MEMORANDUM

To: **Chiefs Executive Council, Okanagan Nation Alliance**

From: **Douglas White and Dr. Roshan Danesh**

Re: ***Tsilhqot'in Nation*** **and the British Columbia Treaty Process**

Date: **February 12, 2016**

A. QUESTION

What are the implications for the British Columbia Treaty Process ("BCTC Process") of the jurisprudence of section 35(1) of the *Constitution,* and more particularly the historic and transformative *Tsilhqot'in Nation* (2014) decision that declared an expansive Aboriginal Title that answers the century-old "Indian Land Question"?

B. SHORT ANSWER

Section 35(1) of the *Constitution*, and in particular treaties, "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty". (*Haida,* 2004) There is a positive obligation on the Crown to diligently pursue the fulfillment of this goal in a way consistent with the honour of the Crown. Meeting this purpose also includes ensuring that the Aboriginal connection to their Territories is maintained and respected, and distinctive cultures and ways of life are protected – objectives and imperatives in relation to which both the Crown and First Nations have responsibilities. *(Tsilhqot'in Nation)*

Good faith and honourable negotiations of treaties are a pathway for effecting this reconciliation. Such negotiations, however, must be conducted in manner that respects the purposes and obligations created by the framework of section 35(1), including those related to continuity and connection to Territory.

The BCTC Process, as currently designed and implemented, is inconsistent with the section 35(1) framework, including principles and standards in *Tsilhqot'in Nation*. Both the current process and approach to treaty negotiations, as well as treaties completed through that process, have significant legal and constitutional challenges, and will increasingly result in growing uncertainty for all parties. At the core of the legal dilemma facing the BCTC Process is its focus on extinguishment and modification of Aboriginal Title and Rights instead of their recognition and implementation. Further, in many respects, including Crown mandates and approaches, the BCTC Process is inconsistent with the principled and purposive framework for reconciliation of sovereignties developed by the Courts. New, recognition-based, models and approaches to Crown-First Nations negotiations are required that meet the purposes of implementing section 35(1) of the *Constitution.*

C. CONTEXT

From the outset of relations between Indigenous Peoples and the Crown, there has been a pursuit by Indigenous Peoples of Nation-to-Nation relationships grounded in the principles of relationships between sovereigns. As the Crown over time came to abandon and reject any commitment to such Nation-to-Nation relationships – and impose systems grounded in assimilation and denial - Indigenous Peoples maintained focus on that essential goal, and over many generations have pursued a diversity of pathways to achieve it. At the heart of this work has been the unyielding determination of Indigenous Peoples to re-establish proper relationships with their Territories that respects their sovereignty, implements their laws and legal orders, functions through their rebuilt governance structures, and maintains healthy societies and economies. Generation after generation have taken various steps forward, desiring to ensure the children to come will not suffer the impacts of colonialism to the same punishing degree.

These pathways towards justice have involved action on the ground and in families and communities, the development of new governance capacity, the revitalization of language, culture, and ceremony, negotiations with the Crown and third parties, the use of the courts, and broader engagement in society to build knowledge, understanding, and patterns of positive relations. All of these pathways are interrelated and intersect in a range of ways, and ultimately they all have roles to play, as well as limits and benefits. While all of these pathways have contributed to successes in important ways, critical work is on going and a tremendous amount remains to be done.

The intersection and interrelationship between two of these pathways – negotiation and litigation – is the primary subject matter of this paper. Also explored are the implications of the significant changes to the current context of Aboriginal-Crown relations – in particular the growing action and leadership of Indigenous people and communities, the *Tsilhqot'in Nation* decision, the adoption of *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),* the Calls to Action of the Truth and Reconciliation Commission, and the growing awareness in society of the imperative of reconciliation – for negotiations to be honourable, meaningful, and successful at this moment in time.

The implementation of section 35(1) of the *Constitution of Canada,* and in particular recognition and reconciliation regarding Aboriginal Title and Rights, engages both negotiation and litigation. The overarching objective of section 35(1) is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". *(Delgamuukw,* 1997*)* Through the efforts of Aboriginal peoples, the courts have played a central role in advancing this process through hundreds of court decisions – the vast majority of which were victories for First Nations. At the same time, the courts have been clear section 35(1) requires negotiations and agreement making**:** "the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims". *(Haida)* Amongst other things, this requirement for negotiations reflects the reality that reconciliation is a messy, complex, multi-

layered, social, political, economic, cultural, legal, and spiritual process which the courts are not designed to achieve. Ultimately reconciliation is about individuals and peoples – how we live together in relationships grounded in recognition and respect.

What are the requirements of these negotiations? What does it mean that they must be "honourable"? What does it mean that section 35(1) is the framework for negotiations? Do negotiations need to consider or respect legal standards and principles? These are questions that are especially pertinent today given the historic *Tsilhqot'in Nation* decision, which recognized Tsilhqot'in Title to almost 2000 square kilometres of Tsilhqot'in Territory. By clarifying the doctrine of Aboriginal Title the fundamental architecture of section 35(1) has now been articulated. In the course of declaring Title over a vast area, and upholding the standard of Aboriginal consent, the Supreme Court of Canada made clear the legal framework for how the underlying purpose of maintaining the Aboriginal connection to the land would be achieved. At the same time, the clarification of this framework raises significant legal and practical imperatives for how negotiations must be conducted to ensure that this same objective may be achieved.

The BCTC Process, which has been in existence for over 20 years, has been the only vehicle available to First Nations seeking to negotiate a comprehensive reconciliation in the form of a treaty protected by the *Constitution* with both levels of the Crown. In recent years, even prior to *Tsilhqot'in Nation,* increasing questions about the viability of the BCTC Process have been raised for a range of reasons including rigid Crown mandates, Federal Crown non-participation, and cost and length of time. Not surprisingly, in the aftermath of *Tsilhqot'in Nation* there have been increasing voices asking whether the BCTC Process must be transformed or end. Amongst other things, the fact that in *Tsilhqot'in Nation* the Supreme Court of Canada issued a declaration of Aboriginal Title over a large area and has immediate and significant legal, political, social and economic consequences – a form of recognition that has not been available through negotiations in the BCTC Process –

further highlights the significant distance between the framework of section 35(1) and the current realities within the BCTC Process. To date, however, there has been little analysis of whether there are legal impediments to the current approach to negotiations of the BCTC Process in light of the requirement under section 35(1) for "honourable negotiations".

D. TREATY-MAKING IN BRITISH COLUMBIA AND THE BCTC PROCESS

A Brief History of Treaty-Making and the BCTC Process

Treaty-making in British Columbia has a long, yet brief, history. Prior to confederation, the British Crown, primarily through the efforts of James Douglas, began a process of treaty-making on Vancouver Island. With a need to access land for settlers, and coal and other resources for resource extraction, Douglas was instructed that legally and politically he needed to effect agreements with the Indigenous peoples regarding lands and resources. This reflected the historic acknowledgement of native title recorded in the *Royal Proclamation of 1763* and early common law principles recognizing the continuity of pre-existing land rights in colonies. Those early efforts – which resulted in fourteen pre-Confederation treaties on Vancouver Island – were soon put to a stop and as British Columbia joined Canada the focus of the Crown turned towards the reserve creation process, pre-emption, and the taking up of the lands of Indigenous peoples. As a result, despite the legal requirements of the common law, the only treaties in British Columbia were those entered into on parts of Vancouver Island, as well as the portion of Treaty 8 that crosses into British Columbia in the Northeast.

Over a century would pass before the prospect of treaty-making in British Columbia would arise again. The *Calder* (1973) decision – in which six of seven Supreme Court Justices held that Aboriginal title existed in Canadian law - prompted the Federal Crown to proceed with the Comprehensive Claims Policy as a basis for their

involvement in treaty negotiations in British Columbia. The Provincial Crown continued to resist participation in treaty-making for almost two more decades. In the early 1990's a number of factors prompted changes in both the Federal and Provincial Crown's attitude towards treaty negotiations, including on-going activism by Aboriginal Peoples, the Oka crisis, and the long, drawn-out, and divisive Aboriginal Title proceedings of the Gitksan and Wet'suwet'en hereditary chiefs that resulted in the vociferous and offensive rejection of Aboriginal Title and histories by the British Columbia Supreme Court in *Delgamuukw* (1991). Based on a Tri-Partite Task Force Report in 1992, the BCTC Process was established, and became operational.

Through the BCTC Process four treaties have been completed - Tsawwassen, Maa-nulth, Yale, and Tla'amin. The costs have been immense, with an excess of 1 billion dollars having been spent by all parties in the BCTC Process to date. First Nations have accumulated over 500 million dollars in loan debt to pay for their participation in negotiations that have been underway for longer than two decades and which were originally expected to take less than a 5-7 years.

Recognizing that such outcomes are insufficient, First Nations and the Crown have made many efforts over the years to try to revitalize and accelerate the BCTC Process. One of the most sustained efforts was through the "Common Table" process, where First Nations and both levels of the Crown sought to develop consensus around proposals for change**.** While consensus was achieved on some "opportunities" these were mostly agreement for further exploration of ideas or alternatives. Consensus was not achieved around new "principles", and ultimately little change has been seen in the BCTC Process. The Crown has commissioned numerous reports to review the process, including most recently the Lornie Report (2011) and the Eyford Report (2015)**.** Similar to the Common Table, few concrete changes to the BCTC Process have occurred to date as a result of these reviews. Further, all of the various reviews over many years have tended to focus on

relatively marginal or incremental shifts in the process, rather then fundamental change to the approach to treaty-making.

In recent years there have been growing signs that call into question the long-term viability of the BCTC Process. While at its height approximately 150 First Nations participated in the BCTC Process, currently there are only approximately 65 First Nations in the BCTC Process and it is estimated that only 25 are active. Further, in 2015, the Province of British Columbia refused to appoint a Chief Commissioner for the Process, and sent strong signals that the process was on life support. The newly-elected Trudeau Government has committed to establish new Nation-to-Nation relationships, including redesigning how Canada negotiates treaties. They have also committed to fully implement the recommendations of the Truth and Reconciliation Commission and *UNDRIP.*

Issues and Conflicts Regarding the BCTC Process

There have been issues and conflicts regarding the BCTC Process throughout its history. For the purposes of this paper, two issues are particularly relevant to the impact of the evolution of section 35(1) and *Tsilhqot'in Nation* on the future of the BCTC Process.

Issue #1 - The BCTC Process is a "political" process, which means, amongst other things, that it does not require assessment of strength of claim of Aboriginal Title and Rights or proof of Title and Rights

The BCTC Process was explicitly designed to be an efficient counterpoint to the long, drawn out, and expensive court battles. As such, the process was designed to facilitate negotiations without any consideration of, and regardless of the connection, of an Aboriginal group to, the lands and resources being discussed. All the BCTC Process requires is for a First Nation to submit a "Statement of Intent to Negotiate", which includes a geographical description of the traditional territory to which the First Nation wishes to negotiate, and list any First Nations with an overlapping claim. No proof of connection to that geographical boundary is

required, and the Commission is explicit that it "does not make any determination of the boundaries of a First Nation's Traditional Territory".

This lack of requirement for analysis of strength of claim and assessment of Title and Rights was a departure from Canada's Comprehensive Claims Policy which included requirements for an assessment of First Nation's claim early in the process.

The design of the process as a 'political' one, as opposed to a 'rights-based' one, means that the BCTC Process does not, and has not, applied the evolving legal standards of section 35(1) to guide, inform, and structure negotiations. Rather, the BCTC Process is an attempt to effect a political compromise through negotiations – though the outcome of those negotiations will become (in most respects) part of a treaty that is constitutionally protected under section 35(1) of Canada.

This design of the BCTC Process as a 'political' one has been the source of a number of corollary concerns.

First, for First Nations seeking to make progress through the BCTC Process, the detachment from legal standards and principles has resulted in significant obstacles such as, for example, the Crown taking positions on key matters that are sometimes explicitly at odds with the law or the imperative of reconciliation. For example, Crown mandates have demanded that the status of lands held under the treaty fall under section 92 of the *Constitution*, and not reflect the status and indicia of Aboriginal Title. Relatedly, provincial jurisdiction has always been highly constrained and sometimes ousted by section 35(1) rights. In *Tsilhqot'in Nation*, the Supreme Court made clear that section 35(1) jurisprudence must guide the interplay between Aboriginal Title and provincial jurisdiction and thereby put severe limitations on provincial jurisdiction. However, the Federal and Provincial Crown have brought an application of laws model to the BCTC Process that results in both of their jurisdictions and authority applying in totality to First Nations lands held under the treaty.

Relatedly, the courts have determined that the understanding of implementation of section 35(1) requires the Aboriginal perspective to be central to the process and outcomes of reconciliation:

> ... The notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is ... one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each. (*Van der Peet,* 1996)

Despite this, within the BCTC Process a common pattern has been take it or leave it mandates and approaches being offered by the Crown – which are often developed without any consideration of the Aboriginal perspective. For example, the quantum for financial compensation has been based on arbitrary and unprincipled measures such as population. Similarly, the land quantum available has been not based on principles of Aboriginal Title, but arbitrary levels set by the Crown. Relatedly, fee simple is a predominant legal designation of the land that may be available by treaty, which is inconsistent with both the nature of Aboriginal Title, and forms of land-holding and designation that may be more appropriate under Indigenous laws and systems of governance.

Second, there has been a pattern of significant divergence between the characteristics of reconciliation as articulated by the Courts, and the pattern of conduct often seen in the BCTC Process. For example, the Courts have emphasised in various ways that at the heart of reconciliation is an on-going pattern of relationship building that requires respect, action, and attention:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns,

> and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. (*Mikisew Cree*)

Modern treaty-making and the BCTC Process, however, in its long and drawn out pattern, has often seen First Nations experience indifference, including for example, a level of the Crown refusing to actively participate. This was most pronounced in the express opposition to the Nisga'a treaty by the Campbell government, and the decision to hold a referendum which both hampered Crown-First Nation relations and further delayed the BCTC Process. More recently, for a number of years the Federal Crown refused to engage in negotiations regarding fisheries, stalling progress at a number of negotiation tables. Recently the Yukon Supreme Court in *Taku River Tlingit* (2016) found the Federal Crown's refusal to actively participate in transboundary negotiations inconsistent with the honour of the Crown.

Third, while First Nations have always endeavoured to respect the choices made by other Nations in their effort to undo colonialism, both participation and outcomes in the BCTC Process have sparked division and legal controversy in the relationship between First Nations because of the issue of so-called "overlaps" – overlapping boundary maps of traditional territories of neighbouring Nations. An outgrowth of the political nature of the BCTC Process is that negotiations within the process, and indeed the completion of treaties, has taken place over lands and resources claimed by other Nations, and without resolution with those Nations. This reality – and problems it creates, has been noted time and again over many years. Most recently, the Eyford Report summarized:

> A foundational principle of the BC treaty process is that Canada does not play a gate keeper role by assessing the strength of a First Nation's rights and title claim. Rather, the Commission accepts First Nations into the process and determines when the parties are ready to commence negotiations.
>
> First Nations are expected to identify and address overlapping and shared territory issues with neighbouring First Nations. However, few First Nations have completed overlap agreements with their neighbours. There is a tension between this approach and evolving legal principles, particularly the Crown's

> duty to consult. The non-rights based approach has exacerbated overlapping claims thereby increasing the cost of negotiations and delaying the completion of agreements.

This 'non-rights-based' approach has resulted in legal challenges to almost every completed Treaty, as well as some close to completion. The original proposed L'heidli Tenneh final agreement (which ultimately was never ratified), the Tsawwassen final agreement, and the Maa-Nulth First Nations final agreement were all challenged in Court. Currently, there is on-going legal challenge to the Yale treaty, as well as a number of challenges to proposed land transfers through 'incremental treaty agreements' completed through the BCTC Process prior to the completion of a final treaty.

Issue #2 - The BCTC Process has required the extinguishment, surrender, and modification of Aboriginal Title and Rights as part of a Treaty

As discussed earlier, the heart of advocacy and effort by Indigenous Peoples over countless generations has been to effect recognition and implementation of Aboriginal Title grounded in the principles of reconciliation of sovereignties. This purpose aligns with the goal of treaty-making as articulated by Supreme Court of Canada in *Haida.*

In contrast to this, the Crown has been focused on denial and extinguishment of Aboriginal Title. For the past century, the Crown's foundational positions as reflected in law, policy, and litigation has been that (1) Aboriginal Title has never existed and (2) if it did exist, it has been extinguished. After the *Delgamuukw* (1997) decision revealed the fiction of these arguments, the Crown added a third argument: (3) if Aboriginal Title still exists, it is minimal and effectively meaningless, and it may only exist over small-spots. *Tsilhqot'in Nation* categorically rejected this third argument, confirming that Aboriginal Title is real, meaningful and territorial in scope.

For a number of decades the courts resisted providing remedies that firmly demonstrated the improper nature of the Crown's fetishistic attachment to denial and extinguishment. One main rationale for the delay by the Courts to take such a step was to allow political negotiations to unfold. With *Tsilhqot'in Nation* and the issuance of a declaration of Aboriginal Title, the Supreme Court of Canada has now departed from that pattern in a transformative way by making it clear that Aboriginal Title can and will be recognized, declared, and implemented at Canadian law, and at the same time clarifying a doctrine of Title that is broad and far-reaching.

When the BCTC Process was launched there was a hope amongst First Nations that it would signal a turn by the Crown from the path of denial and extinguishment. As Chief Joe Mathias stated at the inauguration of the process: "Negotiations, in our view, will not be based on that tired old notion of extinguishment. We will not tolerate the extinguishment of our collective Aboriginal rights. Let us set that clear today." Unfortunately, the Crown has maintained a commitment to that tired old notion. In particular, within the BCTC Process, the Crown's commitment to extinguishment is seen in the following examples:

- The Crown requires First Nations to set aside all section 35(1) rights. First Nations inherent rights are displaced with rights set out and constrained by the four corners of the agreement.

- Aboriginal Title is not implemented. Rather, it is replaced with other forms of land-holding with different characteristics and elements than Aboriginal Title.

- Self-determination rights are set aside and replaced with rights prescribed by the agreement.

- The approach to certainty – modification and release – has the same practical legal effect as extinguishment and termination of inherent rights

Taken together, these elements of the BCTC Process create a model of negotiations where a First Nation surrenders and exchanges its Aboriginal Title and Rights for a package of lands and compensation. This exchange takes place without consideration or assessment of the actual Aboriginal interest in the lands (either those surrendered or those received), or valuation of what has been surrendered.

E. SECTION 35(1) AND THE BCTC PROCESS

While the BCTC Process has operated, many First Nations, including some within the BCTC Process, have continued to pursue the interpretation and implementation of section 35(1) through the Courts. The number of decisions – the vast majority of them victories - is in the hundreds. Along the way critical principles and standards of Crown conduct, and the rights and responsibilities of First Nations, have been clarified and affirmed. It goes without saying that the legal context of First Nations – Crown relationships since the early 1990's when the BCTC Process was created has radically altered. Simply stated, the world of 2016 is very different from that of 1992.

It is beyond the scope of this paper to fully review the evolution of the law of section 35(1). Rather, a focus is placed on developments in the law that either directly or indirectly inform how negotiations should take place to effect reconciliation pursuant to section 35(1). The implications of these developments for the BCTC Process are then considered.

The Nature of Crown-First Nation Negotiations

There is a constitutional duty on the Crown to negotiate treaties or land claims agreements, honourably and in good faith. The honour of the Crown "requires

negotiations leading to a just settlement of Aboriginal claims" (*Haida).* The "promise of rights recognition" represented by section 35(1) is "realized and sovereignty claims reconciled through the process of honourable negotiation." As confirmed in *Tsilhqot'in Nation*, "[t]he Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims. The governing ethos is not one of competing interests but of reconciliation."

Further, the evolution of section 35(1) has also included specific comment on the purposes underlying treaties. The basic premise of Canadian law is that the project of treaty-making is to effect the reconciliation of "sovereigns". As the Supreme Court of Canada states "treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by section 35 of the *Constitution Act, 1982* ." (*Haida*) Crown sovereignty is an "assertion" that must be reconciled with the "pre-existence" of distinctive Aboriginal societies. *(Van der Peet)* As we will see later, the notion of sovereignty is also important in how Aboriginal Title is understood.

While we know that honourable negotiations are required, and understand the broad purposes of treaty-making, the Courts have not said as much about the specific requirements for negotiations to be "honourable". Specifically, in what ways, if any, might section 35(1) limit the Crown's power and privileges to negotiate by constraining or necessitating certain conduct within negotiations?

To date, the courts have rarely been asked this question. One of the most direct considerations of this question was the recent decision of the Yukon Supreme Court in 2016 in which the Federal Crown had committed to lands claims negotiations, but then effectively did not proceed with them. The Court determined that Canada - having accepted the comprehensive claim of the Taku River Tlingit for negotiation - did not act honourably by not participating and proceeding. In reaching this conclusion the Court stated that while the "negotiation of land claims is certainly one of the powers and privileges accorded by the common law to the Crown…the

duty to negotiate in good faith and honourably places constitutional limitations on how that discretion is exercised. (*Taku River Tlingit*).

In reaching this conclusion the Yukon Court also considered arguments from Canada that that it is within the Crown prerogative to decide when and how to negotiate in regards to reconciliation with First Nations. The reliance on the Crown prerogative rests at least partially on an analogy to international treaty-making. In Canada, international relations are the prerogative of the Crown, and the *Constitution* or law provides little authority on how international treaties are negotiated, signed, ratified, or implemented. The contrast to treaty-making between Indigenous Peoples and the Crown is clear. As described above, there are extensive legal and constitutional foundations for treaty-making to take place. While there has not been extensive judicial commentary on the Crown prerogative and treaty-making pursuant to section 35(1) of the *Constitution* the Yukon Supreme Court rejected the argument from Canada that such negotiations were purely political and discretionary and as a result of the Crown's prerogative the Crown had exclusive power and authority over how they were conducted. The Court did not issue the broader declaration that called for specific action to be taken by the Crown to protect certain Taku River Tlingit interests in the land while negotiations took place, but noted that such matters were not fully before the Court.

While the Courts have not gone much further and expressly considered what else may be required for "honourable negotiations" there are principles and elements of the established law of Aboriginal Title and Rights which would appear to have direct impacts on the how negotiations are conducted. In particular, four interrelated elements of the established law are emphasised: the *sui generis* nature of Aboriginal Title; the doctrine of continuity of the Aboriginal connection to the land, the doctrine of Aboriginal consent; and the necessity for knowledge and assessment of Aboriginal Title and Rights.

The Sui Generis Nature of Aboriginal Title

In *Tsilhqot'in* the Supreme Court of Canada expressly endorses the *sui generis* conception of Aboriginal Title and suggests this is the common thread in the modern evolution of the law of Aboriginal Title:

> The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*…Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts".

Following this line of reasoning Aboriginal Title land must be understood as its own distinct category of property interest – it should not be described or equated with, for example, fee simple lands. Importantly, the Court describes the characteristics of Aboriginal title land in relational terms – as opposed to how conventional property terms are spoken of in terms of individualistic and autonomous terms. The *sui generis* concept of Title also appears to incorporate some aspects of sovereignty, reflecting the underlying purpose of reconciliation between sovereigns.

Key aspects of Aboriginal Title as described in *Tsilhqot'in* can be summarized follows:

- *Aboriginal Title is "territorial" in scope* – Aboriginal Title can exist over large tracts of land and is not restricted to "small-spots". The Court categorically rejected the small-spots theory and approach.

- *Aboriginal Title is a collective beneficial interest in the land* – Aboriginal Title holders have the right to the benefits associated with the land, which the

Court describes as the right to "use it, enjoy it, and profit from its economic development". This includes ownership rights similar to those associated with fee simple – such as the right to decide how the land will be used, the right of enjoyment and occupancy; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land. At the same time, there is a limitation on the use of Aboriginal Title lands. Aboriginal Title is held collectively for the present generation and all future generations. One of the implications of this is that "it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it". This point is discussed at length in the next section.

- *The Aboriginal Title-holder is entitled to the full benefit of the land* - Where Aboriginal Title exists the Court stated that the lands in question "vests" in the Aboriginal group. This means that the full beneficial interest in the land – the right to enjoy the land and its resources and enjoy the fruits of their use, is that of the Aboriginal group and not the Crown. Relatedly, where Aboriginal Title exists, the land is no longer Crown land – the Crown does not "own" it. However, there still remains a limited Crown title to Aboriginal Title land. The Court stated that at the time of formation of Canada, by virtue of section 109 of the *Constitution*, the Crown received Title to all land within the Province. However, this Title was subject to Aboriginal Title – the Province only took what is left once Aboriginal Title is subtracted. Where Aboriginal Title exists this leaves the Crown only a limited underlying title interest. This underlying title "is held for the benefit of the Aboriginal group"- meaning it includes a fiduciary obligation on the Crown to protect the Aboriginal group's interest in the land. Implications of this principle include that: (1) Aboriginal consent is required for the use of Aboriginal Title land by the Crown or third parties; and (2) Absent consent the Crown has to seek to justify infringement of Aboriginal Title, including by showing they respecting the fiduciary obligation owed.

Understanding these elements of Aboriginal Title are important to thinking about elements of the BCTC Process. For example, one of the main obstacles to progress in treaty negotiations has been the limited amount of lands the Crown is willing to provide through a treaty settlement. This appears inconsistent with the notion of Title as being "territorial" in nature. As well, the fact that Title carries with it the full beneficial interest in the land raises questions about some of the limitations on land in the BCTC Process. Taken all together, there is a fundamental disparity between the status, nature, and content of Aboriginal Title and the approach within the BCTC Process of treaty-settlement lands being 'section 92' lands, and having the character of fee simple lands.

Moreso, the issue that is raised is that the underlying rationale for this construction of Aboriginal Title is to meet a particular purpose of section 35(1) – namely ensuring the continuity of the Aboriginal connection to the land, and relatedly the preservation of culture and way of life. From *Calder* to *Tsilhqot'in Nation* it has been Aboriginal Title, not section 92 lands and fee simple lands, that have been understood as critical to Indigenous Peoples and achieving the required reconciliation of sovereignties. Continuity, including implications for the BCTC Process, are discussed in the next section.

The Doctrine of Continuity of the Aboriginal Connection to the Land

The pattern established over centuries has been for the Crown to seek treaties that cede, release and surrender the Aboriginal Title in its quest to perfect its own Title and territorial sovereignty by removing the Aboriginal Title burden from it. As seen earlier, this remains the case in the BCTC Process. However, such an approach now appears to be anachronistic and inconsistent with both the reconciliation imperative that the courts have stated in section 35(1) jurisprudence, and the fundamental character of Aboriginal Title land itself. Further, the notion of surrender itself would

now appear to be more clearly at odds with the courts heavy emphasis on preservation of the Aboriginal interest for future generations.

In *Tsilhqot'in Nation* the Court states that Aboriginal title is a "collective title held not only for the present generation but for all succeeding generations." This reflected the reasoning in *Delgamuukw* where the Court stated:

> The relevance of the continuity of the relationship of an Aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of Aboriginal title.

As this suggests, inalienability is part of the doctrine of Aboriginal Title that relates to continuity:

> The idea that Aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to Aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. *(Delgamuukw)*

There are a number of rationales and purposes served by the doctrine of inalienability of Aboriginal Title land to anyone other than the Crown. Some of these are related to the nature of the responsibility, role and capacity of the Crown and third parties, while others are particular to the responsibility, role, and capacity of First Nations:

- Inalienability serves the Crown's interest of securing the Crown's sovereignty over territory - as surrender to the Crown is the only exception to inalienability. Relatedly, inalienability reflects the incapacity of third parties to hold Aboriginal Title land.
- Inalienability reflects a paternalistic protective measure to ensure the continuity of Aboriginal Title land into the future and avoid exploitation by

third parties (which of course has been one historic pattern of colonial settlement).

- Aboriginal Title, as a *sui generis* interest in the land, contains some of the characteristics and elements of pre-existing Aboriginal sovereignty. So, for example, private actors cannot acquire it as only sovereign entities engage and achieve exchanges in the arenas of relationships between sovereigns.
- Aboriginal Title is inalienable because it is inherent to the culture and identity of First Nations and individual Indigenous persons, and relating with the land is pivotal to protecting culture, society, spirituality and way of life.

In *Tsilhqot'in Nation* the Court is clear that there are incursions on Title that may not be justified if they would substantially deprive future generations of the benefit of the land:

> Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

Continuity and inalienability pose significant challenges to the BCTC Process. The "modifications" to Aboriginal Title land that occur under the BCTC Process are complete and total – there is nothing left of Aboriginal Title land in a final agreement. Given the doctrine of inalienability, significant questions are raised by this practice: how could a present generation and the Crown justify wholesale surrender of lands? How could such a surrender be consistent with necessity for continuity? How could surrender of the land for a purpose not allowed by Title be authorized if the overriding necessity and imperative of Title lands to preserve it for future generations would prohibit incursions less then wholesale surrender?

In this regard, it is important to review what the Court says about the doctrine of waste as being a foundation for surrender. In *Delgamuukw* the Court states:

> It is for this reason also that lands held by virtue of Aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the Aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of Aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from Aboriginal inhabitants. It is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements"….What the inalienability of lands held pursuant to Aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an Aboriginal community and the lands over which it has Aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with Aboriginal title to it. The community cannot put the land to uses which would destroy that value.
>
> I am cognizant that the sui generis nature of Aboriginal title precludes the application of "traditional real property rules" to elucidate the content of that title ….Nevertheless, a useful analogy can be drawn between the limit on Aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit "wanton or extravagant acts of destruction"…This description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.

At common law, the doctrine of waste is a limitation on the powers of a tenant for life of property to destroy it. While a tenant for life can fully enjoy the property during their tenure, they have duty to leave it unimpaired for a future interest holder in the property – meaning they cannot destroy it.

This analogy that the Supreme Court draws effectively places current generations of First Nations in the analogous position of the common law property tenant for life who has a responsibility to future generations. The doctrine of waste acts to stop the

commission of acts that would destroy the property. Further, persons entitled to the land in the future may seek an injunction or other remedies preventing that waste.

In *Tsilhqot'in Nation* the Court does not expressly discuss the doctrine of waste, though they imply it through the discussion of continuity and the interest of future generations. Together, the doctrine of Aboriginal Title articulated in *Delgamuukw* and *Tsilhqot'in Nation* suggests there are significant questions about whether either (1) the wholesale surrender of the entirety of Aboriginal Title land, or (2) a surrender justified by the desire to use Title land for a purpose fundamentally incompatible with that Title, could be maintained. Future generations would be wholly deprived of their interest in all or some of the land. Based on the doctrine of waste one would think there must be legal avenues for representatives of future generations to block, through injunction or otherwise, such surrender to the Crown. It might also be suggested that this limitation on the First Nation is not a limitation that derives from their capacity as a Title-holder or land-owner. Rather, it is a limit placed on their authority as decision-makers in relation to that land, and the responsibility to future generations of their people.

Further, there is a parallel to this limitation on First Nations which is the obligations placed on the Crown in *Tsilhqot'in Nation.* Specifically, in articulating how the Crown may justify the infringement of Aboriginal Title, the Supreme Court imposed the requirement that the Crown demonstrate they are meeting the fiduciary obligation they owe to the Aboriginal group. They describe this fiduciary obligation in this way:

> First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.
>
> Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to

> achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). 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".

Based on this, not only is there a limitation – based on the principles of continuity and inalienability – on a First Nation surrendering its Title lands, but there is a fiduciary obligation on the Crown to act in a manner consistent with continuity and the preservation of the interest in the land for future generations. This poses a challenge to how honourable treaty negotiations could be structured to effect the surrender of Aboriginal Title land over large areas (whole territories), in exchange for a small amount of lands whose status is other then Title land.

The Doctrine of Aboriginal Consent

Having suggested there are significant limits on alienability of Aboriginal Title land based on *Tsilhqot'in Nation*, the related question is what can First Nations consent to in relation to Aboriginal Title lands, and how do they provide that consent. Specifically, is there any guidance that can be pointed to concerning whether, or in what conditions, a First Nation can consent to the surrender or modification of its Aboriginal Title through negotiations?

On this point we have little direct legal guidance. In *Tsilhqot'in Nation* the importance of consent is discussed in numerous places. But little is said about the mechanics or dynamics of giving consent, or what limitations may exist on what may be consented to.

Of course free, prior, and informed consent is a central concept of *UNDRIP* where it is expressed in the following ways:

> *Article 10*
>
> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
>
> *Article 11*
>
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
>
> *Article 19*
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> *Article 28*
>
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> *Article 29*
>
> 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
>
> *Article 32*

> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

At the same time, there is also limited guidance, and some on-going dialogue and debate about the full meaning and implications of free, prior and informed consent at international law. At the very least it reflects the principle that Indigenous people should have the right to choose how their lands and resources are used, that this choice needs to be free of intimidation or coercion, is made prior to land and resource use proceeding, is based on the necessary information, and is a decision to be respected and honoured. But specific details of its application remain subject of much dialogue.

While there is not direct legal guidance on the application of consent, the emphasis placed on consent in *Tsilhqot'in Nation* does highlight the following:

- The focus on consent reinforces the principle in *Haida* that the purpose of treaties is the reconciliation of sovereignties. Sovereignty, at international law, speaks to a sovereign peoples' immutable right of self-determination and their decision-making authority over territory. The doctrine of Aboriginal Title, both in how Title is defined as having the characteristic of control (including as evidenced historically), as well as the requirement that Aboriginal consent be the decision-making standard for use of that lands, reflects these basic elements of sovereignty.
- Related to the above, this construction of Aboriginal Title and the application of the standard of consent reflects the public character of Aboriginal Title land, and the limitation of analogies to private fee simple land-holding. Consent, the importance of continuity, and the doctrine of inalienability, all speak to the public character of Aboriginal Title land and the decision-

making authority and jurisdiction that a First Nation has in relation to that land.

- There are analogies in the common law that speak to the sovereign relationship with the land, and how the jurisdictional authority over public land may be limited in order to preserve the land for a range of purposes including for future generations. One example is the 'public trust' doctrine, which while new in Canada, is derived from ancient Roman and English law, and acts as a limitation on the powers of the sovereign government as a decision-maker about public lands. In some places, such as the United States, the doctrine has been used for the purposes of regimes of stewardship and environmental management. Where applicable, the doctrine has been described as restraining governmental authority in a number of ways including lands being held available for public use, prohibitions on the sale of the land, and the maintenance of the land for particular types of uses.
- The doctrine of consent as an expression of the sovereign relationship of an Aboriginal People to their Title land, and in particular their decision-making authority, further highlights the problem with particular mandates and outcomes within the BCTC Process. Under the BCTC Process the Crown seeks a First Nation to alter their sovereign decision-making authority to that of being a municipal-like delegated decision-maker, or of a fee simple landowner. Similarly, the wholesale extinguishment and modification of Aboriginal Title land severs the character of the First Nation's sovereign relationship between the land. Combined this appears inconsistent with the very character of reconciliation between sovereigns, as it constitutes the potential denial and eradication of the very core elements of that sovereignty. It is unclear how such a result is consistent with the imperatives and framework of section 35.

The Necessity for Knowledge and Assessment of Aboriginal Title and Rights

Closely related to the principle of continuity is the necessity for knowledge and assessment of the Aboriginal connection to the land. When the Supreme Court speaks of the need for "determining, recognizing, and respecting" Aboriginal Title and Rights they are pointing to an activity which innately involves gaining knowledge and acting appropriately on that knowledge.

The courts have included in the framework of section 35(1) requirements to gain knowledge and assess Aboriginal Title and Rights. Most notably, the courts have developed the requirement for an assessment of the strength of claim of Aboriginal Title and Rights. In *Haida* the Supreme Court of Canada expressly made assessing the strength of claim as part of the Crown's duty to consult and accommodate, and in articulating this element of the honour of the Crown expressly rejected arguments before it that it is to difficult to ascertain and assess claims:

> I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that section 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation….Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

The evolution of jurisprudence regarding strength of claim has consistently re-iterated the point that prior to proof of Aboriginal Title and Rights it is improper for the Crown to proceed to make decisions regarding lands and resources without considering the strength of claim and the degree of infringement that might entail. This is geared, as articulated in *Haida* to ensure the Aboriginal interest in the land, that is a foundation for reconciliation, can be appropriate considered and preserved, including for the purposes of negotiations.

This immediately raises questions and is a contrast to the BCTC Process, which as noted earlier, has no requirement or condition for considering the strength of claim of a First Nation. How can knowledge and assessment of claims be so vital to the honour of the Crown prior to proof of Aboriginal Title, yet not relevant to the process of achieving final reconciliation through a treaty?

In this regard, it is important to explore how based on the framework of section 35(1) having knowledge of and assessing Aboriginal claims is important beyond the purposes of consultation and accommodation.

Aboriginal Title does not come into existence when a court says it does or it is recognized through a treaty or agreement or other understanding. In *Tsilhqot'in Nation* the Supreme Court states that "the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763" and as such "the content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it". The implications of this point are made more express in *Saik'uz* when the Court stated:

> ... the law is clear that they [Aboriginal Rights and Title] do exist prior to declaration or recognition. All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights.

Based on this principle, in *Sai'kuz* it was confirmed that a First Nation can sue a third party for damages regardless of whether Aboriginal Title has been declared or recognized. It is also reflected in *Tsilhqot'in Nation* where the Court confirms that

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation

> may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

This principle underscores the fact that there is no fine line between the so-called "prior-to-proof" context of consultation and accommodation, and the so-called existence of Aboriginal Title and Rights, whether by declaration, recognition, or agreement. Rather, what is reflected the fact that a reconciliation between sovereigns never occurred over much of British Columbia, and that this directly constrains what the Crown and third parties may do on the land base. That lack of reconciliation requires that an understanding be formed of the Aboriginal interest in the land, and steps taken to preserve that interest and respect the roles and responsibilities of the First Nation. The Crown must be careful to do this properly, if one wants to achieve a level of certainty for a decision made, or protect against liability. Indeed, recognizing these imperatives, in *Tsilhqot'in Nation* the Court encouraged the Crown and third parties to consider operating through the lens of Aboriginal consent, as a path to achieving this certainty:

> Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

All of this puts into question the BCTC Process, and the fact that it operates in absence of knowledge and assessment of Aboriginal Title. Even assuming a First Nation can consent – somehow consistent with its obligation to future generations – to the full destruction of its Aboriginal Title interest through surrender, it is highly questionable that this can take place unknowingly. Fundamental questions about knowing that fair value is being received, that the Aboriginal connection is still somehow being maintained, as well as the fiduciary obligation on the Crown, are all raised.

Further, what all of the above shows is that Aboriginal Title is a fundamental component of reconciliation. It contains aspects, elements, and purposes that are critical to meeting constitutional imperatives. Absent a confirmation from the Court through declaration, it may have been possible to maintain that it could be extinguished or modified consistent with unprincipled and arbitrary Crown mandates and positions grounded in denial of Aboriginal Title. The declaration of Title in *Tsilhqot'in* changes that. The pretense that Aboriginal Title was some form of legal hypothetical designed to spur better relations rather then a real legal interest in the land can no longer be maintained.

F. THE FUTURE VIABILITY OF THE BCTC PROCESS

Tsilhqot'in Nation was a transformative moment in the legal history of the relationship between Indigenous Peoples and the Crown. Much of the slow evolution of jurisprudence regarding section 35 has been preoccupied with clarifying the power of the Crown to infringe Aboriginal Title and Rights as distinct from clarifying, declaring, and giving legal strength to a foundation of Title and Rights for Indigenous Peoples to rely upon. Against the backdrop of that slow evolution, *Tsilhqot'in Nation* is a moment of rupture that inevitably re-orients elements of the legal relationship between the Crown and First Nations, the project of reconciliation, and the future development of section 35(1).

When placed in a context of the past 18 months that has seen additional significant events such as: the ever increasing political advocacy and strength of First Nations in stewarding their lands and determining which uses of lands and resources may proceed; the *Sai'kuz* decision and that of the Canadian Human Rights Tribunal finding systemic discrimination against Aboriginal children; commitments by the Federal Government, and some Provincial governments, to implement *UNDRIP;* the far-reaching Calls to Action of the Truth and Reconciliation Commission; an election of a Federal Government with a platform of new Nation-to-Nation relationships; significant acceleration of the launching of Aboriginal Title actions in British

Columbia; it is undoubtedly and undeniably a moment to challenge and upend old practices, assumptions, and commitments, and embark on new approaches that reflect the reality of this moment in history.

The implications of this moment of rupture are certainly the case with respect to negotiations, and in particular the BCTC Process. Negotiations between the Crown and First Nations regarding Aboriginal Title and Rights have a particular purpose to reconcile sovereignties and achieve a just settlement. To ensure this purpose is met, it is section 35(1) that "provides a solid constitutional base upon which subsequent negotiations can take place" (*Sparrow)*

Contrary to this, the approach of the BCTC Process has been a process of negotiations that ignores or negates the fundamental principles and purposes of the affirmation and protection of Aboriginal Title and Rights in section 35(1). Instead of recognition and affirmation of Aboriginal Title and Rights to ensure that the connection to the land is preserved for future generations, Aboriginal Title is effectively alienated and surrendered in its totality, and Rights are replaced by the four corners of the agreement. This bargain takes place without identifying the Title lands being alienated, assessing them, or ensuring adequate compensation for them (even if they could be alienated in full). It is also quite likely that modern treaties under the BCTC Process effectively surrender Aboriginal Title land to third parties, by relinquishing property assertions and interests throughout a Territory – a form of alienation that is contemplated as impermissible in *Tsilhqot'in Nation.*

Further, in *Tsilhqot'in Nation* reconciliation is brought into the discussion at the justification stage. A government must be pursuing a goal of reconciliation in order to justify infringement: "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." A model of achieving reconciliation by pursuing surrender of Title interests would not appear to be a proper starting point for justification. Indeed, the

Courts have said preservation of the Aboriginal interest is an overriding objective – meaning that pursuing surrender, and more generally structuring negotiations around alienation, as a means of justification would appear inconsistent with core principles of reconciliation.

Given all of the above, it would seem that *Tsilhqot'in Nation* suggests significant limits on the question of alienability of Title lands, and the Crown and First Nation entering into a treaty would appear exposed to an assertion by future generations, or representatives of future generations, that they have not fulfilled respective obligations to maintain the interest for future generations.

In the shadow of *Tsilhqot'in Nation,* a turn to a transformed approach to treaty-making is necessary. The concerns brought forward for years by First Nations within and without the process bear themselves out in how the established jurisprudence has passed by the approach, mandates, and structure of the BCTC Process.