1st Special National Conference on Delgamuukw

February 24, 25 & 26, 1999.

Hosted by Interior Alliance and the Assembly of First Nations

COMMON GROUND

TOWARD RECONCILIATION OF ABORIGINAL & CROWN TITLE

A
DISCUSSION PAPER
ON
IMPLEMENTING THE *DELGAMUUKW* DECISION

February 1999

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EXECUTIVE SUMMARY

Despite the Supreme Court of Canada's ruling on December 11, 1997, in the *Delgamuukw* decision, the federal government is pressing ahead with its Comprehensive Land Claims Policy which is based on extinguishment of Aboriginal title. This is evidenced by the recent Nisga'a Final Agreement and the Sechelt Agreement-In-Principle, the Government of Canada is merely finessing the legal language by referring to "extinguishment" as "certainty". However, this is merely a clever legal technique by the federal and provincial governments.

By "exhaustively defining", in other words, "limiting and restricting", the scope and content of existing section 35 Aboriginal rights to what is contained in Canada's Comprehensive Claims Final Agreements, the legal effect is the same, it empties out existing section 35 rights (which has now been clarified to include Aboriginal title as per *Delgamuukw*) and replaces it with the reduced, restrictive "treaty' rights", as evidenced by the terms of the Nisga'a Final Agreement and the Sechelt AIP.

This is clearly a continuation of the 230 year old settler objective of eliminating Aboriginal title.

The primary purpose of this discussion paper and the Kamloops Meeting of February 24, 25, 26, 1999, is to determine if there is sufficient interest among the Nations represented from unceded Aboriginal title territories to coordinate actions to replace the Comprehensive Land Claims Policy with a policy and process which is consistent with the legal principles and negotiating framework set out in the *Delgamuukw* decision.

Our reading of the *Delgamuukw* decision acknowledges that the Court has set out a process for negotiation. There are four main elements to the process, briefly described as follows:

<u>Step 1 - Establish the Facts Related to Aboriginal Title:</u>

This involves assembling and assessing the factual evidence required to prove the Aboriginal title. In eastern Canada, the federal government still provides financial support to First Nations so that they can gather and organize their evidence. In British Columbia, since the advent of the B.C. Treaty Commission process, this step

has been eliminated.

Step 2 - Determine Whether Activity Infringes or Interferes with Aboriginal Title:

This step involves determining whether past, present or proposed actions by other parties stand to infringe Aboriginal title, or interfere with the free exercise of rights flowing from that title.

Step 3 - Can the Infringement be Justified?

At this stage, offending practices, regulations, legislation and actions need to be reviewed and justified.

Step 4 - Resolution:

The Court stated clearly that Aboriginal title can be reconciled with the Crown's presence without requiring extinguishment (except in exceptional cases). This last stage, then, focuses on reconciliation and remedial measures, with the objective of recognizing and affirming Aboriginal title. This could involve compensation for past actions; agreements on consultation-consent; new arrangements for jurisdiction over lands and resources ; resource revenue sharing, etc., etc.

This process is quite different from the existing Canada's Comprehensive Claims policy. There is a *Delgamuukw* framework to implement, the question remains, is there the political will on the part of First Nations, and on the part of governments?

Rationale for Inter-Tribal Coordination:

There are good reasons why First Nations from unceded Aboriginal title territories should come together and engage the federal government on the Aboriginal title issue. The old adage of strength in numbers is true. Those that have years of negotiating experience with the federal government can confirm that they have not been able, thus far, to move them from their position. Even the Federal Fact-Finder on Extinguishment, Judge Hamilton, noted in his recent 1995 report that; "[t]*he present policy has not changed significantly in the last 230 years.*" So it is no exaggeration to say that the *Delgamuukw* decision really does provide an historic

opportunity.

One only has to look at the growing list of reports that have been ignored or placed on the shelf to see that it is going to take a major effort to get the federal government to move toward honour, justice and good faith negotiations regarding our Aboriginal title.

- Penner Report on Indian Self-Government (1983)
- Coolican Report on Comprehensive Claims Policy (1986)
- Canadian Human Rights Commission Annual Report (1990)
- Canadian Human Rights Commission Annual Report (1991)
- Liberal Party of Canada Redbook & Aboriginal Platform (1993)
- Hamilton Report on Alternatives to Extinguishment (1995)
- Royal Commission on Aboriginal Peoples Final Report (1996)
- Canadian Human Rights Commission Annual Report (1997)

PART 1 - OVERVIEW OF ISSUES

Background:

On December 11th, 1997, the legal standing of Aboriginal title in Canada went through a monumental change. The Supreme Court of Canada issued the Delgamuukw decision, which recognized that Aboriginal title is an exclusive "right to the land itself" - one that contains an "inescapable economic component." What First Nations have asserted for over three centuries, Canada's highest court finally recognized. For indigenous nations across Canada there is now a strong legal foundation, as well as an historic opportunity, to protect, advance and enforce Aboriginal title for future generations.

Policy Barriers:

However, just because the Courts have recognized Aboriginal title as a real property interest, this does not mean that other parties will come along willingly. Instead, Canada is pressing forward with a "land claims" model that pre-dates the Delgamuukw decision: one that is founded on the extinguishment of Aboriginal rights and title, and the denial of the Aboriginal property interest in land and resources.

In the year that has passed since the Supreme Court ruled in Delgamuukw, there have been no changes to Canada's Comprehensive Claims policy. In fact, the federal and provincial governments have continued to successfully pressure First Nations to cede, surrender or extinguish Aboriginal title in order to achieve what they call "certainty". This can be seen clearly in the Nisga'a treaty and most recently, in the Sechelt AIP. (See part 2 for more detail).

Process Barriers:

As well as recognizing the legal currency of Aboriginal title, in *Delgamuukw* the Supreme Court of Canada also set out a framework for negotiation and reconciliation. The process laid out by the Court is very different than the process contained in the Federal Government's Comprehensive Claims policy, or the BC Treaty Commission.

But since December 1997, Canada has taken no steps to change the process for dealing with Aboriginal title since the SCC ruled in *Delgamuukw*.

Summary:

- With *Delgamuukw* and related cases, previous legal barriers to the recognition of Aboriginal title have been removed. However, political and policy barriers continue to prevent First Nations from entering meaningful negotiations which would result in a recognition of their Aboriginal title and a just settlement of the Land Question.

- In this connection, the biggest policy barrier preventing the recognition of Aboriginal title is the Government of Canada's 1986 Comprehensive Claims policy. The biggest political barrier remains the federal Cabinet and its provincial counterparts.

The purpose of this paper is to start discussions among First Nations about possible joint action directed at the federal government, with the objective of removing the existing Comprehensive Claims policy and process, and replacing it with a policy and a process that conforms to the principles and the negotiation framework set out in *Delgamuukw*.

Response: Strategy Based on Shared Interests:

This discussion will focus on the needs and interests of those nations who continue to hold Aboriginal title, but who are not currently negotiating under Canada's 1986 Comprehensive Claims policy. The reason for this focus is simple: past attempts to change the Comprehensive Claims policy have largely been driven by "actively negotiating" groups in consultation with the federal government (witness the Coolican Task Force on Comprehensive Claims in the mid-1980's), without providing due consideration to the rights or the objectives of those nations outside of the process. From Canada's perspective, title appears to be non-existent until you enter the policy (and then it exists only so long as it takes to extinguish it).

This time around, once again the dialogue and momentum appears to be revolving around those nations who are engaged directly in the existing Comprehensive Claims policy. Inevitably this leads to a situation where the existing policy and process become the basis of the dialogue. This does not bode well for those nations who continue to resist extinguishment, and who are searching for alternative processes which more closely match their needs and circumstances.

If they are to have any influence over outcomes, then those First Nations who have avoided involvement in Canada's extinguishment policy need to have a forum in which they can collectively develop alternative approaches that are not contaminated by existing policy and process.

The meeting of nations held in Kamloops, February 24-26, is intended to begin a dialogue among those nations who want to pursue recognition of Aboriginal title outside of the existing comprehensive claims policy and process. In turn, it is hoped that this will lead to more formal and ongoing cooperation between these nations, with the shared objective of setting aside the existing policy and process, and obtaining something which more closely reflects their rights and their aspirations.

Considerations:

There are a number of things which need to be thought about in this connection. We will review some of them below.

- *Delgamuukw* is not a magic bullet. Certainly it does provide a solid legal basis in Canadian law for the recognition of Aboriginal title. But this is a function of settler law, not indigenous or international law. First and foremost, Aboriginal title flows from the Creator and is subject to indigenous laws and practices. At the end of the day, Aboriginal title will be recognized and protected because of the beliefs and actions of the First Nations and their members, not because of settler law. That is where the real strength of the First Nations lies: in the people, their culture, their practices, and their beliefs. For these reasons, it would not be prudent for First Nations to put all of their eggs in the *Delgamuukw* basket.

- Keeping the preceding point in mind, *Delgamuukw* nonetheless provides a strong basis from which to attack and kill prejudicial federal and provincial policies - not just the Comprehensive Claims policy (which is the focus of this discussion), but also a host of offensive federal and provincial laws, regulations and practices which infringe on Aboriginal title and rights. In this respect, it may be easy for other governments to dismiss international law or Aboriginal law, but they will find it most difficult to dismiss their own law without painting themselves into a corner.

- Whether or not it is law, as we have already mentioned, the momentum against implementing *Delgamuukw* is significant. Canada, certain provinces, and a number of First Nations have invested significant time and resources to arrangements negotiated under the existing Comprehensive Claims policy. For a variety of reasons, each of these parties does not relish the prospect of "clearing the deck" and starting over with a different set of objectives and a different process. At the same time, the business community continues to see Aboriginal title and rights as a threat to their continued profits. Finally, a very vocal and well-organized lobby has a head start in whipping up anti-Indian sentiment (ie., Reform Party, provincial Liberals in BC, and so-called "grassroots" settler movements). These interests will do what they can to frustrate efforts at wholesale reform and implementation of *Delgamuukw*.

- Recognition of Aboriginal title and implementation of *Delgamuukw* does not avoid the need to establish the fact situation of each nation and to complete the research required to prove title. Other governments have no real incentive to negotiate in good faith unless they know that you can establish your facts and prove title. This poses special problems for First Nations in B.C., where Canada has made a policy decision not to fund Aboriginal title research.

- The Assembly of First Nations is engaged in a *Delgamuukw* National Review Process with the government of Canada. Although it has been under discussion for almost a year, First Nations themselves have had little or no opportunity for direct input into its design or objectives up to this point. This lack of inclusiveness suggested the need for like-minded First Nations to gather together and consider the possibility of mutual support and coordinated action, at the very least, as a means of influencing the AFN-DIAND process.

That is why, at the Assembly's December 1998 Confederacy meeting in Ottawa, the Interior Alliance and the Algonquin Nation Secretariat co-sponsored Resolution No.80/98, which directed the Assembly to sponsor two special national meetings specifically for those First Nations not negotiating under the Comprehensive Claims policy.

Elements of a Strategy:

Because of the high stakes and the significant resistance to changing current federal policy and practice, the strategies to be put into place must be carefully thought out, have a broad base of political support among participants, and be the subject of ongoing commitment and action. It is expected that the discussions in Kamloops will identify a strategic plan in more detail, but the following items are offered here as a starting point for discussion.

Coordinated Action and Political Commitment:

To date, most of the nations not negotiating under the Comprehensive Claims policy have been fighting to advance and recognize their title - on the ground, in the courts, and as opportunities arise for discussions with other governments. However, most of these actions have been taking place in isolation, without the benefit of national-level coordination. By working together on a coordinated basis, nations from across the country can significantly increase their leverage in local-level negotiations. For this reason, AFN Confederacy Resolution No.80/98 called for the establishment of technical and political working groups coming out of the Kamloops meeting, to provide an institutional basis for the development and implementation of a coordinated action plan**.**

Legal Dimensions:

A number of nations (or their members) are presently in the courts, either asserting or defending Aboriginal title and rights. There is also the possibility of a direct legal challenge to the 1986 Comprehensive Claims policy by way of a judicial review, which has been discussed at length by the Interior Alliance and the Algonquin Nation Secretariat. The Courts can provide one element of a strategy to set aside the 1986 policy and replace it with a policy and process that more closely reflects the

nature and scope of Aboriginal title.

Community Dimensions:

In *Delgamuukw*, the Supreme Court of Canada affirmed that Aboriginal title is held collectively by the members of a nation. Also, as we have mentioned above, regardless of settler courts, the reality of Aboriginal title resides with the grassroots people, their belief in title, and their willingness to implement it and defend it in a consistent and responsible manner. Other governments will take the Aboriginal leadership seriously if they understand that the people themselves are ready to follow through.

Economic Dimensions:

It is widely known that the current federal government takes its cues from Big Business and the Markets. When these interests begin to express anxiety and press for solutions, the federal government will act quickly (in contrast to Canada's reluctance to adhere to the rulings of its own courts). Therefore, one way to increase the pressure on Canada to conform to *Delgamuukw* would be to target the business community and heighten their anxiety level.

Aboriginal title being a property interest, it can be seen as a lien on federal and provincial assets (land & resources). This calls into question the legitimacy and accuracy of the federal government's accounts - outstanding Aboriginal title should be on the national accounts as a debt. Settling claims honourably should be seen as paying down the national debt (which is consistent with Reform & Tory rhetoric, and also consistent with Paul Martin's stated budget priorities), and NOT as new program spending. Potential target audiences: Auditor General, House of Commons Finance Committee, Minister Paul Martin, the Business Council on National Issues (chaired by Tom D'Aquino), the key bond rating agencies (ie., Standard & Poor, Moody's), and selected corporations.

Media & Public Relations Dimensions:

The media, like the general public, has proven to be consistently ignorant of the real issues surrounding title, and therefore the issue has been prone to superficial and/or alarmist treatment. Significant education of the public and the media are needed.

Many nations have made significant strides in educating local/regional media, but title issues generally are still regarded as local or regional in scope. To re-cast this as a national issue, some coordinated action is needed.

Some potential themes are included in part 2 of this discussion paper.

Other Dimensions:

There are no doubt, other items under this heading which participants may identify, and which also require discussion.

PART 2 - DETAILS AND BACKGROUND

Introduction:

As of December 11, 1997, the legal landscape of Canada was remarkably changed by a surprising decision of the Supreme Court of Canada when it recognized Aboriginal title "as a right to the land itself." The *Delgamuukw* decision, written primarily by Chief Justice Antonio Lamer, now provides First Nations from unceded Aboriginal title territories with a strong legal foundation and consequently, an historic opportunity, to attain the justice that our ancestors have been struggling for centuries to achieve.

The purpose of this document is to promote discussion towards united common action among those First Nations that retain unceded Aboriginal title territories across what is now known as Canada.

Evolution of the Comprehensive Claims Policy:

The last time the Supreme Court of Canada ruled on whether or not Aboriginal title existed in Canada was 26 years ago (1973), when Canada's highest Court handed down a split decision in the *Calder* case. The Nisga'a Tribe lost the *Calder* case on a technicality, but the bench was split on whether Aboriginal title continued to exist - three Justices for, and three Justices against (a seventh Justice did not rule on the substantive issue and held against the Nisga'a for not properly following judicial procedures).

In response to the *Calder* decision, George Manuel, President of the National Indian Brotherhood, stated at the time:

> *. . . we do not regard this decision either legally or morally as a defeat for us in our fight for recognition of aboriginal title in Canada. Instead, after rather limited study, it would appear that the concurring Justices have grasped the question well and this would provide us with valuable legal precedents in future actions.*

The federal government responded to the *Calder* decision by way of a "statement of

policy", issued by the then Minister of Indian Affairs, Jean Chretien. The federal policy was to negotiate three types of claims; 1) Comprehensive Claims, 2) Specific Claims, and 3) Claims of another nature. The first two have become familiar to First Nations. The last category, originally intended to address Pre-Confederation claims in eastern Canada, fell off the radar screen for years, but has recently re-appeared as a catch-all for claims that do not fall within existing policy, but where politics requires some arrangement (ie., lands at Oka).

Over the years, the 1973 "statement of policy" has undergone a number of changes, the biggest of which involved separating Comprehensive Claims and Specific Claims into discrete policies with additional definition. The original statement on Comprehensive Claims was amended in 1981 when Canada released "In All Fairness". After receiving the report of the Task Force on Comprehensive Claims (aka the Coolican Report), this policy was changed again in 1986, and renamed the "Comprehensive Land Claims Policy"(emphasis added). The word "Land" was added to clarify that from the federal government's perspective, "self-government" was a separate issue to be negotiated in accordance with the federal 1985 Community-Based Self-Government Policy. The 1986 Comprehensive Land Claims Policy has essentially remained in effect as the federal negotiation position regarding Aboriginal title up to today, except "extinguishment" has been replaced with the notion of "certainty", as well as some changes to the process.

In September 1990, after the "Oka Crisis", then Prime Minister Mulroney announced in his famous "Four Pillars" speech in the House of Commons, which included a commitment to the "acceleration of the settlement of Native claims" by removing the arbitrary limitation of negotiation with only six Comprehensive Claimant groups at a time. (The "cap" on negotiations had been in place since the 1970's under the Trudeau government.)

This of course paved the way for Prime Minister Mulroney to sign the 1992 tripartite Political Accord establishing the British Columbia Treaty Commission, a regional Comprehensive Land Claims negotiation process. From 1973, the only "active Comprehensive Claims" negotiations were with the Nisga'a, and the Government of British Columbia had only agreed to come to that negotiation table in 1990. In the interim, a "waiting list" of 16 "federally accepted" Comprehensive Claims had formed in British Columbia, which, given the times, demanded some sort of political response.

It is interesting to note that the 1992 Political Accord was also signed during the period when Prime Minister Mulroney was seeking support from the First Nations for his post-Meech Lake constitutional amendment process, which culminated in the October 1992 "Charlottetown Accord."

The Political Accord paved the way for the establishment of the B.C. Treaty process, under the auspices of the B.C. Treaty Commission. In this process, the normal research requirements to prove title were waived, essentially lowering the threshold for entrance into negotiations.

Previous Failure to Obtain Policy Change:

Although the federal Native Claims policy was amended in1981 to provide for a separate policy relating specifically to Comprehensive Claims, and revised again in 1986, the federal objective has remained the same: do not recognize title, but just in case, require a complete cession and surrender of any rights that "may exist", in exchange for rights to be specified in the Final Agreement. Now, the Nisga'a Final Agreement refers to "exhaustively defining" section 35 rights which "empties out" section 35 of Aboriginal rights (including Aboriginal title) and replaces the section 35 Aboriginal rights with reduced, restrictive "treaty" rights. This is arguably more prejudicial to First Nations than the extinguishment clauses contained in the pre-*Delgamuukw* Comprehensive Land Claims Settlement Agreements.

In the past, it has been difficult, if not impossible, for First Nations holding Aboriginal title to maintain a common front when treating with the federal government. From the time when Jean Chretien, as Minister of Indian Affairs, first announced the federal land claims policy in 1973, it is no secret that the federal Comprehensive Land Claims policy has been a source of disagreement among First Nations.

The federal government has consciously used the policy as a centrepiece of their divide and rule strategy for decades. The federal limit of only negotiating with six "claimant groups" at a time was part of the federal strategy, to set precedents in claims agreements which others would then be forced to follow if they wanted to achieve a settlement. Even those six "claimant groups" that had initially agreed to negotiate under the policy during the 1970's made numerous attempts to get changes to the offensive aspects of the policy, but they were largely unsuccessful.

In fact, North of the 60th parallel many of the Aboriginal groups have now concluded settlements under the federal Comprehensive Claims policy, and ceded their Aboriginal title. It is south of the 60th parallel that the federal government has been trying to achieve the surrender of Aboriginal title, so that the provinces will then have clear title to lands and resources, but so far they haven't been as successful..

In 1985, the six "actively negotiating groups" formed the Comprehensive Claims Coalition to seek changes to the 1981 Comprehensive Claims policy, which was then being reviewed by the Mulroney government's Task Force to Review Comprehensive Claims Policy (Coolican Report). Unfortunately, most of the recommendations of this Task Force were not implemented. In December 1986, the Minister of Indian Affairs, Bill McKnight, announced the release of the "Comprehensive Land Claims Policy."

It wasn't until 1990, after the "Oka Crisis", that efforts were made by First Nations to once again press for changes to the 1986 Comprehensive Land Claims Policy. The Assembly of First Nations released its Critique of Federal Government Land Claims Policies, dated August 21, 1990. And in September 1990, the six "actively negotiating claimant groups" (Counseil des Atikamekw et des Montagnais, Council for Yukon Indians, Dene Nation-Metis Association of N.W.T., Labrador Inuit Association, Nisga'a Tribal Council, Tungavik Federation of Nunavut), issued a common position paper to the federal government entitled Key Components for Required Change to the Federal Policy on Comprehensive Land Claims.

The Minister of Indian Affairs, Tom Siddon, responded to these calls for change by stating that the Government of Canada did not plan any adjustment to the basic principles of the 1986 Comprehensive Land Claims Policy.

Specifically he said:

> *Our objective in negotiating comprehensive claims settlements is to clarify the rights of all Canadians to use the land, while also creating a new and better relationship between aboriginal peoples and the Government of Canada . . . I do not believe we should seek wording which deliberately misleads aboriginal people as to the nature of a settlement . . . . . It is not*

> *right to deceive people; a very clear exchange of rights is required, and making that exchange fit with the dominant property law system . . . requires a surrender of claims to some aboriginal rights on <u>most</u> of the land.* (emphasis added)

Of the six "actively negotiating claimant groups", three from North of the 60th have since largely reached final settlements under the terms of the 1986 Comprehensive Land Claims Policy, which have been subsequently ratified by federal legislation, while three from South of the 60th have not reached a final comprehensive claims settlement agreement. Of course, there are also over 20 "claimant groups" that have reached the Agreement-in-Principle stage under the British Columbia Treaty Process, which was established in accordance with the 1986 Comprehensive Land Claims Policy.

What has been outlined here by way of background, is that on the First Nations' side, comprehensive claim policy reform has been led largely by those original six "actively negotiating groups", with some coordination from those the federal government calls the "potential claimant groups".

Regrettably, their combined efforts have failed to significantly change the federal Comprehensive Land Claims Policy. However, from the *Calder* decision until now, the law has been vague on the existence aboriginal title in Canada and of course, this has not helped the First Nations efforts.

As a result of the *Delgamuukw* decision, it appears that an historic opportunity is at hand to once and for all eliminate the federal Comprehensive Claims Policy and enter into genuine Nation-to-Nation Treaty negotiations. This involves First Nations leaders and peoples to move from a "claims" mentality into an "ownership" perspective, but once again the burden is on the organizational capacity, discipline and ability of First Nations to change their thinking. The meeting between nations in Kamloops is intended to gather together First Nations that retain Aboriginal title, who are not involved in negotiations under the 1986 Comprehensive Claims policy to see if the political will is there to develop a consensus approach to taking on the federal government armed with a strong legal and moral foundation.

Chretien Government is Unyielding:

The federal response to the *Delgamuukw* decision has so far been a "business as usual" approach. For example, the Minister of Indian Affairs, Jane Stewart, was quoted in the Toronto *Globe and Mail* the day after the *Delgamuukw* decision as saying that it was a "positive affirmation" of Ottawa's approach to land claims, and added that "We don't need to overhaul our approach in any significant way [...] but there may be some things that we have to fine-tune".

Further confirmation of the business-as-usual approach can be found in the January 7, 1998, federal response to the Royal Commission on Aboriginal Peoples Final Report (the "Agenda for Action/Gathering Strength"). In her speech, the Minister of Indian Affairs, Jane Stewart, stated that "we must [...] continue to address Aboriginal land claims in a fair and equitable way." Then she went on to cite the Yukon and Nunavut comprehensive claims settlements as good examples. Both of these settlements were pre-*Delgamuukw* and involved the surrender of Aboriginal title.

Gathering Strength: Canada's Aboriginal Action Plan, under the heading of 'Renewing the Partnerships', states:

> *The federal government believes that treaties — both historical and modern — and the relationship they represent provide a basis for developing a strengthened and forward looking partnership with Aboriginal people [. . .] There are already examples of how governments and Aboriginal people can act co-operatively to address Aboriginal issues . [....] These examples include the British Columbia Treaty Process [...]*

There is more about the Comprehensive Claims Policy in the 'Strengthening Aboriginal Governance' section of the federal document:

> *Seven comprehensive claims settlements have been finalized since 1993, representing 66,000 square kilometers of land and approximately $230 million in financial settlements. With some 70 comprehensive land claims negotiations currently underway, <u>the government is focusing its efforts on maintaining forward momentum</u>*

> *Comprehensive Claims and Certainty*
>
> *The government of Canada is ready to discuss its current approach to comprehensive claims policy and process with Aboriginal, provincial and territorial partners in order to respond to concerns about the existing policy. The government will continue to work with its partners to explore possible methods that will provide certainty for all parties in comprehensive claims settlements.* (emphasis added)

The federal response to the RCAP Report was obviously not altered to take into account the clarification in law that the *Delgamuukw* decision now provides. Granted there was little time, given the Holiday Season and such, but the Minister's comments to the press and the lack of attention in her speech indicate federal avoidance of the recognition of Aboriginal title that now exists in Canadian law.

Delgamuukw **Framework for Negotiations:**

It is obvious to us that the *1986 Comprehensive Land Claims Policy* is now illegal in light of the *Delgamuukw* decision, and it is our understanding that the *Delgamuukw* decision affects all First Nations from unceded Aboriginal title territories, regardless of what region in Canada they are presently located. Clearly, given the federal reluctance to address the issue, we need to articulate, from a First Nations perspective, what the elements of a post-*Delgamuukw* First Nations-Crown negotiations framework would look like.

In our view, it is best for all those affected First Nations to come together, try and develop a consensus approach, instead of being isolated within our respective regions, and present a common front to the federal government, particularly those First Nations that do not want to cede, surrender or extinguish their Aboriginal title.

Our reading of *Delgamuukw* is that aside from speaking to the nature and scope of Aboriginal title, the Court also laid out a process for negotiation. There are four main elements to this process, briefly described as follows:

Step 1 - Establish the Facts Related to Aboriginal Title:

This involves assembling and assessing the factual evidence required to prove Aboriginal title. In eastern Canada, the federal government still provides financial support to First Nations so that they can gather and organize their evidence. In B.C., since the advent of the BC Treaty Commission, this step has been eliminated.

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This step involves determining whether past, present or proposed actions by other parties stand to infringe Aboriginal title, or interfere with the free exercise of rights flowing from that title.

Step 3 - Can the Infringement be Justified?

At this stage, offending practices, regulations, legislation and actions need to be reviewed and justified.

Step 4 - Resolution:

The Court stated clearly that Aboriginal title can be reconciled with the Crown's presence without requiring extinguishment (except in exceptional cases). This last stage, then, focuses on reconciliation and remedial measures, with the objective of recognizing and affirming Aboriginal title. This could involve compensation for past actions; agreements on consultation-consent; new arrangements for jurisdiction over lands & resources, resource revenue sharing, etc. etc.

Certainly this process, as outlined by the Supreme Court, bears little or no resemblance to the process which now prevails under Canada's Comprehensive Claims policy. There is a framework there to implement, the question remains, is there the political will on the part of First Nations, and on the part of governments?

Differing Interests Among First Nations:.

Delgamuukw affects indigenous nations in different ways, depending on their fact situations, and on their current circumstances. In general terms, the following groupings are evident (although there is some overlap within each):

- Numbered Treaties: Although there are clear differences between each of the numbered treaties, there are significant similarities (ie., effect of oral history, spirit & intent vs. extinguishment clauses, NRTA, Aboriginal rights north of 60, etc.). As well, in many numbered treaty areas there are existing processes intended to address treaty issues (ie., the Saskatchewan Treaty Commissioner's office), which legitimately would appear to include matters such as the implications of *Delgamuukw.*

- Modern Day Land Claims Agreements: Those nations who have signed agreements since the 1973, when the policy on Native Claims was introduced, are linked together by similarities in the terms and structure of their agreements, and in the cede & release clauses contained in them. They are also actively engaged with governments on matters related to implementation.

- Actively Negotiating Nations: Those Nations who are currently negotiating under the prevailing federal Comprehensive Claims policy, in B.C., the NWT, and Quebec. These nations share a common experience in that they are negotiating under the prevailing policy and are actively engaged in discussions with federal and provincial governments related to title. These discussions provide an opportunity for direct discussion of Delgamuukw implementation. For instance, in B.C., those First Nations involved in the B.C. Treaty Commission process have been engaged in tripartite discussions on the impact of Delgamuukw since the spring of 1998.

- Pre-Confederation Treaties: There are numerous Pre-Confederation Treaties which dealt with military, economic or political issues, but which did not surrender land. This is particularly true in central & southern Ontario, Quebec, and the Atlantic. Title in these territories remains unceded.

- Non-Parties to Treaty: There are a number of individual First Nations in the area between Ontario and B.C. whose territory lies within the boundaries of a 'land cession' treaty, but who did not participate in the treaty and therefore retain Aboriginal title. For instance, the Cree of Lubicon Lake, Alberta (Treaty #8); the Dakota of Manitoba and Saskatchewan; the Ojibway communities of Pic River, Pic Mobert, Long Lac #58, Pays Plat (Robinson Superior Treaty, Ontario); and Beaverhouse (Treaty #9). There are no doubt other communities in this situation as well. In some cases, these First Nations have submitted claims of Aboriginal title which were rejected.

- Nations Not Negotiating: Those nations who are not engaged in negotiations with Canada and/or the provinces relating to the disposition of Aboriginal title find themselves in a different situation. (This grouping includes nations with Aboriginal title who have never entered into any treaty agreements with the Crown and lie outside of treaty areas, as well as some of those nations who fall into the two previous categories described above.) They are not engaged in any substantive dialogue with other governments to address matters related to title and interests in land (other than the courts) and therefore have no forum in which to consider the implications of *Delgamuukw* on their circumstances.

Each of these groupings of First Nations are impacted by *Delgamuukw* in different ways, and have different interests and circumstances to consider. For the purposes of this discussion, we have focused on the needs and interests of those nations who continue to hold Aboriginal title, but who are not currently negotiating under Canada's 1986 Comprehensive Claims policy.

Rationale for Inter-Tribal Coordination:

There are good reasons why First Nations from unceded Aboriginal title territories should come together and engage the federal government on the Aboriginal title issue. The old adage of strength in numbers is true. Those who have years of negotiating experience with the federal government can confirm that they have not been able, thus far, to move them from their position. Even the Federal fact-finder on Extinguishment, Judge Hamilton, noted in his recent 1995 report that; "[t]he present policy has not changed significantly in the last 230 years."

So it is no exaggeration to say that the *Delgamukw* decision really does provide an historic opportunity.

One only has to look at the growing list of reports that have been ignored or placed on the shelf to see that it is going to take a major effort to get the federal government to move toward honour, justice and good faith negotiations regarding our Aboriginal title.

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- Canadian Human Rights Commission Annual Report (1991)
- Liberal Party of Canada Redbook & Aboriginal Platform (1993)
- Hamilton Report on Alternatives to Extinguishment (1995)
- Royal Commission on Aboriginal Peoples Final Report (1996)
- Canadian Human Rights Commission Annual Report (1997)

Potential Themes for Communications Strategy:

-Federal Liberal Red Book commitment to an independent claims process for ALL types of claims (contrary to subsequent on "specific" claims only). Inaction on *Delgamuukw* betrays the letter and spirit of these commitments.

-UN quality of life index rates Canada #1, but when same criteria are applied specifically to First Nations, they rank among the 3rd world. There is no evidence that agreements such as the Nisga'a will substantively contribute to closing this gap. On the other hand, there is evidence that extinguishment and continued denial of property rights will actually prolong this inequality. [this needs more work]

-Human Rights - Recognition of the property rights of indigenous nations are a human rights issue. Comprehensive claims policy does not conform to prevailing and emerging human rights standards. It would be good to compare CC policy to the UN Conventions on Social, Economic and Political rights, also the draft Declaration on Indigenous rights and ILO Convention 169 (the latter which Canada has still not ratified).

-Equality - Application of *Delgamuukw* is all about obtaining true equality for indigenous nations within Canada. This would attack Reform & BC Liberal's preoccupation with "equal rights" and their bogeyman of Canadian apartheid. How would the Reform Party or the BC Liberal party feel if the state unilaterally nationalized all of their member's property without consent and without compensation, then offered to settle at 5 cents to the dollar? Recognition of indigenous property rights are a key to obtaining real equality.