torres Strait Islander Studies, 1996) at 165.

\textsuperscript{229} \textit{Ibid.} and note the works she cites at 176 - 177.

\textsuperscript{230} Nicholas Peterson, “‘Peoples’, ‘islands’ and succession” in J. Fingleton & J. Finlayson, eds. \textit{Anthropology in the Native Title Era} (Canberra: Australian Institute of Aboriginal & Torres Strait Islander Studies, 1995) 11 at 20.
claim from an ethnographic viewpoint would be the ‘big island claim’ being the whole of the Australian continent.231

It is well known that many fishing areas off British Columbia were owned and controlled by one First Nation, and other First Nations were only allowed to fish those areas upon asking and receiving permission usually with some cost factor included.232 Anthropological information has been lead in courts to prove the existence of Aboriginal fishing rights at specific sites in cases such as Sparrow and Gladstone.233 These are good examples of how the usual common law tools of evidence are enhanced by the oral histories of the First Nations to illuminate the acts undertaken to control and possess ocean spaces by a First Nation. Certainly, the greater the control and use of an ocean space, the more solid the foundation will be for establishing use and occupation, and exclusivity of such occupation within the determined time frame, and in turn Aboriginal title.

The Australian experience provides some further information sources for us in how a claim to title of an ocean space might be dealt with as there have been well over one hundred land-sea

231 Ibid. at 23, and see Paul Memmott, “Elements of native title applications: the issues of ‘exclusive possession’” in Julie Finlayson & Ann Jackson-Nakano, eds. Heritage and Native Title: Anthropological and Legal Perspectives (Canberra: Australian Institute of Aboriginal & Torres Strait Islander Studies, 1996) 178 at 180 [hereinafter Memmott].

232 In the next section, Aboriginal Perspectives, a number of members of the First Nations I interviewed will relate their knowledge about other Nations seeking permission to fish within their territories even though there were no actual physical demarcation of boundaries, or some edict registered.

233 Supra Sparrow and Gladstone at note 2.
claims before the National Native Land Title Tribunal, and many others being readied.\textsuperscript{234} Within the sea component of these claims there are a variety of spaces included such as areas more in-shore where use and occupation have been well established over the years by the gathering and harvesting of resources on reefs, sand bars and ocean grass beds.

There may be other areas further distanced out from shore where fish are regularly found, and outer areas in what might be termed the offshore claimed in more abstract terms where there is little evidence of usage. The claimant group still maintain a real and intimate connection, albeit in an abstract sense, with these outer areas on a spiritual and sacred plain in that these are destinations of the souls of deceased group members, or areas that produce weather patterns.\textsuperscript{235}

In Part B. of this Chapter, I will provide some insight from the First Nations communities I have visited in respect to the ocean spaces within their traditional territories and their bonds with same. From the discussion of these connections, it will be evident that many are similar in nature to those in Australia, and will require the same task of assembling persuasive evidence to meet the required elements of occupation and exclusivity.

\textsuperscript{234} \textit{Supra} Sharp at note 3 at 59.

\textsuperscript{235} \textit{Supra} Memmott at note 231 at 183 - 184, where he notes the claim of Gove Peninsula as set out in Ronald Berndt, “The Gove Dispute: The Question of Australian Aboriginal Land and the Preservation of Sacred Sites” (1964) 1:2 Anthropological Forum 258, and the various marine sites included in the claim which were more in the abstract sense of being used for environmental control of the weather. A sampling of these place names claimed in outer ocean areas include: “cloud comes together and rain spreads”; “clouds join and thunder”; and “lightning snake ‘flashing’ and rain falling”.
From this analysis, we have been able to demonstrate that the principles set out in *Delgamuukw* that characterize Aboriginal title to land can be utilized to provide a basis for recognizing and substantiating the concept of Aboriginal title to ocean spaces. There are a number of other sources in the common law that aid in our quest for recognition which I will explore.

5. Further Common Law Sources

In reviewing the history of Aboriginal title, we have touched on and looked at some of the cases that dealt with Aboriginal rights. There are some principles from these cases that by way of analogy can be adopted to support Aboriginal title to ocean spaces, and I will now discuss three theories. As well in this section, I will comment briefly on the newest Supreme Court of Canada case touching on First Nations issues.

First, the rights afforded the First Nations in regards to fish are of a priority, and some would suggest superior, nature than those afforded the Canadian public. As we have noted, the Supreme Court of Canada recognized the priority right of Aboriginal fishing at specific sites in *Sparrow* in 1990. This principle was noted and confirmed in a number of later cases such as *Van der Peet* and *Gladstone*. The recognition of this right has moved First Nations out of and beyond the historic principle of the public right to fish as found in the English common law.

This common law principle of the public right to fish originates in England with the signing of
the Magna Carta in 1215, and as English law is the foundation stone of Canadian law, this principle became a right afforded to the Canadian public. It provides that all members of the public have the right to fish in the oceans in common with each other without restriction. Today as a result of this principle fisheries is referred to as a common property resource.

Sparrow recognized Aboriginal rights to fish for the Musqueam Band within a specific area of the ocean waters. These ocean waters are a domain exclusively controlled and granted by the Constitution Act, 1867, to the federal government. As the Supreme Court of Canada had no hesitation with intruding on this federal power and granting specific fishing rights for First Nations to exact ocean spaces under federal jurisdiction, the Court if faced with the question of Aboriginal title to specific ocean spaces, may again be prepared to intrude on this area of federal control and grant title to the First Nation involved.

The second principle that could be utilized as a source for Aboriginal title to ocean spaces lies in the very description of Aboriginal title. As we have noted, the description of Aboriginal title has evolved from St. Catherine's Milling in 1888, being “a personal and usufructuary

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236 Historians and legal scholars state that Chapter 33 is the operative section that provides the public with the right to take fish in any public waterway. Chief Justice Lamer refers to this in supra Gladstone at note 2. See Magna Carta [hereinafter Magna Carta] as found and discussed in A. E. Dick Howard, Magna Carta: Text and Commentary (Charlottesville, Virginia: University Press of Virginia, 1964, 1998). There are four originals of the Charter, as it is known, still in existence in England. There is still disagreement between scholars as to the best translation of the Latin into English (see at 34).

237 Supra the Constitution Act, 1867, section 91 (12) at note 63.

238 Supra Garton at note 1 at 586 where he mentions this theory.

239 Supra St. Catherine's Milling at note 125.
right” \textsuperscript{240} and a “mere burden upon the Crown's proprietary estate”,\textsuperscript{241} to being defined in Guerin as a “sui generis interest”.\textsuperscript{242} This description of sui generis has been expanded and elaborated upon in Delgamuukw with one of its unique characteristics being that of its inalienability, and that it may only be transferred to the Crown and not third parties.\textsuperscript{243} The Crown in such a case would be the federal government under its authority for Indians pursuant to section 91(24) of the Constitution Act, 1982, as previously noted.

The notion of First Nations having Aboriginal title to ocean spaces is not in any way incompatible with the concept of ownership of the territorial sea by Canada pursuant to the principles of international law of the sea and the provisions of UNCLOS. The federal government of Canada is the only entity to which a First Nation can transfer, surrender or sell its title, and thus no other entity has the ability to hold ownership of such ocean interests. Recognizing First Nations' title to ocean spaces does not place Canada in jeopardy of ever losing these areas to another entity.

\textsuperscript{240} Ibid. at 54.

\textsuperscript{241} Ibid. at 58.

\textsuperscript{242} Supra Guerin at note 135 at 382. Reaffirmed in supra Delgamuukw at note 35 at para. 112.

\textsuperscript{243} This is stated in ibid. Guerin in the majority judgment of Dickson, J., which is reaffirmed in ibid. Delgamuukw at para. 113.
The third theory that bears some discussion is that of fiduciary duty and how it can be drawn into aid in recognizing the concept of Aboriginal title to ocean spaces. The Supreme Court of Canada's decision in *Guerin*\(^{244}\) in 1984 determined the Crown owed First Nations a fiduciary duty to act in their best interests when dealing with their lands. The paternalistic intent of both the *Royal Proclamation* and the *Indian Act*, coupled with the special nature of Aboriginal title, were the deciding factors upon which the Court based such a duty. The Court noted that the reliance of First Nations peoples and their lands upon these Acts made their title vulnerable to possible discretionary decisions of the federal government, and thus in such a relationship, the government had a fiduciary obligation to First Nations.\(^{245}\)

The concept of a duty owed by the Crown was again discussed in the Aboriginal fishing rights case of *Sparrow*.\(^{246}\) Here, the Supreme Court of Canada determined the Musqueam Band had an Aboriginal right to a food, social and ceremonial fishery in priority to all others except in matters of conservation. The Court also noted Aboriginal rights mandated "a trust-like and non-adversarial relationship" between the First Nations and the federal government.\(^{247}\) The Court spoke about the "honour of the Crown" being of importance in all dealing with the First Nations.\(^{248}\) The federal government in this "fiduciary" role must not act

\(^{244}\) *Supra Guerin* at note 135.

\(^{245}\) *Ibid.* at 329 - 337.

\(^{246}\) *Supra Sparrow* at note 2.

\(^{247}\) *Ibid.* at 408.

\(^{248}\) *Ibid.* at 413.
against First Nations interests and must act to preserve and protect Aboriginal rights. Thus the Crown must justify government regulations which infringe upon Aboriginal rights.

What can we take from this doctrine that will add to substantiate the concept of Aboriginal title to ocean spaces? Let us review the most recent Supreme Court of Canada decision on treaty fishing rights in *R. v. Marshall*\(^{249}\) and its comments on Crown fiduciary duty and parol evidence. This case centred around the question of whether Mr. Marshall possessed a treaty right to catch and sell fish under the Mi’kmaq Treaties of 1760-61 that were signed with the British in what is now the Province of Nova Scotia.

At trial, there were three charges involved: one for selling 463 pounds of eels for $787.10 without a license, the second for fishing without a license, and the third for fishing during a closed season with illegal nets. Both the Crown and the accused led expert evidence in respect of the negotiations leading up to the signing of the Treaties of 1760-61 which were based on the intentions of reconciliation between the Mi’kmaq and the British and mutual advantage.\(^{250}\) During negotiations, the Mi’kmaq leaders had asked for “truckhouses”\(^{251}\)

\(^{249}\) *R. v. Marshall* (17 September 1999), S.C.C. # 26014 (S.C.C.)[hereinafter *Marshall*]. The decision of the Supreme Court of Canada on the motion for rehearing and stay as applied for by the West Nova Fishermen’s Coalition in this case had not been rendered at the time of writing of this Chapter.

\(^{250}\) *Ibid.* at para. 3.

\(^{251}\) *Ibid.* at para. 19. A "truckhouse" is a type of trading post which were prevalent in the 1760s, and disappeared by 1780. There were six such trading posts established after the signing of the Treaties see paras. 6 and 32. Reference to a number of historical documents at trial established these were set up by the British to ensure a flow of advantages to the Mi’kmaq for trading there, and thus would aid in the preservation of peace. The Mi’kmaq had historically been aligned with the French against the British.
which would furnish them with necessaries in exchange for their trade in pelts. The actual treaty document contained only the promise that the Mi’kmaq would not “traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty’s Governor”\textsuperscript{252}. The trial judge found this restraint of trade clause provided the Mi’kmaq with a right to bring their products to the truckhouses for trading, and that the treaties contained all the promises made and mutually agreed to.\textsuperscript{253} However, when this exclusive trade obligation and the truckhouses fell into disuse, the Aboriginal right to trade disappeared, and thus the accused was guilty on all three counts.\textsuperscript{254}

The Nova Scotia Court of Appeal upheld the convictions and narrowed the trade clause. In their view, the Treaties did not grant any rights to the Mi’kmaq, and were in reality only a way to ensure the Mi’kmaq did not trade with the enemies of the British and thus ensured peace.\textsuperscript{255} The Court took a strict approach to the use of parol evidence when interpreting Indian treaties in stating that such “evidence cannot be used as an aid to interpretation, in the absence of ambiguity”.\textsuperscript{256}

\textsuperscript{252} Ibid. at para. 5.
\textsuperscript{253} Ibid. at para. 19.
\textsuperscript{254} Ibid. at para. 38.
\textsuperscript{255} Ibid. at para. 21.
\textsuperscript{256} Ibid. at para. 9.
The majority decision of the Supreme Court of Canada, penned by Binnie J., with Gonthier and McLachlin J.J., in dissent, came to a very different decision. Binnie J., rejected the strict approach to interpretation citing the fact that in the modern context of commercial transactions and contracts, extrinsic or parol evidence may be utilized. The Court had in previous judgments stated that such evidence may be admitted to provide clarity to the historical and cultural context of a treaty even when there was no ambiguity. For in the circumstances surrounding this treaty, the evidence showed the full intentions and understands of the negotiations were not included within the treaty. The terms of the treaty were verbally agreed to and then set to writing, and the Court concluded it would be unconscionable for the Crown to ignore the oral terms and only rely on the written ones. For to allow such a practice “would not uphold the honour and integrity of the Crown”.  

The Court concluded that Mr. Marshall had a right to fish and to trade (sell) his fish on a limited basis being determined by the historic wording “necessaries” which can be interpreted today to mean a modest livelihood and not the accumulation of wealth. This treaty right is a regulated right and can be contained by regulation within proper limits such as catch limits that can be reasonably expected to produce a moderate livelihood for individual Mi’kmaq families at present day standards. These regulations can be established and enforced without


259 *Ibid.* at para. 59. Binnie, J., sets out that “[a] moderate livelihood includes such basics as “food, clothing and housing, supplemented by a few amenities” but not the accumulation of wealth. It addresses day-to-day needs”.  

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offending the treaty right. 260

The Court found that the closed season, the licensing system and the ban on the sale of fish were all regulations that infringed upon the treaty right and thus were invalid. Mr. Marshall was acquitted of all the charges.

The Court reiterated again the principle found in Van der Peet and Delgamuukw of “[t]he need to give balanced weight to the [A]boriginal perspective” when dealing with Aboriginal issues. 261 In Marshall, the Aboriginal perspective that the Court found to be missing from the judgements of the courts below was that of their understanding of what they had negotiated and agreed to with the British. The documents from the negotiations and events that transpired after the signing of the Treaties coupled with the expert testimony, showed that the terms of the Treaties did not give full effect to what the Mi’kmaq had agreed to. Therefore, the treaties had to be interpreted by reference to these extrinsic documents and information.

The other significant point to be taken from Marshall is that of the Court’s very direct and repeated comments about the honour of the Crown and its fiduciary duty to First Nations. 262 This has been a principle long emphasized by the Court as noted in such cases as Guerin and

260 Ibid. at para. 61.

261 Ibid. at para. 19, and supra Van der Peet at note 2 at paras. 49 - 50, and Delgamuukw at note 35 at para. 81.

262 Ibid. Marshall at paras 49 - 52.
Sparrow.\textsuperscript{263} The Court in Marshall, \textsuperscript{264} quotes Cory J.'s, comments in Badger, \textsuperscript{265} where he stated the integrity of the Crown must be maintained and "sharp dealings" will not be sanctioned.

This very strong statement of the Supreme Court of Canada in respect of the principle of Crown honour and integrity and no sharp dealings adds to substantiating the concept of Aboriginal title to ocean spaces. It is a well known and documented fact that many of the Indian Reservations created in the late 1800s in British Columbia were of lesser land acreage than those elsewhere in Canada as the residents depended upon fishing for their food and livelihood and thus did not need large tracts of land to sustain themselves. \textsuperscript{266} This is commented upon in Marshall when Binnie J., discusses at paragraph 25, the colonialist government policies determined for different areas of the country. He notes the east coast protected the traditional Mi'kmaq economy which including hunting, fishing and gathering to ensure they did not become a burden on the public purse, and that a similar policy was

\begin{itemize}
  \item \textsuperscript{263} Supra Guerin at note 135, and Sparrow at note 2.
  \item \textsuperscript{264} Supra Marshall at note 249 at para. 49.
  \item \textsuperscript{265} R. v. Badger, [1996] 1 S.C.R. 771. This case involved Treaty 8 members of the Cree Nation on various charges of hunting moose out of season without licenses. The three accused relied upon their treaty right to hunt, and the major issue was whether the treaty right had been extinguished or replaced by legislation. Convictions of two of the appellants were upheld as the Court determined they were hunting on lands that were outside the Treaty 8 territories while the third appellant had a new trial ordered to deal with the issue of justification of the infringement created by legislation requiring a hunting license. The important points from this decision are the comments about Crown integrity and honour which can be expanded to include Aboriginal rights that arise without a treaty.
  \item \textsuperscript{266} See historical information presented on this very point in Newell supra at note 39 at 56 - 57.
\end{itemize}
followed on the west coast at a later time.267

In deliberating on the topic of Aboriginal title to ocean spaces, these Aboriginal perspectives of the last century will be included within the balanced approach directed by the Court. The Crown held out to the First Nations unlimited access and rights to ocean spaces that were traditionally used and the resources therein. The First Nations were encouraged to continue their connections with their ocean spaces, and to continue deriving their livelihoods and cultures therefrom. The Crown has no ability to now suggest Aboriginal title does not exist as to do so would place the honour and integrity of the Crown in jeopardy.

To add further to the argument that it is Aboriginal title that was recognized by the Crown at that time and not just the right to fish, one can incorporate the concept of implied rights to support the meaningful exercise of express rights as discussed in Marshall.268 The Court in Marshall recognizes this concept and coupled with the decision in Claxton v. Saanichton Marina Ltd.269 we can state that the First Nations of the British Columbia coast in having

267 Supra Marshall at note 249 at para. 25. He quotes Dickson J., in his dissent in Jack v. The Queen, [1980] 1 S.C.R. 294 at 311 where he noted that government policy before British Columbia joined Confederation clearly showed that “Indian fishermen were encouraged to engage in their occupation and to do so both for food and barter purposes”. It is interesting to note that Dickson in this judgment is of the opinion the Terms of the Union which brought British Columbia into Confederation at Article 13 specifically call for protection of the Indian fishery which has priority in respect of the Indian food fishery. The only qualification on this priority he notes is conservation measures. These same comments form the basis of the majority judgment of the Court, as written by Dickson, then C.J., and LaForest J., ten years later in Sparrow supra at note 2.

268 Supra Marshall at note 249 at para. 44.

269 Supra Claxton at note 2 at 168. This case involved the interpretation of one of the Douglas Treaties of 1852 on Vancouver Island and the continuation of the right to fish of the Tsawout Band. The court found that the proposed marina would infringement upon their Treaty right to carry on their fishery,
their rights of fishing, other activities and connections to ocean spaces recognized by the Crown in turn have the implied rights of ownership to these ocean spaces. For without ownership, they have no meaningful way to exercise their express rights of fishing and connecting with these ocean spaces. As will be discussed within Part B. of this Chapter, it is evident that Crown policies and legislation over the decades have led to the diminution of their ocean derived livelihoods and cultures. As in Marshall, disappearance of the truckhouses did not extinguish the right to trade for the Mi’kmaq, and so too can it be said that mere disappearance of the fishing resources or the First Nations use of ocean spaces extinguishes their title and rights in same. Ownership is the only course that will place back into their hands the ability to manage and be responsible for the sustainability of their express rights.

The Marshall decision has sent the East Coast fisheries into a tail spin as the non-First Nations fishermen believe their livelihoods and way of life are now threatened. DFO will

and thus a permanent injunction was granted to halt the development. There were no claims or arguments put forth by the Tsawout in respect of ownership of the ocean spaces or the sea bed, and thus the comment by the Court that the rights granted by the Treaty were not of a proprietary nature are of little consequence.

Since Marshall supra at note 249, First Nations in various locations of Nova Scotia, New Brunswick and Prince Edward Island have set lobster traps during a closed season for lobster fishing under DFO regulations. “Ottawa is rushing to understand the implications” of the decisions according to the Minister of Fisheries and Oceans, Canada. Commercial fishers and the Fisheries Council, an industry group which represents harvesters and processors, are asking the Minister to temporarily suspend the judgement. The issue is what is a “moderate livelihood”. The Council states that if it means $30,000 - $40,000/year that translates into a couple of million dollars annually, an amount which they claim the current industry does not have the capacity to include. There is of course the alternative of taking that amount of capacity away from the present licensed fishers and place with the First Nations. Both these scenarios have produced grave concerns about lose of livelihood for the present fishers, and have created a situation of mounting verbal threats of violence by some factions of commercial fishers. See Chris Morris, “Tensions mount over fisheries ruling” The Vancouver Sun (25 September 1999) A15 and “Keep Fishing, chiefs tell Atlantic Indians” The Vancouver Sun (30 September 1999) A13; and “N.B. fishermen threaten to cut lobster lines” CBC Newsworld Online (27 September 1999) at <http://newsworld.cbc.ca/cgi-bin/templates/view.cgi> and
eventually provide regulations that define a moderate livelihood with the possibility of further litigation down the road. Whatever the end results in Marshall, we can utilize at this time the two points we have discussed to augment our case for recognition of Aboriginal title to ocean spaces.

One further point from Marshall, is the impact it will have upon the present treaty process in British Columbia. It is certain that the government parties around the table will now ensure that all possible be done to have the agreements negotiated as tight as possible. There will be very precise and specific wording included that will attempt to ensure that no extrinsic evidence can be drawn in should there be a judicial review of the treaty.

6. Conclusions

Our review of the history of the discourse on Aboriginal title in Canada has provided some insight into the development and recognition of this concept, and the delineation of its principles as set out in Delgamuukw. By way of analogy, we have then taken these principles and successfully applied them in the context of a claim for Aboriginal title to ocean spaces. In so doing, we have noted that recognition of this concept is reasonable and possible.

The inclusion of Aboriginal perspectives, including oral histories of First Nations, as authoritative sources of information to be utilized and adopted by courts will reshape how

The occupation of ocean spaces is perceived and established. The uniqueness of the *sui generis* interest of Aboriginal title will provide a court with the basis upon which they may intrude into the federal government domain and determine Aboriginal title over areas of the sea.

The recent case of *Marshall* provides further solid grounds upon which to substantiate the concept with the principles of inclusion and balancing Aboriginal perspectives and the insistence of the honour and integrity of the Crown. Having reviewed the common law, we now move on to explore and include the Aboriginal perspectives on Aboriginal title to ocean spaces in order to provide a comprehensive examination of this topic.

**PART B. ABORIGINAL PERSPECTIVES**

1. Introduction

The Supreme Court of Canada in *Delgamuukw* reiterated the Court's description of Aboriginal title as a *sui generis* interest in lands and thus its distinction as a different interest than the usual proprietary interests found within the common law. The Court for the first time provides some development of the concept of Aboriginal title noting that to understand its characteristics, reference must be made to both the common law and Aboriginal perspectives.

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271 *Supra Delgamuukw* at note 35 at para. 112. The most recognized proprietary interests found in the common law are fee simple and leasehold. The Supreme Court of Canada had used *sui generis* to describe Aboriginal title previously in the cases of *Calder supra* at note 133; *Guerin supra* at note 135; and *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 [hereinafter *Canadian Pacific*]. There is further academic discussion about this concept in Kent McNeil, "The Meaning of Aboriginal Title" in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) [hereinafter McNeil]; and *supra* generally Borrows & Rotman at note 138.
perspectives. In utilizing the term “Aboriginal perspectives”, the Court is including a wider expanse of information than a mere review of Aboriginal legal systems. The term encompasses a wide range of reference sources resulting in a more holistic approach to examining the concept of title of First Nations’ territories. Such an approach includes the incorporation of Aboriginal principles, beliefs and ideologies.

This interdisciplinary approach determined by the Court follows the Aboriginal view that land is not an entity in and of itself; but rather is interconnected with other elements such as the earth, sea, sky and resources, and together these are regarded as the land. “Aboriginal perspectives” takes into consideration the reality of a number of different sources to be explored, just as there are many First Nations in British Columbia, all with their own individual systems of laws and ideologies.

This collective approach as advocated by the Supreme Court of Canada provides in essence a learning experience for those schooled in the common law to become acquainted with the Aboriginal ideologies and concepts of title. The Court does not provide direction as to the exact sources to be included in “Aboriginal perspectives”, yet anyone who is familiar with the

272 Ibid. Delgamuukw at para. 112.

273 John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill L. J. 631. In this article, Professor Borrows discusses the need for courts to “draw upon First Nations legal sources more often and more explicitly in order to assist them in deciding Aboriginal issues”. (at 634) Lawyers and judges schooled only in the common law will have trouble interpreting First Nations laws, and he notes there has been discussion about the creation of an institution where First Nations and non-First Nations people can go to learn about such laws and legal systems (at 657). He concludes the Aboriginal legal system is compatible with the Canadian and that the principles of both can co-exist without conflict.
Royal Commission on Aboriginal Peoples\textsuperscript{274} and First Nations communities would suggest that the history, culture and laws of the Nation involved are the sources to be reviewed and included in deliberations on Aboriginal title.

In light of this direction from the Supreme Court of Canada, it was apparent to me that to have as complete and effective a discussion of the concept of Aboriginal title to ocean spaces as possible, I must have reference to Aboriginal perspectives on this very concept. To accomplish this, I was invited to spend time in two First Nations within British Columbia. This next section is thus the culmination and result of discussions and observations while a visitor to the Haida Nation during January and February 1999, and to the Tsawwassen First Nation in March 1999.

It must be understood from the outset I am a non-Aboriginal Canadian, born, raised and schooled in Eastern Canada, possessing minimal education in First Nations issues prior to undertaking this research. My work experience has been as a practicing lawyer with no formal education in the areas of anthropology, ethnography or First Nations history. I am truly a novice carrying out historical and anthropological research, and therefore, my work must be viewed in that context. None the less, the information that I have collected and the experiences I have had are worthy of recording as they provide some insight into the views held by those I have spoken with.

\footnote{Supra RCAP Report at note 208.}
The comments set out within this section of Chapter Three are my sole interpretations of what I observed and the viewpoints and ideas that I believe I heard. It may well be that many of my statements and conclusions contain inaccuracies, and if that be the situation, I most sincerely apologize, especially to those who have been so kind in teaching and assisting me during this learning process. It has been a privilege for me to attend and be welcomed within these communities, and granted the opportunity to enrich my research with views and comments from these two Nations.

Some of those I met and interviewed were skeptical of my work based upon their prior experiences with researchers coming to their communities, placing it and its people under a virtual microscope, extracting data and information, writing about their experiences, and then never giving anything tangible back to the people and the communities.275 After hearing these comments, I could understand the concerns. My goal in undertaking this work is to provide useful and effective information and foundations for these two Nations and their Peoples, and in the wider scope First Nations and their counsels, to utilize in their quests for settlement of issues touching on title to ocean spaces and sea resources.

My comments are not to be viewed as any kind of definitive comment or statement on behalf of the Haida Nation or the Tsawwassen First Nation, nor are my statements provided as some commentary on who they are as a culture. My comments are purely reflections, as accurate

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275 Personal interview with Christopher Collison on 29 January 1999 at Massett [hereinafter C. Collison interview].
as possible, of a non-Aboriginal afforded the privileged opportunity of learning first hand what the sea and its resources mean to these First Nations. What I have recorded are mere glimpses into the world of these two Nations as no one can provide one true picture of places on this earth that are so rich, so diverse and so complex. It is only the Nations who can speak in that manner. This section then is a chronicle of my journey and passage through a series of recent times and places.

There will be those who view my field research as insignificant due to my lack of expertise; however, I do point out the fact the vast majority of legal academic works do not incorporate First Nations perspectives. Rather they deal purely with the common law. I am hopeful this work will lead other academic writers to follow the direction of the Supreme Court of Canada, and explore and experience Aboriginal perspectives when dealing with Aboriginal title issues in future. For by viewing both cultures' ideologies, the difference and similarities will be better understood, and the passage to satisfactory settlement of issues will be attained.

(a) Terminology

During the research and writing process, I spent some time contemplating what appeared to me as the inequality of terms utilized by the Court in Delgamuukw. The terms “common law” and “Aboriginal perspectives” at first blush, did not appear to be of the same weight. For the ordinary person, the common law denotes the foundation of our legal system in Canada based upon the long traditions of the English system, and thus the ultimate set of principles by which our lives are governed. The word “perspectives” on the other hand
suggests beliefs, ideals and principles held by a group of people as their cultural and social values, and as it is not codified, it is viewed as having less authority.

In reflecting on this issue and looking at other terms to use, I have determined using the term “perspectives” as the Court has in Delgamuukw, is not in any way a term of lesser authority and importance than “the common law”. The Court at paragraph 112 of the decision indicates that included in the term “Aboriginal perspectives” are Aboriginal laws and the principles of Aboriginal communities. By using this term, the Court has acknowledged the First Nations ideology of a holistic approach to their culture and concepts, especially in regards to land, and recognized it on the same plain as the common law. One could go so far to say that the Court assigned Aboriginal perspectives greater weight than the common law for perspectives encompasses the wide ranging foundations and roots of a culture as seen through its laws, organizations, social structure, histories, philosophies, and speech.

I have attempted throughout this chapter to chose my words carefully to ensure they do not suggest meanings other than those I mean to convey, or to diminish the value of the concepts imparted. It was pointed out to me by one member of a First Nation that words such as “stories, legends, oral histories, and beliefs” all can be interpreted to suggest views and events that may not be based in fact, and thus are not valuable sources of information. There is much truth in that statement, yet, with the decision in Delgamuukw recognizing oral histories as authoritative forms of evidence before a court, such comments are no longer valid and
must be dismissed.276

The original term “marine spaces” which I used was suggested as too narrow, and “ocean waters” more appropriate. I have contemplated this suggestion, and noted the present day usage in Australian legal and resources management circles of “ocean spaces” to describe areas of the sea claimed by Aborigines under the Native Title Act 1993 (Cth). 277 “Ocean spaces” describes areas of salt water where marine life is found whether that be in the large oceans of the world, or in the case of British Columbia along the shores of the Strait of Georgia, or the salt water reaches flowing inland for some miles such as Massett Inlet. In keeping with the world usage, I have chosen to utilize the term “ocean spaces”.

Before presenting the results of my field experiences, I must provide some discussion about two particular topics, one being that of oral histories and the other being that of the concept of title to land as held by the common law and the First Nations. These two topics are vital components of this discussion, and this need some explanation. These two topics are viewed differently within the First Nations culture and the common law, yet there are similarities and parallel points.

276 Supra Delgamuukw at note 35 at paras. 84 - 87.

277 Supra Native Title Act at note 227.
2. Two Distinct Ideologies

(a) Oral Traditions and Histories

First Nations cultures are based on the oral tradition whereby history, genealogies, stories and other information are handed down from one generation to another by expression within a story, a song, or some other like medium. Such sources provide information from the “inside” of a culture. These oral traditions play a key role in reconstructing the past.278

The courts in Canada have been reluctant to view oral traditions as reliable sources of information for they are categorized as hearsay evidence and are inadmissible under the common law which is accustomed to dealing with facts and figures, and written sources for providing tangible and valid evidence. As a result of the decision in Delgamuukw, this attitude has had to change as the Court specifically stated oral histories must be afforded recognition by the courts and accommodated within the evidentiary process.279

Chief Justice Lamer provides some comment on oral histories, in particular stating that for many First Nations the oral form of history is all they have.280 He quotes the RCAP when he notes oral histories contain a good deal of subjective experience and are to be viewed as “facts enmeshed in the stories of a lifetime” as well as rooted in specific locations.281

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279 *Supra Delgamuukw* at note 35 at paras. 80 - 87.

280 *Ibid.* at para. 84.

further notes oral histories represent a repository of historical knowledge and also express the values of the culture.282

Studies of oral traditions throughout the world have been carried out by anthropologists but only within the last fifty years.283 The work of Jan Vansina is some of the earliest in this field of study. Vansina has written several books on his field work in the Belgian colonial territories of the Congo, Rwanda and Burundi during the 1950 - 60s.284 He defines oral traditions as historical sources of a special nature because they are unwritten yet in a form suitable to oral transmission with their preservation dependent solely upon the powers of successive generations. His work concluded that the oral traditions he studied were trustworthy to rely upon as sources of history, for history is always an interpretation.285

In reading Vansina’s work, I was struck by the fact that the written histories we rely upon in the colonial world have their origins in the oral tradition, and are then set to paper. Most of us grow up hearing the stories about the lives of our parents, grandparents, and other generations before us from which emanates our family history and traditions. David Henige,

282 Ibid. at para. 86.

283 Supra Vansina 1 at note 278 at xiii.

284 Ibid. generally Vansina 1; and Jan Vansina, Oral Tradition (Chicago: Aldine Publishing Co., 1965) [hereinafter Vansina 2].

285 Ibid. Vansina 2 at 183. Every historian is obliged to interpret the sources they deal with whether they be written or oral, and by disclosing the sources relied upon, the reader is then informed as to why the historian has interpreted their sources in the way they have and the evaluation process they have undertaken (at 184 - 185). In the end, a historian arrives at some approximation of the historical truth (at 186). See also ibid. Vansina 1 at 196 - 197.
a student of Vansina's, devotes a whole chapter to discussion on the various cultures that have relied upon and made use of oral sources down through history including the Greeks, Romans, medieval western Europe (with the Celts, the Normans, the monks, and the Norse), and those in Oceania.286

In the foregoing paragraphs I have spoken of oral traditions and oral histories, and Vansina describes the difference between these two concepts. Oral histories are given by those who are alive when the event about which they speak happened. Thus suggesting the information provided is within the recent memory of the narrator. On the other hand, oral traditions happened before the lifetime of the informant.287 These differences noted by Vansina suggest the Supreme Court of Canada may not truly understand the subtlety of these two concepts when they speak of oral histories in Delgamuukw. The Court describes oral histories as a narrative of events that has happened in the past before the life of the narrator in most instances when in fact according to Vansina, this is oral tradition they are describing.

286 David Henige, Oral Historiography (London: Longman Group Ltd., 1982) [hereinafter Henige]. This book is a good resource guide for those undertaking actual field work with cultures who use oral traditions. Henige's comments brought to mind research I had done many years ago in respect of Homer's epic, the Odyssey, and the voyage carried out by Ernie Bradford, an English classical scholar, who studied and sailed the Mediterranean Sea in search of proof that the voyages of Ulysses were not fiction but based on true events and fact. His interest had been perked by an encounter he had as the bridge watch aboard an Allied Forces ship in the Gulf of Salerno during the Second World War. During his watch, he heard voices calling out, but the day long search of the waters found no one. In his book, Bradford concludes the voices he heard that night were those of the Sirens as heard by Ulysses and recorded by Homer so many centuries before. Bradford's investigation produced data about tides, currents and winds in the Gulf which would have created waves lapping upon rock formations creating sounds similar to the human voice. The research and data provided by Bradford concludes the voyages of Ulysses were based upon nautical facts, and could well have happened. See Ernie Bradford, Ulysses found (London: Hodder & Stoughton, 1963).

287 Supra Vansina 1 at 12. Henige also makes this distinction, see ibid. Henige at 2.
A study of oral tradition carried out with the thorough knowledge of the culture and language of the Peoples whose oral traditions are being studied Vansina suggests, is imperative to understanding the oral tradition. There has been much study of First Nations cultures and languages in British Columbia by the disciplines of anthropology and history but little by the members of the Bar, and very minimal if any, by the Bench. Vansina’s comments leave one with the nagging feeling that even though Lamer C.J., decrees oral traditions will be incorporated into the common law court process, they are few involved within the system who will be able to fully appreciate and understand the oral traditions presented.

Oral traditions are not new to the evidentiary process, for in my years of practice at the Bar, I have had occasion to be involved in Quieting of Titles actions which make extensive use of oral tradition albeit it through oral sworn evidence or affidavit. The situation is much the same in that there is no paper title, no specific written record of title to a specific piece of land, and thus the only way to prove title and have the court place the title into one’s name at the Land Title Office is to bring forth seniors of the community who are armed with the knowledge of the land, who lived there, how the land was used and occupied, who claimed it, and the other pertinent factors they recall. This evidence often includes information that springs from the seniors’ realm of knowledge and not from their first hand experiences. This information has been passed on to them through the common knowledge within their family or community.

288 Supra Vansina 2 at note 284 at 183; supra Vansina 1 at note 278 at 200.
The oral traditions of the First Nations provide sources of information and history which are different than those most often utilized by the common law, yet are known, and in some circumstances, used by the dominant culture.

The one other distinct ideology that bears some review is that of the concept of land and its title before we move on to the actual First Nations comments. Here again, we find differences and similarities.

(b) The Concept of Title to Land

My research focuses on finding within the common law, bases for recognition of the concept of Aboriginal title to ocean spaces. As there has been little written or discussed about this topic, I have referred extensively in my research to cases and academic works that involve title to areas of earth (*terra firma*) referred to most often as land, attempting to utilize and equate these theories and concepts to my quest. Now that I am ready to begin discussing Aboriginal perspectives on title and ocean spaces, it is appropriate there be some discussion about the way the legal system in Canada and First Nations structure their relationships with land.

In Canada, the legal system bases relationships to land upon concepts of rights and entitlements of property which include rights to use and enjoy lands by various entities (both owners and users) and various types of title (fee simple, lease, life estates). Land can also be subject to the competing demands of the community and thereby regulated and even
Courts have had difficulty in describing the First Nations’ principles of their interests in land within the Canadian legal conceptions of property and jurisdiction, and thus they have coined the term *sui generis* to denote the unique interest held by First Nations in lands.290 The Royal Commission on Aboriginal Peoples in its *RCAP Report* noted that land is absolutely fundamental to the identity of the First Nations. The First Nations concepts of territory, property and tenure, of resources management and ecological knowledge, differed greatly from the concepts held by other Canadians.291 The *RCAP Report* described the First Nations relationship with land as “both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies”.292

“Land” for First Nations is a broad term incorporating the whole biosphere which includes the earth, rivers, lakes, winter ice, shorelines, the marine environment and the air. It is the very basis of life, and touches every aspect of life by providing shelter, food, clothing, economic activities, social organization through recreational and ceremonial events, systems

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290 *Supra Delgamuukw* at note 35 at paras. 112-115. Lamer, C.J. notes in para. 112 this long standing dilemma. See also *supra* Slattery at note 155 at 3.4; *Guerin supra* at note 135 at 378; and *Canadian Pacific supra* at note 271 at 678.

291 *Supra RCAP Report* at note 208 at volume 2 at 425.

of governance and management, and conceptual and spiritual philosophies. In my research, I found that both the Haida and Tsawwassen First Nations incorporated this holistic vision of land including sea and skies, as a foundation of their culture. In their view when the tide goes down, the land continues underneath the waters, and the skies start at the surface of the earth and the sea.

As land is viewed as the all encompassing source and sustainer of life, First Nations look upon themselves as the stewards and caretakers of the earth. These added values incorporated into the concept of land move the principle of ownership as found in the common law to a higher ideal being one of responsibility and stewardship to ensure sustainability. The common law concepts of ownership and governance stress domination and control with no reference to guardianship or caretaking. In the First Nations communities, there is responsibility placed on each member to respect and benefit their environment, and to follow the laws of nature. The common law community has a set of regulated principles for owners to adhere to which do not have as one of their basis, responsibility.

The principles of stewardship and respect were related to me on numerous occasions during

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293 Ibid.

294 Personal interview with Roy Jones, Jr., at Skidegate on 6 February 1999 [hereinafter Jones, Jr. interview].

295 Supra ibid. RCAP Report at note 208 at 117.

296 Ibid. at 118.

297 Generally Ibid. at 118 -119.
my visits in both Haida Gwaii and Tsawwassen, and are illustrated in the following words:

These lands were given to us by the Creator; we own this land, not so much so that we can go and sell it, that we are responsible for the maintenance and upkeep of it, forever.  

... no actual ownership of places; stewardship of places; absolute respect of the land. It there not to be abused or taken for granted. Always looked upon as place of sustenance and protected in that way.

In the past, we always told land, resources and sea were gifts from the Creator for us to manage and take care of, be stewards of it, with no one really owning it.

There has been much written on First Nations’ systems of land tenure and governance which clearly shows their systems differ somewhat from region to region in keeping with the unique character of the First Nations peoples living there. First Nations relationships with lands merge concepts of ownership with those of stewardship. The authority to use the land goes hand in hand with the duties and responsibilities that are owed to the land. The Canadian common law does not capture these higher ideals and concepts within its land system, nor

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298 Supra C. Collison interview at note 275. Mr. Collison noted that Haida decision-making in respect of their territories encompasses the concerns and issues of a multitude of generations, including the present, those who have come before and those who are yet to be born. This process ensures respect of the ideals held by the Ancestors is not lost, and the effects on future generations are considered.

299 Personal interview with Vincent Collison, councillor, Old Massett Village Council, on 3 February 1999 at Old Massett.

300 Personal interview with Kim Baird, now the Chief Councillor of the Tsawwassen First Nation, at Tsawwassen Reserve on 26 February 1999 [hereinafter Chief Baird interview].

301 The coastal nations of British Columbia tended to be rank societies while the interior nations can be described as band egalitarian societies. The hierarchies of the ranking systems also vary widely. For discussion on these points see Greg Poelzer, “Land and Resource Tenure: First Nations Traditional Territories and Self-Governance” in Roslyn Kunin, ed., Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C. (Vancouver: The Laurier Institituion, 1998) at 89 and Paul Tennant, Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989 (Vancouver: UBC Press, 1990).
are different systems for different areas permitted in keeping with various peoples’ needs.\footnote{302} The Canadian system is generalized and centralized caught up in the concept of who owns what. The First Nations’ concept of property reflects a mixture of principles of ownership, responsibility, stewardship and governance, \footnote{303} and thus goes beyond the narrow common law principle. It is local and intensively specific in nature, and deals with resources allocation rather than ownership concepts. \footnote{304}

It is appropriate to include at this juncture a sampling of the comments and views about lands and territories as voiced by members of the two Nations I visited. These comments will illustrate the uniqueness of each Nation in character, values and location, yet will also illuminate the similarity of their prime values and principles in regards to lands and their responsibility thereto.

\textit{(i) Haida Voices on Interests in Lands and Territories}

The Haida Proclamation found at the beginning of the \textit{Constitution of the Haida Nation} reaffirms in writing the connection and responsibility of the Haida to their lands:

\begin{quote}
The Haida Nation is the rightful heir to Haida Gwaii.
Our culture, our heritage is the child of respect and intimacy with the land and sea.
Like the forests the roots of our people are intertwined such that the greatest troubles cannot overcome us.
We owe our existence to Haida Gwaii.
The living generation accepts the responsibility to insure that our heritage is passed on to
\end{quote}

\footnote{302 \textit{Supra Treaty Making} at note 289 at 9.}
\footnote{303 \textit{Ibid.} at 14.}
\footnote{304 \textit{Supra Harris} at note 39 at 220.}
One of the comments related to me that best sums up the Haida relationship with land is from Lucille Bell, a young member of Old Massett Village, when she stated:

[The] treaty process is not about what is to be owned but what are we responsible for. What are we going to care for. That is my idea of treaty negotiations, not how am I going to benefit but how can I offer my protection to what is out there.\(^{306}\)

The foundation principle that has permeated this connection to flourish throughout the centuries is one not of “ownership” as the common law world knows it; rather it is a holistic vision where land includes water, seas, air, and resources, and incorporates the principles of ownership, control and jurisdiction based upon protection and sustainability of the environment and resources rather than only notions of exclusivity. Stewardship and responsibility for conservation and sustainability of the environment and the resources are the hallmarks of the Haida concept of title.

Chief Kimball Davidson of Old Massett Village Council related to me his understanding of the Haida concept of “ownership”. The Haida are part of the land and the total environment. They do not own their lands as it would place them above the other creatures on the earth.

\(^{305}\) Constitution of the Haida Nation, January 1987 [hereinafter Constitution of the Haida Nation]. The Preamble has an additional line included at the end: “The living generation accepts the responsibility to insure that our heritage is passed on to the following generations” as found at “Haida Spirits of the Sea” a website created by the Haida Nation in conjunction with the Government of Canada celebrating the International Decade of the World’s Indigenous People for the Canadian Pavilion at Expo ’98 in Lisbon, Portugal, and found on 11 April 1999 at <www.chin.gc.ca/haida> [hereinafter “Haida Spirits”].

\(^{306}\) Personal interview with Lucille Bell, Heritage Resource Officer, Old Massett Village Council, at Old Massett, Haida Gwaii, on 1 February 1999 [hereinafter Bell interview].
Ownership of land is only an issue between humans and is used to denote whose territory is whose. The Haida belong to the lands and seas of Haida Gwaii as noted in their Constitution, and in turn have a responsibility to only take what is needed and not to abuse resources.

Responsible for the maintenance and upkeep of the land rather than ownership of it was the common message I heard time and time again from those Haida I spoke with. “Our relationship to the land is the highest principle; this is our culture,” was another common theme. In the Haida culture when one is responsible for or have control over something, it is akin to ownership and is not a task to be taken lightly. These profound statements signify a culture’s ideals of responsibility for the environment rather than owning a possession exclusively.

Today, there are grave concerns about stewardship among the Haida in regards to the preservation of the eco-systems situate in and around Haida Gwaii not only for themselves, but for the non-Aboriginal people who live on the islands. There is much talk of the

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307 Personal interview with Chief Kimball Davidson, Chief Councillor, Old Massett Village Council, on 3 February 1999 at Old Massett [hereinafter referred to as Chief Davidson interview].

308 Personal interview with Guujaaw at Skidegate on 4 February 1999 and by telephone on 4 October 1999 [hereinafter Guujaaw interview]. Guujaaw became the President of the Council of the Haida Nation in the latter half of 1999.

309 Personal interview with Russ Jones, Technical Officer, Haida Fisheries Program, at Vancouver on 3 March 1999 [hereinafter Russ Jones interview].

310 Personal interview with Robert DuDoward at Skidegate on 4 February 1999 [hereinafter DuDoward interview]. Mr. DuDoward notes as his final comment that it is his hope that “the Haida can
damage to and decline in the eco-systems of Haida Gwaii and the need for new policies, guidelines and direction to ensure sustainability. Chief Davidson sums up the concerns in saying “man has certainly shown there is nothing in the world that is inexhaustible”. 311 With the uniqueness of their location in the Pacific Ocean, and as a people, many Haida suggest their Nation could act as an example to all the world in demonstrating how to live in harmony within an eco-system without dominating same, and thus ensure sustainability. 312 The Haida have been practicing this for thousands of years, and realize that if resources are continually gathered and lands continually used without being looked after, all these will be lost forever. 313

The Haida world is a holistic world without compartments. It was described for me as “the sea bottom, to what swims through the sea waters, to the intertidal beach, and on to the grasses at the top of the hill and over the other side”. 314 The Haida have from time before memory lived by the sea. They have never been depicted as forest dwellers. Thus, their relationship with ocean spaces and the sea resources found therein dates from antiquity and is

shoulder the responsibility to maintain the sustenance of life that comes from the oceans and terrestrial systems, and try to deal with the corporations or whoever is dumping toxins and waste into our oceans and depleting the aquatic eco-systems beyond any hope of repair so we can preserve a way of life for all humanity”.

311 Supra Chief Davidson interview at note 307.

312 Ibid.

313 Personal interview with Barbara Wilson, Cultural Program Manager, Gwaii Haanas National Park Reserve, at Skidegate on 4 February 1999 [hereinafter Wilson interview].

314 Ibid.
an inherent and important foundation of their culture. As I present the information I have
gathered, it will be apparent that “Haida Gwaii is one of the wonders of the world”. 315

The Tsawwassen First Nation also possesses philosophies about responsibility and control of
territories which I will now explore.

(ii) Voices of the Tsawwassen First Nation on Interests in Lands and Territories

This we know: the earth does not belong to man;
man belongs to the earth ...
Man did not weave the web of life; he is merely a strand in it.
Whatever he does to the web, he does to himself. 316

This quotation attributed to Chief Seattle over one hundred years ago still has great relevancy
today. It illustrates the Coast Salish ideology in the “essential oneness of man with nature”,
and that all living creatures shared in a world of mutual harmony and understanding. Coast
Salish culture and values always demonstrated the proper respect for the habits and dwelling
places of all species of life. 317 Member groups of the Coast Salish Nation, including the

315 Personal interview with Harold Yeltatzie, a councillor representing Old Massett on the Council of
the Haida Nation, on 29 January 1999 at Massett [hereinafter Yeltatzie interview]. Mr. Yeltatzie also noted
his concerns to me about the lack of stewardship saying: “We [the Haida] are responsible for what happening
today, and are very concerned about what will happen to our children down the road and our culture.”

316 Chief Seattle, Chief of Suquamish and allied tribes on the Northwest Coast of the United States,
being part of the Coast Salish Nation, 1790 - 1866, in a speech to the President of the United States of
America in 1854 during the negotiations of the Indian Treaties headed by Governor Isaac Stevens. The
Treaties negotiated in the Pacific Northwest became known as the Stevens Treaties. Full texts are set out in
114 starting at 37 [hereinafter Parry]. This statement illustrates the belief of First Nations in the concept of
stewardship long before it was fashionable to espouse such ideals in the non-Aboriginal community.

317 Reg Ashwell, Coast Salish: Their Art, Culture and Legends (Surrey, B.C.: Hancock House
Tsawwassen First Nation, incorporated these same values of harmony and co-existence into their philosophies and cultures.

Chief Baird of the Tsawwassen First Nation, explained "territory" for her people includes the elements of water, air, land and resources, while the term "land" only denotes the actual earth. Thus, as with the Haida, the Tsawwassen philosophies espouse a holistic approach to their territories and land.

Chief Baird pointed out that in contemporary times holding to traditional philosophies of stewardship and responsibility over their traditional territories does not provide First Nations with the absolute control of these areas. The Canadian legal system which is a foreign system of laws and principles to First Nations, is where ultimately the questions of responsibility, authority, control and ownership are decided. Therefore, First Nations must employ the principles and concepts of this foreign legal system to obtain the management of their territories and resources, and the protection afforded by such system in order to ensure their sustainability for the future. If ownership is the concept and right that affords the Tsawwassen people with the ultimate decision making powers within their territory, then that is what they would be seeking.318

The Tsawwassen’s ultimate goal is the sustainability of their traditional territories and resources by combining the cultural value of responsibility with the contemporary issue of

318 Supra Chief Baird interview at note 300.
how that can be achieved. This goal incorporates the First Nation ideologies with the foreign
system’s concept of ownership. Councillor Williams believes that this can be achieved only if
there is equality among all the parties involved; for if one is the dictator, it is to the detriment
of all parties. An important first step to achieving equality among the parties, is the education
of the public about the First Nations and their history and struggles over the last century.319

The Tsawwassen are also concerned about the imbalances noted in their environment
especially the decline in salmon stocks, the increase in seals and sea lions, and pollution. The
public regulation of Nature has not been successful, and to restore the balance the world
needs to return to the First Nations’ ways of stewardship and responsibility.320

These words and philosophies of both Nations are high ideals and from my experiences, are
not empty words. There are actual activities that demonstrate these philosophies in action,
and the following section, will provide a few examples of the Haida’s historical philosophy of
stewardship in action.

(iii) The Haida Practice of Stewardship

The Haida appreciation of the need for stewardship is a foundation principle of its culture as
evidenced in testimony given by Henry Geddes, an elder of Old Massett, at the trial in 1988

319 Personal interview with Russell Williams, Councillor and senior member of the Tsawwassen
First Nations at Tsawwassen Reserve on 5 March and 24 September 1999 [hereinafter Williams interview].

320 Ibid. He is not sure that Department of Fisheries and Oceans, Canada [hereinafter DFO] even
takes this information from the TFN into consideration in its management of the salmon stocks, or just shrugs
it off as worthless information from a group of fishermen uneducated in science.
of *R. v. Davis*, 321 where he talked of the Haida traditions of fishing for salmon in the many rivers off Massett Inlet in Graham Island. 322 This knowledge was derived from his own first hand experiences and the information handed down to him by his ancestors, and comprised over one hundred years of fishing information.

When asked at page 104 about the possibility that the Haida could fish out the rivers if they were permitted to fish whenever and wherever they wanted rather than be regulated by a fish license, he replied “no”, and went on to explain why certain rivers do not produce salmon, citing destruction of the natural habitat like the putting in of roads, and logging operations as the major causes. 323

Margaret Edgars, a Haida resident of Old Massett, related to me of learning the ways of resources conservation through observing and being with her elders. When they were on the salmon rivers, they never took any more fish than what they could handle at that time for smoking, drying, and other preservation methods. Once those fish were preserved, then they would go fishing again. 324

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321 *R. v. Davis* [1988] 3 C.N.L.R. 116 (B.C. Prov. Ct). Geddes’ evidence starts at page 99 of the trial transcript which is found in the trial proceedings recorded on 7 March 1988 under Masset 1748 B.C. Provincial Court; further references herein will be to the trial transcript [hereinafter *Davis*].


324 Personal interview with Margaret Edgars at Old Massett on 27 January 1999 [hereinafter Edgars interview].
Chief Reynold Russ, the Hereditary Chief of Old Massett, notes no fish were ever thrown away. He stated there was selective fishing in that often halibut were released if they were too small, or if too big as they could not be handled easily for food preservation purposes. Black cod were never taken when they were small.  

The Haida believe that respect is to be shown to all living things as there is connection between this world and the other world, and the links must not be violated. These Haida principles of respect include not kicking or throwing around captured fish, not teasing any fish except halibut (so that it would bite the hook), and not making fun of or playing with your food.  

Mr. Geddes also told about how his people managed and controlled how much salmon was taken each year. He well remembered the elders sitting around the banks of the rivers, telling the younger people when to start fishing and when they had taken enough. Harold Yeltazie noted the Haida Nation of today carries on these same conservation methods by

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325 Supra Chief Russ interview at note 66. Chief Russ also reiterated Ms. Edgars' comments about only taking enough fish at any one time that they could handle in a day.

326 Personal interview with Ron Brown, Jr., President of the Council of the Haida Nation, on 26 January 1999 at Old Massett [hereinafter Brown interview]. As of the December 1999 band elections, Mr. Brown has replaced Chief Kimball Davidson as the Chief Councillor of the Old Massett Village Council.

327 Personal interview with Charlie Bellis, a senior of the Old Massett Village, at Old Massett on 3 February 1999 [hereinafter Bellis interview #2]. Halibut was one food source available all year round. Also personal interview with Christian White, a councillor representing Old Massett Village on the Council of the Haida Nation, at Old Massett on 30 January and by telephone on 4, 5 and 8 October 1999 [hereinafter White interview].

328 Supra Davis at note 321 at 106 - 107.
fishing different rivers so as not to fish out the stocks that are there.\textsuperscript{329} Christian White notes his people during their seasonal gathering activities do not gather or harvest one species for too long a time to ensure there is no decline in numbers due to over gathering. When digging clams on North Beach, they do so for about two to three days a month during the winter season, and thus do not harm the clams beds.\textsuperscript{330}

Mr. Geddes went on to explain that this grave concern for food was borne out of the experience in the "olden days" when many people starved due to a poor run of fish and bad weather when they attempted to gather and harvest food. He noted they did not waste food, and either had to use it or give it \textsuperscript{331}

Haida history notes the settlement of new villages on the islands, and in the southern portion of Alaska due to the population became so large it was burdensome on the food resources of the local area. In order to ensure people had enough food resources and to sustain those sources, the Haida sought out other areas to settle which took them across the Dixon Entrance in the eighteenth century to the southeastern coast of Alaska and the islands of Long, Sukkwan, Dall and Prince of Wales in the Alexander Archipelago.\textsuperscript{332}

\textsuperscript{329} \textit{Supra} Yeltatzie at note 315.

\textsuperscript{330} \textit{Supra} White interview at note 327.

\textsuperscript{331} \textit{Supra} Davis at note 321 at 107.

\textsuperscript{332} Margaret B. Blackman, "Haida: Traditional Culture" in Wayne Suttles, ed., \textit{Northwest Coast}, vol. 7 of \textit{Handbook of North American Indians} (Washington, D.C.: Smithsonian Institution, 1990) at 240 [hereinafter Blackman]. The article provides information on all the Haida including the Kaigani. "Kaigani" comes from the name of a summer camp in Alaska, and the majority of these Haida came from Langara
These comments made through the voices of members of the Haida Nation give some indication of the importance of stewardship and conservation as practiced by their culture throughout time. Many of these comments come to us through the oral traditions of the Haida. It appears that without these principles and their practice, the Haida might well have disappeared as a culture.

(iv) Conclusions

Through the information presented, we have familiarized ourselves with the two ideologies practiced by the common law and the First Nations in regards to land, territories and their ownership and control. The First Nations' principles of responsibility for territories and in turn stewardship of such areas and their resources, sets forth a higher ideal than the common law concept of ownership.

The First Nations types of land tenure systems do not fit comfortably within Canadian property law which emphasizes individual entitlements of exclusive use and enjoyment of land
as property. Property law is understood by reference to the rights that flow from the specific title to the land. First Nations on the other hand define their relationship to their territories in terms of the responsibilities that flow from that relationship and is best characterized by the concept of stewardship.333

The Canadian land title system does not include such obligations; however, environmental activism continues to grow with industry and government incorporating many of the ideals of stewardship and sustainability of resources with their policies. These concepts are not as yet espoused within the common law concept of property and thus owners of land in Canada have only minimal legal obligations to conserve lands and resources for future generations while First Nations system carry on such ideals as part of everyday life.

Being aware of these two distinct ideologies in regards to land and its stewardship, will now aid in the exploration of the history and culture, and particularly the relationships with ocean spaces and ocean resources, of the two First Nations with whom I visited. One further point to keep in mind through this discussion is that acknowledgment of the dominant society of the connection and link of coastal First Nations of British Columbia with the ocean.

The historical record shows that the coastal First Nations were provided with reservations of smaller land acreage than most other First Nations as the government officials setting up such

reservations recognized these First Nations were fishermen and not farmers. As the ocean and its resources provided food and a livelihood, there was no need for much acreage per family for cultivation purposes. Most usually a postage stamp-sized land base averaging about 5 hectares was granted per Aboriginal along the west coast. These land areas though became further whittled down over the years by further government policy.\(^{334}\)

This is a crucial factor in the examination of Aboriginal title to ocean spaces, and raises the doctrine of the honour of the Crown as denoted in *Marshall* which has previously been discussed.\(^{335}\) The Crown's consideration of such extrinsic factors in determining acreage for reservations, and the documentation of such, is on par with the negotiation records being included to aid the interpretation of the Treaties in *Marshall*.

The honour and integrity of the Crown would be jeopardized if the coastal First Nations of British Columbia are not recognized as having more than mere fishing interests as determined

\(^{334}\) In comparison, First Nations in the interior of the Canadian west were granted an average size of land between 65 to 260 hectares per Indian family. The Royal Commission on Indian Affairs for the Province of British Columbia, more commonly referred to as the McKeen-McBrine Commission, 1913 - 1916, notes within its records that fishing privileges were a matter of high importance in respect of the size of reservations; see *supra* Newell at note 39 at 56. This text provides a general overview of the history of First Nations in the fishing industry of the Pacific coast. The Indian Reserve Commission during the mid-1800s allocated reservation lands in British Columbia based on the premise access to fishing would provide infinite food sources for the Native population. The Natives were assured by the Commission that their fisheries would be undisturbed and based upon that promise, the Natives took the reservations that were allotted. See *supra* Harris at note 39 at 41. It is interesting to note that in 1878 when the Ministry of Marine and Fisheries prohibited the use of weirs for fishing, the Ministry of Indian Affairs protested this regulation as it would diminish the ability of the Natives to have access to their fisheries. Indian Affairs contended that the Natives had a right to use weirs for fishing, and it was a matter of necessity for them. This developed into some inter-departmental bickering, but in the end the regulation stood. See Harris *supra* at note 39 at 76 - 77.

\(^{335}\) See Part A. of this Chapter.
in *Sparrow* and *Marshall*. The ability of these coastal First Nations to survive and flourish was limited by the Crown in the 1800s when it set up the reservations. The Crown has, as the First Nations comments herein will attest, systematically continued to limit and displace these First Nations from their connections with the ocean and its resources. For the Crown to now say these First Nations have no further rights to the ocean and its resources then what have been recognized to date would condone the Crown breaching the very fiduciary duty it owes as the entity responsible for the well-being of First Nations under the *Constitution*. I will touch upon this point again in my concluding remarks at the end of this chapter. Armed with this information regarding oral tradition, the ideologies of title and the basis for creation of the coastal reservations, let us now explore the perspectives of two coastal First Nations of British Columbia.

3. The Haida Nation: An Ocean Culture

(a) Introduction

This section on my experiences with the Haida Nation contains more depth of information than the following section on the Tsawwassen First Nation, as I spent three weeks visiting Haida Gwaii. The uniqueness of this Nation comes from a number of factors such as its distinctive location in the northern waters of the Pacific, its large population, the rebirth of its culture in the last quarter century, and its visibility as a leader in First Nations' issues.

I was most struck by the fact the inter-generations of Haida that I met were well versed in their history, including their cultural stories and recent twentieth century history. Many had
traveled extensively in the world, some had been intensely involved in Indigenous Peoples' issues on the world stage while others had chosen to remain on these outer reaches of British Columbia. All Haida that I met were very much aware of who they were and are as a People.

Looking at a map, it is evident that the lands of Haida Gwaii are intertwined with the ocean. However, until one travels there and views the sea kissed coasts of these islands on the edge of the Northwest coast, sits down with members of the Haida communities and talks about their culture, aspirations and history, one has no feeling for the magnitude of their connection with the ocean. To have some understanding and empathy for the Haida culture, we must start at the beginning - the geographic location and the early history.

(b) The Geographic and Early Historic Perspectives

There is a pole that holds the centre of this world - it's a cedar tree in the middle of Haida Gwaii. 336

Haida Gwaii is an archipelago commonly referred to as the Queen Charlotte Islands located on the far reaches of the north west coast of British Columbia about one hundred kilometers from the mainland and seventy kilometers from the southern promontory of Alaska. These islands lie on the very edge of Canada's Pacific continental shelf. The climate of this area coupled with the sea provides Haida Gwaii with a unique environment abundant in natural resources from the sea and the forest. The above quotation demonstrates that the territories of Haida Gwaii are the central core of the Haida culture. The words Haida Gwaii mean

“people and country” respectively.

Haida Gwaii is often referred to as an archipelago-continent which runs a distance of 280 kilometers north to south, and has remained largely out of mind because of its distance from the mainland. The archipelago has two main islands being Graham to the north and Moresby to the south, with approximately 150 smaller islands, comprising an area of some 3750 square miles.

“Xaaydlaa Gwaayaay” was the early name of Haida Gwaii meaning “islands coming out of concealment”. Creation of these islands is said to have been by seismic activity when the Farallon Plate slid under the North American continent and thus forced up the continental plate producing many geographic areas including these islands, approximately 120 million years ago.

Geological studies show that about 9000 years ago, sea levels were at least twenty to thirty-three meters lower than today and there existed a tundra-like grassy plain with an easily traversable water area of about five kilometers between the mainland and the islands. This

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337 Ibid. at 199. See also Ian Gill. Haida Gwaii: Journeys Through the Queen Charlotte Islands (Vancouver: Raincoast Books, 1997) at 9 [hereinafter Gill].

338 Ibid. Gill at 3.

339 Information taken from supra “Haida Spirits” at note 305.

340 Ibid.

341 Supra Gill at note 337 at 6.
topography would have easily permitted settlement.\(^{342}\) Eventually the melting waters of the Ice Age rose filling this plain with water which is called today Hecate Strait.\(^{343}\) Haida Gwaii is home to many unique species of animals and plants found only on the islands suggesting that during the advance of the last Ice Age, large parts of the islands were ice free.\(^{344}\) These rarities have earned Haida Gwaii the name “Canada’s Galapagos”\(^{345}\).

\(^{342}\) Knut R. Fladmark, “The Early Prehistory of the Queen Charlotte Islands” (1979) 32:2 Archaeology 31 at 41 - 44 [hereinafter Fladmark 1]. There are a number of archaeological sites that have been excavated and continue to be investigated today such as the Lawn Point site on the central eastern coast of Graham Island, excavated in 1970 which contained a rich assemblage of stone tools and small non-shell-midden sites (refuse heap). This items here were estimated to be some 2000 to 7500 years old.

Fladmark opinions that the Moresby people of this era were transitory exploiters of the extensive beaches and intertidal zones of the eastern and northern coats of Haida Gwaii as the beaches would have provided a rich habitat for mollusks and other littoral species as well as birds and land mammals who would have been attracted to the foreshore for food.

There are also sites at Skoglund Landing along Massett Inlet in the north of Graham Island, Richardson Ranch (near Tlêll), and Kasta just south of Sandspit on Moresby Island. Many of these have shell-middens along with other signs of human occupation such as majorat structural remains, and fishhooks and barbed harpoons.

In Knut Fladmark, “Possible Early Human Occupation of the Queen Charlotte Islands, British Columbia” (1990) 14 Canadian Journal of Archaeology 183 at 186 - 187 [hereinafter Fladmark 2], he also mentions excavations at Bluejackets near Skoglund Landing, and the fact that the submerged beach lines of the islands found in Hecate Strait are well defined about 42 meters below the modern sea-level. This suggests that the actual shores of the islands could have been as close as 100 meters or less to the mainland; see also Moira Johnston, “Canada’s Queen Charlotte Islands: Homeland of the Haida” (1987) 172:1 National Geographic 102 at 115 [hereinafter Johnston] where it is noted that Dr. Rolf Mathewes of Simon Fraser University states that the pollens, seeds and plant remains he has collected offers proof that the fir trees were alive before and after the last ice age being some 24,000 years ago, and that is it possible that human life could have been present on Haida Gwaii then as well.

\(^{343}\) Permanent exhibit at Haida Gwaii Museum at Qay’llnagaay, January 1999. There have been recent discoveries of artifacts from the sea bed of Hecate Strait that have been linked to the Haida people dating back some 10,000 years before the waters rose in this area. See H. Josenhans, D. Fedje, R. Pienitz & J. Southon, "Early Humans & Rapid Changing Sea Levels in the Queen Charlotte Islands - Hecate Strait, British Columbia, Canada" (1997) 277:5322 Science 71; Daryl Fedje, Joanne McSporran & Andrew Mason, "Early Holocene Archaeology & Paleoecology at the Arrow Creek Sites in Gwaii Haanas" (1996) 33:1 Arctic Anthropology 116; and H. W. Josenhans, D. W. Fedje, K. W. Conway & J. V. Barrie, "Post Glacial Sea Levels on the Western Canadian Continental Shelf: Evidence for Rapid Change, Extensive Subaerial Exposure, & Early Human Habitation" (1995) 125:1-2 Marine Geology 73.

\(^{344}\) Supra Fladmark 1 at note 342 at 40; and Fladmark 2 at note 342 at 185.

\(^{345}\) Supra Gill at note 337 at 9.
Archaeology strongly suggests that the Haida have for at least nine millennia been thriving maritime hunters and fishermen\(^{346}\), as there are more frequent and visible traces of potentially early human occupations found within these islands being of a relatively small land area, than most other areas of the Northwest coast. Artifacts and sites dating from 8000 to 5500 years ago have been easily found.\(^{347}\) Haida Gwaii has more than 5000 kilometers of coastal shoreline,\(^{348}\) with some 400 Haida cultural sites, including the UNESCO World Heritage Cultural Site at Ninstints on Anthony Island in the extreme south.\(^{349}\)

The Haida genealogies and histories of the origins of their homeland begin with “Raven and a boundless expanse of sea and sky. Raven set Seaward country [the mainland] over there, the islands, here.”\(^{350}\) The original Haida settlements each had their own version of the creation story. One such story is that of Raven and the clamshell dwellers at Rose Spit (known as Naikun in Haida) as recounted at the beginning of this work. Even though there are differences in these stories, the one notable similarity is the connection to the ocean and its resources.\(^{351}\)

\(^{346}\) *Supra* Fladmark 1 at note 342 at 45.

\(^{347}\) *Supra* Fladmark 2 at note 342 at 193 - 194 where he further notes that there has been extensive archaeological research done on the mainland coast adjacent to the islands. In sum, he suggests that Haida Gwaii would have been inhabited during the last major glacial episode.

\(^{348}\) *Supra* “Haida Spirits” at note 305.

\(^{349}\) *Supra* Gill at note 337 at 2.

\(^{350}\) *Supra* Coull at note 336 at 199

\(^{351}\) For other stories see *supra* Coull at note 336 at 199, and *supra* Gill at note 337 at 57 - 59.
The Haida lands and territories are found fully described in the *Constitution of the Haida Nation* as follows:

The Territories of the Haida Nation include the entire Haida Gwaii, the surrounding waters, the air space and the Kaigainaa Archipelago. The waters include the entire Dixon Entrance, half of the Hecate Straits, halfway to Vancouver Island and Westward into the abyssal ocean depths.\(^{352}\)

The first contact between the Haida and the Europeans is recounted in the diary of the Spanish explorer, Juan Pérez, who on 17 July 1774 after arriving by ship near the Haida village of Kiusta, near Langara Island, was greeted by many large wooden canoes carrying Haida villagers.\(^{353}\) The English fur trader, Captain George Dixon, in 1787, gave the islands their English name derived from his vessel, “Queen Charlotte” who was named in honour of the Queen of England.\(^{354}\)

At the time of European contact in the mid-1700s, Haida settlements numbered at least fifty thriving villages.\(^{355}\) By the next century, their communities ranged from the south of Alaska to Ninstints on Anthony Island in the extreme south, with a total population of more than

\(^{352}\) *Supra Constitution of the Haida Nation* at note 305, Article 1, S1. This is the same description utilized in the Haida Statement *supra* at note 33. The abyssal depths would commence approximately thirty to sixty miles off the western shores.

\(^{353}\) *Supra* Blackman at note 332 at 255; and Douglas Cole and Bradley Lockner, Eds. *To The Charlottes: George Dawson’s 1878 Survey of the Queen Charlotte Islands* (Vancouver: UBC Press, 1993) at 4 [hereinafter *Dawson’s Survey*]; and *supra* Fladmark 1 at note 342 at 39.

\(^{354}\) *Ibid. Dawson’s Survey*; and *supra* Gill at note 337 at 3 - 4 where he provides the further explanation that the ship was named for the Queen.

\(^{355}\) *Supra “Haida Spirits”* at note 305. *Supra Dawson’s Survey* at note 353 at 154 - 162 describes the Haida villages on Haida Gwaii that Dawson visited including Kung, Yan, Massett, Tow Hill, Tl-ell, Skidegate, Cumshewa, Skedans, Tanoo, Ninstints which are the main villages still identified today by hereditary chiefs who reside in either Old Massett or Skidegate.
10,000.\footnote{356} Villages were always on the shorelines for purposes of direct access to food from the beach resources to the fish, and safe harbours for their canoes. This expansive Nation was almost decimated with the influx of the colonist traders and settlers, and the spread of disease especially smallpox. During the period 1790 to 1860, the population was reduced by about 95% to a mere few hundred.\footnote{357} Those who came together at one of the two Indian villages (now reserves) situate on Graham Island being Skidegate (known as \textit{iga gilda} in Haida\footnote{358} ) in the south, and Old Massett (known as \textit{Uttewas}\footnote{359} ) in the north. The remaining population of the six original villages in Alaska made their new village at Hydaburg in 1911.\footnote{360}

The Haida of today have a long history of some 9000 years, as residents of this archipelago-continent known as Haida Gwaii, and by its very geographic location, it is evident the sea has been an integral component in the development of the Haida culture and people. The expanse of sea between this archipelago and the mainland has acted as an isolator of sorts keeping outside influences at bay, yet the impact of foreign forces have left their mark on

\begin{footnotes}

\item \footcite{Supra "Haida Spirits"} at note 305. Some other articles suggest that the percentage of population decline was only 70\%, see \footcite{supra Johnston} at note 342 at 119.

\item \footcite{Supra Blackman} at note 332 at 259.

\item \footcite{Supra Gill} at note 337 at 77.

\item \footcite{Supra Coull} at note 336 at 200. Haida settlements in the southern portions of the Prince of Wales Archipelago in Alaska are noted by George Dawson in his 1878 survey, see \footcite{supra Dawson's Survey} at note 353 at 98.
\end{footnotes}
Haida Gwaii.

Now that we have some affinity for Haida Gwaii, its geographical origins and early history, let us review the society structure and culture, to gain further understanding of the Haida Nation.

(c) The Societal and Cultural Perspectives

In this section, I will explore the Haida societal structure and rights including property rights to provide some understanding of how property was held, by whom and how it descended to others. This will provide further information about the connection with the ocean, and a perspective on jurisdiction over ocean spaces.

Haida society has since time before memory been divided into two moieties or clans being the Raven and the Eagle, which in turn are each composed of a number of lineages. The lineages were named most often in reference to their places of origins or possession of a special property or quality. Thus Haida villages can be said to be a collection of corporate

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361 Many of the Haida people I interviewed provided me with their clan affiliation. Charlie Bellis, for example, is of the Raven Clan with a family tree which includes the double finned killer whale, halibut and bear symbols. Personal interview with Charlie Bellis at Old Massett on 27 January 1999 [hereinafter Bellis interview #1]. Mr. Bellis informed me that in the Haida culture all comes from the mother, and "you are what your mother is." The Haida view all living things as being related. Mr. Bellis noted that all living things have the same DNA, a fact that has been examined and proven by Dr. David Suzuki in a documentary entitled "Secrets of Life" produced for PBS. In the 1800s there were numerous totem poles to be found in the Haida villages. The symbols on these depicted the family tree of the household in front of which they stood. Most totems were destroyed at the insistence of the missionaries in the last century, or taken from the Islands for museums and private collections. Recently though, there have been a number of new ones carved and erected in the villages on Haida Gwaii.

362 Supra Blackman at note 332 at 248 - 249.
A group of related families that descend from a common ancestor form a lineage and share crests, names and songs. There are about forty lineages represented on Haida Gwaii. Haida culture required that one must marry the opposite moiety. Lineages controlled both real and incorporeal property which included salmon spawning grounds, lakes, trapping sites, patches of edible plants, stands of trees, bird rockeries, stretches of coastline, halibut holes at sea, and house sites in winter villages.

Property, titles, names, crests, masks, performances and songs are among the Haidas’ incorporeal property and were of prime importance to chiefly families. All properties were inheritable based upon a matrilineal system of descent, being passed from one generation to the next through the mother’s side.

The permanent Haida villages were organized into chiefdoms where the political authority was vested in a recognized head chief. In Dawson’s time of 1878, the chiefs possessed

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363 Supra Knight at note 356 at 32.
364 Supra Blackman at note 332 at 249.
365 Ibid.
366 Supra Blackman at note 332 at 249.
367 Supra Knight at note 356 at 33 - 36.
368 Supra Blackman at note 332 at 252.
considerable influence yet Dawson noted it was starting to decline. The chief was the head of or president of various family lineages, and his decisions needed the agreement of other leaders to have an effect. The chief had no real power to compel others to work.369

The chieftaincy was hereditary and would devolve upon the death of the chief to his next elder brother or his nephew should he have no brothers.370 Success in the acquisition of wealth was an important chiefly criterion. The chiefly families owned the primary fish and other resources sites.

The majority of the population were of other classes who held markedly different rights. The size and concentration of settlements was greater along the coast than inland. Villages were very separate and usually only linked by marriages between chiefly families, potlatches 371 and other social ties. These linkages did not hinder war or raids between different villages of the


370 supra Dawson’s Survey at note 353 at 113.

371 The potlatch was a public ceremonial and social event which included a feast and the distribution by the giver of the potlatch to those who attended a usually very impressive amount of wealth and property. The ceremony served to validate social status, and often ownership of specific areas and resources. Potlatches were held for a variety of events: installation of a new Chief, construction of a longhouse, dedication of a totem pole, removal of shame, and other like events dependent upon the First Nations group. During these ceremonies children received names, tattoos were given to high class people, and titles were bestowed. See Kenneth D. Tollefson, “Potlatching and Political Organization Among the Northwest Coast Indians” (1995) 34:1 Ethnology 53 at 62 - 63 [hereinafter Tollefson 2] for specifics about potlatches, and generally for his theory that potlatches were political for they included regulation and management of interrelations among First Nations groups. Potlatches were outlawed by the Indian Act, (1884) 47 Vict., c.27, s.3 in 1884 until 1951. See Jack Woodward, Native Law (Toronto: Carswell, 1994) at 341 - 342.
Historically, rivers and fishing holes, places in the forests, and areas of the shoreline, all being the major resources sites, were controlled by certain chiefs and their families. These were “owned” sites and were inheritable personal properties which could also be bartered or given away. Dawson noted in his account in 1878 the necessity of disposing of the Indian title would be difficult as the Haida held their lands not in a loose way but have the whole of the islands divided and apportioned off as property of certain families with customs fully developed as to inheritance and transfer of lands. Dawson notes one account of an area near Tl-ell on the eastern shore of Graham Island that came into the possession of Chief Skidegate through his wife, and which was later given as a peace offering to Chief Skedans for the wounding or killing of one of his women. This tract of land was still owned in 1878 by Skedans and was a valued berry picking ground. Dawson tells of another tract of land that was purchased by the Haida villagers of Gold Harbour, near Skidegate, from the Haida of Skidegate. The chief and the family controlled these areas, and anyone other than the family who wanted

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372 Supra Knight at note 356 at 26-27.

373 Supra Dawson's Survey at note 353 at 166.

374 Ibid. at 157, and supra Blackman at note 332 at 249.

375 Ibid. Dawson’s Survey at 160.
to make use of these areas had to first seek permission. 376 Dawson notes that in certain areas actual sticks were set into the ground to define property boundaries, and that these boundaries were strictly enforced against trespassers. He also noted the areas of principal berry-gathering were divided, and the larger salmon streams were often held jointly be a number of families.377

Other sites owned by chiefdoms included weirs and dip netting sites, clam beds and the other main sites for food resources. These coastal sites and resources were held by the chief in the name of his people and, he acted as administrator of the exploitation of these sites. Even though this was of sorts communal land holding, there are characteristics of individual control. Chiefs did not necessarily administer these sites for the equal benefit of all, and chiefs and their families were materially better off than the other members of the village who did not have rights to these resources sites. 378

376 Ibid. at 111.


378 Supra Knight at note 356 at 29 where he cites a number of ethnographic reports from 1938 to 1973 on this very topic which he states at 330, footnote 5, is “the single most contentious issue in Northwest coast ethnography”. He also notes at 331, footnote 7, that some ethnography works suggest that the actual operation of resource ownership was probably always variable and related to the pragmatic conditions of the localized village.

The historical information about land holding is most interesting as the Supreme Court of Canada in Delgamuukw, supra at note 35, has stated at para. 115 that Aboriginal title is characterized by its communal nature and the fact it is not held by individuals. This has always been the rational of the Indian Act supra at note 97, whereby reserve lands are said to be for the “use and benefit in common” of the band; see section 18 (1). Yet, it is possible for individual band members to have an area of Reserve lands under their possession pursuant to section 20 (2) of the Act. From my observations and interviews in Haida Gwaii, no one suggested to me that they owned any particular area as an individual. It was evident that the sharing of lands and resources is the norm. Chief Dempsey Collinson informed me that part of his duties as Hereditary Chief are to share his fish catch with those of his village who are not able to fish. Personal interview with Chief Dempsey Collinson, hereditary Chief of Skidegate, at Skidegate on 6 February 1999 [hereinafter Chief
From this historical information documented by historians and anthropologists, there is ample information and evidence to substantiate use and occupation of ocean spaces in Haida Gwaii, and exclusivity of such spaces by the Haida as per the principles laid down in *Delgamuukw*. As Dawson has noted there was a well developed system of tenure of territories including land and water spaces. Later in this section, I set forth knowledge and information imparted to me from members of the Haida Nation of today which further corroborates this information.

Haida culture did not stand still down through the ages, from its beginnings to now. It has felt and been influenced by the impacts of the influx of European settlement that occurred on the Pacific coast in the 1800s. This next section will discuss these impacts and the influences they have had on Haida Gwaii, and in particular the influences and impacts on the Haida connection with their ocean spaces.

(d) The Change in Haida Culture with European Contact

In the 1800s, with the expansion of the settlers to the west of Canada, the governments of the day, began to designate Indian Reserves for First Nations upon which settlers could not intrude. As we have noted, reservations of the coastal First Nations were smaller in size due to their reliance on the ocean and its resources. Many of the Haida I met, were knowledgeable of these facts and stated that the governments had thus historically recognized

Collinson interview].

379 *Supra* Newell at note 39 at 56.
their connection with the sea.

In 1874, the federal Indian Affairs officials urged British Columbia to move ahead with the granting of lands for Reserves, keeping in mind, the fishing needs of the First Nations. One of the official federal statements at the time noted:

Great care should be taken that the Indians, especially those inhabiting the Coast, should not be disturbed in the enjoyment of their customary fishing grounds, which should be reserved for them previous to white settlement in the immediate vicinity of such localities.\(^{380}\)

Even the Attorney-General of British Columbia recommended that those who lived along the coast did not need large tracts of land as this would “divert [First Nations] from the more lucrative economic activities such as fishing and would in turn inflict a serious injury upon them and the Province”.\(^{381}\) He went on further to state that they could be provided for by reserving their fishing stations, trading posts and settlements. However, these statements of both levels of government were seldom followed in the end, and as we will see, the fishing abilities of the Haida were severely curtailed.\(^{382}\)

In the case of Haida Gwaii, Indian Reserves Commissioner Peter O’Reilly between 1880 - 1898,\(^{383}\) set aside small reserves based upon the knowledge he had about the Haida harvesting and preservation methods of fish (salmon, dogfish, and halibut), sealing and

\(^{380}\) Ibid.

\(^{381}\) Ibid. at 57.

\(^{382}\) Ibid.

\(^{383}\) He actually set up the Massett Reserves in 1882. Supra Stearns 2 at note 369 at 33.
cultivation of root vegetables (potatoes). History shows that as the land and sea were so bountiful with resources, the Haida were never forced to farm. They became the world’s most densely populated society of hunter-gathers.\textsuperscript{384}

The Massett Haida requested title to sixteen ancient village sites and fishing stations that had been the private property of various lineages from O’Reilly in 1882. To these areas were later added six more sites with the total area being designated under the \textit{Indian Act} as the communal estate of the Massett band, in other words their reserve.\textsuperscript{385} This new incorporation made under the provisions of the \textit{Indian Act} received legal status as a band, described as “a corporate group holding an estate of lands and monies”. The old lineages and ways of ownership became replaced in the late 1800s by the band organization as created by the provisions of the \textit{Indian Act}, and the band in turn became the owners of the ancestral villages and areas.\textsuperscript{386} Thus the lands became communally held, and the Haida put their own definition to ownership of their lands as noted in their \textit{Constitution}. There are still those who remember areas of the ocean owned by specific individuals.

Some of the reserves created included productive salmon streams, and O’Reilly incorporated for the Haida the right to fish in a specific area up stream above the tidal waters. Such was the case at the Yakoun River, the Ja-Lun River and Hi-ellen, all claimed by the Massett

\textsuperscript{384} Supra Johnston at note 342 at 110.

\textsuperscript{385} Supra Stearns 2 at note 369 at 33 - 34. \textit{Supra Indian Act} at note 97.

\textsuperscript{386} Ibid. Stearns at 15.
band, 387 and the Dee-na on Skidegate Inlet claimed by the Skidegate band. 388

The inclusion of these types of fishing reservations for the Haida was not long honored. The Haidas’ inclusion and place in the fisheries of Haida Gwaii eroded further with the passing of the federal fishing regulations for the Province in 1888, 389 which provided First Nations only with rights to a food fishery. This reduction in access to the fisheries, some believe was made upon the mistaken notion that with the drastic decline in Aboriginal populations during this period, it was just a matter of time until First Nations would be an extinct culture. 390 With the passage of these federal regulations, management and use of the fisheries moved from

387 Ibid. at 58.

388 Supra Bellis interviews #1 and #2 at notes 361 and 327 respectively. Mr. Bellis showed me the letter of C. Harrison, Indian agent, dated 5 October 1900 which appointed his grandmother’s brother, Robert Bennett, as the headman of the Dinan River (located at the southern end of the Massett Inlet) and surrounding hunting grounds in accordance with Haida laws and customs. This appointment is viewed by the Haida community as placing the jurisdiction and control of these areas with Mr. Bennett, as an individual with the ability for his heirs to inherit same. Mr. Bellis has recently written to the British Columbia government and the federal government advising that he is the rightful heir to his uncle’s interests, and therefore claims his Aboriginal rights to these waters and lands which are presently considered to be Provincial Crown land. In the letters, Mr. Bellis requests that he be consulted at all times in regards to any resources activities that are being contemplated by the government especially in respect to the timber permit that encompasses this area. Both levels of government have responded to the effect that these lands are under Provincial Crown control and Aboriginal lands are communally, not individually, held. Mr. Bellis has been advised that if his community appoints him as the designated representative for these lands, then the governments will deal with him directly. Otherwise consultation will continue in the usual fashion with the Council of the Haida Nation and the public.

389 The Fisheries Act, 1868 was extended into British Columbia by An Act respecting extension and application of “The Fisheries Act” to and in the Provinces of British Columbia, Prince Edward Island and Manitoba, 1874. The Act came into force in British Columbia in July 1877 with provisions that were primarily drafted for the Maritime fisheries and not those of the Pacific. The first Pacific regulations came into being on 1878 with the Salmon Fishing Regulations for the Province of British Columbia, C. Gaz. 1878.11.1258. The Native food fishing privileges were formerly recognized in 1888 in Fisheries Regulations, C. Gaz. 1888.27.1379. But in 1894, the Fisheries Department brought in the requirement that Natives had to obtain permission to exercise these fishing privileges by obtaining a license or written permission. For an excellent discussion about the early history of fishing regulations in British Columbia see supra Harris at note 39.

390 Supra Newell at note 39 at 62.
the First Nations' hands to those of the federal government, with the result that the state would seek increasingly to limit Indian access to and use of the fisheries, especially in the salmon fishery. 391

The Province of British Columbia has always shown great reluctance in providing lands for the First Nations, and in 1910 stated there would be no further allocation of lands. Tensions mounted with such decision and lead to creation of the Royal Commission on Indian Affairs for the Province of British Columbia, known as the McKeen-McBride Commission in 1913. 392 This Commission created four fishing reserves for the Haida at Langara Island, on the northwest tip of Graham Island, signifying the acknowledgment of the Haida's connection with and ownership of the ocean spaces they used and occupied. 393

Today, Langara Island has no fishing reserves for the Haida. Instead it and the waters that surround the island have been leased by the government to non-First Nations fishing

391 Ibid. at 65.

392 Ibid. at 87 - 88. The Commission was set up by both levels of government to reassess the location and size of existing Indian reserves in B.C., with no mandate to examine land title. The Commission sat from 1913-1916 and concluded there be a withdrawal of lands in Indian Reserves where population had declined, and addition of lands to other Reserves. It was also recommended British Columbia convey title to the Reserves in the Province to the federal government and affirm some of the exclusive Aboriginal rights of particular fish areas. The Commission stressed the importance of fish in the statement by its chair, N. W. White: "[A]s fish forms the staple diet of a large percentage of the Indians of this province, the question of fishing privileges assumes a position of high importance." The Commission's report was not adopted by Ottawa until 1924, and title was not conveyed by the Province until 1938. During the interim, further modifications and cut-offs were made to the Reserves leaving them with less area and fishing rights. See also supra Harris at note 39 at 112 where he tells about the allocation of fishing reserves by the Commission to the First Nations Peoples on the Cowichan River, and at 187 to the First Nations Peoples at Lake Babine.

393 Supra Bellis interview #1 at note 361.
enterprises who specialize in sport fishing and fishing lodges. Langara is a prime example of the blatant disregard exhibited by the federal government in relation to the original granting of fishing rights to the Haida in a specific area at the turn of the century. There was no discussion or consultation with the Haida as to their rights prior to the leases granted to the present fishing operations.\textsuperscript{394} Certainly this movement away from honouring the original government policy of founding small reserves with access to the ocean and its resources for the coastal First Nations as determined less than one hundred years ago, has lead to issues of Aboriginal rights and land claims in British Columbia being litigated. Now with the decision in \textit{Marshall} and the importance of the honour and integrity of the Crown, First Nations have further strong arguments for title to their traditional ocean spaces.

(e) The Haida Gwaii of Today

There have been numerous books and articles written on the Haida and the changes wrought on their culture by the influx of European settlement and the introduction of the \textit{Indian Act} in the late 1800s.\textsuperscript{395} Leadership became determined by election rather than heredity, and the \textit{Indian Act} brought in regional Indian agencies with an agent for each band who acted as supervisor. Isolation of people on reserves deprived them of controlling their own internal affairs and their outside relations became mediated by Indian Department officials. The agent oversaw the whole of community life, supervising the home, education, economic activities, moral behavior, health care and governance. First Nations had little ability to overcome the

\textsuperscript{394} \textit{Supra} Chief Davidson at note 307.

\textsuperscript{395} \textit{Supra} Stearns 1 at note 332 at 261.
disabilities brought upon them by their change in status.

The Indian agent has over time been replaced with a host of civil servants in various agencies, and after voting rights were granted to First Nations in 1960, Indian Affairs commenced consolidating agencies, and turning management of the bands over to native administrators subject to the continued authority of the Indian Act. This minimal experience of self-determination, aided the inspiration of a cultural renewal with the First Nations of the Pacific Northwest. In the 1970s, there was the revival of dancing, songs, carving and the pageantry of “potlatching”. This renewal also spurred on the determination of First Nations across Canada joining together to entrench Aboriginal rights within the new Constitution, and to enjoin Canada in the negotiation of outstanding land claims.

On Haida Gwaii, the Queen Charlotte agency closed in 1966 and responsibility for management of local affairs was turned over to the two local band councils. The Indian Act remains in force today, and there is still dependence upon federal financial support. I noted at Old Massett Village Council that there were a variety of programs that they administer receiving financial aid from Indian Affairs. All employees are of Haida descent.

The cultural reawakening of the Haida Nation started about the time the first new totem pole

396 Ibid. Supra Indian Act at note 97.

397 Ibid. Stearns 1.

398 Ibid. at 265.
Training programs were set up for carvers in both communities on Haida Gwaii with carving replacing fishing as the most prestigious of occupations. Henry Geddes in his testimony at the Davis trial in 1988 makes note of the fact that the skills and traditions such as carving, canoe building, totem poles were all coming back.

The 1980s brought forth the issues of land claims and a resurgent militancy against the exploitation of Haida Gwaii's natural resources by the many multi-nation companies. These large companies had been reaping the forests of the Haida for many years and taking the profits elsewhere. The two Haida communities banded together and formed the Council of the Haida Nation.

The logging areas of South Moresby Island became a focal point around which the Haida organized with non-Haida to demonstrate and create blockades. The major blockade took place at Lyell Island, a remote area off South Moresby Island in 1985 with Haida elders and younger members of the Nation staging a protest for as long as it took to end the cutting of

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399 Ibid. at 265 - 266.

400 Supra Davis at note 321 at 114. In a personal interview with Patrick Weir, Sr., of the Raven Clan, at Massett on 31 January 1999 [hereinafter Weir interview], he related to me the revival of the Haida culture he has witnessed in the last thirty years. Mr. Weir’s parents were very much involved in the renewal of the Haida dances, and he himself has been a participant traveling across Canada to perform. He noted that today in Old Massett village there are many weavers and carvers.

old growth forests and the cedars. Seventy-two people were arrested during the months-long confrontation. One elder, Ethel Jones, was arrested by her own nephew, an R.C.M.P. officer, who it is said, wept while he lead her away. This act of unity of purpose aided in joining together all Haida, and was further strengthened by other cultural events such as the launching of the Haida canoe, *Lootas* (Wave Eater) in 1986 designed by world renowned Haida artist, the late Bill Reid. Spurred on by their success at Lyell Island, the Haida leaders drew up proposals for co-management of fisheries and resources with governments and industry, and took on leadership roles with many local boards to ensure the Haida voice was heard and considered.

Today, the Haida Nation is about 7,000 strong with approximately 2000 members living in Old Massett and 1500 in Skidegate. The remaining members are spread out over the Pacific Northwest in southern Alaska, northern British Columbia, Vancouver Island and Greater Vancouver. From my discussions with some Haida who had always resided on Haida Gwaii and those who have just come home to live, there is a very distinct attachment to the territories of Haida Gwaii.

The band councils at the Villages of Old Massett and Skidegate provide the local government

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402 Supra Johnston at note 342 at 108. For a full account of the fight for South Moresby Island by the Haida and other interested citizens during the 1980s until it was made a national park reserve by the federal government with the signing of the *Gwaii Haanas Agreement* see Elizabeth May. *Paradise Won* (Toronto: McClelland & Stewart Inc., 1990) [hereinafter May].

403 Supra Haida Statement at note 33.

404 Supra Coull at note 336 at 202 and 206.
in accordance with the *Indian Act*. The Council of the Haida Nation created in 1986 was formed to work in a broad political spectrum with the two Councils, the clans and individuals. Its mandate is to protect and assert Aboriginal title and the rights of the Haida people. It is the group charged with negotiations for a treaty under the British Columbia Treaty Commission process. The Council consists of eight elected members, four of whom are from Old Massett and four who represent Skidegate. The President and Vice-President are elected at large. At present, election are held every year, and there is the suggestion that amendment may be made to this so that elections are held every two years. 405

At the time of final revision of this work, the Council of the Haida Nation has announced it will be filing an action in the British Colombia Supreme Court in the very near future asserting its title to all of the territories described in its *Constitution*, yet will not abandon negotiations under the treaty process. It is believed that this is the only way for the governments to deal seriously with the Haida’s asserted right to title of its territories and rights to resources.406 What will be the outcome of this action will not be known for some years. As the Haida will be claiming ocean spaces, this discussion has significant meaning.

This review of the historical information provides some insight into the original way of life of the Haida and how that life has been disrupted and turned around with the coming of the

405 *Supra* “Haida Spirits” at note 305, and *supra* Brown interview at note 326.

Europeans. Within the last one hundred years, the Haida as other First Nations on the Northwest Coast have experienced dramatic changes leading their cultures to almost total destruction. It is only within the last few decades that there has been a rebirth of First Nations’ culture in the Reserves with a new found determination to survive and sustain their heritage and values.

The one component that was recognized early on by governments and their agencies was that First Nations along the coast were intrinsically connected to the sea and its resources. That recognition has not, however, been followed. The Haida as a coastal people built their lives around the sea. I now turn to examining and exploring the depth of the ocean culture of the Haida, and to set out some of the most important information about the use, occupation and exclusivity of such.

(f) The Connections to Ocean Spaces

(1.) Haida Sea-faring and Fishing History

The sea was way of the Haida life; without the sea, we would not survive. Haida people are sea-going people.\(^{407}\)

The connection of the Haida to the ocean is found at the very beginning of time with the creation story and mankind being born of the ocean waters. The sea provided the only means

\(^{407}\) Supra Chief Russ interview at note 66.
of transportation other than by foot from the islands of Haida Gwaii, and the forests thereon furnished the large cedar trees necessary to build their ocean going canoes.

(i) Sea Transportation - Cedar Canoes and Boat Building

A Haida canoe was a very prized possession and sought after by other First Nations along the Pacific Northwest coast. The look and style in artistic forms and mediums similarities of the Haida and the mainland First Nations is proof that the Haida due to their expertise in canoe building had contact with other Northwest Coast peoples.

The canoe was at the very heart of the Haida connection to the sea. Carved from giant red cedars found on Haida Gwaii, it permitted distant sea travel for the Haida, as well as offshore fishing and hunting for sea mammals. Often the canoes were sixty feet in length, well crafted for ocean travels and were a sought after as major trade items with the First Nations on the mainland. The canoe was a major trade item for the Haida and they would tow new ones to

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408 Supra Guujaaw interview at note 308. He informed me that there is no historical evidence of wheels or carts being used on the islands. The reference to foot travel is in relation to the fact that Hecate Strait was once land adjoining or almost adjoining the mainland as detailed in the Haida histories and the archaeology information as found at notes 342 and 343 herein.

409 Supra Bellis interview #1 at note 361.

410 Supra Johnston at note 342 at 106.

411 Ibid.; and supra Blackman at note 332 at 246. Dawson notes that the Tsimshian purchased canoes from the Haida who excelled as canoe builders. As well the Haida obtained mountain sheep and mountain goat horns in barter with the Tsimshian. See supra Dawson’s Survey at note 353 at 129 and 138, and 135 respectively.
the mainland to trade. It is said that the Haida were the most expert builders of canoes. George Dawson in his *1878 Survey of the Queen Charlotte Islands* notes that the Haida have from the earliest of times been making long canoe voyages within their own territories and to other areas from Sitka in the north to Vancouver Island in the south. The Haida tell of regular voyages across Hecate Straits to the mainland to trade with the Tshimsian for eulachon grease and north to Alaska to visit relatives, and of great sea voyages that range west to the land of people with red robes (suggested to be Japan and China) and south to South America. The iron implements from those countries were used by the Haida long before the traders arrived in the late 1700s.

Canoes were the pride of the wealthier chiefs and were the longer canoes were used for war and for attending potlatches. Canoes were ornamented in many ways by paintings of family crests and figures on the bow and stern. A single giant cedar tree was used for the canoe

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412 *Supra* Gill at note 337 at 11.

413 George T. Emmons. “‘Wings’ of Haida Ceremonial Canoes” (1928) 5 Indian Notes (Museum of the American Indian) 298 (New York: Heye Foundation) at 299. The author reminisces about seeing thirty foot canoes brought by the Haida to Sitka, Alaska for sale in the spring of 1900.

414 *Supra Dawson’s Survey* at note 353 at 97.

415 *Supra* Stearns 2 at note 369 at 31; and Weir interview at note 400 where he tells of his mother’s people who were Haida living in Howkan, on Long Island, Alaska, traveling by canoe to Forrester Island, which is on the western most island of the Kagan Archipelago, well away from the shores of Dall Island to gather and harvest for the winter (this being a distance of some 40 miles of open water). “Eulachon” is the spelling used in Old Massett for the candle fish (*Thaleichthys pacificus*). The Latin spellings which are often used are “oolachan” and “oolachen”.

416 This was first told to me by Ernie Collison, Tsiij Giitanay, Eagle Clan, in a personal interview at Old Massett on 26 January 1999 [hereinafter E. Collison interview]. This was also mentioned by Chief Reynold Russ and he elaborated that it would be quite possible if one followed the coast north to Alaska and around from there to Asia. *Supra* Chief Russ interview at note 66.
which once finished would be between thirty to forty feet in length and could carry up to forty people with much baggage.\textsuperscript{417} It is noted in the diaries of some of the explorers during the late 1700s that at many of the villages, they could not land as the beaches were filled with Haida canoes.\textsuperscript{418}

The Haida traveled by canoe to Victoria, a round trip of over 1000 miles.\textsuperscript{419} Other stories tell of travels to the land of no trees (which would be the North of Canada and Alaska), and south into Puget Sound, to California for abalone some 6000 years ago, and west to Hawaii.\textsuperscript{420} Archaeology has found the bones of the albatross (also known as “gooney birds”) on the islands suggesting that the Haida hunted these birds far offshore as these sea-going birds are known to stay well away from land.\textsuperscript{421}

Historians have noted the reputation of the Haida as “lords of the coast, the aristocrats of their world”.\textsuperscript{422} They were feared by other coastal peoples as raiders of villages along the

\begin{itemize}
  \item \textsuperscript{417} \textit{Supra Dawson’s Survey} at note 353 at 138.
  \item \textsuperscript{418} \textit{Supra} Johnston at note 342 at 114; see also \textit{Ibid.} at 158 when Dawson tells of speaking with a member of the Skidegate village who told him of there being so many canoes, they could not all be launched in a single row (the beach being approximately half a mile in length) when they set out on their trading expeditions to the mainland. Dawson continues with the account of the trader George Dixon in July 1787 when his ship was present in the Skidegate area, and noting eighteen canoes coming along side with more than 200 Haida, mainly chiefly men.
  \item \textsuperscript{419} \textit{Supra} Gill at note 337 at 11.
  \item \textsuperscript{420} \textit{Supra} E. Collison interview at note 416.
  \item \textsuperscript{421} \textit{Ibid.}
  \item \textsuperscript{422} \textit{Supra} Gill at note 337 at 11.
\end{itemize}
mainland coast, and therefore, the Haida villages were immune from attack by other First Nations.

As time moved forward so did the Haida and their expertise in building ocean going craft. They became known for their boat building trade which was aided by the various readily available types of wood found on the islands. There was a thriving industry at Old Massett in the 1900s where approximately four seine boats a year of approximately fifty-five feet in length launched from the village, encouraged by the abundance of large red cedar found at the mouth of Massett Inlet.

I was informed that European boat designs adapted many of the techniques and styles of the Haida sea crafts. The boats built on Haida Gwaii were most often owned and fished by Haida as a family enterprise.

This information about the building and use of canoes and boats, both from the oral tradition

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423 Supra Newell at note 39 at 137, and Knight at note 356 at 159 where he discusses the well known Old Massett builders and the schooners they built around the turn of the century.

424 Supra Weir interview at note 400. Patrick Weir actually built boats with his uncle, Ernie Yeltatzie in the 1950s in Old Massett. Supra Chief Russ interview at note 66 whereby Chief Russ noted the Haida having a reputation even today as “great boat builders”, and some of the best being: Andrew Yurich, Alfred Davidson, Robert Davidson and Robert Williams (Chief Russ’ Grandfather). Supra Newell at note 39 at 137 where in 1953 Percey Gladstone noted Old Massett has one of the largest and finest seine-boat fleets on the coast, valued at $350,000, and had a modern boat-building yard.

425 Supra Gill at note 337 at 78.

426 Supra Bellis interview #2 at note 327. Mr. Bellis says he read that the Lusitania was built upon the Haida canoe lines in Charles Harrison’s In The Wake of a Haida War Canoe.
and the written accounts, adds to the body of evidence that can be utilized in substantiating the Haida assertion of title to their ocean spaces. The abilities of the Haida to build such craft and their prowess in control of their waterways within and beyond Haida Gwaii aids in demonstrating their exclusivity of use and occupation as called for in Delgamuukw.

To add to this myriad of data is the fishing history of the Haida which will be reviewed in the next section. This is one more area that can be referenced to illustrate the Haida’s use and occupation of the ocean spaces and resources they assert interests in following the principles of Delgamuukw.

(ii) Fishing History

Fishing is who we are.\textsuperscript{427}

The First Nations along the Pacific coast have been integrally involved in fishing and harvesting sea resources since time before memory with archaeology finds showing the presence of fish bones and remnants in middens on Haida Gwaii from 2000 to 7500 years ago.\textsuperscript{428}

With the influx of Europeans into the coastal areas during the 1800s, the First Nations carried on their fishing practices until 1894 when the federal government commenced regulating all

\textsuperscript{427} Supra Bellis interview #1 at note 361.

\textsuperscript{428} Generally supra Fladmark 2 at note 342.
fisheries and those involved. With the coming of these restrictions, the presence and participation of First Nations peoples in the fisheries on the coast began a slow slide in a state of decline and almost non-existence.

The majority of First Nations fishermen in the late 1890s worked under some form of contract with a local cannery for sale of their fish which often meant they fished cannery boats and nets, and obtained advances for supplies. The fish canning industry became one of the three most important income generators in British Columbia at this time with salmon, particularly sockeye, being the foundation of the commercial fishery. Some women fished with their husbands often as the boat pullers, and often were crew aboard the smaller boats (also known as mosquito boats) that trolled for salmon, cod and halibut for subsistence purposes. The Haida prospered in the fishing industry in the early 1900s, the men as fishermen and the women in the canneries. There were some fifteen salmon canneries on Haida Gwaii and some fifty commercial fishing vessels.

The Haida were also involved in seafaring during the 1800s as crew aboard cargo and passengers schooners along the north coast. In the 1860s, there was actual schooner sailing

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429 See note 389.

430 Supra Knight at note 356 at 179.

431 Ibid. at 180.

432 Ibid. at 182.

433 Supra Newell at note 39 at figure 6 at 20.
out of Cumshewa Inlet on Moresby Island with cargo trips running from California to Hawaii, cod fishing in the Okhotsk Sea (near northern Japan and Russia) and sealing trips. Many Haida worked on lumber barques, coastal freighters and tugboats on Haida Gwaii, and along the British Columbia coast.\textsuperscript{434}

In 1910, there were established whaling stations and the associated reduction plants at Naden Harbour (northwestern side of Graham Island) and Rose Harbour (south tip of Moresby Island); however, neither of these employed any Haida, and were soon abandoned with the decline in whaling.\textsuperscript{435} A few Haida were involved in commercial sealing in the 1860s through into the 1900s as crew on voyages to Japanese waters. However, 1911 brought in the \textit{International Sealing Convention} which banned seal hunting in all north Pacific waters.\textsuperscript{436}

Many of the fishermen acquired their own gas powered trollers during the 1920-1930s, and it was very common for First Nations fishermen to operate independently.\textsuperscript{437} During this time frame, the fishermen of the Queen Charlotte Islands, First Nations and non-First Nations organized the Queen Charlotte Salmon Trollers Association.\textsuperscript{438} With more boats and better

\textsuperscript{434} Supra Knight at note 356 at 208. He also relates the enterprises of Henry Edenshaw of Old Massett which included the carriage of cargo, passengers and mail by his schooner which employed Haida crew, at 209.

\textsuperscript{435} Ibid. at 216. Further, the Haida were not known as a culture of whalers as some First Nations along the Pacific coast such as the Makah and Nuu-Chah-Nulth.

\textsuperscript{436} Ibid. at 217, and 225 - 230.

\textsuperscript{437} Ibid. at 185 - 186.

\textsuperscript{438} Ibid. at 186.
equipment the increase in competition for fish stocks began in earnest. Fishermen also
became locked into the system of capital costs, operating costs, maintenance costs and other
costs associated with owning their own boats. This was different than fishing as captain on a
cannery boat.\footnote{Ibid.}

Mary Lee Stearns, an anthropologist, who did extensive study on the Old Massett Haida, has
written that "[t]he occupational role of fisherman rests on the conviction that Haidas have to
go fishing. It's in their blood."\footnote{Supra Stearns 2 at note 369 at 14.} By 1950 Massett had become "the home of one of the
largest and finest seine-boat fleets of any community on the coast"\footnote{Ibid. at 263.} The Haida participated
in the specialized salmon seine fishery during the war years but in the 1950s the fisheries
deteriorated due to depletion of fish, intensified competition, technological change and
market fluctuations. For the Haida and other First Nations fishermen this meant low returns,
long term debt to fish companies and displacement. Almost all Haida were employed in the
fishery either aboard the boats or in the local fish processing plants during the 1950s, with the
result that in 1953 when the fishery failed around Haida Gwaii, food had to be rationed
during the winter in Old Massett and Skidegate.\footnote{Supra Newell at note 39at 138. Chief Russ also spoke of the fact that there were no people on
the street come the summer as they were all employed in some capacity in the fishery, supra Chief Russ
Interview at note 66.} By the 1960s, Massett fishermen had
reverted to the small boat patterns of before and relied on a mixed economy.

\footnote{Ibid. Stearns 2 at note 369 at 14.}

\footnote{Ibid. at 263.}

\footnote{Supra Newell at note 39 at 138. Chief Russ also spoke of the fact that there were no people on
the street come the summer as they were all employed in some capacity in the fishery, supra Chief Russ
Interview at note 66.}
At the beginning of the 1960s, there were approximately ninety trollers and twenty-five seine boats owned by Haidas actively fishing from the wharf in Massett.\textsuperscript{443} This economic stability started to disappear in the 1960s with the introduction of the Davis Plan whereby regulations required the licensing of fishermen, and the fishery moved into what is known as “limited entry”.\textsuperscript{444} As well, Government programs and fishing corporations who financed construction of Haida boats made the new owners go so far into the hole and sell their catches at predetermined prices that they could not pay their loans, and thus the boats were seized.\textsuperscript{445}

First Nations were not able to resort to banks for fishing vessel loans as they seldom had any property to place as collateral. Their lands on reserve were not by the provisions of the

\begin{itemize}
\item \textsuperscript{443} Supra Bellis #1 interview at note 361.
\item \textsuperscript{444} Supra Newell at note 39 at 148 - 153. The Davis Plan, also known as the Salmon Vessel License Control Plan, was designed to keep the Pacific Coast salmon fishery profitable for full-time mobile fishers and large scale centrally located processors, who operated all year. The gillnet and troll fleets were reduced with an increase in the seine fleet with many boats being able to fish more than one gear. The restriction and reduction in the number of licensed salmon vessels in mainly the gillnet and troll fleet did not stop over-capitalization of the fleet as many moved to seine boats which had greater capacity for holding fish and more capabilities to find fish with specialized equipment and more than one fishing gear type. The costs of these new boats was very high and most usually financed through banks and federal government subsidy schemes. Good analysis about the Davis Plan and other DFO policies is found in Geoff Meggs, \textit{Salmon: The Decline of the B.C. Fishery} (Vancouver: Douglas & McIntyre, 1991) at chapter 22. Today, scientists and fishermen around the world tell of fisheries in decline due to over-fishing and over-capitalization of fishing fleets. See John Cushman, Jr., “Pact Provides Cap on Size of World’s Fishing Fleets” \textit{The Vancouver Sun} (10 March 1999) A1.
\item \textsuperscript{445} Supra Chief Russ interview at note 66 where he noted that in 1972 when he was first elected to Council at Old Massett boats were being repossessed and his people were being pushed out of the fishing industry due to the companies and the banks. The fishing regulations were changing in subtle ways that eventually saw the loss of First Nations’ rights to fish. Supra Bellis interview #1 at note 361. Mr. Bellis characterized the Davis Plan as the death nail for the Haida fisheries as the Haida fishermen could not easily obtain financing in order to purchase and maintain boats and equipment. See also supra Newell at note 39 at 138 and Stearns 2 at note 369 at 95 - 101.
\end{itemize}
Indian Act to be used as collateral. Further, the First Nations communities were always the ones who endured the first cuts in the commercial fisheries when changes were made.

When the southern areas of the British Columbia coast started to be declining in fish stocks, the fishermen of that area migrated north to catch fish, and in turn fished out the northern stocks. The Haida had no markets or transportation here for handling fish and fish products, so the fishing industry was kept very much off the islands.

Even so, the Haida still considered themselves as fishermen, and continued to fish in a limited way with smaller boats commonly referred to as the “mosquito fleet” which was used for a variety of fisheries including trolling for spring and coho salmon, gillnetting for sockeye, and jigging for halibut. These boats were small and only useable in good weather and thus allowed the Haida to maintain some self-sufficiency in a small way, but were not able to maintain the demand of the commercial fishermen. Even the Davis Plan sought to eliminate these small boats by bringing in further restrictions, such as landing quotas and high licensing fees, both of which could not be met by the First Nations participants.

\[446\] Ibid. Bellis interview #1; and Newell at 158. Supra Indian Act at note 97 at s. 29 and 89(1).

\[447\] Supra Jones, Jr. interview at note 294.

\[448\] Ibid.

\[449\] Supra Stearns 2 at note 369 at 102.

\[450\] Supra Newell at note 39 at 141 and 159, and supra Bellis interview #1 at note 361.
As a result, First Nations members have been virtually eradicated from the commercial fishing industry seascape in British Columbia. In Old Massett now there are approximately one to two boats owned by members of the Haida Nation.\textsuperscript{451} There are two boats owned by the Old Massett Village council that have food fish licenses issued from DFO, and they go each year off Langara Island to fish for salmon for the village members.\textsuperscript{452} At Skidegate, there are now about five to six trollers, a great reduction in number when about thirty to forty years ago, one would be able to count about fifty-two boats in the harbour. \textsuperscript{453} The streets are no longer empty during summers as Chief Russ remembers in the 1960s.\textsuperscript{454} In order to continue to fish today as many of these men have fished during the last forty years, one would be required to hold some five licenses for the different fish species, different fishing gear types and different areas; whereas one license had sufficed.\textsuperscript{455}

For the past ten years, the Council of the Haida Nation has run the Haida Fisheries Program

\textsuperscript{451} \textit{Ibid.} Bellis interview #1.

\textsuperscript{452} \textit{Supra} Weir interview at note 400.

\textsuperscript{453} \textit{Supra} Jones, Jr. interview at note 294. Roy Jones, Sr., a senior member of the Skidegate community, noted that everyone had a boat in Skidegate that would fish commercially and for food. Personal interview with Roy Jones, Sr., at Queen Charlotte City on 7 February 1999 [hereinafter Jones, Sr. interview].

\textsuperscript{454} \textit{Supra} Chief Russ interview at note 66.

\textsuperscript{455} \textit{Supra} Bellis interview #1 at note 361. Mr. Bellis notes he fished ocean spaces around the northern areas of Graham Island and Hecate Strait for cod, halibut, crab, and salmon. Fisheries regulations now require a license for each of these specie and gear type, as well as the different fishing zones. For the Haida this means that one would have to have a separate license to fish salmon by troll and another license to fish by gillnet. These licenses are each worth many thousands of dollars. Mr. Bellis retired from fishing in 1996 due to the change in DFO regulations which really made it so “one could not survive economically fishing only one gear type or one fishing zone”. DFO bought back his “A” license at a value of over $80,000.00.
which now employs some twelve full-time and twenty-five part-time staff involved in a variety of salmon, shellfish and herring projects and studies. The program includes co-operative research and assessment about species where there is limited information (such as sockeye and coho salmon, sea urchins, geoduck clams) co-management of a mainly Haida razor clam fishery, a hatchery at Pallant Creek on Graham Island for chum and coho salmon, management of a variety of communal fishing licenses, and a watchmen program that monitors recreational fisheries in Dixon Entrance. The object of the program is for the Haida to develop fisheries management capacity and to have input into the fisheries decisions that affect the stocks around Haida Gwaii.\textsuperscript{456}

There are licenses for herring roe on kelp to individual Haida, and both Councils have one license. The herring fishery is in decline and has had very limited openings in the past few years. The Old Massett Village Council are in the process of purchasing two crab boats, one of which has prawn traps. There are crab and rock fish licenses owned by the community which are fished by a specific boat and fisher rather than as a communal licenses.\textsuperscript{457}

Skidegate has been less economically dependent upon the fishing industry than Old Massett, as many of the community worked in the logging operations on the islands. Today, unemployment is a major problem as participation in the commercial fisheries is almost non-

\textsuperscript{456} Supra Russ Jones interview at note 309.

\textsuperscript{457} Supra Davidson interview at note 307.
existent and logging has declined.\footnote{Supra Stearns 2 at note 369 at 266. Coastal communities of British Columbia at present are suffering effects of unemployment due to the down turn in the timber industry and the closure of fisheries especially salmon due to decline in numbers.}

Fishing is important as an economic activity and as a means of sustenance in times of poor economies to provide food.\footnote{Ibid.} Many of the Haida I spoke with told me of their dependence upon the beach gathering to supplement their diets. Robert DuDoward, who lives in Skidegate, noted this past year many households who do not usually gather seafood present on the beach. He believes it is most likely due to the hard economic times.\footnote{Supra DuDoward interview at note 310.}

As has been recounted, the Haida were intrinsically involved in fisheries both for their own personal use and for economic gain during the late century. However, during the twentieth century, government regulation has reduced their ability to be participate, to feed themselves and produce an income. This systematic reduction in access to and involvement with the ocean spaces and resources historically used by the Haida, and recognized by both levels of government, is not in keeping with the ideal of the honour of the Crown. In \textit{Marshall}, the Court has declared the integrity and honour of the Crown is the standard that must be met when dealing with First Nations. From the historic information provided herein, one can advance a sound argument that the Crown’s integrity and honour are in question when examining the policies and regulations of DFO in respect of the fisheries and the Haida.
As well, from the information related here about the Haida and their fisheries, we again have added more salient data to aid the proof of use and occupation of the various ocean spaces in which the Haida have an interest. This information flows from time before memory to today. The fact that the Haida are not present today in using and occupying these ocean spaces as previously is due to government regulation that has diminished their involvement. The Crown, pursuant to *Marshall*, has no ability to suggest that they have abandoned their ocean spaces due to lack of use, occupation and exclusivity.

The Haida culture has enjoyed and partaken of the bounty of sea resources within their territories over the centuries. Gathering and harvesting are important facets of this ocean culture and will be described and explored in the next section of this work. These cyclical activities add to the compliment of information about the Haida Nation’s use and occupation of their ocean spaces.

(iii) *The Harvesting of Ocean Resources*

Haida culture and life are designed around the ocean waters. Sea water and inland water is the essence of our lives and our movement in the seasons.  

The ocean is and has always been the major source of food for the Haida and provided them with the bulk of their diet. Ocean foods included cod, halibut, many species of salmon

461 *Supra* E. Collison interview at note 416.

462 *Supra* Blackman at note 332 at 244; and *supra* Dawson’s Survey at note 353 at 103 where he notes his observations of the Haida living principally on fish with halibut and salmon being the most prevalent.
(genus Orcorhynchus), herring (Clupea harengus), herring roe on kelp, shellfish including sea urchins (Loxechinus), butter clams, blue mussels, abalone (Haliotis kamtschatkana), scallops, chitons (Cryptochiton), cockles, octopus, crabs, as well as seaweed, and sea mammals such as seals and sea lions and otters.463

The Haida were “serious exploiters of bottom fish - halibut (Hippoglossus stenolepis), and black cod (or sablefish, Anoplopoma fimbria), with halibut being found in waters of fifteen to thirty fathoms or more. 464 Whales were not actively hunted but those that washed up on shore were utilized for food and bone. The Tsimshian from the mainland would come to Haida Gwaii to fish black cod, having first sought permission of the Haida as the Tsimshian recognized the Haida ownership of this fishery and the waters in which it took place. 465

The abundance of salmon as a food source is alleged to have been greater in British Columbia than anywhere in North America.466 Fishing resources were abundant and also seasonal and

463 Supra Dawson’s Survey at note 353 at 105 - 106. Dawson notes that oysters were not found on the coasts of Haida Gwaii even though clams, chitons and sea urchins were bountiful.

464 Supra Newell at note 39 at 181 - 182 and following, and supra Knight at note 356 at 41. Both these fish have been fished by many of the people I interviewed and all have spoken of consuming halibut on a regular basis year round as it was available to be fished all year. Black cod is known for being found only in deep water of at least 90 fathoms mainly along the west coast of Haida Gwaii.

465 Supra Chief Russ interview at note 66.

466 Supra Knight at note 356 at 41. There are no quantitative accounts though of the take of this fish.
fluctuating, and were obtained for winter use through coordination and hard work.\footnote{467} Experts state that extensive knowledge of the local resources and fishing technology was imperative for successful and abundant gathering and harvesting. The hooks used were very intricate and specific to each fishery such as cod, spring salmon and halibut.\footnote{468}

Halibut was the most important fish in terms of numbers and plentiful all year round, while salmon was considered the most important winter fish.\footnote{469} Halibut was used as a trading commodity for eulachon fish and its oil and grease, and is still such a commodity in trading of today.\footnote{470} There were seasons to fishing for these items, and the rite of gathering from the beach is very much a "family activity" whereby generations of each family would join together to go to the beach to gather whatever food resources were present over a day period.\footnote{471} Most of the shellfish were gathered on the beach after the winter winds churned up the waters and washed these items ashore.

\footnote{467} Ibid, at 42 where it is noted that ocean resources may have been abundant but documented evidence shows First Nations had to gather and harvest everyday that they could for the winter ahead.

\footnote{468} Supra Newell at note 39 at 181 - 182 and following, and supra Knight at note 356 at 41. The Haida developed advanced fish hooks for halibut that show their understanding of these fish which had protruding lips and thus the hooks had a large breadth between the barb and the shank to ensure the halibut when it went after the bait on the hook was caught, supra Guujaaw interview at note 308. Ernie Collison, supra at note 416, stated that hook designs came to his ancestors through visions as they were not able to see the fish feeding in the waters and thus determine the techniques necessary to successful catch them.

\footnote{469} Supra Blackman at note 332 at 244; and supra Dawson's Survey at note 353 at 103.

\footnote{470} See ibid. Dawson's Survey at 106. See also supra Chief Russ interview at note 66 when he related his recollections of his mother drying halibut for trade purposes with the First Nations of the mainland, and Edgars interview at note 324 where in 1994, Mrs. Edgars traded dried halibut for eulachon, and remembers her "Naanii" (Grandmother) doing the same thing. Mrs. Edgars plans to continue this same practice later in 1999.

\footnote{471} Supra Bell interview at note 306.
Villages of the Haida were situated to be within easy reach of the halibut banks and coastal fisheries. Fishing was the activity most engaged in by the Haida. Halibut were taken in large quantities when they were plentiful. The Haida used hooks and lines for fishing from their canoes during the 1800s. The hooks employed were wooden armed with iron, barb and a curved iron hook that they manufactured themselves. Halibut was dried in long flakes by the sun or a slow fire. Dawson notes the excellent halibut banks along the north shore of Graham Island.

Even though there are no large rivers on the islands, Dawson states there were salmon rivers well known to the Haida who fished by use of spear or weirs. The rivers are the "property of the several families or subdivisions of the tribes..." Dawson also notes that the villages would empty at salmon season to go to these river areas to fish.

Dawson recounts other species of fish utilized by the Haida including trout, herring, flounder, rock cod, pollock and the gathering of both herring spawn and salmon roe. The dog-fish was not eaten by the Haida but instead its oil was extracted and sold to traders. Sharks

472 Supra Dawson's Survey at note 353 at 109.
473 Ibid. at 103.
474 Ibid. at 104.
475 Ibid. at 104.
476 Ibid. at 160.
477 Ibid. at 160, and Dawson notes that it would have been "contained in hollow bulb-shaped heads of the gigantic sea-tangle (Macrocystis)" or seaweed. This type of seaweed was observed by the author on 30
were feared by the Haida as they frequently would break up the canoes and put the occupants at risk. Seals were speared and shot.\footnote{478}

As we have noted there was historically in the Haida Nation ownership of specific areas by individuals. A prime example of this concept of individual ownership was in the situation of the washing up on shore of a dead whale. The Haida viewed it as belonging to the person’s whose beach it was located on.\footnote{479} In most situations the whale would be shared at a feast celebration.

Many of the Haida I spoke with had stories and information about their yearly gathering of ocean resources. The following section includes those narratives which establish solid support of the Haida’s fishing and harvesting regimes which in turn demonstrate their use and occupation of intertidal areas, tidal flats and salt water river estuaries.

\textit{(iv) The Yearly Food Gathering Cycle}

When the tide goes down, the table is set.\footnote{480}

\footnote{478} Ibid. at 105.

\footnote{479} Ibid.

\footnote{480} This expression was first told to me by Roy Jones, Jr., as being the phrase coined by the Haida to describe the relationship of their diet and the sea; \textit{supra} Jones Jr. interview at note 294. Later I found this same phrase used in \textit{supra} Gill at note 337 at 107.
Every Haida throughout Haida Gwaii participated in some capacity in seasonal food gathering regardless of their position in society. I witnessed this tradition being carried on today in the communities of Haida Gwaii. For the villagers of Old Massett, the gathering cycle had them move about four times a year to obtain food resources from the sea. The season began in March/April when the villagers would head out to Tow Hill, along North Beach on Dixon Entrance to gather and preserve clams usually by drying for about a month. Then they would head to Naden Harbour for crabs.

In late May into early June, families would travel south along Massett Inlet to the sockeye salmon areas being the Yakoun River, the Awun River, Dinan Bay and the Ain River. They would camp at these areas for the summer, catching and preserving their winter fish supplies by drying, smoking and later canning. In the early fall, the villagers would head west to Langara Island to fish coho, chinook, halibut and black cod. Some might return to the Awun and Ain Rivers and Dinan Bay to fish for dog salmon. During these food harvesting activities, they also gathered berries, birds eggs, and trapped forest animals. The Haida

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481 Supra Guujaaw interview at note 308.

482 Both the Yakoun and Ain Rivers are noted as salmon harvesting rivers in supra Dawson's Survey at note 353 at 156.

483 Supra Blackman at note 332 at 245, and ibid. Dawson's Survey at 107. Also supra Chief Russ interview at note 66 where Chief Russ told of being involved in this food gathering activity through out his early life. Christian White, as a member of the younger generation of Haida, describes his activities of seasonal food gathering and he partakes as often as his work as a carver permits. He has all his life gathered shellfish on North Beach in the winter, picked seaweed, fished for halibut and salmon. Supra White interview at note 327. Supra Edgars interview at note 324 where she notes she usually goes to the Yakoun and Ain Rivers to catch salmon each year.
were not historically known as great hunters of land animals.484

Christian White of Old Massett, a renowned young carver, related to me his activities in gathering seaweed about April around the area of Tow Hill, and then following as it moves westward along the shoreline over a three month period. Seaweed is pulled not cut as it will not grow back in the same manner. During gathering, he and the other Haida with him will put out a "skate" line for catching halibut and cod. They often take blue mussels while they gather seaweed.

Mr. White related to me about learning to fish salmon with his Grandfather, "Chinni", when he was fourteen years of age.485 Their first fishing trip was to the Awun River. They traveled there by small boat and made a camp. It was here that his Grandfather explained and taught him the Haida rituals involved in salmon fishing. The first salmon caught by a Haida fisherman holds great significance for it is the link to future catches of salmon.

The first salmon is cut in a special manner so that the head, backbone and tail are left intact, and only the flesh from the sides will be used as food. The bones are then ceremonially returned to the river with a prayer song. Later the flesh is taken to their camp and prepared for a feast to which the other Haida fishermen camped nearby would be invited. The rest of the salmon catch is used in a number of ways. There is no wastage of any part of the fish

484 Ibid. Dawson’s Survey at 106.

485 "Chinni" is the Haida word for grandfather.
caught. The heads and tails and eggs are eaten fresh, while the remainder is preserved by processes of drying and smoking for later consumption.\textsuperscript{486}

Observance of this ritual for the first salmon enabled its spirit to continue on its journey and thus complete its life cycle. It also hopefully would bless the Haida with more salmon in the following years. During Mr. White’s youth, this ceremony was usually carried out by individual Haida fishermen. In 1988 it revived as a public ceremony when the Haida Nation and Friends of the Yakoun River celebrated the “Return of the First Salmon Ceremony” at the Yakoun River. This celebration affirmed the importance of safeguarding the River as it was the mainstay of fish for the Haida down through time.\textsuperscript{487} In Mr. White’s words: “the salmon has always been so abundant for the Haida, it is deserving of special treatment”.\textsuperscript{488}

Inherent in the food gathering and harvesting cycle was the need to put food away for later in the year as there was much uncertainty created by the weather and tides. The Haida were well versed in the tides and weather as they could be deadly if not known. In telling of the harvesting and gathering experiences with his Chinni, Mr. White marveled at his Chinni’s knowledge of every little place they went both on the water and the land. He knew the location of all the rocks and dangerous areas, he knew all the points of land, and the Haida

\textsuperscript{486} \textit{Supra} White interview at note 327.

\textsuperscript{487} See the collection of essays written by members of the Haida Nation in the comprehensive work on the Yakoun River; the Council of the Haida Nation, \textit{Yakoun: River of Life} (Masset: The Council of the Haida Nation, 1990) at 8 and 20.

\textsuperscript{488} \textit{Supra} White interview at note 327. He also notes that the Yakoun River run of salmon is usually the longest being from late April to mid-June.
names for very rock, inlet and village where they traveled. Their usual mode of transportation was by twelve to fourteen foot open skiff, often covering as much as forty miles in a day passing through some treacherous waters. Mr. White remembers these as good experiences for he and his two younger brothers.489

Almost all year there was some food resource that was harvestable. Crabs were available all year in the tidal pools. There was also trout available off North Beach. Seagull eggs were gathered and eaten as a delicacy, and I am told the seagulls will relay if their eggs are missing, so the Haida brought no harm upon the birds.490

Food gathering was more difficult before the food fishery and communal licenses were granted, as government regulations make it difficult to keep a boat. Margaret Edgars well remembers her “Naanii” fishing for and preserving salmon on the rivers each year. “I practice what my parents taught me, it is our survival,” stated Ms. Edgars who now acts as a resource to the school children of Old Massett on topics of Haida trading and gathering of food.491

Roy Jones, Sr., a life long resident of Skidegate for some seventy years, tells about the

489 Ibid. Mr. White’s Chinni, Geoffrey M. White, 1908 - 1988, was in his seventies when he took his grandsons on these expeditions. Together they would make camp and sleep out under the trees. His Chinni had been a builder of commercial seine boats and a fisherman, and had enjoyed much experience in the wilderness with his own father who had been a logging foreman, hunter, and guide. Mr. White notes that the commercial boat building industry had disappeared before his birth.

490 Ibid.

491 Supra Edgars interview at note 324.
gathering of sea foods by his community in the southern areas of Graham Island and on Moresby Island. Gathering would take his people to Burnaby Narrows, a channel about one kilometer long and fifty meters wide on the eastern side of south Moresby Island. This small area of salt water is reputed to contain more protein per square meter of bottom than any other place on earth. Mr. Jones and other Haida would gather herring spawn, moving from one place to another as the herring moved north along Moresby Island. The spawn was dried and salted right on the spot, and only what was needed for the Haida’s own needs was the amount taken.

Mr. Jones routinely fished halibut as it was available all year, as well as herring. The halibut was often dried and brought home for future meals. Herring was used for bait for halibut fishing, and Mr. Jones sold some herring commercially as bait to a broker in Vancouver which provided him with a small amount of pocket money. He noted that this was the way much of his community survived by fishing for their own food and selling some fish.

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492 Supra Gill at note 337 at 105 who tells of his own experience of diving in this channel and the profusion of sea life such as starfish, clams, sea urchins, sea cucumbers, rock fish, octopus, red crabs, and numerous other species.

493 Supra Jones, Sr. interview at note 453. Mr. Jones has been involved in the fisheries for over fifty years in Haida Gwaii and has extensive knowledge about the herring and salmon fisheries. He related to me the beginning of the commercial herring roe on kelp fishery. It started one day many years ago by him throwing kelp into the herring pond (fenced in ocean waters where herring would come to spawn near shore). The herring eggs clung to the kelp on both sides, and when cut into chunks was a variation of the herring roe fishery. DFO would not approve this type of operation when first approached by Mr. Jones. Eventually after much discussion, DFO granted the first permit for this fishery to Mr. Jones and Chief Dempsey Collinson, calling it the “J” license scheme (being “J” for “Jones”). Herring roe on kelp was traded with First Nations on the mainland, and eventually a very lucrative export market grew with the Japanese. More licenses have been issued over the years, with most being to First Nations fishermen. Mr. Jones noted this is a staple in his diet.
Mr. Jones is now a retired from fishing yet still each year makes a trek to south Moresby for herring roe taking with him other families for about a month. The catch is shared with elders and others upon their return to Skidegate. In his younger days, all fish was dried before they got freezers. Catching fish in its season and preserving it for future ensured that they had food for the full year, and permitted its use at potlatch ceremonies in the winter. 494 Fish is a staple and constant in the Haida diet and way of life.

Today though, the herring fishery is on the decline and the Haida are very concerned about the limited opening that DFO permits for the seine boats from the south around Haida Gwaii. 495 The Haida have been very vocal to DFO about the decline of the herring. As DFO has paid little attention to these concerns and continued a limited fishery in the Moresby Island waters, last year the Haida took matters into their own hands and created a “herring storm”. About nine boats of varying sizes from Skidegate congregated around the areas where ten seiners were legally fishing and let “sea lion bombs” go that broke up the schools of herring so they would not all be scooped up in one day and thus gone perhaps forever. 496

494 Supra Jones, Sr. interview at note 453.

495 Ibid. Mr. Jones notes that there is a marked change in the sea life in Skidegate Harbour with the appearance of whales which scare off the herring and thus deplete the herring roe fishery. He believes that the whales are coming in closer to shore now in search of food which is not as prevalent offshore.

496 Ibid.; and supra Chief Collinson interview at note 378. The “sea lion bombs” are a depth charges. Mr. Jones, Sr. notes that DFO’s data on herring schools is inaccurate as they are only sampling herring around Haida Gwaii and not other areas, and it well could be that the herring they count are the same school which keep moving. Conservationists have become vocal in 1999 in respect of the continuation of the herring fishery when these fish are on average getting smaller. They are considered the pillar of the marine food chain providing food for many species including salmon and whales. See Larry Pynn, “Moratorium sought to save herring fishery” The Vancouver Sun (4 March 1999) B8.
The accounts and details of the gathering and harvesting process in Haida Gwaii show the use and occupation by the Haida of ocean spaces and land areas that are touched by the ocean. Prevalent within these narratives is the practice of the principle of stewardship and the concern for sustainability of the ocean resources. From this data, it is clear the Haida were well acquainted with and knowledgeable about the ocean spaces within their territories and the resources that could be harvested. As well some members of the community are familiar with those Haida who owned specific fishing sites.

(v) Local Knowledge of Ownership of Fishing Sites

There is much local knowledge within the Village of Old Massett about who owned individual fishing holes and salmon rivers. Chief Reynold Russ, the hereditary chief of Old Massett, has fished on seven fishing boats that were owned by his family. He tells of a number of halibut fishing holes on the north end of Graham Island that were owned by certain people including his grandfather Ed Russ (Elancumce) near Percy Sound; Chief Matthews (deceased); Chief Jimmy Harris off Chown Point and Waih Point; and Ben White off Yaka Point, Tow Hill. His knowledge of these matters comes from the elders who have over time spoken of this ownership, and the fact that these areas were able to be defined by the landmarks.

On the other hand, Chief Russ tells of communal ownership of the black cod spots. Control of the fishing areas was acknowledged to be with the Haida as he is personally aware of members of the Tsimshian Nation coming from the mainland wanting to fish for black cod
and asking permission of the Haida. In regards to salmon streams, we have noted Charlie Bellis’ great uncle being appointed by the Indian agent in 1900 pursuant to the Haida laws as the headman of the Dinan River off Massett Inlet, and thus he controlled who fished there. This signified to the Haida that the great uncle owned this river area.

Ernie Collison related to me his knowledge that some of the fishing banks were owned by certain clans. Charlie Bellis noted the inconsistency in the property ownership concept of First Nations being characterized as collective and communal rights when historically there were specific areas owned by specific Haida families on an individual basis.

There were papers given to Haida people naming them as the “head river person” by the Indian Commissioners and then the government imposed legislation that supposedly ended the ownership and curtailed the fishing in the rivers. People would make payments to those who owned the river to fish in it. Really payments in some form or another for everything including trees. The tangibility of economies was very important to the Haida.

It was evident in my discussions that today there is no claim of personal ownership of these

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497 Supra Chief Russ interview at note 66.

498 Supra Bellis interview #1 at note 361. See also note 388 herein for further information. Mr. Bellis noted that courts have viewed traplines of First Nations Peoples as being owned individually and not lost due to lack of use.

499 Supra Bellis interview #2 at note 327.

500 Supra E. Collison interview at note 416.
areas. Rather, by the *Constitution of the Haida Nation*, all these areas of lands, seas and waters are claimed as belonging to the Haida people, and are described as belonging to the Haida Nation as noted previously in the Proclamation.\(^{501}\) This most likely is a result of the imposition of the *Indian Act* and its regulations which set out reservation lands are to be held communally.

The *Constitution* further provides certain specific Rights and Freedoms within Article XV as follows:

**S1**

Collective Rights: The Haida Nation holds Hereditary and Aboriginal Title to Haida Territories.

**S2**

Individual Rights: Every Haida Citizen has a right of access to resources for food or commerce, consistent with the Laws of Nature, as reflected in the Laws of the Haida Nation.\(^{502}\)

These paragraphs detail the Haida views that the territories that have been utilized by their people whether individually or communally are now characterized as communal, and that everyone has the right to resources both on a personal and economic level as long as that usage follows the Laws of the Haida Nation and Laws of Nature which denote responsibility and stewardship, concepts discussed in some detail in Section 2. (i) of this Part B. of Chapter Three. These provisions of the *Constitution* follow the decision in *Delgamuukw* which provided that communal title to land is one of the characteristics of Aboriginal title.\(^{503}\) In

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\(^{501}\) *Supra The Haida Constitution* at note 351.


\(^{503}\) *Supra Delgamuukw* at note 35 at para. 115.
keeping with this principle of Delgamuukw, the Haida claim communal title to the ocean spaces of Haida Gwaii.

As with many things, they are but a mere cog in a chain of events and activities. Such is true with the gathering and harvesting of ocean resources as it provides food for the Haida and also a means for some economic livelihood. The history of trade by the Haida provides one more fragment of information to add to the long list which goes to substantiate use and occupation of the ocean spaces of the Haida territories.

(vi) Trading

Because of the seaworthiness of their sea crafts, the Haida were led to distant shores to trade their goods for those not present on Haida Gwaii. All Haida members that I met talked of the history of voyages of their ancestors to far off lands for trading purposes. During the 1800s, the Haida enjoyed a vigorous trade with other First Nations along the mainland coast including the Tsimshian and those along the Nass and Skeena rivers and as far south as Vancouver Island trading in seaweed, salmon, halibut and potatoes. Potatoes came to Haida Gwaii through the European traders, and by 1825 the Haida were growing large quantities which they traded with the Tsimshian, see supra Blackman at note 332 at 255 and Knight at note 356 at 168 where he notes that by the mid-1800s, the Haida were trading over 400 bushels of potatoes with First Nations on the mainland on a regular basis. Margaret Edgars still puts in many potatoes in her garden at Old Massett for trading purposes with First Nations on the mainland, supra Edgars interview at note 324. See also supra Johnston at note 342 at 114. In supra Dawson's Survey at note 353 at 107, he notes that potatoes (skow-shit in Haida) formed an important part of the food supply. See at 138 in regards to canoes.
Haida Gwaii. The Haida have always maintained an extensive eulachon import trade system with the Tsimshian as it is not a native fish to Haida Gwaii. This trade cycle continues today albeit not in the planned seasonal expedition sense but through the mail, delivery of goods through visitation of relatives and friends, etc.

Margaret Edgars, a member of the Old Massett community, carries on the culture of trading, and has traveled to Greenville in the Nass River Valley on the mainland for such purposes taking with her potatoes, soop berries, halibut and salmon to trade for eulachon and other commodities. Patrick Weir has carried on trading in food resources he collects on North Beach. Ron Brown tells of the present day mailing of dried fish each year to Haida Nation members in Arizona.

The information recounted in these sections about fishing, water craft, ownership of fishing places and trading, all contribute to the establishment of the historical and present connection of the Haida Nation with the ocean spaces that surround them. There are many points upon which to draw to substantiate the required elements of use and occupation of these ocean spaces.

505 Christie Harris. Raven's Cry (Vancouver: Douglas & McIntyre, 1966, 1992) at 65. The goat horns were traded with the Tsimshian on the mainland.

506 Eulachon was known as tow in Haida, an oily smelt favored by Northwest peoples was an important and much relished ingredient of many Haida dishes. It is utilized as a fish, and for its oil and sweet rich grease. This fish is not found in the waters of Haida Gwaii but is bountiful in the river estuaries of the mainland, and the Haida would travel to trade with the mainland First Nations yearly. See supra Fladmark 1 at note 342 at 40; supra Dawson's Survey at note 353 at 106; and Edgars interview at note 324. Supra E. Collison interview at note 416, where Mr. Collison recounted to me the Haida oral history which relates the story of the loss of eulachon in the waters off Haida Gwaii because the trust with the Creator was broken, and as punishment the eulachon were taken away. Thus, the Haida have since time before memory had to seek and trade for eulachon elsewhere.
spaces as determined in *Delgamuukw*. There is information both from the oral traditions and
the writings of explorers and others that shows the Haida to use and occupy these spaces as
their own, exclusive of others. This documentation provides good solid sources that can be
utilized to substantiate Haida title to their ocean spaces.

The folklore including stories, legends and myths of the Haida’s connections with the ocean
and its resources have not been explored as yet, and as *Delgamuukw* includes oral histories as
viable sources of evidence, I will provide a short review in that context. As with any analysis
and research, there will be avenues not thought of in the initial review of the obvious sources,
and I will examine a few other materials that can add to our portfolio of salient proof of the
Haida title to their ocean spaces.

(2.) Other Sources of the Sea Connection

Look past the written word and you will find yourself in the world of people whose fate is
intimately tied to the ocean people, the sky people and the forest people.\(^{507}\)

No longer is it necessary to have only the written word viewed as reliable evidence by a
court, as *Delgamuukw* recognizes that oral histories are indeed sources of evidence. As with
every culture there are folklore stories that provide not only delightful genealogy accounts of
adventure and mysterious happenings but also serve as insight into the very souls and

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\(^{507}\) Guujaaw, Gak’yaals Qiigawaay Clan, in Forward of John Enrico, ed. *Skidegate Haida Myths and Histories, Collected by John R. Swanton* (Skidegate, B.C.: Queen Charlotte Islands Museum Press, 1995) at vii [hereinafter Enrico]. Swanton (1873-1958) collected Haida texts and ethnographic and linguistic information in Haida Gwaii for a year during 1900 to 1901 as part of the Jesop North Pacific Expedition. The Acknowledgment sets out that his subsequent publication is the most important ethnographic and textual materials about the Haida.
spirituality of its people. Stories are used for teaching societal principles both in the Haida communities and in non-Haida communities. Many people suggest that these stories are just tales with no substantial basis to them other than telling a fictional tale. Haida society and culture is based on the spoken word and not written accounts as found in societies of non-First Nations. Their stories, songs and dances are incorporeal properties that are valued above material wealth. The anthropological evidence states that these properties are inheritable and play a great role in the culture of the Haida.

Stories are not rendered just for the asking, most often they start over the execution of a simple task such as the digging of a bucket of cockles or seeing some thing that triggers the story teller. Ernie Collison explains that many things in the Haida history are not so clear due to the fact that “a lot of things got lost in time and forgotten due to smallpox”. Another factor is the conversion of three to four generations of Haida to Christianity and the influence of western culture has added to this loss. These events have had significant impact upon Haida history and explains where Haida culture is today.

\[508\] \textit{Ibid.} at viii.

\[509\] \textit{Supra} see generally the modern anthropology works of Stearns 2at note 369; and Boelscher at note 377 where she notes at 43 that telling oral histories of chiefship or lineage rights in public (such as feats, potlatches or other occasions) provides official and legitimating status to what is stated. The Haida view the written accounts of non-Haida as the same type of attempts at legitimating and officiating claims as their oral traditions.

\[510\] \textit{Supra} Guujaaw interview at note 308.

\[511\] \textit{Supra} E. Collison interview at note 416.
Haida culture is sustained through education by inter-generational teaching of practices, as well as some classes at the local schools. The older generation still teaches the younger how to carry on the culture by participating in their traditional activities and passing on oral Haida history although much has been forgotten. Many of these stories are related to the sea both as it being the stage and being the home of the sea creatures that interact with the Haida. These oral histories depict the Haida culture and values, as well as demonstrate the spiritual connection between the Haida, the sea and various different locations on the shores of or at sea.  

There is a story documented in Dawson about the killer whale, a sea mammal that represents the principle of evil and because of that, this whale is dreaded by the Haida. Killer whales break canoes and drown Haida who then become whales themselves. The chief of the whales is the evil one. The story originates from days of the grandfathers of these Haida men who related the story to Dawson in 1878. There were two Haida belonging to the now ancient Village of Tanu on Moresby Island who went out in a canoe to kill the whales. This was considered a daring exercise. One man was drowned when the canoe was broken up by a group of whales far out to sea. The man who lost his life had told his partner that if he should be drown, he would hang onto his knife and stab the other whales.

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512 Supra Russ Jones interview at note 309. See also Jay Miller, “An Overview of Northwest Coast Mythology” (1989) 23:2 Northwest Anthropological Research Notes 125 at 128 [hereinafter Miller] where he talks of the stories of the coastal First Nations being greatly concerned with the sea. Such stories would involve visits to the Undersea World to enlist supernatural aid. Shore terrain would be described, and the beings below the sea would hold the same social rank and have the same economic values as those above. There were various monsters who represented the perils of the sea. And the concern with weather was represented in the persona of Fog Woman, the Four Winds, and the Thunderbirds.
The Haida who survived witnessed a vast number of dead whales come floating to the surface. The medicine man of Tanu stated after being told of the event that he knew and had seen one of the whales killed was the chief, and that now the drowned Haida had killed him was now the chief of the whales.\(^{513}\)

Another story related by Dawson is about Rose Spit (also known as *Naikoon*) which to the Haida is a place full of real or imagined terrors. It is a dangerous and treacherous point to round by boat even in the best of weather, and many Haida have been drowned there. The Haida medicine men tell of the souls of those lost continuing to haunt the area. There are dreaded storm spirits and sea monsters at Rose Spit. Paddlers scatter swan’s down on the waters to keep them calm, and children do not laugh for fear of offending the spirits, and no man ever spat in the ocean. The Haida believe that if one laughs even a very little when rounding the Spit, there will be evil awaiting him brought on by these creatures.\(^{514}\)

Ian Gill recites a story told to him by Terry Husband, a member of the Haida Nation, about the rock known as “He Who Stands Shining in the Water” near Luxmoore Island on the west coast of Moresby Island near the ancient village of Kaisun. The strongest of the Ocean People lived there in spirit, and could be implored upon to provide benefits to the nearby community such as the beaching of a whale.\(^{515}\)

\(^{513}\) *Supra Dawson’s Survey* at note 353 at 145.

\(^{514}\) *Ibid.* at 146. See also *supra* Gill at note 337 at 57 - 58.

These oral histories shed light upon the relationship of the Haida culture with the sea. The Council of the Haida Nation has spent some time gathering videos of elders telling of these historical events and their knowledge of Haida life and culture. Most of these stories do include reference to the sea. These types of oral information are part of the oral histories that the Supreme Court of Canada in *Delgamuukw* directs are to be regarded as reliable sources of evidence in litigation.

For those who believe that legitimacy of sources of information is only achieved through the written word, there are numerous accounts and records available in regards to the Haida culture and life such as works by anthropologists and the accounts of eighteenth century traders. More recent sources of information in regards to the relationship of the Haida and the sea include trial transcripts and affidavits filed in court proceedings including *Davis* and the *Council of the Haida Nation*.

In the case of *Davis*, elders of Old Massett provided testimony at trial about the salmon fishing that took place in Massett Inlet. Emma Matthews (wife of the then deceased and

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516 *Supra* Brown interview at note 326.

517 *Supra Delgamuukw* at note 35 at paras. 98 - 101.

518 The main authors include the early and mid-1900s works of John Swanton, Franz Boas, Charles Harrison, C. Marius Barbeau, and more recent works of Knut R. Fladmark and John Enrico. For an extensive listing of works see *supra* Blackman at note 332 at 260.

much revered Chief Wiah, Number Four, also known as Chief William Matthews, of Old Massett) at the age of ninety-five years in 1988, told of her life experiences fishing for salmon and her knowledge of her grandparents (who could be traced back to the early 1800s) fishing all of their lives in this same area. Mr. Geddes stated: “[A]ll the rivers were Indian rivers, owned by the natives”.

In the *Haida Nation* case, there were a number of affidavits filed as exhibits from elders of the Haida Nation telling of their use and occupation of Haida Gwaii, as well as affidavits from historians and anthropologists, in particular Dr. George F. MacDonald of the Museum of Civilization in Ottawa, and Dr. Marianne Boelscher Ignace, discussing the historical and anthropological data that is available to substantiate Aboriginal title to Haida Gwaii.

The Haida have been involved in challenging the government regulation of their fisheries for many years. Chief William Matthews approximately sixty years ago was charged with fishing in a closed area off Old Massett for halibut. He was successful in his defence and the Judge ruled he and members of his Band had the right to fish for food purposes. This information is both recorded in writing and in oral histories.

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520 *Ibid. Davis* trial transcript commencing at 93 - 99. Mrs. Matthews was well respected within the community and looked upon as someone important even after her husband’s death as she had been a Chief’s wife for some thirty years. This was reported to me in a personal interview with her daughter, Vesta Helmer, on 31 January 1999 at Massett [hereinafter Helmer interview].

521 *Ibid. Davis* at 104.

522 *Ibid.* at 110 - 112. This same story was also related to me by Vesta Helmer, Chief Matthews’ daughter, supra Helmer interview at note 520. Charlie Bellis remembers in his early years Chief Matthews relating this experience to him and noting the Judge acquitted him for illegal fishing as the charges
Further modern sources of information that can be utilized to show the use that has been made of the lands of and seas around Haida Gwaii are those of aerial and satellite fly-by photos and GIS (geographic information system) which provide a pictorial view of the islands and their usage. These photos record timber cover and cuts, and depict a more holistic view of the islands with their eco-systems by providing actual pictures of the changing resources on Haida Gwaii from year to year. There may be other sources not yet really thought of as providing useable information that will become evident as an argument and support is put together for sustaining a claim.

Other more modern day sources of use and occupation that can be brought forth by First Nations to aid their attestations of title include the mapping of territories both with historical information and present information, boat registries and log records, fishing log and record books, and like sources. One further source is the present on-going tradition of gathering of seafood on the beaches which was described earlier in this chapter. This information source can provide a court with the opportunity of a possible viewing of the gathering process and invaluable up to date information about the sea resources gathered, where they are gathered and by whom.

specifically stated “no person or persons shall fish” and there was no indication that an Indian was to be included as a “person”; supra Bellis interview #2 at note 327.

523 Supra DuDoward interview at note 310. Fishing information such as actual sites, who fished these sites and what types of fish were obtained has been documented by a group in the Torres Strait area of northern Queensland, in Australia, to aid in substantiating claims of the Aborigines to certain ocean spaces within the last few years. This information is then recorded on GIS maps. Personal communication with Geoff Dews, Marine Strategy Coordinator, Torres Strait Island Coordinating Council, on 8 July 1999 at the International Symposium on Society and Resource Management, at the University of Queensland, Brisbane, Australia.
(3.) Conclusions

From the information and data recounted in this section about the Haida Nation and their connection to the ocean spaces around Haida Gwaii, it is clear there are many and varied avenues and sources of proof available to demonstrate and confirm their title to these ocean spaces. Their society and culture has flourished and survived based upon the ocean and its resources from time before memory up to the present time.

With the decision in *Delgamuukw*, the breadth of evidentiary sources has been expanded to include the oral traditions of the Haida which draw in their laws, ideologies, histories and genealogies, along side the more usual avenues of proof that include written historical accounts, anthropological studies and modern geological and archaeological information.

I now turn my research to focus on specific information and views related by members of the Haida Nation in regards to their ever present relationship and link with the sea, and how those relationships establish ownership of and responsibility for specific ocean spaces to the Haida. To achieve a comprehensive perspective, I have included comments and reflections about the past, present and future made by Haida members.

(g) Today's Realities: Economies and Culture

The Haida, as many First Nations, experience a high incidence of unemployment on the Reserve, with a rate of approximately 70% in Old Massett. 524 As of 1998, there were just

524 *Supra* Chief Davidson interview at note 307.
two individuals of the Village involved in the commercial fisheries, with fishing licenses held by five or less members of the Village. The governments of the Nation and the two Reserves are actively seeking new avenues of employment opportunities with the view to enhancement and survival of their culture.

The Haida Nation is charged with the responsibility to negotiate the land claim filed with the British Columbia Treaty Commission, and presently these negotiations are at stage 2 of the process. Many Nations are well beyond and working on an Agreement-in-Principle. The Haida are concerned with the governments continued actions in areas of natural resources that directly effect Haida Gwaii suggesting that the governments are not dealing in good faith at such negotiation tables. They have resorted to recent litigation to terminate a number of timber leases that have been granted, and are contemplating litigation on matters such as fisheries opening and closings and other issues where the Haida are not included in the direct decision-making process. These government actions are on-going during the processes of land claims negotiations and strongly suggest to the Haida the lack of good faith.

Many Haida are of the opinion they are not the ones who need to prove they are the rightful owners of Haida Gwaii and the waters surrounding the islands. The governments are the ones

\[525\] Personal interview with Kevin Brown, Economic Development Officer, Old Massett Village Council, on 1 February 1999 at Old Massett [hereinafter K. Brown interview].

\[526\] Supra Haida Nation at note 519.

\[527\] Supra Brown interview at note 326.
who must come to them, and acknowledge the underlying Haida title. This gesture would
demonstrate the governments genuine interest in negotiating their land claim. 528 Many other
Haida that I spoke with believe the treaty process and negotiation is the better route to
finalize their land claim as it is more flexible, and not “written in stone” and so defined as a
court decision. 529

The Haida recognize that to sustain their culture and their homeland, they must have access
and inclusion in decision-making powers to Haida Gwaii, the sea and its resources. The sea
has provided a large portion of the economic basis of this Nation as well as its sustenance
throughout the history of the Haida culture. 530

Christian White discussed with me his grave concern about the loss of his people and culture
through the lack of health and nutrition, and family and community unity. He noted the
studies carried on in regards to the heath issues that arise in First Nations from the access to
their historical natural diets. 531 There is great incidents of diabetes, obesity, cancer, high

528 Supra C. Collison interview at note 275; and Yeltatzie interview at note 315. Many believe as
Canada’s systems are foreign to the Haida that they will lose out in the treaty process, even though it was
created from the recommendations of the tripartite group in 1991 who wrote the Task Force supra at note 10.

529 Supra Yeltatzie interview at note 315; and Chief Russ interview at note 66.

530 Supra White interview at note 327. Councillor White is concerned with the growing population
of the Haida Nation and the limited access his people have to fishing resources in that they have few licenses
and the fact that the fishing resources are declining. There is no territory for them to migrate to as they did in
the past when the population grew too large and placed a strain on the sustainability of the area’s resources.

531 Ibid. Charlie Bellis notes that the health and well-being of the Haida People is derived from the
ocean and the fish. He suggests the high concentration of protein is the reason why the Haida have
historically enjoyed longevity. Supra Bellis #1 interview at note 361.
blood pressure and heart disease directly linked to the non-traditional diet.  

There is among the younger generation of the Haida, a sense and deep feeling that the children of their Nation be encouraged to involved in the resources issues that face Haida Gwaii and through such involvement learn to regard such resources as unique, as that will aid in continuation of the Nation.

(h) Future Development Aspirations in the Haida Context

The depressed economies and issues with the governments that appear to stay stalled have not put a damper on the Haida spirit to look to the future. Within this vision for the future is a very real conflict between the want and need to exploit natural resources to produce economic well being and sustaining their resources in order to preserve their culture.

There were expressions that both avenues are possible.

Lucille Bell told me of the expression of interest shown by the people of Old Massett in promoting ocean based tourism by conducting tours to the village of Yan across the Massett

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532 Neal D. Barnard, M.D. and Derek M. Brown. “US Dietary Guidelines Unfit for Native Americans” (<http://www.okit.com/opinion.htm>, 5 May 1999). History shows that the First Nations diet in North America was more vegetable, legumes and grain oriented than the common notions of great meat eaters. Those First Nations along the coast or in land lake regions were fishers. Dr. Barnard founded the Washington, D.C. based Physicians Committee for Responsible Medicine (PCRM) in 1985 which calls for an end to the racially biased federal food guidelines.

533 Supra Bell interview at note 306.

534 Supra Johnston at note 342 at 108 where she notes this same conflict from her visits to Haida Gwaii and long relationship with the late Haida artist, Bill Reid.
Inlet via the large Haida canoes. Should this project go ahead there will be community consultation and investigation into the possible issues and problems that could arise by reference to Alaskan communities where this activity is widely promoted.\textsuperscript{535}

Kevin Brown, the Economic Development Officer for the Old Massett Village Council, knows of export markets and marketing opportunities that exist for Haida products with all the benefits flowing into their communities rather than as in the past to a middle broker with minimal benefit to the Haida. To achieve development of these economic opportunities, the Haida must obtain more commercial fishing licenses. Marketing is an important ingredient in development of these economies especially as there are still markets available in Asia that have as yet not been tapped.\textsuperscript{536}

Chief Davidson notes further future tourism activities being considered include a hiking trail along the western coast of Graham Island which would require partnership between the Crown, the Haida and other land holders as it would traverse lands of all three entities. He is optimistic the Haida will return to their involvement with the sea as producers of fancy fish products for foreign markets and as part of the team with governments in managing the seas and their resources.\textsuperscript{537}

\textsuperscript{535} Supra Bell interview at note 306. One important point in all of these discussions about tourism activities is the Haida principle that they demonstrate they are “good hosts”.

\textsuperscript{536} Supra K. Brown interview at note 525.

\textsuperscript{537} Supra Chief Davidson interview at note 307.
From these comments, one can see the Haida are enthusiastic about their future and look forward to new economic ventures that stress their culture and links to the sea and at the same time provide economic benefits to their communities.

(i) Observations and Comments

The comments and observations that I have included in this section are strictly those of myself and are meant to highlight a number of the Haida perspectives that I have related herein. My field experiences are not conclusive and there is much more information that could be gathered and reviewed; however, such an in-depth examination would take a number of years to produce a full and complete study of the Haida culture, and even then would not be definitive as their culture continues to evolve.

The Haida have a well developed identity, and have been very active in promoting their culture and advancing their issues on the world stage during the latter part of this century. They have gathered much of their history and stories from their elders in an attempt to ensure these are not lost to the passage of time. Their history and culture embodies their intrinsic link with the ocean spaces of Haida Gwaii. The issues they face today are integrally connected with the sea and its resources.

The Haida view their connection with the lands and ocean spaces from the doctrine of responsibility for sustaining Haida Gwaii rather than just the right of ownership. Their concept of territory ownership is embedded in history, cosmology and nature, and not just
involved with real estate value.\textsuperscript{538} Today, their territories are viewed as communally held and for the benefit of all, yet history from both the colonist world and the First Nations illustrates that the right of ownership was not foreign to their history, and was practiced in the past in regards to some areas and resources.\textsuperscript{539} As previously discussed, this historical right of ownership still incorporated the goal of benefitting the owner, as well as the family, the household and very often the whole village. The concept of stewardship was carried on through control of resources. From the information included herein, the ideal of responsibility for sustainability of territories and resources has always been paramount down through the ages of the Haida, and is still one of the foundation of their connections to territories and resources.

Haida Gwaii is one of the unique land claims filed with the British Columbia Treaty Commission. The Haida have always been separate and district due to their location. There are no over-lapping claims or non-First Nations urbanization issues to discuss and negotiate, and thus their position have some advantages in producing a satisfactory resolution to their issues.\textsuperscript{540}

\textsuperscript{538} Supra Boelscher at note 377 at 200.

\textsuperscript{539} Supra Chief Russ interview at note 66 where he described salmon fisheries and halibut holes as individual owned yet black cod was a communal fishery.

\textsuperscript{540} Ibid. Chief Russ believes this is a most important point for the Haida to stress in their negotiations.
I was referred on a number of occasions to the *Gwaii Haanas Agreement* of 1993 541 which I will examine in some detail in Chapter Four, Section 4. under *Examples of Reconciliation Instruments*. This Agreement is rather unique in that it sets out the sovereignty, title and ownership claims of both the federal government and the Haida Nation in respect of the land and ocean spaces of the South Moresby Island region, yet there is not joint ownership of these areas, or either entity denoted as the owner. The Agreement was struck after many years of activism and negotiation and it seeks to protect and sustain this unique heritage and nature site. It provides access by the Haida to the areas of Gwaii Haanas, and a limited involvement in its management. This Agreement though could aid in forming some basis for future reference for similar projects in regards to title issues to territories around Haida Gwaii.

It is evident that much of the shellfish gathered in the winter is washed up from the offshore depths and comes to rest on the foreshore. This links the Haida and their culture not only to the foreshore but also to those offshore areas, and in fact the very sea bed such shellfish inhabit. It is a known fact that when the tide goes down, the land continues underneath the waters thus providing a further connection between the Haida’s use of the foreshore and the actual sea bed and subsoil located there.542 One would be hard pressed to find any better examples by the governments of Canada or British Columbia making greater or closer usage


542 *Supra* Jones, Jr. interview at note 294. Mr. Jones mentioned this fact to me during our interview which in turn lead to my extension of the fact to the case at hand.
and occupation of the foreshore or sea bed than what I have mentioned.

Negotiations must provide the Haida with control or at the very least significant and meaningful input in the decision-making processes regarding not only sea resources but also the whole water column to the sea bed in order to ensure the protection and sustainability of the ocean spaces that sustain their daily use of food. This is based upon the case of *Claxton v. Saanichton Marina* 543 in which the British Columbia Court of Appeal determined the principle whereby an Aboriginal right that existed under a treaty implicitly included the protection and sustainability of the habitat that enabled that right to be carried on. In the *Claxton* case, the right guaranteed by treaty was the right to fish, and thus the sustainability of the fish habitat was inherent in that right, and the building of the proposed marina was terminated due to the possibility of damaging the fish habitat and thus ending the Aboriginal right to fish in that area.

This same style of argument can be successfully maintained with Aboriginal rights that exist without treaty, and thus can be employed in Haida Gwaii as the totality of information overwhelmingly demonstrates the Haida have a right to fish in the ocean spaces of these territories. *Sparrow* determined there was an Aboriginal right to fish in priority to all except conservation, and the Haida have proof that their fishing has been practiced since before European contact and within all the areas of the territories of Haida Gwaii. Further the species of fish, such as ground feeders, and the technologies employed since time before

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543 *Supra Claxton* at note 2.
memory to obtain same, confirm a definitive link to the sea bed where those fish are found. The policies by any government that undermine the sustainability of these Haida fisheries as determined by Sparrow and in turn by s.35 (2) of the Constitution, are invalid except if such policies are for conservation purposes.

Certainly, DFO would suggest that all its policies and regulations in respect of the fisheries that impact on the ocean spaces around Haida Gwaii are based squarely upon conservation principles. However, if the Haida are able to show with a good degree of certainty that the growth of the fishing fleet and sport fisheries, and the movement of some of the fleet to the northern waters, has diminished the fish stocks, the principles set out in Claxton can be utilized.

A further point for the Haida to canvas any and all discussions had with the Crown in respect of their access to the fisheries and the ocean spaces of Haida Gwaii. During the discussions with the Crown agents at the time of creation of the reservations on Haida Gwaii, there would have been deliberations about the size of the reservation, the actual area it entailed, and the Haida access to fisheries and fishing areas. Marshall has stated that extrinsic information that relates to the dealings between First Nations and the Crown is to be considered. In the case of the Haida, such extrinsic evidence from elders, and Haida fishermen during this last century may well add to an argument that the Crown has not upheld its duty to the Haida by continuing to limit and reduce their access to the fisheries, being the opposite of what discussions had stated.
The Haida have a wealth of information and data available from a variety of sources denoting
their use and occupation of the water column and sea bed around Haida Gwaii which
provides strong evidence to substantiate their title to these ocean spaces of Haida Gwaii as
described in the *Statement of Intent* filed with the Treaty Commission. As mentioned there
is archaeological evidence that shows they were resident on the land, now the sea bed of
Hecate Strait, before the time of first contact, which provides a strong foundation for their
assertion to “half of the Hecate Straits”, and ownership of the sea bed and subsoil of the
Strait.

From my observations while in Haida Gwaii, I noted there is no transition between land and
sea in the Haida view, and these two elements that are differentiated in the non-Aboriginal
world are regarded as the same. “The sea connects the Haida with all places’ whether those
be other geographic areas, the spiritual world, their history, their food, their livelihood, and
their very essence of being Haida.” Life in Haida Gwaii is wholly interdependent with the
natural resources that are immediately at hand for both economic and sustenance purposes.

Fish and the sea are foundations of their culture. It is the place where most Haida learn of
their history and traditions. The continuation of the Haida culture is dependent upon their

544 *Supra* Haida Statement at note 33 which includes ocean spaces of the entire Dixon Entrance, half
of the Hecate Straits, halfway to Vancouver Island and Westward into the abyssal ocean depths.

545 This idea of “the sea connects the Haida with all places” was conveyed to me by Russ Jones. I
have taken the liberty of expanding his statement to include some of the specific links that I have through my
time spent among the Haida come to identify. Mr. Jones has been the Technical Director, Haida Fisheries
Program, for some ten years, and resides in Skidegate. *Supra* Russ Jones interview at note 309.
continued access to and use of the sea and its resources. It provides the means of support in
times of economic hardship as recounted in the candid comments of Ms. Edgars in discussing
her traditional gathering of foods and trading:

I have been able to survive this way, to trade my goods and my foods for whatever I want. If I
don’t do this, I don’t know what would happen because I’ve been so unemployed.  

The sea also provides the link to health of the Haida people. Lucille Bell tells of the
importance to her of learning the ways of preserving fish such as drying and smoking so that
she can feed her future children properly. Endemic food of the Haida is primarily available
only in Haida Gwaii, on and off their Reserves. It is not easily available unless one is
resident in Haida Gwaii. 

This inherent attachment of the Haida and the sea is well described in the 1987 remark by
Miles Richardson during the South Moresby logging protests when he was the President of
the Council of the Haida Nation:

We are not talking about 70 logging jobs. We’re talking about forever. The issue is not logging
versus ‘eco-nuts’. It’s our ability to sustain our culture. And that lies in our relationship - as a
people with a 10,000 year history - to the land and the sea and their resources. 

546 Supra Edgars interview at note 324.

547 Supra Bell interview at note 306. She strongly believes there is a direct link with the health of
the Haida people and their diet of fish. When she was a student at University of British Columbia she, like
many other First Nations students, brought their own fish and other natural foods from their homes. Their
traditional foods were consumed at least a couple of times per week.

548 Supra Johnston at note 342 at 126. The essence of this statement was reiterated by all the
members of the Haida Nation that I spoke with during my field experience. Mr. Richardson was a member of
the British Columbia Claims Task Force; see supra Task Force at note 10 which became the foundation of the
British Columbia Treaty Commission. He is presently the Chief Commissioner of the Treaty Commission.
Most of the Haida members I spoke with are very concerned about their continued link with the sea and its resources especially in light of dwindling fish stocks. Chief Russ poignantly summed up the concerns when he stated: “What are we leaving our children? ....We are taking all away and giving nothing back.” At the same time though there is optimism for the future of Haida Gwaii as captured in the words of Russ Jones when he told me:

There is no question that the connection with the sea will continue; the only question is how that connection will be accommodated by the governments of the day.

The most controversial topic in Haida Gwaii during my visit was the possible lifting of the oil and gas exploration moratorium by the federal government. The Prince Rupert Chamber of Commerce and the contractors who do the commencement work before exploration have joined together to lobby the federal government to reassess this moratorium. The City of Prince Rupert is most interested as they have suffered great economic losses recently with the down turn in the forestry and fishing industries, and such activities would bring in much needed economic benefits. The concerns voiced by Haida members about oil/gas exploration are seen in the words of Chief Russ interview at note 66.

550 Supra Russ Jones interview at note 309.

551 Personal interview with John Broadhead at Queen Charlotte City on 8 February 1999 [hereinafter Broadhead interview]. Mr. Broadhead was involved as a presenter before the assessment panel struck to investigate the viability of oil/gas exploration in this area and make recommendations to the federal government in the early 1980s. He stated that the present owners of the leases in the waters around Haida Gwaii appear to be the oil producers Chevron, Shell and Mobil. It is his understanding that PetroCanada is no longer involved. There are over a dozen test wells presently capped in the area, some on the lands of Haida Gwaii and others in Hecate Strait. Mr. Broadhead was involved in the last federal environmental assessment of oil and gas exploration in this area in the 1980s in preparing information on behalf of those who were opposed in part on the impacts of seismic exploration on fish eggs and zoo plankton. Their reports found that there could be expected a 3/4s mortality rate in stocks of halibut, cod, and mussels when they are in the egg and larva stage as they are free floating in the water column and are disturbed by the seismic array used to explore for oil and gas deposits. He cites the damage to fish stocks is in the exploration stage rather than the exploitation stage. He also noted that the deposits in the Gwaii Haanas area are not huge. Mr. Broadhead wrote “The All Alone Stone
exploration were in regards to the decline in fish stocks that will accompany seismic testing before drilling even commences, the danger of pollution from spills and disasters due to the seismic instability of the area, the diminishment of fishing areas due to the placement of drilling platform, and the loss of Haida culture and territories as a result of the an influx of people and technology.

Many felt that the moratorium would be lifted no matter what arguments and evidence were presented for its continuation. In my discussions with John Broadhead, a local conservationist in Haida Gwaii, he suggested at present there is a low level of interest on the part of the Canadian Association of Petroleum Producers in pursuing this as these resources companies are concentrating all their efforts and monies on the Canadian east coast. Further, new exploration is not economically viable as the world price of oil is still fairly low.

Even though there are many negative aspects to the possible lifting of the moratorium, there

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Manifesto about the struggle to have the area of South Moresby in Haida Gwaii reserved as a national park. See Monte Hummel, ed., Endangered Spaces: The Future for Canada's Wilderness (Toronto: Key Porter Books, 1989) at 50.

552 Supra Chief Russ interview at note 66, and Weir interview at note 400, where they both noted the changes in fish stocks after seismic testing pre-dating actual oil/gas exploration in Alaskan waters where both these men fished for many years.

553 Supra Chief Davidson interview at note 307 where he recounted Hecate Strait is one of the most dangerous areas for offshore drilling. This is due to several reasons including severe storms and weather, continual seismic activity in the area, and the difficulties posed for exploration due to Haida Gwaii lying on a thermal plain. He also mentioned that oil and gas may well be a thing of the past as there are environmentalists who state that the world is on the verge of new energy sources coming on line.

554 Supra Broadhead interview at note 551. At the time of our interview in February 1999, prices were low. It must be kept in mind that prices of oil can fluctuate quite quickly.
are on the other hand a great many benefits that flow from such exploration and possible exploitation down the road such as employment, and demand for services, as well as a cheaper and close power source. The Haida members who discussed this issue, as well as a number of non-Haida residents of Haida Gwaii agreed, it would be imperative that the Haida and local residents be involved from the beginning of such projects, that they be consulted, and be the recipients of a goodly portion of the benefits generated.\textsuperscript{555} There was suggestion the best course of action is not to lay back and wait for the rigs to show up, but to be involved now stating the Haida position, and thus ensuring their inclusion should the project ever go through. Some feel with the advancements made in offshore drilling technology, it is only a matter of time until there is exploration around Haida Gwaii.\textsuperscript{556}

There is one possible twist to the claim of the Haida Nation to Aboriginal title to the ocean spaces of Haida Gwaii which will bring into play many new issues and agendas. As the archipelago of Haida Gwaii lies beyond the territorial sea of Canada, it would seem the entity to be involved in discussions and negotiations about ocean spaces would be the government of Canada. However, it is possible British Columbia will make a claim the sea bed of Hecate Strait belongs to the Province as the natural prolongation of the sea bed and waters of the

\textsuperscript{555} Supra Jones, Jr. interview at note 294 where he talked about an Indian reservation in the state of Georgia where they built a casino and all the benefits derived go to assist every Indian on the reserve no matter what their moral fiber. In his opinion benefits should be used first for health and then education, as both will ensure the continuation of the Haida culture.

\textsuperscript{556} Personal interview with Margo Hearne, local activist and environmentalist who was involved in the assessment in the 1980s, on 29 January 1999 at Massett. John Broadhead advised that the Province will push hard for the lifting of the moratorium as it would be viewed as a good revenue source. He bases this on the fact that Dan Miller, the local MLA and the newly appointed Premier, has been vocal about his agreement with this proposal. Supra Broadhead interview at note 551.
Strait of Georgia north. The Province could argue the usual base lines of demarcation, running along the shoreline of the mainland of British Columbia are not appropriate, and that the base lines should run on the west side of Haida Gwaii. This argument would be based on the decision of the Supreme Court of Canada as previously noted whereby British Columbia was determined to own the sea bed of the Strait of Georgia. This would thus bring British Columbia to the table with its own agenda of issues to discuss. As to what those issues might include, those issues involving economic results such as management of fisheries and oil/gas exploitation would be high on the agenda.

Presently, the Haida are at a junction of rediscovering their culture and values, with the sea as an important dimension in that rediscovery. My examination of Haida culture and field experience has shown there is ample evidence available which can establish exclusive use and occupation of the ocean spaces of Haida Gwaii, and thus substantiate Haida title to such ocean spaces utilizing the principles set out in Delgamuukw, and those in Marshall.

4. The Tsawwassen First Nation: “A People Facing the Sea”

(a) Introduction

The most notable feature of the Tsawwassen First Nation (hereinafter TFN) is its proximity

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557 Supra Strait of Georgia Reference at note 91 in which the Court determined that the sea bed of the Strait was the property of British Columbia.

558 As stated by Ernie Collison, supra E. Collison interview at note 416.
to the sea. “Tsawwassen” means “people facing the sea”\textsuperscript{559}, which provides some sense of the significant bond between the people of this Nation and the body of ocean upon which it lies.

The TFN today occupies a Reserve of approximately 640 acres\textsuperscript{560} situate along the southeastern shores of the Strait of Georgia, in British Columbia, on delta lands south of the Fraser River mouth, and adjacent to the Canada/United States border. Roberts Bank is the ocean space that affronts the Reserve. Their traditional territories as documented on their Statement of Intent filed with the British Columbia Treaty Commission includes portions of Boundary Bay, the Strait of Georgia, Trincomali Channel, Stuart Channel, Active Pass and Boundary Pass among others.\textsuperscript{561} In this section, I will explore the history and anthropology of the TFN and its culture. This information will illuminate the changes that have taken place from its pre-European period, through European contact, to where the Nation finds itself today and its vision for the future. It is evident TFN has enjoyed since time before memory a distinct linkage with the sea and its resources. Fish and food gathering from the sea have been of fundamental importance to this society as a food source and a means of commerce.

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\begin{itemize}
\item \textsuperscript{560} \textit{Ibid.} at 69. There are also included in the reserve 53 acres of marginal lands which are dissected by Highway #17 which is the BC Ferry Terminal road and causeway and a hydroelectric power cable right-of-way leading to Vancouver Island.
\item \textsuperscript{561} \textit{Supra} TFN Statement at note 34 which includes a map describing the following ocean spaces within the TFN territories: all the sea waters within the Strait of Georgia bounded on the north by the north edge of Lulu Island (being all of the City of Richmond) to a south boundary of the Canada/United States boundary, including lands of the islands of Galiano, Mayne, Saturna, North and South Pender and Saltspring.
\end{itemize}
Property rights have played a part in the evolution of this Nation, and coupled with the First Nations’ concept of responsibility has resulted in communal use of such resources.

During the preparation of this section, I have had the privilege of learning about the TFN from two of its members, and visiting its Reserve. At the close of this section, I have provided some personal remarks and observations drawn from those experiences and the reviewed written sources. I am hopeful these comments will provide some foundations upon which the TFN may substantiate their Aboriginal title and right of responsibility for the ocean spaces within their traditional territory.

(b) The Historic, Cultural and Societal Perspectives

(i) The Pre-European Period

To have some understanding of TFN, we must be acquainted with their history. They are a member of the Halkomelem language group, one of the five language groups included in the Central grouping of the Coast Salish Nation which from time before memory extended over an area encompassing the southern end of the Strait of Georgia, most of Juan de Fuca Strait, the lower Fraser Valley and adjacent areas. These territories included parts of the present day Province of British Columbia and the State of Washington. The present Reserve was

562 Supra Baird interview at note 300; and Williams interview at note 319. Councillor Williams was born on the Reserve over sixty years ago where his grandparents and many prior generations of his family had lived.

563 Wayne Suttles. “Central Coast Salish” in Wayne Suttles, ed., Northwest Coast, vol. 7 of Handbook of North American Indians (Washington, D.C.: Smithsonian Institution, 1990) at 453 [hereinafter Suttles 1]. I have utilized the anthropological information mainly from Suttles’ work to which I was directed by Chief Baird. In discussion with Keith Carlson, a historian for the Sto:lo Nation and a Ph. D. candidate in
determined in the later half of the 1800s at the location of a major historic Coast Salish village. Data found at excavation sites on the Reserve by archaeologists in 1989/90 have determined the Coast Salish peoples had been present in these areas for over 5000 years.

The wealth of the Coast Salish Nation was categorized by its abundance in natural resources of fish, game, berries and trees, not in gold, silver, or other precious minerals. The social organization of the Coast Salish found members intermarrying with other First Nations people throughout their own region and beyond, with marriage to those outside the village.


For the recent scholars who have written contra to these concepts see: Jay Miller, “Back to Basics: Chiefdoms in Puget Sound” (1997) 44:2 Ethnohistory 375; and supra Tollefson 1 at note 332, and his other articles entitled: “The Snoqualmie: A Puget Sound Chiefdom” (1987) 26:2 Ethnology 121, and “Political Organization of the Duwamish” (1989) 28:2 Ethnology 135.

Ibid. Suttles 1 at 471; and supra 1996 Report at note 559 at 68. At the time when the reserve lands were determined the population was extremely small as the number of First Nations peoples on the Pacific Northwest Coast had been severely reduced due to smallpox. Lands were granted based on the numbers of members of a Nation.


Supra Chief Baird interview at note 300, and ibid. at 205 where the author notes the archaeological information shows the earliest occupation of the site is circa 4000 - 3000 BP.

Supra Ashwell at note 317 at 13.
was encouraged, with residence in whichever village was preferred. Kinship was bilateral with no distinction made between the father or mother's relatives. Villages were most often established on low beaches just above the high water line of the sea or flood level of the river.

Anthropology works tell us residential groups included the family, household, local group and winter village. A household would consist of several families related through the male or female line who co-operated with each other economically and socially. The members were descendants of one notable ancestor from whom they inherited shared rights to resources, names, ceremonial activities and possessions. Actual management of resources remained with the hands of the elite within the household. Most often these responsibilities would be handed to the eldest born; however, those showing special aptitude would often be included within the elite.

Local groups (or extended families) were a number of households who shared a common identity and descended from the same “first man” even though they could well be of different classes and not consider themselves kin. Most often there was one strong household to


569 Supra Ashwell at note 317 at 78.

570 Supra Suttles 1 at note 563 at 463 - 464.

571 Ibid. at 464.
which several dependent households were attached, thus making up a local group.

Chiefs were the heads of the leading households who were considered wealthy as they could provide visitors with food and guidance. Their wealth did not provide them with any authority beyond their villages. Both the elite of a household or a chief could task members of their households with activities such as harvesting at fishing sites and clam beds, building a fish weir or working special gear during food gathering activities.\(^{572}\)

Winter villages consisted of several local groups where people joined together in some subsistence gathering activities, and ceremonial activities. There was no village authority among the Coast Salish to enforce such co-operation and each household acted independently.\(^{573}\)

Traditional histories and genealogies of households and local groups tell of their founder dropping from the sky at or near the winter village or summer camp, and the Transformer/Creatore providing him with technical and ritual knowledge. This knowledge aided him in establishing special relationships with local resources which were then passed down to the household or local group.\(^{574}\)

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\(^{572}\) *Supra* Suttles 2 at note 568 at 65.

\(^{573}\) *Supra* Suttles 1 at note 563 at 464 where he notes there is no historical evidence of any formal intervillage organization among the Coast Salish.

\(^{574}\) One such Coast Salish traditional history tells of the Katzie ancestor who married a sockeye salmon woman and was taught how to perform the rites that would ensure the return the next year of the summer run of sockeye salmon, being the people of the salmon woman. *Ibid.* at 466. (Katzie territory is
The TFN had connections with the larger Coast Salish Nation through family ties, trade and the exchange of resources with other members along the Fraser River estuary, the Fraser Valley inland, the Gulf Islands and Vancouver Island. Historical and anthropological information characterizes the TFN as enjoying a thriving coastal economy based on marine resources.

The Coast Salish, as most First Nations of the Pacific Northwest Coast, had as one of their cultural cornerstones, the potlatch ceremony being a complicated giving away or redistribution of wealth ceremony whereby the recipients of the gifts were bound at some point to reciprocate such generosity. These ceremonies were the means of proving to the community a person’s standing and influence, by giving back more than what one had earlier received.

located in the Pitt Meadows area of the Lower Mainland of British Columbia, east of Vancouver.)

See Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997) [hereinafter C. Harris] at 68 - 76 where he relates the gathering of many of the First Nations groups in the lower Fraser Valley and southeastern Vancouver Island along the Fraser River for the harvesting of salmon, and elsewhere for other gathering and harvesting purposes. Many were bi- or trilingual, and often members from various groups would overwinter with other First Nations on the Lower Mainland. These groups were also connected by marriage. Also supra 1996 Report at note 559 at 60.


Yet, it is evident that potlatchers did not expect potlatch gifts would be returned with interest, nor even perhaps returned at all. Such events gave the opportunity for fame, which in turn could be rewarded through stable relations with neighbours and good marriages for their children. Further, these ceremonies established a potlatcher’s title to an area of territory and resources.

One particular instance of traditional redistribution of wealth documented by historians is that of a Coast Salish man providing his parents-in-law with food. They in return would hold, and give wealth back to the man and those who had attended with him. In an interview with Councillor Russell Williams, he explained potlatch was often used in situations where members of the community who were not able to gather their own food would be helped so no one went hungry. He noted reciprocation for such aid might not happen for a number of generations.

(ii) Changes Following European Contact

The TFN society and its culture experienced great changes with the arrival of the Europeans. History notes the first European to come to the Coast Salish territories was most likely the fur trader, Charles Barkley in 1787. There followed little exploration of the area until 1792

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578 Supra Suttles 1 at note 563 at 469.

579 Wayne Suttles, Coast Salish Essays (Vancouver: Talconbooks, 1987) at 21 [hereinafter Suttles 3].

580 Ibid. at 18 - 20.

581 Supra Williams interview at note 319.
when George Vancouver charted the region, yet overlooked the Fraser River. In 1808, Simon Fraser, a fur trader for the North West Company, found this extensive river, and by the 1820s exploration was in full swing with the Hudson Bay Company founding Fort Langley situate up river from the present TFN Reserve in 1827.\textsuperscript{582}

With the founding of Fort Victoria on Vancouver Island shortly thereafter, trade especially in furs between the Europeans and the Coast Salish including the TFN flourished. Some suggest that this new found commerce and the ways of the Europeans lead the First Nations to abandon their beliefs in stewardship and exploit to near exhaustion fur-bearing animals.\textsuperscript{583}

Further changes were experienced with the signing of the \textit{Oregon Boundary Treaty} in 1846 creating the international boundary between the United States and what is now Canada effectively dividing the Coast Salish Nation.\textsuperscript{584}

The mid-1800s saw the creation of the Indian reserve system in Canada whereby specific lands with specific boundaries were determined for First Nations. Most often such Reserves contained smaller areas of land than what had historically been traditional territory. For the TFN, its traditional lands were diminished with the creation of the Reserve, yet as a number

\begin{footnotesize}
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\item \textsuperscript{582} \textit{Supra} Suttles 1 at note 563 at 470.
\item \textsuperscript{583} \textit{Supra} Ashwell at note 317 at 22. This may be add to the highly held ideal of stewardship within the First Nations communities in that they have seen the harm that comes of not keeping that ideal at the forefront of all resource activities.
\item \textsuperscript{584} \textit{Supra} Suttles 1 at note 563 at 471. \textit{Treaty Between Her Majesty and the United States of America, For the Settlement of the Oregon Boundary (Oregon Boundary Treaty, 1846), TS 120, in supra Parry at note 316 at vol. 114 at 39.}
\end{itemize}
\end{footnotesize}
of the TFN were involved in farming, more acreage was allotted than many other reserves along the coast of British Columbia as a number of the members were actually farming the land. “The government was happy the Indians were farming” and thus assimilating to the non-Aboriginal ideals, and this was to be encouraged by providing more acreage to the Reserve. There was also a strong presence of Tsawwassen involvement in fishing both for food and commerce, as well as the building of canoes and hunting.

The ethnographers and anthropologists of the past century engaged in estimating Native populations in British Columbia have been mainly in agreement as to the population numbers. Professor Suttles suggests the population of the Coast Salish prior to contact exceeded 20,000. He further notes these numbers were dramatically reduced to less than 7,000 with the smallpox epidemics after contact during the 1800s. Professor Harris’ recently published interpretation of the data and historical information suggests the Coast Salish were “once the most numerous people on the Northwest Coast”, and at the time of contact had

585 Supra Chief Baird interview at note 300.

586 Supra Williams interview at note 319.

587 Supra Suttles 1 at note 563 at 473. Population numbers after contact are not always accurate as census counts were often conducted in summer when many of the Coast Salish were away from their villages gathering and harvesting for the winter months. The Tsawwassen permanent village before contact encompassed an area starting at the present Tsawwassen Reserve, continuing east along Tsawwassen Beach (the location of the road to the ferry terminal) to Boundary Bay and Point Roberts, being about seven miles in length. Councillor Williams has been told by Elders during his lifetime that there could have been approximately 20,000 members of the Tsawwassen Nation living in the village during the winter months. He also related that other diseases in addition to smallpox took their toll on his People including tuberculosis, influenza, and venereal disease.

588 Supra C. Harris at note 575 at 23 - 26.
a population of approximately 100,000. The TFN records show the smallpox epidemics in the late 1800s reduced their population to about 20 people.

Coast Salish people were employed by the Hudson Bay Company in various occupations such as fishing, hunting, loggers, farmers, sailors and stevedores. Many sold fish, berries and other native foods. By the 1870s, many members were employed by the canneries where the men fished, and the women and children worked in the canning process.

The coming of the European settlers and their values changed the Coast Salish culture dramatically in terms of taking away large portions of their traditional territories, bringing employment opportunities that took them away from their communities, and outlawing the potlatch ceremony in British Columbia from 1884 to 1951. The decline in economic opportunities for the Coast Salish commenced at the turn of this century, and the effects of unemployment has added to the erosion of their culture.

589 Ibid. at 30. In Chapter 1, he discusses the data and historical information that is available and the reasons why these scholars have interpreted the population estimates they have. He contends that smallpox reached the Strait of Georgia in 1782, before European settlement began, with devastating effects. The epidemic started in Mexico in 1779 and spread both south to Chile and north throughout the North American continent. Professor Harris notes determining pre-contact population numbers is very difficult. From his analysis of the available information, he concludes the Native population of the Western Hemisphere was reduced by ninety percent due to smallpox, with the Native population of British Columbia prior to contact being approximately 400,000. See 3 - 30.

590 Supra 1996 Report at note 559 at 68. For estimates of the Coast Salish population in 1881 broken down by language group see ibid. C. Harris at 146 - 149, and 153 - 156.

591 Supra Suttles 1 at note 563 at 471.

592 Supra Kew at note 577 at 476.

593 Supra Suttles 1 at note 563 at 472.
Government policies and regulations have created great changes in the First Nations culture. Councillor Williams recounts his father telling about the outlawing of the First Nations methods of fishing (weirs, spears and nets) so the gill nets of the non-Aboriginal commercial fishermen of the Fraser River would not be interfered with.\footnote{Councillor Williams knows first hand the twentieth century government policy requiring one to be a Canadian citizen in order to obtain a commercial fishing license.\footnote{Such government policies have resulted in the present sixty to seventy per cent of the TFN being unemployed or on social assistance according to expert study.}} Councillor Williams knows first hand the twentieth century government policy requiring one to be a Canadian citizen in order to obtain a commercial fishing license.\footnote{In 1952, a new Indian Act came into being with much the same provisions as before, with some differences in the enfranchisement of First Nations Peoples. He notes there was little interest shown for obtaining the right to be a citizen and vote, for to do so, ended band membership and Indian status, and thus would effect the benefits associated therewith.\footnote{First Nations Peoples were not able to hold Canadian citizenship, and were disenfranchised for voting in Provincial elections in 1872 pursuant to Qualification and Registration of Voters Act, 1872, s.13.}} Such government policies have resulted in the present sixty to seventy per cent of the TFN being unemployed or on social assistance according to expert study.\footnote{Supra 1996 Report at note 559 at 86.}

Today, the population numbers of the TFN are starting to recover with a young membership of about 260, with 150 members living on reserve. There are about 100 non-members who

\footnote{See supra Harris at note 39 generally in chapters 2 and 3 for information about weir fishing on the Cowichan River on Vancouver Island, and in Lake Babine by the First Nations populations there, and the government regulation of same.}
also reside on reserve. The band council structure prescribed by the Indian Act includes four councillors and a chief councillor elected by the membership every two years. Most of the Reserve lands have been allocated over the years to individual members through Certificates of Possession (CP) under the Indian Act which has left the Nation with a small portion of lands that are communally held. CPs are literally held “in trust” and therefore are not available to be used as collateral by the possessors.

Upon visiting the Reserve, one is struck by the beauty of the Reserve’s seaside setting and lack of urbanization. Access to the ocean highway and its resources appears to be easily at hand, yet, as one surveys the horizon looking out to sea, reality comes into view. This sea view is dramatically interrupted by the modern developments of the British Columbia Ferry Corporation Terminal and the Roberts Bank Superport. To describe these two facilities as visual blights on the western face of the Reserve is an understatement.

598 Supra Chief Baird interview at note 300; and ibid. 1996 Report at 86 as to population numbers. See supra Indian Act at note 97 at section 74 in relation to make up of band council and elections.

599 Ibid. Chief Baird interview. Even though one has a certificate of possession for lands granted pursuant to section 20 (2), one is not able to pledge these lands as security for a loan pursuant to section 89 (1), supra Indian Act at note 97. Most lands are used for housing purposes.

600 Supra 1996 Report at note 559 at 9 - 10 where it notes the terminal was initially built in 1962 and the Superport in 1968, with continued major expansions to both until the mid-1990s.

601 I observed there two massive structures during my personal visits to the Reserve on 26 February and 5 March 1999. B.C. Ferries Corporation runs daily services from early morning until late evening with large capacity ferries to both Swartz Bay and Duke Point on Vancouver Island, and smaller ferries to various locales on the Gulf Islands. The Superport includes coal heaps and loading facilities, stock piling of shipping containers and loading booms, and an assortment of railway cars. Both facilities have motor vehicle access which includes transport trucks.
These developments have produced nuisances that directly effect the Reserve including dust, noise, traffic, non-First Nations people traveling the Reserve, impediments to the visual views of the Reserve, pollution, changes in the foreshore, decline in food resources, and termination of foreshore access. These two structures have been characterized as a "major intrusion on the face of the Reserve"\(^602\) and have had significant impacts on the TFN, its way of life and culture.\(^603\) Some of these nuisances and impacts will be discussed and reviewed further in this section.

(c) The Tsawwassen Connection with the Sea

(i) Fishing

The sea has been intrinsically linked with the TFN from the Nation's beginnings as noted in the meaning of its name, and in sea activities. History notes the sea and its shores provided a rich source of various food stuffs, and archaeological data shows from prehistoric times down through the centuries, salmon has been a major subsistence resource. Archaeological excavations have also found flatfish, herring, and shellfish especially basket cockles and mussels to be other important sea foods.\(^604\) The Coast Salish diet as evidenced by remains of shell middens also included various species of barnacles, crab, cockles, chiton, a variety of clams and oysters, rock scallops, mussels, octopus, goeduck, and moon snails.\(^605\) These sea

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\(^{602}\) *Supra* 1996 Report at note 559 at 81.


\(^{604}\) *Supra* Kusmer at note 565 at 189.

resources were utilized when fresh as much as possible, and also preserved and stored for use during the winter months especially in the ceremonial season. 606

Most ethnographers and archaeologists contend salmon was the most significance source of food as an economic and dietary staple. However, there is now archaeological evidence that strongly suggests shellfish, flatfish and plant resources have been underrated. 607 The actual determination of which sea resources played the more significant role matters little in the real scheme of TFN’s subsistence as all these resources were procured from the sea and its shores, thus illustrating the vital attachment of the TFN with the sea from time before contact.

In Coast Salish society labour was divided by gender, with women being very involved in gathering and processing fish, plants and shellfish. They harvested all shellfish, 608 which they did by utilizing digging sticks and baskets. 609 As with many First Nations, there was an annual cycle of food production and consumption which necessitated the movement of Coast Salish peoples to various areas within their territories. This cycle included the activities of gathering food for immediate use, preservation of food for later use, and the conservation of resources, especially those shellfish that were available at the winter sites.

606 Ibid. at 217.
607 Ibid. at 217, and supra Kusmer at note 565 at 189 and 191.
608 Supra Suttles 1 at note 563 at 459.
609 Supra Suttles 2 at note 568 at 61.
Social functions like visiting relatives within the Coast Salish territories also played a part in this seasonal shift in locale, and the gathering of food. Trolling for salmon took place in the Coast Salish territories during the winter months, and herring spawn was collected in the area of the TFN in winter and early spring. A number of shellfish were available all year round for immediate consumption even though much was preserved for the winter months. The historical information indicates the Coast Salish peoples had an abundance of seafood available to them all year which they utilized. Yet, their history is not without its times of famine due to depletion in food resources.

In the excavated shell middens in the Tsawwassen area, the remains of fish and shellfish are more abundant than bird or mammal bones. During different time frames in history, various species of fish and shellfish appear to have been more important than others. Archaeologists suggest that the greater use of different species of fish and shellfish at various times throughout history is most likely due to the changing environment created by the maturation of the Fraser River estuary which in turn brought about changes in sites locations

610 Supra Krieger at note 605 at 218.
611 Supra Suttles 2 at note 568 at 62.
613 Ibid. at 206, and supra Suttles 2 at note 568 at 58 - 60.
614 Supra Kusmer at note 565 at 199 and 201.
615 Ibid. See generally the article as Kusmer discusses a number of excavations within the Tsawwassen territory that contain different concentrations of food sources in various prehistoric time periods.
and activities, and disease of species in certain years. \(^{616}\)

Historical accounts found in the diaries and journals of travelers, explorers and the Hudson Bay Company officials confirm these patterns of food gathering and consumption, as well as the actual land use by the Coast Salish. From these accounts, it is evident that the influx of Europeans in the 1800s, alienated the Coast Salish and the TFN, from many of the highly productive shellfish beds, salmon streams and prairies with substantial impacts on their subsistence economy. \(^{617}\)

One historical account relates the period around March being called “blow time”, the time when one would be hungry all the time. Some historians suggest such phrase referred to the lack of food, while others believe it suggested a very restricted diet with only a few sources of dried or smoked food that would leave one wanting. \(^{618}\)

There is evidence the Tsawwassen fished all the salmon runs of the Fraser River thus adding credence to the position that salmon was an important commodity in their culture in pre-contact times. \(^{619}\) From archaeological findings of very early times, the Tsawwassen site has

\(^{616}\) *Ibid.* at 191 and 203 - 205. It is estimated that the northern delta lands where the TFN reside has moved westward out into the Strait of Georgia about 5 km in the last 2000 years. Research suggests that the island known as English Bluff/Point Roberts was joined to the delta land surface about 2000 to 3000 BP.

\(^{617}\) *Supra* Suttles 2 at note 568.

\(^{618}\) *Ibid.*

\(^{619}\) *Supra* Kusmer at note 565 at 202.
been shown to be an attractive location for either a late winter/spring flatfish-herring-shellfish procurement camp or permanent winter village. With the expansion of the Fraser delta and the maturing of salmon fishing technology, this site came to be a more permanent village with increased exploitation of salmon and mammals. ⁶²⁰

Salmon has been said to be as basic a food source to the Coast Salish as bread is to the non-Aboriginal. Like most First Nations of the Pacific Northwest Coast, the Coast Salish practiced reverend salmon ceremonies each year with the catching of the season’s first salmon. These ceremonies differed somewhat in how they were carried out through out the Coast Salish territories, yet the common basis was the acknowledgment of the salmon as beings who lived like people in their own world, and came each year as fish to provide their flesh as food to the First Nations. To ensure their return the next year, the fish were treated with great respect, being carefully carried by children to the cooking place, and then cooked in a special way and eaten by all. Thereafter, the bones were ritually returned to the water to ensure their return the next year. ⁶²¹

The TFN enjoyed the bounty of five types of salmon being the chinook (spring), sockeye (red), coho (silver), humpback (pink) and dog (chum) ⁶²², all of which came at various times through the summer and fall. Salmon was fished by various methods including traps, weirs,
spears, nets, and any other method that worked, and were most often smoked or dried for later use. Today, sockeye salmon is the main source of the TFN fish diet. Councillor Williams though notes that the availability of this food source to his People is very dependent on DFO’s conservation and fishing regulations.\textsuperscript{623}

In the lifetime of Councillor Williams’ father, salmon were fished both inside and outside the tidal flats in the TFN territory. He recalled around the turn of the century, the Tsawwassen using reef nets similar to those used by the Coast Salish in the United States for fishing salmon.\textsuperscript{624} Today, not all five species of salmon are available for fishing, rather the fisheries of spring and sockeye salmon are open with limits. Chinook have been classified as a distressed specie by DFO.\textsuperscript{625}

Other specific species of fish and sea resources utilized historically by the TFN include halibut, various types of cod, sturgeon, herring and seals (that would follow the salmon up the river) and porpoises.\textsuperscript{626} Elders of the Nation recall fish traps constructed for sturgeon on Roberts Bank near the Superport. These were owned by the one who built them, and were still visible in the early 1900s.\textsuperscript{627} The oil from seals and salmon was stored and used with

\begin{itemize}
\item \textsuperscript{623} Supra Williams interview at note 319.
\item \textsuperscript{624} Ibid.
\item \textsuperscript{625} Ibid. Councillor Williams has concerns that the destruction and change in habitat around the Superport where the chinook feed are having detrimental effects on the fish stocks.
\item \textsuperscript{626} Supra Ashwell at note 317 at 43 - 45; see also supra Kusmer at note 565 at 203.
\item \textsuperscript{627} Supra 1996 Report at note 559 at 45.
\end{itemize}
dried fish. 628 Anthropological evidence suggests the consumption of vegetables by adult Coast Salish was less than ten per cent of their total diet, with seafood forming the substantial part of their diet. 629

Councillor Williams considers the Tsawwassen First Nation his homeland, and has resided on its territories for the greatest part of his life. It is here where he spent much time learning the Coast Salish traditions and history from his father and other members of his extended family. His father was a farmer and not a fisherman, as one could not do both. Councillor Williams took up fishing as a young man and has spent his life in this occupation.

Sturgeon was one of the main species of fish caught by the TFN, and was available all year round. 630 Salmon was and still is an important species though it is only available fresh during the runs, and is preserved for the remainder of the year. Today, sturgeon and other species of fish are very restricted or in decline and therefore are no longer part of the TFN diet. Councillor Williams recalls major eulachon runs in the waters of Canoe Pass in the Fraser River. 631 He believes that overfishing and pollution in the Fraser River and the Strait of Georgia are the two major factors that have greatly affected fish stocks in the TFN territories.

628 Ibid. at 63.

629 Supra Suttles 2 at note 568 at 61.

630 This was related to Councillor Williams by his father. When Councillor Williams was involved in the salmon fishery, sturgeon over three feet were permitted to be taken as a by-catch. He notes from his experience, sturgeon were very seldom caught. Supra Williams interview at note 319.

631 Ibid. Councillor Williams notes that eulachon is regulated by a quota, and has been closed for the last two years due to the decline in the stocks.
over his lifetime.\textsuperscript{632} There is no scientific data presently available on what implications have come about since the building of the two super structures yet there have been noticeable changes in the intertidal habitats. \textsuperscript{633}

Sealing was practiced by all Coast Salish peoples using various methods. Other sea mammals such as porpoises, sea lions and possibly elephant seals were also taken. The TFN did not hunt whales;\textsuperscript{634} however, stranded whales were taken for their meat and belonged to the person who owned the beach or waters where they were found.\textsuperscript{635} There was a formula to the distribution of the meat from other sea mammals which saw specific portions go to the hunters and the paddlers of the canoes.\textsuperscript{636} The practice of hunting sea mammals by TFN was discontinued before the lifetime of Councillor Williams. \textsuperscript{637}

(ii) Property Rights and Ownership of Fishing Spaces

History tells us that there were actual areas and resources owned or controlled by certain kin groups, and often managed by one particular person being one of the leaders of such

\textsuperscript{632} \textit{Ibid.}

\textsuperscript{633} \textit{Supra} 1996 Report at note 559 at 37.

\textsuperscript{634} \textit{Supra} Suttles 3 at note 579 at 234 - 235.

\textsuperscript{635} \textit{Ibid.} at 245.

\textsuperscript{636} \textit{Ibid.} at 237 - 238. The first harpooner to strike was entitled to the rear portion and the head; the second got a flipper, the third the other flipper, the fourth the back, the fifth the neck and the belly went to the remaining harpooners. Each harpooner in turn divided his share with his paddler. All received a piece of the gut.

\textsuperscript{637} \textit{Supra} Williams interview at note 319.
In regards to the sea and its resources, there were areas recognized as controlled and managed by one group. These included weirs constructed under the supervision and knowledge of a group, and tidal pounds owned by the descendants of the builder found in the channels near the mouth of the Fraser River where larger salmon and sturgeon were placed.  

Weirs and traps for salmon in the Coast Salish communities appear to have been usually built by the whole community with no distinction to access. The smoking houses located at the weir sites were owned by individuals or extended families.

Some types of fishing such as sturgeon traps, reef-net locations were restricted by property rights. The most famous shellfish beds most usually butter and horse clams were owned by kin groups. Yet even with these property restrictions, it seems that access to these areas and the resources gathered were in one way or another shared with the community and in some instances other communities.

It is suggested that even though there was wide spread sharing of food resources,

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638 Supra Sutlles 1 at note 563 at 464; and supra Sutlles 3 at note 579 at 17.

639 Ibid. Sutlles 1 at 457.

640 Supra Sutlles 2 at note 568 at 65; and supra Sutlles 3 at note 579 at 20 -21.

641 Supra Sutlles 1 at note 563 at 459.

642 Supra Sutlles 3 at note 579 at 20 - 21.
“ownership” was important to show outsiders that permission had to be sought if they wanted to take resources. 643 Those who produced more food than others were honoured, and one was expected to share food gathered with close relatives and housemates. Food was also shared indirectly by imparting food gathering techniques and in some instances by distributing resources to neighbours and relatives in other communities. The sharing of food and directing food gathering efforts provided one with high status. 644

Councillor Williams has knowledge of fishing sites off the TFN Reserve that belonged to different families. The ownership of these areas was passed down from generation to generation. Not every family had a fishing site, and thus created trading between the members of the community, and others. As these fishing sites had been in one family for such a long time, these sites were known to belong to the elder of the family. The ownership of these sites was recognized by the other First Nations in the area, and any one wanting to fish such a site would ask permission.

Sometimes permission to fish a site was denied as the run was poor, and the owner had to look after his own extended family first. 645 In years of low runs, the Coast Salish peoples practiced sustainability and the fact other communities depended upon the fish run too. The TFN practiced these ideals. Most usually they would hear about the size of the run from their

643 Ibid. at 21.
644 Ibid. at 20 - 21.
645 supra Williams interview at note 319.
relatives and others on Vancouver Island, and then ensure they took only what was necessary
to sustain themselves so there would be fish to continue up the river for their relatives and
neighbours residing there. Councillor Williams in telling of this practice noted that the
commercial fisheries of today appear to have only one thought in mind which is to take as
many fish as they can no matter what the consequences.\footnote{646}

(iii) Fishing Today

There has been of late an upswing in the number of members of the TFN involved in the
fishery compared to earlier this decade. The \textit{Aboriginal Fisheries Strategy} (AFS) was the
response by Department of Fisheries and Oceans, Canada (DFO) in 1992 to the priority rights
to fisheries resources after conservation guaranteed to Aboriginal peoples in \textit{Sparrow}.\footnote{647}
AFS\footnote{648} sought to include the First Nations in the actual delivery of DFO services and the

\footnote{646} \textit{Ibid.}

\footnote{647} \textit{Supra Sparrow} at note 2.

\footnote{648} AFS was commenced as a seven year initiative worth $140m with approximately 70 \%
earmarked for the west coast fisheries for projects such as enhancement, enforcement and conservation. Pilot
salmon sales projects involving the areas of the Lower Fraser Aboriginal Fisheries Commission (comprising
the Burrard, Musqueam and Tsawwassen Nations), Tsu-ma-uss Fisheries, and three Aboriginal nations on the
Skeena River, were all permitted to sell salmon.

In 1997, there were 77 AFS agreements signed in the Pacific Region representing 58 Aboriginal groups.
Agreements vary in degree of Aboriginal stewardship from group to group. For general information see
\textit{supra Aboriginal Fishing Strategy} (AFS) at note 99, and Department of Fisheries and Oceans Canada, \textit{West
Coast Fisheries: Changing Times} (Ottawa: Supply and Services, 1993).

A review of the pilot salmon sale projects was carried out in 1994 by Gardner Pinfold Consulting
Economists Ltd.; see generally \textit{An Evaluation of the Pilot Sale Arrangement of Aboriginal Fishing Strategy
(AFSS)} (Vancouver: Gardner Pinfold, 1994) which found AFS had generated economic opportunities for
Aboriginal communities while at the same time making improvements in fishery management. A later study
in 1997 by James G. Matkin agreed with these findings. His report does set out a number of criticisms of
AFS such as uncertainty in the allocation of fish and the jeopardy into which non-Aboriginal fishermen’s
livelihoods are placed. See generally "Working Towards More Certainty and Stability: Fact Finding Review
of the AFS Pilot Salmon Sales Program" February 1997 [unpublished].
making of policies. This program aided in the growth of the TFN fleet from a meager five to eight boats to approximately twenty to twenty-five boats (being mainly twenty foot open skiffs). These boats in turn employ approximately forty to fifty band members and provide regular access to the salmon fishery in the summer thus creating employment and economic benefits. \textsuperscript{649} The AFS has been an economic benefit to the reserve, and “when the fishery is open the Reserve is like a ghost town”. \textsuperscript{650} Presently, there are about three members of the Nation who hold commercial fishing licenses in their own names (being mainly licences for the salmon fishery).

TFN receives, as do other First Nation communities, communal food fishery licenses from DFO which allow fishing by members of the Nation to obtain fish for the Reserve members which is about thirty-five sockeye salmon per family per year. TFN are also involved in the AFS pilot salmon sales project which permits them to engage in a restricted commercial salmon fishery. \textsuperscript{651}

With the building of the ferry terminal and the Superport, docking facilities for the TFN fishing boats was stopped. Today most Tsawwassen boats are moored in Ladner, a community north of the Reserve, \textsuperscript{652} which adds extra costs of moorage and transportation.

\begin{flushright}
\textsuperscript{649} Supra Chief Baird interview at note 300.
\textsuperscript{650} Ibid. Chief Baird is a fisher herself and owns her own boat employing one deck hand.
\textsuperscript{651} Ibid.
\textsuperscript{652} Ibid.
\end{flushright}
back and forth to the usual costs of running a fishing operation. No longer being able to
operate their fishing operations from their own land base is clearly an impediment to their
Aboriginal right to fish, a right that has by the historical and traditional knowledge accounts
existed for the TFN since before contact.\textsuperscript{653} It is questionable whether these infringements
on the TFN’s right to fish and access to the ocean caused by the building of the ferry terminal
and the Superport are justifiable. The courts have determined that justifiable infringements
include: conservation,\textsuperscript{654} legislative objectives of economic and regional fairness and the
recognition of the historical reliance upon and participation within the fishery by non-
Aboriginal groups,\textsuperscript{655} and safety concerns for all people.\textsuperscript{656} The justifiable infringements
enunciated in \textit{Delgamuukw} have little relevance here as they concern the development of the
interior of the Province.\textsuperscript{657} As we have noted, if infringements are not justified than the court
can order such practice be discontinued or compensation be awarded.

In respect of the infringement of the TFN’s access to their fishing rights, some of the present
restrictions were imposed by DFO due to safety concerns in the use of small sea craft around

\textsuperscript{653} \textit{Supra} 1996 Report at note 559 at 48 and 54. It is suggested that the changes in the habitat of the
foreshore of the Reserve could well be classified as an impediment to the Aboriginal right to a food, social
and ceremonial fishery as guaranteed by \textit{Sparrow}. The case of \textit{Claxton supra} at note 2 set out that fish
habitat must be protected in order to ensure that an Aboriginal treaty right to fish continued to exist and be
exercisable. It is strongly suggested that this same type of argument could be utilized here for the
stabilization of the sea area around the TFN Reserve to ensure that the habitat of the fish is not destroyed so
the TFN can exercise its Aboriginal right to fish.

\textsuperscript{654} \textit{Supra Sparrow} at note 2 at 412.

\textsuperscript{655} \textit{Supra Gladstone} at note 2 at para. 75.

\textsuperscript{656} \textit{Supra Seward} at note 196 at para. 80.

\textsuperscript{657} \textit{Supra Delgamuukw} at note 35 at para. 165
these super structures. With the result that TFN now only fish the areas of the mouth of the Fraser River which include Canoe Pass, Ladner Beach and Deas Island areas. There is no fishing permitted in the Strait of Georgia waters that front the Reserve. With the result that TFN now only fish the areas of the mouth of the Fraser River which include Canoe Pass, Ladner Beach and Deas Island areas. There is no fishing permitted in the Strait of Georgia waters that front the Reserve.658 There are good grounds upon which the TFN is able to claim breach of their Aboriginal rights by the actions of the federal government, and as these two super structures appear to be in place to stay, to demand compensation whether by monetary evaluation or through some other viable option.

Many of the other traditional food fisheries of the TFN are restricted by federal policies. The crab fishery restrictions have recently been settled to some satisfactory end with DFO in that a communal license for crab has been issued to the TFN permitting the members of the Nation to fish such for food purposes by means of traps.659 At present, there appears to be no license requirement for clams; however, there is no fishery as the traditional clams beds are most usually closed due to pollution.660

As a boy, Councillor Williams gathered mussels, clams and oysters along the beach in front of the TFN where the ferry causeway starts. These shellfish beds, he recalls were virtually wiped out when the ferry access highway was built with the influx of the public to this area. Councillor Williams notes the traditional TFN crabbing area located where the Superport is today, is now polluted, and last year while fishing he saw no signs of crabs. There are a few

658 Supra 1996 Report at note 559 at 47 and 54.

659 Ibid.

660 Supra Williams interview at note 319.
cockles still available on the west side of the Superport and it is possible they would be contaminated. Cockles were a major food sources during the summer months.\textsuperscript{661}

Shellfish has almost disappeared from the TFN diet as the harvesting of shellfish on Roberts Bank and the foreshore of the Reserve is banned for health reasons due mainly to the pollution created by the urban, industrial and agricultural areas found upstream on the Fraser River,\textsuperscript{662} and surrounding the Reserve.\textsuperscript{663}

(d) The Nuisances and Impacts of the Roberts Bank Developments

The TFN have been vocal in raising their concerns about the impacts to their traditional territory and the environment. In 1992, during public hearings before the Review Panel dealing with the expansion of the Roberts Bank Container Terminal, Chief Tony Jacobs stated his concerns as follows:

\begin{quote}
Over the 22 years there's been much destruction of our foreshore. As you can see, we have 200 acres of marshland. Prior to the two causeways that marshland was rich with salmon, and in between the two causeways prior there was crabs, an abundance of crabs, clams, oysters and sea life there, and we had used that. As a kid, as a child I went out there with my grandfather and grandmother and we went out there and lived off the land. Today we can't do that.\textsuperscript{664}
\end{quote}

The voices of the TFN continue these same themes in their comments today stating that the federal governments actions have lead to the depletion of their fish stocks. There is no

\begin{itemize}
\item \textsuperscript{661} Ibid.; and supra Kusmer at note 565 at 203 - 204.
\item \textsuperscript{662} Supra 1996 Report at note 559 at 42.
\item \textsuperscript{663} Supra Williams interview at note 319.
\item \textsuperscript{664} Supra 1996 Report at note 559 at 56.
\end{itemize}
question the TFN have a right to fish in the area surrounding their Reservation, yet that has been steadily infringed upon and eroded until the traditional rights of the TFN, such as fishing, access to the ocean, and their spiritual places have been eradicated, and the configuration of their territories changed.

Councillor Williams states pollution is a major problem with the foreshore and sea areas of the TFN territory, and such pollution is a direct result of the ferry terminal and Superport structures which have created an area of dead water between them. The flushing action of the waters of the Strait of Georgia has been permanently stopped, thus allowing the build up of chemicals and other foreign materials to accumulate there. Further, these two structures have taken away more than half the coastline claimed by the TFN as part of their traditional territory.\(^{665}\)

These structures have also effectively ended the traditional mode of transportation of the TFN. They were known for traveling by canoe over the sea and inland water ways taking in activities such as hunting, trading, visiting relatives, and creating hostile conflicts. The Coast Salish style of canoe was used for saltwater fishing and hunting, and were of the cedar dugout style which could be as long as fifty feet and six to eight feet wide. The explorers Lewis and Clark documented a huge canoe of eight to 10,000 lbs. which held twenty to thirty people.\(^{666}\) At the time of contact, in a Coast Salish community there would be found on the


\(^{666}\) *Supra* Ashwell at note 317 at 64.
beach various kinds and sizes of canoes turned over and protected from the sun with mats.\textsuperscript{667}

One finds today, no canoes of any description pulled up on the beach of the TFN. In fact, I am informed that no one on the Reserve owns a canoe.\textsuperscript{668} The two super structures completely hamper the TFN’s access to the open sea.\textsuperscript{669} It was not all that long ago that Councillor Williams’ father related to him stories about his father, being Councillor Williams’ grandfather, traveling by canoe across the Strait of Georgia to Mayne Island in the Gulf Islands group to visit his relatives along the same route as that which the ferry would travel today. To aid in such a sea voyage, his grandfather would have made use of his traditional knowledge of the tides and winds in these ocean spaces.\textsuperscript{670}

The development of the two facilities on Roberts Bank has also produced changes in the salt water marsh used by the TFN. The marsh has actually expanded further out into the sea waters, and taken on a muddy/mushy bottom impeding access across the tidal flats and out to the intertidal areas. The eelgrass of the tidal flats has become more dense than earlier in this century as observed by Councillor Williams which in turn makes access to the tidal flats more difficult.\textsuperscript{671}

\begin{itemize}
\item \textsuperscript{667} Ibid. at 65; and supra Suttles 1 at note 563 at 462.
\item \textsuperscript{668} Supra 1996 Report at note 559 at 62. My purview of the foreshore of the TFN found there was an absence of water craft.
\item \textsuperscript{669} Ibid. at 47.
\item \textsuperscript{670} Supra Williams interview at note 319.
\item \textsuperscript{671} Ibid.; and supra 1996 Report at note 559 at 36 and 48 - 49.
\end{itemize}
The one further important link between the Tsawwassen and the sea is found in the sacred and spiritual areas located both at sea and along the coast. Councillor Williams notes that some of these revered places are located south of the access highway leading to the ferry terminal, and around Mayne Island. 672 These industrial developments and the increase of users of these areas has greatly interfered with the spirituality of these places and their sacredness.

These numerous changes in the traditional territories and activities of the TFN in relation to the sea and its resources have not diminished the connection of the sea with the Tsawwassen spirit. The sea signifies home to the members of this Nation, as it is the place where they hunted, went swimming, fished and looked out upon everyday of their lives. The developments that have taken place on and around the Reserve have started to fray somewhat that connection with many feeling it is no longer home. 673

The historical and traditional knowledge I have reviewed and explored clearly demonstrates harvesting of resources from the sea has been a foundation block of the TFN culture and life through out the centuries, and is still of importance today. Fishing was and is still considered a major occupation in the TFN both for food and for commercial ends. 674 Clearly, the sea

672 Ibid. Williams interview.

673 Ibid. Councillor Williams told me these were his feelings.

674 Supra 1996 Report at note 559 at 56.
has been an integral part of the life of the TFN since time before memory providing transportation, food, and spiritual well-being. That sense of oneness found in that abiding relationship has been altered over the last two hundred years, and is today threatened with complete loss.

The TFN has the history and information to sustain an argument that they have utilized their ocean spaces within their traditional territories since before European contact. How then do the TFN substantiate their claim for ownership of and responsibility for their traditional ocean spaces? What sources can be utilized to aid in this information gathering?

(e) Sources of Substantiative Information for Claims to Ocean Spaces

As previously mentioned, there are diaries and journals produced by the early explorers to the Fraser River area which are regarded as sources of information about the people of this area. These include the journals of the Spanish explorers, and those of the George Vancouver expedition, and others. 675 Records such as those of the Hudson Bay Company for various regions in the Canadian West have been extensively used by historians both in their writings

and in evidence before the courts. 676

Similarly, the works of noted anthropologists like Dr. Wayne Suttles who has spent over
years forty years studying, investigating and writing about the Coast Salish culture, are good
sources of reference. Dr. Suttles in particular is recognized as being influential in shaping the
direction of Northwest Coast studies, and his work “occupies a secure place in the forefront
of the study of this cultural area”. 677 There have been a number of archaeological
excavations carried out on the TFN Reserve and in the surrounding area, with the results of
these works being published. 678 These publications can aid greatly to the body of sources to
substantiate claims of practices and usage of areas.

These sources as noted are predominately from the non-Aboriginal society. There are
sources within the First Nations that are now viewed as reliable sources of information. The
Coast Salish culture possessed no written language, and thus the information about their
origins, history, achievements and newly learned facts were preserved in the oral tradition.
Story-telling became an essential part of the cultural heritage of First Nations as the means of

676 See generally supra Newell at note 39; C. Harris at note 575; and Knight at note 356. Knight
notes that the Hudson Bay Company Archives is located in Winnipeg and holds over journals for over 210
Hudson Bay trading posts from 1705 to 1943 (at 335).

677 Foreword remarks by Michael Kew in supra Suttles 3 at note 579 at ix - x.

678 See generally the works of Belcher, Kew and Suttles in regards to anthropological information,
and Krieger and Kusmer for archaeological information. The bibliography and articles in Wayne Suttles,
Institution, 1990) provides further information about the Coast Salish especially in the state of Washington.
Some of the data and remarks made within these publications, I have utilized within this work.
passing on the culture and genealogy to the next generation. During the long winters, oral stories were told and acted out. The TFN have many oral histories which document their cultural and genealogical stories; however, much has been vanished due to the loss of elders. The TFN is presently making an effort to document as many of oral histories and elders as possible to prevent further erosion of their culture; however, funding for carrying out such projects is very limited.

One such genealogical story that Chief Baird shared with me was about the sea and its resources, and in particular why octopus are non-existent in the waters off the TFN. The story begins with the first ancestor long ago coming to the Tsawwassen area when the Bluff was an island (also known as English Bluff/Point Roberts). Its only attachment to the mainland was by a cedar rope. The ancestor had traveled far and was very tired, so he placed his face into the sea water where he encountered a giant octopus. The ancestor wrestled with the octopus. In the end, the ancestor tore the octopus into five different pieces and threw the pieces into many different directions. At each of the five locations where these pieces of octopus landed in the Strait of Georgia, thereafter octopus was plentiful. There has been no octopus in Tsawwassen since that wrestling match. The ancestor was told of this fact, and he

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679 Supra Ashwell at note 317 at 74. See generally supra Miller at note 512 which provides an excellent review of the style, content and social context of oral literature, particularly mythology, of the Northwest Coast, as well as other sources. The main researchers have been: Franz Boas, Melville Jacobs (a student of Boas), Claude Levi-Strauss and Dell Hymes. Dale Kinkade has built upon the works of Hymes with the Salish.

680 Supra Chief Baird interview at note 300.
compensated his people for this loss by joining the Bluff to the mainland.681

The TFN itself has commenced putting together information with the funding of two reports in 1995 and 1996 on the cumulative effects of development around their Reserve in response to the proposed expansion of the Roberts Bank Superport facility.682 Both these reports provide lengthy information about the changes in the Reserve and its people over the last century, and provide a good source of information about the territories used and resources exploited. These reports are not exhaustive in their documentation of the Tsawwassen people and their culture, and there is more information gathering that need to be done. As Chief Baird has advised there is some documenting of elders’ recollections happening which provides first hand knowledge of the life of the TFN within this century, and with the recognition and affirmation by the Supreme Court of Canada of oral histories as viable sources of evidence for substantiating Aboriginal title and rights, this type of information will be invaluable.683

The matter of overlapping claims by other First Nation groups to the traditional territories noted by the TFN will also need to be addressed as treaty negotiations move along. First

681 Ibid. What is interesting about this genealogical story is how it ties together the archaeological data that concludes Point Roberts was indeed an island that eventually connected with the mainland with that of the TFN oral tradition and histories. Further the archaeological data found no signs of octopus as a fish historically used by the Tsawwassen. See supra Kusmer at note 565 generally; and supra 1996 Report at note 559 at 60.


683 Supra Delgamuukw at note 35 at paras. 98 - 101.
Nations on the southeastern end of Vancouver Island who traveled to the Fraser River for fishing purposes, and the those situate on the Lower Mainland such as Musqueam, Katzie and St:lo, all claim interests in parts of the TFN territories.\(^{684}\) The procurement and gathering of further information about the Tsawwassen culture, territorial areas and resources usage will aid in sorting through these issues. Further study of records and journals, and the interviewing of First Nations peoples will produce the information sought. This is often long arduous work which then requires ingenuity in presentation.

A number of First Nations here and in other countries such as Australia are taking the information gathered whether it be on where medicine plants were gathered to where fishing holes were, and plotting this on maps with some tying it into the GIS maps. Some use a series of maps depicting the information with the first commencing from the time at contact, to another a number of years later, to a final map showing where these areas are today. This style of presentation provides a good visual chronology as to the changes that have occurred from the date of contact.

As with any information seeking, there must be some determination as to what is to be proven and what type of information is to be gathered. The TFN will need to discuss and determine these issues and work from there. Information gathering also requires funding of which the TFN has little, and this will factor into the determination of how to go about collecting information.

\(^{684}\) Supra Chief Baird interview at note 300.
(f) Today’s Realities and Tomorrow’s Vision

Chief Baird tells us that the TFN want to reattach their culture to the sea, and are therefore looking to establish developments that promote such a goal.\textsuperscript{685} The Nation is working towards self-determination and self-sufficiency. They have been involved in the British Columbia Treaty process since 1993, and are presently at stage 4 negotiating an Agreement-in-Principle.\textsuperscript{686} They concluded a Framework Agreement on 2 August 1997\textsuperscript{687} which provides for the process of negotiations to be followed by the parties, identifies the scope of negotiations, and establishes the issues and timetable.\textsuperscript{688}

Section 5.2 of the Agreement details the list of substantive issues to be discussed, some of which include environmental management, fisheries, the quantum, selection and management of land, and resource management. Implicit within these topics for discussion will be issues surrounding ocean spaces which I conclude will include issues such as Aboriginal title, rights to resources, rights to manage such areas, and possibly co-management. As the TFN agreed within this Agreement to resolve the issues about overlaps of traditional territories, ocean spaces will be a topic for discussion between the First Nations groups who have interests in the Fraser River estuary and ocean areas that are adjacent thereto. It is therefore important for the TFN, and other First Nations to review this topic and determine their position and

\textsuperscript{685} Ibid.

\textsuperscript{686} Information found at the website of the British Columbia Treaty Commission at \texttt{<www.bctreaty.net/nations/tsawwassen.html>} on 1 May 1999; and confirmed in \textit{ibid}. Chief Baird interview.

\textsuperscript{687} \textit{Ibid}. British Columbia Treaty Commission website.

\textsuperscript{688} See section 2.1 of the Tsawwassen First Nation Framework Agreement, dated 2 August 1997.
what results they are after before heading to negotiations.

Chief Baird as the TFN Treaty Negotiations Director knows first hand what has gone on with her Nation and the Treaty process. The Nation is very concerned with creating development opportunities for their people in keeping with the highest and best use that can be made of the small land area they retain communally, and to meet this end, they see tourism based developments and industries rather than residential as the proper course.689

(g) Observations and Comments

Today, the TFN can no longer be described as a nation “facing the sea”. Their historical relationship with the sea as highway, trade route, food source, economic livelihood, and foundation of their culture has been altered by the changes and developments brought about by European contact. The infringements upon this relationship threaten the very culture and existence both in quality of life and economic well-being of the TFN.

The information presented here from historical sources such as archaeology, anthropology and historians, as well as the oral traditions of the TFN substantiate the intrinsic link of the TFN with the ocean spaces situate off its shores. There is historical information setting out the use and occupation of the Reserve lands and ocean spaces that abut the Reserve before the assertion of sovereignty. As to exclusivity of use and occupation of these areas, the TFN is working with those other First Nations groups who have overlapping claims to determine

689 Supra Chief Baird interview at note 300.
solutions to these territorial issues. It was never the traditional policy of the Coast Salish to occupy the lands of another group. From the information reviewed, the TFN were using and occupied their traditional territories at the time of the assertion of sovereignty in 1846.

The TFN has a long history of certain areas being owned by an individual group or person while at the same time the sharing of resources was common place. This historical perspective illustrates that the TFN is no stranger to the concept of communal holdings of territories and resources. This provides some basis for the possibility of involvement in systems of co-management with government agencies for ocean spaces near the Reserve, and the co-management of the sea resources found therein. As Chief Baird has noted, her Nation has presently limited capacity to take on complete management of such. The TFN is eager to reattach itself to the sea, and working co-operatively may be the best option for such goal to be achieved.

The 1996 Report commissioned by the TFN suggests the centrality of the sea is at the very core of the TFN, and with its loss, the TFN's quality of life and its culture are significantly affected. Access to traditional food sources directly impacts the health of the members of the Nation. The gathering activities of food resources serves to preserve and continue the

690 Supra Ashwell at note 317 at 82.

691 Supra Delgamuukw at note 35 at para. 145 as to the applicable date of sovereignty in British Columbia.

692 Supra Chief Baird interview at note 3000; and 1996 Report at note 559 at 40.
TFN culture for going to the beach to collect shellfish provides an opportunity for the older
generation to teach the younger generation about their traditional ways and genealogies. The
loss of these connections to ocean spaces and sea resources places the continuation of the
TFN culture in peril.

The TFN have a goodly amount of oral histories and documented information readily
available to assist them in substantiating their title to the ocean spaces that affront their
Reserve in accordance with the principles determined in Delgamuukw which have been
discussed previously.

5. Conclusions

These two First Nations situate on the Pacific coast of British Columbia have inherent links
with their traditional ocean spaces since time before memory. By the variety of information
sources as noted in this research, it is possible to demonstrate these ocean spaces have been
used and occupied by these Nations for thousands of years prior to European contact.
Recently compiled data and information continues to illustrate these intrinsic connections
with the sea even though the years and outside influences have diminished, and in some
instances, ended the linkage.

Each of these Nations has the tools and abilities to bring together a strong body of evidence
though their traditions of oral histories and the usual sources of court materials to advance
and substantiate Aboriginal title to the ocean spaces included within their territories. First
Nations should attempt to include innovative techniques of recording and analyzing marine data to ensure preservation of such information for future generations.

*Delgamuukw* has set forth guidelines that can be utilized in building the concept of Aboriginal title to ocean spaces. It will up to the First Nations claiming their title to determine the exact dimensions of this title. The discussion of the doctrine of Crown honour and integrity as set out in the recent case of *Marshall* can also be brought in by these First Nations to further attest to their title to these ocean spaces in that such doctrine goes to the very heart of the size of the Reservations created for coastal First Nations in this Province.

Today, the Haida Nation and the Tsawwassen First Nation are both concerned with the survival of their people and culture. In every society, culture defines who we are as a people, and provides us with a sense of place. For a culture to survive, its traditions and values must be passed down from generation to generation. As traditions become eroded and disappear, so too does the culture become less visible.

The diminishment of access to and responsibility for the traditional ocean spaces and the sea resources of these two Nations during the last hundred and fifty years has aided the erosion of their traditional practices, and in turn their cultures. The transmission of cultural information has been greatly slowed, with the possibility that the present generation will not acquire the traditional knowledge and values of these cultures, and such will be lost forever.

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693 *Supra* 1996 Report at note 559 at 61 - 63.
The sea is the very essence of what these people are about as a culture, and they are presently in the very fight for their lives. No further reduction of the connection to their ocean spaces can be withstood, for such could result in cultural extinction for both these Nations.

(a) The Obstacles That Hold Back Successful Settlement of Aboriginal Title Issues

Reconciliation can only be achieved if each party involved itself in making the process meaningful for all, and all must truly feel they are equal partners in the process. From my field experiences, I learned of a number of instances where these two First Nations have come to question the sincerity and in turn the integrity of the negotiation processes they are involved with. These age old attitudes and views do little to spur on discussions between the First Nations and the governments, and really are obstacles to meaningful negotiations that could lead to successful reconciliation. The following comments from these two Nations are so of the issues that have been identified to me.

(i) The Haida Nation Voices

The first and foremost comment I heard from those Haida I interviewed, was the lack of trust that they had for government authorities. Charlie Bellis told me: “the government talks out of both sides of its mouth, and our rights are not being considered. They give all the north coast away to the sport fishery.”694 Margaret Edgars states that if the government continues to mismanage things the way they have there will be noting left in the oceans or on

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694 Supra Bellis interview #2 at note 327.
the lands of Haida Gwaii. Chief Russ notes that it seems that for First Nations’ rights to ever be recognized there must be a court judgement to that effect.

The government has by its policies over the years taken from the Haida the right to make a living which has dramatically challenged their ability to sustain their lives on Haida Gwaii or their culture. Such policies and actions by those in authority can lead to the extinction of a culture and a charge of cultural genocide.

The second comment offered many times by members of the Haida community as a sore point in their relationship with governments, was the lack of respect shown by those government agencies to the Haida way of life. They are included in discussion groups, yet feel that they are not a participating member of the decision-making process in regards to all industries that impact the islands. The Haida and members in the fishing industry are consulted but their opinions and ideas are never taken with any amount of weight. “They talk all around us but not to us.” Chief Russ truly believes that if their opinions had been listened to the

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695 Supra Edgars interview at note 324; and Weir interview at note 400 where he notes that about 99% of the Haida in Old Massett depend upon the ability to gather and harvest their food.

696 Supra Chief Russ interview at note 66.

697 Charlie Bellis gave me this idea; supra Bellis interview #1 at note 361.

698 Supra Yeltatzie interview at note 315 where he agrees that meaningful consultation between the haida and government agencies is not happening. He also agrees that not only the Haida are suffering due to the fisheries policies but many other non-First Nations peoples too.

699 Supra Brown interview at note 326 when he discusses the government agencies especially fisheries.
fisheries would not be in such decline as they are today.  

Roy Jones, Sr. has lived in Haida Gwaii over seventy years, and fished during most of his life. He has vast knowledge and experience as any person would who has had that length of involvement. He is familiar with where herring would spawn each year, and how to catch them. Mr. Jones notes the indifference and superior attitude demonstrated time and time again by officials with DFO when information and local knowledge is presented by local fishermen, be they Haida or non-Aboriginal, which would suggest changes in DFO policies.

He cites one specific occasion when he provided information to a DFO official about the marked decline in herring stocks, with the reply of “who the hell are you as someone to believe?” He notes that time has not erased this type of attitude. Each year, DFO invites fishermen to Vancouver to provide their comments and suggestions based upon their local knowledge and experience to aid in shaping DFO policies for the herring roe fishery. The resultant polices never reflect the comments or suggestions made by the stakeholders.  

From my field experience and discussions, it appeared to me that there are many Haida who have fished all their lives, and who possess valuable and significant information about fish stocks.

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700 Supra Chief Russ interview at note 66.

701 Supra Jones, Sr. interview at note 453. Many Haida I spoke with commented that the governments come seeking input but never appear to pay any attention to their suggestions and comments, and proceed to make policy in whatever way the government sees fit. Many are of the opinion it is a waste of time to even participate in such meetings.

702 Ibid.; and supra Chief Russ interview at note 66.
Lack of respect for the Haida as a Nation and originating peoples of Haida Gwaii is also exhibited in the granting of sport fishing leases specifically to a number of sport fishing lodges and other enterprises without consultation or discussion with the Haida. Most of these leases are centered around Langara Island, and provide exclusive fishing rights for the lodges and their guests to these areas which are also sacred and spiritual places for the Haida. 703

Christian White voices his displeasure with the lack of direct Haida involvement with fisheries management. He is concerned that the fisheries could be on the route to extinction. Oil pollution on the shore lines around Old Massett is evident to him. He also notes Massett Inlet suffers from sewage pollution resulting in the resources of the beach being no longer suitable for eating.704 A new concern for his people is the possibility of the expansion of fish farming, and the introduction of foreign species to the Haida Gwaii waters such as Japanese scallops and oysters which are already present in Skidegate and Massett Inlets in experimental fish farm operations. There are grave anxieties voiced about virus and disease that will affect other species.705

703 Ibid. In this area, and other areas that are now controlled by governments, there are burial caves and halibut holes that were owned in the past by Haida members.

704 Supra White interview at note 327. Also supra Weir interview at note 400 where he notes a decrease in food resources on the beach, and black discoloration of the mussels in Massett Inlet which he believes comes from the pollution caused by the logging camps, logging barges and probably the village of Massett. There are no clams left in Naden Harbour which he says were not fished out but are gone due to pollution. Lucille Bell also notes in the twenty years she has been regularly eating fish there has been a decline in the fish resources; supra Bell interview at note 306.

705 Ibid. White interview; and Ibid. Weir interview where he states he believes that diseases will come if there are fish farms permitted in the waters of Haida Gwaii. Infectious salmon anemia (ISA) and amnesic shellfish poisoning toxin are well documented as being spread by fish farming in Scotland. See Kim Munro, “Salmon farms facing a state of emergency, ISA spreads and infects wild fish" Aberdeen Press and Journal (5 November 1999) 1; and Shirley English, “Deadly virus spreads to wild salmon" The [London]
Mr. White believes that to ensure sustainability of the sea resources of Haida Gwaii, the responsibility for its management should be located on the islands and looked after by the people of Haida Gwaii, and not some group situated on the mainland. In that way, management has a stake in the outcomes of their actions. The people responsible for management decisions are local residents and thus not able to walk away at the end of the day from the decisions they have made.

Many of the Haida spoke favourably about treaty negotiations as the best process to follow in order to achieve what they wanted. Harold Yeltatzie though felt the different cultural mix of government negotiating officials was not very productive in attaining an atmosphere conducive to negotiations as they lacked sufficient knowledge of the First Nations’ plight in Canada. He also noted a general lack of public education and understanding of First Nations and their issues, especially the Haida culture.  

The Haida as noted previously have gone to court when they felt it was necessary to do so, and will engage in that route again should it be determined litigation is the only way to deal

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*Times* (5 November 1999) Home News section. ISA has been found in the salmon fish farms in New Brunswick. See Sarah Schmidt, “Fish and Chips: Environmental and competitive pressures are spawning new aquaculture technology, as food, cages - even fish- are modified” *The [Toronto] Globe and Mail* (18 November 1999) Technology Features section.

Salmon farming on the Pacific coast includes Atlantic salmon species, and there is grave concern voiced by many that these populations could carry ISA and create the toxin. With salmon species already in decline, and specifically with the coho fishery closed for the last two years, many are calling for a moratorium on the granting of fish farming licenses. See David Suzuki Foundation News Release, 18 October 1999 at <http://www.davidsuzuki.org/news/1999>. The sockeye salmon fishery of the Fraser River was closed for the first time in British Columbia’s history this year. See Daniel Sieberg, “Fraser faces season-long closure” *The Vancouver Sun* (20 August 1999) B1.

706 *Supra* Yeltatzie interview at note 315.
Upon visiting the Tsawwassen First Nation, I was struck by the similarity of their comments with those I had heard in Haida Gwaii. The following are some the comments relayed to me.

(ii) The Tsawwassen First Nation Voices

Chief Baird has been involved with treaty negotiations for her Nation for a fairly lengthy time. She notes negotiations have not always been harmonious, and there have been times when the Province’s stance on issues has offended the TFN.

The prime example has been dealing with the issues of interim measures. The TFN requested the Province slow the Crown land referrals it was sending out to the TFN, as they had neither the staff nor the funds available to provide timely comments and responses in regards to TFN interests in such areas. The referrals are voluminous with a packet about three inches thick arriving for reply almost very week. The Provincial referral letter demands TFN prove Aboriginal title to every single square inch of territory in which they state they have an interest. As Chief Baird notes, this barrage of paper work has undermined the good faith of the TFN in their negotiations with the Province.

707 Supra Brown interview at note 326.

708 Supra Chief Baird interview at note 300.

709 Ibid.
Actions like these by the Province only serve to strengthen the views already held by the TFN that non-Aboriginal governments and their agencies show little if any respect for or recognition of traditional knowledge. The TFN are very aware of the lack of their direct involvement in decision-making processes that effect their Reserve and way of life. The limitations in the resources of the TFN (lack of people due to small population, and funds) to review and formulate their interests and vision of their Nation in turn disadvantages them in any decision-making process. 710

Chief Baird unequivocally stated in the past the usual way for the TFN to ensure it is being noticed and heard is to initiate legal or direct action. “We feel like we have to be in war strategy to get our concerns recognized and addressed”, she stated. 711 The lack of recognition and respect by the governments and dominant society dates back to at least the turn of this century with the building of the dyke along the waterfront lands west of the Reserve which effectively provides protection for the non-Aboriginal farm lands. This dyke built with gravel excavated from the Reserve, extends some four miles to the Fraser River from a point about one quarter mile inside the west boundary of the Reserve. At the time of construction, there had been flooding from the Strait of Georgia experienced every winter by the Reserve, yet the government did not see fit to provide any protection.

In 1970, after many years of requesting aid for the government, the TFN took matters into

710 Ibid.; supra Williams interview at note 319; and 1996 Report at note 559 at 100.

711 Ibid. Chief Baird interview.
their own hands and were able to obtain fill from an excavation site off the Reserve and build up the road bed to stop the waters flooding across the road to the houses.\textsuperscript{712} This situation can be characterized as a blatant act of disregard of the TFN and their existence as a people by the dominant society.

Councillor Williams notes many different instances during his years on band council and as Chief Councillor when his people and their Nation's lands have been ignored. One major instance was the building of the ferry terminal in 1962 with a major highway through the Reserve severing it into two sections. No secure and safe access for the Tsawwassen members to cross the highway was ever provided. Finally after some thirty years of requesting such, there has been in the last year a walk light installed at the highway to stop the high speed traffic to permit travel between the two parts of the Reserve.

A further instance fresh in Councillor Williams' memory is the public hearings that were held prior to the building of the Roberts Bank Superport. The TFN and local area fishermen voiced their concerns about the effects the development would have upon the salmon runs and the tidal pools. Their comments were met only with the sympathy of the panel, and were not included in any meaningful way within the report.\textsuperscript{713}

These events all illustrate the minimal if even any real consultation that has been undertaken

\textsuperscript{712} Supra Williams interview at note 319.

\textsuperscript{713} Ibid.
by governments with the TFN during decision-making processes that have directly affected their Reserve. These instances as noted serve to underscore the failure of the dominant society to recognize the TFN as an entity that will be impacted and to include them within the process. These continued affronts to the recognition of the TFN as a people and culture erode further any thoughts they might have about the good faith of others, and the opportunities they have to exercise their traditional activities. These events can be characterized as a direct attack on who they are as a people and their culture. 714

The TFN is somewhat reserved in declaring its faith in the treaty process and the motives of all levels of government, be it federal, provincial or municipal. Chief Baird remains optimistic co-management of resources and lands is a viable route to achieving reconciliation of the issues faced by the parties and economic stability for her people. There are many matters the TFN want to be involved with and realize they do not have the capacity to be in ultimate control. The Aboriginal Fishing Strategy could be viewed as a commencement point for TFN involvement with fisheries and their management. 715

Chief Baird believes negotiations through the channels of the treaty process are the best avenue for achieving reconciliation leading to a better future for her people. That is not to say the TFN have not made effective use of the court process in the past, and would consider


715 Supra Chief Baird interview at note 300. It must be noted though DFO still maintains as its policy basis inclusion of a First Nation in the pilot salmon sale program is as a privilege not an Aboriginal right to a commercial fishery. See supra AFS at note 99.
going that route again if necessary. The sad reality she notes is that “every right we have
gotten has been through litigation”. 716 The practice of DFO persisting in its requirement
that all First Nations members carry their status cards issued by Indian Affairs while they
engaged in fishing, is only further proof of First Nations’ feelings of lack of good faith on the
part of government agencies. 717

From these comments of the TFN, one can understand the lack of trust and confidence on the
part of First Nations when dealing with government agencies. In turn, it appears that the
TFN has been ignored and betrayed by the dominant society. Chief Baird has indicated if
negotiations do not produce a viable future for her Nation and culture, court action is the
alternate route. 718

Councillor Williams notes the one further annoying matter in relations with governments is
that of lengthy delays in obtaining information and decisions. He describes the system today
as being not very different from years ago when he states: “in the days of sailing ships, it took
six months for a ship to go to England and back to obtain a response, and it’s still the same
time frame today with Ottawa”. 719

716 Ibid.

717 Supra Williams interview at note 319. This has persisted even after the 1990 decision in Sparrow
Supra at note 2 which determined there was an Aboriginal right to a food, social and ceremonial fishery.

718 Supra Chief Baird interview at note 300.

719 Supra Williams interview at note 319.
(iii) Conclusions

The governments must recognize that First Nations have legitimate concerns about the sincerity and integrity of treaty negotiations based upon these continuous instances reflecting lack of respect, consultation and good faith. Education of the public in regards to First Nations, their actual history, and their issues is imperative if negotiations in regards to Aboriginal title is to have a successful conclusion. Otherwise, as both these Nations have noted, they are prepared to head to court to have their issues including title determined. In fact the Council of the Haida Nation has already started to move in the litigation direction. They announced in October 1999 that they will be filing an action in the British Columbia Supreme Court shortly for a determination of title to Haida Gwaii.\(^{720}\)

PART C. INTERNATIONAL PERSPECTIVES

1. Introduction

In this third and final section of “The Sources For Recognition of the Concept” Chapter, I shall explore the arena of international and foreign legal materials to draw out principles and concepts used elsewhere in the world in respect of indigenous title to ocean spaces which by analogy could be used here in Canada. This voyage though international materials will show a global awareness of Indigenous rights and title and will provide some suggestions as to how this consciousness can be incorporated into viable arguments here for First Nations.

First, I will discuss the abilities of the courts in Canada to consider and make use of foreign

\(^{720}\) See note 406 herein. As at 31 December 1999, there had been no further word about the law suit.
materials in their deliberations. Following which, I will specifically examine two foreign jurisdictions. Australia has been very active in respect of Indigenous issues over the last few years as a result of the *Mabo* decision. I will describe the case and provide some analogy from the principles set out therein and the proof of Aboriginal title to ocean spaces in Canada, followed by some of the comments arising from academic discussion in Australia. The other jurisdiction I will mention in limited detail is that of the United States, in particular Alaska, and the issue of title by the Natives there to ocean spaces, and the possible principles that can be taken from those decisions and utilized here.

In consideration of time and length of this work, I have limited my review to two foreign jurisdictions. There are materials of many other countries that can be consulted and looked to for information, analogies and influence such as New Zealand, Sweden and Finland. The rights and title of the Indigenous Peoples of these countries have been discussed and litigated for many years, and they in turn provide other sources of criteria and arguments that support the concept of Aboriginal title to ocean spaces in Canada.

The final segment of my research in this section will centre on the sphere of international human rights and the documents produced by the United Nations and its committees, and how these documents could be effective in discussions on Aboriginal title to ocean spaces in the Canadian context.

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*Supra Mabo* at note 178.
2. The Use of International and Foreign Legal Materials to Interpret and Inform Domestic Law

It must first be stated that international and foreign laws and legal materials are not binding upon Canadian courts. However, that is not to say these sources do not receive consideration by our courts, for since the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, our Supreme Court of Canada has become one of the most cosmopolitan of courts in its use and consideration of foreign sources. It is suggested that a more enlightened interpretation of domestic law occurs by reference to and use of international and foreign law and materials.

The use of international materials has been sanctioned by the Supreme Court of Canada from as early as 1987 as noted in the dissenting decision of Chief Justice Dickson in the case of *Re Public Service Employee Relations Act* and in his majority judgment in *Slaight*.

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722 *Supra* the *Charter* at note 123. The *Charter* is linked closely with the language and ideology of the international human rights principles that were manifest during the period from its inception to its enactment as commented upon by Anne Bayefsky and Maxwell Cohen, O.C., Q.C., in their article "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 C. B. Rev. 265 written shortly after the Charter was proclaimed. These two scholars have continued to write in the field of international law and its connection to domestic law, see Anne Bayefsky, "International Law in Canadian Courts" (1990) Can. Council Int'l L. Proc. 273 [hereinafter Bayefsky] and Cohen, "Towards a Paradigm of Theory and Practice: the Canadian Charter of Rights and Freedoms - International Law Influences and Interactions (1986) Can. Hum. Rts. Y.B. 49. See also the comments in regards to this topic in Mr. Justice G. V. LaForest, "The Use of International and Foreign Material in the Supreme Court of Canada" (1988) Can. Council Int'l L. Proc. 230 at 231 [hereinafter LaForest 1].


724 *Supra* Bayefsky at note 722 at 273.

725 *Re Public Service Employee Relations Act*, [1987] 1 S.C.R.313; see generally pages 348-349 where he states that the sources of international human rights law are relevant and persuasive in the interpretation of the *Charter* because it was made in the spirit of the contemporary human rights movement.
Communications Inc. v. Davidson, where he noted that international human rights principles have importance to Canada for they are the result of a wide consensus of world states.\(^\text{726}\)

He also noted that such principles may be used to determine the content of and the limits of domestic human rights. There have been many cases that have utilized international law when it is relevant to assist in interpreting constitutional validity in the areas of human rights and the Charter. \(^\text{727}\)

The Supreme Court of Canada has utilized foreign and international material for matters other than human rights and the Charter specifically in the case of \textit{R. v. Beauregard}\(^\text{728}\) which dealt with the interpretation of section 100 of the \textit{Constitution Act, 1982}.\(^\text{729}\) Public international law has been used as an interpretative aid in dealing with domestic

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\(^\text{726}\) \textit{Slaight Communications Inc. v. Davidson}, [1989] 1 S.C.R 1038, at 1056 - 1057. It is interesting to note that Chief Justice Dickson in \textit{Simon v. R.}, [1985] 2 S.C.R. 387 at 399 stated that court's views and language in respect of First Nations rights should not reflect biases and prejudices of bygone eras for such is not acceptable in Canadian law. He further noted that it may be helpful to look at international law on matters of treaty termination; however, the principles of international law were not determinative (at 404). From this, one could infer we should look to any source that would be pertinent to the matter. See Peter W. Hutchins, "International Law and Aboriginal Domestic Litigation" (1993) Can. Council Int’l L. Proc. 11 at 13 [hereinafter Hutchins].

\(^\text{727}\) Anne Bayefsky states there were some two hundred and fifty Canadian cases that cited international human rights law from the time the Charter was enacted to the year of her book \textit{International Human Rights Law} (Toronto: Butterworths, 1992) at 709, and that one hundred and twenty of these references were to international laws to which Canada was not a party or signatory (at 712). Mr. Justice LaForest quotes that the Supreme Court had within the first six years following the enactment of the Charter, made reference to foreign and international materials within twenty-five cases (see \textit{Supra} LaForest 1 at note 722 at 232). See also the statistics provided by H. Patrick Glenn in "Common Law in Canada" (1995) 74:2 C.B. Rev. 261 at 287.


\(^\text{729}\) See Mr. Justice G. V. LaForest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y.B. Int’l L. 89 at 99-100 [hereinafter LaForest 2].
environmental cases before the Canadian courts as noted by Professor Jutta Brunnee.  

Mr. Justice G. V. LaForest, as he then was, in writing on the topic of the consideration and application of international materials by the Supreme Court of Canada, advocates the use of such information aids in understanding and promoting uniformity in applying international norms. He also notes the Court's willingness to recast the law if need be to conform to evolving international conditions. Justice LaForest suggests that the Supreme Court of Canada will continue in future to rely on and benefit from other jurisdictions' experiences.

This same style of discourse is not limited to the Canadian experience as it is also found expounded upon by the High Court of Australia in Mabo when Mr. Justice Brennan stated:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.  


731 See generally supra LaForest 2 at note 729 where Mr. Justice G. V. LaForest describes the continued evolving approach of the Supreme Court of Canada to international law issues and its willingness to reformulate its principles to meet modern conditions and to foster compliance with its norms.

732 Ibid. at 89 and 96; and see also supra Bayefsky at note 722 at 276. See also Rosemary Hunter, "Aboriginal histories, Australian histories, and the law" in Bain Attwood, ed., In the Age of Mabo: History, Aborigines and Australia (St. Leonards, NSW: Allen & Unwin, 1996) [hereinafter Hunter] at 11-16 where she notes the High Court of Australia in Mabo, supra at note 178, were influenced in their radical decision by the climate of change exhibited in Aboriginal rights during the 1970-80s. The law as the Court saw it, needed to be brought into line with the widely acknowledged historical realities, and no longer should it perpetuate past injustices.

733 Ibid. LaForest 2 at 100.

734 Supra Mabo at note 178 at (1992), 107 A.L.R. 1 cite at 29.
In the case of Delgamuukw, we have seen the Court’s consideration and incorporation of foreign and international principles for questions touching s. 35(1) of the Constitution Act, 1982, by its review and application of specific principles set out in Mabo and United States v. Sante Fe Pacific Railroad Co. In fact, at the Court of Appeal level, the Government of British Columbia quoted Vattel’s Law of Nations to put forth the theory that a nation could not possess more territory than it was capable of settling and cultivating, and as much of the territories claimed by the Gitksan and Wet’suwet’en was not settled nor cultivated, it was therefore unoccupied and could thus be taken by the Crown. Even though the Supreme Court of Canada put this theory to rest, it is interesting to note that international materials are used by parties before the courts.

Before Delgamuukw, the Assembly of First Nations, as Intervener, in the case of Ontario (A.G.) v. Bear Island, referred the Court to a number of international materials including D. P. O’Connell’s International Law and the International Court of Justice decision in The

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735 Supra Delgamuukw at note 35 at paras. 31 and 153 where the Court mentions Mabo.

736 Supra United States v. Sante Fe Pacific Railroad Co. at note 182 which is referred to by the Supreme Court of Canada in discussing the concept of joint title to Aboriginal lands due to shared exclusivity at para. 158 of ibid. Delgamuukw.

737 E. de Vattel, The Law of Nations 1763, revised ed. (London: Whieldon & Butterworth, 1973) [hereinafter Vattel] a book on international concepts of land holdings who advocated that cultivation of land was paramount to occupation of it. It is from his work that the doctrine of terra nullius as applied in Australia to colonize the lands held by the Indigenous population has come according to Hunter supra at note 732 at 6.

738 Supra Hutchins at note 726 at 15.

Western Sahara Advisory Opinion.

As is evident by the review we have undertaken here, the past practice of the Supreme Court of Canada has been to review and make use of international and foreign materials to aid in formulating its decisions on domestic matters. The actual parties have on occasion also utilized these sources to aid in their vision and argument. In respect to viable sources that aid in the recognition of Aboriginal title to ocean spaces in Canada, it is highly likely that the court determining such a matter would refer to such sources. To date, no Canadian courts have made pronouncements or comments on this issue of title, and there is minimal Canadian scholarship discussing the concept. These factors coupled with the view of members of the judiciary that international materials can be looked to for analogies and influence, give the court good reason to employ international law to provide insight and support for its determination.

Now, let us examination two different foreign jurisdictions to gain some insight into their principles about indigenous title to ocean spaces. Let us review a number of international and foreign materials that might be relevant to our discussion of Aboriginal title to ocean spaces.

3. Two Specific Foreign Jurisdictions

The two specific jurisdictions that I will examine here are Australia and the United States. As

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I have noted, there are other foreign regimes that could be canvassed; however, time and length of research consideration do not allow such an exhaustive examination. It is important to realize such materials can contain significant information for adding to the recognition of Aboriginal title to ocean spaces.

I have come to chose Australia as one of my comparative examples as its High Court pronounced the forerunner decision on Aboriginal title to our own. There has been since Mabo in 1992, much discussion amongst the public, the academics, and the politicians about where this concept will lead the country. There has been legislation proclaimed as a result of this decision with the Native Title Act 1993, with controversial amendments in 1998, and much academic writing. The Indigenous population have been the somewhat silent factor in all of this conundrum.

The United States, specifically Alaska, is included as another comparative jurisdiction as it enjoys the continuation of the same coast line as British Columbia, and as Justice LaForest has indicated is one of the most usual foreign jurisdictions for the Supreme Court of Canada to consult for guidance.

741 Native Title Amendment Act 1998 (Cth). The Native Title Act supra at note 227, sets up a system in which the rights, especially title, of the Aborigine and Torres Strait Islanders may be recognized and protected under the common law. It is an extensive Act providing for mechanisms for determining claims to native title by the courts and tribunals, a registry for native title, and compensation when title has been infringed upon. The Act at s. 6 extends to every territory of Australia and the coastal sea and other waters over which Australia asserts sovereignty.

742 Supra LaForest 1at note 722 at 236 - 237.
(a) Australia and the Impact of Mabo

The judgment in *Mabo v. Queensland* \(^{743}\) has been referred to as a landmark decision for Australia and its Indigenous population. On 3 June 1992, the High Court of Australia, by a majority of six to one, recognized Aboriginal title. This case arose ten years earlier when a group of Meriam people \(^{744}\) sought confirmation of their traditional land rights in Murray Island (Mer) and the surrounding islands and reefs in the Torres Strait. These areas had been continually inhabited and exclusively possessed by their people, an organized society having a system of law and land tenure. Even though this territory had come under the sovereignty of the British Crown in 1879, the Meriam people argued their land rights had not been extinguished.

This case and its principles are of major importance to the determination of other Aboriginal title cases that come before the Australian courts. \(^{745}\) The principles determined by the Court are first and foremost, that the Meriam people are entitled to possession, occupation, use and enjoyment as against all others to Murray Island. Secondly, the

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\(^{743}\) *Supra Mabo* at note 178.

\(^{744}\) These people were of Melanesian extraction rather than Australian Aborigines. Melanesian people are from Melanesia the area of islands in the Pacific Ocean north of Australia including the Solomons, New Hebrides, New Caledonia and the Fijis.

\(^{745}\) These comments about *Mabo supra* at note 178, are noted in the speech of Katie Hare entitled *Human Rights and Indigenous Australians, Land and Sea*, a member of the Northern Land Council of Australia, to the Australian Reconciliation Conference held on 26-18 May 1997, available online at: <http://www.austlii.edu.au/ do/disp.pl /au/orgs/car/ speeches/seminar2/hare.htm/query=aboriginal *%20 and%20 sea%20claims> [20 May 1998]. During my recent attendance as a presenter in the Indigenous land and resources management forum (one of twenty theme groupings) at the International Symposium on Society and Resource Management, the University of Queensland, Brisbane, Australia, in July 1999, references to *Mabo* were very frequent within the over forty-five paper presentations made within my forum alone.
principles determined extend to all of Australia and its Indigenous Peoples in that the
traditional rights of Indigenous Peoples to their tribal lands were not necessarily extinguished
by the annexation of such lands by the British Crown. Thirdly, the Court emphatically rejects
the doctrine of *terra nullius* which stated that a colony could be annexed by settlement even
if already inhabited, as long as the inhabitants lacked a sufficiently organized system of law
and land tenure.footnote[746] Fourthly, traditional native lands are alienable only to the Crown. Fifthly,
traditional native title to land are most often communally held title.footnote[747] Many of these
principles are reiterated in *Delgammukw*.

The *Mabo* Court enumerates the required elements for proving an Aboriginal claim to lands.
The basis of the claim must emanate from a substantially maintained traditional connection to
the land by an identifiable Aboriginal community from the time of annexation.footnote[748] Such a
connection reveals the continuation of the community's laws and customs. The Court
acknowledges these connections can change over time as no rule is static, and continued
occupation is not an absolute but without evidence of continuation, title will be difficult to
prove. The evidence presented to the High Court showed the Meriam people had always

footnote[746] John Kidd, "Australian Aboriginal Land Rights: The Impact of the 1992 *Mabo* Decision" (1994) 26 Bracton L. J. 31 at 32-33 [hereinafter Kidd]. *Terra nullius* means "lands belonging to no one" or literally "uninhabited territory". The doctrine set out title to such lands was open to all states under the international doctrines of discovery and occupation. See *supra* Hunter at note 732 at 6-10 for more information about these European doctrines and her discussion about the different versions of Australian history as a result of such doctrines.


insisted on exclusive occupation of the lands they claimed. Even so, the Court did recognize there could be situations where there was not exclusivity of one group of people, and that factor in and of itself, should not rule out Aboriginal title.\textsuperscript{749}

The matter of extinguishment of Aboriginal title was also discussed by the Court who determined such could occur due to the extinction of a community, discontinuance of occupation, or voluntary surrender to the Crown. Such extinguishment could also occur by legislation proclaimed by the Crown as long as there was clear and plain intention set out with the regulations.\textsuperscript{750} The Court did note that extinguishment could happen and be effected even though invalid if there was a grant by the Crown to a third party that ends the continued traditional connection to the land.

The High Court continued on with its decision in discussing compensation and its availability when land had been wrongfully extinguished.\textsuperscript{751} These remarks are \textit{obiter dictum} as the Court split on the issue. Aboriginal rights were found to be protected and enforceable by resorting to the courts, and the Court pointed out there is a fiduciary duty on the part of the Crown in

\textsuperscript{749} \textit{Ibid}, at 487.


\textsuperscript{751} \textit{Ibid}, \textit{Mabo} where Dean and Gaudron J.J., in their judgement, and Toohey J., in his separate judgement, all expressed the view that where the Crown extinguishes native title by inconsistent grant it has the legal obligation to pay compensatory damages to the dispossessed community.
all its dealings with the Aborigines.  

The decision in *Mabo* refers specifically to the Court's use of foreign and international materials, and it is worthy of note that the Court approved four Supreme Court of Canada cases, and explained a fifth. The High Court applied the standards of modern rights law both at the international and domestic levels when it rejected the doctrine of *terra nullius*. The Court stated that after its review of previous and modern international sources and developments, the doctrine could not stand as it was contrary to both international and domestic law values. Brennan J., stated that the rules of international law are "a legitimate and important influence on the development of the common law".

As is evident by this review of *Mabo* most of these principles are also found in *Delgamuukw*, and further as noted *Mabo* is specifically referred at paragraphs 31 and 153. The first reference discusses the trial judgement and that the starting points for analyzing Aboriginal land rights were taken from a number of Canadian decisions as well as *Mabo*.

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752 *Ibid.* at 491-494, see also discussion at 453 and 430.


754 The Canadian cases approved by the High Court were: *Calder supra* at note 133; *Guerin supra* at note 135; *Hamlet of Baker Lake v. M.I.A.* (1979), 107 D.L.R. (3d) 513 (S.C.C.); and *supra Sparrow* at note 2. The explained case was that of *St. Catherine's Milling supra* at note 125.

755 *Supra Kidd* at note 746 at 31.

756 *Supra Mabo* at note 178 at 422.

The second reference to Mabo at paragraph 153 of the majority judgment in Delgamuukw, incorporates the requirement of the "substantial maintenance of the connection" between people and the land as the proper test in Canada for proof of Aboriginal title that is dependent upon evidence from the present to prove occupation at the time of sovereignty. Here is a prime example of the Supreme Court of Canada's practice of reviewing and incorporating foreign and international material into its decision.

Professor Anthony Bergin suggests that the principles in Mabo as to Aboriginal title to land can be extended and applied to customary marine tenure.\textsuperscript{758} He suggests that as most states' historical claims to lands and the abutting seas originate with the doctrine of discovery or terra nullius, and the fact that Mabo ended the doctrine of discovery, the issue of Aboriginal title to the portion of the sea that would be integral with land territory claimed by some Aboriginal groups, is resolvable in favour of the Aboriginal group.\textsuperscript{759} The Court in

\textsuperscript{758} Anthony Bergin, "Aboriginal Sea Claims in the Northern Territory of Australia" (1991) 15:3 Ocean & Shoreline Management 171 and "A Rising Tide of Aboriginal Sea Claims: Implications of the Mabo Case in Australia" (1993) 8:3 Int'l J. of Marine & Coastal L. 359 [hereinafter Bergin]. The term "customary marine tenure" is used extensively in the Australian experience and is interchanged with a number of other terms that seem to reflect the differences in academic disciplines. The legal profession steers away from the term and instead uses "Aboriginal sea rights", "native title to the sea", and "customary or traditional fishing rights and interests", to name a few. Those involved in anthropology use "ownership of the seas", "sea tenure", "sea property" among its terms. Generally the term refers to Aboriginal rights and title to areas of the seas. For discussion about this term see supra Pannell at note 3 at 241.

It should also be noted that since the date of Bergin's article sea claims have become a hot issue with a number of claims before the courts in Australia. (E-mail discussion with Professor A. Bergin on 27 May 1998). The numbers of claims received by the National Native Title Tribunal to April 1998 total 140 with seventy-three in Queensland, thirty-five in Western Australia, five in South Australia, eleven in the Northern Territory, eleven in New South Wales, three in Victoria, one in Tasmania, and one in the Commonwealth. See David Campbell, "Valuation of Indigenous Fisheries" (Paper presented to the 43\textsuperscript{rd} Annual Conference Australian Agricultural & Resource Economics Society, Inc., Christchurch, New Zealand, 20 - 22 January 1999) [unpublished] [hereinafter Campbell] at 3.

\textsuperscript{759} \textit{Ibid.} Bergin at 363.
Delgamuukw notes Aboriginal title predates colonization of Canada by the British, and survives British sovereignty, thus indicating that *terra nullius* was not a theory present in the founding of this country. 760 Thus, the theory suggested by Professor Bergin could be utilized in Canada.

*Mabo* discussed the unity of the Aboriginal environment which includes both the land and the ocean, and thus the extension of its principles to deal with claims of title to ocean spaces is a proper approach. 761 As noted in the previous section entitled Aboriginal Perspectives, both the Haida and the Tsawwassen First Nations can dramatically illustrate unity of the environment as their cultures have no boundaries between land and ocean. Dr. Nonie Sharp describes the sea holdings of the Meriam people in *Mabo* based upon four principles:

[F]irstly, land-sea properties are inherited as a sacred trust first and foremost through the spoken word; secondly, these rights which are vested in the elder male, entail complementary responsibilities to other kin; thirdly, they form an interrelated whole with a living habitat which is part of culture (not nature); and finally, the religious and economic aspects are inseparable, thus neither sea nor land is seen simply as a resources. 762

Since *Mabo*, there has been a goodly amount of information produced about the process and steps taken in various regions of northern Australia in researching and compiling a claim for ocean spaces. 763 These writings provide some answer, as noted by Professor Bergin, to the

760 *Supra Delgamuukw* at note 35 at para. 114.

761 *Supra* Bergin at note 758 at 363.

762 Nonie Sharp, "Why indigenous sea rights are not recognized in Australia ... ‘the facts’ of *Mabo* and their cultural roots" (1997) 1 Australian Aboriginal Studies 28 at 29.

763 See generally some of the more recent writings in Bain Attwood, ed., *In the Age of Mabo: History, Aborigines and Australia* (St. Leonards, NSW: Allen & Unwin, 1996) of: Deborah Bird Rose, "Histories and rituals: land claims in the Territory" at 35; and Tim Murray, "Creating a post-*Mabo*"
difficulties apparent in proving a claim that includes more sea bed than just the area where gathering or fishing took place.\textsuperscript{764}

There is an argument to be made against the notion of First Nations having any title claim to ocean spaces based upon the reality that international law accrues such title and rights in the offshore to a coastal state being a nation or state as recognized by international law standards.\textsuperscript{765} However, there is certainly a valid argument to be made that Aboriginal title to ocean spaces within the territorial sea could be advanced as ownership of the territorial sea has been a concept for centuries long before the 1846 date set by \textit{Delgamuukw} as the applicable time frame for proof of title.

It is true that coastal states interests in ocean spaces beyond the three mile territorial sea have only been recently recognized with UNCLOS, and some scholars believe that lack of historic recognition of a coastal state’s interest in ocean spaces beyond the historic three mile territorial sea thus indicates there can be no claims beyond that limit prior to UNCLOS in archaeology of Australia” at 73. Also in Nicholas Peterson & Bruce Rigsby, \textit{Customary Marine Tenure in Australia} (Sydney: University of Sydney, 1998) the following articles: Bryce Barker \textit{supra} at note 3 at 89; Paul Memmott & David Trigger, “Marine Tenure in the Wellesley Islands Region, Gulf of Carpentaria” at 109; Bruce Rigsby & Athol Chase, “The Sandbeach People and Dugong Hunters of Eastern Cape York Peninsula: Property in Land and Sea Country” at 192; and Michael Southon, “The Sea of Waubin: The Kaurareg and their Marine Environment” at 219.

\textsuperscript{764} \textit{Supra} Bergin at note 758 at 363-364.

\textsuperscript{765} \textit{Ibid.} at 365. See also \textit{supra} Cullen 2 at note 48 at 300. As previously noted UNCLOS, \textit{supra} at note 42, at Part 1, Article 1, s.2(1) sets out no substantive definition of what a state is, therefore meaning we must refer to international norms.
In the same analogy, Aboriginal rights, including Aboriginal title, in Canada have only been officially recognized by the Constitution Act since 1982. Prior to this, there were a number of cases such as *St Catherine's Milling* and *Calder* which discussed Aboriginal title without confirming whether it was still in existence or had been extinguished. However, this lack of historic recognition of the concept still existing has not prevented the Supreme Court of Canada from recognizing Aboriginal title based on historic occupation prior to 1982.

Another argument that can be advanced for Aboriginal title to ocean spaces within the territorial sea rests upon the property rights concept that the territorial sea includes the actual sea, air space above it, and the sea bed and subsoil beneath it, and ownership is to the coastal state adjacent to it. *Delgamuukw* sets out the title to land of the Crown can be encumbered by Aboriginal title. As the Crown owns the territorial sea by international law standards, and Crown land can be encumbered by Aboriginal title, by analogy the title of the territorial sea off British Columbia can be encumbered by Aboriginal title.

One last argument could be based upon extinguishment of Aboriginal title to the sea. Professor Bergin suggests that in Australia, the *Seas and Submerged Lands Act* could be

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767 *Supra St. Catherine's Milling* at note 125; and *Calder* at note 133.

768 *Supra* UNCLOS at note 42 at Part II, Section 1, Article 2.
used as the basis for this argument, as the legislation uses clear and plain language to end all others rights to these areas.\textsuperscript{769} As mentioned previously, the legislation dealing with the sea in Canada contains no clear and plain language to extinguish Aboriginal rights, and in fact the present legislation notes such rights (which by \textit{Delgamuukw} include Aboriginal title) are not abrogated.\textsuperscript{770}

The arguments of Professor Bergin have merit, and can be used as analogy in the Canadian context to infer that the principles from \textit{Delgamuukw} can be extended to First Nations claims to Aboriginal title to ocean spaces. We can base this upon the principle that Canadian courts review and look to foreign and international materials.

The most encouraging point in all of this is the changing perceptions and outlooks of the courts as noted in the decisions of \textit{Delgamuukw} and \textit{Mabo} for we can see emerging a more supportive attitude in regards to Aboriginal title.\textsuperscript{771} Courts have noted the actions and policies of colonization that lead to the marginalization and devastation of Indigenous Peoples. As we have noted in the most recent Supreme Court of Canada case of \textit{Marshall}, the Court remarks have been pointed squarely at the upholding of the honour of the Crown and their readiness to go beyond the mere written word of a treaty to include the intent of the

\textsuperscript{769} \textit{Supra} Bergin at note 758 at 366 where Professor Bergin suggests that it would depend upon the effect of the action taken by the Crown yet must also be done in a clear and plain manner.

\textsuperscript{770} \textit{Supra Oceans Act} at note 60.

\textsuperscript{771} \textit{Supra} Bergin at note 758 at 365.
parties and the contents of negotiations to give effect to the meaning of the actual words. These attitudes and approaches as exhibited by our courts may well signify a favourable determination being rendered when a claim for Aboriginal title to ocean spaces is made.

Professor Rosemary Hunter makes a good argument that international rules of law may well be set aside in respect of Aboriginal issues due to the racism and discrimination they have evoked. She bases this on the fact that the British were able to acquire Australia based upon the international rules of founding of colonies determined among the European powers in the eighteenth century which facilitated the division of the world among those powers. These rules were supported by religious and philosophical arguments which viewed Indigenous Peoples as objects rather than subjects of such rules. The High Court of Australia shook off these rules in respect of *terra nullius* in 1992, and our own Supreme Court of Canada through *Delgamuukw to Marshall* have in turn reshaped history by recognizing Aboriginal rights and title.

It is possible to apply this change in historic philosophy and legal ideals in the context of the principles of international law of the sea, and ownership of the seas. The rules created many centuries ago were for the privilege of the dominant European countries, which just as with land, gave no serious or meaningful recognition to the rights and interests held at the time of

772 *Supra* Hunter at note 732 at 6.

first contact by the Indigenous populations around the world.\textsuperscript{774} Initially rights to ocean spaces and their resources had rested with the local inhabitants but at various time frames through out the centuries prior to 1600, the rights to these areas shifted to the various Crowns in Europe. With England, the right to fish became an enshrined public right with the signing of the \textit{Magna Carta} in 1215.\textsuperscript{775} Maritime powers grew out of Europe and England and they plied the oceans of the world setting up trade routes. Their ultimate aim in the disguise of the theory of “freedom of the seas” as developed by the classical Roman jurists\textsuperscript{776} was to secure control of the oceans and trade routes solely for themselves.\textsuperscript{777} One scholar equates the doctrine of \textit{terra nullius} to the ocean calling it “\textit{mare nullius}”, and this aided the Europeans in carrying on successful their commercial activities, without any recognition of the Indigenous interests in ocean spaces.\textsuperscript{778}

One can say that many of the principles and policies of today as found in UNCLOS predicate

\textsuperscript{774} See the discussion of the historic evolution of sea space in \textit{supra} Sharp at note 3 at 47 - 54.

\textsuperscript{775} \textit{Supra} Magna Carta at note 236.

\textsuperscript{776} \textit{Supra} Sharp at note 3 at 52.

\textsuperscript{777} \textit{Supra} Pannell at note 3 at 236. The recent articles she reviews suggest the concept of the “freedom of the seas” is intrinsically linked with privatization, and this contradiction of public property producing private economies drives the “Tragedy of the Commons” theory as first detailed in Garrett Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243 [hereinafter Hardin]. This classic article describes the inevitable tragic destiny that develops when humans are able to use a resource freely and unregulated. Participants become locked into a system that compels them to increase their use of the resource without limit. They continue to maximize their own personal gain even though they recognize that ruin is the end result. Hardin states that users do recognize the necessity to scale back for sustainability; however, as there is no certainty that other users will follow such a course, the pursuit of users' own best interests continues until the resource is destroyed.

\textsuperscript{778} \textit{Ibid.} Pannell at 235.
those objectives still, especially in the areas of fishing.\textsuperscript{779} Inequality is present within the principles of delimitation of the various sectors of the oceans and the interests held by coastal states for such interests are granted to those who abut the coasts and provides little for landlocked states. One noticeable point is that UNCLOS is silent in respect of Indigenous Peoples rights and interests. This is most likely due to the fact these issues were not as visible and globally discussed during the years of deliberations leading up to its signing in 1982 as they are now.\textsuperscript{780}

With these examples of the maturation of historic theories and principles in respect of ownership of and interests in ocean spaces away from discriminatory and non-recognition of Indigenous Peoples interests, a court may realign the law, as they have in the cases of \textit{Mabo}, \textit{Delgamuukw} and \textit{Marshall}, to follow the modern global views. One could also argue that in Canada, Aboriginal title has always existed in ocean spaces. Its non-recognition by the Crown permitted the Crown to go ahead and declare its ownership of the seas in accordance with international law of the sea. However, non-recognition of an interest, as we have seen with Aboriginal title in \textit{Delgamuukw}, does not extinguish such interest or title.

\textsuperscript{779} A prime example is that of the Turbot War and the arrest of the \textit{Estai supra} at note 58. The legislation brought in by Canada as conservation measures to preserve fish stocks may have included the objects of conserving fish stocks for the world. But in reality such was to protect the Canadian fishing industry and economies.

\textsuperscript{780} Just like in the \textit{Strait of Georgia Reference supra} at note 91, in 1984, two years after UNCLOS, there was most likely no representation before the Court in respect of First Nations' interests as the decision is silent on such issues. \textit{Supra} Pannell at note 3 at 232 where she notes that until the late 1970s in Australia, references to the sea in anthropological writings are almost absent. Further, she suggests that European perceptions and orientations to the preoccupation with land as the commodity of value, kept title to ocean spaces as a non-issue.
Another area to which we can look in respect of informing and influencing our proposition is use of oral histories in Australian land cases before the courts and tribunals. Professor Rosemary Hunter discusses the different kinds of histories that make up the Australian landscape which include histories of creation, histories of invasion and dispossession and those of relationships to land. 781 She discusses the way that Australian history is told from the colonial point of view without reference to the existence or inclusion of the Aboriginals. The Court in Delgamuukw discuss this point to some extent.782 In our use of oral histories, we must be mindful that they are told from the Aboriginal perspective which will in all reality differ greatly from the history which we are familiar with as that history has been told from a colonial view. As well, we must be aware that there may be different types of histories in the Canadian Aboriginal context just as Professor Hunter has noted in the Australian experience. It will be imperative for us to understand these difference types and their significance as it is part of the Aboriginal perspective.

There have been a number of court cases in Australia since Mabo whereby claims have been made by the Indigenous inhabitants of different areas, most usually the northeastern areas of Australia, for title to specific ocean spaces. The case that has generated some recent interest is that of Mary Yarmirr and Ors v. The Northern Territory of Australia, 783 most usually

781 See generally supra Hunter at note 732.

782 Supra Delgamuukw at note 35 at paras. 84 - 87 where the Court discusses the differences between oral histories of First Nations and those histories of the colonization of Canada.

referred to as the *Croker Island* case. A claim was made by the Aboriginal Peoples of Croker Island, northeast of Darwin, for extensive rights over an expanse of 1,600 square kilometres of islands and ocean waters. The rights included were those to control the access of others to such ocean spaces, to trade the resources of the ocean and to receive a portion of the catches from the area.

Judge Howard Olney, sitting alone, determined that communal native title existed in relation to the ocean and the sea bed within the claimed area but only to the territorial limits of the state or territory which in many instances is established by the low water mark. As territorial limits extend over waters within gulfs, bays, between islands and the mainland, and other like bodies of water within the baseline of Australia, these are the areas to which native title can attach.\textsuperscript{784} These are more "internal waters" as defined by UNCLOS \textsuperscript{785} rather than offshore ocean spaces.

The Court also determined that such title did not confer possession, occupation, use and enjoyment of such to the exclusion of all others. The Croker Island People did have rights in the area for the purposes of: travelling through the area; fishing and hunting in order to satisfy their own personal, domestic and non-commercial communal needs; visiting and protecting places of cultural and spiritual importance; and safeguarding their cultural and spiritual knowledge.

\textsuperscript{784} This decision has thus extended the *Native Title Act supra* at note 227, to claims over sea spaces.

\textsuperscript{785} *Supra* UNCLOS at note 42 at Part II, Section 2, Article 8.
It was determined though that native rights must yield to all other rights and interests in the sea and sea bed that existed pursuant to the laws of the Commonwealth of Australia and the Northern Territory. In this particular instance, the Croker Island People had to coexist with the rights and interests held by a lessee from the Crown. And further, the Court permitted the sports and commercial fishermen the rights to use these ocean spaces as well. There was suggestion that in some instances compensation would be payable for the loss of these rights.\footnote{This mention of compensation payable for infringement and loss of rights has also been mentioned in *Delgamuukw supra* at note 35 at para.169. There has been some academic discussion on this topic in Australia; see *supra* Campbell at note 758; and his further paper “Economic Evaluation of Indigenous Rights” (Paper presented to the 1999 International Symposium on Society and Resource Management, University of Queensland, Brisbane, Australia, 7 - 10 July 1999) [unpublished].}

There has been an appeal launched in this matter to the full Bench of the Federal Court with the suggestion is that it will eventually make its way to the High Court of Australia.\footnote{Personal communication with David Campbell, a consulting fisheries economist, of Kippax, ACT, Australia, on 15 October 1999.} Two of the grounds of the appeal are 1. native title includes exclusive rights of possession to areas of the sea and rights to minerals, and 2. native title is not subject to the public right to fish not the right of navigation, nor the international right of innocent passage.\footnote{*Supra* Campbell at note 758 at 3 - 4.}

One further point adding to all of this is the reaffirmation by the United Nations Committee for the Elimination of Racial Discrimination of its March 1999 decision that certain provisions of the *Native Title Amendment Act 1998* are incompatible with the *International
Convention for the Elimination of All Forms of Racial Discrimination. As Australia is a signatory to this Convention, it is obliged to comply domestically with the provisions therein.

These last few mentioned items certainly suggest that Aboriginal title to ocean spaces is still very much an evolving concept in Australia, from which, I suggest, we in Canada can learn a great deal.

I now will turn my focus in respect of international and foreign materials to the United States which Mr. Justice LaForest suggests is the one jurisdiction to which the Supreme Court of Canada most often refers when deliberating on constitutional issues.

(b) The United States and Indigenous Title Issues in Alaska

I will briefly touch on two of the cases from the State of Alaska that I have found in my research which deal with the issue of Aboriginal title to ocean spaces. Time has not permitted an exhaustive search in this foreign jurisdiction. These two cases are discussed to give some insight into how these Indigenous groups went about substantiating their claim to spaces of the ocean off their village sites. From these, there can be analogies made to the Canadian context.

789 Supra Convention for the Elimination of Racial Discrimination at note 750.

790 Supra LaForest 1 at note 722 at 236; and LaForest 2 at note 729 at 97.
(i) *Amoco v. Gambell* \(^{791}\)

In 1987, the United States Supreme Court determined that the subsistence rights of the Aboriginals in Alaska did not go beyond the three mile limit from the shoreline as defined in the *Submerged Lands Act*. \(^{792}\) This legislation defines the boundaries of the coastal states and grants ownership of the three mile territorial sea to them. The Court also found that Aboriginal rights to the outer continental shelf (held by the federal government) had not been extinguished by federal legislation under the *Alaska Native Claims Settlement Act* \(^{793}\) as this only dealt with Alaska, and not federal territory. \(^{794}\)

The *Gambell* action commenced in the early 1980s when two Inuit villages in Alaska who traditionally hunted and fished in the Bering Sea, sought to halt the scheduled federal sale of oil and gas leases for an area of 2.4 million acres on the outer continental shelf in Norton Sound off the western shore of Alaska. The Inuit asserted that Aboriginal title or rights to the shelf for an area of twenty to thirty miles offshore had not been extinguished by the *ANCSA* even though the *Act* explicitly stated that all Aboriginal land claims were extinguished in exchange for some $962.5 million paid to authorized Native corporations,


\(^{793}\) *Supra* *ANCSA* at note 332 at paras. 1601-1628. This is a federal piece of legislation passed by the United States Congress.

\(^{794}\) *Supra* B. L. Brown at note 792 at 624-625.
coupled with the designation of certain lands as Aboriginal. The claim was based upon the
traditional hunting, whaling and fishing that had gone on in the area. 795

The court in Gambell agreed with the Inuit that Aboriginal title had not been extinguished by
the wording in the ANCSA. The wording of "a need to settle in a just and fair way all claims
by the Natives based on Aboriginal land claims", was not enough to show the requisite
congressional intent to extinguish Aboriginal title to the outer continental shelf. 796 Therefore,
Aboriginal claims to the outer continental shelf still existed.

This favourable ruling for Aboriginal title to ocean spaces did little in the final analysis to
provide the Inuit with title or rights as the courts in the United States defer to Congress to
determine whether the government will honour its fiduciary obligation and recognize
unsettled Aboriginal claims. 797 The most likely remedy that would be provided is
compensation by way of a share of the revenues of the royalties derived from the oil and gas
leases. 798

795 Supra Valencia at note 85 at 144-145.
796 Supra B. L. Brown at note 792 at 627.
797 Ibid. at 636.
798 Ibid.
(ii) Inupiat v. United States

Another Inuit case from Alaska, in 1982, in response to the government’s sale of oil and gas leases, saw an argument made by analogy to ownership of the minerals in the sea bed of the traditionally used outer continental shelf waters. Evidence was lead substantiating the Aboriginals had traditionally hunted, fished and lived seasonally on the polar ice pack from time immemorial. The use and occupation did not limit their title just to the ice pack, but it penetrated the ice to the water column beneath, and to the sea bed and the minerals therein. The Inupiats' claim included title to the water column and the sea bed in specific areas of the Arctic Ocean, being some three to sixty-five miles offshore, as well as damages and an injunction to terminate any further interference with traditional rights.

The United States Supreme Court did not agree with the Inupiats’ arguments and held firm to their previously stated conviction that the interests of the nation sovereign are dominant over the seas and the outer continental shelf in order to protect national interests and responsibilities as opposed to the interests of a state or other groups within the country.

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799 Inupiat Community of the Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska, 1982), aff’d, 746 F. 2d 570 (9th Cir. 1984), cert. den. 106 S.Ct. 68. This case is noted in Ibid. B. L. Brown at 627, and supra Valencia at note 95 at 144.

800 Ibid. B. L. Brown at 628; and note the United States Supreme Court cases included by Brown; see also Valencia Ibid. at 144. This doctrine of federal paramountcy has been upheld in a more recent case that of Native Village of Eyak et al v. Trawler Diane Marie and the United States, 154 F. 3d 1090 (9th Cir. 1998).

Here the United States Court of Appeals affirmed the District Court for the District of Alaska's decision which stated that the doctrine bars the Aboriginal title claims to the Outer Continental Shelf (OCS) including the exclusive rights of hunting and fishing. The OCS in this situation includes all submerged lands outside state territorial boundaries (being beyond three miles offshore) extending to the outer edge of the continental shelf and within the United States’ jurisdiction and control.

The Court based its decision upon the four Supreme Court cases in which a number of states disputed ownership and control of the territorial sea and the adjacent areas of the OCS. From these cases emerged this doctrine. The states had argued their ownership based on historical occupation and use, and in some
may well be that in Canada, the courts would determine the national interest must be the
overriding consideration, yet, with the information on use and occupation, and in turn integral
connection to certain ocean spaces which can be demonstrated by both the Haida and
Tsawwassen First Nations, a finding of Aboriginal title to those ocean spaces is a very real
probability.

Both these cases deal with ocean spaces, and areas beyond the twelve mile territorial sea.
The *Inupiat* case is illustrative of the unique arguments that can be made. At first glance, this
appears to be a far-reaching argument to be employed in British Columbia on an issue of use
and occupation of an ocean space right to the sea bed. Yet, as we have seen the fishing
techniques of the Haida for deep water fish, the archaeological evidence of Hecate Strait
showing it was once above the water, and the sacred and spiritual places in the ocean, all add
to the body of Aboriginal perspectives that demonstrate use and occupation.

The last area of international and foreign materials to examine are international conventions
on human rights. As we have noted, Courts have been influenced by the changing norms of
the world on matters of Indigenous rights. As well, Courts have been prepared to move
forward and incorporate these norms within their judgements and to rewrite history in some
instances the fact that they had possessed such ocean spaces as various entities, such as republics and as
successors in title from the Crown of England, before they joined the Union. The Court in *Eyak* reasoned that
if states did not have property rights in the OCS then it was not possible for Aboriginal groups to have such
interest even though they existed prior to the United States coming into existence. Further, it made no
difference that such Aboriginal groups had been using and occupying this area for thousands of years, as the
same reasoning applied for the states' assertions of historical use. National interests in the offshore in matters
of defence, commerce, and foreign affairs, and the fact that Aboriginal populations are subordinate entities
within the constitutional scheme require the ownership of the OCS be with the United States.
cases.

There are two particular pieces of international material which I will discuss, as they provide us with the global consciousness which could well have significant impact in the developing area of Indigenous Peoples’ rights.

4. Reference to International Materials

Indigenous Peoples have sought out international forums to plead their case for recognition of human rights from early this century when the Canadian Iroquois Chief Deskaheh travelled to the League of Nations in Geneva in the 1920s with a delegation of Chiefs to request attention to the plight of the Iroquois. About this time, the Maori leader Ratana travelled from New Zealand to Geneva to plead his peoples' case.801

Within the last fifty years, a number of international organizations have examined matters of human rights of Indigenous Peoples including the International Labour Organization and the United Nations.802 Both of these groups have prepared and adopted conventions in regards to Indigenous Peoples and their human rights. These conventions can provide building blocks of support for First Nations in regards to a claim for areas of the territorial sea.


802 Supra Valencia at note 95 at 152-155 discusses the forerunners of the Conventions hereinafter discussed.
(a) International Labour Organization **Convention #169**

The *Convention on Indigenous and Tribal Peoples in Independent Countries* 803 came into force in 1991 with specific provisions for land as set out in Part II, articles 13 to 19. This *Convention #169*, as it is called, is an update of an earlier *Convention #107* of 1957 and the first *Convention #169* of 1989. The *Convention* has never in any of its forms been ratified by Canada. Many states have been critical of the lack of detail in some of its provisions and that its tone is paternalistic.804 In any event, it is a document worthy of consideration.

The provisions in regards to natural resources are important to the cause of First Nations in Canada. Article 13 in defining "land" states it “shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”. Article 14 gives recognition to the ownership and possession of the lands which have been traditionally occupied by the Indigenous Peoples. Article 15 goes on to state that the rights of the Indigenous Peoples to the “natural resources pertaining to their lands” shall be safeguarded, and further that they shall “participate in the use, management and conservation of these resources”.

By the very definition of “land” in Article 13, one can state unequivocally that ocean spaces are included as long as the criteria of it being occupied or used by the Indigenous Peoples is


804 *Supra* Bankes at note 750 at 83;and *supra* Sanders 1 at note 801 at 23.
met. The reference to "natural resources pertaining to their lands" in Article 15 guarantees the Indigenous Peoples the ownership and jurisdiction over the resources present in the seabed, subsoil and in the ocean waters.

Article 15 further provides that where the state has retained ownership specifically of minerals or sub-surface resources then there must be consultation with the Indigenous Peoples in regards to how exploitation and exploration will affect them. The Indigenous Peoples are to receive wherever possible the benefits of such activities and also compensation where they sustain damages.

The rights of Indigenous Peoples to direct their own futures by enunciating standards that recognize their ownership of lands, and the use of and benefit from the natural resources therein are guaranteed by the Convention. Some argue that Article 15 denies Indigenous Peoples ownership of the natural resources, and only provides the benefits that can be derived, and consultation on their usage. Article 15 does not grant a veto power to Indigenous Peoples on matters of development of the natural resources retained by the state and situate on their lands.

Convention #169 can be described as protectionist as it continues the fiduciary duty of the


Supra Bankes at note 750 at 85.
state to the Indigenous population; a relationship that is built on the premise of the more powerful entity looking out for the weaker. However, for all its criticisms, there are important aspects to this document. The first and foremost of which is that an international organization to which many countries of the world subscribe, has defined a code for Indigenous Peoples and their rights.

The rights included in this code provide for definite entitlements to land and other territories that make up the environment of the Indigenous Peoples which for many will include ocean spaces. As to resources, the benefits and consultation always rest with the Indigenous Peoples while the right to develop and exploit will be dependent upon the state. Prior to Convention #169 and its forerunners, there was no definitive international statement in regards to Indigenous Peoples and their territories.

(b) Draft Declaration on the Rights of Indigenous Peoples

The second and more recent international document to which Indigenous Peoples refer is produced by the Working Group on Indigenous Populations of the United Nations. With the creation of the United Nations in 1945, Indigenous Peoples launched their drive for

Draft Declaration on the Rights of Indigenous Peoples, United Nations Subcommittee on the Prevention of Discrimination and Protection of Minorities, August 1993, U.N. Doc. E/CN.4/sub.2/1994/2/Add. 1 (1994) [herein Draft Declaration]. In early 1995, this document was presented to the Working Group of the United Nations Commission on Human Rights, a body comprised of State representatives and experts. Here there will be new discussion over language and standards. In discussion with Professor Douglas Sanders of the University of British Columbia Faculty of Law on 17 April, 1998, he advised that the document is still at this level of examination. Professor Sanders does note in his article "A Text and a New Process" [1994] 1 C.N.L.R. 48 [hereinafter Sanders 2] at 49, that it is important the review process move slowly so that there is maturation in the thinking that occurs within this Working Group rather than have a quick and poorly drafted rewrite that is then presented for review by the General Assembly.
recognition of human rights. Little happened even though petitions were made on a yearly basis, until the 1960s when the Amazon rainforest issues came to the fore. Anthropologists and social scientists concerned with the Indigenous Peoples of this area convinced the United Nations to investigate discrimination. Lobby groups requested the establishment of a specialized group sponsored by the United Nations to examine Indigenous issues. As a result, the Working Group of Indigenous Populations was created in 1982 with a number of human rights experts among its membership.  

This Working Group has been characterized as the most open forum of the United Nations as from its inception, any Indigenous person could attend its meetings and have the opportunity to be heard. 809 In 1993, the Working Group brought forth its Draft Declaration on the Rights of Indigenous People which goes well beyond the Convention #169 with its vision of total power to Indigenous Peoples for determining their own destiny and objectives.

The Preamble of the Draft Declaration acknowledges the deprivation of lands, territories and resources from the Indigenous, and recognizes a “need to respect and promote their rights” especially those in relation to land, territories and resources. For with such recognition, Indigenous Peoples will be able to maintain and grow within their own cultures and develop their own aspirations.

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808 Supra Sanders 1 at note 226 at 21-22.

809 Supra Sanders 2 at note 807 at 48.
The Preamble also sets out that treaties and agreements made between Indigenous Peoples and their states are of "international concern and responsibility". With such statement, the drafters of the Draft Declaration have illustrated the global awareness and attitudes in respect of Indigenous issues, and have emphatically stated they are no longer wholly domestic matters.

Part VI of the Draft Declaration contains provisions in regards to natural resources and lands. Articles 25 and 26, in defining the rights of Indigenous Peoples to own and develop their traditional lands, includes the words "waters and coastal seas and other resources". The inclusion of these words incorporates the international community's recognition of Indigenous Peoples' rights, interests and ownership to ocean spaces and the resources situate there. Article 26 sets out that the "laws, traditions and customs, land-tenure systems and institutions for the development and management of resources" rests completely with the Indigenous.

Article 30 furthers the development and management of resources by the Indigenous by directly giving to them the sole ability to determine what will take place on the lands, territories and with other resources. The absence of the words "water and coastal seas" in this particular Article does not effect the extension of this concept to ocean spaces, as the Article goes on to state that Indigenous peoples have the right to veto any project by others that would affect their lands especially when exploitation is in regards to "mineral, water or other resources".
There is a view held by some that the inclusion of the word “mineral” in Article 30 suggests ownership by the Indigenous of mineral rights is not part of “other resources” as set out in Article 26. As mineral resources are considered non-renewable resources and are therefore of a somewhat different concern than other renewable resources, and as mineral resources often create a higher return of benefits, it is suggested that the inclusion of the word “mineral” in Article 30 is merely there to denote its importance.

Article 26 recognizes the distinctive relationship of Indigenous Peoples and their traditional lands as a whole environment including “lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used”. It encompasses all that traditional territories could be to Indigenous Peoples and leaves little room for varying interpretations. This Article recognizes the point of view as we have seem illustrated by the comments of both the Haida Nation and the Tsawwassen First Nation earlier in this work where they have stated their traditional territories are inclusive of all areas and resources, with no defined boundaries.

Professor M. E. Turpel, as she then was, states that “Canada must fully support this Draft Declaration” and its principles because of our constitutional obligations to First Nations Peoples and further because it is a matter of honour and integrity on the international level. As these principles are the product of long deliberations of world state representatives, experts in the field of human rights and Indigenous Peoples, she asserts that these principles

\[\text{\textsuperscript{810} Supra Bankes at note 750 at 87.}\]
can be referred to as representing the values to which the Indigenous Peoples aspire.\textsuperscript{811}

\begin{enumerate}
\item \textbf{(c) Global Consciousness of Human Rights}
\item Both these international documents represent ideals of a high nature in respect to human rights on a global scale. They are the products of lengthy critical discussions and deliberations by informed experts from varying and diverse disciplines and cultures. The issues contained within these two documents are written in a modern social and political context. They reflect the general global modern day thought on Indigenous rights as determined by representatives of those world countries represented by these organizations.\textsuperscript{812}

As previously noted, our Supreme Court of Canada often looks to and reviews foreign and international materials in reaching their conclusions. Both these documents provide an international view of Indigenous rights which should be utilized to substantiate the concept of Aboriginal title to ocean spaces.\textsuperscript{813}

With the decision in \textit{Delgamuukw} perhaps we are seeing some incorporation of the principles of these two documents into the Canadian context of Aboriginal rights. The Supreme Court

\begin{enumerate}
\item \textit{Supra} Turpel at note 801 at 52.
\item \textit{Supra} Yukich at note 805 at 256.
\item \textit{Supra} Turpel at note 801 at 51 where she states that the \textit{Draft Declaration} can be used in the courts in Canada to interpret s.35 of the \textit{supra Constitution Act, 1982}, at note 9, and also to aid in discussions between States and Indigenous Peoples. She suggests that the document can be used now as a framework to ensure that the resulting treaties and agreements entered into by these parties are in keeping with international norms and principles rather than wait for the final form from the General Assembly which could be some years from now.
\end{enumerate}
of Canada recognized that land must be described by reference to not only the common law concept but also that of Aboriginal perspectives which in essence incorporates a holistic vision of territories including the whole environment, and not just land as earth and soil.

Further, Delgamuukw by determining that Aboriginal title permits lands to be used for purposes other than just traditional uses such as hunting, gathering and fishing, has recognized that First Nations should be able to move forward into modern times and become more self-sufficient and determinative in their communities. This is in keeping with the international principles of self-determination. Delgamuukw does not make any judgement on self-determination, but the Court does appear to move away from a totally paternalistic regime whereby the federal government is responsible for First Nations to one where First Nations achieve some ability for economic well-being and self-sufficiency by owning land and being able to use it in ways they see fit.

Professor Kent McNeil whose works were referred to by the Court in Delgamuukw, notes that if First Nations are not permitted an all-encompassing interest in their lands subject to alienability only to the Crown, they are denied the right to change and adapt to the new conditions that result from the process of colonization. This would then condemn First Nations societies to extinction, as cultures that can not adapt are bound to disappear.814

As this analysis has shown, there is a growing influence of international human rights norms.

814 Supra McNeil at note 271 at 151.
It is evident from criticism levelled at Canada by United Nations organizations and committees that our record of implementation of these norms as part of our international commitment is not as upstanding as it should be.\(^{815}\) It is not disputed that Canada is viewed as a world leader in such issues, yet its domestic record of applying these standards is mediocre at best.

The courts have not kept up with these world influences, yet have on occasion noted their consideration and use of foreign materials in their deliberations of First Nations' issues. Yet, a review of the list of cited materials in recent Supreme Court of Canada decisions in this area show an apparent lack of direct consideration of international human rights sources.\(^{816}\) Paul Joffe in a recent article states the “Canadian courts have yet to adequately consider these existing and emerging international standards” which have been, he notes, “an integral part of the Canadian domestic and international legal framework for a sufficiently long period”.\(^{817}\)


\(^{816}\) A review of the list of cited materials referred to by the Court in both Delgamuukw supra at note 35 and Marshall supra at note 249, will illustrate the lack of international human rights materials. There may be some references to such materials within a number of the articles cited by the Court, yet, as a review of the titles of these articles illustrates none are in respect of international law. Delgamuukw does cite as previously discussed Australian and United States cases, while in Marshall the only sources referred to outside Canada are a number of old English cases. This is not to say that the parties to these actions did not argue and place before the Court international materials.

Mr. Joffe outlines the various recommendations that have been made to the government of Canada by the international community in respect of its approach towards First Nations' rights. Specifically he notes the critical comments by the United Nations Human Rights Committee this year in respect of our continued practice of extinguishing Aboriginal rights, and limiting land use to rigidly defined terms which are drawn from historic activities. There is still talk of extinguishment in order that a First Nation can utilize their lands for uses that would not follow the principles set out in *Delgamuukw*. 818

Joffe notes that United Nation’s committees view Canada’s continued policy of extinguishment as being the direct link to the economic marginalization of First Nations. 819

As the international materials we have reviewed indicate, Indigenous Peoples have the rights to own and utilize their lands and resources in order to create sustaining economic and cultural environments. In light of the United Nation’s comments and the ideals set out within international human rights, Mr. Joffe concludes governments when negotiating agreements with First Nations are not justified in insisting upon surrender of their rights or title. 820

818 *Ibid.* at 6. *Supra Delgamuukw* at note 35 at para. 131 where the Court states a First Nation can use their lands in a way that is incompatible with its historic use if they surrender such lands, so the Aboriginal title is extinguished. Upon obtaining these lands back as fee simple lands from the Crown, the Nation is at liberty to carry on the uses they so desire.


820 *Ibid.* at 27. Today, we see a different approach to wording, in particular in the *Final Agreement Between the Nisga’a Nation and Her Majesty the Queen in Right of British Columbia, and Her Majesty the Queen in Right of Canada*, initialed 4 August 1998 [hereinafter *Nisga’a Final Agreement*] within the Preamble is states the relationship of the parties is “to be based on a new approach ... rather than by the extinguishment of rights”. Chapter 2 at para. 22 provides: “[t]his Agreement constitutes the full and final
On the point of negotiating agreements, it is interesting to note the *Labrador Inuit Agreement-in-Principle* at Part 2.8.1 provides:

2.8.1 Subject to certainty provisions referred to in part 1.12, nothing in the Agreement affects the ability of Inuit to participate in or benefit from any existing or future constitutional rights for [A]boriginal people which may be applicable to them.

This statement alone on its face suggests the Inuit will not give up any Aboriginal and treaty rights that might be determined in future. However, as stated the paragraph is subject to the following:

2.12.1 The Agreement will provide for certainty with respect to Inuit rights under section 35 (1) of the *Constitution Act, 1982*.

2.12.2 Prior to the Agreement the Parties will:
   (a) negotiate the precise legal technique to achieve certainty; and
   (b) negotiate finality.

By the provisions of this paragraph, it is clear that the final agreement that will be signed will contain some form of wording whereby the terms of the agreement are to be the full and final settlement in respect of the rights of the Inuit. From a review of the most recent agreement negotiated with First Nations, it is evident Canada still advocates a policy of extinguishment even though the exact words are not used, in respect of Aboriginal rights.

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*settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga’a Nation.*” The *Agreement-in-Principle Between the Sechelt Indian Band and Her Majesty the Queen in Right of British Columbia, and Her Majesty the Queen in Right of Canada*, initialed 16 April 1999 [hereinafter *Sechelt Agreement-in-Principle*] at para. 1.7.0 contains the same phraseology with the appropriate changes. Even though these examples of the wording utilized in the most recent treaties do not include “extinguishment”, the intended result is the same.

Agreement-in-Principle Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Her Majesty the Queen in Right of Canada, initialed 10 May 1999 [hereinafter *Labrador Inuit AIP*].
The one further point Mr. Joffe brings out in his writing is that of the fiduciary duty owed by the Crown to First Nations. He believes that recognition of this sacred principle by the courts serves to reinforce Canada’s national and international obligations and commitments to follow the norms of international human rights. As we have noted, the most recent case of *Marshall* is very much concerned with the honour of the Crown and the responsibility they have to First Nations. *Delgamuukw* also contained discussion of this principle as noted earlier. Perhaps, these judicial comments in some small way signify our Supreme Court’s willingness to recognize and incorporate international human rights norms within the issues of First Nations which in turn could translate into the Court’s expanding of Aboriginal title to include ocean spaces.

5. Conclusions

The Supreme Court of Canada has historically made use of foreign and international materials in its decisions. As the global recognition of international human rights continues to grow, the Canadian courts will come to refer and consider and incorporate those norms as determined by the world community. We do have some basis of hope for this as the High Court of Australia in *Mabo* condemned the doctrine of *terra nullius* (upon which the taking of territories from its Indigenous population had been based), as racially discriminatory and colonial-based in relation to the new world views.

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822 *Supra* Joffe at note 817 at 26 and 27 where he notes the comments of D. McRae in his 1993 commissioned report to the Canadian Human Rights Commission that state at the very least Canada must observe minimal human rights standards due to its fiduciary duty owed to First Nations.

823 *Supra Mabo* at note 178 at 42.
There is also a movement in some countries in respect to the offshore to have the provinces or states within the country exercise larger roles in offshore governance. In the United States, the *Submerged Lands Act* \(^{824}\) brought into being in 1953, gave coastal states jurisdiction jointly with the federal government over the three mile territorial sea. Their authority was not extended further, however, when the United States extended its territorial sea to twelve miles in 1988.\(^{825}\)

States have though been able to extend their involvement in ocean spaces beyond the twelve mile territorial sea through joint efforts such as the Oregon Ocean Resources Management Plan of 1991 which established a state management plan with a view to co-managing an area beyond the territorial sea with the federal government. Critics suggest the plan has been successful in giving Oregon a strong presence in discussions concerning offshore mining and oil and gas development.\(^{826}\)

The plight of Indigenous Peoples throughout the world has lead the international community to be more aware of human rights and to work collectively to bring about the recognition and acceptance of their governance of their territories and resources. Canada has historically maintained a foreign affairs agenda based upon human security espousing the “moral high

\(^{824}\) *Supra Submerged Lands Act* at note 792.

\(^{825}\) Jon L. Jacobson, "United States Coastal States and the International Law of the Sea" (1993) 24:4 Ocean Dev. & Int'l L. 393 at 393. The authority of Texas and the Gulf of Mexico side of Florida were extended to the twelve mile limit.

\(^{826}\) *Ibid.* at 394. The State of Hawaii also has a cooperative role with the federal government in regards to mineral leasing in the offshore adjacent to the State; see 394.
ground". On numerous occasions our leaders have publicly condemned other countries in respect of their human rights abuses. The work of the United Nations and its committees, and other agencies who focus on human rights, will continue in the new millennium, and Canada, as one of the vocal leaders on human rights, must bring its own domestic policies in respect of its First Nations population into line with such evolving international norms.

Our examination throughout this section has provided a wealth of materials, from both the world stage and other individual jurisdictions, from their courts and academic writings, that can be used to augment the Canadian sources of the common law and Aboriginal perspectives, in our passage to recognition of the concept of Aboriginal title to ocean spaces in Canada.

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827 Mike Trickey, “Reform calls for review of membership in UN” The Vancouver Sun (16 November 1999) A14.

1. Introduction

Discussion of First Nations issues whether they be rights or title oriented always turn to the concept of “reconciliation”. This concept is used to denote the finding of a place to incorporate First Nations concepts into the Canadian legal context so they are resolved with the dominant society’s concepts yet ensuring they are not assimilated and lost. Reconciliation thus emphasizes the coming together of the cultures in Canada to create a society that recognizes the originating peoples and their culture, encourages its growth and differences, and promotes harmonious coexistence.

To date, one would say that reconciliation is oft mentioned as the goal, yet there has been minimal achievement. The Supreme Court of Canada has noted in numerous cases dealing with First Nations issues that reconciliation will be achieved by the course of action determined by the parties to give effect to the court’s decision. However, often the agencies of the government that are the entities involved with implementing the changes in respect of the decision do not seek out input from First Nations, and to all appearances these agencies continue to exert their ultimate control. A prime example is the mayhem that occurred after the Marshall decision in the Maritime Provinces due solely to the unpreparedness of DFO for the possible situation that they lost the case. Further, their ineffectiveness in wading into the
controversy immediately after the decision was rendered only added to the escalation of
tensions and concerns voiced by all parties including the Mi’Kmaq, the commercial
fishermen, provincial governments and the fish processors.

In this chapter, I will explore some of the comments made about reconciliation with a view to
providing some practical means of harmonizing the concept of Aboriginal title to ocean
spaces within the Canadian common law. I will canvas two particular non-First Nations
sources of commentary on reconciliation being that of the Royal Commission on Aboriginal
Peoples and the judiciary. There will be some discussion of the theory of co-management
and its utilization as an effective vehicle in meeting the challenge of reconciliation of this
concept. The voices of the two First Nations with whom I had the privilege of speaking will
also be included in this section, and a review of a number of the present day legal instruments
that appear to have created reconciliation relationships between First Nations and
governments in Canada. First, let us consider some of the comments that have been made
about reconciliation to gain some understanding of what is meant by this term.

2. Comments From Non-First Nations

(a) The Royal Commission on Aboriginal Peoples

One of the major sources of reconciliation comment is the great compilation of information
and opinions gathered by the Royal Commission on Aboriginal Peoples during its travels
across Canada in early to mid-1990s. The Report chronicles and compiles much information
about First Nations ideologies and cultures. It focuses on putting forth practical methods of
reconciliation in order to secure a “foundation of mutual recognition and respect” between the First Nations and the non-First Nations peoples of Canada.\textsuperscript{829} To achieve such a goal, the Commission has set out a multitude of recommendations that deal with numerous issues including amendments to the \textit{Indian Act}, public inquiry into the residential schools, and reform in relation to relocation and responsibility of Aboriginal communities, self-government, lands and resources, economic development, and all aspects of social policy.\textsuperscript{830}

Many of those who made presentations before the Commission stated their belief that if Canada were to address the differences between the First Nations and non-First Nations cultures such action would lead to reconciliation of the different perspectives resulting in the creation of benefits and opportunities for all.\textsuperscript{831} The Commission concluded in its Report that “the concepts of coexistence and shared jurisdiction over lands and resources” appeared to provide a window of opportunity for reconciliation.\textsuperscript{832} As we shall note later in this Chapter, there are already in practice a number of these types of coexistence and shared jurisdiction schemes.

Reconciliation of the different cultures appears to be the supreme goal in resolving First

\textsuperscript{829} Note quotation on the back cover of \textit{supra RCAP Report} at note 208 at volume 2.

\textsuperscript{830} The \textit{RCAP Report} is made up of five volumes and is a lengthy chronicle and commentary on the First Nations of Canada. The recommendations of the Commission are interdispersed within each volume. \textit{Supra Indian Act} at note 97.

\textsuperscript{831} \textit{Ibid.} \textit{RCAP Report} at volume 2 at 447.

\textsuperscript{832} \textit{Ibid.} at 446.
Nations issues. This has been an ideal sought by courts over the years as evidenced within their comments in various First Nations litigation. In this next section, I will review some of the recent Supreme Court of Canada cases in this regard.

(b) The Courts

Judicial comment about Aboriginal title was first mentioned in the 1888 Privy Council decision of *St. Catherine's Milling and Lumber Co. v. The Queen* 833. This case was most colonialist in its views of Aboriginal title for it set out that the Crown had been vested with a substantial and paramount estate underlying the Indian title. 834 Since this decision, many courts in their decisions regarding Aboriginal rights and title, have felt compelled to grapple with finding plausible means of explanation which would reconcile Aboriginal rights and title within the Canadian legal context. In attempting to accomplish this goal, courts have stated such would explain and resolve the issues that arise from the methods by which the Crown gained and claims sovereignty over lands that had at the time of contact been occupied by the First Nations. Comments about the need for reconciliation and how it can be achieved can be readily found within the fisheries cases of the last decade. Perhaps in citing this need for reconciliation, the courts believe that the thorny issue of how Crown sovereignty came to be over First Nations lands can finally be put to rest, and the two cultures can smooth out the troubles and tensions that are evident.

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833 *Supra St. Catherine's Milling* at note 125.

In *Gladstone* for example, Lamer C.J., notes:

> "Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory;..."  

He goes on further in that same paragraph to state that "Aboriginal rights are a necessary part of the reconciliation of Aboriginal societies with the broader political community of which they are part;...". Both these statements clearly articulate the Court’s desire that by their recognition of certain Aboriginal rights such as fishing, hunting and gathering, the resolution of these rights into the broader community will take place.

Interestingly enough, the Court in recognizing for the first time the Aboriginal right to fish in *Sparrow*, also provided for a justifiable infringement. In many cases since 1990, there has been a broadening of the class of justifiable infringements which may act as window dressing to make the recognition of the Aboriginal right or title more palatable for the broader community; thus lessening the perceived impact of the Aboriginal right or title so determined. In these cases, one can see the Court is also focused on reconciling the two cultures so that the assertion by the Crown of its sovereignty over lands held by First Nations (which were never conquered or purchased by the Crown) is explained.

Lamer C.J., in *Delgamuukw* notes that the reconciliation of the Aboriginal right to fish as recognized in *Sparrow* into the broader Canadian community is found in the Court’s

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835 *Supra Gladstone* at note 2 at para. 73.

determination of conservation as a justifiable infringement. This decision recognizes the integral connection of the First Nations with fish while at the same time ensuring there are enough fish for all including non-Aboriginals. Delgamuukw in turn expands the class of justifiable infringements on Aboriginal title. From the comments about Sparrow and the expansion of the infringements, it is clear the Court’s goal is to lessen the impact of recognition of Aboriginal title on the rest of Canada.

In the concluding remarks of Delgamuukw, Lamer C.J., again reiterates the Court’s mission when dealing with cases involving s. 35(1) and First Nations’ issues being that of “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. His comments reflect his belief that by recognizing these Aboriginal rights and title, and in providing some counter balance to their impact, it will address the improprieties of the European immigration and the Crown’s assertion of sovereignty. And, thus move the Aboriginal cultures and those of the non-First Nations of Canada towards harmony.

Achieving this goal certainly has its challenges. The Chief Justice of Canada will be retiring in the new year with the result that the direction and goals of the Court may undergo some fundamental changes in ideologies in the near future. Further, there are numerous issues to be clarified and remedied between First Nations and Canada. First Nations still occupy the margins of Canadian society, and movement form those margins will not happen overnight.

837 Supra Delgamuukw at note 35 at para. 161.

838 Ibid. at para. 186.
Reconciliation is the ultimate goal to be reached, and its achievement will only be obtained through much earnest and forthright efforts to address the issues of First Nations and Canada. As we have noted from the voices of those First Nations members included in this work, there is much skepticism within their communities about the role and motives of governments. Only time will bear witness to reconciliation becoming a reality in Canada.

This work has demonstrated there are legal foundations upon which the concept of Aboriginal title to ocean spaces can be recognized. As the Supreme Court of Canada has noted reconciliation of Aboriginal rights and title matters with the sovereignty of the Crown as one of its foremost goals, an exploration of what tools can be utilized to accomplish reconciliation in respect of this new title concept would be useful. Important to this discussion are the theories of coexistence and shared jurisdiction over lands and resources. Understanding these concepts which are known in the field of resource management as "co-management" will furnish more clarity to my later review of a number of actual examples of groups working together in respect of the management of lands and resources. Therefore, I will start the discussion of reconciliation by reviewing the concepts of co-management.

3. Co-Management

(a) Perimeters of the Concept

Co-management is a recurrent theme of growing importance in the management of renewable resources throughout the world. There is no one agreed upon definition for co-management but it does include such concepts as co-operative management, joint management, and multi-
party agreements. These management theories developed around common property resources such as fisheries and forestry, and involve management as a sharing of powers and responsibility between governments and local resources users. This type of arrangement ensures each party acts as a check on the other to stop over-exploitation of the resource.

In practice there is a wide spectrum of co-management schemes that vary in degree of power sharing and responsibility from at one end mere tokenism, to at the other end, the user group having substantial control. Some schemes focus on specific geographic areas while others focus on specific species. Many of these arrangements have occurred through formal and informal mechanisms which have been developed by the community to prevent over-exploitation of their own local resource. Such community practices regulate the local users and the access by outsiders to the resource.

Co-management regimes integrate the dissimilar systems that are utilized by governments and First Nations for management of resources. In the case of the government, its authority is derived from its legislative powers, and its management policies are based on science data. First Nations participants on the other hand, derive their authority to be responsible for


840 See E. Pinkerton & M. Weinstein, Fisheries That Work: Sustainability Through Community-Based Management (Vancouver: Suzuki Foundation, 1995) [hereinafter Pinkerton & Weinstein]. At 11, they discuss the informal regulatory co-management practices that have come about with the lobster fishers of Maine. Their own local self-regulation consists of a knot tied in the rope of an outsider’s lobster trap as a warning to leave. If such intrusion continues, traps will be cut, and in cases where the encroachment still persists, there is more drastic action taken.
resources and their methods of accomplishing same through their long term acquired knowledge, values and social conventions. Their systems are based upon self-regulation.\textsuperscript{841} By bringing together these two differing cultures and ideologies, co-management could be described as an “example in progress” of reconciliation of the First Nations culture with that of the broader Canadian community which is so fervently discussed by the Courts.

From the research undertaken to date, it appears the management schemes that have enjoyed the most success arise out of a crisis or near disaster in the resource when the resource is almost at the point of collapse. Most successful regimes have a number of common characteristics including: provision for long term solutions, involvement of the communities affected and the user groups at a level of actual decision making and not just consultation with the government body, promotion of dialogue thorough data collection, discussions of the positions of the parties, and a meaningful working relationship of the parties.\textsuperscript{842}

The usual type of co-management scheme is set up by an agreement, signed by the parties,\textsuperscript{841} \textit{Supra Notzke} at note 839 at 188 - 189.\textsuperscript{842}

providing for all the pertinent legal rights and duties and responsibilities of the respective parties. The agreement often includes financial considerations being made by the government to the management group. There has been widespread utilization of co-management arrangements between governments and First Nations often as end results of comprehensive land claims settlements, or as a result of court recognized First Nations exclusive or priority harvesting rights, all with varying success rates.\textsuperscript{843}

During my field experiences, I spoke with members of the two First Nations involved about their thoughts and experiences with co-management. The following section sets out some of these comments to provide further insight into the potential of using co-management as an instrument of reconciliation.

\textbf{(b) First Nations Comments on Co-Management Schemes}

The majority of First Nations people with whom I spoke had positive comment to make about the viability of co-management as a means for their Nation to be included in the decision-making processes that affect their ocean spaces and the resources found therein.\textsuperscript{844} This positive attitude was in some instances based upon previous experiences with similar types of management arrangements. Others opinioned it was the less contentious route to becoming a player in the decision-making process especially in light of the fact litigation was

\textsuperscript{843} See generally \textit{supra} Notzke at note 839 for examples of successful co-management schemes between First Nations and governments.

\textsuperscript{844} This is the same conclusion determined by the research carried out by Ms. Notzke that First Nations want access to a fair share of the resources they have utilized as well as being participants within the management process of those resources. See \textit{Ibid.} at 188.
long and costly, and in some instances there was not the present capacity available to take on the full responsibility for management. I will now turn to the comments provided by members of each of these Nations.

(i) Reconciliation Potential Within the Haida Nation

The Haida are involved on a number of committees and boards that advise government departments in regards to fisheries and other activities impacting their territories. They have been involved as previously noted in the *Aboriginal Fishing Strategy* and other fisheries programs with DFO whereby specific harvesting rights are bestowed upon the Village Councils of the two Reserves. These harvesting rights are included in communal licenses which determine what specie of fish will be taken, who fishes, the number of fish to be taken and when fishing will take place. These programs do not place ultimate authority in the Haida Nation as DFO still remains in control. However, they can be viewed as steps forward in placing some meaningful input from the Haida into the fisheries policies and enforcement that impact their way of life, both from a cultural sense and their economic livelihood.

Chief Davidson furnished information about Naikoon Provincial Park located on the eastern side of Graham Island, near Old Massett, as a possible future example of a co-management relationship between his people and the Province. To date there has been a coauthored management plan for the Park. Chief Davidson notes that the Haida have been able to continue their gathering and harvesting of resources within the Park areas, with some
reluctance on the part of the Province.\textsuperscript{845} There is an old Haida Village site within the Park area located on the beach which has Reserve status and thus can not be interfered with by the Province. Chief Davidson thinks it may be possible in future to have a co-management regime with the Province in respect to the Park area similar to the \textit{Gwaii Haanas Agreement}.\textsuperscript{846}

Councillor Yeltatzie believes co-management schemes are viable options for involving the Haida with the governance of their ocean spaces and resources until the Haida have the necessary skills to manage and govern on their own. He noted Haida governance of the territories of Haida Gwaii would not dislodge the present resident non-Haida, nor would it reject those from other cultures who come to live there from sharing Haida Gwaii and its resources. For working together with friends on the basis of respect and trust for one another is a an important principle of the Haida culture.\textsuperscript{847} There is concern voiced by he and others about the loss of marine resources not only for the Haida but for all people. Employment for the Haida is a top priority, and he believes co-management options are one of the more practical methods to bring about economic prosperity than lengthy and costly

\textsuperscript{845} Telephone interview with Chief Kimball Davidson on 21 September 1999.

\textsuperscript{846} \textit{Ibid.; and see the Draft Naikoon Master Plan} prepared by Skeena District and Northern B.C. Regional Planning Services, B.C. Parks, March 1996. The \textit{Gwaii Haanas Agreement supra} at note 541 will be explored in more detail further in this Chapter. For the purposes of the immediate discussion it represents a co-management scheme between the Haida and Canada who state within the Agreement, their claims and assertions of interests and title in the lands and ocean spaces it covers.

\textsuperscript{847} \textit{Supra} Yeltatzie interview at note 315. In my interview with Roy Jones, Jr., \textit{supra} at note 294, he described his home village of Skidegate as being a multi-cultural community as many other cultures including other First Nations are present on the Reserve.
Lucille Bell is another member of Old Massett who has faith in the prospect of co-management for Haida Gwaii, especially in light of the fact the Gwaii Haanas Agreement has become a reality and appears to be giving her people a real say in the governance of Gwaii Haanas. She does note the Agreement has its critics and there are drawbacks especially when it comes to implementing what is on paper. Management responsibilities are not in reality shared 50/50 between the Haida and the federal government, and the Haida have to work very hard to ensure they are involved in the decision-making process and their voices are heard.

The Gwaii Haanas Agreement which will be discussed as one of the examples of reconciliation instruments in the following section, recognizes the claims of both Nations, being the Haida and Canada, to sovereignty over the sea and its resources around Haida Gwaii. Provisions within the Agreement place limitations on public access, and development within Gwaii Haanas being the southern portion of Moresby Island. The Haida have decision-making power in respect of sites for development and they play a vital role in ensuring the preservation of the sites and their history by acting as the hosts and guides at such sites. I am told that the Haida involvement in the determination of what sites are to be developed within Gwaii Haanas has been successful. Guujaaw, the newly elected President

848 Supra Gwaii Haanas Agreement at note 541.
849 Supra Bell interview at note 306.
of the Council of the Haida Nation, views the Agreement as providing checks and balances which in the end probably have created a better situation than if one side owned the area completely.  

Ron Brown, the President of the Council of the Haida Nation during my visit, advised that co-management of Haida Gwaii must be a local matter, and it was not appropriate for such arrangements to be run by an agency on the British Columbia mainland, or in Ottawa. He noted his concern that co-management seems to be focused on “crisis management”, and issues are only addressed when they reach a crisis point. This is especially true of the fisheries as DFO’s management policies as of late have been to move fishing licenses from the south to the north around Haida Gwaii as fish stocks in the south are depleted. The results of these management decisions have provided no local benefits to Haida Gwaii and only served to take away fish from the Haida.  

Certainly these observation are in keeping with one of the usual ways that co-management schemes come into being that of a crisis or near disaster with a resource.

Kevin Brown notes the Haida involvement in AFS and the joint capacity building presently taking place between the Haida Fisheries Program and government agencies in the areas of the Yakoun and Copper Rivers in respect to salmon harvesting is a start, and he is hopeful

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850 Supra Guujaaw interview at note 308.

851 Supra Brown interview at note 326.
the Haida will in future have a greater impact in the exporting and management of fisheries.\footnote{Supra K. Brown interview at note 525.}

In my discussions with Chief Russ, I found him to be much more wary of co-management schemes as he believes the Haida can not have self-government unless they control their lands and resources. He discussed the support given by the Haida Nation to the Canadian government’s stance on declaring a 200 nautical mile exclusive economic zone to safeguard their fisheries pursuant to UNCLOS and that such support did not recognize Canada’s ultimate authority for this area but rather it was an avenue through which protection of the Haida fisheries and in turn their culture could be obtained.\footnote{Supra Chief Russ interview at note 66.} Perhaps, today this historic support could be viewed as a starting point for reconciliation as the Haida and Canada came together on the important points of conservation and sustainability of the fisheries and the oceans, both of which play such vital roles in the Haida culture and the existence of the western coastal communities of Canada.

Roy Jones, Jr., a businessman and member of the Skidegate Reserve, explained to me the desire of the Haida People to take over management of their local resources which is precisely what modern co-management theory envisages. Stakeholders involved in the management of resources are more likely to protect and do all possible to ensure the resources are sustained so that their livelihoods continue. Those who are intrinsically involved with the resources have better knowledge and information than all others as to the
ways of conservation and sustainability. He noted it is essential that the focus of resources management plans be inter-related with the land and the waters, shoreline, inter-tidal zones and the open waters of Haida Gwaii, and further that all people of Haida Gwaii have a say in such co-management processes. His statement that “these are rich food gathering grounds and not many areas left that are rich like this,” provides the essence of what the Haida seek which is the conservation and sustainability of their territories and resources, and in the end their culture through direct involvement in the issues, decision-making processes and management of these matters.

All these comments by the Haida provide clear indication that their goal in being involved in co-management schemes is to ensure the conservation and sustainability of the resources in Haida Gwaii. Their principles and ideals in managing resources coincide with those of co-management theory in that they are stakeholder-based which in turn provides opportunity for reconciliation.

(ii) Reconciliation Potential Within the Tsawwassen First Nation

Chief Kim Baird of the Tsawwassen First Nation is optimistic that co-management of resources and lands is a viable route to achieving reconciliation of the issues faced by her Nation and the governments at the treaty table. There are many areas the TFN want to be involved with and realize at present they do not possess the capacity to be in ultimate control. She sees her Nation’s involvement with AFS as a beginning point for their role in the
management of the fisheries.\textsuperscript{855}

The Coast Salish groups involvement in the past of working together to harvest and protect resources for the future, suggests partnerships in co-management schemes are an attainable possibility today. Historical accounts detail the Coast Salish employing techniques for co-hunting of mammals as well as the co-building of fishing gear.\textsuperscript{856} The demonstration of working co-operatively in the past provides a solid foundation upon which to build future co-operative enterprises with other neighbouring First Nations, and with the two levels of government. The ideal of stewardship as espoused by First Nations will aid in keeping those groups with overlapping claims focused on the real issue being that of sustainability of the territory and its resources for future generations.

Councillor Williams believes co-management will only be successfully achieved if there is equality among all the parties involved; for if one is the dictator, it is to the detriment of all parties. In his opinion, an important first step to achieving equality among the parties, is the education of the public about First Nations, and their history and struggles over the last century.\textsuperscript{857} He notes the co-management of territories and resources are possible avenues to

\textsuperscript{855} \textit{Supra} Chief Baird interview at note 300.

\textsuperscript{856} \textit{Supra} Suttles 3 at note 579 generally at 233 - 247.

\textsuperscript{857} From my work and research involvement with First Nations’ issues, I suggest Canadian history must be taught at the secondary school level as the history of Canada truly unfolded, with all the grievous and sorted details being revealed. By studying the true events of the exploitation, attempted assimilation and marginalization of First Nations, the public will come to have some appreciation of where First Nations find themselves today, and their hopes and aspirations for the future. The public will be able to grasp what issues such as fishing rights and Aboriginal title, to name a few, mean to First Nations. One other avenue of
attain satisfactory resolution of the issues facing TFN which he cites as more access to and management of those resources historically used by his people. The most important factor in achieving reconciliation will be the parties working together on an equal footing.858

(c) Conclusions.

My First Nations contacts provide encouraging commentary about their thoughts and involvement with co-management schemes within their respective areas. The present co-management regimes are few and provide varying degrees of responsibly to these Nations, yet they are a start of policies placing some authority and decision-making processes into the hands of these First Nations.

There are historic precedents of co-management arrangements between First Nations groups, and between First Nations and governments where these entities have successfully joined together to form partnerships to protect and sustain resources which have resulted in the

education is that of exposure of school age children to First Nations cultures and histories as a means of understanding. It is said that it takes at least a generation to change thinking, so by introducing today’s children to First Nations cultures, we are starting the change in thinking of the next generation. The other avenue that is available now is that of more meaningful contact, rather than just the “going through the motions”. In Chapter Three, a number of First Nations members have noted their frustrations and concerns with governments, and how they feel there is no recognition of their input in the issues upon which they are consulted. It is interesting to note that fishermen in Southwestern Nova Scotia during meetings with Mi’kmaq members in the fall of 1999 in respect of lobster fishing allocations following the Marshall decision, supra at note 249, stated they better understood the Mi’kmaq wants and needs after the two parties joined together and had face to face discussions. Purposeful communications between the parties is the key to achieving understanding and in turn successful reconciliation.

858 Supra Williams interview at note 319.
preservation of First Nations cultures. Past experience shows these partnerships have worked, and thus such past experiences can provide a foundation for future partnerships, and a potential path to reconciliation of the concept of Aboriginal title to ocean spaces.

In this age of down-sizing, right-sizing, shrinking departmental budgets, and the public’s demand for less government intrusion in their lives, the schemes of co-management are attractive to government departments delivering services to the public for shifting the responsibility of government to stakeholder groups. These schemes are also attractive to the stakeholders as the wealth of academic and field studies conclude there are economic, social and sustainability benefits to be realized.

Co-management arrangements are more practical methods to bring about meaningful input into resources management policies and aid in bringing about a successful conclusion to a number of long standing issues rather than lengthy and costly litigation. Such co-management agreements are the result of parties recognizing and working through their differences and issues at the negotiation table, where the process of reconciliation can

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859 A good example of past co-management between First Nations and non-First Nations of Haida Gwaii is the Queen Charlotte Salmon Trollers Association organized by a group of independent fishermen who owned their own boats rather than fishing company owned boats in the 1920-1930s as noted in supra Knight at note 356 at 186.

860 DFO has announced that its budget will decrease from $775m in 1995 to less than $450m by the year 2000; see Canada Department of Fisheries and Oceans, "The New DFO Framework, Fact Sheet"printed from <http://www.ncr.dfo.ca/communic/fact/1995/ 950228el.htm>. Offloading some of its programs to other entities would certainly aid DFO in meeting these targets.

861 See sources at note 842.
I will now turn the focus of the remainder of the discussion about reconciliation to the actual review of a number of agreements settled through negotiations which provide for a variety of co-management schemes. Each of these agreements has been chosen as there is some component of ocean spaces or fishing included within the regime that is co-operatively managed in varying degrees by a First Nation and a government agency. At present, it appears that governments are comfortable with these types of arrangements, and in all likelihood will continue this trend.

4. Examples of Reconciliation Instruments

The federal government of Canada has always maintained it has sovereignty over all ocean waters below the high water mark on all shores. This position has not varied with any of the settlements produced under the Comprehensive Land Claims policy.\textsuperscript{862} This policy, announced in 1986, widened the scope of negotiations to include offshore harvesting rights to resources, sharing of resource revenues, a voice in environmental decision-making and a commitment to negotiate self-government. Settlements are intended to ensure First Nations' interests in resource management and environmental protection, as well as sharing of the benefits derived from development.

The only ownership offered under the policy has been to actual land and not to any ocean

\textsuperscript{862} Supra Comprehensive Land Claims at note 94.
waters. The following passage in regards to ocean spaces is illustrative of the federal government preparedness to recognize harvesting rights, and First Nations participation in co-management schemes for environmental purposes and revenue sharing, with no mention of title to such areas:

"In many cases, the areas traditionally used by Aboriginal groups to pursue their way of life include offshore areas. In such cases, negotiations concerning harvesting rights in offshore areas will be conducted, to the extent possible, in accordance with the same principles as those which apply to terrestrial areas. Participation in environmental management regimes and resource revenue-sharing arrangements may also be negotiated with respect to offshore areas." 863

The Task Force to Review Comprehensive Land Claims which provided recommendations from which the policy of 1986 was framed did not address itself to the issue of Aboriginal title to ocean spaces as noted in the following:

"And offshore:
Recognizing the natural and legal differences between land and sea, topics for negotiations could include access to wildlife and fishery resources, participation in decision making for conservation and resource allocation, and a sharing of the benefits from the sub-sea minerals and hydrocarbons. The sharing of benefits from non-renewable offshore resources will have to be discussed in light of proposals regarding onshore resources." 864

It is evident that during the last twenty-five years, Aboriginal title to ocean spaces has not been an issue on the agenda for discussion. As I have noted in the very beginning of this work, the topic has received little academic interest, and the Courts have not included it within their discussions of fishing rights or land title.

I will now turn to review a number of these land claims agreements that have been negotiated

863 Supra Elliott at note 7 at 182.

864 Ibid. at 227.
over the last quarter century, both prior to and under the new lands claims policy of 1986. The First Nations groups represented are from various geographic locations and cultures within Canada. The main features of these agreements are the provisions for specific harvesting rights especially of fish, and the inclusion of the First Nation within some type of co-management scheme most often as members of management boards. It can be said that these agreements do provide some basis for reconciliation of First Nations' territories and culture within the broader Canadian context.

The most interesting and forward thinking agreement of those reviewed is that of the Labrador Inuit which includes provisions dealing with Aboriginal title to ocean spaces for the first time ever in a modern agreement. By reviewing these agreements in some detail, I will attempt to draw out the ideologies of the government players with the view to determining what may be included in future negotiation agendas in regards to Aboriginal title to ocean spaces.

At the end of the review, I have included two agreements in respect of oil and gas exploration and exploitation on the East Coast. First Nations are not parties to these, yet the agreements do demonstrate the federal government's stance on the offshore and how the question of ownership is concluded.

The initial document I will review is perhaps the proper starting point, even though again First Nations are not a party to it, for it does represent two ideologies and two entities, each
attempting to dominate the legal landscape.

(a) Canadian Federalism

The first and foremost document to our review of reconciliation documents is the Constitution Act, 1867 with its division of powers between the federal and provincial governments. Here the agendas of two institutions are set out, with one being national in interest, while the other more regionally oriented. The Canadian federal state has existed since 1867, albeit with some challenges to the authority bestowed upon the two levels of government. Most challenges have been by the Provinces in regards to legislation produced by the federal government which they argue has infringed upon their powers.

Sections 91 and 92 set out in some detail the division of exclusive powers between

\[\text{Supra Constitution Act 1867 at note 63.}\]

\[\text{See as some examples cases such as Gulf Trollers Association v. Canada (Min. of Fisheries and Oceans), [1987] 2 F.C. 93; (F.C.A.) where the Federal Court of Appeal determined the policies of the Minister of Fisheries and Oceans Canada that restricted the commercial salmon fishery while at the same time allowed an unrestricted sport salmon fishery were valid as federal legislative powers over fisheries was not limited to conservation purposes and could reflect socio-economic objectives. In the case of Fowler v. R., [1980] 2 S.C.R. 213, the Supreme Court of Canada discussed the constitutionality of section 33(3) of the Fisheries Act supra at note 205, which prohibited the placement of logging debris into waters that might be frequented by fish. The Court concluded the federal legislation was ultra vires as it sought to regulate logging operations (being under the exclusive power of the Province pursuant to s. 92(5), (10), (13) and (16), rather than fisheries.}\]

A case dealing with nearly the same section, s. 33(2), of the Fisheries Act, is that of Northwest Falling Contractors Ltd. v. R., [1980] 2 S.C.R. 292 which had an opposite determination in that the legislation was valid as its true nature and character was to protect fish pursuant to the federal head of power of "Sea Coast and Inland Fisheries" set out in s.91(12).

A third case involving fisheries and the constitutionality of federal legislation is that of R. v. Crown Zellerbach Can. Ltd., [1988] 1 S.C.R. 401. The issue in this case centered around whether the regulation of the dumping of wood waste into a navigable salt-water cove within the Province of British Columbia was indeed ultra vires the federal government. The Court found that regulation was intra vires Parliament under the national concerns doctrine of the federal peace, order and good government power in s. 91 as it dealt with the control and regulation of marine pollution which the Court characterized as a matter of national concern.
Parliament and the Provincial Legislatures. The federal Parliament's areas of power are very clearly national in scope, and for the purposes of this work, matters relating to First Nations and the sea are found under the federal heads of power in sections 91 (10) "Navigation and Shipping", (12) "Sea Coast and Inland Fisheries", and more importantly (24) "Indians, and Lands reserved for the Indians". These three subsections provide exclusive power to the federal government to deal with Aboriginal title to ocean spaces.

As mentioned earlier, the Province of British Columbia does own the sea bed of the Strait of Georgia and will thus be involved in such assertions of Aboriginal title over ocean spaces within that area. Further, under section 92A. (1) (a) of the Constitution Act, 1867, the Province has greater interests then just ownership of the sea bed, as it has the ability to exclusively make laws in relation to the exploitation of non-renewable resources that are situate within the Province. Section 92 A.(4) also provides British Columbia with the authority to tax in relation to such resources. These two sections confer very real interests in the ocean spaces of Strait of Georgia upon the Province. The review of the oil and gas agreements of the Canadian East Coast later in this Chapter will provide some suggestion as to how relationships are forged between parties who both claim interests in the sea bed.

Federalism has functioned in Canada for over one hundred years and stands as a symbol of reconciliation of two systems of power working in concert with each other. It can be viewed as an instrument of reconciliation between two authorities with different agendas and visions, and can be utilized as a resource tool in building reconciliation instruments between the First
Nations and Canada in the broad sense on the issue of Aboriginal title to ocean spaces.

(b) Historic Land Claims Agreements

Some of the more recent sources to look to in regards to reconciling First Nations concepts within the Canadian system are the land settlement agreements signed within the last quarter century. The older agreements such as the James Bay and Northern Quebec Agreement of 1975 and the Inuvialuit Final Agreement of 1984 all specifically state the sovereignty of any ocean spaces within the settlement areas is with Canada. The waterbeds on the land mass such as lakes, streams, rivers, as well as the renewable resources such as fish, are most usually determined to be owned and managed by the First Nations group subject to the public right of navigation of the water ways. The water itself is owned by the federal government.

Some agreements like the Inuvialuit Final Agreement actually surrender and convey “all their Aboriginal claims to the Northwest Territories and Yukon Territory and adjacent offshore areas”. The settlement legislation that gives authority to the settlement agreement contains the explicit extinguishment of “[a]ll native claims, rights, title and interests, whatever

867 The enabling legislation for the Agreement is found in the James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c.32.

868 Canada, Department of Indian and Northern Affairs. The Western Arctic Claim: The Inuvialuit Final Agreement (Ottawa: the Department, 1984).


they may be, in and to, ... adjacent offshore areas". 871

(c) Nunavut Final Agreement

One of the agreements under the new land claims policy is the Nunavut Final Agreement signed on 25 May 1993, between the Inuit of Nunavut in the central and eastern Northwest Territories and the Government of Canada. Later that same year, the Nunavut Land Claims Act 872 was proclaimed in force providing for the creation of the third Canadian Territory, Nunavut, as of 1 April 1999.

Discussion about ocean spaces is found first in the preamble of the Agreement where it declares: “certainty and clarity of rights ... for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore” as one of the prime objectives. 873 This statement is all telling in regards to whether there will be any consideration of Aboriginal title to ocean spaces found elsewhere in the document for it specifically only speaks of rights, not title. At Article 15 entitled “Marine Areas” it is clearly stated “[t]here shall be no Inuit Owned Land in marine areas.” 874 Thus, the only involvement the Inuit will have with ocean spaces are rights based and in co-management schemes as provided for in the Agreement. When the Inuit of Nunavut first

871 Ibid. at section 3(3).


874 Ibid. at para 15.2.3.
asserted their claim, it included Aboriginal title to lands, waters and land-fast ice, based upon their traditional use and occupation of such areas. 875

This Agreement continues unabated the federal government’s view of its absolute sovereignty over ocean spaces, and provides no discussion about Aboriginal title in such areas.

(d) **Nisga’a Final Agreement** 876

For British Columbia the first modern day treaty is the *Nisga’a Final Agreement* negotiated under the comprehensive land claims policy, and signed on 4 August 1999 between the Nisga’a Nation and both the governments of Canada and British Columbia. To date, it has been ratified by both the Nisga’a Nation and British Columbia, with the settlement legislation scheduled to be introduced into Parliament in the fall of 1999 with recent comment by the Prime Minister indicating “it will be passed”. 877

The Nisga’a territories do not include any ocean spaces, and the only marine issue contained within the document is that of fisheries discussed at Chapter 8. There are extensive provisions for harvesting rights of all species especially salmon. 878 Again, as is the usual case, there is a co-management scheme included that of a Joint Fisheries Management Board,

875 *Ibid.* where this is noted in the preamble at 1.

876 *Supra Nisga’a Final Agreement* at note 820.


878 *Supra Nisga’a Final Agreement* at note 820 at Chapter 8, para. 11 - 37 in regards to salmon.
composed of two members from each of the three parties with a mandate to provide recommendations to the Minister of Fisheries and Oceans in respect of quotas and other matters that impact the fisheries within the Nisga’a territories. The Minister, as is the usual situation, holds the ultimate responsibility “for the management of fisheries and fish habitat”. The Agreement does set out the duty of consultation on the part of Canada with the Nisga’a when Canada is formulating its position in international discussions and negotiations which would significantly affect the fish resources of the Nisga’a.

The Agreement provides no real guidance on Canada’s attitude in respect to title to ocean spaces. From a review of the document, one could say there is some recognition and respect given to the rights of the Nisga’a as the Agreement calls for their input in decision-making processes that affect their fish stocks. Albeit, questions could be raised as to exactly when such consultation is an absolute, for the Agreement provides for consultation only at those times when “significant” affects on fishing resources are contemplated, and precisely what situations are significant is not described.

All the agreements so far discussed are federal in origin, and thus very seldom have included any province in the negotiations. The next modern day treaty I will review is the first of its kind under the British Columbia Treaty Commission process.

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879 Ibid. at Chapter 8 para. 77 - 83.
880 Ibid. at para. 68.
881 Ibid. at para. 115.
(e) *Sechelt Agreement-in-Principle*

On 16 April 1999, the first Agreement-in-Principle was initialled under the British Columbia Treaty Commission process between the Sechelt Indian Band, and the Governments of Canada and British Columbia.\(^{882}\) The territories of the Sechelt do lie on the ocean waters of the Strait of Georgia whose sea bed is the property of British Columbia.\(^ {883}\) The Agreement contains no references to Aboriginal title to ocean spaces, and more specifically at paragraph 6.4, the parties set out the Agreement will not affect the public’s right of access on the navigable waters that are within the Sechelt Treaty Land.\(^ {884}\)

The Agreement provides for fishing rights, and again specifically notes the Minister of Fisheries and Oceans as the responsible entity for the management and conservation of fish and their habitat. The parties go further to state that no alteration to the laws of Canada with respect to property in fish or marine plants is contemplated.\(^ {885}\) The justifiable infringements on the Aboriginal right to fish being conservation, public heath and safety as previously determined by the courts are specifically stated in paragraph 7.1.3. The harvesting of fish is noted to be only for food purposes and not commercial, and the entitlement is communal in nature for the Sechelt Indian Band.\(^ {886}\) Commercial fishing licenses for the Sechelt, as with

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\(^{882}\) Supra *Sechelt Agreement-in-Principle* at note 820.

\(^{883}\) Supra *Strait of Georgia Reference* at note 91.

\(^{884}\) Supra *Sechelt Agreement-in-Principle* at note 820 at para. 6.4.

\(^{885}\) *Ibid.* at Chapter 7, para. 7.1.1 and 7.1.2.

\(^{886}\) *Ibid.* at paras. 7.1.5 and 7.1.7.
the Nisga’a Final Agreement, are given no special treatment, and are only available if the
Sechelt qualify in the same manner as all other Canadians. There is, however, special
provision for issuance of eleven commercial licenses to the Sechelt Band, some of which are
for salmon and others for shrimp, subject to payment of the usual applicable fees and
charges. 887

This Agreement does not set up a specific co-management scheme. Rather there is provision
for the two government levels to enter into co-management agreements with the Sechelt in
regards to fisheries activities. 888 Certainly co-management of fisheries is contemplated as
further in the Agreement there are provisions which dictate the Sechelt will be consulted and
added as members of any advisory board established by either level of government when it is
appropriate. 889 When it is appropriate is not spelled out, and perhaps as this is just an
Agreement-in-Principle, such ambiguity will be addressed and clarified in the Final
Agreement.

It is apparent that the parties to this Agreement are not discussing, nor are they prepared to
recognize Sechelt title to those ocean spaces utilized and occupied by them. The Minister of
Fisheries and Oceans, as we have previously seen, maintains control of fisheries. The Sechelt
Agreement provides us with further proof the parties at the treaty negotiation tables are not

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887 Ibid. at para. 7.8.

888 Ibid. at para. 7.1.10.

889 Ibid. at para. 7.5.4.
pursuing discussion on the topic of Aboriginal title to ocean spaces, and are still very much oriented towards providing only for exclusive resource harvesting rights within ocean spaces.

The last two agreements I will review are by far the most important reference points for First Nations in determining the federal government's stand on Aboriginal title to ocean spaces. The first, being the *Gwaii Haanas Agreement*, is of great significance to the Haida Nation as it is in force at this date and thus provides some view of a working relationship in respect of ocean waters between the government and the Haida.

(f) *Gwaii Haanas Agreement*

This agreement came about as the result of many years of activism on the part of the Haida and other environmentally minded citizens, numerous blockades of logging operations, discussions with the government of British Columbia, and many negotiation tables.\(^890\) The Agreement was signed by the Minister of the Environment, Canada, and the Council of the Haida Nation on 30 January 1993, and brought into being the National Park Reserve of Gwaii Haanas\(^891\), an Archipelago encompassing the southern portion of Moresby Island, the outer islands, and the ocean waters that surround these land masses.

\(^890\) For a good overview of the issues and events that lead to the signing of the Agreement see generally *supra* May at note 402. *Supra Gwaii Haanas Agreement* at note 541.

\(^891\) Gwaii Haanas includes the southern half of Moresby Island, as well as the other islands found off this area and "all those lands covered by water and tidal areas up to the O.H.W.M. (Official High Water Mark) within co-ordinates" as noted on Appendix 3, Map of the Archipelago Marine Area, *ibid. Gwaii Haanas Agreement*. 
Section 1 describes the overall purpose which is to provide "long-term protection measures" to safeguard the area "as one of the world's great natural and cultural treasures". In achieving this goal, the parties have agreed to utilize the highest standards of protection and preservation.

The most interesting and, one might say innovative point of the Agreement, is that while the diverging philosophies of the two parties on sovereignty, title and ownership of the Archipelago are fully described, the parties focus their attention and commitment on "objectives concerning the care, protection and enjoyment" of the Archipelago. This is an extraordinary document for it acknowledges the differences in opinion of the parties, yet the true emphasis of the agreement is focused on the real issues at hand.

The details of the two ideologies of ownership are set out in section 1, placed in two separate columns, side by side, thus ensuring no one ideology is positioned ahead of the other. This is the first time that a modern agreement between a government and a First Nation has included both ideologies and interests. It is suggestive that governments may be coming to recognize and respect the interests of First Nations in the territories historically utilized and occupied by them. It is a step towards reconciliation of the two cultures interests in the same territories, and furthers the movement towards co-management of resource areas. It may also signify the paradigm shift away from determination of who has title, to a posture instead of describing the interests of the parties and their common goals.
Canada clearly states the Archipelago is Crown land “subject to the sovereignty of her Majesty the Queen” in the right of Canada and British Columbia. The Haida Nation in turn in the adjacent column describe their view as follows:

“The Haida Nation sees the Archipelago as Haida Lands, subject to the collective and individual rights of the Haida citizens, the sovereignty of the Hereditary Chiefs, and jurisdiction of the Council of the Haida Nation. The Haida Nation owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly.”

The parties acknowledge they are acting in good faith and common cause in their desire to protect and preserve the Archipelago, and that the terms of the Agreement do not prejudice the parties’ views as to sovereignty, title or ownership. The Agreement is not to be utilized as a treaty or land claims agreement, nor does it in any way create, affirm, recognize or deny any Aboriginal or treaty rights, thus leaving open the door for further negotiations or court action to determine title.

The prime objective of the Agreement is the sustainability of the Archipelago and indirectly the Haida culture, and to meet that end, the parties have resolved there will be no commercial extraction or harvesting of resources on the lands or non-tidal waters, except trapping of fur-bearing animals and the cutting of trees for ceremonial or artistic purposes intended for public

892 British Columbia is noted as having entered into an agreement with Canada to transfer all its interest in these areas to the federal government in order that these areas may become part of Gwaii Haanas.

893 Supra Gwaii Haanas Agreement at note 541 at section 1.1. Supra Constitution of the Haida Nation at note 305.

894 Ibid. Gwaii Haanas Agreement at section 9.1.
As with a number of the precedent land claims agreements, there is established a management board (known as the Archipelago Management Board) which in essence creates and maintains a relationship of co-jurisdiction between the parties. The make-up of the Board is by equal membership representing Canada and the Haida Nation, with each party designating one of its members as co-chairperson.\textsuperscript{896} The Board’s main objective is the co-management of the area, and to ensure sharing and co-operation of the parties in the planning, operation and management of Gwaii Haanas.\textsuperscript{897} The Board is duty bound to make every effort to achieve consensus on the issues it deals with, and in situations of disagreement, assistance of an independent third party may be sought.\textsuperscript{898}

Provision is made for the continuation of many Haida cultural activities within the Archipelago such as the gathering of traditional Haida foods, plants, fishing, hunting, cutting of trees, traditional, spiritual and religious ceremonies, and traveling within the Archipelago.\textsuperscript{899} There are also direct benefits to the Haida communities from the Agreement through employment of Haida members with the Park service, training programs, Haida

\begin{flushleft}
\textsuperscript{895} Ibid. at sections 3.2 and 3.3.
\textsuperscript{896} Ibid. at part 4.
\textsuperscript{897} Ibid. at section 3.4.
\textsuperscript{898} Ibid. at sections 5.1 and 5.3.
\textsuperscript{899} Ibid. at section 6.1.
\end{flushleft}
representation on hiring boards, and the acknowledgment of Haida heritage and culture as an important aspect of employment and the very essence of Gwaii Haanas.

This Agreement is a prime example of a bi-lateral document creating a relationship of stewardship and responsibility between two Nations while at the same time leaving undetermined their claims of sovereign right over the Archipelago. It is a successful model of how two states with differing views about title can put such matters aside, and come together for the ultimate goal of sustainability and protection of an area of territory that includes both land and ocean spaces. In the end analysis, the parties by joining forces for a common good have ultimately agreed to preservation of the culture and life of the non-dominant state, in this situation being the Haida Nation. This partnership did not happen easily. It was carved out of a decade of activism and negotiations, with many set backs along the way, most of which were purely politically motivated involving issues between Canada and British Columbia. 900

Today, some six years after the creation of Gwaii Haanas, there are varying comments within the Haida communities as to whether the Agreement has achieved its goal and is truly working. All the trappings of a National Park are visible with a park office, staff members and a website available. 901 The Park staff, being mainly Haida, are presently engaged in documenting old Haida villages sites, industrial remains such as mine shafts, canneries and

900 Supra May at note 402.

901 The Gwaii Haanas website can be found at <www.harbour.com/parkscan/gwaii/>.
rails, determining the Haida place names, and liaising with the Haida leaders on a regular basis so that the concerns and views of the members of the Nation in regards to Gwaii Haanas are known and thus incorporated into its development. 902

Some members of the Haida Nation noted the co-management initiatives of the Agreement look good on paper, yet in reality there is not the equality as had been anticipated. The Haida feel they must be ever vigilant and push to have their ideas and views included in the management policies of Gwaii Haanas. Members of the Haida Nation take an active role as the hosts and guides of visitors as access to Gwaii Haanas is by permit only issued through the Haida Watchmen program, and all travel must be with a Haida guide. On a positive note, since the signing of the Agreement, all development within Gwaii Haanas has been as determined and agreed to by the Haida. 903

From my observations and the comments of the Haida community members, there is some degree of success in attainment of the goals envisioned by the Agreement. This might suggest there is some achievement of reconciliation of the Haida ideologies and culture into the broader community. The relationship created by this Agreement between the Haida and the federal government can be looked to as a model for future arrangements whereby title to ocean spaces may be in dispute between First Nations and the federal government. This Agreement provides a forum whereby the world is made aware of the differing ideologies of

902 Supra Wilson interview at note 313.

903 Supra Guujaaw interview at note 308.
the parties, while at the same time dealing with the matters at hand. In the Haida Gwaii experience, the preservation of a territory was the *raison d'etre* which in turn aided and supported the continuation of the Haida culture.

I now turn to examine the most recent lands claims agreement initialed just a few short months ago which contains many of the provisions we have previously reviewed.

*(g) Labrador Inuit Land Claims Agreement-In-Principle*

This is the most recent of all land claims agreements with the Agreement-in-Principle (AIP) having been signed on 10 May 1999 by the three parties involved being the Labrador Inuit Association (LIA), the Government of Newfoundland and Labrador, and the Government of Canada. Once this AIP is ratified by each of the parties, it becomes the basis for negotiating a final agreement. It must be remembered that as it stands now, the AIP is not a binding document.

There are approximately 4,800 Inuit who live in northern Labrador and northeastern Quebec, and claim Aboriginal rights over and title to an area from the northern most tip of Labrador to the southern side of Groswater Bay, then seaward to the limit of Canada's territorial sea, and westward to the Labrador/Quebec border. This area is approximately three-fourths of the land mass of Labrador.  

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904 Schedule 1-A, *supra* AIP at note 821.
The actual settlement area will be smaller, and includes 28,000 square miles of land and interestingly enough some 17,000 square miles of adjacent Tidal Waters and ocean areas. The most profound difference of this AIP when compared to all other land claims settlement agreements is the inclusion of ocean spaces within the settlement area. However, as noted before in other agreements, there is no recognition of Aboriginal title to ocean spaces, instead this AIP provides for ownership of the sea bed to the Inuit in certain circumstances, with the ownership of the Tidal Water column remaining with the federal government.

The AIP is the result of the LIA claim filed with the Government of Canada entitled “A Statement of Claim to Certain Rights in the Land and Sea-ice in Northern Labrador” in 1977, which was accepted as a claim for negotiation. In 1980, the Province of Newfoundland was invited to join the negotiations, and in 1996, the parties all agreed to fast track the negotiations.

There are suggestions this AIP signifies the willingness of Canadians to reconcile historical and cultural differences through negotiations and compromise. To the Inuit, the AIP reflects their aspirations “and ensures that the benefits of economic development are shared in

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905 Ibid. at section 4.3.3.

906 Ibid. at section 3.4.3.

907 These comments were made by the Honourable Jane Stewart, Minister of Indian Affairs and Northern Development on 10 May 1999 at the signing ceremony. See News Release at <http://www.gov.nf.ca/releases/1999/exec/0510n01.htm> at 1.
a fair and just manner among all parties”. 908

This is an extensive agreement including settlement of lands and ocean spaces, resources benefits, co-management of areas, establishment of a park reserve and protected areas, provisions for land-use planning and environmental assessment, further provisions for fisheries, self-government, protection of Inuit history, culture and artifacts, as well as terms about financial matters and taxation, dispute resolution, and membership in the Inuit community.

The AIP provides for two distinct territories. The first is noted as the Inuit Settlement Area the exact boundaries of which will be determined by the parties to the AIP, and will be situated within or contiguous with the boundaries of the initial Land Claims area as previously described above. 909

The second territory which is smaller comprising 6,100 square miles is known as the Labrador Inuit Lands and the exact area will be selected through consultation with all the Inuit communities once the AIP has been ratified by the Labrador Inuit Association which is expected to be completed very soon. 910 The Inuit will have title to this area in fee simple, 911

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908 Ibid.

909 Supra AIP at note 821 at Part 4.3.

910 Ibid. at Parts 3.3. and 4.2.

911 Ibid. at Part 3.4.
however, the AIP only permits transfer of the title of any part of these lands to the governments of Canada or Newfoundland.\footnote{Ibid. at section 3.4.6.}

It is possible for the Inuit to identify water lots within the Labrador Inuit Lands. This does not, however, give the Inuit title in fee simple to such ocean spaces as it does with actual land masses included within the Labrador Inuit Lands. Only the sea bed is included within the title of the Inuit, and the ownership of the Tidal Water column is exempted, thus leaving it in the federal government.\footnote{Ibid. at section 3.4.3 (a).} This is the same situation for inland waters which vests the lands under the water with the Inuit with the water column vesting in the Province.\footnote{Ibid. at section 3.4.3 (b).}

This appears to be a recognition of sorts by the federal government of Aboriginal title to ocean spaces within a very limited sense. It is not unlike the Strait of Georgia situation whereby the sea bed was determined by the Court as being owned by the Province of British Columbia.\footnote{Supra Strait of Georgia Reference at note 91.} Why the federal government has recognized the Inuit’s interest may be linked to their historical evidence of use and occupation of these waters in all seasons for hunting, fishing and travel purposes. The preamble notes that title to the land claims area is based upon the Inuit’s “traditional and current use and occupancy of the lands, waters and landfast
sea ice” within that area.916

By the provisions of UNCLOS, Canada as the coastal state, has comprehensive authority over the territorial sea,917 which was legislated as a twelve miles wide territorial sea in 1996.918 Thus Canada has the ability to recognize the Inuit interest in the sea bed. As to Inuit interests in ocean spaces beyond the territorial sea limits, there would be questions of an international law import in regards to these areas as they are not ocean spaces for which Canada by international law has exclusive ownership and jurisdiction.919

The Inuit are the first to have their interests in ocean spaces recognized by the federal government; albeit in a very limited sense and not within the full definition of Aboriginal title as set out in Delgamuukw. The ultimate jurisdiction and control of these waters within the ocean spaces still rests with the federal government.

Chapter 6 entitled Ocean Management, clearly spells out that ultimate authority of all matters

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916 Supra AIP at note 821 at Preamble para. 1.

917 Supra UNCLOS at note 42 at Article 2.

918 See supra the Territorial Sea and Fishing Zones Act at note 60 as repealed by the Oceans Act supra at note 60 which sets out at section 4 (a) that the territorial sea of Canada is of a width of twelve nautical miles.

919 Supra UNCLOS at note 42 at Part VI. as to the jurisdiction over the continental shelf by the coastal state, and Part V in regards to the exclusive economic zone (often called the 200 mile limit; also known as the EEZ) which only provides for the prescription of certain activities by the coastal state within the EEZ such as fishing, and non-living resource exploitation. The coastal state does not have sovereignty over the EEZ.
involving ocean spaces within the settlement area lies with the Minister of Fisheries and Oceans, Canada. There is placed upon the Minister the duty to consult with the Inuit when making decisions about management of the territorial sea; however, at the same time, the Minister is given the ability to proceed in making a decision different from that recommended by the Inuit government. The Inuit have no authority to step in and stop the policies or decisions being made by the Minister. Their only recourse appears to be court action based upon an argument of no consultation, or lack of consideration by the Minister of the Inuit recommendations.

In reviewing this chapter one is struck by the fact that even though the Inuit will have some water lots and thus title to the sea bed, they have very little control of what goes on. They appear to be compensated for this lack of authority through the receipt of benefits that will flow from future development projects. In all instances, before development permits are granted, a Benefits Agreement must be struck between the developer and the Inuit.\textsuperscript{920} Interesting enough, as in keeping with the Supreme Court of Canada’s justifiable infringements as outlined in \textit{Delgamuukw}, \textsuperscript{921} the Minister, may issue this type of permit and allow development to proceed if he determines waiting to conclude such an agreement would jeopardize the development. In that situation, the only recourse for the Inuit is compensation.

\textsuperscript{920} \textit{Supra} AIP at note 821 at Part 6.7.

\textsuperscript{921} \textit{Supra} \textit{Delgamuukw} at note 35 at para. 165 where the Court notes a long exhaustive list of justifiable infringements that can over ride Aboriginal title including “the general economic development of the interior of British Columbia” which could be equated with the same type of development policy in Labrador.
as determined by a board of arbitration. A Benefits Agreement is required to provide preferences to the Inuit which include generous terms of economic, social, and environmental advantages such as preferential employment and training of Inuit, Inuit participation in corporate ownership and joint ventures, the incorporation of Inuit values and culture in employment conditions, protection of the Inuit society, culture and environment, and environmental rehabilitation.

Fisheries and harvesting rights dominates Chapter 13. The priority in decision making in regards to fisheries policies is stated to be conservation. The AIP clearly codifies the priority of the Aboriginal right to fish above all others as per Sparrow by stating the Inuit have a domestic fishery available all year within their settlement area for any fish stocks being taken for food, social and ceremonial purposes. The Inuit also have the right to "exchange, trade or barter among themselves and other aboriginal individuals", and the right to transport fish to Inuit or other aboriginal people outside the settlement area. The AIP specifically sets out the only limits on these rights are those imposed by Inuit Law, Laws of General Application and measures established on matters of conservation, public health or

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922 Supra AIP at note 821 at section 6.7.12.
923 Ibid. at Schedule 6 - A pursuant to section 6.7.3.
924 Ibid. at section 13.2.1.
925 Ibid. at Part 13.3; and supra Sparrow at note 2.
926 Ibid. AIP at sections 13.3.6 and 13.3.12.
public safety as in keeping with the common law.\textsuperscript{927}

Part 13.5 of the AIP provides for a co-management scheme of sorts for determining the actual harvest level or total allowable catch (TAC) each year for the food fishery. The basic premise is the protection of the fisheries for the Inuit,\textsuperscript{928} with the Minister of Fisheries and Oceans determining the quota as recommended by the Inuit Central Government.\textsuperscript{929} The Minister may, however, proceed to determine a different quota if that as recommended is not supported by the available information.\textsuperscript{930} This same style of determination scheme is utilized in establishing customary fishing zones and applicable policies to provide for the protection of these areas that have traditional importance to the Inuit. Again, the Minister is given ultimate authority even after consultation with and recommendation from the Inuit about such matters.\textsuperscript{931}

There is no commercial Inuit fishery provided, only a guarantee that some of any future licences will be to the Inuit Central Government suggesting communal licenses, in some ways similar to the \textit{Sechelt Agreement-in-Principle}. It must be noted though, persons who then

\textsuperscript{927} \textit{Ibid.} at section 13.4.1; \textit{supra Sparrow} at note 2 as to conservation, and \textit{supra Badger} at note 265 as to conservation and safety.

\textsuperscript{928} \textit{Ibid.} AIP at section 13.5.1.

\textsuperscript{929} \textit{Ibid.} at section 13.5.3.

\textsuperscript{930} \textit{Ibid.} at section 13.5.5. Available information as noted in section 13.5.4 includes data complied by the Inuit on an on-going basis using traditional ecological knowledge, historical data, and monitoring information.

\textsuperscript{931} See \textit{ibid.} at sections 13.6.3 - 13.6.6.
seek to fish such licences must meet the “existing federal policy for issuance of Commercial Fishing Licenses”. 932

As I have noted with the Haida, it has been most difficult to qualify for a commercial fishing license due to limited openings and quotas with the result of minimal if any catch, and thus no monies to cover expenses. These circumstances lead many fishermen to slow down their fishing operations or even abandon them completely, and therefore not maintain the required days of fishing to qualify for a commercial licence. These provisions for the Inuit may appear encouraging on paper, yet in reality may be of little gain and benefit to the Inuit.

There is a further co-management regime set up with the creation of the Torngat Joint Fisheries Board to deal with matters in the sports fishery, specifically the annual sport fish quota. 933 There is provision for this Board to give its recommendations to the Minister, as well as input from the owners and operators of sports fish camps within the settlement area. 934 The Inuit fishing camps are given preference in regards to any fish quotas as well as

932 Ibid. at section 13.11.12.

933 Ibid. at Part 13.9. The Board has seven members, three appointed by the Inuit Central Government, two by the federal government, one by the Newfoundland government, and the chair nominated by the Board, see section 13.9.2. The Board provides recommendations to the Minister in regards to conservation and management of fisheries, aquatic plants and fish habitat in the settlement areas. This includes such matters as quotas for the food fishery, the sport fishery, issuance of licences, restrictions on fishing gear and vessels to name a few; see Part 13.10. This really is a lower form of co-management which stress more consultation with First Nations groups rather than actual turn over to them of management policies. This has been the trend in all land claims agreements that have been negotiated previously to this one.

934 Ibid. at section 13.11.13.
the establishment of Inuit fishing camp enterprises.\textsuperscript{935} There are similar priority provisions for the Inuit in matters of establishing aquaculture facilities and fish processing facilities.\textsuperscript{936}

In response perhaps to the growing discussion surrounding Canada’s duty to the First Nations and its international commitments, there is provision whereby any legislation which is utilized to implement the terms of an International Agreement relating to fish, aquatic plants, fish habitat or management of fisheries in the settlement area, or which would impact that area, must be interpreted and administered so the Inuit are treated “on at least as favourable a basis as any other aboriginal people of Canada.”\textsuperscript{937} This clause goes further than any provision seen before in attempting to guarantee the security of determined Aboriginal rights and title. This section also calls for Inuit representation in all discussions leading to the formulation of Canada’s position respecting such international matters,\textsuperscript{938} similar to that found within the \textit{Nisga’a Final Agreement} previously noted.

The Inuit AIP is clearly a movement forward for the federal government in terms of partial recognition of Aboriginal title to ocean spaces within the territorial sea, and providing more of a guarantee that Aboriginal rights and title recognized under land claims settlement agreements will not be infringed upon. The AIP provides for the first ever quasi-recognition

\textsuperscript{935} \textit{Ibid.} at section 13.11.15.

\textsuperscript{936} \textit{See ibid.} at sections 13.11.18 - 13.11.28.

\textsuperscript{937} \textit{Ibid.} at section 13.12.1

\textsuperscript{938} \textit{Ibid.} at section 13.12.3.
of Aboriginal title to the territorial sea yet at the same time has squarely placed the authority
to regulate the use of these ocean spaces through management polices with the federal
government. The federal government has a duty to consult with the Inuit on the issues that
impact their ocean spaces and the resources therein, yet when closely scrutinized, this duty is
nothing more than a platitude. The Inuit truly do not control their own territories and the
activities that go on there.

The AIP does provide for much appreciation and respect of the Inuit values and culture,
especially in regards to fisheries quotas and other decisions. It is interesting to note that the
AIP specifically states the Minister of Fisheries and Oceans may only delegate the authority
of his office to the Regional Director General, and no person below that level. As noted
previously, respect and appreciation for First Nations culture by DFO has been sorely lacking
as evidenced by the remarks of the Haida and TFN. These provisions may suggest the
forging of a new direction in the relationship between Aboriginal Peoples and DFO, and the
commencement of the reconciliation process envisioned by the Supreme Court of Canada.
The provisions whereby the Inuit are included in discussions leading to international and
domestic interjurisdictional agreements reiterates this new direction as it suggests the federal
and Newfoundland governments' acknowledgment of the Inuit as counterparts on a nation to
nation level.

The AIP is ripe with benefits that flow to the Inuit in forms of economic and social

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939 Ibid. at section 13.5.11.
developments from projects that will progress in future, as well as compensation for infringements on their territories and rights. These provisions are very much in keeping with the tenor of *Delgamuukw.* The federal government has acknowledged the Inuit’s interests in ocean waters based upon use and occupation, and exclusivity of that occupation, and at the same time, has kept the course of economic development of the North as a justifiable infringement upon those interests and the rights recognized to be inherent in the Inuit.

For all the innovative provisions and the near recognition of Aboriginal title to ocean spaces noted within this most recent and modern land claims AIP, the status quo still remains in that jurisdiction over ocean spaces and their resources within the settlement area is firmly entrenched in the federal government.

**(h) Oil and Gas Agreements**

The era of the 1970 - 80s was a time of great debate on the East Coast over the ownership of the offshore in light of the discovery of the Hibernia oil fields off Newfoundland and gas off Sable Island, Nova Scotia. 1982 saw the negotiation of the *Nova Scotia Agreement* whereby ultimate offshore management lay with the federal government while all direct offshore revenues were provided to the province until such time as its per capita fiscal capacity was above the national average.\(^{940}\)

Newfoundland asserted that its economic and historical links to the sea for some three

\(^{940}\) *Supra* Cullen at note 47 at 299.
hundred years gave the province the authority over the minerals there. Two court challenges ensued with Newfoundland in the end losing the argument. However, the Atlantic Accord in 1985 provided Newfoundland with some interest in Hibernia through a legislated offshore management scheme steered by the province, with provincial access to all direct offshore oil and gas related revenues without any cap (as had been the case in the Nova Scotia Agreement), and a commitment to entrench the Atlantic Accord within the constitution. Eventually Nova Scotia renegotiated their Agreement on much the same terms as Newfoundland.

In both situations, the ultimate determination of sovereignty, title and ownership to the oil and gas rich ocean spaces of the East Coast offshore was left unanswered. Instead negotiations were conducted and agreements concluded with the provinces on the issues of control and allocation of benefits, much like the Gwaii Haanas Agreement of 1993.

5. Conclusions

It is evident from the review of these land claims and oil and gas agreements that the

941 Ibid. at 300.

942 Ibid. at 301. The enabling legislation for this Accord is found in the Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3.

943 Ibid. at 301.

944 Ibid. The enabling legislation for this new Agreement is found in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c.28. Supra Gwaii Haanas Agreement at note 541.

945 Ibid. Cullen at 301.
sovereignty, title and ownership of ocean spaces asserted by the federal government has remained intact. The early land claims agreements were not prepared to move away from the notion of federal title, let alone entertain ideas about Aboriginal title to ocean spaces. Interestingly enough though, there have been occasions when Canada has agreed to deal with the more pressing issues such management of resources and territories, and benefits allocation, as found within the *Gwaii Haanas Agreement* and the East Coast oil and gas accords, rather than bicker about ownership of ocean spaces.

All the agreements I have reviewed contain co-management schemes of some order with varying degrees of success. Research has shown that inclusion of user groups within the management of a resource, especially fisheries, can be effective in leading the resource away from the "Tragedy of the Commons" model described and advocated for so long as the inevitable result of common property resource use. By the wide spread usage of these co-management schemes as ways of dealing with resources and land use issues of First Nations, the same result may also be achieved. This may place total control of resources and territories with the First Nations. However, it does provide the protection and sustainability which they seek in order to guarantee the continued existence of their cultures.

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946 *Supra* Hardin at note 777 at 1244.

The Royal Commission on Aboriginal Peoples advocates co-management as a viable, and to be encouraged, mode of dealing with competing interests whether they be rights or title issues. In their view, co-management provides a scheme whereby First Nations' concerns and interests are included within the decision-making process.\textsuperscript{948} We have been able to see that recognition of and respect for First Nations' knowledge, traditions and concerns are some of the results of these schemes as noted from the \textit{Gwaii Haanas Agreement} and within the management scheme for Naikoon Provincial Park. These schemes may not be perfect as the Haida comments attest, yet they can be viewed as a beginning on the passage to reconciliation for First Nations and Canada.

There is some suggestion within the academic writing about co-management that these schemes may in future become constitutionally entrenched rights of the First Nations of Canada. These comments are based upon the theory that as such regimes are part of comprehensive land claims agreements which are in themselves constitutionally protected, the consistent use of such regimes will lead to the guarantee of their protection under the \textit{Constitution} as well.\textsuperscript{949} Should this be the result, the determination of ownership may become moot if the co-management scheme provides the desired end results of sustainability of the lands, resources and First Nations culture.

\textit{The Labrador Inuit Agreement} provides some suggestion that the concept of Aboriginal title

\textsuperscript{948} \textit{Supra} RCAP Report\textit{ at note 208 at volume 2 at 678.}

\textsuperscript{949} \textit{Supra} Notzke\textit{ at note 839 at 206 - 207.}
to ocean spaces is at least being discussed. The Inuit will, once their lands are determined, have fee simple title to areas of sea bed within the territorial sea, yet they will not enjoy jurisdiction over same. This Agreement provides some small ounce of recognition to Inuit title to ocean spaces, yet places sovereignty squarely in the hands of Canada. The Inuit in turn are pacified with benefits from the development of their ocean areas, much the same as the earlier East Coast oil and gas accords.

It may well be that Canada will deal differently in negotiating land claims which include those ocean spaces more actively involved in Canada’s maritime economies. The east coast of Labrador is isolated and plays no real part within the maritime economy of the country. For areas such as British Columbia, with a vast coastline running the length of Canada’s west coast, and large economies based around ocean spaces, Canada may not confer even the slightest recognition to First Nations’ title to ocean spaces.

As we sit on the cusp of the twenty-first century, it appears that Canada may be willing in some situations to give some recognition to the concept of Aboriginal title to ocean spaces albeit in a very limited and negligible way with sovereignty over such areas remaining firmly and absolutely within her grasp.
CHAPTER FIVE

CONCLUSIONS

Discourse on Aboriginal title in Canada has been preoccupied with exploring and commenting upon title to land. Thus discussion has not expanded into consideration of the other components such as ocean spaces, air space or land waters which make up the holistic view held by First Nations of their "lands and territories". This void in academic discussion in relation to title to ocean spaces will soon become very apparent as twenty-two treaty tables under the British Columbia Treaty Commission process commence their negotiations for specific ocean spaces within the delimitation of their territories.

My research and analysis has attempted to address this vacuum, and in so doing, evoke some reaction and response within the legal and First Nations communities. By inclusion of defined ocean spaces within their filed Statements of Intent, First Nations are seeking the determination of their rights and title to the waters, sea bed, subsoil and resources of such ocean spaces. The investigation I have undertaken in this work is timely, and has employed a pragmatic approach with a view to providing the parties involved in the treaty negotiations, and future litigants, with credible foundations upon which to demonstrate Aboriginal title to ocean spaces.

Through the exploration of this topic, we have determined a variety of sources from which elements and principles can be drawn to recognize and substantiate Aboriginal title to ocean spaces as a viable legal concept within the Canadian context. As this quest involves a legal
concept, the first source that I have consulted is the common law. In reviewing that framework, it is apparent the Supreme Court of Canada over the last two decades has been developing a spectrum of First Nations’ rights which is still evolving.

The most important decision in relation to my research is that of Delgamuukw, where the Court recognized the concept of Aboriginal title and delineated for the first time its foundations and perimeters. The Court dealt solely with title to land, and as time proceeds, there will be further evolution of this concept. Such evolution will be brought about due to the evitable assertion by First Nations that ocean spaces are portions of their territories. The next logical step in the development of the doctrine of Aboriginal title will be the recognition of such title to ocean spaces.

Included within the analysis of this concept of title to ocean spaces, I have by analogy applied the primary principles of proof of land title as determined in Delgamuukw to the ocean. This analogy has demonstrated that the principles of use and occupation of land spaces, and exclusivity of such occupation, are readily applicable to ocean spaces. Such an examination has provided a credible and substantive basis upon which to build this concept.

Delgamuukw has broadened the realm of evidentiary sources of title to include the perspectives and oral histories of the First Nations as reliable and effective mediums, and as a

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950 Supra Delgamuukw at note 35.

951 Supra Lambert at note 150 at 258.
result, pure physical occupation will no longer be the deciding criteria. Oral histories and Aboriginal perspectives encompass historic, cultural and spiritual use and occupation of territories. This expansion of sources of support and verification will provide greater leverage to First Nations at the treaty table to press for inclusion of their ocean spaces within their treaty settlement lands, and to substantiate their title should they proceed to court.

The other principal source, and no less important than the common law, for recognition of the concept is found within the perspectives of First Nations. Delgamuukw has directed that all inquiries into Aboriginal title are to incorporate the philosophies and cultures of First Nations. The very essence of Aboriginal title is found in the interaction of two distinct ideologies, that of the common law with its rules of property law based on a system of individual ownership, and that of the Aboriginal viewpoint encompassing a land system based upon Aboriginal law, societal and cultural values, and the concept of stewardship.

To aid in some understanding of the First Nations perspectives on this concept, I have included an array of Haida and Tsawwassen First Nations' voices. These personal comments made by members of both these Nations clearly illustrate the intrinsic links between these Peoples and their ocean spaces since time before memory. Such narratives articulate the basic principle upon which First Nations assert their interests being that of responsibility for preservation and sustainability of their territories and resources. Responsibility and stewardship principles are the sustaining foundations of their cultures. This ideology in respect of title is vastly different from that of the common law world which equates title to
individual ownership with no extended duties or responsibilities. From these commentaries, it is evident the core principles of stewardship which ensure the continuation of traditional practices and foods, enhance and sustain the health and well-being of these First Nation cultures.

Materials from the international arena further strengthen the basis for recognition of Aboriginal title to ocean spaces within the domestic sphere. The academic discourses and cases of those countries that have of late been dealing with Indigenous land and resources issues are an excellent source of further information. Australia has been most pro-active and produced a proliferation of academic writings and discussions on Indigenous title issues. The Australian courts recognized Indigenous title prior to Delgamuukw, and have been grappling with development of the concept and the issues that have emanated therefrom for sometime. The Croker Island decision, presently under appeal, has recognized sea title, albeit in a limited sense. This recognition coupled with the sea claims cases presently before the Australian courts and tribunals provide analogies and support for recognition and development of this concept in Canada.

The State of Alaska, the other jurisdiction briefly reviewed, has had a number of judgments rendered specifically on the issue of Aboriginal title to ocean spaces which furnish other possible avenues that can be utilized in substantiating the concept in Canada. Our Supreme Court has historically consulted and considered the decisions and materials of other like

\[\text{952 Supra Croker Island at note 783.}\]
jurisdictions when called upon to deliberate on a new area of law. Keeping this in mind, it is reasonable to conclude that these jurisdictions’ decisions and academic discussions will aid in the evolution and development of the doctrine of Aboriginal title in Canada to include ocean spaces.

The international perspective on human rights as addressed within the international documents concluded by the United Nations and its various committees and organizations is a further area that can be drawn upon in our exploration of this topic. The Draft Declaration and Convention #169 as composed by experts from various disciplines and countries of the world, advocate that Indigenous Peoples are to be granted their territories and resources in order to facilitate their self-determination and self-sufficiency. These documents are hailed as the modern day view of the rights of Indigenous Peoples, and include ocean spaces as part of the territories to be held and controlled by Indigenous Peoples. Canada, being regarded as a world leader, can not shirk its duty and responsibility to its First Nations by denying these world acclaimed principles.

These principles as set out by the world community are also being followed by some of the highest courts. The High Court of Australia’s comments in Mabo condemning the continuation of policies that discriminate against Indigenous Peoples is indicative of these global views of human rights being embraced by the courts. It only stands to reason that as

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953 Supra the Draft Declaration at note 807;and Convention #169 at note 803.

954 Supra Mabo at note 178.
Canada makes its way through these debates and issues, it too will come to incorporate these global views that will encourage the recognition of Aboriginal title to ocean spaces.

This embracing of the condemnation of discriminatory policies *vis-a-vis* the Crown and First Nations is evident in the recent decision in *Marshall*.\(^{955}\) The Supreme Court of Canada emphatically declared the upholding of the honour and integrity of the Crown to be a fundamental principle in all dealings with First Nations, and that such doctrine is reviewable no matter how long ago the dealings took place. In the case of British Columbia, the Crown during the last century acknowledged the importance of the connections of First Nations with the ocean, and that by maintaining those connections, First Nations Peoples could sustain themselves with a smaller land base. The narratives from the First Nations included in this research portray their struggle for survival as distinct cultures within the framework of Canada. The continual diminishment of First Nations involvement with the ocean due to regulations and policies of governments has created this struggle for survival. It is evident that further loss of access to and responsibility for their ocean spaces could in fact be the death nail. The honour and integrity of the Crown in executing its fiduciary duty includes not only acting in good faith at the time of signing treaties or dealing with First Nations, but also extends to actively aiding and advancing the continuation of these societies and cultures which can be accomplished by ensuring their access to and responsibility over their ocean spaces.

\(^{955}\) *Supra Marshall* at note 249.
As witnessed by this research and analysis, there is a wide variety of information, arguments and sources, both domestic and international, that can be utilized to substantiate the concept of Aboriginal title to ocean spaces in Canada. The real question at the end of the day, however, becomes not one of whether recognition of the concept is possible, for as this research and analysis concludes, it is; but rather one of how such recognition will be encroached upon and diminished. As the portfolio of First Nations’ rights has developed, we have noted the Court’s willingness to open the door with one hand to recognize rights and title, yet at the same time, take back with the other hand a portion of those rights by placing limitations on same through justifiable infringements. In Sparrow, the matter of conservation was determined as the justifiable infringement. Some years later, Gladstone added objectives directed at the pursuit of economic and regional fairness, and the recognition of historical reliance upon and participation in the fishery by non-First Nations as valid infringements.

Justifiable infringements were dramatically expanded in Delgamuukw which literally provided for all contingencies that flow from the development of the interior of British Columbia. The latest infringement is found in Marshall where the Court has determined the Aboriginal right to a commercial fishery can be regulated so that the goal of provision of a moderate livelihood is attained with no accumulation of wealth.

956 Supra Sparrow at note 2.

957 Supra Gladstone at note 2.
In determining and justifying such infringements, the Court has eroded the very Aboriginal rights it has come to recognize. Such infringements seem to serve as a platform from which reconciliation of these recognized and somewhat diminished Aboriginal rights and title with the common law can move forward. Neither culture is ultimately in control or has absolute jurisdiction; thus meaning the two cultures and ideologies must work together to sort out their relationship. This is clearly evident in Marshall, where the Court has provided an Aboriginal right to a commercial fishery yet at the same time placed restrictions upon same which must be sorted through by all those who fish the waters covered by the Treaties of 1760 - 1761. The Court has thus created a scenario where the two cultures of Canada must reconcile the commercial right to fish.

In their 1997 article about the uniqueness of Aboriginal rights, Professors Borrows and Rotman conclude that First Nations are not attempting to dismantle Canada through their assertions and claims of rights and title, but are trying to redesign and improve it “through the recognition of their rightful place within the country”. This conclusion they base upon their knowledge of First Nations and the issues facing First Nations Peoples, and from their review of comments made by many non-First Nations scholars. From my observations and experiences, albeit brief and as a novice, with the Haida and Tsawwassen First Nations, I would agree with such a statement. This statement suggests that reconciliation is also a goal of First Nations.

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958 Supra Borrows & Rotman at note 138 at 29 - 30.
The most obvious source of reconciliation for the concept of Aboriginal title to ocean spaces within the Canadian context may well be achievable through the very description of the concept of Aboriginal title by the courts as *sui generis*. This term incorporates the blending of two cultures and ideologies, and as the concept thereby takes it meaning from these two ideologies. In essence, it straddles both cultures, acting as a bridge and expanding the ideologies of both cultures. The Courts have emphatically stated there must be inclusion of Aboriginal perspectives with the common law when dealing with First Nations issues in order to balance these two ideologies.\(^959\) By placing equal weight to each of these ideologies as required by the Court, the concepts and perspectives must be framed in terms that are recognizable to both cultures, and in the end, true reconciliation can be accomplished.\(^960\)

Reconciliation has been attempted, and in many cases achieved, through the negotiation process and the signing of various types of agreements between the federal Crown and First Nations under the comprehensive land claims policy, and just recently under the British Columbia Treaty Commission process with Sechelt. The *Gwaii Haanas Agreement* \(^961\) has been shown to be a unique model illustrating two vastly divergent ideologies in respect of ownership of territories, yet at the same time acting as the catalyst for agreement by the parties to achieve the joint goals they desire. These documents when closely reviewed may not achieve perfect balancing of the two ideologies as envisioned by the courts, but they do

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\(^959\) *Supra Marshall* at note 249; and *Delgamuukw* at note 35.

\(^960\) *Supra Borrows & Rotman* at note 138 at 25.

\(^961\) *Supra Gwaii Haanas Agreement* at note 541.
represent models and examples of what can be achieved, and act as foundations upon which to improve.

One of the striking features of these instruments of reconciliation is the inclusion of principles and schemes of co-management to deal with the issues of ownership and title to resources and territories, in particular ocean spaces. Based upon the historic trend of negotiation and settlement of such issues, and the movement away from the direct determination of the ownership of the offshore as witnessed in the Gwaii Haanas Agreement and the East Coast oil and gas agreements, the future reconciliation of Aboriginal title to ocean spaces may deal solely with questions of management and fiscal rights to the benefits derived therefrom, and forego any decision on who holds title.

One further point in respect of reconciliation of Aboriginal title to ocean spaces comes from an recent article by Professors Bell and Asch where they quote remarks made by the early twentieth century anthropologist, Bronislaw Malinowski, in his 1930 commentary on the Re Southern Rhodesia judgment. Malinowski insisted it was absurd for the Privy Council, being the highest court, to determine that the question of land tenure was beyond them, based upon their Lordships' views that the system they were reviewing was so inferior that it

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962 Supra Nova Scotia Agreement and Atlantic Accord at pages 344 - 345 herein.

963 Re Southern Rhodesia, [1919] A.C. 211(P.C.) [hereinafter Re Southern Rhodesia]. The case dealt with determining the status of a large area of lands in Southern Rhodesia that included native reserves, land occupied by activities of the British South Africa Company (incorporated by Royal Charter in 1889 with the purpose of carrying on the government and administration of all areas of Africa for Britain, especially developing and cultivating lands), and country described as unsettled and of waste. (at 213)
was below the "dignity of legal recognition".\textsuperscript{964} In his opinion, Malinowski asserted that any system of land tenure, no matter what the degree of sophistication, was reconcilable with the institutions and legal ideas of a civilized society, for reconciliation of the two systems was precisely the task of Colonial statesmanship.

There is no denying that Canada came about based upon the policies of a colonial regime, and at times in her past, such discriminatory and racist attitudes voiced by the court in \textit{Re Southern Rhodesia} in 1919 were part of her fabric. Many today would shrug off Malinowski's remarks as those of a by-gone era and of little relevancy. Yet, I suggest his remarks are applicable today, for if followed, they will result in the upholding of the honour and integrity of the Crown as addressed in \textit{Marshall}, and would aid in bringing about the reconciliation between the cultures as envisioned by the Supreme Court of Canada.

Legislation is created and brought into force as a reply to some relevant situation, and should continue as long as there is relevancy. In relation to section 35 (1) of the \textit{Constitution Act, 1982},\textsuperscript{965} and its guarantee of Aboriginal rights, Professor Borrows has stated that courts in not extending protection to the rights of First Nations that have developed as a result of European contact, have permitted such rights to remain partial and incomplete under the


\textsuperscript{965} \textit{Supra Constitution Act, 1982} at note 9.
Constitution.\textsuperscript{966} He notes that there is no question the rights of all other Canadians are afforded the protection in the form to which they have evolved and developed over time, for it would be inconceivable that a court would hold otherwise.\textsuperscript{967} By not recognizing the First Nations rights that evolved, he contends the very survival of First Nations as distinct cultures is at stake.

Whether the concept of Aboriginal title to ocean spaces is determined to be a right prior to contact or as a result of European contact makes little difference for non-recognition puts the survival of these Nations, as we have noted, at risk. As Professor Borrows submits, it is redundant for Canada to hold out recognition and affirmation of Aboriginal rights within its Constitution when the very rights, necessary to sustain First Nations cultures, have not been fully developed and recognized by the courts.

To take this theory and apply it to our examination of Aboriginal title to ocean spaces, leads us to conclude that for the courts of Canada to give full effect and relevancy to the recognition and affirmation of Aboriginal rights in Canada as provided for in our Constitution, the courts must extend the concept of Aboriginal title to ocean spaces in order to aid in the survival of the First Nations. For what is the point of recognising and affirming rights if the First Nations who exercise such rights have ceased to exist due to the narrowing and limiting of such rights.

\textsuperscript{966} Supra Borrows at note 41at 49.

\textsuperscript{967} Ibid.
The information and comments provided by the voices of the Haida and Tsawwassen First Nations vividly demonstrate the vital links their cultures and peoples have with their ocean spaces. Non-development of the concept of Aboriginal title to include ocean spaces by the courts would jeopardize the survival of these Nations’ communities, and thus the guarantees of s. 35 of the Constitution become irrelevant.\footnote{968}

Our voyage of discovery has concluded that Aboriginal title to ocean spaces is a viable concept recognizable in the Canadian legal context. Reconciliation of the concept with the common law is possible through a variety of sources to bring about new schemes of management and responsibility of the ocean spaces off British Columbia’s shores. The course for navigating our way to this recognition and reconciliation is charted in the words of the late Bill Reid in his recounting of the legend of the Raven and the First Human Beings found at the beginning of this work when he relates: “[p]erhaps it’s time that Raven or someone found a way to start again.”\footnote{969}

Recognition of Aboriginal title to ocean spaces is precisely this new genesis. No matter whether the voyage to recognition and reconciliation be charted by a starboard or port tack, in that the courts declare recognition of Aboriginal title to ocean spaces with justifiable infringements, or the negotiating tables of the treaty process include ocean spaces within First Nations territories governed via co-management schemes, the end result will ultimately lead

\footnote{968} Ibid. at 63.

\footnote{969} Supra Reid at page xii herein.
to the interaction of the two cultures and their philosophies. This in turn will bring together the best of both cultures with the view to sustaining ocean spaces and their resources for the benefit of all.
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APPENDIX “A”

PERSONAL INTERVIEWS

HAIDA NATION

Format:

I personally attended in the communities of Old Massett and Skidegate, Haida Gwaii during the period from 25 January to 9 February 1999. The interviews were conducted on a personal basis, many at the interviewees’ homes, while others were in public places. The usual length of interview was one hour to one hour and a half. I made use of a set of questions included herein, and canvassed further topics as they became apparent during each interview.

The interviews of members of the Haida Nation in Haida Gwaii are as follows:

Ron Brown, Jr., President of the Council of the Haida Nation, on 26 January 1999 at Old Massett

Ernie Collison, Tsiij Giitanay, Eagle Clan, on 26 January 1999 at Old Massett

Charlie Bellis, Raven Clan, on 27 January 1999 and 3 February 1999 at Old Massett

Margaret Edgars on 27 January 1999 at Old Massett

Christopher Collision on 27 January 1999 and 29 January 1999 at Massett

Chief Reynolds Russ, Ijawass, Eagle Clan, hereditary chief of Old Massett, on 28 January 1999 at Old Massett

Harold Yeltatzie, Councillor, Council of the Haida Nation, on 29 January 1999 at Massett

Christian White, Councillor, Council of the Haida Nation, on 30 January 1999 at Old Massett

Gilbert Kelly on 30 January 1999 at Old Massett

Vesta Helmer on 31 January 1999 at Massett

Patrick Weir, Raven Clan, on 31 January 1999 at Massett

Kevin Brown, Economic Development Officer, Old Massett Village Council, on 1 February 1999 at Old Massett
Lucille Bell, Heritage Resource Officer for the Old Massett Village Council, on 1 February 1999 at Old Massett

Kimball Davidson, Chief Councillor of the Old Massett Village Council, on 2 February 1999 at Old Massett

Bonnie Dallyn and Ron Dallyn (non-Haida) on 2 February 1999 at Massett

Vincent Collison, Councillor, Old Massett Village Council, on 3 February 1999 at Old Massett

Heather Richardson DuDoward on 4 February 1999 at Skidegate

Robert DuDoward on 4 February 1999 at Skidegate

Barbara Wilson on 4 February 1999 at Skidegate

Guujaaw, Councillor, Council of the Haida Nation (now President) on 4 February 1999 at Skidegate

Robert Anthony Young on 5 February 1999 at Skidegate

Roy Jones, Jr. on 6 February 1999 at Skidegate

Chief Dempsey Collinson on 6 February 1999 at Skidegate

Roy Jones, Sr. on 7 February 1999 at Queen Charlotte City

Rosalind Russ and Millie Pollard on 7 February 1999 at Queen Charlotte City

Russ Jones on 3 March 1999 at Vancouver

Interview Questions:

• Identification of the interviewee

• What do you know of your Nations' Statement of Intent filed with the B.C. Treaty Commission?

• What sea areas are included within your traditional territories?

• What has been the historical use and occupation of these sea areas?
How do you know this information?

What personally have you had to do with these sea areas?

What if any other stories are there about sea areas within your Nation?

What if any claims have there been from other Nations to these sea areas?

What does Aboriginal title to marine spaces mean to you, and to your Nation?

Who if anyone else should I be speaking with about this issue and why?

Interviews in Haida Gwaii with non-members of the Haida Nation are as follows:

Marcell LaFlame, lawyer, on 28 January 1999 at Old Massett

Margo Hearns on 29 January 1999 at Massett

John Broadhead on 8 February 1999 at Queen Charlotte City

Note: The interviews of the non-Haida members were on specific points and did not utilize the interview questions.

TSAWWASSEN FIRST NATION

Format:

I personally attended on three occasions at the Band Office on the Tsawwassen First Nation Reserve. The interviews were conducted on a personal basis with the usual length of interview being about one hour and a half. I made use of the same set of questions as with the Haida Nation, and canvassed further topics as they became apparent during each interview.

The interviews of members of the Tsawwassen First are as follows:

Chief Kim Baird on 26 February 1999 at Tsawwassen

Russell Williams, Councillor, Tsawwassen First Nation, on 5 March 1999 and 24 September 1999 at Tsawwassen