James Douglas meet Delgamuukw
"The implications of the Delgamuukw decision on the Douglas Treaties"

The latest decision of the Supreme Court of Canada in *Delgamuukw* vs. *The Queen*, [1997] 3 S.C.R. 1010, has shed new light on aboriginal title and its relationship to treaties. The issue of aboriginal title has been of particular importance in British Columbia. The question of who owns British Columbia has been the topic of dispute since the arrival and settlement by Europeans. Unlike other parts of Canada, few treaties have been negotiated with the majority of First Nations. With the exception of treaty 8 in the extreme northeast corner of the province, the only other treaties are the 14 entered into by James Douglas, dealing with small tracts of land on Vancouver Island. Following these treaties, the Province of British Columbia developed a policy that in effect did not recognize aboriginal title or alternatively assumed that it had been extinguished, resulting in no further treaties being negotiated[1]. This continued to be the policy until 1990 when British Columbia agreed to enter into the treaty negotiation process, and the B.C. Treaty Commission was developed. The Nisga Treaty is the first treaty to be negotiated since the Douglas Treaties. This paper intends to explore the Douglas Treaties and the implications of the *Delgamuukw* decision on these. What assistance does *Delgamuukw* provide in determining what lands are subject to aboriginal title? What aboriginal title lands did the Douglas people give up in the treaty process? What, if any, aboriginal title land has survived the treaty process?

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[1] Joseph Trutch, Chief Commissioner of Lands and Works and Walter Moberly, Assistant Surveyor-General, initiated this policy. In a report to Governor Seymour in 1867 Trutch stated, " The Indians have no right to the lands they claim, nor are they of any actual valve to them, and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to the Government or to Individuals. On January 29, 1870 he stated that " the title of the Indians in the fee of the public lands, or any portion thereof, has never been acknowledged by the Government". Later as the first Lieutenant Governor he wrote to Sir John A. MacDonald, " The Canadian system as I understand it will hardly work here. We have never bought out any Indian claims or lands, nor do they expect we should, but we reserve for their use and benefit from time to time tracts of sufficient extent to fulfill all their reasonable requirements for cultivation or grazing. If you now commence to buy out Indian title to lands of B.C., you would go back of all that has been done for 30 years past and would be equitably bound to compensate tribes who inhabit the districts now settled farmed by white people equally with those in remote and uncultivated portions. LaViolette, Forrest E., The Struggle for Survival, Indian Cultures and the Protestant Ethic in British Columbia, University of Toronto Press, 1961 at pp. 108-111.

Fifty- one hereditary chiefs of the Gitksan and Wet'suwet'en launched their land claim case of *Delgamuukw v. B.C.* claiming title to 58,000 square kilometers of central British Columbia. The case was brought against the governments of British Columbia and Canada. The Chief Justice of the Supreme Court of British Columbia presided over the trial, which took 374 days over a period of two and half years. In 1991, McEachern, C.J.B.C. delivered his decision. He decided that the ancestors of the Plaintiffs had the right to use, for traditional purposes such as hunting, fishing and gathering, land in the central part of the claim area, but they did not have ownership (aboriginal title) or jurisdiction (self-government) in the claimed area.

McEachern, C.J.B.C. found that the "convenient starting point" to the history of English contact in British Columbia was the 1778 visit by Captain James Cook to Nooka. Cook was instructed to lay claim on any territory that he found uninhabited.[2] These instructions were in conformity with the Royal Proclamation of 1763, in that he was instructed to lay claim to unoccupied lands as against all other European powers, with the consent of the natives. European countries had developed a principle termed the "doctrine of discovery" This doctrine operated to grant the discovering state, upon discovering a "new" land, the right to claim this land as against all other European states[3]. The doctrine of discovery acted to limit competition between European nations but did not perfect their title without first extinguishing aboriginal title. Between 1790 and 1846 Britain's claim to what is now British Columbia was contested by Spain, Russia and the United States. During the "Nooka Sound controversy" the Spanish seized British ships. In a

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[2] Cook was told to take possession in the name of the King, subject to the consent of the natives. *"You are also with the consent of the natives to take possession in the name of the King of Great Britain of convenient stations in such countries as you may discover, that have not already been discovered or visited by any other European power, and to distribute among the inhabitants such things as will remain as traces and testimonies of your having been there. But if you find the countries so discovered are uninhabited you are to take possession of them for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.*

[3] The doctrine of discovery has been discussed by the United States Supreme Court in *Mitchell v. United States*, 34 U.S. (9 Pet.) 711 (1835), Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), Cherokee Nation v. Georgia, 31 U.S. (5 Pet.) 1 (1831), Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823), Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

communication sent by the British charge d'affaires at Madrid, the claim by Spain to exclusive right of sovereignty was rejected.[4]

Great Britain and the United States entered into Conventions in 1818[5] and 1827, which provided for "joint occupancy" to the Northwest Coast[6]. Subsequently, Great Britain and the United States entered into the *Treaty of Washington (Oregon Boundary)*[7] on June 15. 1846. None of these documents made mention of the aboriginal people living within the Northwest Coast, since under the doctrine of discovery, these European nation were settling who would have the right to the land and to acquire any aboriginal title that existed. After so doing they acquired sovereignty over that land.

Lamer, C.J.C. found in *Delgamuukw* at paragraph 145, that the relevant date was 1846, which established Great Britain's sovereignty over what is now British Columbia[8]. Following the 1846 treaty, Britain became concerned that emigrants from the United States may settle the territory. For example, the Mormon sect had been driven out of the state of Illinois beginning in 1846 and was heading west. Their leader Brigham Young had indicated that Vancouver Island was a probable destination for settlement[9]. In these circumstances, the British government was uncertain about how to proceed with British settlement, since they wanted to do this without cost. The Hudson's Bay Company

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[4] …British subjects trading under the protection of the British flag in those parts of the world where the subjects of His Majesty have an unquestionable rights to a free and undisturbed enjoyment of the benefits of commerce, navigation, and fishery, and also to the possession of such establishments as they may form, with the consent of the natives, in places unoccupied by other European nations. Manning, The Nootka Sound Controversy, 1905: 396

[5] *Treaties and Other International Acts of the United States, Volume 2*, Millar, Hinter ed., United States Government Printing Office, Washington, 193, p. 658

6.*Treaties and Other International Acts of the United States, Volume 3*, Millar, Hinter ed., United States Government Printing Office, Washington, 193, pp. 309

7.Article 1. From the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between Great Britain and the United States terminates, the line of boundary between the territories of Her Britannic Majesty and those of the Unites States shall be continued westward along the said 49th parallel of north latitude, to the middle of the channel which separates the continent form Vancouver's Island; and thence southerly, through the middle of the said channel, and of Fuca's Straits to the Pacific Ocean; provided however that the navigation of the whole of the said channel and straits, south of the 49th parallel on north latitude, remain free and open to both parties.

[8] "I conclude that aboriginals must establish occupation of land from the date of assertion of sovereignty in order to sustain a claim for aboriginal title. McEachern, C.J.B.C. found, at pp. 233-34, and the parties did not dispute on appeal, that British sovereignty over British Columbia was conclusively established by the *Oregon Boundary Treaty* of 1846."

submitted a proposal that the Company receive a grant of the Vancouver Island for the purposes of colonization.

On January 13, 1849, the Hudson's Bay Company was given a revocable grant to Vancouver Island. The grant included the purpose of " the protection and welfare of the native Indians residing within the portion of our Territory".[10] These instructions were further defined in a document referred to by McEachern, C.J.B.C. at p. 236 of the trial decision, " It must be added that in parting with the land of the island Her Majesty parts only with her own right therein, and that whatever measures she was bound to take in order to extinguish the Indian title are equally obligatory on the Company".[11] These instructions were in accordance with the Royal Proclamation 1763 and followed well established British policy. The new colony of Vancouver Island was administered by Richard Blanshard, the first governor appointed by the Colonial Office in London. However, the Hudson's Bay Company was granted control of land and settlement issues. James Douglas, Chief Factor of the Company, was given the responsibility of carrying out the instructions to extinguish the Indian title. On September 3rd, 1949, Douglas wrote the following to Archibald Barclay, Secretary of the Hudson's Bay Company;

> Some arrangement should be made as soon as possible with the native Tribes for the purchase of their lands… I would strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indian Fisheries, Village Sites and Fields, should be preserved for their benefit and fully secured to them by law. [12]

This position recognizes that the First Nations where the owners of their lands. Douglas suggested that these lands must be bought from the tribes. This was consistent with the doctrine of discovery, the Royal Proclamation 1763 and established British policy and suggests that Douglas was aware of and accepted these. Douglas further suggests that tracts of land being used by the tribes should be set aside, presumably so the

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[9] Widtsoe, John A., *Discources of Brigham Young*, Deseret Book Co., 1954 at p. 474
[10] Vancouver's Island Royal Grant, January 13, 1949
[11] *Supra*, Note 3
[12] Bowsfield, H., ed. *Fort Victoria Letters, 1846-1851*, Winnipeg: Hudson's Bay Record Society, Vol. 32

tribes could continue to possess and use these lands. *Blacks Law Dictionary* definition of benefit includes an interest, advantage or profit. From the First Nations point of view, this makes sense, since they would not want to dispose of lands that they needed to survive.

In December 1949, Archibald Barclay wrote the following to Douglas;

> With respect to the rights of the natives, you will have to confer with the chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they are occupied by cultivation, or had houses built on when the Island came under the undivided sovereignty of Great Britain in 1946. All other lands is to be regarded as waste, and applicable to the purposes of colonization… the Natives will be confirmed in the possession of their Lands as long as they occupy and cultivate them themselves but will nor be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them…[13]

Barclays' interpretation of aboriginal title reflected a narrow point of view. This point of view was influenced by the attitude that permeated the relationship between Europeans and First Nations since contact. It was heavily influenced by the European value placed on agriculture and fails to recognize the way of life and value system of First Nations. Barclay adopted this narrow view of aboriginal title as legitimate without consulting the First Nations.

The First Nations of southeast Vancouver Island are Lekwungen people of the Coast Salish group[14]. This group is made up of the Saanich, Klallam and Sooke, and occupied village sites in Cadboro Bay, the Gorge, Discovery Island, Ross Bay, Parry Bay, Beecher Bay and Esquimalt Harbour. The Songhees village was established after

[13] Pethick, Derek, *James Douglas: Servant of Two Empires*, Vancouver: Mitchell Press 1969, pp. 77-78

Douglas moved a large village site across the bay. He also moved a village site from where the Parliament Buildings now stand to Esquimalt Harbour. Like other Coast Salish, the Lekwungen lived in villages, which had from one to fifteen large rectangular houses constructed of cedar posts and beam covered with split cedar planks. Lekwungen families who lived within these "big houses" were called hw'nuchalewum.[15] The land was viewed by the hw'nuchalewum for its value in providing resources to house, feed, clothe, and provide tools that were needed. Importance was placed on locations for the clam beds, seal rocks, fishing sites, camas and wild clover patches, medicines, and material for spiritual activities.[16] The land provided abundant amounts of all that was needed to survive. A single sturgeon could weight nearly a ton, a bull sea lion more than a ton, a whale more than thirty tons, thousands of salmon came up the rivers to spawn, thousands of waterfowl would gather in the marsh lands as well as deer and elk which provided a wealth of food.[17] The locations of these resources were jealously guarded against any intrusion.[18] The Lekwungen along with other First Nations maintained this attitude upon the arrival of the European. Douglas was concerned for the safety of the Colony due to their inferior position and maintained that the Lekwungen "must be protected in their rights and we endeavour by every possible means to conciliate their good will".[19]

In the spring of 1850, Douglas commenced the process of entering into treaties with the First Nations people surrounding Fort Victoria. On May 16, 1850 Douglas reported on his activities to Barclay as follows:

> I summoned to a conference, the chiefs and influential men of the Songees Tribe, from Gordon Head on Arro [Haro] Strait to Point Albert on the Strait of De Fuca as their own particular heritage. After considerable discussion it was arranged that the whole of their lands, forming as before stated the District of Victoria, should be sold to the

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[14] Maud, Ralph,ed. *The Salish People, The Local Contribution of Charles Hill-Tout, Volume IV: The Sechelt and the South-Eastern Tribes,* Talonbooks, 1878
[15] Arnett, Chris, *The Terror of the Coast,*Arnett, Talonbooks, 1999
[16] *Ibid*, at p. 23
[17] Suttles, Wayne, *Coast Salish Essays*, Talonbooks, 1987 at p. 46-47
[18] *Supra*, Note 14 at p. 23
[19] Dispatches, December 16, 1851, Douglas to Earl Grey

> Company, with the exception of the Village sites and enclosed fields, for a certain remuneration, to be paid at once to each member of the tribe. I was in favour of a series of payments to be made annually but the proposal was so generally disliked that I yielded to their wishes and paid the sum at once.
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> The members of the tribe on being mustered were found to number 122 men or heads of families, to each of whom was given a quantity of goods in value to 17*s* Sterling and the total sum disbursed on this purchase was 103.14.0 Sterling at Dept. price… I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and carry on their fisheries with the same freedom as when they were the sole occupants of the country.
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> I attached the signatures of the native Chiefs and others who subscribed the deed of purchase to a blank sheet on which will be copied the contract or Deed of conveyance, as soon as we receive a proper form, which I beg may be sent out by return of Post".[20]

From Douglas' prospective, he is following the policy of extinguishing aboriginal title. From the First Nations prospective, these "treaties" were pacts of friendship and co-operation, as was practiced in their culture.[21] The Lekwungen believed that Douglas was recognizing their ownership and confirming their right to hunt and fish.[22] Two general models of treaties exist in British jurisdictions of North America: Georgian treaties (often called peace and friendship) and Victorian treaties

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[20] *Supra,* Note 7

[21] Marshall, Daniel, *Those Who Fell From The Sky*, Vancouver: Morriss Printing Co. 1999

[22] The practice of giving away blankets at gatherings has continued to the present day. The Lekwungen leaders who gathered for the meeting with Douglas did not likely understand or intent to sell their lands. This was seen as a symbolic gesture of peace. As one elder retells, one of the men at the signing of a Saanich treaty stated, "I think James Douglas wants to keep the peace". *Ibid,* note 14.

(often called the numbered treaties).[23] Trutch would later state that the so-called treaties were only for the purpose of securing friendly relations with the Lekwungen people and not an acknowledgement of aboriginal title.[24] It is not unreasonable to conclude that the Lekwungen people understood the purpose of the agreement proposed by Douglas as a peace or friendship agreement.

A second anomaly of the agreement is that Douglas accepts that the Lekwungen people have title over the whole of the lands. He confirms that they, and their children, will retain occupation of their village sites, fields and will continue to be able to hunt over unoccupied lands and carry on their fishery as formerly. This indicates that Douglas bought the "waste lands" even though this appeared to be contrary to the British policy. This would serve to reinforce the perception of the Lekwungen people that Douglas was recognizing their right of ownership over the land. They were not being asked to give up any of the land that they traditionally used. Had they been asked to do so, Douglas may have received a very different reception. Douglas appears to have either been a very shrewd negotiator or deceptive in his approach.

On August 16, 1950, Barclay sent the following reply to Douglas;

> The Governor and Committee very much approved of the measures you have taken in respect of the lands claimed by the Natives. You will receive herewith the form of Contract or Deed of Conveyance to be used on future occasions when lands are to be surrendered to the Company by the Native Tribes…[25]

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[23] Henderson, James Youngblood, *Empowering Treaty Federalism*, 58 Sask. Law Review 241 (1994)
[24] Tenant, Paul, *Aboriginal Peoples and Politics, The Indian land Question in British Columbia, 1849-1989*, University of Vancouver Press, 1990 at p. 40
[25] The text forwarded to Douglas was as follows: Form of Agreement *for* purchase of Land from Natives of Vancouver's Island … Know all men. We the Chiefs and Peoples of the tribe called_____ who have signed our names and made our marks to this Deed on the _____ day of _____ one thousand Eight Hundred and _____ do consent to surrender entirely and for ever to James Douglas the Agent of the Hudson's Bay Company in Vancouver's Island that is to say, for the Governor Deputy Governor and Committee of the same the whole of the lands situate and lying between_____.
The condition of, or our understanding of the sale is this, that our village sites and Enclosed fields Are to be left for our own use, for the use of our Children, and for those who may follow after us; it is understood however that the land itself shall be properly surveyed hereafter; it is understood however that the land with these small exceptions becomes the Entire property of the White people forever; it is also understood that

Although Barclay approves of Douglas' approach, he forwarded a text for the treaty that indicated that the Lekwungen people have surrendered their lands, within the area to be specified, entirely to the white people forever. Following the receipt of the text from Barclay, Douglas drafted the text to the blank pages of the treaty. This became the template for all the "Douglas Treaties". The text read:

> TEECHAMITSA TRIBE - COUNTRY LYING BETWEEN ESQUIMALT AND POINT ALBERT
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> Know all men, we, the chiefs and people of the Teechamitsa Tribe, who have signed our names and made our marks to this deed on the twenty-ninth day of April, one thousand eight hundred and fifty, do consent to surrender, entirely and for ever, to James Douglas, the agent of Hudson's Bay Company in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying between Esquimalt Harbour and Point Albert, including the latter, on the Straits of Juan de Fuca, and extending backwards from thence to the range of mountains on the Saanich Arm, about ten miles distant.
> The condition of or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.
> We have received , as payment, Twenty-seven pounds ten shillings sterling.

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we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. We have received as payment$_____.
In token whereof we have signed our names and made our marks at ____on the _____ day of One thousand Eight hundred and_____. (here follow the Indian signatures) Barclay to Douglas Fort Victoria Correspondence PABC A/C/20/Vi7

> In token, whereof, we have signed our names and made our marks, at Fort Victoria, 29t[h] April, 1850.
>
> (signed) See-sachasis his x mark
> and 10 others
>
> Done in the presence of
> (signed) Roderick Finlanson
> Joseph William McKay[26]

All of the "Douglas Treaties" followed essentially the same form. The 11 treaties for the area surrounding Victoria were made in the following order. [27]

Songhees

1. Teechamitsa (April 29, 1850)
2. Kosampsom (April 30, 1950)
3. Swengwhung (April 30, 1850)
4. Chilcowitch (April 30, 1850)
5. Whyomilth (April 30, 1850)
6. Chekonein (April 30, 1850)

Klallam

7. Kakyaakan (May 1, 1850)
8. Chewhaytsum (May 1, 1850)

Sooke

9. Soke (May 10, 1850)

Saanich

10. South Saanich (February 7, 1852)
11. North Saanich (February 11, 1852)

The "Douglas Treaties" followed the text used by the New Zealand Company to buy tracts of land from the Maori.[28] A select committee of the House of Commons considered the Treaty of Waitangi in 1844.[29] The Select Committee produced a report dated 29 July 1844. The debate centered on the extent of aboriginal title possessed by

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[26] *Papers connected with the Indian Land Question, 1850-1875*, Victoria
[27] Duff, Wilson, *The Fort Victoria Treaties*, B.C. Studies 3 , Fall, 1969 at p. 9
[28] *Supra,* Note 23 at p. 19
[29] The Treaty ceded to The Queen the sovereignty of the Northern Island; and in the following words the Crown guaranteed, in return, "To the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively and individually possess, so long as it is their wish and desire to retain the same in their possession. But the chiefs of the united tribes, and individual chiefs, yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them on that behalf". *Proceeding of the Select Committee on New Zealand,* House of Commons, Hansard July 23, 1844, p. 25.

the Maori. The Treaty of Waitangi recognized the aboriginal interest in unoccupied lands. The treaty was viewed as ambiguous and " highly inconvenient"[30]. The Maori apparently maintained that they had a "proprietory title of great value to land not actually occupied". [31] Sir George Gripps, Governor of New South Wales, upon which New Zealand as a British Colony was dependent, proposed the following principles. First that "the uncivilized inhabitants of any country have but a qualified dominion over it or a right of occupancy only" and that "all unoccupied land would forthwith vest in the Crown".[32] The Report proposed that it would have been better had no treaty been made. The Committee stated that the natives were incapable of comprehending the treaty and that it should be assumed to be a nominal treaty[33]. In a letter dated January 24, 1843, Lord Stanley stated, " We do not believe that even the Royal power of making Treaties could establish, in the eyes of our courts, such a fiction as a native law of real property in New Zealand. We always have had very serious doubts whether the Treaty of Waitangi, made by naked savages by a Consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy devise for amusing and pacifying savages for the moment"[34]. The House of Commons and the Select Committee relied on two positions to justify passing the resolutions that would provide that the natives only had title to the land they "occupied and enjoyed" and that the Crown had exclusive title to all unoccupied lands. First, the treaty was uncertain due to its ambiguity and that it was not in fact a treaty but an agreement to pacify the natives, or in other words an agreement to maintain the peace. Second, the doctrine of discovery was interpreted to mean that in asserting sovereignty the Crown gained title to all the unoccupied lands. Since the natives on New Zealand were agrarian, and not hunters and gathers, all lands other then those they actually used

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[30] "Your Committee have observed that the terms of the treaty are ambiguous and in the sense in which they have been understood, have been highly inconvenient, in this we refer principally to the stipulations it contains with respect to the right of property in land. The information that has been laid before us, shows these stipulations, and the subsequent proceedings of the Governor founded upon them, have firmly established in the minds of the natives notions which they had then but very recently been taught to entertain, of having a proprietary title of great value to land nor actually occupied" *Ibid. p. 3*

[31] *Ibid* p. 5

[32] *Ibid. p. 4*

[33] *Ibid.*p. 5

[34] *Hansard's Parlimentary Debates*, June 17, 1845 at p. 742

could be classified a “waste lands” and subject to Crown title. [35] This view of aboriginal title maintained that only land occupied by aboriginal people was subject to aboriginal title.

The United States Supreme Court in *Mitchel v. U.S.*, 9 Pet. 711, 9 L.Ed. 283 (1834) considered this issue and expressed the following view at p. 746:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the clear fields of the whites…

Lamer, C.J.C. in *Delgamuukw* considers this issue and concludes that in determining lands subject to aboriginal title, "Physical occupation may be established in a variety of ways, ranging from the construction of dwellings, through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources"[36]. This appears to be in accord with the conclusion reached in *Mitchel.* However, the court adds the additional requirement that the hunting grounds must be those regularly used in order to be included in aboriginal title. This raises the threshold test that First Nations must meet in order to establish title to these lands. How often must a First Nation use land for hunting to be considered regular use? Under this definition, lands that are subject to aboriginal title include the lands that were actually used as village sites and for cultivation. Also included are the lands regularly used for hunting, fishing and grounds otherwise exploited for its resources. How the term regularly used is defined will become important, since First Nation’s likely exploited particular locations for particular resources. Some of these resources may have been harvested in a particular season on an annual or longer basis. The same is true of agricultural societies, where certain crops can only be harvested in a particular season. If a crop occupies a piece of land and is only harvested once a year, is this considered regular use of the land? Generally, the purpose of land use is to provide shelter, food, and protection from the elements. The Colonists viewed land as a resource

[35] *Supra*, note 29 at p. 7
[36] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 149

to be used for building and agriculture. The First Nations used the land for the same reasons. However, in their hunting and gathering economy, they may have utilized a greater area of land, for select purposes. Douglas incorporates this concept into his treaty discussions when he states that the Lekwungen would be secure in their village sites, cultivated fields and hunting and fishing
grounds.

The lands subject to the aboriginal title of the Lekwungen people are described in the treaty documents by reference to geographical landmarks. Duff describes and maps out the areas included in each treaty. [37] This map covers the entire area surrounding Victoria. Douglas, and as in the New Zealand treaty, recognizes that the Lekwungen owned all the land, including the “waste lands”, which Douglas purchased. The village sites, surrounding fields and hunting and fishing grounds are mentioned, however, these areas of land to be exempted from the surrender were not identified. These lands were to be described at a later date after a survey was completed. It is clear that the First Nations that entered into "Douglas Treaties" enjoyed village sites and were engaged in agricultural activities. Suttles described how Douglas found the Songish growing potatoes in 1842 near what is now Victoria[38]. They were also hunters and fishers, as well as gathers. It is arguable that the entire territory for which aboriginal title existed for these First Nations were much larger then the current reserve areas. As an example the current reserve land base for the Songhees band is 125.5 acres, but it unclear what the size of their traditional territory was.

In determining the land subject to aboriginal title, Lamer, C.J.C. states that " title is made out when a group can demonstrate ' that their connection with the piece of land…was of a central significance to their distinctive culture'.[39] In considering how an aboriginal group could establish title he states at paragraph 81 that " a court must take into account the perspective of the aboriginal people claiming the right…while at the same time taking into account the perspective of the common law". In establishing this

[37] Note 13, *Supra*, at p. 11
[38] Suttles, Wayne, *Coast Salish Essays*, Talonbooks, 1987 at p. 140

as an approach to resolving disputes, Lamer, C.J.C. has created a difficult balancing act for future courts. In considering the Douglas Treaties the courts will be aided by reference to the principles of treaty interpretation established by the Supreme Court.

The Supreme Court of Canada has established a long line of cases that have described how treaties are to be interpreted. In *R. v. Badger*, [1996] 4 W.W.R. 457 at p. 474, Cory, J. sets out these principles.[40] First, treaties are to be considered solemn promises of a sacred nature between the Crown and the First Nation. As such the honour and integrity of the Crown is always at stake in dealings that impact on treaty interpretation. Second, the Crown is assumed to intend to fulfil its promises and must not give the impression of "sharp dealings". Third, any ambiguity or doubtful expression in the words of a treaty must be resolved in favour of the First Nation. Fourth, the onus of proving extinguishment lies upon the Crown. There must be strict proof of a clear and plain intention to extinguish treaty rights. These principles impose a heavy responsibility on the Crown whenever they are dealing with treaty issues. When there are conflicting views, the Crown must apply these principles in resolving any such conflict. Where the parties cannot achieve resolution the courts must also apply these principles in their determinations. These principles represent a significant step forward, regarding First Nations treaty rights, from the attitudes that existed in the House of

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[39] Note 16, *Supra* at p.

[40] First it must be remembered that a treaty represents an exchange of solemn promises between the Crown and various Indian nations. It is an agreement whose nature is sacred. See *Sioui v. Quebec (Attorney General), (sub* nom. *R. v. Sioui)* 2 S.C.R. 387 at p. 401. Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty and aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealings" will be sanctioned. See *Sparrow, supra,* at pp. 1107-08 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (CA), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary of this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. R.,* [1983] 1 S.C.R. 29 at p. 36, *R. v. Simon,* [1985] 2 S.C.R. 387 at 402, *Sioui, supra,* at p. 1035; and *Mitchell v. Sandy Bay Indian Band,* (sub nom. *Mitchell v. Peguis Indian Band),* [1990] 2 S.C.R. 85, at pp. 142-43 [[1990] 5 W.W.R. 97}. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of government to extinguish treaty rights. See *Simon, supra,* at pp. 405-06, *Sioui, supra,* at p. 1061, *Calder v. British Columbia (Attorney General),* [1973] S.C.R. 313, at p. 404 [[1973] 4 W.W.R. 1].

Commons towards the Maori during the time when the Douglas treaties were negotiated.

The Supreme Court of Canada recently considered the case of *R. v. Donald John Marshall, Jr.* [1999] 3 S.C.R. 456. The facts as set out in the headnote are that Marshall, a Mi'kmaq Indian, was charged with three offences set out in the federal fishery regulations, selling eels without a licence, fishing without a licence and fishing during the close season with illegal nets. He admitted that he had caught and sold 463 pounds of eels without a licence and with a prohibited net within close times. The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 that exempted him from compliance with the regulations. During the negotiations leading to the treaties of 1760-61, the aboriginal leaders asked for truckhouses "for the furnishing them with necessaries in exchange for their peltry" in response to the Governor's inquiry "whether they were directed by their Tribes to propose any other particulars to be treated upon at this time". The written document, however, contained only the promise by the Mi'kmaq not to "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". While this "trade clause" is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals, the trial judge found that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. He also found that when the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. The accused was convicted on all three counts. The Court of Appeal upheld the convictions. It concluded that the trade clause does not grant the Mi'kmaq any rights, but represented a mechanism imposed upon them to help ensure that the peace between the Mi'kmaq and the British was a lasting one, by obviating the need of the Mi'kmaq to trade with the enemies of the British or unscrupulous traders.

Binnie, J. in the majority decisions stated at paragraphs11and 12;

> Secondly, even in the context of a treaty document that purports to contain all the

> terms, this court has made it clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. .. Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, per Dickson, J. (as he then was) in *Guerin v. The Queen,* [1984] 2 S.C.R. 335.

Binnie, J. utilizes the principles of treaty interpretation to find that Marshall continued to have a treaty right to sell eel. Specifically, he refers to the oral terms, used during the negotiation process, as understood by the First Nation and gives this significant weight when determining the actual terms of the agreement. This is of particular importance when considering the Douglas treaties since any ambiguity may be resolved by reference to the oral history surrounding the negotiation of the treaties. This may have particular importance in the case where the First Nations signed a blank piece of paper and the wording filled in at a later date.

When considering the "Douglas Treaties", there are certain issues that could arise since *Delgamuukw.* The "Douglas Treaty" states that the Lekwungen people that entered into these treaties maintained exclusive control of their village sites and enclosed fields. They also retained the right to hunt over unoccupied lands and to carry on their fishery as formerly. The lands that they surrendered were the “waste lands”; all lands other than their village sites and enclosed fields and tracts of land regularly used for hunting and fishing. In applying the principles of interpretation, the first question be answered is, what were the terms of the treaty and what lands did the "Douglas Treaty" people surrender?

Lamer, C.J.C. in *Delgamuukw* at paragraph 82 considers the issue of oral history as a means of establishing historical events. He begins this analysis by restating that

aboriginal rights are *sui generis* and that this demands a unique approach to the treatment of evidence.[41]

Oral history has existed as one of the earliest exceptions to the hearsay rule in the form of declarations by deceased persons with respect to matters of family history.[42] McEachern, C.J.B.C. in *Delgamuukw* considered the issue of oral history. He referred to *Kruger v. R.* [1978] 1 S.C.R. 104 at 109 where Dickson J. (as he then was) said:

> Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not 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.

McEachern, C.J.B.C. also refers to *R. v. Simon*, 23 C.C.C. (3^d) 238 where at page 255 Dickson C.J.C. (as he then was) states, "The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt…"
McEachern, C.J.B.C, then conducts an analysis of the common law approach to this type of evidence. He acknowledges that the admission of this type of evidence was necessary, since it was impossible to prove the plaintiff's history through documentary or living witnesses. He then finds that any oral history evidence that touches upon matters that living witnesses could testify to was not admissible. He then applied the common law rule of reputation evidence. This exception relates to declarations relating to the reputation of a public or general right. It is held to be admissible if the declarant is dead. The subject matter generally involves reputation of ancient rights. These rights generally affect the interest of the community as a whole. If the matter concerns private rights, then the rule does not apply and such evidence is not admissable. One other condition is that the declaration must have been made *ante litem motam.* This means that the statements must have been made prior to the commencement of any actual

[41] Note 17*Supra*, at para. 82
[42] Skopinka, J, Lederman, S. Bryant, A., *The Law of Evidence in Canada*, Butterworths, 1992

controversy upon the issue.[43] In an earlier ruling, McEachern in *Uukw et al. v. R. In Right of British Columbia and Attorney General on Canada*, [1988] 1 C.N.L.R. 188 at p. 194 quotes *Wigmore on Evidence:*

> (b) The circumstances creating a fair trustworthiness are found when the topic is such that the facts are likely to have been generally inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one.

In *Delgamuukw,* McEachern C.J.B.C. stated at p. 176 that this evidence must be weighted and tested for trustworthiness. He found that " the totality of the evidence raises serious doubts about the reliability" of the evidence presented. He quoted from the expert evidence of Drs. Bishop and Ray:

> Even when employed carefully, memory ethnography can only provide totally accurate information for relatively short time spans, usually one hundred years at the very most.

Lamer. C.J.C. in *Delgamuukw* at paragraph 98 states that " The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties in adjudicating aboriginal claims".[44] Lamer, C.J.C. in *Van der Peet* at paragraph 68 stated, " The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would apply, for example, in private law torts case". This is followed up in *Delgamuukw* at paragraph 87, Lamer C.J.C. states, " Notwithstanding the challenges created by the use of oral

[43] *Supra,* at p. 223

histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with types of historical evidence that courts are familiar with, which consists largely of historical documents". He further states at paragraph 82 that this accommodation must be done in a manner that does not strain "the Canadian legal and constitutional structure"

At paragraphs 81 and 82, Lamer C.J.C. stated " Accordingly, 'a court must take into account the perspective of the aboriginal people claiming the right… while at the same time taking into account the perspective of the common law' such that [t] rue reconciliation will, equally, place weight on each" and " accords due weight to the perspective of aboriginal peoples". He further recognizes at paragraph 86 that the oral history of aboriginal people does not merely relate to historical events, but is interwoven with history, legend, politics and moral obligations.

The *sui generis* nature of aboriginal and treaty rights has its origin in the fact the aboriginal people possessed the land prior to British sovereignty. They had their own pre-existing systems of aboriginal law. These systems of laws must be considered, accepted and applied equally by the courts when considering aboriginal title and rights. When applied to the concept of oral history, the trial judge must be prepared to adapt the usual rules of the common law, to accommodate any specific system of aboriginal law that exists for that particular people. Oral history must not be seen as a "brute container of evidence" "to be mined for nuggets of truth" [45] This requires that the trial judge become familiar with that particular aboriginal system of law. This could include gaining knowledge of the governance system, laws and how history was passed down from generation to generation. Once the trial judge has a firm grasp of these issues, she can then begin to reconcile them with the common law rules of evidence. For example she can determine the issue of reliability from the aboriginal perspective. With this balance achieved, the trial judge would then in a position to consider and weight equally

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[44] Note 17, *Supra,* at para. 98

[45] Cruckshank, Julie, (1992) "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.,* B.C. Studies, Special Issue No. 95, 25-42

all the evidence. The probability that greater weight will given to scientific evidence could then be overcome.

It is not uncommon for the history of a people to be passed through the use of stories, which include mythology or folklore. The story of Moses is an example. While the story describes the history of the people of Israel leaving Egypt, it includes supernatural events such as the parting of the Red Sea, being fed by Manna and looking at the staff of Moses to avoid death after being bit by poisonous snakes. While the story tells the history of these people, if the strict rules of evidence were applied, it may not pass the "threshold test" of reliability or be given little weight on the issue of ultimate reliability. To find otherwise requires the approach that Lamer, C.J.C. suggests. It is only when the Trial Judge understands the context, laws and the system for passing down the story from generation to generation that this historical evidence can be reconciled with the common law rule of evidence and be given equal weight.

The Coast Salish people, which include the Lekwungen people that entered into Douglas treaties, have a system of laws that where given by HALS (the creator) and this knowledge is passed from generation to generation through the elders. These traditions include traditional names, which are passed from generation to generation. These names are associated with places, which are also named, where the name came from. A system of spokespersons are selected, who are have knowledge of the customs and affairs of the First Nation. These individuals are used to voice opinion or wishes at gatherings. At these gatherings, witnesses are selected. Their function is to recall the matters discussed and to generally witness the events. The law, traditions, and culture are taught in the traditional bighouse.[46] To the Lekwungen people this system is both reliable and trustworthy. It is a system that depends on the openness and community discussion that *Wigmore on Evidence* talks about. This is an example of a system that a judge should consider when implementing the principles set out in *Delgamuukw.*

[46] The First Nations of South Island, *Aboriginal Self Determination, Indian Family Law, Tribal Indian Governments*, June 1, 1987.

In determining what lands the Douglas Treaty people retained or gave up, the oral traditions of the people must be considered. What were the traditional village sites and hunting and fishing grounds? What was the understanding of the First Nation people concerning these treaties? This evidence must then be weighed along with any written or expert evidence. The court would then be in a position to determine the terms of the treaty.

The Supreme Court of Canada has held that treaties are a sacred promise. [47] This would seem to elevate these documents to a status greater than contracts. In contract law, the terms of the contract must be certain. It follows that the same principle must apply to treaties. In the case of the Douglas treaties the terms seem to be ambiguous. Was it the intent that the terms continue to change over time as colonization took place, in that the reserved traditional hunting and fishing grounds would be surrendered? If not, then what is the remedy available to the court, where a breach of the contract is found? In contract law a court could order rescission[48], specific performance[49], or order damages.

It seems unlikely that the court would intervene in a treaty process, which is a political process, to find the treaty void. The court may make such a finding and issue a declaration, as in *Delgamuukw*, suggesting that the parties negotiate settlement of the matter. It also seems unlikely that the courts would order specific performance, since to do so would displace the current innocent owners of fee simple lands. The alternative that will likely be followed is to consider an order for compensation. However, after finding an infringement of the treaty right, the issue of justification would have to be considered.

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[47] *R. v. Badger*, (1996) 4 W.W.R. 457

[48] The courts have found that there may be barriers to the equitable remedy of rescission. Laches may be such a barrier. *Rucheinsky v. A. Spencer Co.*, [1948] 2 W.W.R. 392(B.C.C.A.); *Hudsons Bay Invt. Co. v. Thompson*, [1924] 1 W.W.R. 933 (Man. K.B.). The court may rescind a contract where there is an unequal bargaining power. *Morrison v. Coast Finance Ltd.*,(1965) 54 W.W.R. 257 (B.C.C.A.); *Knupp v. Bell*, (1968) 67 D.L.R. (2d) 256 (Sask.C.A.). The court may not order rescission were to grant this would be inequitable. *Pepper v. Prudential Trust Co.*,[1965] S.C.R. 417 (S.C.C.)

[49] The court will not enforce specific performance where the contract is vague, ambiguous or uncertain. *Campbell v. Barc.*,[1917] 1 W.W.R. 283 (Man. C.A.), *Sweitzer v. Grange*, (1923) 54 O.L.R. 70 (Ont. C.A.), *McSorely v. Murphy*, [1928] 3 W.W.R. 589 (B.C.C.A.)

In *Delgamuukw* the court held that infringement on aboriginal title might be justified in certain situations. The first test for justification is that the infringement must be in furtherance of a legislative objective that is compelling and substantial. (para. 159(ii)). Legislative objectives that address both the recognition of prior occupation by aboriginal peoples and the reconciliation of this with the assertion of Crown sovereignty would meet this test. Thus in *Sparrow*, conservation was held to be a valid legislative purpose since it seeks to address both the aboriginal and legislative interests. The second part of the test requires an assessment of whether the infringement is consistent with the fiduciary relationship between the Crown and aboriginal people. (para. 162) The test requires that the Crown takes into account the right and then demonstrates that the process and allocation reflect the prior aboriginal interest. This includes the duty of consultation. (para. 168)

In the case of the Douglas treaties, it appears that the allocation of lands in furtherance of settlement would be a compelling and substantial legislative objective[50]. However, reconciliation of this with the prior aboriginal/treaty right does not meet the threshold test for justification, since the specific aboriginal interests where not taken into account. The Crown may argue that they have made efforts to reconcile these interests by permitting Douglas treaty people to hunt in other locations in the Province. First, the Crown would have the onus of establishing compliance with the principles of treaty interpretation, including consultation, which is a principle discussed in *Delgamuukw*. [51] Lamer, C.J.C. stated that there is always a duty to consult with First nations when decisions are made regarding their lands. In some instances, full consent may be required, where the Crown intends to infringe on these rights. Since the courts have held that rights are site specific, any position taken by the Crown that the Douglas treaty people have an opportunity to hunt in other locations would not be pursuant to their treaty right.

[50] *Supra*, note 36 at para. 165
[51] *Ibid.* at para. 168.

With respect to the second test, fiduciary relationship, the Crown does not appear to have taken into account the prior treaty rights, when allotting fee simple lands. There does not appear to be any efforts at reconciliation of the competing interests or involvement of the aboriginal people in the process.

If it is accepted that the Douglas treaty people's rights were established at the time the treaties were entered into, then unless justified, compensation would become payable when the right was infringed. The Supreme Court of Canada in *Guerin* and subsequently in *Delgamuukw* have held that compensation for breaches of fiduciary duty is a well established part of aboriginal rights case law. Lamer, C.J. stated " fair compensation will ordinarily be required when aboriginal title is infringed". (para. 169) The issue of the quantum of damages will be difficult to determine. In *Delgamuukw* Lamer C.J.C. stated that "the amount of compensation will vary with the nature of the particular aboriginal title affected". (para. 169) If it is accepted that the Douglas treaty people intended to maintain aboriginal title/treaty rights over their traditional village sites, enclosed fields and hunting and fishing grounds, then this is the right affected when these lands were subsequently allocated by the Crown in fee simple. *Delgamuukw* held that aboriginal title is the right to exclusive use and occupation of the land for a variety of purposes. (para. 117) Presumably the rights of the Douglas treaty people would not be frozen in time and for the purposes of determining damages in the amount equal to fee simple land value could serve as a starting point. The amount may in fact be found to more than the fee simple value. (para. 181)

Following the Australian High Court decision in *Mabo,* the government established the National Native Title Tribunal and a national compensation fund. This provides an alternative process to litigation to settle claims. This type of process may provide for more flexibility and be less costly in settling these issues. In British Columbia, the Treaty Process has been established. This process is negotiation based and does not recognize compensation as a part of the mandate. This narrow approach has led to frustration by First Nations. The approach by Australia may be an alternative that could be explored.

A final issue is whether the Douglas treaties have extinguished the aboriginal rights of those whose ancestors entered into these treaties. Prior to 1871, the colonial government was subject to the Royal Charter to the Hudson's Bay Company. As stated previously, this included a provision for the protection and welfare of the Indians living within Vancouver's Island. The principles of the Royal Proclamation, 1763 were also to be followed by the colonial government. The Supreme Court of Canada has held that there must be a clear and plain indication of any intent to extinguish aboriginal rights. There is nothing in the language of the Douglas Treaties regarding the village sites, enclosed fields and traditional hunting and fishing grounds, that addresses this issue. Therefore it is presumed that aboriginal rights and title have survived the Douglas treaty process prior to 1871.

Following 1871, *Delgamuukw* held that the Province of British Columbia no longer had the legislative jurisdiction to extinguish such rights. (para. 173) Since 1871 the exclusive power to extinguish aboriginal rights, including title, rests with the Federal government. (para. 173) Although Provincial laws of general application apply *proprio vigore* to Indians and Indian Lands, these laws cannot extinguish aboriginal or treaty rights. Dickson, C.J.C. (as he then was) stated in *R. v. Simon*, supra, at p. 253, "Given the serious and far reaching consequences of finding a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises". Similar comments were made by Dickson, C.J.C. (as he then was) in *R. v. Sparrow, 56 C.C.C.* (3d) 262 at p. 280.

It therefore appears that the Douglas treaties have not extinguished the aboriginal and land title rights of those First Nations that entered into them. They continue to exist and are now further protected by the *Constitution Act, 1982* section 35. In addition, these First Nations also have treaty rights, which are also protected, by section 35

In conclusion, this paper has explored the possible implications of the *Delgamuukw* decision on the First Nations that entered into pre-confederation treaties

with James Douglas. *Delgamuukw* has made clear that Douglas was correct in his approach in the treaty process. The lands subject to aboriginal title included the village sites, lands surrounding in the form of fields and the traditional hunting and fishing grounds. The real issue is what territory was included in this land base. This question must be resolved by taking into consideration the oral history of the specific aboriginal people and what they believed the terms of the treaty to be. If it included lands that have since been alienated to fee simple ownership, then the likely remedy is compensation. This may occur through litigation or in an alternative resolution process. The compensation may include money, land and jurisdiction. Whatever the forum, the views and rights of the aboriginal people must be deal with utilizing integrity and fairness. There must be resolution to these long standing differences if the two cultures are to exist in harmony.