



Forest Legislation and Policy Reference Guide 2009

Chapter Twelve

First Nations

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12.1 First Nations

12.1.1 Policy Objectives

In British Columbia, the courts have played an important role in clarifying aboriginal rights and title. Beginning with the 1973 *Calder* case in the Supreme Court of Canada, there have been a number of landmark court cases that have provided direction in defining the nature and scope of aboriginal rights and title.

In recent years, in response to court decisions, both forest legislation and policy now recognize that aboriginal people may have potential aboriginal rights and title that must be considered prior to making proposed forestry decision authorizing forestry activities.

Key Legal Dates

- 1846 Effective date of British Sovereignty over what would later become British Columbia (Oregon Boundary Treaty).
- 1850 -
- 1854 Douglas Treaties signed on Vancouver Island.
- 1867 Confederation - complete division of legislative authority between Federal and Provincial Governments.
- 1871 British Columbia joined Confederation - British Columbia subject to division of constitutional powers.
- 1951 Section 88 of the *Indian Act* came into force - giving Provinces power to generally affect “Indians” (as defined in the *Indian Act*).
- 1973 *Calder* - Nisga’a land claim. Supreme Court of Canada is divided on whether aboriginal title has been extinguished.
- 1982 *Constitution Act, 1982, Section 35*, recognizing and affirming existing aboriginal and treaty rights.
- 1990 *Sparrow* - Supreme Court of Canada interprets Section 35(1) of the *Constitution Act* and provides clarification regarding aboriginal rights, and infringement and justification.
- 1991 *Delgamuukw (BCSC)* - British Columbia Supreme Court ruled that all aboriginal title (ownership of land) in British Columbia has been extinguished.
- 1993 *Delgamuukw (BCCA)* - British Columbia Court of Appeal reversed the lower Court decision and ruled that aboriginal rights have not been extinguished in British Columbia on a blanket basis.
- 1996 *Van der Peet, N.T.C. Smokehouse and Gladstone* – Supreme Court of Canada clarification on the nature of aboriginal rights and criteria for determining whether an aboriginal right might exist.

- 1997 *Delgamuukw (SCC)* - Supreme Court of Canada explains the concept of aboriginal title, how aboriginal title is protected under Section 35(1) of the *Constitution Act*, the requirements necessary to prove aboriginal title, the content of aboriginal title and the circumstances in which governments can justifiably infringe aboriginal title.
- 2004 *Haida (SCC)* – The Supreme Court of Canada holds that the Crown has a legal obligation to consult with Aboriginal people whenever the government has knowledge, real or constructive, of the potential existence of a potential aboriginal right or title and contemplates conduct that might adversely affect such as yet unproven rights and / or tile. Depending on what is revealed by the consultation process and where appropriate, the Crown may also be under an obligation to accommodate the claimed rights and / or title prior to making a proposed Crown decision. This case also highlighted the need to consult on administrative decisions.
- 2006 *Sappier (SCC)* - The Supreme Court of Canada released a decision dealing with two cases - *R. v. Sappier* and *R. v. Gray*. These decisions address a First Nation's ability to access timber for domestic purposes as an aboriginal right. This decision has potential implications for the Ministry of Forests and Range including its legislative authority, compliance and enforcement activities, land stewardship and tenuring processes. The Free Use Permit provision in the Forest Act has been amended to address this court decision.(See Chapter 14, Topics of Interest.)
- 2007 The British Columbia Supreme Court released a decision regarding a claim for aboriginal rights and title. The Xení Gwet'in people sought declarations of aboriginal rights and title to parts of the Cariboo-Chilcotin region of B.C., on behalf of all Tsilhqot'in people. The declarations of aboriginal title to the Claim Area and claim for damages for infringement were dismissed without prejudice to the Plaintiff's ability to litigate these matters in the future. The Tsilhqot'in people were found to have aboriginal rights to hunt and trap and to trade and provisions of the *Forest Act* infringed those aboriginal rights, but no damages were awarded.
- 2008 In August 22, 2008, the British Columbia Supreme Court issued its decision in *Wii'litswx v. British Columbia* (Minister of Forests), 2008 BCSC 1139 ("Gitanyow"). The decision dealt with the duty to consult and accommodate aboriginal interests.
- 2008 The British Columbia Supreme Court released its decision in *Klahoose First Nation v. Sunshine Coast Forest District* (District Manager), 2008 BCSC 1642. At issue was the Ministry of Forests and Range("MFR") approval of a Forest Stewardship Plan ("FSP") for Tree Farm Licence 10. The court found that the Crown did not adequately consult or accommodate the First Nation's aboriginal interests. The court also indicated that the Klahoose First Nation did not have the ability to veto harvesting in the Tree Farm Licence.

In December 1997, the Supreme Court of Canada handed down its decision in *Delgamuukw*. In this decision, the Court described the nature and scope of aboriginal title, set out the principles with respect to title, and ruled that it is a constitutionally protected right where proven to exist. The court found that aboriginal title can be proven to exist where a First Nation can prove exclusive occupancy to lands at the time that the Crown asserted sovereignty (in some cases there may have been shared exclusivity resulting in jointly held title). While government may justifiably infringe upon aboriginal title in cases where a compelling and substantial legislative

objective is at issue – which may include economic development in forms such as forestry – it must adequately consult with those affected aboriginal groups and may be required to provide fair compensation if aboriginal title is infringed.

The decisions in *Delgamuukw*, together with the Supreme Court of Canada decision in *Sparrow*, and a number of other decisions from the Supreme Court of Canada constitute a growing body of case law which reaffirm and clarify existing aboriginal rights and title and urge governments to resolve outstanding issues through negotiation.

Many of the recent cases have dealt with the obligations of the Crown and industry to aboriginal people who have asserted claims of aboriginal rights or title but have not yet proven them. In 2004, the Supreme Court of Canada released its landmark decision in *Haida Nation v. Ministry of Forests* in which the Court held that the government (but not industry) has an obligation to consult with aboriginal people regarding the scope and nature of their aboriginal interest (potential aboriginal rights and title) and how these interests may be impacted by the proposed Crown decision and where appropriate, accommodate their aboriginal interests where the Crown contemplates conduct that might adversely affect these interests.

Since the *Haida* Supreme Court of Canada decision in 2004, MFR has been aware of the need to consider the strength of aboriginal interests and the potential impact a proposed decision may have on those interests. Policy advice and guidance has been based on this case law.

Clarification regarding how and when this consideration is undertaken has recently been provided in the *Gitanyow* and *Klahoose* decisions. These court decisions have indicated that the Crown must undertake a preliminary assessment of the First Nation's strength of aboriginal interests and the potential impact the proposed decision may have on these interests in order to determine the appropriate level of consultation prior to beginning the consultation process. The Crown must also share this information with the First Nation. Undertaking this preliminary assessment and sharing the information with the First Nation is considered to be an important first step in the consultation process and in meeting the Crown's legal obligation.

The British Columbia Supreme Court decision in the *Tsilhqot'in Nation* case is the first trial judgment touching on aboriginal title since the Supreme Court of Canada decided the *Delgamuukw* case in 1997. The decision has at least two significant implications. First, it demonstrates the type and degree of evidence required to prove aboriginal title. Second, while it reinforces the importance of the Crown's obligation to consult and potentially accommodate First Nations in respect of their claims of aboriginal title and rights, it does not change the nature and scope of the Crown's duty in this respect.

Having expressed his opinion as to the existence of *Tsilhqot'in* aboriginal title, the trial judge considered the consequences of this decision. He further opined that the provisions of the B.C. *Forest Act* do not apply to aboriginal title lands because the *Forest Act* is only applicable to the use of the forest resources of the Crown, not those resources belonging to other parties – including resources on aboriginal title lands. Alternatively, the trial judge reasoned that the provincial government is unable to regulate forestry activities on aboriginal land because the federal government has constitutional authority over “Indians and Lands reserved for the Indians”, The Court concluded that this jurisdiction includes aboriginal title lands. As a result, the Court held that only the federal government has the constitutional jurisdiction to authorize forestry activities, or any other use or control of resources (such as mining, oil and gas, and hydroelectricity) on aboriginal title lands.

However, the trial judge noted that an area which is merely subject to an *assertion* or *claim* of aboriginal title or rights is not excluded from the jurisdiction of the Forest Act (or, by extension, any other provincial legislation of general application). The judge also held that the existence of aboriginal rights on land, short of aboriginal title (such as hunting, trapping and gathering) does not oust provincial jurisdiction over that land.

The judgement emphasizes that the Courts are not well suited to settling complex issues related to aboriginal rights and title and encouraged parties to pursue negotiations.

12.1.2 Current Policy

12.1.2.1 Recent Legal History (Ministry of Forests and Range)

Cited below are some court decisions that discuss principles of aboriginal title and rights as it relates to forestry matters:

- *Westbank v. Minister of Forests* (2000)
- *Adams Lake Band v. Minister of Forests* (2000)
- *Paul v. Forest Appeals Commission* (2001)
- *Gitksan Houses v. British Columbia (Minister of Forests)* (2002)
- *Kitkatla v. Minister of Small Business, Tourism and Culture* (2002)
- *Husby Forest Products v. Minister of Forests* (2004)
- *Haida Nation v. Minister of Forests* (SCC, 2004)
- *Huu-Ay-Aht Nation v. Minister of Forests* (2005)
- *Hupacasath First Nation v. Minister of Forests* (2005)
- *R. v. Sappier; R v. Gray* (2006)
- *Tsilhqot'in Nation v. British Columbia* (2007)
- *Wii'litswx v. British Columbia* (Minister of Forests) (2008)
- *Klahoose First Nation v. Sunshine Coast Forest District* (2008)

12.1.2.2 Policy Evolution

Over the past decade the Provincial Government and the Ministry of Forests and Range have released a series of policies and guidelines to ensure that Government meets its legal obligation to consult with the First Nation. The Ministry of Forests and Range has also developed policy and guidelines, consistent with the provincial direction, to assist its staff when consulting with First Nations. These guidelines are amended from time to time to be consistent with new court decision to ensure that the policy and guidelines reflect the current state of the law.

Provincial Policy for Consultation with First Nations – October 2002

Following the decision of the SCC in *Haida Nation v. British Columbia*, the Government updated its policy on consultation. This policy deals expressly with aboriginal rights and title that are asserted but unproven. Such rights are considered to be “potentially existing aboriginal rights and/or title.”

The SCC also indicated that consultation is a spectrum from deep consultation to notification, depending upon the aboriginal interests and the impact of the proposed decision. This, and other matters related are presented in **sec. 12.1.5 Consultation and Accommodation**.

However, under the current policy, there are a number of activities and principles that provide a foundation for consultation practices and should be considered. The provincial policy indicates that provincial agencies are to conduct consultation with First Nations to attempt to address and/or accommodate their concerns where a sound claim of aboriginal rights and/or title has been made out. The soundness of the claim will dictate the scope and depth of the required consultation. Consultation should be carried out as early as possible in the decision-making process. Records of all meetings, telephone calls, site visits, and other efforts by the Crown to obtain information about aboriginal interests should be maintained.

Ministry of Forests Consultation Guidelines – 2003

In response to the Province's Consultation Guidelines, which were published in October 2002 to meet the requirements of the BC Court of Appeal's *Haida* judgments, the Ministry of Forests and Range updated its Consultation Guidelines, available online at: www.for.gov.bc.ca/haa/Docs/MOF_Consultation_guidelines_final.pdf. The Ministry's Policy and Guidelines address aboriginal interests as well as aboriginal rights and title. Process steps are set out for the following types of forestry or range decisions that may affect First Nations interests:

- Operational activities (e.g. forest development plans, forest stewardship plans, range use plans);
- AAC determinations; and
- Other statutory decisions (e.g. tenure replacement, new tenures, tenure sales/transfers).

12.1.3 Aboriginal Rights and Title

In order for an activity to be considered an aboriginal right it must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right prior to contact with European society. Different aboriginal rights may exist in different places, depending upon the traditional use or occupation of the land in question.

Depending on the particular aboriginal culture, examples of aboriginal rights may include, fishing, hunting and trapping for food, and perhaps in some circumstances, the use of land or resources for medicinal, spiritual and ceremonial purposes. The singular fact of aboriginal presence on the land is insufficient to give rise to aboriginal rights; there must have been use of land or resources, for purposes integral to that particular culture, in a defined area to qualify as an aboriginal right. The traditional activity may be practiced in a modernized form, (i.e. changes in technique or technology) but activities which were not integral to aboriginal culture prior to European contact or which came about as a result of that contact, do not qualify as aboriginal rights.

Government activity that prevents the exercise of aboriginal rights may be challenged in the courts. Government is required to bear the burden of justifying any activity that interferes with the exercise of an aboriginal right protected under **sec. 35** of the *Constitution Act*, 1982. However, the First Nation has the obligation to substantiate the right or practice as being central and significant to the First Nations' distinctive culture, in the area in question.

How Does Aboriginal Title Relate to Aboriginal Rights?

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

At one end of the spectrum, there are aboriginal practices and customs that are an integral part of an aboriginal culture. These are not necessarily tied to the land, but are nonetheless protected as an aboriginal right. At the far end of the same spectrum lies another form of aboriginal right: aboriginal title. Therefore, aboriginal title is a form of an aboriginal right with the important distinction that it is a proprietary interest in a specific area of land.

While the *Delgamuukw* decision did not confirm aboriginal title for any First Nation in BC, it set out principles with respect to aboriginal title and provided some guidance to government in considering aboriginal title within statutory decision making processes.

Some Principles from Case Law Respecting Aboriginal Title

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

Some Criteria from Case Law to Prove Aboriginal Title

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

Since the onus to prove aboriginal title lies with First Nations, the Crown does not assume the existence of aboriginal title where its existence has not been legally proven. The Supreme Court of Canada and, recently, the Supreme Court of BC in the *Tsilhqot' in Nation* decision identified negotiations with First Nations as a desirable way to resolve issues associated with aboriginal title.

The *Delgamuukw* (SCC) decision discussed a number of principles by which government could justify its use of proven aboriginal title land, provided that the level of consultation with First Nations was appropriate to the degree of infringement of such title.

Principles Relating to Infringement of Proven Aboriginal Title:

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

12.1.4 Treaty Rights

Treaty rights are those rights held by specific aboriginal groups under a particular treaty. They are also recognized and affirmed in **sec. 35** of the *Constitution Act, 1982*. Treaty rights vary in scope from one treaty to the next, and also between historic and modern treaties (sometimes referred to as land claim agreements or final agreement). Historic treaties (such as Treaty 8), generally serve to extinguish aboriginal rights and title in relation to the land, replacing them with specific treaty rights. Modern land claim agreements modify existing aboriginal rights as negotiated by the First Nation, government of BC and government of Canada. The nature of the aboriginal right is set out in the treaty as a treaty right. Some modern treaties that have been negotiated include: Nisga'a, Tsawwassen and Maa-nulth.

12.1.5 Consultation and Accommodation

There is a legal duty to consult with aboriginal people when the Crown, by its actions, will affect claims of aboriginal rights and / or title or will unjustifiably infringe proven aboriginal rights or title.

The scope of the duty of consultation will vary with the circumstances and in most cases the duty will be significantly deeper than mere consultation, and in some cases, such as the regulation of fishing or hunting on proven aboriginal title lands, may even require consent of the aboriginal title holder.

There has been some uncertainty over the obligation of the Crown to consult with aboriginal people in the absence of or in advance of legal confirmation of the existence of aboriginal rights or title in relation to particular lands, but the Supreme Court of Canada has confirmed that such an honour of the Crown duty does exist when the Crown is aware that there are potential aboriginal rights or title which would be impacted by the contemplated government action. Where appropriate, it may also be necessary to accommodate the aboriginal interests in government decision-making. The Court clarified that this obligation is an obligation of the Crown (which would include any government ministries) but not of licensees.

Levels of appropriate consultation will vary with the impact of the contemplated use of the land on the rights or title claimed, and the strength of the claim. Aboriginal people do not have a veto over government plans, but if the consultation reveals a need to alter the contemplated action to accommodate the claimed interests, the government is expected by the courts to alter the plans

in order to provide such accommodation. The degree to which the government should alter its plans to accommodate aboriginal interests requires a balancing of aboriginal with other societal interests.

While the consultation obligation has generally been imposed in respect of government decisions relating to the use of public land, a decision of the British Columbia Supreme Court in 2005 in a case brought by the Hupacasath First Nation held that when the government removed private fee simple land from a tree farm licence, there was an obligation to consult the neighbouring First Nation in respect of the impact of such removal on aboriginal use of and potential claims over the remaining public lands.

In the forestry context, consultation and, if appropriate, accommodation, should take place at the strategic level (see **sec. 12.1.7 Land Use Planning**). For instance it is not enough to consult on cutting permits after the licences have been issued and the allowable annual cut has been set. It is necessary to consult prior to the licences being granted or renewed replaced.

It should also be noted that the Ministry of Forests and Range is now also responsible for the entire range planning and management responsibilities for Crown range use. There is a need to ensure that First Nations' interests are integrated with Crown range use activities.

12.1.5.1 New Initiatives to Enhance Consultation

The Ministry of Forests and Range is also continually seeking to streamline and improve the consultation process. Two examples are:

- A First Nations Information – Sharing Bulletin, prepared by Ministry of Forest and Range staff and representatives of forest tenure holders was released in June 2005. This bulletin was designed to create consistency by providing an overview and a set of roles and responsibilities for both the ministry and licensees associated with statutory review and comment requirements and common law consultation processes with First Nations related to Forest Stewardship Plans (FSPs) under the *Forest and Range Practice Act* (FRPA) (**See section 2.1.7 Forest Stewardship Plan**).

The Bulletin reflects both the common law and legislative requirements associated with First Nation consultation and the development and approval of an FSP under FRPA. It also offers a number of relatively simple procedural suggestions that are voluntary on the part of licensees that, if adopted, are designed to make the review and approval of FSPs more timely and efficient for both parties. The Bulletin also recognizes the importance of the participation of aboriginal groups in the consultation process.

- The MATRIX: Interim Guidance for Consultation (MATRIX) is a consultation communication tool which Forest Service decision makers can consider while engaging First Nations in a discussion about the type of consultation approach that they would prefer in relation to different forest and range decisions.

British Columbia has moved towards a co-ordinated First Nations' consultation and engagement framework. This coordinated approach is being led by the Integrated Land Management Bureau and is intended to be more efficient, reducing the referral workload on First Nations and government, and to be more effective by coordinating information and resources.

12.1.6 First Nations Forest Strategy

In March 2003, the Ministry of Forests established a First Nations Forest Strategy that was a component of its forestry revitalization plan. Part of that plan included the enactment of the *Forestry Revitalization Act* to take back 20% of the allowable annual cut from major replaceable forest licences and tree farm licences throughout the Province. This decision was made, in part, in order to provide volume for direct awards of forest tenures to First Nations. At the same time, the Province appropriated a total of \$95 million for forestry revenue sharing with First Nations throughout British Columbia.

Between 2002 and 2003, the Ministry developed and began implementing a Forest and Range Agreement (“FRA”) program which was a strategic policy approach to fulfilling the Province’s duty to consult with aboriginal peoples with respect to possible infringements of potential aboriginal or treaty rights in the face of uncertainty surrounding First Nations’ claims yet to be proven. The FRA program was based on an offer of forest revenue sharing and tenure allocation in an amount proportionate to the registered population of the Indian Band to whom the offer is made.

The New Relationship and Forest and Range Opportunities (FROs)

British Columbia is forging new relationships with First Nations, based on reconciliation, recognition, and respect. The New Relationship is a cross government initiative. The New Relationship commits to establishing processes and institutions for shared decision-making, revenue and benefit sharing and to support economic self-sufficiency for First Nations. The New Relationship also commits the provincial government to involve First Nations' leaders in public policy work that affects the lives of aboriginal people. The Ministry of Forests and Range will continue to consult with First Nations in accordance with the Crown’s legal obligations while developing positive relationships with First Nations. The Province and the First Nations Leadership Council are currently looking to further implement the commitments of the new Relationship. A Discussion Paper on Instructions for Implementing the New Relationship can be found on the Ministry of Aboriginal Relations and Reconciliation website at: www.gov.bc.ca/arr/newrelationship/down/implementing_the_new_relationship_0309.pdf.

In June, 2006, Ministry negotiators were instructed to begin utilizing a new agreement called an Interim Agreement on Forest and Range Opportunities (FROs). This new template resulted from negotiations between the Province and the First Nations Leadership Council regarding the previous FRA template, ensuring that the old First Nations Forest Strategy was consistent with the New Relationship vision for these agreements.

Since 2002, the Province has entered into interim measures agreements with 158 First Nations to provide access to 39 million cubic metres of timber and over \$230 million in forest revenues. This includes Forest and Range Agreements (FRAs), Forest and Range Opportunity (FROs) agreements and other direct award tenures to First Nations, including agreements for access to Mountain Pine Beetle (MPB) timber. The agreements are posted online at: www.for.gov.bc.ca/haa/FN_Agreements.htm. The timber harvest volume held by First Nations has increased to 10.5% of the provincial allowable annual cut (AAC).

About 20 First Nations have, or are pursuing, a Community Forest Agreement providing new economic opportunities on a defined landbase providing an opportunity to manage in recreation, wildlife, watershed and cultural heritage resources.

The First Nations Forest Strategy is continuing and the Ministry of Forests and Range is reviewing the Forest and Range Opportunities program from the last five years.

Working Roundtable on Forestry

The Working Roundtable on Forestry released 29 recommendations directed at all forest sector stakeholders in order to achieve a vibrant, sustainable, competitive forest industry that provides benefits for current and future generations and provides for strong communities.

Recommendations with respect to First Nations include:

- revenue proportional to the value of timber harvested in their sharing First Nations respective territories,
- encouraging First Nations to become full partners in forestry business particularly in the emerging areas of biofuels, bioenergy, carbon and reforestation,
- capacity building among First Nations governments, First Nations forest corporation and First Nations forest institutions to achieve full participation in forest activities, and
- collaborating with First Nations to involve First Nations youth in forest employment opportunities.

The complete Roundtable Recommendations can be found at:

www2.news.gov.bc.ca/news_releases_2005-2009/2009FOR0033-000319-Attachment1.htm

12.1.7 Tools to Address Aboriginal Issues

Forest Stewardship Plans (FSPs)

With the coming into force of the *Forest and Range Practices Act* (FRPA), licensees and BC Timber Sales (BCTS) need an approved Forest Stewardship Plan (FSP) to obtain a cutting permit, road permit or Timber Sale licence. FSPs do not require operational information such as cutblocks and road locations. As a result, First Nations may request relevant operational information in order to ensure that they have a full understanding of those activities being proposed “on the ground” from MFR staff, licensees and BCTS that was not required or available at the FSP stage.

To address the issue of post FSP First Nations consultation requirements the Ministry has:

- developed advice for staff in the First Nations Information Sharing Bulletin, (**see section 12.1.5**),
- developed the Administrative Guide to FSPs, and
- negotiated and continues to negotiate consultation protocols that will assist in addressing this issue.

The licensee and/or BCTS have an obligation to participate in the FRPA information sharing process with First Nations during the development of the FSP but the licensee is not legally required to participate in the any post FSP consultation requirements that may arise. However, licensee participation is encouraged. The decision maker must be satisfied that any outstanding

First Nation requests for relevant operational information that will assist the First Nation in achieving full understanding of what is being proposed on the ground has been addressed and that the consultation process has been adequate prior to issuing any harvesting authority.

Cultural Heritage Resources

FSPs must identify results or strategies that address a range of objectives set by government. These objectives are set out in the Forest Planning and Practices Regulation, and include the objective of conserving, or if necessary, protecting cultural heritage resources (see **Chapter 7, section 7.13, Cultural Heritage Resources**).

The Forest and Range Evaluation Program (FREP) was put in place as a multi-agency program to evaluate practices under *Forest and Range Practices Act* (FRPA), including the government's intent for the sustainable use of resources, such as cultural heritage resources.

Interim Measures

An interim measure is an activity related to the management or use of land or resources undertaken before or during treaty negotiations. The province's approach to interim measures is founded upon:

- its legal obligation to avoid an unjustifiable infringement of existing or asserted aboriginal rights and/or title;
- policy commitments:
 - to increase First Nations' opportunities for input into land and resource management;
 - to utilize existing government programs to improve the opportunity for First Nations to participate in and benefit from economic activity based on natural resources in their areas; and
 - to promote economic growth and ensure the continued economic development of the province and to provide certainty and stability for all British Columbians; and
- the province's acceptance of the BC Claims Task Force recommendation that interim measures be negotiated where an interest is being affected which could undermine the process of treaty negotiations. Both FRAs and FROs are forms of interim measures agreements.

Interim Measures Agreements

Interim measures agreements are used to consider Aboriginal rights and title issues prior to treaty finalization. They provide interim solutions, economic accommodation and opportunities such as forest tenures and revenue sharing. Interim measures may be in the form of documented arrangements between the province and a First Nation, but do not extend to broad restrictions or moratoria on the development of lands. These arrangements can establish a working relationship between the Ministry of Forests and Range, First Nations and affected third parties and have proven to be useful to forestry operations throughout the province. Interim measures arrangements are negotiated at a local level between forest districts and First Nations to provide a framework for consultation and cooperation and reduce the potential for confrontation over forest resource decisions.

Treaties

The BC treaty process is open to all First Nations in the province. These negotiations are overseen and facilitated by the BC Treaty Commission (BCTC), an independent body established in 1992 by Canada, British Columbia and the First Nations Summit.

First Nations decide how they will organize themselves for the purposes of treaty negotiations. At some tables, there is a single First Nation represented, while at others there may be two or more. Currently there are 42 negotiating tables in the BC Treaty Commission process.

Incremental Treaty Agreements

Incremental Treaty Agreements are a new approach that does not follow the framework of the BCTC. This approach allows First Nations and the Province to enjoy shared benefits in advance of a Final Agreement. The Incremental Treaty Agreement between Tla-o-qui-aht First Nations and B.C. was the first signed between the Province and a First Nation.

Archaeological Overview Assessments (AOAs)

AOAs determine the archaeological resource potential of an area. They result in predictions regarding archaeological site variability, density and distribution and may assist in developing a framework to judge the significance of sites.

Archaeological Impact Assessments (AIAs)

Managed by the Archaeology Branch at the Ministry of Tourism, Sport and the Arts, AIAs are designed to gain the fullest possible understanding of archaeological resources, which would be affected by the forest management activity. They assist the licensee in designing, planning and implementing the proposed forest activity while minimizing impacts to archaeological resources. A handbook for foresters has been created by the Archaeology Branch and provides a more full discussion of the management of archaeological resources. This handbook has been developed to support foresters in effectively and efficiently managing archaeological resources as part of forestry operations. The handbook is available online at:

www.tsa.gov.bc.ca/archaeology/docs/handbook_for_foresters.pdf

Traditional Use Studies

A traditional use study (TUS) is a tool to identify sites and areas holding significance to a First Nation cultural group. The goal of a TUS is to promote the collection and mapping of traditional land use information. TUS are typically conducted by a First Nation which undertakes detailed ethnographic and archival research using community knowledge and resources. Products include maps, study reports and a database of traditional use sites and areas. The mapping and inventory of traditional use sites include contemporary as well as historic land use patterns of traditional activities. Proposals for TUS are now eligible for funding under Forest Investment Account (FIA). (See Chapter 11 Forest Investment).

To ensure reliable data, standards for recording, mapping and storage of TUS data have been developed by the province and it is a condition of funding that these standards be used. It is also a condition of funding that the province receives a copy of the mapping and database for storage in the Traditional Use Study database. More information on the program is available at:

www.for.gov.bc.ca/hcp/fia/landbase/standards/traditional_use.htm

Consultation Protocols

Consultation Protocols are agreements negotiated with First Nations that help build relationships by articulating and formalizing the consultation needs and obligations and obligations of both parties. By negotiating consultation protocols, a number of goals can be accomplished, i.e. mutual expectations are established; various levels of planning and forest activities can be addressed. This makes the process more efficient and effective for all parties.

A number of the Interim Agreement on Forest and Range Opportunities (FRO) that have been negotiated with First Nations commits the Ministry of Forests and Range to engage First Nations to develop a consultation protocol outside of the FRO that clarifies consultation responsibilities of the various parties.

Interim Protection Measures

Interim Protection Measures are formal agreements between government and First Nations to protect land in dispute from resource development activities. They may be negotiated to protect the land selected during the Agreement in Principle stage of the treaty process. This is a treaty-related protection measure and is only appropriate during the final stages of the treaty process after land selection.

Joint Ventures

Joint ventures between First Nations and industry provide opportunities for aboriginal people to acquire skills, training and employment in forest resource management. These arrangements encourage First Nations and industry to form partnership arrangements.

Tenure

Tenure opportunities are available to aboriginal people, under the *Forest Act*, through the direct award (as discussed in 12.1.6) or the competitive bid process. Opportunities available through competitive bid process include woodlots, Small Business Forest Enterprise Program (SBFEP) and other tenures. Tenure opportunities facilitate the creation of First Nations' employment opportunities by providing access to skills development, training and experience.

Secs. 43.2 and 47.3 of the *Forest Act* enable the Minister of Forests and Range to invite, without competition, an application from a First Nation or its representative for a Community Forest Agreement, Forest Licence, or Woodlot Licence in order to implement or further an agreement between the First Nation and the Province. These direct award opportunities may be provided through Forest and Range Agreement/Interim Agreement on Forest and Range Opportunities.

First Nations Mountain Pine Beetle Initiative

The First Nations Mountain Pine Beetle Initiative (FN MPB Initiative) was established in 2006 to harmonize First Nations and government strategic partnerships in the management of the MPB epidemic.

A key strategy of the First Nations Mountain Pine Beetle Initiative is to help negotiate First Nations Mountain Pine Beetle-related agreements with First Nations organizations, municipal/regional, provincial, federal and other organizations (e.g. industry).

The First Nations Leadership Council established the First Nations Forestry Council (FNFC) to provide support to BC First Nations with respect to forestry-related matters. The FNFC evolved out of the Interim Mountain Pine Beetle Working Group, established to coordinate a First Nations response to the Mountain Pine Beetle epidemic.

Land Use Planning and Consultation

Recent court decisions have indicated that First Nation consultation is important at the strategic level and not just the operational. The land use planning framework in the Province (under the auspices of the Integrated Land Management Bureau of the Ministry of Agriculture and Lands) can assist in addressing this strategic level of consultation with First Nations. Consultation at the strategic level may assist in streamlining consultation processes with First Nations on further downstream operational decision, as the initial level of consultation will have informed the land use development process.

The “tactical” planning level (watershed, landscape unit), if applied correctly, could be used as a vehicle to work with First Nations to identify First Nations values on the land base and support consultation when operational decisions are brought forward.

Consultation at the landscape planning level and recording the results of consultation efforts may be enhanced through the consideration and analysis of existing information relating to cultural heritage resources.

12.1.8 Right to Harvest Wood for Personal Uses

Sappier and Gray Decision – Aboriginal Right to timber for domestic purposes

On December 7, 2006, the Supreme Court of Canada released a decision dealing with two cases - *R. v. Sappier* and *R. v. Gray*. These decisions address a First Nation's ability to access timber for domestic purposes as an aboriginal right including the construction of a residential dwelling. The Court made it clear that the harvested wood cannot be sold, traded or bartered to produce assets or raise money.

As a result of these decisions and to address the direction provided by the Court, amendments have been made to **section 49** of the *Forest Act* and a new division has been added titled "Free Use Permits for First Nations and Others." Changes to the Free Use Permit Regulation have been made to provide proper management of forest resources while supporting a First Nations' aboriginal right to harvest wood for domestic purposes on Crown land.

12.1.9 References

- Mountain Pine Beetle timber access agreements:
www.for.gov.bc.ca/haa/FN_Agreements.htm
- Working Roundtable on Foestry:
www2.news.gov.bc.ca/news_releases_2005-2009/2009FOR0033-000319-Attachment1.htm
- Traditional Use Study database:
www.for.gov.bc.ca/hcp/fia/landbase/standards/traditional_use.htm
- *Aboriginal Rights and Title Policy* and Consultation Guidelines:
www.for.gov.bc.ca/haa/policies_reports.htm

- *Constitution Act* 1982: www.qp.gov.bc.ca/statreg/stat/C/96066_01.htm
- *Heritage Conservation Act*: www.qp.gov.bc.ca/statreg/stat/H/96187_01.htm
- Government Actions Regulation:
www.for.gov.bc.ca/tasb/legsregs/frpa/frparegs/govact/gar.htm
- British Columbia Archaeological Resource Management Handbook for Foresters.
www.tsa.gov.bc.ca/archaeology/docs/handbook_for_foresters.pdf
- R. v. Sappier; R. v. Gray, 2006 SCC 54, [2006] 2 S.C.R. 686

12.1.10 Apply the Knowledge

1. What requirements exist for recognizing and respecting aboriginal rights and title?

The courts have now set out the obligations of the Crown in respect of both unproven and proven aboriginal rights, (including title) and have determined that governments must take these unproven or proven rights and/or title into account during forest development activities.

Government policy was developed to address the Supreme Court of Canada's decision imposing duties on the Crown with respect to both claimed and proven aboriginal rights and title. The Provincial Consultation Guidelines were developed to assist ministries and Crown agencies to meet those duties.

The Ministry of Forests and Range developed an Aboriginal Rights and Title Policy and Consultation Guidelines that provides guidance to ministry staff when consulting with First Nations regarding potential forest management activities and the existence of aboriginal interests.

Both of these Consultation Guidelines apply to aboriginal interests (that is, potentially existing aboriginal rights and/or title) as well as established rights and title.

More recently, the MATRIX was developed and can assist in making consultation more efficient and effective.

2. Is there a provision for protecting unique or significant aboriginal social, cultural or spiritual sites? If so, what are they?

The *Heritage Conservation Act* provides for the management and protection of archaeological sites. Licensees must fulfill the legislative requirements set out in the *Heritage Conservation Act*.

The Forest Planning and Practices Regulation **sec. 10**, deals with the objective set by government for cultural heritage resources. Whereby a licensee is required to develop results or strategies that will conserve, or, if necessary, protect cultural heritage resources that are: (a) the focus of a traditional use by an aboriginal people that is of continuing importance to that people, and (b) not regulated under the *Heritage Conservation Act*. This regulation does not include archaeological sites.

Government Actions Regulations (under the *Forest and Range Practices Act*) provide for protection of resource features in relation to a specific area. Cultural heritage resources that are the focus of a traditional use by an aboriginal people, and that are not regulated by the *Heritage Conservation Act*, are considered under these regulations.

3. **How Does Aboriginal Title Relate to Aboriginal Rights?**

In *Delgamuukw* the Supreme Court of Canada (SCC), stated that there is a spectrum of aboriginal rights.

Different forms of aboriginal rights lie at different points on the spectrum, according to their degree of connection with the land:

- At one end of the spectrum, there are aboriginal practices and customs that are an integral part of an aboriginal culture and are not necessarily tied to the land.
- At the far end of the same spectrum aboriginal title. Therefore, aboriginal title is a form of an aboriginal right with the important distinction that it is a proprietary interest in a specific area of land.

The SCC decision did not confirm aboriginal title for any First Nation in BC; however, it provided some guidance to government in considering aboriginal title within statutory decision-making processes.

4. **What are Incremental Treaty Agreements?**

Incremental Treaty Agreements are a new approach which does not follow the framework of the BCTC. Incremental Treaty Agreements permit First Nations and the Province to shared benefits in advance of a Final Agreement.

5. **What were the Sappier - Gray Decisions? What were the implications of these decisions?**

The Supreme Court of Canada released a decision dealing with two cases - *R. v. Sappier* and *R. v. Gray*. These decisions address a First Nation's ability to access timber for domestic purposes as an aboriginal right including for the construction of a residential dwelling. The Court made it clear that the harvested wood cannot be sold, traded or bartered to produce assets or raise money.

This decision had implications for the Ministry of Forests and Range with respect to its legislative authority, compliance and enforcement activities, land stewardship and tenuring processes.

6. **What changes to legislation or regulations have been made as a result of the Sappier - Gray Decisions?**

As a result of these decisions and to address the direction provided by the Court, amendments have been made to section 49 of the *Forest Act* and a new division has been added titled "Free Use Permits for First Nations and Others." Changes to the Free Use Permit Regulation have also been made to provide proper management of forest resources while supporting a First Nations' aboriginal right to harvest wood for domestic purposes on Crown land.