Can forest harvesting and the practice of Aboriginal rights exist compatibly on the landscape?

By

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We accept this thesis as conforming

to the required standard

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Figure 1: Dasiqox Biny (Taseko) Lake (part of the Claim Area¹).


¹ Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at page 11 (f)
Abstract

Colonization and settlement have had a significant impact on the land base in British Columbia (BC). Forestry legislative changes, the mountain pine beetle epidemic and Aboriginal law developments over the past 30 years have magnified land management challenges in the Cariboo Region. Governments follow a court-developed consultation-engagement framework with First Nations when contemplating natural resource decisions. This study investigated the question: Can forest harvesting and the practice of Aboriginal rights exist compatibly on the landscape? I address this question by interviewing forest industry and local governments and by exploring the perspective of Tsilhqot’in people. Additional questions include: Have BC and First Nations moved closer to “reconciliation?” What does “unjustifiable infringement” look like? And what constitutes the ability to “balance societal and Aboriginal interests” on the ground? Study results confirmed the continuing complexity of an evolving legislative landscape and formed the basis for recommendations to improve good land stewardship, which is recognized as a shared goal by all of the interests in Tsilhqot’in territory.

Keywords: Aboriginal rights, Tsilhqot’in Nation, consultation, unjustifiable infringement, forest harvesting and mountain pine beetle.

2 Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73
Acknowledgements

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<td>AAC</td>
<td>Allowable Annual Cut</td>
</tr>
<tr>
<td>BC</td>
<td>British Columbia</td>
</tr>
<tr>
<td>BCCA</td>
<td>British Columbia Court of Appeal</td>
</tr>
<tr>
<td>BCSC</td>
<td>British Columbia Supreme Court</td>
</tr>
<tr>
<td>CCLUP</td>
<td>Cariboo-Chilcotin Land Use Plan</td>
</tr>
<tr>
<td>FLNR</td>
<td>Ministry of Forests, Lands and Natural Resource Operations (British Columbia)</td>
</tr>
<tr>
<td>MARR</td>
<td>Ministry of Aboriginal Relations and Reconciliation (British Columbia)</td>
</tr>
<tr>
<td>MOF</td>
<td>Ministry of Forests and Range (British Columbia)</td>
</tr>
<tr>
<td>SCC</td>
<td>Supreme Court of Canada</td>
</tr>
<tr>
<td>SCR</td>
<td>Supreme Court Report</td>
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<td>SCSC</td>
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<td>WLRTSA</td>
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ABORIGINAL RIGHTS AND FOREST HARVESTING

Introduction

The Chilcotin Plateau, located in the interior of BC within the Cariboo Region, is home to the Tsilhqot’in Nation (Tsilhqot’in), described spatially in Figure 1, which indicates the location of the six Tsilhqot’in communities (Yuneset’in, Xeni Gwet’in, Tsi Del Del, Tl’esqox, Tl’etinqoxt’in, and ?Esdilagh). The Chilcotin Plateau is located within the Williams Lake Timber Supply Area (WL TSA), which has been dramatically impacted by the mountain pine beetle (MPB) for approximately the past 30 years. The lodgepole pine, being the preferred species of the MPB, represents 63% of the timber harvesting land base in the WL TSA (Snetsinger, 2007). A portion of the Chilcotin Plateau is also subject to the BCSC3, BCCA4, and SCC5 court decisions, which affirmed proven Aboriginal rights to a specific area, as well as the recent historic declaration of Aboriginal title to the six Tsilhqot’in communities (known as the Claim Area6). It is assumed that a healthy forest ecosystem is required for the practice of Aboriginal rights, in the form of food, spiritual, ceremonial, and cultural uses, and more specifically the gathering of plants and the hunting of wildlife. What, then, will be the effect of the pine beetle infestation and forest harvesting on the Tsilhqot’in’s traditional practices?

Location of Research Study in BC

Figure 2 indicates the location of the Tsilhqot’in communities Yunesit’in (Stone), Xeni Gwet’in (Nemaiah), Tsi Del Del (Alexis Creek), Tl’esqox (Toosey), Tl’etinqoxt’in (Anaham), and ?Esdilagh (Alexandria). Anthropologist Robert Lane spent a period over four years (1948 to 1951) with the Tsilhqot’in gathering information for his 1953 thesis Cultural Relations of the

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3 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700
4 William v British Columbia, 2012 BCCA 285
5 Tsilhqot’in Nation v British Columbia, 2014 SCC 44
6 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at page 11 (f)
Figure 2: Tsilhqot’in: (Anaham, Alexis Creek, Stone, Toosey, Alexandria, and Nemaiah)

Chilcotin Indians of West Central British Columbia (Lane, 1953, p. i). The BCSC decision valued this work in the trial, noting that his “dissertation is an important contribution to the understanding of Tsilhqot’in people.”7 This map is part of Lane’s work on the Tsilhqot’in, building on his 1953 thesis (Lane, 1981, p. 402). The BCSC decision considered Lane’s work a “valuable record against which to consider the oral histories adduced at trial.”8

Research Methodology

Research Objectives and Questions

The main research question of this study is: Does the practice of accelerating the harvest of beetle-infected wood affect the ability of First Nations to practice their Aboriginal rights on the Chilcotin Plateau? With Aboriginal law being defined and re-defined through the courts regularly, the answer to this question is evolving. This research explored the burgeoning compendium of Aboriginal law regarding Aboriginal rights and title (Aboriginal Interests) and its relevance and applicability to the Tsilhqot’in. It also investigated the impact of accelerated harvesting due to the effects of the MPB on those Aboriginal Interests.

Evolving jurisprudence on Aboriginal Interests has been significant and will be discussed in greater detail within this thesis. Through the courts, various frameworks and tests have been laid out for First Nations and governments to meet when engaged in consultation on proposed activities that could impact the land base. Yet today there remain unanswered questions that require further research:

- Do governments understand and are they following the consultation framework that the Canadian courts have developed for engaging First Nations on proposed decisions?

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7 Ibid., at para 334
8 Ibid., at para 179
The courts have agreed that the following examples are compelling and substantive legislative objectives: “agriculture, mining, forestry and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, building of infrastructure and settlement of foreign populations”9. With this in mind:

- How is an activity determined to have unjustifiably infringed on claimed, proven, or treaty rights? For example, given that the MPB has led to increased and ongoing forest harvesting, what event triggers consideration of an unjustifiable infringement of Aboriginal Interests on the Chilcotin Plateau?

- The “Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims”.10

- Has the Crown been able to achieve this balance and justify the activity within a defendable land-management decision-making process? What balance of societal interests has been achieved with economic gain, environmental protection, and the practice of Aboriginal rights? Do the factors considered in balancing societal and Aboriginal Interests change over time?

- With Aboriginal title as a distinct and collective right, and given that the land must be developed in a manner that ensures future generations will be able to enjoy the special qualities of the land, what points should a rationale to justify development address?11

- Does forestry legislation adequately address First Nations concerns, such as the potential for multiple forestry decisions to have cumulative effects on the forest ecosystem?

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9 Delgamuukw v British Columbia, 1997 3 SCR 1010 at para 165
10 HaHa Nation v. British Columbia (Minister of Forests), 2004 SCC 73 at para 45
11 Tsilhqot’in Nation v British Columbia, 2014 SCC 44
Has the MPB epidemic changed forestry practices? Could management of the MPB have been different? Does climate change continue to be a critical factor for consideration? What does the future of the forestry economy look like in the Cariboo Region?

Have the provincial government and First Nations moved closer to reconciliation? Have governments and First Nations paid attention to the courts’ strong encouragement for all parties to negotiate rather than litigate?

In pursuit of answers to these questions, I investigated the perceptions of people with differing interests on the Chilcotin Plateau. My analysis of these findings provided evidence from which I developed recommendations to improve the provincial government’s processes for decision making and policy development.

**Methodological Approach and its Justification**

This was an exploratory research project requiring a qualitative methods approach. I conducted semi-structured interviews with staff from the provincial government and the forestry industry, which are the major non-Aboriginal interests in the Tsilhqot’in territory. As little research has been done in this area, I triangulated findings gathered through interviews, document analysis, and participant observation. Several ideas are expressed in the public and scientific domain as to the impact of forest harvesting on Aboriginal Interests, which complicated the research somewhat. The continuing evolution of Aboriginal law and the courts’ development of a consultation framework including the justification and infringement test for assessing impact on the practice of Aboriginal Interests complicated the project further. These factors combine to create uncharted territory for governments and industry in the business of extracting resources. Previously, the forestry industry was only regulated by provincial statutes.
and did not have to consider these constitutional rights (Constitution Act, 1982, SS 35). Moreover, the action of infringement looks different to different people. The chosen participants and the structure of the interview process were intended to capture the diverse theories and perspectives on what a justified infringement of Aboriginal Interests might look like. A pitfall I identified by using theory triangulation was the potential for significant increase to the scope of my project. However, the advantage, as pointed out by Denzin (as cited in Flick, 2007, p.10), is that theory triangulation supports the exploration of alternative explanations and prevents close-mindedness to the topic.

**Data Triangulation**

Given the complex, trans-disciplinary nature of this research, a data triangulation using a purposive sampling strategy was most effective. Newing indicates the importance of triangulation, especially in “sensitive issues” (2011, p. 116). For this study, the question of who is responsible for changes in forest ecosystems is the sensitive issue; declining moose populations provide an example of an indicator of a negative effect in harvested forest ecosystems. In previous discussions with First Nations people, they have typically indicated that non-native hunters, poachers, and the logging industry are responsible for this decline, while a government biologist typically suggests First Nations are hunting moose to extinction as they engage in unregulated moose hunting.

**Methods of Data Analysis**

The data collected from First Nations, local and provincial government natural-resource-management staff, and the forest industry provided an opportunity for me to gather diverse information supporting multiple viewpoints. Prior to interviewing, I simplistically categorized these groups into the following: First Nations (focused on Aboriginal Interests), provincial
government (focused on economics and stewardship), forest industry (focused on profit), and the Mayor and Council of the City of Williams Lake (who are peripherally informed). However, I constructed the questions in Appendix A thoughtfully so that the data collected would provide insights into the complexity of this research. The data also allowed me to identify information gaps which I had not identified in the literature review, as they were of an operational nature.

I classified the interview questions according to the following interview group themes: (a) Aboriginal law, (b) consultation, (c) forestry legislation, (d) cumulative effects (multiple forestry decisions), (e) forest health (ecosystem) stewardship practices, (f) forestry economics, and (g) mountain pine beetle epidemic. These themes helped in the summation of the interview results. Two additional themes emerged from the interviews, which I added to the interview summation results: (h) historical events, and (i) relationships between First Nations and governments. Key quotes from the interviews were included in the interview summations within the Results section. By following a defined process, I ensured integrity in the validity of the data and improved research reliability. As the author, I asked the questions while an assistant typed the interview answers; these were finalized within 24 hours after each interview, resulting in a higher level of validity.

**Conflict of Interest**

Project participants in groups 3 and 4 are government consultation staff and decision makers. All of them are my colleagues and some of them report directly to me. To address this potential bias, I had a third-party interviewer conduct the interviews with groups 3 and 4. This interviewer is a respected natural resource consultant who completed in confidence the invitations, interviews, and data compilation, supplying me the data interview results only. The
same assistant who recorded the other interview groups assisted with the recording of interview groups 3 and 4.

**Data Collection—Project Participants and Interview Structure**

Key participants were identified for either the individual, semi-structured interview or the focus group interview. The interviews complemented my ongoing reading of peer-reviewed articles as well as governmental and non-governmental reports. Table 1 shows the intended project participants, which would have included Tsilhqot’in First Nation community members and Tsilhqot’in First Nation community members employed in the forestry industry, provincial government statutory decision makers and technical staff, representatives of the local forestry industry, and the Mayor and Council of Williams Lake.

Table 1: Participant groups and interview format

<table>
<thead>
<tr>
<th>Participants</th>
<th>Interview format</th>
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<tbody>
<tr>
<td>1   Tsilhqot’in Community elders</td>
<td>Semi-structured interview</td>
</tr>
<tr>
<td>2   Tsilhqot’in members involved in forestry</td>
<td>Focus group</td>
</tr>
<tr>
<td>3   Forestry statutory decision makers</td>
<td>Semi-structured interview</td>
</tr>
<tr>
<td>4   Government staff engaged in forestry consultation on forestry activities</td>
<td>Semi-structured interviews</td>
</tr>
<tr>
<td>5   Forestry industry representatives</td>
<td>Semi-structured interview</td>
</tr>
<tr>
<td>6   Mayor and Council of the City of Williams Lake</td>
<td>Semi-structured interview</td>
</tr>
</tbody>
</table>

As this study involved human participants and, in particular, interviews with Tsilhqot’in community members, I completed an ethical review. This included initial contact with the
Tsilhqot’in communities I planned to visit and interview, to determine whether there were existing community ethical codes such as Ownership Control, Access, and Possession.

Indigenous Knowledge is sacred to First Nations communities because individuals and groups within a community can be vulnerable and the First Nations leadership within a community is not always obvious. Therefore all participants were interviewed with the exception of those in groups 1, 2, and 6. I was not able to secure an interview with the Mayor and Council despite several invitations and indications of interest. Non-participation by groups 1 and 2 (Tsilhqot’in Community elders and Tsilhqot’in members involved in forestry) was not unexpected. I relied instead on Tsilhqot’in leadership discussions with the media, on public websites, and published documents. I discuss the reasons for the Tsilhqot’in’s decision to not participate in the Results section.

**Political Significance of Research**

The results of this research could influence and improve policies regulating the natural resource sector of BC. With the evolution of Aboriginal law and the continued importance of BC’s forestry economy, it is critical for decision makers to know they can rely on relevant and appropriate policies and practices that support defensible decision making. I demonstrate that this research study has provided critical insights as to whether the legal *infringement and justification test* has been applied appropriately. This study also provides nine key recommendations for BC to consider in improving policies that address both Aboriginal law and forest and land stewardship.
Literature Review

The literature review covered a wide span of areas, topics from social sciences and Aboriginal law to forestry economics and biology. Literature sources came from government publications and policies, scientific forestry academic journals, legal court decisions, and ethno-historical reports. My research explored First Nations’ perspectives on the impact of climate change on forests and the health of the forests that surround their communities, as well as the potential for rejuvenating forest health. The literature review focused on topics including the Tsilhqot’in’s historical presence on the land and relationship with the forest, the pine beetle epidemic, and responses from First Nations and stakeholders, which included provincial and local governments, and the forest industry.

My research into how First Nations have adapted and their resilience to the changing environment informed my investigation into First Nations’ responses to the recent mountain pine beetle epidemic. My research explored First Nations’ perspectives on how co-management of the environment could be implemented, especially in a time of climate change. My research investigates whether the provincial government and First Nations have attempted this, and whether there has been success in exploring the opportunity to co-manage decisions that affect the environment.

Tsilhqot’in Nation Proven Rights and Aboriginal Title

Within the Chilcotin Plateau, the BCSC court decision declared that the Tsilhqot’in hold proven Aboriginal rights throughout a specific area, stating:

The Tsilhqot’in people have an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual,
ceremonial, and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work. Tsilhqot’in people have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood. These rights have been continuous since pre-contact time which the Court determines was 1793.\textsuperscript{12}

The proven rights are defined by a boundary commonly known as the Brittany Triangle (aka Tachelach’ed) and Trapline Territory\textsuperscript{13} (known as the Claim Area), as explained in Figure 2. The BCSC court only offered an opinion of where Tsilhqot’in Aboriginal title may exist inside and outside the Claim Area.\textsuperscript{14} The BCCA affirmed the declared proven rights for the Tsilhqot’in but did not agree with the BCSC’s assessment of the geographic assessment of Aboriginal title.\textsuperscript{15} The Aboriginal title component prompted an appeal by all parties, which resulted in the SSC hearing on November 7, 2013; on June 26, 2014, the SCC declared Aboriginal title of the Tsilhqot’in to a specific area.\textsuperscript{16} This SCC decision has a significant impact on jurisdiction, Aboriginal title, and provincial government decision making as well as on treaty and non-treaty agreement negotiations. Figure 3 is the map posted on FLNR’s Fish, Wildlife and Habitat website indicating where the declared Aboriginal title and the areas subject to strong claims of Aboriginal title are located to inform hunters, anglers and fishers.

\begin{enumerate}
\item Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at page iv
\item Ibid., at para 39(f)
\item Ibid., at page iii
\item William v British Columbia, 2012 BCCA 285 at para 240
\item Tsilhqot’in Nation v British Columbia, 2014 SCC 44 at para 153
\end{enumerate}
Figure 3: Posted on FLNR’s Fish, Wildlife and Habitat website – Aboriginal title map

Figure 4: Brittany Triangle (aka Tachelach’ed) and Trapline Territory (Claim Area)
The lighter green areas (existing continuously below the dark green boundary) is the area
confirmed as the proven rights to the Tsilhqot’in while the dark green boundary is the area
declared as Aboriginal title to the Tsilhqot’in.

Note: From the Tsilhqot’in Nation v British Columbia, 2014 SCC 44, p. 76. Copyright 2014 by
the Supreme Court of Canada. Adapted with permission.
Historical Events Leading to *Tsilhqot'in v BC (2014)*

The events that led to the SCC\textsuperscript{17} decision started several decades ago. The Carrier Lumber Co. was granted a forestry licence in 1983, an approved Forest Development Plan in 1989, and an approved cutting permit in 1990 allowing forest harvesting to occur in the Trapline Territory.\textsuperscript{18} In 1989, the Tsilhqot’in commenced legal action, seeking injunctions against Carrier’s desire to harvest in the Trapline Territory.\textsuperscript{19} In 1990, while Carrier agreed to not operate in the Trapline Territory, they turned their interest instead to the Brittany Triangle.\textsuperscript{20} This prompted 100 Tsilhqot’in members to establish a blockade to prevent improvements to Henry’s Crossing bridge in anticipation of this forest harvesting. As expressed in the trial, with 40 Tsilhqot’in members without housing and therefore argued it was impossible for them to accept forestry revenue and wood products being taken from their land\textsuperscript{21}. As well, they predicted forest harvesting activities would interfere with their practice of Aboriginal rights to hunt and trap. The blockade ceased on May 13, 1992 when Premier Mike Harcourt declared that no forestry activities would occur in the Xeni Gwet’in’s traditional territory without their consent, including the Claim Area.\textsuperscript{22} In response to Premier Harcourt’s declaration, the Xeni Gwet’in prepared no-harvesting community plans. However, in 1997, the Ministry of Forests (MOF) approved a forestry license in the Claim Area suggesting differing interpretations by both the Xeni Gwet’in and BC in understanding the Premier’s announcement.\textsuperscript{23} In 1998, the Xeni Gwet’in responded by amending their original court action to seek “Tsilhqot’in Aboriginal title, infringement of

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 at para 60 and 61
\item Ibid., at para 63 and 64
\item Ibid., at para 69
\item Ibid., at para 25
\item Ibid., at para 70, 71 and 72
\item Ibid., at para 71 and 78
\end{enumerate}
\end{footnotesize}
Aboriginal rights and title, compensation for breach of fiduciary duty, declaratory orders concerning issuance and use of certain forest licences and injunctions restraining the issues of cutting permits.” Twenty-five years later, on June 26, 2014, the SCC responded to these actions by releasing their decision, which declared Aboriginal title to the Tsilhqot’in.

**Argument for Oral Histories as Court Evidence in Tsilhqot’in v BC (2007)**

The ethno-historical information presented at the BCSC trial for the Claim Area and surrounding areas was recorded by Euro-Canadians and confirms the importance of including oral Tsilhqot’in traditional knowledge as critical in “completing the picture.” Chief Justice Vickers referred to a previous ruling made in the BCSC on the consideration of the admissibility of oral history evidence in court proceedings where he:

established a procedure for the preliminary examination of lay witnesses who intended to offer oral history evidence. The purpose of that procedure was to assist the court in assessing the necessity and reliability of oral history evidence and ultimately, its admissibility;

He stated further in the more recent 2007 BCSC ruling that:

The goal of reconciliation can only be achieved if oral tradition evidence is placed on an equal footing with historical documents. Oral tradition evidence ‘would be consistently and systemically undervalued’ if it were never given any independent weight but only used and relied upon where there was confirmatory evidence: *see Delgamuukw (S.C.C.*)

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24 Ibid., at para 68
25 Ibid., at para 205
26 Ibid.
27 William et al. v British Columbia et al., 2004 BCSC 148
28 Ibid., at para 23
29 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at para 152
Woodward & Company made a compelling case for oral history to be considered in the BCSC case, arguing that “the historical record in this case was, however, written not by the Tsilhqot’in but by Europeans . . . to judge history based on only one perspective, the non-Aboriginal perspective, is another form of colonization” (Campo, 2008, p. 136). In conclusion, Woodward argued that “reconciliation is a bridge between the two and recognizing and giving weight to both perspectives and histories is imperative in moving forward. Thus, the voices of the elders should be heard” (p. 136).

An example of this is the Tsilhqot’in creation story. The legend of Lhin Desch’osh is core to understanding the Tsilhqot’in’s claim to certain geographic areas, in particular defining the western boundary of Tachelach’ed. The courts gave this and other legends great importance when making final conclusions on where the proven Aboriginal rights were located and an opinion of Aboriginal title. The Tsilhqot’in legend of Ts’il?os and ?Eniyud is another important legend that defines significant geographic landmarks and their connection to the Tsilhqot’in people. Ts’il?os and ?Eniyud were married and separated, each taking children with them. They were all transmogrified into the existing landscapes of today: Ts’il?os holds authority over the Claim Area, while ?Eniyud sculpted the land to create Xeni and Ts’uni?ad (Tsuniah Valley), including the snow mountains of Xeni Dzelh (Konni Mountain), Gweq’ez Dzelh (Mount Nemaih), and Ts’uni?ad Dzelh (Tsuniah Mountain). Both Ts’il?os and ?Eniyud “are charged with the responsibility of protecting and watching over Tsilhqot’in people forever.”

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30 Ibid.
31 Ibid., at para 655
32 Ibid., at para 655
33 Ibid., at para 660
34 Ibid., at para 660
The BCSC decision determined contact between the Tsilhqot’in and Europeans occurred in 1793. Court decisions have determined the dates that support the legal framework for governments to follow in assessing the location of individual First Nations’ Aboriginal Interests. The SCC decision clarified the test for Aboriginal title indicating the requirement of First Nations Consent, noting that if no Consent is obtained, BC is obligated to prepare a rationale justifying the infringement in support of approving an activity that overlaps a strong Aboriginal title claim.

History of the Forestry Industry in BC

The evolution of Aboriginal case law parallels the historical growth of the exploitation of BC’s forests. From the first recorded European use of timber in BC in 1778 by Captain Cook and the first recorded export of timber in 1788 to China by Captain Meares, BC has had a long and pronounced history in the timber industry (Reid, 1985, p. 1). Integrated forest management was more the focus between 1978 and 1988. As recommended by BC’s fourth Royal Commission report, licencees were required to carry out silviculture obligations after harvesting; ensure replanting included ecologically suitable and commercially valuable trees; and push for diversification in the forestry industry through the creation of different types of licences (FLNR, 2013, p. 6). Prompted by the 1987 United Nations Brundtland Commission, which “emphasized the interdependence of environmental integrity and economic development in meeting the needs of current society and future generations,” forestry legislation began to focus more heavily on sustainable management (p. 7). In the 1990s, the provincial government committed to negotiating treaties with First Nations and developing a First Nations consultation policy (p. 7).

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35 Ibid., at page v
36 Tsilhqot’in Nation v British Columbia, 2014 SCC 44 at para 90
In 1995, the Forest Practices Code of BC Act (the Code) established “new environmental standards for commercial forestry activities” (p. 7). It also prompted the initiation and completion of one of the first land use plans in BC, called the Cariboo-Chilcotin Land Use Plan (CCLUP) (Government of BC, 1995, February).

Innovative legislation was introduced with the 2003 Forestry Revitalization Act, which committed to timber reallocation by mandating that major licensees return 20% of their replaceable logging rights. This in turn was partially redistributed to small tenure holders, community forests, and woodlots. There was also support for the new direct-award policy for forestry opportunities for First Nations (FLNR, 2013, p. 8). New forestry legislation was introduced in 2004 to supplant the Code, and still exists today: the Forest and Range Practices Act (FRPA). (Ministry of Forests [MOF], 2004, January 23). In brief, the main purpose for both these Acts (FRPA and the Code) was to set out “the requirements for planning, road building, logging, reforestation and grazing” (FLNR, n.d.c). The significant difference between these Acts is that the Code was prescriptive to industry, while FRPA is results-based, depending on professional reliance.

**How FRPA Addresses Biodiversity**

What is biodiversity? A pamphlet titled *Biodiversity in British Columbia* emphasizes BC’s unique biodiversity as compared with the rest of Canada, and the importance of maintaining biodiversity due to its connectedness with ecosystems (Ministry of Environment, Lands and Parks, n.d., p. 2). BC has a rich variety of habitats, which include forests, grasslands, meadows, rivers, wetlands, wetlands, rivers, intertidal zones, and sub-tidal zones. Of BC’s total land base of 95 million hectares, 60 million hectares is forested (FLNR, 2013, p. 2). This
emphasizes the need to pay attention to forest biodiversity: it occupies vast tracts of land and has many connections to diverse species (flora and fauna) and ecosystems within the forests.

It has been a challenge to have biodiversity afforded the attention it deserves. As Reed Noss, Conservation Ecologist, laments in his paper, “biodiversity is presently a minor consideration in environmental policy” (Noss, 1990, p. 355). Noss explains that “if measurable indicators” could be developed to assess the “status of biodiversity over time,” the connections to biodiversity conservation and long-term ecosystem research would be more meaningful and relevant (p. 355). The Forest and Range Evaluation Program (FREP) has a comprehensive Protocol for Stand-level Biodiversity Monitoring, which explains how the Protocol’s indicators connect biodiversity and wildlife—a truly integrated process (FLNR, 2009). FREP’s purpose and objectives are indicated in greater detail in Appendix B. In supporting FREP, BC seems to be partially addressing Noss’ concern with the lack of “measurable indicators” (1990, p. 355)—that is, by making the monitoring of the effects of forest management on biodiversity a meaningful exercise.

**Do FRPA’s Values Measure Up to Aboriginal Rights?**

The distinct differences between FRPA and the Code are discussed within the Malkinson thesis on evaluating FRPA (2011), which states that industry must address 11 values in their Forest Stewardship Plans, including biodiversity, cultural heritage, fish (riparian and watershed), forage and associated plant communities, recreation, resource features, soils, timber, visual quality, water, and wildlife (FLNR, n.d.a). One challenge in the FRPA framework is the lack of defined outcomes for some values. Another is that, where there are measurable outcomes defined for some of the values, there is no good understanding of how to measure these outcomes.
ABORIGINAL RIGHTS AND FOREST HARVESTING

(Malkinson, 2011, p. 76). If there are no ways to measure outcomes based on definitive science, how is industry to develop innovative strategies, as encouraged in FRPA, to meet outcomes?

Most of these values appear to be linked in support of the practice of Aboriginal rights, which, as noted on BC’s website, “may include hunting, fishing, plant gathering and use of wood for domestic purposes” (BC, n.d.a, p. 9). The management of the riparian value is seen as the most controversial FRPA value when consulting with First Nations. Riparian area management addresses water, fish, wildlife, and biodiversity, all of which are intricately connected to the practice of Aboriginal rights. Within the WL TSA, 430,000 hectares is covered by both the BCSC and BCCA court decisions, which affirmed proven rights and declared Aboriginal title to the Tsilhqot’in, highlighting the importance of addressing riparian area management.

First Nations are concerned about the size of riparian management areas, as they are crucial in supporting critical wildlife corridors and maintaining the overall connectivity of untouched forest (wildlife habitat) between forestry-cutting permit areas. The successful management of the riparian value requires a broad understanding of the cumulative effects of multiple forestry decisions on the ground. Compared to the early days of the 1900s, when BC forestry legislation focused simply on managing the allocation of the economic value of the timber (FLNR, 2013), today’s forestry legislation is broadly focused on “sustainable management,” as evidenced by the 11 FRPA values. FREP’s Mission, as a monitoring tool for FRPA, is laudable, as it strives “to be a world leader in resource stewardship monitoring and effectiveness evaluations; communicating science-based information to enhance the knowledge

37 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700
38 William v British Columbia, 2012 BCCA 285
of resource professionals and inform balanced decision making and continuous improvement of British Columbia’s forest and range practices, policies and legislation” (FLNR, n.d.e).

A Key Forest Biodiversity Component: Wildlife

FREP’s Biodiversity webpage states that “the goal of stand-level biodiversity monitoring is to determine if the present policy of retaining wildlife tree patches and riparian reserves is achieving the desired levels and types of structures to maintain species diversity” (FLNR, n.d.a). The continued support of FREP’s mandate is critical, especially given BC’s news releases indicating serious moose population declines in several areas of BC (FLNR, 2013, April, p.1). Within the Cariboo Region, west of the Fraser River (Chilcotin Plateau), surveys indicate a 45% moose population decline since 2001 and that the “bull to cow ratios are stable and within provincial objectives, suggesting that the licensed harvest of bull moose has not been responsible for the declines in population” (p. 3). The licensed harvest is known as the Limited Entry Hunt (LEH), a government-regulated hunt for non-First Nations resident hunters. First Nations have a constitutional Aboriginal right to hunt wildlife within their traditional territory with unlimited restrictions unless there is a “conservation” concern. This right was well defined in the SCC decision as a descending hierarchal right to wildlife: (a) conservation; (b) First Nations sustenance; and (c) non-First Nations commercial or recreational harvesters.\(^{39}\) In response to the moose decline, FLNR commits to further decreasing the LEH in addressing this serious issue, and to hiring “an independent moose expert to assess the influence of factors responsible for the moose population decline” (FLNR, 2013, April, p. 4). The Tsilhqot’in publicly expressed concern with the moose population decline, as members rely heavily on moose for “food, social or ceremonial purposes” (Pynn, 2012).

\(^{39}\) R v Sparrow, 1990 1 SCR 1115(i)
Moose experts McNay, Sutherland, McCann, and Brumovsky were hired to produce a report to explore the factors attributing to the moose population decline. The report points out that the “paucity” of survey information inhibits the ability to make strong conclusions on the declining moose population (McNay et al, 2013, p. i). However, the report does list the main factors influencing the moose population declines and provides recommendations to FLNR for future management (p. 54).

McNay et al. draw a strong conclusion between the MPB outbreak’s effect on forest mortality and the increased vulnerability for at least some of the moose population “because: (1) moose may have had to alter habitat use patterns in response to the tree mortality or (2) there may have been increased access from MPB salvage roads leading to increased harvesting of moose by predators and non-regulated hunting” (p. 57). The report provides the following recommendations:

- Encourage First Nations communities to voluntarily reduce cow and calf harvesting.
- Target management of wolf populations in low cow:calf populations.
- Increase cow:calf monitoring and surveys.
- Increase research to compare moose habitat use in MPB and non-MPB affected areas regarding natural mortality rates and habitat suitability for reproduction (p. 57).

With the declining population, we move closer to conservation, raising questions as to whether (a) LEH is valid, and (b) a First Nations hunting moratorium is required until the population recovers. Chief Joe Alphonse of the Anaham Band (Tsilhqot’in) responded to the McNay report by saying “the clearcuts out there are a desert. You can now see them [moose]
from 300 to 400 yards. That makes it easier for hunters, poachers, everyone” (Pynn, 2012, December 26).

**Forestry Industry Economics**

When the “Crown is bound by its honour to balance societal and Aboriginal interests,”

those societal interests include stewardship, economic, and social values. This section discusses how the forest industry has been a key revenue contributor to BC, supporting the cost of modern-day amenities now viewed by society as necessities. Of BC’s total land base of 95 million hectares, 60 million hectares is forested (FLNR, 2013, p. 2). More than 95% of that forested land is Crown land, meaning the provincial government manages the land base in concert with the environmental, social, and economic interests of citizens (p. 2).

In *Empire of the Beetle*, Nikiforuk recounts the significant economic value of the forest over the past decades (2011). Until 2004, wood accounted for 40% of all provincial revenues and generated $14 billion in revenue. The pine “estate” forest was estimated to be worth $240 billion. It’s noteworthy that BC has incurred a $55 billion cost in attempting to manage the MPB (p. 52). Forestry revenue decreased from $1.3 billion to $540 million between 2001 and 2009 while mining sector revenue increased from $1.3 billion to $2.6 billion during this period (FLNR, 2010, p. 53). But it would be considered a falsehood if a conclusion could be drawn that decreased forestry revenues indicated a lesser impact of forest operations on the ground. The MPB epidemic has had significant negative impacts on the forestry industry, which have greatly influenced forestry regulations and policies. To help offset economic impacts, the Minimum Stumpage Rate Regulation (1987) was introduced to subsidize the industry through financial

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40 *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73 para 45
incentives on the stumpage paid to BC for harvesting MPB-affected lodgepole pine (Government of BC, 2012).

By 2006, it was estimated that the beetle had affected 9.2 million hectares and 582 million cubic metres of timber in BC (Snetsinger, 2007, April 18, p.2). The WLTSA has been significantly affected by the MPB epidemic. It is centrally located within the Cariboo Region, where lodgepole pine represents 63% of the timber harvesting land base (p. 2). Every 5 to 10 years, the Chief Forester makes a Determination on the allowable annual cut (AAC) for each provincial TSA. In 2007, the Chief Forester directed forest harvesting in the WL TSA to target its AAC toward affected forest stands containing > 70% pine (p. 15).

Table 2 shows Cariboo Region TSAs, including the highest (Prince George) and the lowest (Revelstoke) TSAs in BC. It does not include updated WL TSA figures, as this TSA is presently undergoing a Timber Supply Review. AAC refers to the maximum amount of timber that may be harvested in a specified area of land in cubic metres (m$^3$) (FLNR, 2014b). To put this in rough context, one logging truck holds 40 cubic metres (Johnson, 1996).

<table>
<thead>
<tr>
<th>Ranking</th>
<th>TSA</th>
<th>AAC</th>
<th>Early AAC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Prince George</td>
<td>12,500,000 (2011)</td>
<td>14,900,000 (2004)</td>
</tr>
<tr>
<td>2</td>
<td>Williams Lake</td>
<td>(2014)</td>
<td>5,770,000 (2007)</td>
</tr>
<tr>
<td>3</td>
<td>Quesnel</td>
<td>4,000,000 (2011)</td>
<td>5,300,000 (2004)</td>
</tr>
<tr>
<td>8</td>
<td>100 Mile</td>
<td>2,000,000 (2012)</td>
<td>2,000,000 (2006)</td>
</tr>
<tr>
<td>39</td>
<td>Revelstoke</td>
<td>225,000 (2011)</td>
<td>230,000 (2005)</td>
</tr>
</tbody>
</table>

(FLNR, 2014b)
The economic value (shelf life) of dead lodgepole pine trees in the dry belt of the Chilcotin Plateau (located in the western half of the WL TSA) is estimated at five years (Snetsinger, 2007, April 18, p. 22). AACs that support increased forest harvesting have been created in an attempt to recover the economic value of the dying or dead lodgepole trees.

Figure 5: Cariboo Region (Williams Lake Timber Supply Area)

MPB Effects and Climate Change on the Chilcotin Plateau

In her 2013 TED talk, *The Great Mountain Pine Beetle Outbreak—A Global Perspective*, Diana Six, who has a PhD in Forest Entomology and Pathology, clearly explains the connection between recent warming climates and the largest recorded insect outbreak on this planet—the MPB epidemic in BC (:53). Six says that, for an outbreak of this magnitude to occur, there must be (a) lots of pines on the landscape, and (b) a trigger (4:12). The trigger in this recent outbreak was the warmer climate, which has allowed for the increased survival of MPB young and greater survival over the winter (6:10). With a bread basket of healthy trees, the MPB population explodes and overwhelms the forest. In the past, temperatures would cool in winter and beetle populations would significantly decrease, resulting in a non-threatening insect population (7:39). The recent epidemic is 10 times bigger than any previously recorded insect outbreak and the MPB is on the move to areas and forests where it has never been seen before (8:50). The MPB is now located in the Yukon and Alberta, with predictions that it will move east to Ontario (9:45). It would be incorrect to believe this is only a local issue, as the “implications are global; trees are incredible sinks of carbon but when vast areas die they become sources” of atmospheric carbon (11:15).

Ten years prior to Six’s TED Talk, Carroll, Taylor, Régnière, and Safranyik presented a paper on the results of climate change and its effects on the MPB at the Mountain Pine Beetle Symposium in Kelowna (2003). This paper linked the expansion of MPB’s range in BC to climate change, based on Carroll et al.’s conclusion that minimum winter temperatures > 40°C cause 100% mortality within the MPB population (p. 225). MPB’s dramatic impact is described on the provincial government’s interactive website.
The impact is particularly impressive given that one MPB is the size of a grain of rice (FLNR, 2011, January).

Allan Carroll, now Director of the University of BC’s Forest Sciences Program, was first introduced to MPB while spending summer vacations in the Chilcotin in the 1970s and seeing the beetle outbreak first hand (Nikiforuk, 2011, p. 51). He recalls observing red-topped trees and trees marked with “sticky pitch tubes,” along with the smell of turpentine, an indication of an insect-attacked forest (p. 51). The massive MPB outbreak of the 1970s ended in 1986 due to two successive winters of greater than 40°C temperatures (p. 50). This experience was instrumental in determining Carroll’s future. By 1999, he had become an insect ecologist and was leading a response to the notorious 1994 Tweedsmuir Park MPB outbreak (p. 51). Debates continue in my work place as to whether the provincial government did enough (or could have done anything) to stop the Tweedsmuir outbreak, which eventually became the biggest insect outbreak in recorded history. But the situation was more complicated than most people realize, says Nikiforuk. In the 1930s, he explains, BC initiated fire suppression through two measures: (a) not allowing First Nations to traditionally burn as “a burning tree represented a lost dollar,” and (b) amassing firefighting equipment, which had become a significant arsenal by the 1950s (p. 60). This crusade for fire suppression created one of the two conditions needed to initiate a massive insect outbreak—an unnatural breadbasket of lodgepole pine and the second trigger was the unprecedented warming of the climate (Six, 2013, 4:12).

While the Tweedsmuir Park epidemic erupted, other outbreaks were taking place 900 kilometers away; this was an early indicator of the magnitude of the problem, and our inability to manage it (Nikiforuk, 2011, p. 53). The Canada’s Federal Insect Disease Survey (FIDS) had proved to be a very useful organization, providing early detection of insect outbreaks across
Canada for 60 years (p. 54). However, in 1996 the federal government decided to shut FIDS operations down, turning this responsibility over to the provinces. During the 1998–1999 transition period, BC did no insect planning conducted no insect plans (p. 54). It was as though, as Carroll eloquently expressed, “the federal government had poked out its eyes and blinded itself” (p. 54).

Building on his experience, Carroll et al.’s 2003 research showed that the MPB had been attacking previously unsuitable habitats at an increasing rate since 1970 (2003, p. 223). They also predicted that, with the MPB having expanded into new areas, combined with indications of continued warming, the MPB would be seen further northward, eastward, and at higher elevations (p. 223). Six’s 2013 presentation confirmed Carroll et al.’s predictions (8:50). The introductory paragraph of the Ministry of Water, Lands and Air Protection (MOWLA) report includes the compelling statement “that most of the warming observed over the last 50 years can be attributed to human activities that release greenhouse gases into the atmosphere” (MOWLA, 2002, p. 3).

The Ministry of Environment (MOE) explains in their Adaption Strategy how the MPB infestation became an epidemic due to warmer winters between 1990 and 2008, impacting more than 14.5 million hectares of forests in BC (MOE, 2010, p. 1). In addition, severe seasonal droughts in 2003 and 2009 occurred in the same years as BC’s most dangerous forest fires (p. 1). These events are compounded by the very dry MPB killed lodgepole pine being an excellent fuel source for forest fires (p. 1).

In 2014, in their Summary for Policymakers, the Intergovernmental Panel for Climate Change (IPCC) provided an updated and succinct list of assessments and an opening statement that “human interference with the climate change system is occurring.” In other words, the IPCC
messaging is much less hesitant and more absolute than previous debates on the question of whether climate change exists (p. 3). However, this debate continues in the public domain and among some government officials.

In her TED talk, Six offers two actions for addressing the MPB epidemic and its continuing adverse effects on the land: (a) decrease greenhouse gases now; and (b) stop thinking logging will fix everything in our forests, and instead use our knowledge of genetics and adaptation to develop new tools to control the MPB (2013, 13:17).

History of the Management of Wildlife and Hunting in BC

The Aboriginal right to wildlife is a critical component of First Nations sustenance, and for social and ceremonial purposes. Wildlife biodiversity is recognized as an important component in the assessment of healthy forest ecosystems. With the arrival of European settlers 200 years ago, the hunting effects on wildlife were dramatic and have been well documented. Wildlife were sacrificed to the “guns and snares of market hunts in the previous century” to satisfy the unregulated and unlimited market for animal pelts in the European market (Burnett, 2007, p. 167). At the core of this culture, it is best described by “the notion that every citizen had an inalienable right to harvest wildlife at will was deeply rooted in the pioneering traditions of North America” (p. 169).

Historically, conservationists, biologists, and concerned citizens have tried to get the government’s and society’s attention regarding this unsustainable practice. For example, in 1864, George Marsh wrote Man and Nature, describing how “humankind is not the righteous redeemer of nature’s bounty, but instead a disturber of natural harmonies and a threat to life on earth” (MacKinnon, 2013, p. 10). This book was written at a time when the majority of society believed the “natural wealth of the earth was infinite” (p. 10). Seeing such natural riches in the newly
founded worlds, the new explorers plundered the seemingly unlimited wildlife for their home base in Europe (p. 10). Visionaries, such as Marsh, see what the majority could not until it was too late.

Until the 1900s, when BC started to develop legislation to manage the wildlife resource, hunting was an unregulated practice. The LEH, which provided “opportunities via a lottery and is used where necessary to limit the number of hunters, the number of animals taken, or limit the harvest to a certain ‘class’ of animal,” was not introduced until 1974 (MOE, n.d.).

Should we care? MacKinnon provides plenty of examples of why we should (2013, p. 10). In the 19th century, it could be observed that “buffalo in the hundreds of thousands still roamed the Canadian Prairies and Great Plains, grizzly bears skulked through every mountain range in the west,” and “the last million-pound hauls of shad would be fished from the rivers of the Eastern Seaboard” (p. 10). But an important sentiment, and one clearly directed to us all regardless of ethnicity, was that “we wouldn’t live long without these companion life forms, and vice versa; biodiversity is a part of what makes us human” (p. 146).

**Cumulative Effects**

BC has defined *cumulative effects* as “changes to economic, environmental and social values on the landscape caused by the combined effect of present, past and reasonably foreseeable human actions or natural events” (FLNR, 2014a). BC further commits to developing a framework that “provides a balanced approach where cumulative effects are assessed and managed and supports the province’s goals to develop B.C.’s land and resources in a sustainable manner” (2014a).

Consideration of cumulative effects in the decision-making process for the natural resource sector is critical; it’s also a key component of the First Nations concerns that have been
recognized in recent Aboriginal law cases. This is of particular importance with the increased forest harvesting in the WL TSA (Chilcotin Plateau) and has a direct influence on cumulative effects triggered by multiple forestry decisions. Local FLNR staff have embarked on an innovative project in this area by modeling moose winter habitat and other values, as detailed in *A Broad Scale Cumulative Impact Assessment Framework for the Cariboo-Chilcotin* (Dawson, Hoffos, & McGirr, 2014). This work was mainly undertaken to address pressing First Nations wildlife and access management concerns within a defined area known as the *South Chilcotin Stewardship Committee* (SCSC) planning area. The modeling tool has assisted decision makers operationally in considering cumulative effects in the context of multiple natural resource decisions.

Their work has provided a mapped layer which, when combined with proposed and harvested forestry-permit polygons, road development, and CCLUP targets, has produced valuable management information for decision makers. As a response to recent moose population declines, the modeling of the moose winter feeding habit was critical “because it is an important limiting habitat for moose populations” (p. 19). FREP Extension Note #28 emphasizes the cumulative effect of the undesired increase of the “extensive networks of unmaintained roads” known as Temporary Access Roads (TAS) (Chapman, Thompson, Bulmer, & Berch, 2014, January, p. 1). This paper raises concerns with the TAS not being properly regulated and inventoried; ultimately resulting in an increasing total amount of soil disturbed areas (p.1). Increased TAS is also identified as a key contributing factor in moose population decline providing better access for all hunters (First Nations and regulated hunters) and predators to wildlife, having a detrimental effect on the populations (McNay et al., 2013, p. 54).
It would be prudent for industry and BC to further explore the suggestion within McNay’s report that, due to tree mortality, the moose have had a disruption to their habitat; and to recommend provincial support for the valuable work already underway in addressing riparian management and road development in the SCSC planning process.

On June 26, 2014, as I neared the conclusion of my work on this thesis, a historic legal decision by the SCC for the first time declared Aboriginal title to the Tsilhqot’in. This decision concluded a 25-year legal fight initiated and led by Chief Roger William of the Xeni Gwet’in, on behalf of the Tsilhqot’in. During that time, the largest ever recorded insect outbreak occurred in the same area.

**Results and Discussion**

It is evident that in the past 30-plus years, the Chilcotin Plateau has been the platform for the occurrence of significant, multiple events, which have created a complex and challenging land management issue. This perception was confirmed in the literature review and interview results, which included valuable insight into how First Nations, the forestry industry, and the provincial government responded to this dynamic and evolving environment. The results indicated that the ecological, social, and economical imperatives required in good decision making were significantly and equally tested during this time (Dale, 2001).

**Results**

I have worked for the past 15 years in the capacity of providing advice and leading First Nations consultation in support of the statutory decision-making process. Given increasing case law, the courts’ encouragement to negotiate rather than litigate, the consideration of cumulative

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41 *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 153
effects, and balancing of societal needs, consultation has become far more complex than it was previously. Early in this research, I categorized the forest industry and First Nations into what I believed to be their predominantly core interests: forest industry (capitalism) and First Nations (Aboriginal rights). My research and interview results indicate that both groups are closer to the middle. The forestry industry recognizes that good stewardship addresses the integrity of Aboriginal Interests, and First Nations recognize that economic development can benefit their communities. Following is a discussion of the events that formed today’s complex and legalistic environment. The topics are organized by interview themes into (a) Aboriginal law (historical events), (b) consultation (relationship), (c) forestry legislation, (d) cumulative effects (multiple forestry decisions), (e) forest health (ecosystem) stewardship practices, (f) forestry economics, and (g) mountain pine beetle epidemic. These category themes are noted in the headings of the following sections. Included in these sections are summations of interview findings, augmented by key quotes from the interviews.

Aboriginal Law (Historical Events)

The following section explains the first theme of the effect of the increasing Aboriginal law in addressing historical events. This discussion is critical in understanding the conflicts of today between Aboriginal peoples and the forestry industry (similarly applying to any natural resource extraction in BC).

Key Historical BC Events that Led to Today’s Aboriginal Law Environment

Although modern society has attempted, in recent years, to address the inequities created by BC’s forebears, the issues of governance, consultation, accommodation, and reconciliation continue to churn through the provincial and federal courts. The following background explains the events that precipitated the Aboriginal law environment of today.
In the Royal Proclamation of 1763, the British monarch, King George III, recognized that “nations or tribes” required “lands reserved to them . . . as their Hunting Grounds”; and reserved the exclusive right to negotiate cessions of Indian title through treaty negotiations (The Royal Proclamation, 1996). Since 1763, several significant documents have continued to recognize the special status afforded Indians and their connection to the land, some examples being the Constitution Act (1867), the British Columba Terms of Union (1871), the Indian Act (1876), and the 1890 Joint Commission (federal and provincial governments assessing the establishment of Indian Reserves). However, these government actions were not necessarily viewed as supporting the original intent of the 1763 Royal Proclamation (BC Treaty, 2009a, p. 3).

Between 1850 and 1854, on behalf of the British Crown, James Douglas negotiated 14 land purchases known today as the Douglas Treaties; but instead of completing treaties with all BC First Nations as directed by The Dominion of Canada, Governor Douglas made the controversial decision to set out reserves for each tribe (p. 3). From 1851 to 1864, Governor Douglas was instrumental in passing controversial policies affecting Aboriginal peoples. Decades after his retirement, many of Douglas’ policies were reversed (p. 4). However, many remained into the 20th century; for example, it was not until 1951 that Parliament repealed provisions in the Indian Act that outlawed the potlatch and prohibited land claims activity (p. 4).

Although the Indian Act (passed in 1876 and further amended in 1884) was presented as protecting land for Aboriginal people, it “essentially made ‘Status Indians’ wards of the Crown, and regulated their lives,” preventing them from practicing their culture (Canada’s First Peoples, 2007). These restrictions ranged from rules on the election of leaders to education of their children and estate management; in other words, First Nations were allowed virtually no self-governing powers (2007). Aboriginal peoples were banned from participating in culturally
significant events; for example, the Lakota Plains Aboriginal people were not allowed their “Sun Dance” tradition, while West Coast Aboriginal peoples were forbidden to practice their “Pot Latch” ceremony of feasting and gift-giving (2007). The 1876 Act also authorized residential schools to lead the forced removal of children from their homes; evidence of the cultural damage this decision caused is seen in the media regularly today (2007). The Act stipulated that any Aboriginal person who obtained a university education or ordination would be stripped of their rights (2007). It also denied Aboriginal peoples the right to leave their reserve, or produce or sell goods without the permission of the Indian Agent (2007). It was not until 1961 that Aboriginal people were granted the right to vote (2007).

In 1920, Bill 13: British Columbia Indian Lands Settlement Act was passed. This legislation implemented the McKenna McBride recommendations allowing “reductions or ‘cut-offs’ of reserves without consent of the Aboriginal people, contrary to provisions of the Indian Act” (BC Treaty, 2009a). In 1984, the British Columbia Indian Cut-off Lands Settlement Act was passed, with the intention of resolving issues caused by the McKenna McBride recommendations (BC Treaty, 2009a). For example, a clause within the McKenna McBride Report— that “the casual observ[ed] unused cultivable land in Indian Reserves appears to be an evidence that the Indians are in possession of much more land then they require and that it should be thrown open for settlement by people who would make use of it” (McKenna, 1913, p. 6)—initiated the controversial “cut-offs” of reserves that BC and the federal government are still dealing with today.

The federal government gave legal status to Aboriginal rights with the inclusion of Section 35 of the Constitution Act of 1982, which states that “... the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed” (BC
Government, 2010, p. 5). The British Columbia Claims Task Force was created in 1990 with the intent “to build a new relationship between First Nations, British Columbia and Canada” (MARR, n.d). And more recently, in 2012, the federal government established the Truth and Reconciliation Commission (TRC) in an effort “to contribute to truth, healing and reconciliation.” This required a:

commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups (TRC, n.d).

The TRC 2012 report written by the Chair and Commissioners provides a good historical summary of the residential schools experience and is the informational basis for the TRC task force in 2013 and 2014. This report directs responsibility of the outcome by stating that “in talking about residential schools and their legacy, we are not talking about an Aboriginal problem, but a Canadian problem” (TRC, 2012, p. 3).

**Aboriginal Law Developments from 1888**

The turning point for Canadian Aboriginal law occurred with the introduction of the Constitution Act in 1982, which included the statement that “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (SS 35). Prior to 1982, there were few legal decisions over the preceding 100-year period:

- An 1887 court decision determined the Crown could extinguish Aboriginal title (Salteaux tribe of Ojibbeway Indians in Treaty 3).\(^{42}\)

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\(^{42}\) *St. Catharine’s Milling and Lumber Co. v R*, [1887] 13 SCR 577
• The 1973 Calder decision overturned the 1887 court decision as being the leading case on Aboriginal title for 80 years, and declared instead that Aboriginal title does exist.43
• Section 35 of the Constitution Act (1982) recognized and preserved Aboriginal rights.
• The first SSC decision after the Constitution Act declared that Aboriginal title is unique in nature and that the federal government has a fiduciary duty to preserve it.44

Aboriginal case law since 1982 has been extensive, as depicted in Table 3 (note the 14-year upsurge). Appendix C provides a more in-depth summary of a few landmark Aboriginal court decisions45 since 1990, and their significance to Aboriginal rights and title, consultation and accommodation, and reconciliation. These are the key components for BC to consider while engaged in First Nations consultation and decision making on proposed activities on the land base. The National Post article 170 legal victories empower First Nations in fight over resource development provides a good visual snapshot of the location cluster of Aboriginal law cases in Canada, with a notable majority in BC (Cattaneo, 2012, December 12).

Consultation (Relationship)

As First Nations and BC follow the legalistic court directed consultation framework, success is determined largely on the strength of the relationship between First Nations, the forestry industry and BC. The following section discusses this second theme: consultation (relationship) and the importance with the connectedness to a good cultural relationship for successful consultation.

42 Calder et al. v Attorney-General of British Columbia, [1973] SCR 313
43 Guerin v The Queen, [1984] 2 S.C.R. 335
Table 3: The number of (not conclusive) Canadian Aboriginal law cases

(O’Sullivan, 2014)

**Aboriginal Law Evolution has Defined the Consultation Process since 1982**

Since 1982, Aboriginal case law has been extensive, with court decisions building upon one another in the development of a First Nations consultation engagement framework for governments to follow when contemplating natural resource decisions on the land base (BC Government, 2010, p. 4). This section first discusses the beginnings of BC’s consultation policy, followed by a detailed discussion of the development of today’s legal consultation engagement framework.

**The Beginnings of the Consultation and Accommodation Policy**

This section discusses how BC has responded to increasing Aboriginal law in addressing Aboriginal Interests and its constitutional obligation (BC Government, n.d.). Forestry activities have had a far-reaching geographic scope on the land base, which has initiated numerous court
actions; for example, in 1995, the MOF was compelled to develop the first provincial
government consultation policy (BC Government, 2010, p. 4). The MOF managed the
Traditional Use Study program with a budget of $16 million (MOF, 1996, October), which
funded First Nations to lead a study process that would document their community’s traditional
use practices by conducting interviews with community elders and members.

In 2002, a new *Provincial Policy for Consultation with First Nations* was developed with
the intention of instructing all BC statutory decision makers on how to engage in consultation,
and to consider accommodation if required (BC, 2002, October). A specific MOF policy
followed in January, 2003. As part of a continuing commitment toward transparency, BC
updated its policy with the *2010 Consultation Procedures*, prompted mainly by the notable
SCC\(^{46}\) decision (BC Government, 2010, p. 4). Interviewees agreed that the relationship is an
important component for successful consultation, although they recognized that differing
perspectives bring unique challenges to the achievement of that success. This was clearly
articulated by one interviewee:

> The adequacy of the consultation piece is really based on the perspective of who the party
> is. I think that First Nations don’t think the consultation process is adequate. I think that
government thinks the consultation process would be adequate if everyone is on the same
page.

The robustness of the *2010 Consultation Procedures* policy reflects the growing body of
Aboriginal law since the Constitution Act, 1982. In the following paragraphs, I have outlined the
nature of the tests within the legal consultation engagement framework as directed by the courts.

\(^{46}\) *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73
Infringement and Justification Test:

The landmark Aboriginal law cases\(^{47}\) drew on previous court cases in articulating key principles. The 1990 SCR decision stated “if a valid legislative objective is found, the analysis proceeds to the second part of the justification issue,” meaning at that point government considers “whether the legislation or action in question can be justified.”\(^{48}\) This is known as the infringement and justification test, which allows the provincial government to infringe as long as the activity proposed is justified and considering that “the honour of the Crown is at stake in dealings with aboriginal peoples.”\(^{49}\) Building on the infringement and justification test, the 1997 SCC decision provided specific examples of compelling and legislative objectives that would “satisfy the first part of the justification analysis.”\(^{50}\)

Legal Timelines in Determining Strength of Claim:

The 1997 SCC decision provided two legal timelines to assess strength of claim of Aboriginal Interests for individual First Nations: (a) time of contact for assessing Aboriginal rights,\(^{51}\) and (b) 1846 for assessing Aboriginal title.\(^{52}\)

Evolving Legal Framework for Consultation and Accommodation Policy:

The 2004 SCC\(^{53}\) decision was the catalyst for BC to develop the 2010 Consultation Procedures (BC Government, 2010, p. 4). BC is required to consult on government decisions with First Nations on claimed, proven, and treaty Aboriginal rights prior to making a decision

\(^{47}\) R v Sparrow, 1990 1 SCR 1075 and Delgamuukw v British Columbia, 1997 3 SCR 1010

\(^{48}\) R v Sparrow, 1990 1 SCR 1079(d)

\(^{49}\) Ibid., 1114(g)

\(^{50}\) Delgamuukw v British Columbia, 1997 3 SCR 1010 at para 165

\(^{51}\) Ibid., at para 22

\(^{52}\) Ibid., at para 145

\(^{53}\) Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73
that may impact or infringe on those rights, and to consider accommodation if necessary (p. 4). Two circumstances must exist together for consultation to be required:

1) BC must have information indicating a claimed, proven, or treaty Aboriginal right to exist.

2) A proposed BC decision may impact that claimed, proven, or treaty Aboriginal right.

Due to Aboriginal Interests being geographically extensive in BC, the duty to consult is triggered for most government decisions (p. 8).

**Preliminary Assessment:**

Building on these legal timelines, the 2004 SCC decision stated that “the commitment is to a meaningful process of consultation” and provided greater clarity in directing BC to complete a preliminary assessment (known as the two-prong test) by ensuring that:

- the scope of the consultation required will be proportionate to a [1] preliminary assessment of the strength of the case supporting the existence of the right or title, and [2] to the seriousness of the potentially adverse effect upon the right or title claimed.

The spectrum of engagement ranges from notification to deep consultation, depending on the strength of the Aboriginal rights and the potential for an adverse impact by a government decision as articulated in Figure 6 (BC Government, 2010, p. 11).

In developing the initial assessment of the strength of claim, provincial staff utilizes only the known Aboriginal information available to the province. The next step in consultation is seeking First Nations input, which will better inform BC of the strength of claim (p. 14).

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54 *Ibid.*, 513
55 *Ibid.*, at para 68
Figure 6: Two prong test for a preliminary assessment

Note. From the *Updated procedures for meeting legal obligations when consulting First Nations: Interim*, by the BC Government, 2010, p. 11. Copyright 2014 by the Provincial Government of British Columbia. Adapted with permission.

Information is gathered to inform the assessment about where Aboriginal rights are located and the nature of the pre-contact activities or practices of a particular First Nation, including the ethnographers’ description of the First Nation’s traditional territory. These internal government sources include traditional use studies, archaeological information, ethno-historic reports, and wildlife and fish inventories (p. 21). As articulated by the courts:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the
Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.\textsuperscript{56}

And:

At the other end of the spectrum lie cases where a strong \textit{prima facie} case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.\textsuperscript{57}

The ultimate goal of the consultation engagement process is nicely summed up in court decisions that take the approach, “let us face it, we are all here to stay;”\textsuperscript{58} and “the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.”\textsuperscript{59} However, the recent SCC decision declaring Aboriginal title requires a more in-depth explanation.

\textit{Responding to Proven Aboriginal Title:}

The recent SCC\textsuperscript{60} decision provided greater clarity for governments to follow when considering a decision that overlaps a strong Aboriginal title claim. BC must either:

1) Seek consent\textsuperscript{61} from the First Nation, or

2) Meet the following justification test within the procedural duty to consult and accommodate including the consideration that it:

\begin{itemize}
  \item “must further a compelling and substantial purpose;” and
\end{itemize}

\textsuperscript{56} \textit{Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73} at para 43
\textsuperscript{57} \textit{Ibid., at para 44}
\textsuperscript{58} \textit{Delgamuukw v British Columbia, 1997 3 SCR 1010} at para 186
\textsuperscript{59} \textit{Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73} at para 50
\textsuperscript{60} \textit{Tsilhqot’in Nation v British Columbia, 2014 SCC 44}
\textsuperscript{61} \textit{Ibid., at para 76}
There was overwhelming evidence provided in the earlier BCSC trial (485-page judgment) that led Justice Vickers to the finding of an opinion of Aboriginal title for the Tsilhqot’in. This BCSC finding supported the recent SCC decision in declaring Aboriginal title having considered the additional test factors: “sufficient . . . continuous . . . exclusive . . .” in support of Aboriginal title. The BCSC earlier finding of an opinion of Aboriginal title was foreshadowed during the trial when Justice Vickers shared that:

I confess that early in this trial, perhaps in a moment of self pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot’in people had been in the Claim Area for over 200 years, leaving the real question to be answered. My view at this early stage of the trial was that the real question concerned the consequences that would follow such an admission. I was assured that it was necessary to continue the course we were set upon. My view has not been altered since I first raised the issue almost five years ago.

The acknowledgement of Aboriginal title was also recognized prior to the SCC decision by an interviewee suggesting, pragmatically:

Currently, government is the landlord. If land switches over due to title and the First Nations are the landlord, from our perspective, it doesn’t really matter who the landlord

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62 Ibid., at para 84
63 Ibid., at para 25
64 Tsilhqot'in Nation v British Columbia, 2007 BCSC 1700 at para 1373
is. We don’t see title changing the world too much for us. We could make agreements with First Nations.

Discussion on Forest Harvesting and its Impact on Aboriginal Rights

Did the practice of accelerating the harvesting of beetle-infected wood affect First Nations’ ability to practice their Aboriginal rights on the Chilcotin Plateau? There is general agreement that the landscape has changed in significant ways since the time of contact in 1793 and that societies have always evolved in adapting to changing environments. The resulting case law for the past 30-plus years exists due to unmet obligations and promises made by the Dominion of Canada before 1858. To address historical wrongs in the context of present-day societal values and landscape realities is a tall challenge; hence, the SCC direction is “to balance societal and Aboriginal interests” of today, and the BCSC decision states that “reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate contemporary interests.”

Unsurprisingly, the answer to the original question would be “yes,” forest harvesting does affect the practice of Aboriginal rights. If both the practice of Aboriginal rights in 1793 and forestry practices in 2014 were viewed through the same lens, a dramatic difference would be observed in the impacts to the forest and surrounding environment, which are key components for a culture that depended solely on the immediacy of the land for survival. This scenario would likely be an example of a complete infringement on Aboriginal Interests.

65 Ibid., at page v
66 Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 at para 50
67 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at para 1363
Today “the Crown’s duty to consult is readily triggered—it is triggered where claimed or proven rights, or treaty rights, may be impacted by a potential Crown action or authorization” (BC Government, n.d., p. 3). BC continues to finds itself in uncharted territory when gauging whether the consultation process has been “adequate” in meeting the test of a “justified infringement.” The courts continue to define the boundaries of this test and direct governments and proponents to re-engage in further consultation to address the inadequacy of the process in avoiding an infringement on claimed, treaty, or proven Aboriginal rights. The exception is the SCC decision, which unquestionably concluded that forest harvesting was an unjustifiable infringement on Aboriginal Interests in the Claim Area.

Finding the balance of *societal and Aboriginal interests* is truly one of the more complex problems we face today in land-based resource management. The core components to this issue are dynamic and evolving, including Aboriginal law, environmental protection, and local and global economics. Similar to what is observed in other areas of modern society, the speed at which we live our lives and the way we receive information affects the ways differing societal groups perceive the correct balancing of societal and Aboriginal interests. The readiness of society to accept changes to previously held cultural values is a key component in how we successfully balance societal and Aboriginal interests. For example, it has only been in the last 15 years that First Nations consultation has been fully accepted as a key component in conducting business on BC’s land base. The BCSC decision recognizes the challenges in meeting this balance:

I have already noted that a legislative scheme that manages solely for timber with all other values as a constraint on that objective can be expected to raise severe challenges
when called upon to strike a balance between Aboriginal rights and the economic interests of the larger society.68

Interviewees struggled with this dilemma, including the situation of First Nations balancing their Aboriginal Interests while pursuing economic opportunities with the potential of impacting their own Aboriginal Interests. One interviewee noted:

It’s an interesting question because how are we to balance the First Nations’ interests with stewardship and economics? We are expected to consider those values, much like how First Nations communities now have to consider those values, now that they are engaging in the forest industry.

**The Infringement and Justification Analysis Regarding Forestry Decisions**

The SCC decision agreed with the BCSC findings that forest harvesting is considered a compelling and substantial legislative objective and could be reasonably considered a justifiable infringement when managing “pest invasions or prevent[ing] forest fires.”69 The SCC further explained that the economic argument that would support a justifiable infringement can only be made by considering “the economic value of logging compared to the detrimental effects it would have on Tsilhqot’in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder.”70

The BCSC concluded that forest harvesting has a detrimental effect on “wildlife diversity and destruction of habitat” impacting the Tsilhqot’in’s Aboriginal rights and suggests this is an

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68 Ibid., at para 1290
69 Tsilhqot’in Nation v British Columbia, 2014 SCC 44 at para 123
70 Ibid., at para 127
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infringement which BC must then justify.\(^{71}\) The BCSC provided two reasons that do not support the proposed forest harvesting for this area as a *compelling and substantial legislative objective*. First, with the recent addition of this area into the TSA, after having been excluded from it for some time, forest harvesting does not support an economical objective; and second, the intent of the proposed forest harvesting was not aimed at preventing the MPB.\(^{72}\) During the trial, the former Chief Forester said he believed he could not adjust the “AAC determination on the basis of a claim to Aboriginal rights and title” and had not consulted with the First Nation to determine their interests.\(^{73}\) The BCSC responded that a rationale to justify an activity could not be reached if consultation had not occurred,\(^{74}\) and that “all of the events that lead up to the granting of a cutting permit signal the Province’s intention to manage and dispose of an Aboriginal asset,” which requires consultation and accommodation.\(^{75}\) BCSC further concluded that “the protection and preservation of wildlife for the continued well-being of Aboriginal people is very low on the scale of priorities.”\(^{76}\) BCSC also concluded that:

> a [forestry] management that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot’in Aboriginal rights. To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area.\(^{77}\)

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\(^{71}\) *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 at para 1288

\(^{72}\) *Ibid.*, at para 1107 and 1108

\(^{73}\) *Ibid.*, at para 1128

\(^{74}\) *Ibid.*, at para 1128

\(^{75}\) *Ibid.*, at para 1131

\(^{76}\) *Ibid.* at para 1286

\(^{77}\) *Ibid.*, at para 1294
The SCC decision concluded with the following declarations of Aboriginal title to the Tsilhqot’in, describing how BC breached its consultation obligations to the Tsilhqot’in:

I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot’in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot’in through its land use planning and forestry authorizations.78

This final statement accurately reflects events on the land 25 years ago. Since 1983, several landmark Aboriginal legal cases have defined the evolution of the consultation framework, which the provincial government has since adopted in keeping with the “honour of the crown.”79

Both the BCSC80 and SCC81 decisions unquestionably concluded that the forest harvesting proposed in the 1980s was an unjustifiable infringement on the Tsilhqot’in’s Aboriginal Interests.82 This provides a starting point for the unanswered question on the applicability and justification rationale for forest management outside the areas of the Tsilhqot’in’s proven Aboriginal rights and declared Aboriginal title—that is, the rest of the province of BC. This question provides the substance for a thesis entirely dedicated to this topic.

Forestry Legislation, Stewardship Practices, Cumulative Effects, and Forest Health

Operational Application of the Legal Consultation Framework

This section combines the third, fourth and fifth themes that emerged in this study: forestry legislation, stewardship practices, cumulative effects and forest health. With the

78 Tsilhqot’in Nation v British Columbia, 2014 SCC 44 at para 153
79 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 45
80 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700
81 Tsilhqot’in Nation v British Columbia, 2014 SCC 44
82 Ibid., at para 127
evolving Aboriginal law and the consideration of cumulative effects, First Nations consultation has become a very complex process. This section discusses ongoing challenges in meeting the requirement of defendable and honourable land management decisions and the recognition of the similarities between Aboriginal rights and good land stewardship. This section also discusses an example of a successful forestry operational process and the content of BC forestry accommodations for the past 12 years.

“One” Decision Maker.

As a result of the December, 2010 amalgamation of all the natural resource sectors, FLNR is one ministry with multiple decision makers. Since that time an ongoing discussion has occurred about moving to “one” decision maker in a defined area instead of the present framework where there is one decision maker for each natural resource sector: forestry, range, lands, mining, water, fish, wildlife, and recreation decisions. This is an important debate, as my provincial government work responsibilities are to ensure adequate consultation in support of natural resource decisions, including major projects. Moving to “one” decision maker would be beneficial as it would support improved transparency and clarity in consultations with First Nations.

One decision maker will strengthen the broader understanding and more effectively address the cumulative impacts of multiple decisions. This will create better overall decisions on the land base instead of the continued practice of siloed natural-resource-sector decision making. Success will require thoughtful implementation, but to date there has been no tangible movement in how and what that will look like. In discussing causes for the gridlock that can exist within government, Ann Dale notes that when government staff are commended for their loyalty to their minister (2001, p. 106), it can have the effect of discouraging debate, which can in turn
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encourage decision making that occurs at the lowest common denominator (2001, p. 97). If government organizations are unable to problem-solve the outstanding multiple decisions makers of natural resource sectors or to address the benefits of healthy debate among colleagues, how will the natural resource sector successfully integrate the ecological, social, and economic imperatives (2001, p. x) essential to good decision making?

**FRPA Legislation Requires Amendment.**

Of all the natural-resource-sector consultation required in FLNR’s Cariboo Region, forestry decisions make up the largest percentage. First Nations consultation engagement can be a good barometer in assessing what is and is not successful when forestry legislation and policies change.

The former Code legislation was very prescriptive nature, with government defining forest industry decisions. By comparison, FRPA legislation is results-based, depending on industry innovation and professional reliance in the practice of forestry. All interviewees expressed concern with this dependence on industry, aptly reflected in the following quote: “FRPA is frustrating. It provides the licensees with flexibility, perhaps too much flexibility, around what needs to be done around rights and title.” One key critical requirement of forestry licensees in the Code was the five-year forest development plan (Section 10). Section 10 consolidated forestry operational plans described the location of cut blocks for the future (FLNR, n.d.c). These operational plans were essential for all parties involved (government, industry, and First Nations) in understanding the comprehensive impact of forestry decisions occurring or planned to occur on the land base. This is no longer required in FRPA and has proved to be a significant issue for First Nations consultation and provincial government planning intended to address cumulative effects. As one interviewee noted, “I think it’s because of the [forestry]
legislation that there are some inadequacies in addressing First Nations’ concerns.” Consultation requires understanding the impact of forestry decisions on Aboriginal rights, and then considering measures to mitigate and accommodate if required. The lack of requirement for these operational plans in the FRPA is particularly noticeable during an accelerated harvesting period (that is, a period of multiple forestry decisions), which causes anxiety and concern to all involved due to the potential for significant cumulative effects. One interviewee summed it up this way:

I think we have to retool the FRPA system and go back to something similar to the Forest Practices Code. There needs to be a hybrid model that has room for professional reliance, but also allows government to have a little more control over what happens on the land base. There needs to be some kind of hybrid between the Code and FRPA.

*Wildlife and Hunting Management and Aboriginal Interests.*

Wildlife and hunting management continues to be a source of intense discourse between First Nations and European culture. Differing perspectives resulted in a clash of cultures in BC approximately 200 years ago, which remains with us today. First Nations have a unique Aboriginal right to hunt wildlife for food, sustenance, spiritual, and cultural purposes. The colonizing European culture viewed wildlife as food, and as an unlimited source to satisfy trade with their home countries in Europe. This culture also introduced the right to trophy hunt, a cultural perspective foreign to First Nations and intensively debated today in society. Alberta suspended the grizzly bear hunt in 2005 and a BC “poll shows 87 per cent favour a bear-hunting ban” (Hume, 2013, September 9).

The following example illustrates the continuing misunderstanding of the spiritual aspect of wildlife, which unfortunately continues to harm the relationship between Aboriginal and non-
Aboriginal cultures. In *The Golden Spruce*, John Vaillant describes the true story of a non-Aboriginal man, Grant Hadwin, who, in 1997, felled the unique 300-year-old Sitka spruce that was covered in rare golden needles. This spruce tree was located on Haida Gwaii and was revered by both Haida Gwaii members and non-Aboriginal residents. Haida legend explains that the golden spruce represents a defiant yet good young boy who had been transformed (p. 136). It was located in the “sacred grove of the Yakoun River” (p. 147). The Haida see the Yakoun River as the River of Life, similar to the Tree of Life in the Bible (p. 147). The death of the golden spruce captured such attention that the *Victoria Times-Colonist* asked, “Can there be another Golden Spruce?” meaning “Can there be another Gandhi or Martin Luther King?” (p. 139).

When asked by a journalist whether a boy could turn into a tree, a Haida member named Skilay retorted, “Do you believe a woman could turn into a block of salt?” (p. 149). This referred to the Biblical story of Lot’s wife, who disobeyed God’s command not to look back as she fled the town of Sodom, and was turned into a pillar of salt. The Bible had an important cultural influence on European settlers in North America, who used Christian mythology to explain events of the past; the strong cultural significance of myths and legends is common to many societies around the globe. Knowing this, it is puzzling to see the lack of acceptance of First Nations’ legends and stories, which link their culture today to their past. It is also why it was important for the courts to recognize the existence and importance of the Tsilhqot’in’s legends and oral histories.

*South Chilcotin Stewardship Committee Planning Process.*

In July 2012, in response to the FRPA’s gap in not requiring consolidated forestry operational plans, the Tsilhqot’in initiated the local SCSC planning process. Provincial government staff and three active major forestry operators (BC Timber Sales, West Fraser Mills,
and Tolko Industries) were invited to participate in a coordinated exercise of planning for a defined area of land that is heavily impacted by forest harvesting. The initial goals of this process were to (a) model the moose wintering habitat, (b) map forestry and road (existing and planned) development, and (c) map CCLUP targets as the base layer for all other values. This modeling was very well received by all parties at the SCSC planning table. It has now being considered as a province-wide tool for the BC’s Cumulative Effects Framework. A majority of interviewees referenced the positives of the SCSC work. One interviewee said:

We’re trying to foresee the issues and concerns in that area upfront, and then incorporate the issues around moose, hydrology, and other values ahead of time. I feel better now with the South Chilcotin work and how First Nations’ concerns are being addressed.

An additional result of SCSC has been a Licensee Commitment document, recently signed by all three licensees, agreeing to coordinate management practices for road access and the connectivity of riparian zones and corridors (Provincial Government, 2014). Management of this FRPA value is crucial to First Nations because of its intimate connection to wildlife habitat and other biodiversity values. The figure 7 is a partial snapshot of the mapped area, which articulates the riparian corridors (dark green) that provide connectivity for wildlife travel, these being a key wildlife habitat concern.

The licensees have also met a request First Nations have made consistently over the past 10 years to share their 5-, 10-, and 20-year forestry operating plans in the area. The impact of this Licensee Commitment is two-fold, as it addresses transparent coordination and provides a key process to build on concerns regarding multiple decisions in a particular area. The first step in properly assessing cumulative effects is a thorough understanding of past and planned events.
**Figure 7:** Partial map and full legend of the SCSC

*Note:* From the [Licensee Commitment Document and Map], by the Provincial Government of British Columbia, 2014. Copyright 2014 by the Provincial Government, Tolko, West Fraser and BC Timber Sales and the Tsilhqot’in National Government. Adapted with permission.
For BC, the SCSC model was an attempt to address the potential for an *unjustified infringement* on Aboriginal Interests in this area associated with the cumulative effects triggered by multiple forestry decisions.

**Forestry Accommodations: Revenue Sharing and Forestry Tenure.**

Accommodation is a key component in the consultation engagement process. While addressing First Nations concerns, BC must consider whether the best approach to a given situation will be mitigation, reconciling interests, or adapting a proposed decision (BC Government, 2010, p. 5). This process does not set out “a duty to agree” but includes “an attempt to harmonize conflicting interests,” requires “good faith efforts” in understanding each other’s concerns (First Nations and BC), and seeks “balance and compromise” (p. 5).

In response to providing “accommodation” for the impact of forestry activities on Aboriginal Interests, BC’s throne speech (February 11, 2003) committed to (a) share forestry revenue with First Nations, and (b) seek opportunities to increase First Nations participation in the forestry industry (FLNR, 2011). (The current status of those accommodations is described in Appendix E.) The Forest Act was amended to include Sections 43.5 and 47.3, which allow First Nations access to timber tenures through direct award (MOF, 2003). The priority focus of the 2003 Forestry Roundtable was to have *First Nations becoming full partners in Forestry* (FLNR, 2011, p. 25). With continued support from the *Forestry Roundtable*, “amendments were made to the Forest Act in 2010 to allow for the creation of a new area-based tenure—a First Nations Woodland Licence” (p. 25). The principles of these agreements include the (a) acknowledgement of the Transformative Accord, (b) agreed-upon consultation principles regarding forestry and range decisions, and (c) agreement that partial accommodation had been provided to First Nations (BC, 2008a, &FLNR, n.d.b). The *Transformative Accord* and the *New Relationship* is a
2005 agreement between BC and the Assembly of First Nations to address inequities in “education, health, housing and economic opportunities” (BC Government, n.d.b, p. 1). Darrell Robb, a former BC Director, noted that other Canadian provinces had expressed interest in the success BC has realized from these initiatives (personal communication, November 28, 2013). These initiatives with First Nations are the first of their kind in Canada. Globally, since the time of contact, there have been financial or material exchanges between Aboriginal peoples and colonists; these have usually been based on informal arrangements and terms, and not always well understood by both parties.

**Supporting the New Relationship**

In 2008, following on the heels of the *Forestry Roundtable*, the Integrated Land Management Bureau (ILMB) and the Ministry of Aboriginal Relations and Reconciliation (MARR) expanded the scope of their treaty negotiations with First Nations to include all non-treaty negotiations (BC, 2008c). As an employee of BC, I then observed several reorganizations, including the 2010 integration of the individual natural resource ministries (forestry, range, lands, and water) into one ministry: FLNR. Since the 1990s, mainly through the forestry sector, BC has been negotiating agreements striving to recognize Aboriginal Interests through a process of revenue sharing, reconciliation, and consultation as an alternative to the treaty process (BC, 2008a). Since the inception of the British Columbia Treaty Commission in 1991, 60 out of 200 First Nations groups have engaged in the treaty process (BC Treaty, 2009b). However, a significant number of First Nations do not see the treaty process as appropriate for addressing their un-extinguished Aboriginal Interests.
**Negotiation Instead of Litigation**

The *Kunst’aa guu–Kunst’aayah Reconciliation Protocol* between the Haida Nation and BC (dated for reference December 11, 2009) is an example of a significantly advanced reconciliation and shared decision-making agreement (Council of the Haida Nation, 2013). These negotiations were initiated in response to the SCC\(^8\) decision, concluding with this historic Reconciliation Protocol. The *2010 Haida Gwaii Reconciliation Act* was enacted into provincial legislation through Bill 18 (2nd Session, 39th Parliament). This new legislation authorizes the council to be composed of equal members of the Haida Nation and provincial government in order to make joint decisions on, for example, *Section 5* on the determination of the allowable annual cut (2010). The Reconciliation Protocol stated:

> [The] Haida Gwaii Management Council has the authority to make high-level decisions in key strategic areas for resource management on Haida Gwaii, such as implementing the Haida Gwaii Strategic Land-Use Agreement, land-use objectives for forest practices, determination of the allowable annual cut for Haida Gwaii, conservation of heritage sites and approval of management plans for protected areas (MARR, 2011, April 13).

**Tsilhqot’in Nation and Xeni Gwet’in Negotiations with BC**

As the Tsilhqot’in’s have advanced through the court system for the past 25 years, several agreements have been signed with them. In 2009, a five-year forestry agreement provided the Tsilhqot’in with an annual $1.5 million forestry revenue-sharing payment, an annual direct-award volume totalling 168,800 m\(^3\), and a commitment to consultation on all forestry and range decisions (FLNR, n.d.d). In 2009, a strategic engagement agreement known as

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\(^8\) *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73
the Tsilhqot’in Framework Agreement (TFA) was signed (renewed June, 2014); it is described on MARR’s website as an agreement to work on “processes that will streamline consultation on natural resource decisions, provide increased certainty for investors and build on government's New Relationship with B.C. Aboriginal communities” (BC, 2008b). However, the TFA does not include the Claim Area and, although these court cases declared proven rights and Aboriginal title to the Tsilhqot’in, the Claim Area is also home to the Xeni Gwet’in. The Xeni Gwet’in have requested additional recognition by the provincial government through various forms of agreements consistent with the BCSC decision, expressed as follows:

Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsilhqot’in people can be achieved.  

In 2011, the Xeni Gwet’in clearly articulated the vision they desire in “protecting their land, water, and resources” (Friends, 2011, p. 1). With the development of an Ecosystem Based Plan (EBP), the Xeni Gwet’in are looking to incorporate their cultural and ecological values and design a community-based economy (p. 1). To assist in this, the Xeni Gwet’in wish to obtain a Community Forest Agreement (BC form of forestry tenure), which would provide them with: control over the Caretaker Area, or a significant portion thereof, in order to implement the EBP. There are precedents with other First Nations for CFAs that are managed under an ecosystem-based plan and utilize Indigenous knowledge as a primary basis for decision-making in planning and operations (p. 13).

84 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at page 11 (f)
85 Ibid., at para 1382
The EBP is seen “as the main guidance for land protection” for Xeni Gwet’in membership (p. 13). The Xeni Gwet’in’s intentions of protecting “their land, water and resources,” as expressed in the EBP, is similar to the Tla-o-quit-aht First Nation’s desire to “design ‘shared’ forms of governance” in the pursuit of protecting areas to address “sociocultural, economic and environmental objectives” (Murray & King, 2012, p. 385).

FLNR government staff met with Chief Roger William of the Xeni Gwet’in to discuss options regarding the area-based tenure (personal communication, April 23, 2014). Chief William expressed the desire for an area-based tenure and the community’s holistic approach in the management of this tenure. The Xeni Gwet’in are less interested in reaching the approved 10,000 m³ of AAC and more concerned about pursuing stewardship values similar to the intent of the EBP. This is where the Xeni Gwet’in are seeking innovation from BC’s legislation and policies to better address their proven rights and desire for shared decision making. The recent SCC\(^{86}\) decision to declare Aboriginal title to the Tsilhqot’in makes the Xeni Gwet’in’s desired outcomes for this area much more likely to be realized.

**How important is the Relationship?**

There has been a large emphasis on examining the “legal” question and there is a strong indication that litigation will remain a compelling piece in addressing this complex problem—even more so since the SCC\(^{87}\) decision. Judges have encouraged First Nations, federal, and provincial governments to negotiate rather than litigate. Negotiation would be preferred, as litigation is divisive and costly. It is unclear which avenue will be most fruitful, legal action or negotiated agreements.

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\(^{86}\) *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 153

\(^{87}\) *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44
My research results highlighted the importance of building relationships with First Nations as a vital aspect of addressing the evolving Aboriginal legal direction. Relationship-building with people and communities seems like an oxymoron when a legal decision is your road map for success. However, it is common place for parties to resort to courts to settle disputes of many types arising from relationship conflict. The court process can support parties to work together to reconcile interests that seem at odds, and it can help to reconcile Aboriginal Interests to the land and legislated forestry tenure rights to the trees. This can be an aspect of relationship-building.

A positive relationship weighs heavily in whether negotiations are successful. For the past 200 years, the relationship between colonists and First Nations has been fraught with conflict and misunderstandings. One interviewee summarized the importance of the relationship this way:

Relationships with First Nations will be more important than ever. As treaties get settled, there will be more in their hands. If you’ve dealt with them well, it will benefit you. They’re not going to forget if they were mistreated or not listened to.

**Tsilhqot’in Nation’s Non-Participation**

All participants were interviewed with the exception of groups 1 and 2 (Tsilhqot’in Community elders and Tsilhqot’in members involved in forestry). This was not unexpected. Although initial conversations with the Tsilhqot’in leadership about this research study had been positive, when the formal invitation was sent to the Tsilhqot’in leadership in July, 2013, the Tsilhqot’in declined involvement. In 2013, the ongoing court action regarding the Tsilhqot’in’s quest for declaration of their Aboriginal Interests, which had started in 1989, was still ongoing.
The Federal Panel (appointed by the federal government) attended Tsilhqot’in communities from July 15 to August 31, 2013 to conduct hearings in response to Taseko’s proposal to build the New Prosperity gold and copper mine at Teztan Biny (Fish Lake). This proposal was controversial to the Tsilhqot’in and non-Aboriginal citizens alike, and also garnered international attention, as the proposed site is located in the proven rights area, as declared by both BCSC\textsuperscript{88} and BCCA\textsuperscript{89} decisions (Protect Fish, n.d.). Subsequently, the proposal to build New Prosperity was turned down on February 26, 2014 by the Honourable Leona Aglukkaq, Minister of the Environment and Minister responsible for the Canadian Environmental Assessment Agency (CEAA, 2014).

Additionally, in September and October, 2013, several First Nation protests, including road blockades, were set up to prevent access to non-Aboriginal hunters and forestry industry operations (Lamb-Yorski, 2013). In the context of these events, the Tsilhqot’in’s mistrust of governments extended to distrust of a government employee (me) conducting a research study directly with the members. Therefore, in place of interviews with Tsilhqot’in leadership, I have relied on their discussions with the media, on public websites, and in published documents on these issues. Neither my request for interviews, nor their refusal to be interviewed, has harmed my working relationship with the Tsilhqot’in.

The future of the Forestry Industry Economics and MPB

The following section explores the sixth and seventh themes: forestry economics of the future and the continuing management of the MPB. This discussion sums up the perspectives of

\textsuperscript{88} Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700  
\textsuperscript{89} William v British Columbia, 2012 BCCA 285
interviewees and research conducted on what the predictions of the future in the Cariboo Region may look like.

**What Does the Future Look Like for the Forest Industry?**

The interview results provided good insight into this question, with a few issues emerging regarding forestry economics. First, the past 10-plus years have been focused on harvesting dead lodgepole pine, with less attention paid to forest stewardship values and planning. “There needs to be a lot more intensive management, for the future of forest health in general.” There was no optimism evident in these interviews: “I think the future is bleak” and “we had a gravy train, and now we are headed to tougher times” were typical comments. For the past 10 years, AACs within the Cariboo Region have been significantly increased to address the MPB effects. “We’re lucky to have another 10 years before our AAC is just going to plummet,” one interviewee said. Interviewees recognized the negative effects arising from the intense focus on pine salvage and felt there was little choice about managing the MPB differently. As one interviewee expressed “I don’t think it’s one that a scientist or research could have ever predicted. The MPB went right into the alpine and white bark pine. It’s unprecedented, what it’s done.”

Second, all interviewees supported the practice of area-based tenures versus volume-based tenures as a good alternative for sustainable forestry management and diversifying the economy in the woods. As one interviewee said, “When you have area-based tenures, there’s more certainty on both sides.” Several references were made to the risk of having a homogenous tree species, lodgepole pine, and noting the preferred and more sustainable practice of species diversification in response to climate change. Several interviewees referenced the “perfect storm” that has occurred with the forest industry due to (a) the MPB epidemic, (b) forest volume redistributed through direct award to First Nations, (c) significantly increased AACs, (d) First
Nations Aboriginal Interests and the evolution of Aboriginal law, and (e) the global economic crisis in 2009. As one interviewee said:

There were a lot of unreasonable expectations for First Nations. The Timber Supply Area is 5.7 million m$^3$ [AAC] and we are only cutting 3.8 million m$^3$. There are reasons we are undercut. The Tsilhqot’in was given a very large forest licence, and they have capacity issues. They were like, “Where’s the wood?” It was a perfect storm. You had lots of product, an increase in the AAC, lots of capacity in licensees, but the USA economy crashed. Late 2007 through 2012 and even this year has been tough.

**Climate Change and the MPB Effects on the Forest Industry**

Interviewee responses suggested that a chaotic response occurred at the time of the MPB epidemic and continues today. The introduction of FRPA with relaxed constraints on the increased forestry activities (no coordinating planning required) and a period of increased AACs were the main factors of this undesirable situation; as stated by one interviewee, “Some of the constraints have been relaxed around seral stage distribution and Old Growth Management Areas.” Overall planning became harder to achieve and all parties were left in the dark as licencees ended up pursuing their economic forest interests during a time of uncertainty for the global economy and Aboriginal law. As expressed by one interviewee, “It’s a ribbon race, basically. First Nations work with the licensees and a corridor is left to protect their interests, and a week later another licensee will lay out that [same] accommodation corridor, saying we want that wood.”

In response to several interview questions, interviewees noted the lack of an FRPA-coordinated planning tool as an impediment to good stewardship practices. Interviewees
commented on the importance of salvaging the forest from the devastating MPB effects in an effort to recoup some economic value. This also provides a more immediate opportunity to replant and rejuvenate the forest. However, interviewees recognize the dilemma of the effects of increased forest harvesting on the land base (increased road development, soil degradation, and loss of wildlife habitat).

Interviewees commented on the sheer speed that the MPB infestation turned from an endemic level to an epidemic and that existing forestry management practices seemed in conflict with successful MPB epidemic management. For example, with the decrease of First Nations and prescribed burns in response to society’s fear of fire, the lodgepole pine stands were allowed to expand and ultimately provide a bread basket for the MPB to flourish. As eloquently expressed by one interviewee, “when you have an old pine forest that’s been protected by fire management practices, those stands become so attractive to beetle or fire. One way or another, Mother Nature is going to flush the systems.”

**Xeni Gwet’in’s Response to Climate Change**

Locally in response to climate change, the Xeni Gwet’in financed the *Xeni Gwet’in Community-based Climate Change Adaptation Strategy*, which provides ideas for the community to adapt to the present environment (Lerner, Rossing, Delong, Holmes, McCrory, Mylnowski, & Oppermann, 2010). This comprehensive plan provides advice for the community on a variety of situations; for example, Section 9 *Biodiversity Protection and Conservation* suggests keeping the Xeni Gwet’in ecosystem intact by limiting the amount of industrial development; this brings increased road structure, which in turn has an impact on wildlife (p. 69). Community members share ideas on how to manage hunting, stating, “take only what you need” (p. 58). With the recognition of the threat of an increase of fires, and flooding in areas that did not previously
experience it, the Xeni Gwet’in members support the development of plans to address these potential events (p. 60).

Additionally, the Tsilhqot’in had secured funding of $100,000 from the federal government to support a Climate Change Adaptation Tsilhqot’in Territory Project Year 2 (AANDC, 2013). The Tsilhqot’in National Government’s newsletter includes a summary of the project’s interviews with Tsilhqot’in elders, including their observations of the past and present changes. For example, the past observations include “sun is hotter... more moose... fish taste better” and the present observations “used to get more rain... less moose... fish taste different” (Tsilhqot’in, 2013, p. 13). See Appendix E for the complete summary.

**Conclusion and Recommendations**

The research study confirmed that people today who are tasked with land-based management are faced with complex challenges, especially when considering the main research question: does the practice of accelerating the harvesting of beetle-infected wood affect the ability of First Nations to practice their Aboriginal rights on the Chilcotin Plateau? The simple answer is, yes. What is more important, though, is how First Nations, government staff, and industry have reacted to the events that have occurred in the past 200 years, and specifically the last 30 years in the Cariboo Region, with regards to Aboriginal law, MPB, forest industry, economics, and societal interests. What is most critical to recognize, and was made evident by the research study, is that “time does not stand still”; to put it another way, it would be impractical to apply wholly the societal principles of 1793 to the landscape of 2014. The research study instead explored how the people involved responded to events on the land and reconciled their actions with those events, whether from a legislative or community perspective.
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With the evolution of Aboriginal law in addressing historical events, the courts have provided a consultation engagement framework to be followed by both First Nations and governments. On June 26, 2014, the SCC found BC had breached its duty to consultation and agreed with the BCSC’s assessment that the proposed forestry management would be an unjustifiable infringement on the Tsilhqot’in. Both these court assessments were based on the events in 1989. My research study found that forestry legislation and consultation policies have evolved in that 25-year period in response to Aboriginal law. Would the courts have come to the same finding today in that area? The declaration of Aboriginal title is based on historical facts that would not have changed and the conclusion would have been the same. The consultation policies and forestry practices have evolved appropriately, but the BCSC’s criticism of the totality of forestry management, including the lack of adequate wildlife assessments, remains valid today. The question of how to apply this SCC decision in BC, but outside the Claim Area, could be the substance of a future thesis.

The people interviewed feel the pressure daily in balancing societal and Aboriginal interests in their consultation and decision-making responsibilities. However, it is Judges in court rooms and Cabinet Ministers in the legislature who make the decisions that directly impact people working on the ground, and those people are expected at the end of the day to “make things work.” The recommendations are provided to assist the people who are required to balance interests; however, they are recommendations governments must decide to implement.

A lot has happened in the 200 years since the time of contact, including significant changes to forestry legislation and stewardship practices, and with specific response to concerns regarding cumulative impacts and forest health. This is a short period of time. Some positive change has occurred in a very challenging and changing environment with demanding societal
expectations. The research results have shown that adaptive management continues to be vital in a quickly changing landscape to ensure we address complex issues as well as possible. The research findings prove that the people involved are thoughtful, concerned, and recognize actions that need to take place to address this complex issue.

My experience with the SCSC is an example of my increased hope that individuals together can address this complex issue, although I am cautious in my optimism. In the absence of coordinated operational plans presently not required by legislation, provincial government staff, industry, and First Nations pulled together and created an alternative process to address the coordination required for defendable forestry decisions. This newly developed coordination tool is now much appreciated by decision makers in supporting better decisions. During the SCSC planning process with government, industry, and First Nations, I observed a shared desire amongst all parties to see and create better stewardship on the land base. I believe this strengthens the ties between us as we seek to achieve a very important common goal that affects us all regardless of our ethnicity or culture. At times, there is still the lingering belief that the practice of forestry needs to remain status quo focused solely on supporting forest economics, with less consideration for values other than those legislated through FRPA.

It could be argued that, to address the other values associated with the cumulative effects and multiple decision concerns, legislative change is the most appropriate venue. The continued pressure, though, will lie in addressing the constitutional obligation to address Aboriginal Interests, which are intricately connected with a healthy forest ecosystem. I have come to realize that, when carrying out consultation obligations, the goal of avoiding a legal challenge is not realistic; court cases can give clarity in a continually evolving area of law, and legal clarity can be a good thing. Ultimately, though, it is ideal that we resolve these issues of outstanding
Aboriginal Interest claims and stewardship concerns through reconciliation and negotiation, given this common goal to steward the land and forests.

The courts have recognized the dilemma of reconciling the practice of Aboriginal rights in 1793 with today’s society. The balancing of Aboriginal and societal interests is referenced in all court decisions today as a reminder for the need to balance past events with present realities.

Before moving into recommendations, I end with Justice Vickers’ words of wisdom:

As a consequence of colonization and government policy, Tsilhqot’in people can no longer live on the land as their forefathers did. How is a former seminomadic existence, one that cannot be replicated in a modern Canada, to be given “cultural security and continuity” in this twenty-first century and beyond? Governments and Tsilhqot’in people must find an accommodation that reconciles the historical Tsilhqot’in place in Canada with the place of their neighbours who come from all corners of the world.90

Recommendations

Based on the evidence of my findings from the literature review and interviews, I will be providing policy recommendations to the provincial government to better address both the constitutional obligations associated with Aboriginal Interests and with the societal expectations of good forest stewardship. Significant change has occurred in BC and on the Chilcotin Plateau “since the time of contact” approximately 200 years ago. This thesis only touches on the cultural, ecological, and industrial changes. There is more that could be said. However, it is obvious that society recognizes the importance of these land management issues, as reflected in the evolution of forestry legislation, Aboriginal law, and government policy development.

90 Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700 at para 1379
As we enter a new era defined by the courts, governments, and industry, if we are going to address the challenges in front of us and be seen as leaders in land management, we need to proceed thoughtfully. I provide the following recommendations for the provincial government to consider:

1. **Amend FRPA**: Require the forestry industry to prepare a consolidated forestry operational plan as part of their Forest Stewardship Plan, as previously required in the Code.

2. **Support land use planning**: Address the connection of the totality of forestry management and it impacts on wildlife (causing a decline of wildlife habitat) by supporting land use planning. This strategic planning initiative addresses cumulative effects, better stewardship, and clarity for First Nations consultation engagement. With the expected increase of Aboriginal law challenges, land use planning will provide BC with a tool for defensible decision making.

3. **Restructure the treaty/non-treaty process**: Determining where Aboriginal title exists in BC for all First Nations will provide clarity to all parties. Streamlining the language in an agreement template would ensure consistency for all agreements with First Nations. Key components should include:
   a) Aboriginal title mapping;
   b) Financial compensation package (including “accommodations”);
   c) Incorporation of the *Tsilhqot’in v BC* (2014) decision direction for consultation; and
   d) Matrix for levels of engagement for all natural resource decisions.
This could start with the *Forestry and Consultation Revenue Sharing Agreement* and the principles of the *Forestry Roundtable* and expand on its elements using the recommendations above.

4. **Designate “one” decision maker:** Have one decision maker per District instead of individual decision makers for each sector (forestry, range, lands, water, and mining). Increase support staff to the “one” decision maker (including technical, operational, and management staff) to ensure the “one” decision maker receives a well-informed package of technical and First Nations consultation engagement information.

5. **Implement wildlife assessment and recovery strategy:** Immediately implement a wildlife assessment and recovery strategy (moose) for the Cariboo Region. In doing so, BC will be seen as the leader in wildlife management, and will be recognized for a forward-thinking initiative that will address Aboriginal Interests and good land stewardship. This will also address the BCSC decision’s criticism of inadequate wildlife assessments.

6. **Fully implement the Tsilhqot’in v BC (2014) decision’s direction in the assessment of the strength of claim for all First Nations:** Support staffing resources to adequately prepare initial assessments of strength of claim for Aboriginal Interests and share with First Nations and industry (similar to what occurs in the environmental assessment process). This will provide certainty for First Nations and industry.

7. **Make the “cumulative effects model” a provincial priority:** Provide adequate staffing resources to ensure its success provincially in supporting further research, implementation, and adaptive management practices (Hoffos, Dawson, & McGirr).
8. **Incorporate Diana Six’s recommendations:** Diana Six offers two straightforward solutions for addressing the MPB epidemic and its continuing adverse effects on the land:

   a) Decrease greenhouse gases.

   b) Develop new tools, as logging will not fix everything, and instead refer to our knowledge of genetics and adaptation (Six, 2013, 13:17).

In the past 10 years, conducting research and staffing research scientists have **not** been a priority for BC, but both are required to support *genetics and adaptation*.

9. **Make tree-species-diversification replanting a government priority:** This would prevent future homogenous lodgepole pine stands that support an endemic MPB population from quickly turning epidemic again. More diverse future forests would be more resilient in the face of climate change predictions.
References


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Resources Canada, Canadian Forest Service. Retrieved from


http://www.haidanation.ca/Pages/Agreements/pdfs/Kunstaa%20guu_Kunstaayah_Agreement.pdf


Delgamuukw v British Columbia, 1997 3 SCR 1010


Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73


Intergovernmental Panel on Climate Change. (2014). Climate change 2014: Mitigation of climate change. Summary for policy makers. Retrieved from


Lane, R. (1953). *Cultural relations of the Chilcotin Indians of West Central British Columbia*. 


MacKinnon, J. (2013). The once and future World Nature as it was, as it is, as it could be. Toronto, ON: Random House.


https://circle.ubc.ca/bitstream/handle/2429/36432/ubc_2011_fall_malkinson_leah.pdf?sequence=1


http://www.gov.bc.ca/arr/reports/bctf/bc_claims_task_force_introduction.html

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http://www.kitimatdaily.ca/go4417a/UNIQUE_Haida_GWAI1_DECISION_MAKING_COUNCIL_FORMED


http://www.env.gov.bc.ca/cos/100years/1961/index.html


http://www.livesmartbc.ca/attachments/Adaptation_Strategy.pdf


http://www.for.gov.bc.ca/hfp/frep/values/


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http://www.for.gov.bc.ca/haa/policies_reports.htm


http://www.for.gov.bc.ca/hfp/frep/about/index.htm


http://www.for.gov.bc.ca/mof/forestry_roundtable/20110120-RoundtableStatusUpdate.pdf


http://www.for.gov.bc.ca/hts/tsa/tsa29/index.htm


http://www.for.gov.bc.ca/hts/aactsa.htm


R. v Sparrow, 1990 1 SCR 1075


http://ubcic.bc.ca/files/PDF/McKenna_McBride/Confidential_Report_cropped.pdf


Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700

Tsilhqot’in Nation v British Columbia, 2014 SCC 44


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William et al. v British Columbia et al., 2004 BCSC 148

William v British Columbia, 2012 BCCA 285
## Appendix A - Interview Questions

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<th>FLNR consultation staff</th>
<th>Forestry Industry</th>
<th>Tsilhqot’in members &amp; Elders</th>
<th>Tsilhqot’in Forestry Committee</th>
<th>Mayor and Council of WL</th>
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<tbody>
<tr>
<td>Aboriginal Law</td>
<td>Please describe your understanding of the legal test evolved through aboriginal law on the assertion of aboriginal rights and title.</td>
<td>Please describe your understanding of the legal test evolved through aboriginal law on the assertion of aboriginal rights and title.</td>
<td>Please describe your understanding of the legal test evolved through aboriginal law on the assertion of aboriginal rights and title.</td>
<td>As Tsilhqot’in Nation members and holders of the largest proven rights case in British Columbia, what are your feelings about working with the provincial government in addressing your proven rights?</td>
<td>Please describe the legal test evolved from aboriginal court cases in the assertion of aboriginal rights and title.</td>
<td>Please describe your understanding of the legal test evolved from aboriginal court cases in the assertion of aboriginal rights and title.</td>
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<tr>
<td>Consultation</td>
<td>In your role as the SDM, how do you assess the adequacy of First Nations’ consultation when making a decision? Is this decision-making process adequate? Please explain.</td>
<td>On which natural resource sector decisions do you consult? Ie: forestry, mining, lands, range. In your view, are the provincial consultation procedures adequate? Please explain.</td>
<td>When is information sharing with First Nations on proposed forestry decisions complete prior to submitting to FLNR for consideration and approval? Please explain.</td>
<td>In your life time, how has the forest and your traditional use of the forest changed. More specifically, how has the recent mountain pine beetle epidemic affected your traditional uses? Has your ability to hunt, berry pick and fish been affected? Please explain. Do you see changes in the forest? And if so, what are they? How do you view the future for your traditional use and the forest resources?</td>
<td>As Tsilhqot’in Nation members and holders of the largest proven rights case in British Columbia, how do you feel about working with the provincial government in addressing your proven rights? Do you see changes in the forest? And if so, what are they? How do you view the future for your traditional use and the forest resources?</td>
<td>Who has the legal consultation obligation to consult with First Nations on forestry harvesting? Industry, FLNR or First Nations? And what does that process look like? Please explain.</td>
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<td>Forestry Legislation</td>
<td>Do present forestry legislation and policies (FRPA) adequately address the First Nations’ concerns about the land base? If not, what changes do you believe are needed? If so, please describe how?</td>
<td>Do present forestry legislation and policies (FRPA) adequately address the First Nations’ concerns on the land base? If not, what changes do you believe are needed? If so, please describe how?</td>
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<tr>
<td>Cumulative Effects (multiple forestry)</td>
<td>How is the assertion of cumulative effects addressed as part of the decision-making?</td>
<td>How is the assertion of cumulative effects made by First Nations addressed in the consultation process?</td>
<td>How is the assertion of cumulative effects made by First Nations addressed in the forestry planning?</td>
<td>Do you see an increase of forestry harvesting? Please explain.</td>
<td>Do you have concerns with multiple forestry decisions occurring causing cumulative effects to the forest?</td>
<td>Have you heard concerns of multiple forestry decisions occurring causing cumulative effects to the forest?</td>
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91 Color coded boxes indicate questions are exactly the same.
92 FRPA—Forestry and Range Practices Act
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<th><strong>Process? Please explain.</strong></th>
<th><strong>Forestry ecosystem? In a particular area? Please explain.</strong></th>
<th><strong>Ecosystem?</strong></th>
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<tbody>
<tr>
<td><strong>Forest Health (Ecosystem) Stewardship practices</strong></td>
<td>Have forestry business practices changed since the mountain pine beetle epidemic and the subsequent increase of the Allowable Annual Cut? If so, what changes have you seen? Could something different have occurred to address this beetle attack? Please explain.</td>
<td>Have forestry business practices changed since the mountain pine beetle epidemic and the subsequent increase of the Allowable Annual Cut? If so, what changes have you seen? Could something different have occurred to address this beetle attack? Please explain.</td>
<td>Have forestry business practices changed since the mountain pine beetle epidemic and the subsequent increase of the Allowable Annual Cut? If so, what changes have you seen? Could something different have occurred to address this beetle attack? Please explain.</td>
<td>Have forestry business practices changed since the mountain pine beetle epidemic and the subsequent increase of trees to be harvested? If so, what changes have you seen? Could something different have occurred to address this beetle attack? Please explain.</td>
<td>Have forestry business practices changed since the mountain pine beetle epidemic and the subsequent increase of trees to be harvested? If so, what changes have you seen? Could something different have occurred to address this beetle attack? Please explain.</td>
</tr>
<tr>
<td><strong>Forestry Economics</strong></td>
<td>How does the SDM balance First Nations interests, forest stewardship and forestry industry economics? Please explain.</td>
<td>How does the SDM balance First Nations interests, forest stewardship and forestry industry economics? Please explain.</td>
<td>How does industry balance First Nations interests, forest stewardship and forestry industry economics? Please explain.</td>
<td>How does the provincial government, when making decisions, balance First Nations interests, forest stewardship and forestry industry economics? Please explain.</td>
<td>Must FLNR reach a balance of addressing First Nations interests, forest stewardship and forestry economics? If so, how? Please explain.</td>
</tr>
<tr>
<td><strong>Mountain pine beetle epidemic general</strong></td>
<td>What is your view of what has occurred in the forestry industry in the Cariboo Region in the past 10 years? What does the future look like? Please explain.</td>
<td>What is your view of what has occurred in the forestry industry in the Cariboo Region in the past 10 years? What does the future look like? Please explain.</td>
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</tbody>
</table>

(O'Sullivan, 2013)
Appendix B – Forest and Range Evaluation Program (FREP)

Note: From the FREP Forest and Range Evaluation Program website by the Ministry of Forests, Lands and Natural Resource Operations, n.d. Copyright 2014 by the Provincial Government of British Columbia. Adapted with permission.
Appendix C—Aboriginal Law Landmark Cases

<table>
<thead>
<tr>
<th>Aboriginal Rights</th>
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</thead>
<tbody>
<tr>
<td><strong>R. v. Sparrow (1990)</strong></td>
</tr>
<tr>
<td>cited the Constitution Act of 1982, declared First Nations have the right to fish for food and ceremonial purposes and described the descending hierarchal Aboriginal right as firstly, conservation; secondly, First Nations sustenance; and thirdly, non-First Nations commercial or recreational harvesters (p. 1115)</td>
</tr>
<tr>
<td><strong>Delgamuukw v. BC (1997)</strong></td>
</tr>
<tr>
<td>Known as a legal goalpost (time of contact):</td>
</tr>
<tr>
<td>“activities that were to be protected were only those carried on at the time of contact or European influence and that were still carried on at contact of time of sovereignty” (p. 1037); Aboriginal rights can be practiced in a modern form (p. 1051)</td>
</tr>
<tr>
<td><strong>Haida v. BC (MOF) (2004)</strong></td>
</tr>
<tr>
<td>discussion on the preliminary assessment of the strength of the claimed Aboriginal rights and title as mentioned in the consultation engagement process</td>
</tr>
<tr>
<td><strong>Tsilhqot’in Nation v. BC (2014)</strong></td>
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<table>
<thead>
<tr>
<th>Aboriginal Title</th>
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<tbody>
<tr>
<td><strong>R. v. Sparrow (1990)</strong></td>
</tr>
<tr>
<td>“The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation” and “that is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples” (p. 1108)</td>
</tr>
<tr>
<td><strong>Delgamuukw v. BC (1997)</strong></td>
</tr>
<tr>
<td>Known as a legal goalpost (1846):</td>
</tr>
<tr>
<td>“I conclude that must establish occupation of the land from the date of the assertion of sovereignty order to sustain a claim for aboriginal title. . . that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty 1846” (p. 1099); “aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both aboriginals and members of other aboriginal nations” (p. 1123); “it is held communally. Aboriginal title cannot be held by individual aboriginal persons; collective right to land held by all members of an aboriginal nation” (p. 1082); “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title” (p. 1111)</td>
</tr>
<tr>
<td><strong>Haida v. BC (MOF) (2004)</strong></td>
</tr>
<tr>
<td>discussion on the preliminary assessment of the strength of the claimed Aboriginal rights and title as mentioned in the consultation engagement process</td>
</tr>
<tr>
<td><strong>Tsilhqot’in</strong></td>
</tr>
<tr>
<td>the Delgamuukw test for Aboriginal title to land is based on “occupation”</td>
</tr>
<tr>
<td>Case</td>
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<tr>
<td>------</td>
</tr>
<tr>
<td>Nation v. BC (2014)</td>
</tr>
<tr>
<td>R. v. Sparrow (1990)</td>
</tr>
<tr>
<td>Delgamuukw v. BC (1997)</td>
</tr>
<tr>
<td>Haida v. BC (MOF) (2004)</td>
</tr>
</tbody>
</table>
1) the preliminary assessment of the strength of the claimed rights and title; and 2) the seriousness of the adverse impact of the proposed Crown’s activities on those claimed rights and title. This assessment places the consultation engagement on a scale notification to deep consultation; consultation and accommodation obligation rests with Crown; honour of the Crown cannot be delegated, although aspects of the consultation procedural can be delegated to the proponent; the consultation process does not give First Nations group a veto over land and resource or demand Aboriginal consent; First Nations must not frustrate the Crown’s reasonable good faith attempts and First Nations have a duty to express their interests and concerns with sufficient clarity; and the Crown will not act unilaterally in disposing of allocating land and resources;

“A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, an established claims” (p. 530)

“ultimate legal responsibility for consultation and accommodation rests with the Crown” (paragraph 53)

<table>
<thead>
<tr>
<th>Tsilhqot’in Nation v. BC (2014)</th>
<th>(87) The requirement of proportionality is inherent in the Delgamuukw process of reconciliation and was echoed in Haida’s insistence that the Crown’s duty to consult and accommodate at the claims stage “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (para. 39); Infringement test: The issuance of timber licences on Aboriginal title land for example—a direct transfer of Aboriginal property rights to a third party—will plainly be a meaningful diminution in the Aboriginal group’s ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent (paragraph 124).</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. Sparrow (1990)</td>
<td>“Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights” (p. 1109)</td>
</tr>
<tr>
<td>Delgamuukw v. BC (1997)</td>
<td>“recognized that aboriginal rights are not absolute and may be infringement by the federal and provincial if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples” (p. 1021); I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake (p. 1134); “Ultimately, it is through settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve... ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’ Let us face it, we are all here to stay.” (p. 1124)</td>
</tr>
<tr>
<td><strong>Haida v. BC (MOF) (2004)</strong></td>
<td>“Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. . . Balance and compromise will then be necessary” (p. 534); “Balance and compromise are inherent in the notion of reconciliation” (p. 536).</td>
</tr>
<tr>
<td>-------------------------------</td>
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</tr>
</tbody>
</table>
| **Tsilhqot’in Nation v. BC (2014)** | The governing ethos is not one of competing interests but of reconciliation (paragraph 17).  
[82] As Delgamuukw explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d’être* of the principle of justification. Aboriginals and non-Aboriginals are “all here to stay” and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective. |

(O’Sullivan, 2014)
Appendix D—Direct Award Tenures and Revenue Sharing as of 2012

Direct Award Tenures:
From early 2002 to April 1, 2012, 172 First Nations have signed a total of 256 direct award agreements offering a total of 66.1 million m$^3$ (up from 63.9 million m$^3$ at the end of December) when issued within forest tenures. Of this amount, 47.8 million m$^3$/yr have been awarded in forest tenures and 18.3 million m$^3$ have been harvested. Of the total volume offered, 72% is now within forest tenures and 28% has been harvested.

- [Quarterly Report September 2011](#)
- [Quarterly Report December 2011](#)
- [Quarterly Report April 2012](#)

### Total Agreements with First Nations and Revenue Sharing

As of June 20, 2012:

<table>
<thead>
<tr>
<th>Agreement Totals</th>
<th>Executed</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Agreements</td>
<td>189</td>
<td>360</td>
</tr>
<tr>
<td>First Nations with Agreements</td>
<td>149</td>
<td>175</td>
</tr>
<tr>
<td>Agreements with Active Tenures</td>
<td>70</td>
<td>187</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Revenue Sharing Totals</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Revenue (current Fiscal Year)</td>
<td>$30,552,736</td>
</tr>
<tr>
<td>Total Program Revenue (including current Fiscal Year)</td>
<td>$323,865,522</td>
</tr>
</tbody>
</table>


**STEWARDSHIP DEPARTMENT-CLIMATE CHANGE PROJECT**

**Climate Change Adaptation Tsilhqot’in Territory Project Year 1 Recap**

*Goal:* The project’s aim was to write a plan that would help Tsilhqot’in communities explore options for adapting to climate change.

*Objectives:* (1) to use traditional knowledge and existing science in planning adaptation strategies; (2) engage in community talks to identify climate risks and adaptation strategies; and (3) to increase awareness and adaptive capacity in communities.

*Activities:* Engagement with elders through interviews and discussions with the broader community members at luncheons to better understand how the Territory has changed in recent memory, how the communities have been affected as a result of those changes, and what might be done in the future so communities can be stronger as the climate gets warmer and drier.

*Results:*

Summary of changes in the Territory as expressed by elders during the elder interviews

<table>
<thead>
<tr>
<th>Then (Past)</th>
<th>Present</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colder winters (down to -60C)</td>
<td>Warmer (&quot;the sun feels hotter&quot;)</td>
</tr>
<tr>
<td>More rain and snow accumulation</td>
<td>Drier (&quot;use to get more rain&quot;)</td>
</tr>
<tr>
<td>More moose (&quot;use to see them every day&quot;)</td>
<td>Less moose; smaller; further away now</td>
</tr>
<tr>
<td>More fish; healthier; tasted better</td>
<td>Some fish taste different; thicker slime</td>
</tr>
<tr>
<td>More small mammals; lots of trapping</td>
<td>Fewer small animals; limited trapping;</td>
</tr>
<tr>
<td>Few predators</td>
<td>More predators (e.g. wolves, hawks)</td>
</tr>
<tr>
<td>More hay for ranching activities</td>
<td>Less hay available; poor soils</td>
</tr>
<tr>
<td>People use to eat more traditional foods;</td>
<td>More store bought foods; little interest in</td>
</tr>
<tr>
<td>more community gardens</td>
<td>community gardens</td>
</tr>
<tr>
<td>More ranching activities for employment</td>
<td>Fewer economic opportunities; youth</td>
</tr>
<tr>
<td>and income</td>
<td>moving away; lack of work</td>
</tr>
<tr>
<td>Fewer social gatherings</td>
<td>More social gatherings (birthdays, bingo)</td>
</tr>
<tr>
<td>Strong use of Tsilhqot’in language</td>
<td>A loss of language (youth not learning)</td>
</tr>
<tr>
<td>People use to lead more active lifestyles;</td>
<td>More technology (cell phones, videogames, quads)</td>
</tr>
<tr>
<td>more time outdoors</td>
<td>A loss of traditional practices amongst youth</td>
</tr>
<tr>
<td>Strong traditional practices</td>
<td></td>
</tr>
</tbody>
</table>

Based on the discussions at the community luncheons, the changes of greatest concern to communities were: i) water resources; ii) fish and fish habitat; iii) forests and grasslands; iv) wildlife; and v) traditional practices, knowledge and beliefs.