NORTHEAST FIRST NATION PARTICIPATION IN THE BRITISH COLUMBIA OIL AND GAS POLICY COMMUNITY

by

Tracey Wolsey

B.A., The University of Calgary, 1989

THESIS SUBMITTED IN PARTIAL FULFILMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in

POLITICAL SCIENCE

THE UNIVERSITY OF NORTHERN BRITISH COLUMBIA

August 2001

Abstract

This thesis investigates the changing role of First Nations in the oil and gas policy community in northeastern British Columbia. Prior to the NDP government coming to power in the early 1990s and prior to some important court cases, First Nation communities were not members of the policy community. As a result of these two critical variables--important court cases and NDP government policy--the thesis argues that the First Nation communities in northeast British Columbia are now members of the oil and gas policy community. This critical power shift has resulted in changes to policy, changes to oil and gas development, and changes to the way the provincial government, oil and gas companies and the First Nation communities interact with each other.

TABLE OF CONTENTS

LIST OF TABLES AND DIAGRAMS

Acknowledgement

A master's thesis is a lengthy and difficult undertaking at best. There were many people pushing and pulling along the way. The encouragement was vociferous and welcome. I would like to thank the professors and staff of the Political Science Programme at the University of Northern British Columbia. My studies were exciting and worthwhile thanks to your efforts. The professors include Greg Poelzer, Ed Black, Alex Michalos, Mary Louise McAllister, Tracy Summerville and John Young. Professors in other departments who also provided advice and encouragement include Heather Myers and William Morrison.

My supervisor and committee deserve special thanks for their time, effort, and advice. They include Greg Poelzer, Tracy Summerville, and Aileen Espiritu. I would also like to thank Professor Antonia Mills for her advice and encouragement and Professor Tom Flanagan from the University of Calgary for good advice.

I thank my peers, those fellow Political Science folks who made my studies so very entertaining.

Last, but most of all I would like to thank my husband Dave for his unfailing encouragement and my family and friends for their support and acceptance of my efforts and dreams.

The idea for this study was based on my work with the Northeast Industry Group and the Aboriginal people of Northeast British Columbia, especially the Prophet River First Nation. Their hard work and dedication to reach their goals are evident in aspects of the policy changes. To these people especially I owe my thanks. Your efforts have made a difference.

I also wish to recognize those dedicated individuals from the oil and gas industry and the companies that supported them, who have worked to bring Aboriginal people into the oil and gas development process. They have made a difference to the lives of people in the northeast.

Introduction

The past few decades have witnessed dramatic changes in the role of Aboriginal people in policy development. In the past, governments and industry did not perceive a need to include Aboriginal people in policy decisions even though these decisions had a profound effect on First Nation's communities, lands and resources. Governments and industry often developed oil and gas, minerals, and forest products, on lands used by Aboriginal peoples, without any meaningful consultation. Events such as the Berger Commission inquiry, the landmark Calder, Sparrow and Delgamuukw court cases, the inclusion of Aboriginal rights into the 1982 Canadian Constitution Act, and changing public opinion have altered governments' and industry's perceived need to consult meaningfully with First Nation people and to include them in the development of public policy that profoundly affects them.

One example of this change is the Memoranda of Understanding (MOUs) the British Columbia Ministry of Energy and Mines signed with the northeast British Columbia Treaty 8 First Nations in 1998 and 1999. The MOUs accompanied the emergence of the Oil and Gas Commission (the Commission) opened in 1998 as part of the British Columbia government's drive to increase oil and gas activity in the province under Premier Glen Clark. The MOUs and resultant Commission policy requires the provincial government to consult with First Nations regarding potential effects on their treaty and/or Aboriginal rights as a result of proposed oil and gas activity.

These MOUs and the resultant policy are noteworthy for several reasons. First, because of the change that has resulted within the oil and gas regulatory regime. The oil and gas industry in Canada has traditionally had a strong lobby and enjoyed a close

relationship with the provincial governments where resources are developed. Stakeholders, such as Aboriginals, have not been welcomed into the policy development clique or the regulatory approval regime for fear they may weaken the industry's influence within these arenas.

Second, the policy has given First Nation communities much greater influence over oil and gas development and related policy development in the province. For the first time they now have mechanisms to address issues at a policy level, through the MOUs, and at a regulatory level through the Commission policy. The MOUs and Commission policy and their development may provide a useful model for other policy sectors and other jurisdictions in Canada.

This is a radical change for the oil and gas industry which, prior to 1995, only had to meet the legislated requirements set out by government and not try to address any issues of a third party that uses the lands. The result is that First Nations, for the first time, are brought into the regulatory framework and industry now has to mitigate adverse affects to Aboriginal and or treaty rights prior to development approval. The provincial government also has a new role as they must determine how the proposed development may effect Aboriginal and or treaty rights.

This thesis investigates the development of the British Columbia oil and gas Aboriginal consultation policy and the resultant effect of that policy on industry, the First Nation communities, and the provincial government. The thesis seeks to answer the following questions: Why did this policy emerge, particularly in this sector? How does policy making and regulatory approval work in practice since the introduction of the changes? And what have been the consequences for First Nation communities, the oil

and gas industry and the provincial government? Using a policy community approach to answer these questions, the thesis seeks to explain how First Nation people in northeast British Columbia moved from outside the margins of the oil and gas consultation policy process into the coveted inner core where policy is actually developed.

Within this framework, the study gives special attention to two variables. One variable is the important legal decisions handed down by the Supreme Court of Canada including the Sparrow decision and the Delgamuukw decision. The other variable is the change in government in British Columbia when, in 1991, the NDP party was elected to power and it subsequently enacted new policies regarding Aboriginal peoples and natural resources. The thesis argues that both of these variables played important roles in reshaping the oil and gas policy community in northeastern British Columbia.

Exploration of this subject is significant because of the importance of natural resources to British Columbia's and Canada's economies and the ensuing effect this policy change has on natural resource development and industry within Canada. To fully understand this or any emerging policy we must first understand how and why policy changes occur and the subsequent effect of those changes on the players involved including governments, industry and stakeholders. The first chapter looks at policy community theory and related literature. It will also discuss the literature on Aboriginal issues and its significance within the province and within natural resource development.

Chapter Two looks at the policy community prior to the radical changes of the 1990s. It will discuss the players, their respective roles and why Aboriginals were not included in the policy process. Chapter Three will look at four important legal cases that have had a significant effect on Aboriginal issues, natural resource development, and the

oil and gas industry, especially in northeast British Columbia. The fourth chapter will discuss the particular role of the NDP government in this process and how they were instrumental in putting this policy into place. The final chapter examines the effects of the changes for stakeholders in the policy community, especially for First Nation communities.

Chapter 1 Review of Theory and Literature

This thesis argues that in the 1990s First Nation communities became an integral part of the oil and gas policy community in northeast British Columbia. This change was a result of two crucial factors: First, a number of important legal decisions gave First Nation people additional legal leverage to become actively involved in natural resource management and decision making. Second, the election of the new NDP government in British Columbia ushered in a fundamentally different direction in Aboriginal policy. Prior to the new government, policy did not include Aboriginals in resource management or decision making in meaningful ways. With the election of the NDP government, new policy now required both the provincial government and industry to consider Aboriginal and treaty rights in natural resource decision making. These changes have resulted in new roles for the Province of British Columbia, for the oil and gas industry players and for the First Nation communities. Specifically, the Province is now taking an active role in consulting with Aboriginals regarding possible infringements on treaty and or Aboriginal rights and subsequent mitigation strategies. The oil and gas industry has accepted the First Nation communities in the northeast into the policy and regulatory domain and First Nations themselves enjoy a new level of influence and recognition within the oil and gas policy and regulatory communities.

This thesis endeavours to explain these changes from a policy community approach. The study builds on existing research literature on resource policy communities and on Aboriginal peoples and resource politics. In addition to the works of Michael Howlett and Paul Pross, among others, the study draws special insights from the

study by George Hoberg and Edward Morawski on parallel policy changes in the forestry sector in Clayoquot Sound, British Columbia. The chapter initially discusses and defines key concepts: policy communities, actors, policy networks, the policy regimes and finally the sources of policy change. The second part of the chapter focuses on current literature on Aboriginal consultation and participation in natural resource policy and development in Canada. The final section of the chapter outlines the framework for analysis to explain why First Nation people have become part of the oil and gas policy community in northeastern British Columbia.

Key Concepts, Definitions, and Discussion

A common assumption is that only governments develop policy but in a democratic polity, governments depend on a wide range of groups and individuals to participate in the policy process. This can include participation from pressure groups, industry representatives, academics, interested publics and even the media to bring forth information used to develop and establish policy. Such a group is essentially a policy community: a group of individuals representing industry, sectors, institutions, and the government who together influence and form policy in a given area. In natural resource sectors, industry is usually very heavily involved as it brings knowledge and expertise to the table, whereas in social policy, organizations representing various stakeholder[1] groups may be heavily involved. The following section presents various definitions of policy communities and discusses related key concepts of policy communities, including policy networks, actors, and explanations of policy change.

Policy Communities

A policy community, as defined by William Coleman and Grace Skogstad, is the part of a political system that has acquired a dominant voice in determining government decisions in a field of public activity. This is as a result of its functional responsibilities, vested interests and specialized knowledge. Actors within policy communities include government agencies, pressure groups, media, and individuals such as academics who have an interest in a particular field and attempt to influence it.[2]

A policy community can also be defined as a broad based association of actors who exercise influence over policy over a long period of time. The actors are held together by a specific focus or view in respect to the policy in question. Wilks and Wright explain a policy community as including "...all actors or potential actors with a direct or indirect interest in a policy area or function who share a common "policy focus," and who, with varying degrees of influence shape policy outcomes over the long run."[3] A third definition stresses the shared knowledge of the actors in a policy community. Michael Howlett in his book, *Studying Public Policy,* draws heavily on Wilks and Wright's definition for a policy community and argues that members of a policy community are linked together by shared knowledge. He discusses the relationship between the state and policy communities based on whether the state and societal members share ideas and the degree of consensus between the two.[4]

Policy communities can also be described as actors and institutions that are directly involved in the policymaking process in a specialized policy area and who follow and attempt to influence public policy. Hank C. Jenkins-Smith et al. describe a policy

community as "Members of subsystems (that) include representatives of businesses, interest groups, trade associations, executive agencies, and relevant legislative committees, as well as the elected officials, scholars, and members of the press that regularly track and seek to influence the course of public policy in the issue area."[5]

Defining a policy community as that part of a political system that has acquired a dominant voice in determining policy outcomes is logical considering why particular actors try to influence policy. Generally those actors who have a vested interest and are directly affected by the policy, want to track and influence policy so the outcomes are more beneficial to them. This is certainly the case with business. It is directly affected by natural resource policy and so it would want to have a dominant voice in policy making. As Howlett notes, industry would have knowledge of a particular sector and that knowledge would be beneficial to state decision-makers. Theorists often argue that business has an elevated position or relationship within the policy making process. "...business interest associations possess 'privileged' position in the policy process...Yet business does not always win. From time to time, the state acts autonomously in favour of other interests; interests opposed to business may develop organizational structures that give them additional leverage in policy conflicts."[6] However, Coleman and Skogstad go on to argue that

> even when the state intervenes on behalf of non-business interests and financially supports their organizations,...such interests are vulnerable to challenge by other state agencies or business interest groups. Thus, it is important to note that even within pressure pluralist policy networks, all interests are not at the same level of organizational development. Again, business interest associations appear more likely to have reached a higher level of development than other societal groups.[7]

As has been noted, the actors that comprise policy communities have a strong effect on that policy community. Theorists have divided actors within policy communities in a variety of ways: by policy networks which categorize actors within a policy community; by the sub-government and the attentive public, those who actually make policy and those who merely influence policy; and by purposive and non-purposive, based on the type of interest actors have in a policy community.

Policy Networks

The concept of a policy network is prevalent within the literature and is described as a smaller group of actors within the policy community, who work together, who usually share a common goal, and who may have similar motivations. Howlett defines policy networks again using Wilks and Wright's definition. He compares a policy community to a policy network arguing that

> ...'community' refer(s) to a more inclusive category of all those involved in policy formulation, and ... restrict(s) 'network' to a subset of community members who interacted with each other on a regular basis. In their view, 'Policy community identifies those actors and potential actors drawn from the policy universe who share a common policy focus... ' This approach integrates 2 different sets of motivations guiding the actions of those involved in policy formulation: knowledge or expertise, and material interest. Thus a policy community is based on specific knowledge base while a policy network is based on pursuit of some material interest.[8]

Actors within a policy network share more than the policy field, which is shared by all the policy community participants. They have a unique relationship with each other because they share a particular approach to the policy issues and thus develop a relationship with the state, other actors, or policy communities. Coleman and Skogstad define a policy network as "...the relationships among the particular set

of actors that forms around an issue of importance to the policy community."[9] The main difference between a network and a policy community is that the policy community exists because a policy field exists, whereas a network exists because those in it share an approach to policy. Policy communities divide or break down into policy networks.[10] Coleman and Skogstad argue that within a policy community different types of networks may exist as actors react to different issues. The networks may interact differently with the state or with other policy communities to the extent that the way policy is made or influenced is distinct.[11]

A policy community develops a distinctive culture based on its networks, particular actors, and policy outcomes.

> ...policy communities are institutions in themselves and become integrated to greater or lesser degrees by developing a set of shared values, norms and beliefs which shape the policy networks that emerge and, ultimately, the policy outcomes in the given sector. Attention must be given to understanding the rules of the game and the strength of the belief systems that predominate in a policy community.[12]

An example of a policy network would be a group of industry actors such as companies in the oil and gas industry, that hold shared values and strive for similar policy outcomes. Industry has a material interest in the policy outcomes and according to Coleman and Skogstad the industry network itself would have its own culture and belief systems.

Actors

Another way to distinguish actors within the policy community is based on their level of influence on policy. That is, do they actually make policy or do they simply influence policy? Pross is one of the few theorists who differentiates the

actors within a policy community based on their level of influence. He distinguishes between the sub-government and the attentive public; the former are those that actually make policy and the latter are those that only influence policy. The sub-government is composed of government agencies, interest associations and societal organizations such as business firms that actually make policy in a given sector. The attentive public is more loosely knit and may contain experts, media and others who are interested in the sector. The attentive public attempts to influence policy but does not regularly participate in policy making as the sub-government does.[13]

The difference between the sub-government and the attentive public gives credence to Wilks and Wright's definition of a policy community containing actors with varying degrees of influence. Those with the greatest influence are part of the sub-government. This also ties in with the actors having varying degrees of knowledge, a factor Howlett stresses. Logically, those with the greatest degree of knowledge would likely be part of the sub-government.

A further way to group actors within a policy community is by looking at their reason for being a member of the policy community. Does the actor receive some direct benefit from the policy outcome or are they representing a broad-based group that does not receive a direct benefit but is concerned about the greater good or an indirect interest? Melody Hessing and Michael Howlett argue that actors within a policy community can be divided into those that are productive and those that are non-productive. Productive actors have a direct material interest in the policy process. Within a natural resource sector they include the holders or capitalizers of the means of production, those who have equipment and labour used in extracting the resource, as well as the landowner to whom

rents are paid for the resource. This landowner or resource owner in Canada and certainly in British Columbia is the government and is a category that is not necessarily common to non-resource sectors. The productive actors can be lumped together into a policy network as they have a distinct material interest in the development of the natural resource.[14]

Non-productive interests include those that represent broad public interests. In the resource domain Hessing and Howlett include "...health, recreational, community, gender, First Nations, environmental, and educational concerns." as non-productive interests.[15]

Similar to the productive, non-productive dichotomy Howlett puts forth, Jenkins-Smith divides the policy community into material and purposive actors where the former pursue fairly narrow interests in whatever way is possible, typically profits, while the latter pursue broader ideological based goals that are limiting in that "...to deviate is to risk loss of membership."[16] The material actors closely resemble the productive actors and the non-productive actors resemble the purposive actors.

In essence, purposive groups have ideological goals directed at a broad audience with little latitude for deviation from the ideological goals, while material groups have generally narrow goals directed at a small audience but have great latitude for deviation to achieve those goals.

There are other actors or institutions that may have a significant effect on policy but are not ongoing or direct participants within the policy community. The most critical in this case is the judicial system. Hessing and Howlett include the judicial system within the realm of the government or state actor. This realm comprises the elected government

party and its leaders, the bureaucracy including appointed officials, and the judicial system.[17]

The judicial system is designed to provide a reasonably impartial means of adjudicating issues defined by statute or the common law. It also provides for the evaluation of policy through its decisions on matters brought before the courts...it constructs a context in which ongoing policy efforts are directed and therefore can affect which policy options are considered and which are not.[18]

The judicial environment is important, as the thesis will argue that court decisions were crucial in shaping consultation and regulatory policy through court cases and judicial reviews where courts evaluate decisions made by the regulatory agencies. The Aboriginal actors within the province and within this policy domain strategically used litigation to influence public policy and legislation.

The influence actors or networks may have on the policy community and the policy outcome is not static over time. Their level of influence may change because of institutions such as the judicial system or because of the elected party, the bureaucrats or external events. Toner and Doern present a case where actors tried to influence public policy during a crisis situation. Their premise is that during the oil shocks of 1973 and 1979-1980 pressure groups such as the oil and gas industry groups in Canada had less influence within the policy community because of an external event such as OPEC's effect on prices, and because of intensive federal-provincial bargaining which left non-governmental groups out of the decision making loop.[19] As a result, the industry pressure group tried to exert their influence over as wide an audience as possible to regain their influence within the policy community.[20]

In a similar United States case, government bureaucrats reacting to external events changed the balance of power within a policy community by drastically changing their stance on a particular policy issue. Jenkins-Smith et. al. argue that even in relatively stable policy subsystems, government agencies or bureaucracies influence the policy community as they move between polar opposites on a given policy issue, in this case offshore leasing for energy exploration, when reacting to external events like price shifts or crises.[21]

Aboriginal Participation in Natural Resource Development

Within the literature concerning Aboriginals, there is little discussion about changing models of Aboriginal participation in natural resource development with Aboriginals as policy community members, or as participants that set or influence policy outside of land claim models or self-government models. The treaty process within British Columbia has afforded an opportunity for discussion regarding meaningful Aboriginal participation in natural resource development as an interim measure while treaty negotiations are underway. Unfortunately, little has happened beyond the discussion stage unless the Aboriginal groups have employed civil disobedience or depended on the courts to force acceptance of their participation. This section will summarize the literature concerning Aboriginal participation in natural resource development and in particular focus on an article by George Hoberg and Edward Morawski and a specific situation in British Columbia where First Nations in the Clayoquot Sound area became co-managers of the forest resource with the provincial government. The Hoberg article draws a close parallel to the case this thesis will

consider namely, Aboriginal participation in the oil and gas consultation and regulatory policy community in northeast British Columbia. The literature starts with government reports and evolves towards surveys of Aboriginal involvement in resource development. Theoretical models based on specific case studies have added academic rigour to the literature. Finally, gaps in the literature will be discussed along with the unique contribution to the literature that this thesis makes.

Literature Review

Government Reports

Anthropological literature on Aboriginal peoples clearly articulates the unique and important relationship between the people and the land. Interestingly however, in the modern context, this crucial relationship is largely ignored when development of natural resources is discussed. Within the existing legislative umbrella, few models exist that provide Aboriginal people a meaningful opportunity to participate in policy creation or decision-making around natural resource development.

A work that has made a significant contribution to the literature and to the recent history of Canada is Thomas Berger's report on the proposal to build the Mackenzie Valley Pipeline. Berger actually took the inquiry to the Aboriginal people of the north and in an

> ...unprecedented...holistic approach to analyzing the impact of a project...(the) inquiry did not treat the building of a pipeline as a mere technical or engineering problem, nor did they restrict themselves to economic feasibility studies or standard environmental impact assessments. They went further to study the consequences of possible ecological changes for the people's land-based economy...and examined the general social and economic impact of large-scale development on northern people... .the inquiries were a clear departure from the

> blind reliance on "expert" opinion, as they offered a chance for local people to share their experiences and to express their feelings and expectations. [22]

Berger's report was also unique in that he recommended the pipeline not be built for at least ten years so that land claims may be settled. He stressed the importance of the traditional subsistence economy and the need for it to be strengthened instead of replaced or weakened so that the northern people retain a sense of control over their lives and culture and are not solely dependent on the industrial, wage economy.[23] Berger understood that without settled land claims and without a strong subsistence economy, there would be no co-development. Instead, development would be wholly southern imposed and southern controlled.

Almost a decade later, the Bruntland Commission concurred with Berger's assessment.

> The starting point for a just and humane policy for such groups (indigenous and tribal groups) is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life...And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.[24]

Thomas Berger argued that this recognition could not happen because the dominant society rejected most aspects of Aboriginal life. "Native religion had to be replaced; native customs had to be rejected; native uses of the land could not, once the fur trade had been superseded by the search for minerals, oil and gas, be regarded as socially important or economically significant."[25] Other authors have discussed Aboriginal uses of the land and the significance both economically and socially of that usage however there is still a dearth of literature regarding models of how Aboriginals and non-Aboriginals can share the resources and share the responsibility to manage the development of the resources and uses of the land. [26]

One of the most recent Canadian government reports should be mentioned largely because of its encapsulation and dissemination of a cross-section of public opinion. "Gathering Strength" is the output from the work of the Royal Commission on Aboriginal Peoples. The Royal Commission asked the following question to people across Canada. "What are foundations of a fair and honourable relationship between the Aboriginal and non-Aboriginal people of Canada?"[27] The answer the Royal Commission received is that Aboriginals need control over their lives, over lands, resources and self-government. They also need time, space and respect from Canada to heal and revitalize.[28] It is interesting to note that these three government reports were completed in consecutive decades starting in the 1970s, one being international in scope, yet they give the same message: that Aboriginal peoples need control over their lives. This includes, in particular, control over development of resources. The task within Canada then is to identify models or processes to facilitate this sharing of control; within existing treaties, within modern treaties, and in areas where no treaties exist. The first and the last circumstance pose the greatest challenge.

Survey Of Aboriginal Participation in Natural Resource Development

A valuable source in the literature regarding Aboriginal participation in natural resource development across Canada and across resource sectors is a book by Claudia Notzke. This work covers all resource sectors and includes cases in all provinces and territories. Notzke's book *Aboriginal Peoples and Natural Resources in Canada* looks at models and situations across Canada where Aboriginal people have had some participation in the development or management of natural resources and where their lack

of participation has had deleterious effects on the people and their environment. Specific examples of lack of participation can be found in most natural resource sectors. Of interest are those in the oil and gas industry where development occurred on Alberta reserves and the resultant unexpected wealth wreaked havoc on the reserve population resulting in suicides and social upheaval.[29] In British Columbia, Notzke argues that non-renewable resource development on reserve is "...characterized by an overall denial of Indian interest and jurisdiction..."[30] Examples of situations where Aboriginal people do have some participation in natural resource development include the James Bay Agreement and Northern Quebec Agreement[31] and the Metis Settlement Land Act of 1988 in Alberta.[32]

Similar to Notzke's work but on a much smaller scale is an article by Jackie Wolfe-Keddie in *Resource and Environmental Management in Canada.* Wolfe-Keddie's article covers two familiar variables in the discussion about Aboriginal peoples and resource management: recent court cases and treaty rights. Wolfe-Keddie begins with a discussion of recent court decisions and the effect those decisions have had on natural resource development. This is a consistent theme throughout the literature since recent important cases such as Sparrow and Delgamuukw have changed legal opinion about Aboriginal people's rights. Wolfe-Keddie then proceeds into a discussion about recent land claims and the land base and control modern Aboriginal treaty signators hold over the various types of land. This subject has been widely discussed in the literature by authors such as William Morrison, David Elliot, and James Frideres. These works focus on modern land claims mostly in northern Canada where Aboriginal people now control vast tracts of land. In some cases surrounding land is managed or co-managed by the

Aboriginal group and the federal/territorial government. Under these new regimes Aboriginal peoples now have direct control over resource management or at least share control with the regional governments.

Finally, Wolfe-Keddie ventures into territory seldom discussed in the literature, the emerging models for Aboriginal participation outside modern comprehensive treaties, namely co-management and factors critical to the success of such relationships including recognition of traditional ecological knowledge.

Many co-governance models that exist in Canada today are not based on partnerships with provincial or federal governments, but instead exist because industry has chosen to bring Aboriginals into the decision making process, either as regulators, co-developers, or as environmental remediators. A work that does an industry-based survey is by Pamela Sloan and Roger Hill, *Corporate Aboriginal Relations: Best Practice Case Studies*. It presents some of the existing models that have developed through cooperative efforts between industry and Aboriginals. Unfortunately, without the state's involvement it is difficult to sustain such cooperative efforts and to apply them in alternate sectors or jurisdictions.

An example of one successful joint venture in the fishing industry is between the Baffin Regional Inuit Association and Farocan, a private southern corporation. The corporation supplies the management, technical expertise and capital equipment for a shrimp fishing enterprise and the Inuit provide the fishing licenses and labour to do the fishing. The initiative has provided employment for the Inuit and an opportunity to purchase an interest in the capital equipment.[33] This venture was established to boost

Inuit employment as well as the commercial fishery. If it can also assist to manage the resource it will truly be a co-management venture.

Theoretical Models

The government reports provide the context, the background, and even the solutions broadly stated. The surveys provide the information about what is happening in industry, in communities, and in resource sectors. Without theoretical concepts or models the reports and surveys remain simply information or specific case studies. The following works will present theoretical models that can be used to do rigorous comparisons and analysis and perhaps eventually lead policy community actors to cases that can be successfully replicated across sectors and jurisdictions.

A 1997 work by Melody Hessing and Michael Howlett though not Aboriginal in focus includes Aboriginals as a variable while analyzing the resource and environmental policy process in Canada. They conclude that Aboriginals are not an integral part of the policy community and generally are not part of the policy network where the state and industry actors make most decisions. "First Nations participation in the resource policy subsystem is sporadic and sector specific."[34] In some sectors such as fisheries and parks management they play a primary role including a co-management role but the authors do not expound on what type of models the co-management assumes and whether the state entered into these models by choice or was forced to act because of litigation. Within other sectors they argue that the Aboriginal people's participation is discretionary and largely restricted to policy formation rather than implementation. They predict participation by Aboriginals will increase and the existing resource and environmental

policy paradigm will change as a result of the land claims issue, the increasing profile of First Nations, and the trend toward self-government.[35]

George Hoberg and Edward Morawski examine a situation in the Clayoquot Sound area of British Columbia where a local First Nation actually achieved co-management status in forestry development through civil disobedience. They examine the events that led up to this historic partnership and the factors that led to policy change.

Hoberg and Morawski frame the policy change within a policy community context and they also introduce the idea of two policy communities in two separate sectors coming together or intersecting and resulting in policy change. The sectors are the forestry sector and the Aboriginal policy sector. The intersection occurs in the Clayoquot Sound area and results from the strategic actions of the Nuu-chah-nulth First Nations and environmentalists to bring about change. They argue the intersection does not encompass all aspects of the Aboriginal policy community such as fisheries, tourism and mining but it does encompass the entire forestry policy community in the Clayoquot area.

The co-management model discussed here is significant and came about because of several occurrences. The courts played a role by granting Nuu-chah-nulth First Nations an injunction to stop logging on Meares Island, an area within the Sound and within the First Nation's traditional territory, claimed under the treaty process. Civil disobedience throughout the Sound by both environmentalists and Nuu-chah-nulth First Nations in the form of roadblocks made logging difficult for the companies and both occurrences forced government to become actively involved in the situation.

The authors discuss some of the important legal decisions that resulted in the injunction being granted and the critical role the courts played in bringing about a change

in policy. The authors note that although a co-management model has been established the provincial government has worked hard to contain this model to this area. They do not want this to spread to other geographic areas or policy sectors either as interim measures or within treaties. [36] This is consistent within the literature arguing that governments are loath to enter into such co-management arrangements unless they are forced to, usually as a result of court decisions. [37]

The discussion of the policy communities prior to the First Nation group achieving co-management illustrates the control formerly held by the state and industry. Environmental groups had been successful at making some inroads in the late 1980s and early 1990s but the First Nation group had not. The former utilized public opinion successfully while the latter depended almost entirely on the courts. These causal variables are different and result in divergent outcomes. The First Nation group achieves co-management using the courts but the environmentalists, using changing public opinion, achieve some influence in the process but do not achieve co-management and do not achieve a place within the sub-government sphere of the policy community.

Building Theory - Examination of a New Case

The existing literature has provided useful information, insights, and examples for study. However, more cases and examples are needed to successfully build theory. It would be useful if there were cases that look at diverse economic sectors and cases that highlight alternate cooperative models. The Clayoquot Sound situation provides an important look at a forestry sector case where a form of co-management has been established between the state and a First Nation group outside of a modern treaty

arrangement. Hoberg and Morawski's theoretical construct involving policy communities and introducing policy intersection is a valuable addition to the literature. It provides a close example to the case that this thesis will discuss, that of Treaty 8 First Nation participation within the oil and gas consultation and regulatory policy communities in the northeast area of British Columbia. The oil and gas case will illustrate an alternative cooperative arrangement where the First Nation communities have joined the state and industry as powerful actors within the policy community. This discussion will add an additional case to the literature on policy communities and on cooperative models.

There are some similarities and some differences between the Clayoquot case and the oil and gas case. The economic sectors are different, forestry in the Clayoquot case and oil and gas in the Treaty 8 case. The outcomes are also different in that the Clayoquot case resulted in a co-management agreement, while the oil and gas case resulted in the First Nation's inclusion in the policy community but did not result in co-management. Similarities involve the importance of court decisions as an agent of change and the philosophy of the NDP government in terms of including First Nations in resource development decision-making. This thesis argues that because of First Nation people's use of the court system and the resulting decisions, the provincial government chose to respond with particular policy outputs. These policy outcomes resulted not in co-management as in the Clayoquot case but in the First Nation group's entrance into the oil and gas policy community and of their influence on regulatory decision-making and policy development. This is vastly different from the place Treaty 8 First Nation people held within the oil and gas policy community before the NDP came to power.

Of particular interest in this case is the fact that in the northeast area of British Columbia the First Nation groups are covered by Treaty 8. This is an important factor and provides an important case to the literature. Unrest in historic treaty areas is already festering and will continue until the various provincial governments begin to include First Nation groups into land and resource management decisions and regimes. The outcomes in this case developed as a result of joint efforts by the provincial government, industry and First Nations. It may prove to be a model that is applicable in other jurisdictions and in other economic sectors.

Endnotes

1. A stakeholder can be defined as any individual or group who is affected or can affect an organization's objectives. Practitioners use the following 3 measures to determine the importance of a stakeholder, power, legitimacy, and urgency. A stakeholder possessing all three attributes should be given more credence by the organization than a stakeholder possessing only one or two attributes. For a discussion See R. E. Freeman Strategic Management: A stakeholder approach. Boston: Pitman 1984 and Thomas Donaldson and Lee E. Preston, "The stakeholder theory of the corporation: concepts, evidence, implications". Academy of Management Review 20: 65-91. 1995
2. William Coleman and Grace Skogstad, 'Policy Communities And Policy Networks; a Structural Approach in *Policy Communities And Public Policy In Canada*, eds., Coleman and Skogstad (Mississauga, Ontario: Copp Clark Pitman Ltd, 1990), 14-33.
3. Ibid., 25.
4. Michael Howlett and M. Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems* (Toronto: Oxford University Press 1995), 129.
5. Hank Jenkins-Smith, Gilbert K. St. Clair, Brian Woods. 'Explaining Change in Policy Subsystems: Analysis of Coalition Stability and Defection over Time'. *American Journal of Political Science*, Vol. 35, No.4, (November 1991) 852.
6. Coleman and Skogstad: 11-12.
7. Ibid., 12.
8. Howlett and Ramesh: 128, 129.
9. Coleman and Skogstad: 23-24.
10. Paul Pross, *Group Politics and Public Policy: Second Edition* (Toronto: Oxford University Press 1992), 119-120.
11. Coleman and Skogstad: 29-30.
12. Ibid., 29.
13. Pross: 120-123.
14. Melody Hessing and Michael Howlett. *Canadian Natural Resource and Environmental Policy: Political Economy and Public Policy* (Vancouver: UBC Press 1997), 83.
15. Ibid., 78.
16. Jenkins-Smith: 853.
17. Hessing and Howlett: 85-87.
18. Ibid., 87.
19. Glen Toner and G. Bruce Doern 'The Two Energy Crises and Canadian Oil and Gas Interest Groups: A Re-examination of Berry's Propositions,*' *Canadian Journal of Political Science* Vol XIX:3 (September 1986), 480 – 481.
20. Ibid., 481.
21. Jenkins-Smith: 878.
22. Claudia Notzke. *Aboriginal Peoples and Natural Resources in Canada* (North York, Ontario: Captus Press Inc. 1994), 217, 218.
23. Thomas R. Berger. *Northern Frontier Northern Homeland: The Report Of The Mackenzie Valley Pipeline Inquiry* revised ed. (Vancouver: Douglas & McIntyre 1988), 24.
24. Notzke: 4.

25. Berger: 128,129.
26. See Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre 1988) for his analysis of the subsistence lifestyle of the Beaver nations in northeastern British Columbia. See Jackie Wolfe-Keddie 'First Nations' Sovereignty and Land Claims: Implications for Resource Management' in *Resource and Environmental Management in Canada* ed. Bruce Mitchell (Toronto: Oxford University Press 1995) for a discussion of co-management examples in Canada.
27. *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Minister of Supply and Services Canada 1996), x.
28. Ibid., 3.
29. Notzke: 206,207.
30. Ibid., 211.
31. Ibid., 27-28.
32. Ibid., 184-186.
33. Ibid., 77.
34. Hessing and Howlett: 246.
35. Ibid., 246-247.
36. Hoberg: 407.
37. Notzke: 52-53.

Chapter 2 Policy Community Before Aboriginals Were Involved

Prior to the mid 1990s, First Nation groups in northeast British Columbia were not part of the oil and gas policy community. That domain was controlled firmly by the provincial government and by the oil and gas industry. These two actors worked closely to develop the hydrocarbon resources located largely in the northeastern part of the province. The First Nation people in the region have tried over the years to become part of the decision making process since oil and gas development has a significant effect on the lives and lands used by First Nation people. Until the 1990s, the provincial government was unwilling to allow them into the sub-government segment of the policy community. While various industry actors were willing to consult with the First Nation communities and work with them on socio-economic and traditional heritage protection issues, industry was largely reticent to accept the First Nation group as decision makers within the policy community.

This chapter will look at what the oil and gas policy community looked like prior to the mid 1990s without the active participation of the northeast First Nation communities. It will explore the actors within the policy community, the provincial government and the oil and gas industry players, as well as the Aboriginal communities in the northeast, some of whom would eventually become members of the policy community. A brief discussion of the northeast area itself will provide a context and setting for the industry and resident actors. Finally it will review the question of why the Aboriginal groups were not part of the policy community and give some background about provincial policies up to the 1990s.

The Actors: The Oil and Gas Industry, The BC Government and Aboriginal Peoples

The critical players that made up the sub-government of the oil and gas policy community included the oil and gas industry, various departments of the British Columbia government including the Ministry of Energy and Mines, in Victoria and in Fort St. John.[1] Other government departments involved in approvals included the Ministry of Forests, Ministry of Environment and Parks and Ministry of Lands in the northeast region. These parties had a direct influence on policy.

Industry

In Canada, oil and gas companies have traditionally retained a strong and pro-active role in attempting to influence government policy affecting their industry. This has been especially true since the early 1980s when the federal Liberal government established the industry-despised national energy policy which had a profound impact on the industry as a whole.[2] The somewhat insular oil and gas industry has never welcomed interference in policy making by other players such as environmental groups or Aboriginal groups that have frequently tried to establish influence in the industry policy setting arena. The insular nature and active lobbying by the industry is perhaps partially due to the small number of companies that originally made up the industry worldwide and their incredible dominance over several decades. Although that dominance has been challenged in jurisdictions globally and largely reduced, the independence of the industry seems to have remained largely intact. In Canada, the lobbying arm of the industry is institutionalized within the Canadian Association of Petroleum Producers (CAPP).

CAPP, representing approximately 165 producer companies that produce almost 95% of Canada's natural gas and crude oil, has an annual budget of $9 million and has a staff Canada wide of 45 people. The association also represents 135 associate member companies that provide a broad range of services to the industry.[3] The association is active in lobbying and attempting to influence governments of all levels from the federal level down to local levels if necessary. The staff is well educated and trained in various aspects of the industry, in effective communication techniques, and in lobbying.[4] Many of the current staff members have worked in the industry or in government. CAPP and its predecessor, the Canadian Petroleum Association (CPA), have been very effective in ensuring industry's message and wishes are efficiently communicated on an ongoing and timely basis.

At present there are many companies active in northeast British Columbia. The companies generally bring their concerns and issues to the British Columbia government themselves and through CAPP. CAPP has a close working relationship with the British Columbia government. This has been the case for several decades.

A number of companies active in northeast British Columbia in the early 1990s formed a group to discuss Aboriginal issues. Representatives from industry realized that they needed to better understand the issues and concerns of the First Nation communities and to work with the communities to resolve these issues. Community members from each of the reserves were invited to attend what was to become the Northeast Industry Group (Industry Group). The Industry Group formed largely because several companies were working in areas of great significance to the communities and there were outstanding issues that were not being addressed. One of the companies, Amoco, was

proposing to explore in the sacred Twin Sisters area. A subsequent court case concerning this project will be discussed in Chapter Three.

The majority of the companies that attended the Industry Group meetings realized that the First Nation people affected by oil and gas activity needed to have a process to resolve outstanding issues. Government was invited to participate in the Industry Group but did so mostly as observers. There were companies active in the area that did not attend the Industry Group meetings and did not attempt to work with the communities to resolve issues.[5]

The Western sedimentary basin is the source of most of Canada's current conventional oil and gas production. Other areas such as the far north and the eastern seaboard are still in an exploratory or early production stage. At present most of the production still stems from Alberta, with small pockets in southwestern Saskatchewan and northeastern British Columbia rounding out the known production and reserves in the sedimentary basin. In British Columbia, 100% of production at present comes from the northeastern area of the province. That is the area on which this thesis will focus.

The northeast area of British Columbia is bordered on the west and south by the Rocky Mountains and on the east and north by the Alberta and Yukon/Northwest Territories borders respectively. The sub-surface is an extension of the western sedimentary basin while the surface is an extension of the prairies. The region consists of almost one-third of the land base of British Columbia but has only about three percent of the province's population. Almost all of British Columbia's oil and gas production lies within this area but the industry comprises only 2.33% of the GDP of the province.[6] Thus, historically, neither the industry nor the region has been given much attention by

governments in Victoria. Although the oil and gas industry is critical to the area in terms of income and jobs it historically has held little sway in the provincial capital, especially when compared to forestry, which is the dominant provincial industry.

Since the industry began operations in the province in the 1940s, $8.8 billion has been directly contributed to the provincial economy in the form of revenue.[7] In 1999, gross revenue was $587.3 million.[8] The individual companies' expenditures in the province are not included in these figures and they provide another $20 million spent in the province from 1985 through to 1999.[9]

Employment in the oil and gas sector includes unskilled labour and specialized skilled jobs. The British Columbia industry has developed and exported skills, technology, and labour to the Middle East, Siberia, South America, and North Sea sites. The same skills are developed and retained in the province to support the industry here. In 1989, all subsurface activity including mining provided 1.8 percent of total workforce in the province of British Columbia. This is direct employment, only, it does not include the service industry that supports the primary sector.[10]

The oil and gas industry is also important to the province because of the supply of product that the province receives and the excess it exports. In 1990, total supply of natural gas was 418 petajoules and provincial demand was 245 petajoules. Excess natural gas is exported to other provinces and the United States, especially California.[11] Crude oil production provided the province with 73 petajoules while provincial requirements equalled 388 petajoules.[12] The additional crude oil required is imported from Alberta. "British Columbia's current energy requirements are supplied by the following fuel types: 37% by oil, 22% by natural gas, 22% by woodwaste and other fuel

types, and 19% by electricity."[13] Of the energy required, only a portion of the crude oil has to be imported, the province provides the remaining, plus substantial exports.

The Provincial Government

Prior to 1991 when the New Democratic Party (NDP) was elected, the province of British Columbia was governed, for the better part of four decades, by the Social Credit Party (Socreds) except for a brief period in the early 1970s when Dave Barrett's NDP formed a government. The Socreds have traditionally enjoyed the support of business in the province and their political agenda included actively developing the vast resources of the province and opening up the hinterland areas to accelerate and support that development. The NDP on the other hand, historically garnered most of its support from labour and some of the large urban areas of the province. It has had little support in the hinterland regions, especially the northeast.

Given the Socred's close relationship with business, including the oil and gas industry, the government and the industry worked closely together to set policy and to develop the resources of the province. It was not uncommon for the industry representatives, based on the existing regulatory and policy environment in Alberta, to suggest policies and procedures to the government in British Columbia. The Socreds adopted many of the industry's suggestions. Thus the two parties worked closely together in setting policy and regulations concerning the exploration and production of oil and gas.

From the 1950s, when the industry started to become active, until the 1980s there were few groups that bothered to challenge the pre-eminence of the government and the companies as the primary policy setters within the policy community. The environmental

groups and the First Nation communities were the main contestors for a voice in the oil and gas regulatory process and policy in the region. The environment groups had intermittent success, depending on the economy and relative importance of environmental concerns on the political agenda.[14] The main environmental group active in the area was the Chetwynd Environmental Society. The First Nation group had almost no success in getting their concerns on the policy agenda. They wanted the provincial government to work with them to protect their treaty and Aboriginal rights when natural resources were developed. The provincial government did not see protection of treaty and Aboriginal rights as their role as there were no legislative or legal reasons, at that time, to cooperate with the Aboriginal people.[15] They were continually referred to the federal government to seek redress for their treaty and land use issues. The next section will discuss British Columbia's historic view of Aboriginal issues.

The Aboriginal Players

The Aboriginal players within the northeast area of the province are the members of the First Nation reserves covered by Treaty 8 and those Aboriginal peoples living in Kelly Lake, a community populated by treaty, non-treaty, and Metis peoples. The First Nation reserves are Fort Nelson First Nation, Prophet River First Nation, Halfway River First Nation, Blueberry River First Nation, Doig River First Nation, West Moberly First Nation, and Saulteau First Nation. The communities within the region are made up largely of Slavey, Beaver, Cree, and Saulteau peoples.[16] Many of the Kelly Lake people are from Iroquois descent. Historically, the Peace River area was largely populated by the Beaver people but the Cree pushed them north and west and intermarried with them.[17]

The Iroquois people from Kelly Lake came from Eastern Canada as guides and remained in the Peace River area also intermarrying with the local Beaver and Cree populations. The Slavey traditionally lived in the area farther north around Fort Nelson.

Treaty 8 was signed in 1899 and most of the groups in northeast British Columbia adhered to the treaty between 1899 and 1915.[18] The treaty was extended to this area because of the Yukon gold-rush and the need for gold-seekers to make their way safely through the Peace region without being threatened by the local Indian population.[19] Thus this is the only area in British Columbia covered by one of the numbered treaties which were signed in much of southern Canada.

The First Nation communities are at times represented by Treaty 8 Tribal Association, a central office directed to administer various programs and deal with issues common to all the communities. In the 1980s and 1990s, Treaty 8 Tribal Association has represented the First Nation communities in their efforts to have some influence with regard to oil and gas policy and procedures. The communities were seldom successful in these endeavours to influence policy. The underlying reasons for the lack of influence lie with government policy that had been in place for over 100 years. The provincial government demonstrated no intention of changing their policy until the courts forced them to do so. This study will focus on the First Nation communities of Treaty 8 in northeast British Columbia as they are the group that have become a part of the policy community in oil and gas development.

The next chapter will discuss the role the courts eventually played to encourage more First Nation input in both policy and practice across a wide spectrum of areas including oil and gas development.

Why Aboriginal Players Were Not Part of The Policy Community

Prior to some of the landmark court cases and important events that have shaped Aboriginal and natural resource policy in British Columbia, Aboriginal people and Aboriginal issues had little relevance in policy making and in fact Aboriginal people were given little opportunity to submit their views on issues that affected them. This was not because the Aboriginal people did not express their views but rather that their views did not fit with the current practices and ideology of governments, industry, policy makers and the general public. Until critical legal cases were decided and particular events occurred, policy makers had little impetus to change.

One of the basic assumptions of the European occupation of British Columbia was that the land was "essentially empty and unused until it was discovered and put to use by Whites."[20] British Columbia differed from most other provinces in Canada in that the province, until recently, consistently ignored alternative "historical interpretations and legal principles commonly applied elsewhere."[21] Other jurisdictions signed treaties with Aboriginal people acknowledging they held Aboriginal title and had rights to land and treaty rights. British Columbia, for the most part, did not follow this practice.

The principle of 'discovery' was a traditional theory promulgated by U.S. Justice Marshall in 1823 and later used in Canadian Aboriginal rights law. "Aboriginal lands could be considered vacant and subject to discovery because of the method of Aboriginal land use and the superiority of English institutions."[22] British Columbia governments have continued to use this concept of 'discovery' as recently as in the trial court decision of Delgamuukw in the early 1990s to assert British sovereignty.[23]

Religion also came into play when 'discovery' was applied by European Christians to non-Christians or pagans, who as a result, had no claim to sovereignty and related land rights.[24] Another name for 'discovery' is 'terra nullius', used by Columbus and other Old World Explorers and conquering nations to proclaim that the New World belonged to no one and "...the colonizers could occupy the lands of Indigenous peoples without their consent."[25]

Consistent with the belief that the land was empty was the belief by the Europeans that the Aboriginals had no title and limited rights to the land. Legally it was argued that "Aboriginal title was contingent on Crown recognition" of that title. This dated from the 1888 St. Catherine Milling Case in Ontario. This premise was not effectively challenged until the Calder case in 1973.[26]

In Paul Tennant's comprehensive overview of Aboriginal history in British Columbia, he argues that notwithstanding the court's view of title prior to 1973, the history and documents surrounding the Douglas Treaties on Vancouver Island clearly indicate that James Douglas believed the Indians owned the lands.[27] It was not until later that this view was refuted by Douglas himself and adhered to by his successors and future British Columbia governments.[28] In fact, the elected Assembly and the people of the colony of British Columbia in the early 1860s also accepted the view that the Indians held title and that it must be extinguished with treaties.[29]

Once the British Columbia government adopted the policy that Aboriginal people had no title and limited rights they proceeded with developing and opening the province with no thought to Aboriginal people's traditional and historic use of the land. The Aboriginal people were not consulted in British Columbia or elsewhere in Canada when

resources were developed, or when land was taken for farming or settlement. Robin Fisher states that under Douglas there was consultation with Aboriginal groups about reserve size and placement but under Joseph Trutch and subsequent administrations, consultation effectively ended even about critical issues such as the size and placement of reserves.[30]

Tennant asserts that the British Columbia government held this view into the 1990s. In the 1960s, the province realized there were bound to be some Aboriginal title cases in the courts so they prepared their arguments for that eventuality. They argued that the Royal Proclamation of 1763 did not apply to British Columbia. This proclamation states that Aboriginal title exists. Second, they argued that if the courts decided that title existed then that title was implicitly extinguished by actions and legislation of the British Columbia government or explicitly by Confederation.[31]

Along with the terra nullius concept and lack of Aboriginal title was also the view that Aboriginal people had few Aboriginal rights except those given to Aboriginal people by the treaties. Michael Asch holds up the 1973 Calder case as the turning point in Canadian legal tradition when the Supreme Court questioned the prevailing view that Aboriginal people had no Aboriginal rights as they did not live in societies prior to the arrival of the Europeans.[32] The inherent rights theory is now an accepted theory in Canadian law and it is based on the belief that Aboriginal rights stem from a source independent of Crown recognition.[33]

In the late 1960s the Nisga'a brought the Calder case against the government of British Columbia. The case was actually lost by the Nisga'a over a technicality, however, it was important because the Supreme Court justices for the first time "...recognized

Aboriginal title as a legal right derived from the Indian's historic occupation and possession of their tribal lands."[34] The Supreme Court justices were divided on whether that title had been extinguished.[35] After this case the federal government opened treaty negotiations with the Nisga'a people in British Columbia. Even though the Canadian government reacted to the Calder case and changed their policy, the provincial government refused to participate in negotiations or change their Aboriginal policy for another 17 years.[36]

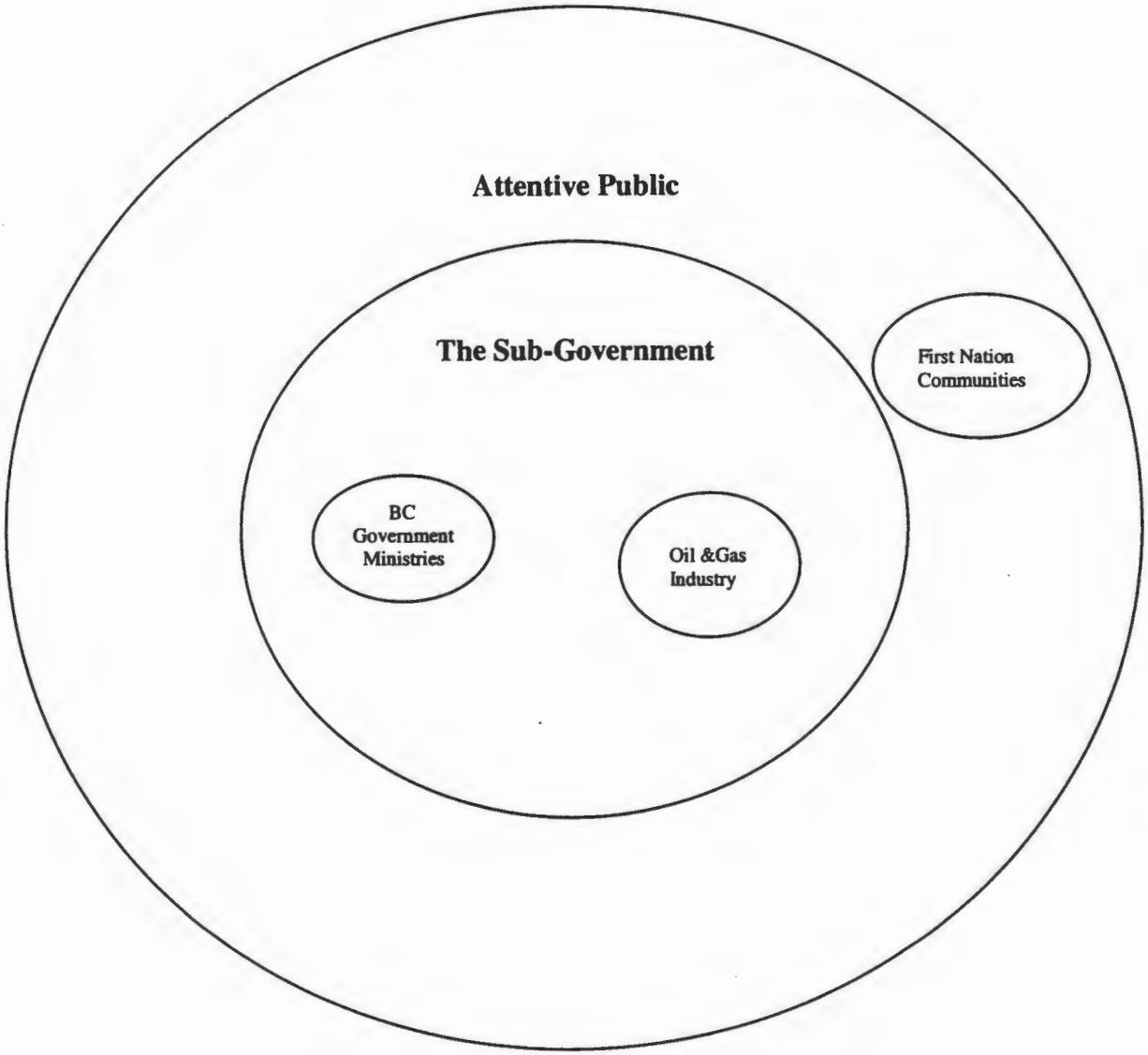
The 1973 Calder Supreme Court decision was one of the first of a series of events that brought Aboriginal issues onto the political agenda. Several more important court cases would follow including Guerin in 1984 which established that government had a fiduciary responsibility to safeguard Aboriginal interests and that First Nation's interest in land, both on reserve and outside reserves, was a "pre-existing legal right" not created by the Crown.[37] This effectively quashed the idea that Aboriginal title was contingent on Crown recognition.

The next critical policy event came with the addition of section 35 (1) into the Canadian Constitution in 1982, which provided Aboriginal and treaty rights recognition and Constitutional protection. Subsequent court cases such as Sparrow would test section 35 and build onto the precedent set by the previous cases. These events served to firmly entrench Aboriginal issues onto the political agenda. Aboriginal people were finally experiencing some success in the courts and in the political system. Although the federal government had begun to rethink their policies, the British Columbia government would not start to change their policies until the end of the 1980s. It would take several more critical court cases to allow Aboriginals more of a voice in provincial policy. In the late

1980s, industry and the public had also started to push both the provincial and federal governments to deal with the uncertainty created by the Aboriginal land question.[38]

During the early 1990s, some oil and gas companies began to lean toward including all the Aboriginal communities in northeast British Columbia into the industry more in terms of consultation, employment and contracting. This was as a result of several litigation efforts by First Nation communities against companies, delayed projects, adverse media coverage and a growing understanding that Aboriginals should have some influence or should be included in some way in the oil and gas decision making process. Neither the federal nor the provincial governments were willing to go that far. They would need more strident encouragement from subsequent legal decisions to change their policies.

The Policy Community Before
First Nation Groups Were Involved



Conclusion

Prior to the 1990s, before a series of events began to change the face of policy in British Columbia, First Nation groups had little or no influence on the policy arena and were not members of the oil and gas policy community. The policy community was dominated by the British Columbia government and by the oil and gas industry and was quite resistant to outside groups attempting to influence the process. First Nation concerns, mostly related to conflicting uses of the land, and resource rents were largely ignored by both the provincial and the federal government resulting in a veritable vacuum where little or no action was taken to resolve First Nation's concerns. It was left to some industry players to recognize that First Nation people should have some influence and decision making power in the process but the courts were the final impetus that led to legislational and policy changes. The next chapter will discuss those legal cases that were critical to affecting that change in British Columbia.

Endnotes

1. The Ministry of Energy and Mines was later renamed the Oil and Gas Division of the Ministry of Employment and Investment.
2. See Glen Toner and G. Bruce Doern's article 'The Two Energy Crises and Canadian Oil and Gas Interest Groups: A Re-examination of Berry's Propositions,*' *Canadian Journal of Political Science* Vol XIX:3 (September 1986), 475 – 493 for a brief description of the National Energy Policy and an analysis of the oil and gas industry's lobbying ability and actions in crises situations. See also Glen Toner and G. Bruce Doern's book *The Politics of Energy: The Development and Implementation of the NEP* (Toronto: Methuen 1985).
3. CAPP, Interview, 2000.
4. Toner and Doern, 1986: 474.
5. Authors experience with the Northeast Industry Group from 1990-1995. See also Pamela Sloan and Roger Hill, *Corporate Aboriginal Relations: Best Practice Case Studies* (Toronto: Sloan Hill Associates Inc. 1995) 201-206.
6. Paul Gosh, B.C. Stats, personal telephone conversation 2001. Figure is as of 1999 and is based on 1992 constant dollars.
7. Ministry of Energy and Mines, Oil and Gas Initiatives Branch 'Petroleum & Natural Gas Title Holdings, Hectares and Revenue 1989-1999' and '1947-1994.' This figure covers 1947-1984 and every year after until 1999. The 1947-1984 figures are valued in those years' dollars. The figures have not been indexed to reflect current dollar values.
8. Ministry of Energy and Mines, Oil and Gas Initiatives Branch, 'Petroleum & Natural Gas Title Holdings, Hectares and Revenue 1989-1999'.
9. Energy Mines and Petroleum Resources, 'Drilling & Production Statistics', November 1995, Ministry of Energy and Mines, Oil and Gas Initiatives Branch, 'Drilling & Production Statistics 1989-1999'.
10. Ministry of Finance and Corporate Relations. *Labour Force Survey Data*, 1989.
11. G.E. Bridges. *Decision-Making Processes and the Energy Sector.* Prepared for the British Columbia Round Table on the Environment and the Economy, June 1990 pp15-16. Note: A petajoule is equivalent to 163,500 barrels of oil or 900 million cubic feet of natural gas. This is roughly equivalent to the total energy consumed in Vancouver in one day.
12. Ministry of Energy Mines and Petroleum Resources. *Energy Supply & Requirements 1990.*
13. British Columbia Round Table on the Environment and the Economy. *Sustainable Development and Energy*, 1990: 11.
14. *Koopman v. Ostergaard,* B.C.J. No. 1822, 1995.
15. An example is during the Land and Resource Management Planning (LRMP) process in the northeast region, the First Nations refused to sit at the LRMP tables as a stakeholder. They wanted to be a part of the Inter-Agency Management Committee within the provincial government. This committee oversaw the tables and worked at a higher level. The provincial government refused their attendance at this table.
16. Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre 1988), 31.

17. David W. Leonard & Victoria L. Lemieux, *The Lure of the Peace River Country 1872 - 1914* (Calgary: Detselig Enterprises 1992), 65.
18. Brody, 69.
19. Ibid., 65.
20. Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press 1990), 15.
21. Ibid., 15, 218.
22. Michael Asch. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press 1997), 45.
23. Ibid., 49.
24. R Bruce Morrison and C. Roderick Wilson eds., *Native Peoples: The Canadian Experience Second Edition* (Toronto: McLelland and Stewart Inc. 1986), 49, 50 See also Robin Fisher, *Contact and Conflict: Indian – European Relations in British Columbia, 1774-1890. 2nd edition* (Vancouver: UBC Press 1992),104-105. Fisher goes back to writings by Sir Thomas More, John Locke and the Swiss jurist Vattel on the value of land and non-ownership of land if it is not cultivated and only inhabited by non-Christian hunting societies.
25. Asch: 185. See also Paul Tennant 'Aboriginal Peoples and Aboriginal Title in British Columbia Politics' in *Politics, Policy and Government in British Columbia,* ed. R.K. Carty (Vancouver: UBC Press 1996), 46, 49, 51, 54.
26. Ibid., 48-9.
27. Tennant: 20.
28. Tennant: 30. Fisher: 171.
29. Tennant: 21-25.
30. Fisher: 166,184.
31. Tennant: 217.
32. Asch: ix, 48.
33. Ibid., 48.
34. John J. Borrows, and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary.* (Toronto: Butterworths Canada Ltd. 1998), 58.
35. Paul Tennant, 'Aboriginal Peoples and Aboriginal Title,' 54.
36. Tennant 1990: 172.
37. British Columbia Ministry of Aboriginal Affairs. 'Landmark Court Cases,' (n.d.), 1.
38. Frank Cassidy ed., *Reaching Just Settlements: Land Claims in British Columbia* (Lantzville, B.C: Oolichan Books and Institute for Research and Public Policy 1991), xii.

Chapter 3 Variables of Change

Introduction

Prior to the mid-1990s, First Nation peoples were not members of the oil and gas policy community in northeast British Columbia. Two critical variables changed that situation. The first was important legal decisions and the second was the Aboriginal platform of the newly elected NDP government and the policies they enacted as a result of the legal decisions.

This chapter will present four important legal cases and analyze their effect on natural resource development and Aboriginal people in British Columbia. The second part of the chapter outlines the pertinent policies the NDP government enacted and their effect on natural resources and First Nation peoples in the northeast area of British Columbia.

Legal Cases

Over the past decade, a number of legal decisions have made an indelible impact on the way that the British Columbia government deals with Aboriginal peoples and land and resource development. The court cases to be discussed in this chapter include R v. Sparrow (1990), Delgamuukw et al. v. Her Majesty the Queen in Right of British Columbia and The Attorney General of Canada (1997), Halfway River First Nation v. British Columbia (1999) and Kelly Lake Cree v. British Columbia (1998). The British Columbia government has introduced policy in response to these decisions. The policy outlines the steps the government must take when dealing with Crown land and land

tenure where Aboriginal rights may exist. This policy creates a new role for government departments and industry, as they now must take responsibility to discern if Aboriginal rights exist and to what extent. The decisions also result in Aboriginal groups having more influence on policy; specifically this paper will focus on how the northeast First Nation communities became part of the sub-government or inner policy community concerning oil and gas development. Inquiries into legal questions, definitions and interpretations will be limited to specific issues that the British Columbia government has noted as part of its policy.

Some of the important aspects of these decisions are to specify that Aboriginal rights and title were not extinguished with Confederation, as was previously argued by the government of British Columbia. The decisions resolved that under the 1982 Constitution Act, section 35 (1) protects Aboriginal rights, and that any proposed government regulation that infringes on the exercise of Aboriginal rights must be constitutionally justified. Aboriginal people have priority to fish for food after conservation goals are met and Aboriginals have rights other than that of ownership over their traditional territories. Vacant Crown land is available for use by Aboriginal people for sustenance and ceremonial purposes until that land is to be used for other purposes. The provincial government cannot arbitrarily limit that use. The government must consult with Aboriginal people, prior to development to mitigate any possible Aboriginal rights infringement. Conversely, Aboriginal people also have a responsibility to consult meaningfully and in good faith with government. The first case to be discussed is the Sparrow case, which deals with protection of Aboriginal rights under the 1982 Constitution Act.

R v. Sparrow

In the Sparrow case a Musqueam band member from British Columbia, Reginald Sparrow, "...was found to have been fishing on 25 May 1984 in Canoe Passage with a drift net that was longer than had been permitted by the band's food fishing licence."[1] The licence was granted to the band under the British Columbia Fisheries Act.[2] The license stated that the drift net could not be longer than 25 fathoms. The defendant was caught with a net 45 fathoms in length.[3] Sparrow was found guilty in provincial court. His defence was based on section 35 of the Constitution. This section recognizes and affirms existing Aboriginal and treaty rights.[4] Sparrow conceded that the net violated regulations but he contended that he was exercising an existing Aboriginal right. The decision held when it was taken to county court. "The British Columbia Court of Appeal rendered an ambiguous decision: ...on the one hand they overturned the conviction because they found Sparrow's Aboriginal right to fish had not been extinguished prior to 1982, on the other they limited the protection of section 35 so that the net restriction was not inconsistent with it."[5] Both the Crown and Sparrow appealed to the Supreme Court of Canada. The Supreme Court of Canada ordered that a new trial be held. A new trial was not pursued.

Sparrow appealed on the ground that the Court of Appeal erred in two respects. First, that section 35 of the Constitution Act 1982 only protects the Aboriginal right when exercised for the purpose of obtaining food and restricts those rights whenever "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest."[6] Secondly, the appeal was based on the fact that

the court did not find the net restriction in the band's food fish licence inconsistent with section 35 of the Constitution Act 1982.[7]

> The Crown cross appealed on the ground that the court of Appeal erred in holding that the aboriginal right had not been extinguished before April 17, 1982, the date of commencement of the Constitution Act, 1982, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the Band and that the Band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups.[8]

The court ruled that "...the Constitution Act provides 'a strong measure of protection' for Aboriginal rights. Any proposed government regulations that infringe on the exercise of those rights must be constitutionally justified. It further ruled that

- Aboriginal and treaty rights are capable of evolving over time and must be interpreted in a generous and liberal manner
- governments may regulate existing Aboriginal rights only for a compelling and substantial objective such as the conservation and management of resources; and
- after conservation goals are met, Aboriginal people must be given priority to fish for food over other user groups."[9]

The court devised a test to determine if a regulation infringes on an Aboriginal right. The following questions must be answered.

- Is the limitation (or infringement) of the Aboriginal right reasonable?
- Does the limitation (or infringement) impose undue hardship?
- Does the limitation (or infringement) deny the holders of the right their preferred means of exercising that right?[10]

The court found that there was insufficient evidence to deal with the question of whether the net length restriction outlined in the fishing licence was inconsistent with section 35 of the Constitution Act, 1982.[11]

The Sparrow ruling ascertains that Aboriginal rights were not extinguished by Confederation or by implicit actions of the British Columbia government. Prior to the ruling the British Columbia government had held that Aboriginal rights were extinguished with Confederation. This ruling has had a critical effect on the British Columbia government because it can no longer deny the existence of Aboriginal rights. Further, the Sparrow case was the first case in which the Supreme Court of Canada was called upon to interpret what section 35 of the Constitution Act really means.[12] The court ruled that the Constitution protects Aboriginal rights and that Aboriginal rights evolve over time and must be interpreted generously.

The ruling also specifies that the provincial government cannot arbitrarily regulate Aboriginal rights. Regulation must be for compelling and substantive reasons and any regulations that limit Aboriginal rights must be justified. A test was established to ascertain justification of infringement. The test specifies that the infringement must be reasonable, it cannot result in undue hardship, and it cannot deny the Aboriginal people the preferred means of exercising that right. This effectively limits the ability of the provincial government to set regulations that may affect Aboriginal rights. This aspect of the ruling has probably had the most prevalent effect on natural resource development in the province. The province now must ensure regulations are for substantive and compelling reasons and that infringement of Aboriginal rights is minimized to the greatest extent possible.

While this test appears to be restrictive on the ability of governments to regulate Aboriginal rights, it also "...permits legislative infringement which is specially justified in individual cases."[13] This parallels section 1 of the Charter of Rights and Freedoms,

that while guaranteeing rights and freedoms asserts that those same rights and freedoms are subject to reasonable limits. When section 35(1) of the Constitution Act was enacted it was set outside the Charter and so section 1 of the Charter did not apply to section 35(1). The justification test in Sparrow effectively mirrors section 1 of the Charter and applies specifically to section 35(1) of the Constitution Act. Frank Cassidy argues that although the provincial government is now constrained in its ability to set regulations that may limit Aboriginal rights "...at the same time, it (the ruling) laid the foundation for a good measure of government control over these rights. Government...may limit aboriginal rights when it has 'a valid legislative objective."[14]

The decision also affirmed that Aboriginal peoples have priority to fish for food over other users. If the province reduces the fishing quotas for conservation reasons then that reduction must come off the non-Aboriginal, commercial fishing industries' catch. This directly impacts the commercial fishing industry and may affect the livelihood of non-Aboriginal fishing fleets. During the trial the "...Attorneys General of British Columbia, Ontario, Quebec, Saskatchewan, Alberta, and Newfoundland supported the respondent (Province of British Columbia) as did the British Columbia Wildlife Federation...the Fishery Council of British Columbia and the United Fishermen and Allied Workers Union."[15] The other provinces and commercial fishery groups understood that this decision could effect their quota system and potentially their livelihood.

As a result of the Sparrow decision, the question of whether Aboriginal rights exist is being decided on a case-by-case basis. The criterion by which government or indigenous people decide if Aboriginal rights do exist is vague. If there is any

disagreement the matter is decided by negotiation or in the courts. This is very expensive and time consuming and leaves both government and Aboriginals in uncertain positions. The questions that are raised are as follows: in which individual cases do Aboriginal rights exist, if they do exist are they being infringed and if they are, is that infringement justified?

The next case to be discussed is Delgamuukw, one which affirms many of the tenets of Sparrow including the existence of Aboriginal rights.

Delgamuukw et al. v. Her Majesty the Queen in Right of British Columbia and The Attorney General of Canada

The second case is commonly referred to as Delgamuukw. This decision has surely had more of an impact on Aboriginal rights and title and related government policy than any case in Canadian history. The Supreme Court of Canada rendered the decision in 1997. In 1984, 35 Gitksan and 13 Wet'suwet'en Hereditary Chiefs asked the British Columbia court to recognize their ownership of 57,000 square kilometres of land near Hazelton in northwest British Columbia, as well as their right to govern their traditional territories, and to receive compensation for loss of lands and resources. In 1991 the lower court ruled that the Crown had extinguished Aboriginal rights at the time of Confederation, however, the province had a legal obligation to permit Aboriginal sustenance activities on unoccupied Crown land until the land was dedicated to another purpose. The Chiefs appealed. The appeal court ruled that the Gitksan and Wet'suwet'en peoples do have "unextinguished non-exclusive aboriginal rights, other than a right of ownership" to much of their traditional territories. The justices strongly

recommended that the scope and content of those rights would best be defined through negotiation rather than litigation.[16]

The Supreme Court of Canada agreed to hear a further appeal from the Chiefs. Instead, the province and the Chiefs resolved to sit down and work towards treaty negotiations. An Accord of Recognition and Respect was signed on June 13, 1994. This accord meant that the two parties would, over the next year, attempt to come to terms through negotiation instead of litigation.[17] In 1995, the negotiations began to break down and eventually the parties resumed litigation. Herb George, chief negotiator for the Wet'suwet'en people stated that the original intent of the court action was to encourage the province to negotiate with his people.[18]

A summary of the 1993 BC Supreme Court Delgamuukw decision is as follows:

- Blanket extinguishment of Aboriginal rights did not occur prior to 1871 and therefore, these rights continue to exist in British Columbia today.
- The Aboriginal people in question have unextinguished non-exclusive Aboriginal rights, other than a right of ownership, or a property right, in an area of Northern British Columbia specifically described by the Court of Appeal.
- The Aboriginal people's claim for jurisdiction was dismissed.
- Aboriginal rights are those activities that are integral to the distinct culture of an Aboriginal society. They may vary from context to context in accordance with distinct patterns of historical occupancy and use of land. The activity must have been in existence prior to 1846, and for a sufficient length of time to become integral to the Aboriginal society.
- As of 1982, existing Aboriginal rights were protected and continue to be so protected by Section 35(1) of the Constitution Act.[19]

The resultant Supreme Court of Canada (1997) decision is summarized as follows:

- The questions of whether the Aboriginals possessed title to the lands in dispute and the issue of self-government were both sent back to trial. British Columbia was deemed to not have the power to extinguish Aboriginal rights and title after its admission into Confederation in 1871.[20]
- Aboriginal title is a right in land, it confers the right to exclusive use and occupation of the land for a variety of activities including but not limited to Aboriginal rights. Aboriginal title is a collective right held by the community not by an individual. Decisions with respect to the land are made by the community.[21]

- Aboriginal title is different from other Aboriginal rights in that it arises "...where the connection of a group with a piece of land was of a central significance to their distinctive culture." Aboriginal rights are activities whereas Aboriginal title is a right to the land itself.[22]
- Existing Aboriginal rights and title are protected under section 35(1) of the constitution.[23]
- The test for Aboriginal title is as follows i) the land must have been occupied prior to sovereignty, ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and iii) at sovereignty, that occupation must have been exclusive.[24]
- Aboriginal title land must be used in a way consistent with traditional Aboriginal uses and rights, the only way to use the land in an inconsistent manner would be to surrender those lands to the Crown and convert them into non-title lands.
- There is always a duty to consult, this will vary from situation to situation and may be a simple discussion of important decisions in minor situations or actually require full consent in major situations.
- Oral evidence of history, practice and occupation was allowed to be heard as evidence to establish Aboriginal title.[25]

The importance of the Delgamuukw decision to Aboriginal rights and title is pervasive. Once again the Supreme Court ruled that Aboriginal rights were not extinguished in British Columbia by Confederation and so they continue to exist today. The court also declared that the province of British Columbia did not have the power to extinguish Aboriginal rights after Confederation. These two statements effectively dissolved the validity of the province's historic stance with regard to Aboriginal rights, namely, that the province had extinguished Aboriginal rights either explicitly with Confederation or implicitly by laws and actions since Confederation. Legally, British Columbia has to address unextinguished Aboriginal rights.

Similar to the Sparrow case, the ruling also decreed that existing Aboriginal rights were protected and continue to be so by the Constitution Act of 1982. This means that any proposed government regulation that infringes on the exercise of Aboriginal rights must be constitutionally justified.

The ruling also established a duty to consult with regard to Aboriginal rights and title. This means that before government can proceed with development on Crown land they have a duty to consult with Aboriginal peoples regarding Aboriginal rights and in non-treaty areas, Aboriginal title. The court indicated that the amount of consultation may vary resulting in full consent by Aboriginal people in some instances or perhaps require input on decision making in other situations. This requirement has changed the way the provincial government proceeds with development. Consultation adds a process into resource development decision-making that had not existed before.

As often happens in case law, the initial cases may not clearly delineate the practical process of important principles discussed in the decisions. The element of consultation, given its crucial relationship to development, has since been tested and further enunciated by the courts. The following two cases look at consultation in northeast British Columbia.

Halfway River First Nation v. British Columbia

The third case to be considered here is commonly referred to as Metecheah. Chief Bernie Metecheah is the leader of the Halfway River First Nation located in northeast British Columbia, approximately 100 kilometres northwest of Fort St. John. In 1997 the judgment of the British Columbia Supreme Court effectively quashed a Canadian Forest Product's (Canfor) cutting permit in an area just south of the reserve, formerly approved by the British Columbia Ministry of Forests. The 1999 appeal supported that decision concurring that the Halfway peoples' treaty rights were infringed,

that the infringement was not shown to be justified by the Crown and that proper consultation procedures were not followed.[26]

The importance of this case is that it applies the Sparrow justification test for treaty and Aboriginal rights infringement and secondly that is sets out to discover, in this situation, how consultation regarding natural resource development should or should not proceed.

The band argued that the area where Canfor was proposing to log was a traditional area within Treaty 8 where community members had traditionally practised their treaty and Aboriginal rights such as hunting, fishing, trapping, and gathering. The area is referred to as Tusdzuh and is just south of the reserve, close enough to the band so members could easily and often carry on traditional pursuits. The Ministry of Forests (MOF) and Canfor argued that the permit would still allow use of other areas of the Tusdzuh for traditional pursuits. The judge disputed this, stating this argument ignored the holistic perspective of the Halfway people as well as their preferred means of exercising their Aboriginal rights in an unspoiled area close to their reserve lands. The court cited that "...there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of CP 212 (the permit area) to avoid interfering with Aboriginal rights."[27] So not only was there found to be a *prima facie* or direct infringement of Aboriginal and treaty rights, there was also an infringement on the preferred means to practice those rights.

The judge further found that the Crown failed to justify infringement of the treaty right because it failed in its duty to conduct "...adequate, reasonable consultation..."[28] with the band. Although consultation was pursued by MOF and Canfor in that numerous

letters were written, telephone calls made, meetings held, and feedback received there were situations where "...reasonable opportunities to consult were denied to Halfway."[29] These opportunities included denying Halfway the opportunity to meet with both MOF and Canfor, to review documents at an early timely stage, to review the actual permit application at a timely stage and more critically, for the British Columbia government to inform itself fully regarding Halfway and their practices and thus potential infringement on treaty and Aboriginal rights. All reasonable efforts were not made to consult and thus MOF did not meet its fiduciary obligations.[30]

In the appeal two of the higher court judges concurred with the trial judge saying that any interference with the right to hunt was a *prima facie* infringement on treaty rights; however they diverged from the lower court's decision that the preferred means related to a place (close to the reserve) but rather meant a method or mode of hunting and that the Tusdzuh was not 'unspoiled' as it had been subject to previous oil and gas and mining activity.[31] The appeal judges went on to state that the legislative objectives of pursuing forestry development are sufficiently important to warrant infringement on treaty and Aboriginal rights as "those objectives include conservation, and the economic and cultural needs of all peoples and communities in the Province."[32] The appeal judges stated that the Crown must and actually did prove minimal infringement when in fact infringement was to occur. They also determined that the benefits from forestry to the province generally and in this case specifically, outweighed the detriment to the Aboriginals caused by the infringement to their right to hunt.

On the question of consultation the judges stated:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a

> timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have an opportunity to consider the information provided... and to consult in good faith by whatever means available to them.[33]

The Aboriginal people cannot refuse to consult or impose unreasonable conditions so as to frustrate the consultation process. The appeal judges found that the Crown did not provide information in a timely way to the Halfway that they would need in order to inform themselves of all the issues and secondly to ensure that Halfway had an opportunity to express their interests and concerns.

The importance of this case is that it illustrates the provincial government's role to consult. The provincial government is ultimately responsible to consult with Aboriginal people regarding resource development. This is as a result of their fiduciary duty to Aboriginal peoples.[34] This duty requires that Aboriginal interests be respected and given priority, that consultation is necessary as a minimum with full consent possible, and that fair compensation may also be required.[35] The consultation in this case was deemed to be insufficient because not enough information was gathered by MOF to properly establish the rights of the community and the uses they made of the area. Also, the Halfway band was not given important information in a timely manner regarding the development plans. Thus the provincial government is responsible to ensure consultation is comprehensive, provides sufficient information to the community and gains sufficient information from the community to ascertain whether infringement will occur.

The other aspect of the case that is critical is the fact that the justices deemed forestry and by extension other natural resource development including oil and gas,

'compelling and substantive' to the province and its people such that this type of activity warrants infringement on treaty or Aboriginal rights. This assumes the Sparrow test is applied, infringement is reasonable, does not cause undue hardship, nor denies the Aboriginal people the preferred means of practising that right.

An interesting point one of the higher court justices illuminated in this case, was the question of who in government is qualified and responsible for ascertaining "...the nature and scope of the treaty right at issue (and) whether the proposed use (of the land) is compatible with the treaty right".[36] In this case the District Forest Manager was given this responsibility. The justice notes that a person in this position is no more qualified to make this type of decision than they (the justices) would be qualified to make technical forestry decisions.[37] This is an interesting statement and in future may certainly affect the validity of processes and outcomes associated with resource development and Aboriginal and treaty right decisions.

Kelly Lake Cree v. British Columbia

The last case to be discussed is commonly called Amoco. In 1998, the British Columbia Supreme Court heard evidence from the Saulteau First Nation and the Kelly Lake Cree Nation asking it to review decisions made by the Ministry of Energy and Mines to approve a license for Amoco Canada to drill a well near Mount Montieth in northeastern British Columbia and for the Ministry of Forests to grant a cutting permit to Amoco for the same purpose. The two communities asked that the permits be set aside and that the respective ministries resume consultation regarding the proposed development with the communities as meaningful consultation had not occurred. Mount

Montieth is one of the locally named 'Twin Sisters', two mountains that the Saulteau and Beaver people consider to be sacred.

The court denied the application to set aside the permits on all assertions. They found that adequate and meaningful consultation had occurred over a period from 1992 until the permit was issued in July of 1998. Both the provincial government and Amoco consulted with the First Nation communities. Two other First Nation communities that were participants were satisfied with the consultation and indicated such in written correspondence. The judge asserted that in the case of the Kelly Lake Cree Nation,

> ...there was no duty to consult with the KLCN given the remoteness of the KLCN to the area in question and the claims of the (Saulteau First Nation, West Moberly First Nation) and the Halfway First Nation. However given the lack of response to the... correspondence...even if the Crown had a duty to consult...that obligation was fulfilled when KLCN...failed to express any interest in the proposed Montieth Mountain Project.[38]

Similarly, regarding the Saulteau First Nation claim for lack of meaningful consultation, the judge dismissed the claim saying that "...consultation is a two way process..." and the Saulteau seemed implacable in their opposition to any development in the area.[39] It is the process of consultation and consideration of such issues and not a power of veto that is required.[40] Thus, the courts have said that 'meaningful consultation' is a two way process which does not give the Aboriginal party the power to veto development however they must be able to express their interests and ensure their concerns are seriously considered and where possible integrated into the proposed development.

As was the case with the Metecheah decision, the significance of this case is the scope and content of consultation: what constitutes 'enough meaningful' consultation; who is to be consulted; as well as the role all parties, government, industry, and Aboriginal groups must play during such a process. The provincial government took a

lead role in consultations in this case. The justice decreed that sufficient consultation took place and that Aboriginal parties must also engage in meaningful consultation and cannot stall the process by not participating. Not all Aboriginal groups have the right to participate in decision making on all projects, only those who can prove they have an interest in the area.

As with the Metecheah case, this case also raised the question of who in government is qualified and responsible to decide about the nature and scope of the Aboriginal rights and the efficacy of the process. The justice decided that the director who made the decision was capable even though he had not actively been involved in the consultation process. The director based his decision on the reams of information that had been generated from meetings, studies, discussions, etc. and so had access to sufficient information.

Both the Metecheah and Amoco cases were brought against the provincial government as the primary defendant and the resource development companies as the secondary defendant. Prior to Metecheah, the practice in British Columbia was to have industry consult with Aboriginal communities. Other important cases such as Guerin v. R have established government as having a fiduciary responsibility towards Aboriginal people. As such the courts now recognize government as the entity that must consult on rights and infringement issues. Industry has continued to consult on technical, employment and mitigation issues.

Conclusion – Legal Cases

The Sparrow and Delgamuukw decisions in particular have clearly resulted in a change in how Aboriginal rights are perceived. These decisions now specify that Aboriginal rights and title were not extinguished by Confederation as the British Columbia government had previously asserted. They also specify that the British Columbia government did not have the power to extinguish Aboriginal rights and title after its admission into Confederation. This effectively eliminated a policy that the British Columbia government had adhered to for well over 100 years. The onus is now on government to ascertain if Aboriginal rights exist and to ensure that those rights are not adversely affected by development. If the rights are infringed then government must minimize the infringement and justify why that infringement is necessary. This reaffirms the provincial government's rights to legislate and control activity within the province subject to Aboriginal people's rights.

The outcome is that the natural resource regulatory process within the province had to change, as the government must now ascertain if infringement of Aboriginal rights is occurring and act accordingly. Commercial fishing operations are affected by the Aboriginal right to have priority to fish for food. Consultation by government must be thorough to establish what rights and potential infringement exist.

Once the courts handed down these decisions, the British Columbia government chose to change some of its current Aboriginal policies. Several of these new policies will be discussed in the next section along with the NDP platform concerning Aboriginal peoples.

NDP Government

The British Columbia NDP government has reacted relatively swiftly to the Sparrow, Delgamuukw, and Metecheah legal decisions. They have enacted legislation regarding natural resource development on Crown land. They have made critical changes to the strategy around the Delgamuukw court case itself and they have implemented new legislation and policies in the oil and gas sector that bring the First Nation groups in northeast British Columbia into the policy community. As important as these court decisions are, they do not exhaust the causal factors explaining the changes in government policy. To court cases, we must add the ideological changes in government ushered in with the election of the NDP in 1991. This chapter now presents an overview of the NDP policy both prior to and after their 1991 election win, as it pertains to First Nation issues.

Pre-election Policies of the Party

At the 1990 New Democratic Convention held in Vancouver in March the following Aboriginal Land Claims Policy was accepted:

> The New Democratic Party believes that resolution of the Indian Land Question in British Columbia is a critical political, economic and moral issue that can no longer be ignored. A just and honourable settlement of the Land Question is vital if we are to achieve sustainable economic development for the province as a whole. Toward this end, the New Democratic Party is committed to:
>
> 1. recognition of Aboriginal title and Aboriginal peoples' inherent right to self-government;
> 2. provincial participation in modern-day treaty negotiations to achieve a just and honourable settlement of the land question;
> 3. third-party interest in negotiated treaties on the land question;
> 4. sustainable economic development initiatives in both Aboriginal and non-Aboriginal communities resulting from settlement of the land question;

5. Renewal of constitutional processes aimed at entrenching Aboriginal peoples' inherent right to self-government in the Constitution of Canada.[41]

This was new for the NDP as their 1972-5 government, of which Frank Calder was a minister, held views similar to those of the Socred Government held up until 1990. Both governments refused to participate in treaty negotiations. They tried to assert that British Sovereignty had implicitly extinguished Aboriginal title.[42] Frank Calder was a member of the Nisga'a nation and involved in the important Calder case that was the first time the Supreme Court justices "recognized Aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands."[43] The Supreme Court justices were divided however on whether that title had been extinguished.[44]

The Socred government, under Premier Vander Zalm, also changed their policy dramatically from their historic stance that Aboriginal title had been extinguished prior to British Columbia joining confederation. They formally joined the ongoing Nisga'a negotiations; created a Premier's Council on Native Affairs that presented a report on Aboriginal issues; created a provincial Land Claims Registry office; and created a provincial Land Claims Negotiation Office to further assist the federal government.[45] However, in their 1991 election platform the Socreds, under Premier Rita Johnston, drew the line at mirroring the NDP's platform. The Socreds stated that they would not recognize Aboriginal title as a precondition for treaty negotiations or the inherent right to self-government. They also disagreed with the NDP promise to negotiate treaties that provide "...innovative resource and habitat management regimes that benefit all British Columbians." The Socreds pointed to the Ontario NDP who had a similar platform and whose policies resulted in unfair access to lands and resources by Aboriginal people.[46] The major difference between the two parties' views on Aboriginal policy was in regard

to natural resource management and control. Both parties agreed to try and resolve outstanding treaty claims but while the Socreds would not include Aboriginal control over natural resource development the NDP advocated innovative resource management regimes which included Aboriginal participation.

Both of these provincial parties recognized that changes to policy and current legislation had to occur. This was largely as a result of civil unrest by Aboriginal groups across the country including the stand-off at Oka and numerous road blocks and actions by British Columbia Aboriginal groups.[47] Industrial development was at risk because of the uncertainty created by various interpretations of the legal decisions, Aboriginal demands, and resultant civil unrest. Both parties reacted with very different platforms to try and deal with the Aboriginals' unresolved and largely ignored issues. With the 1991 election win, the NDP had the opportunity to put their platform into action. Given the unresolved Aboriginal issues and tension surrounding some of the recent events there was an expectancy with the incoming NDP government and their Aboriginal platform. Claudia Notzke sums up the anticipation:

> ...British Columbia's First Nations find themselves on the threshold of a new relationship with mainstream society. The provincial government's 1990 decision to acknowledge the validity of comprehensive aboriginal claims and the rise to power of the New Democrats the following year set the stage for a redefinition of the relationship not only between the province's Indian people and government, but also between native people and industry.[48]

Post-Election Policies of the Party

In the speeches from the throne from 1992 to 1996, the governing NDP party platform promised to address Aboriginal concerns. The following are some excerpts from those speeches.

1992 We recognize Aboriginal title and the inherent right of Aboriginal people to self-government. An agreement to establish a new Treaty Commission has been negotiated, and we are pleased it has received the approval of this government and the First Nations Summit Chiefs.
This government is committed to negotiation to settle issues with Aboriginal people. We are working to support initiatives to encourage self-sufficiency in Aboriginal communities while developing joint stewardship arrangements with First Nations to provide for cooperation on the management of resources prior to treaty negotiations. The third party consultation process is being strengthened to ensure all interests are heard and considered. [49]
1993 British Columbia will take another historic step this Session. This government will introduce the Treaty Commission Act to enable the negotiation of modern treaties with Aboriginal peoples to proceed. Fair and just settlements with First Nations will not only provide greater economic certainty but also, more importantly, mean new economic opportunities for Aboriginal and non-Aboriginal peoples.
This government has moved to formalize our responsibility to represent third party interests at the negotiating table and to establish a cost-sharing arrangement with the federal government which is fair to B.C. taxpayers. [50]
1994 Land-use disputes must be settled in a fair and timely manner to protect jobs, our environment and treaty negotiations with First Nations...In addition, this government will build on the significant policy initiatives and positive changes introduced in the legislative sessions of the past two years (to)...forge a new relationship with Aboriginal peoples. [51]
1996 ...the past year has also seen important advances - and none more fundamental to the destiny of this province than the initial steps toward British Columbia's first modern-day Aboriginal treaty. And in the coming year, my government will work toward concluding a formal agreement with the Nisga'a people... [52]

Promises to work on other aspects of Aboriginal life were also included such as employment equity, social and family services, cultural and heritage protection, and protection of the salmon. Some of these promises resulted in enacted legislation and policy. The following section will explore the policies and legislation specifically affecting the oil and gas industry.

One of the early actions taken by the NDP government is surprising and perhaps gives a clue as to their future policy direction. The Delgamuukw case had started in 1984 with judgment by the lower court judge handed down in 1991. The judge had basically

denied the Gitksan and Wet'suwet'en their claims of ownership, self-government and compensation. This was seen as a victory for British Columbia. The Socred government promised to continue negotiating despite the trial's outcome. When the NDP came to power they switched counsel for the upcoming appeal case. That is, they fired the team that had won the case in the lower courts and hired a new team of lawyers who had worked with Aboriginal people in land use disputes. These lawyers were seen as sympathetic to Aboriginal claims. Melvin Smith asserts that the NDP government was looking for judicial support for their Aboriginal platform. In response, the court took an unusual step and had the previous team of lawyers, who had successfully defended the lower court case, appointed as "friends of the court".[53] Such an action by a provincial government is very unusual, especially in a province where treaties have yet to be settled and where settlement will likely carry a heavy cost. This action is suggestive of a governing regime that wants to speed up implementation of their Aboriginal policy and perhaps is looking for support for a radically different policy. The NDP's policy response was indeed a radical change.

Crown Lands Policy

In response to the legal cases and in line with their platform, the NDP government implemented a new Crown lands policy in 1995 titled 'Crown Land Activities and Aboriginal Rights and Policy Framework'. This policy dealt with all types of resource development activity on Crown lands, including oil and gas development, and provided a guide for the bureaucracy and industry as to how to deal with possible Aboriginal interests. The policy statement or basic precept of this document is as follows: "The

provincial government will endeavour to make its best efforts to avoid any infringement of known Aboriginal rights during the conduct of its business."[54] The province proposed to do this by following these steps: to establish if Aboriginal rights exist through consultation or other available information, to determine if the action would infringe on that right, to resolve matters of conflicting interest by negotiation, to attempt to justify the infringement if it cannot be avoided.[55] This policy was based specifically on the Sparrow and Delgamuukw appeal cases. This was a sharp policy adjustment for the province of British Columbia.

This Crown land policy was the first step toward bringing Aboriginals into the policy community. Through consultation the Aboriginal groups were given information directly about activity that was planned on their traditional lands. Prior to this policy Aboriginal people seldom knew if development was planned in their areas. They usually found out about development by actually witnessing it or by being hired onto a labour crew. This new process allowed them to begin negotiating provisions around access to the land, employment, community development, heritage protection, and in some cases compensation. Industry realized that they must now deal directly with Aboriginal communities and respond to their queries and demands.

Although this was a Crown lands policy aimed at bureaucrats and permit providers, industry in the oil and gas sector had to take on the role of consultation. This was an unfamiliar role to them in two ways. First, most companies had seldom dealt with Aboriginal communities, although there were some companies that had started consulting on their own initiative and involving the communities in projects and employment. Second, companies were used to notification as opposed to consultation. The courts in

Comparison of NDP and Socred Policies Relative to Important Court Decisions

Important Court Decisions	British Columbia Party Policy	
Dates	**NDP**	**Socreds**
1989		1. Joined Nisga'a negotiations 2. Created Premier's council on Native Affairs 3. Created Land Claims Registry 4. Created Land Claims negotiation office
1990 Sparrow Decision	1. Recognition of Aboriginal title & Aboriginal people's inherent right to self-government 2. Provincial participation in modern day treaty negotiations 3. Third-party interest in negotiated treaties 4. Sustainable economic development in both Aboriginal and non-Aboriginal communities resulting from settlement of the land question. 5. Renewal of constitutional processes to entrench Aboriginal peoples' inherent right to self-governement in the Canadian Constitution.	
1991 Delgamuukw British Columbia Court Decision		1. Refused to recognize Aboriginal title as a precondition to treaty negotiations
1994 Delgamuukw BC Supreme Court Decision		
1995	Crown Lands Policy enacted Oil and Gas Handbook Policy enacted	
1997 Halfway lower court decision		
1997 Delgamuukw Supreme Court decision		
1998 Amoco decision	Oil and Gas Commission created	
1999 Halfway BC Supreme Court Decision		

the Sparrow and Delgamuukw Appeal cases did not define consultation. So it has been and still continues to be a vague and difficult concept to understand and execute.

Conclusion

The policy of the NDP prior to their winning the 1991 election clearly indicated that they intended to try to address Aboriginal issues in a meaningful way. The policy and legislation enacted by the NDP subsequent to 1991 clearly shows a trend toward implementation of their policies. The legislation around natural resource development in particular also clearly responds to important legal decisions, including Sparrow and Delgamuukw.

These policies and legislation were a radical change from those of the previous government of British Columbia. They changed the way natural resource development and decision-making occurred in the province. Other provincial governments did not respond to the legal decisions in the same manner. The legislation and policies resulted because of the NDP policy and because of the legal decisions.

The next chapter will look at two final legislative changes that brought First Nation communities in northeast British Columbia into the policy community, the Oil and Gas Handbook, a compilation of oil and gas regulations, legislation and policy and the Oil and Gas Commission, a regulatory agency overseeing the development of oil and gas in the province.

Endnotes

1. Peter Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press 1994), 212.
2. British Columbia Ministry of Aboriginal Affairs. 'Landmark Court Cases,' (n.d.), 2.
3. Kulchyski, 214.
4. BC, Aboriginal Affairs, 'Landmark Cases,' 2.
5. Kulchyski, 212.
6. Ibid., 216.
7. Ibid.
8. Ibid.
9. BC, Aboriginal Affairs, 'Landmark Cases,' 2.
10. British Columbia Ministry of Environment Lands and Parks. *"Guidelines for Pre-Treaty Consultations with First Nations,"* May 1994, 43.
11. Kulchyski, 237.
12. BC, Aboriginal Affairs, 'Landmark Cases,' 2.
13. David W. Elliot. *Law and Aboriginal Peoples in Canada.* (North York, Ont: Captus Press Inc. 2000), 69.
14. Frank Cassidy, ed. *Aboriginal Title in British Columbia: Delgamuukw v. The Queen.* (Lantzville, B.C: Oolichan Books and Institute for Research and Public Policy 1992), 14.
15. Kulchyski, 217.
16. BC, Aboriginal Affairs, 'Landmark Cases,' 2.
17. Ibid.
18. Herb George, telephone interview 1995.
19. Province of British Columbia, *"Crown Land Activities and Aboriginal Rights Policy Framework"* (January 25, 1995), 1-2.
20. John J. Borrows and Leonard I. Rotman. *Aboriginal Legal Issues: Cases, Materials & Commentary.* (Toronto: Butterworths Canada Ltd. 1998), 83.
21. Ibid., 74-75.
22. Ibid., 79.
23. Ibid.
24. Ibid., 80.
25. P.E. James Prentice, 'Consult, Consult, Consult: Doing Business with First Nations After Delgamuukw,' presentation to CAPL Conference, Calgary, Alberta, 1998.
26. *Halfway River First Nations v. B.C.* BC Appeal 1999, 5.
27. Ibid., 13.
28. Ibid.
29. Ibid., 14.
30. Ibid.
31. Ibid., 27.
32. Ibid., 28.
33. Ibid., 29-30.
34. See Guerin v. R 1984.
35. Lawson Lundell Lawson & McIntosh 'Aboriginal Law in British Columbia: Current Issues and Implications for Business' presentation February 9, 1998.

36. Halfway, 44.
37. Ibid., 44-45.
38. *Kelly Lake Cree Nation vs Canada*, BC Appeal 1998, 81.
39. Ibid., 101.
40. Ibid., 120.
41. Frank Cassidy ed. *Reaching Just Settlements: Land Claims in British Columbia* (Lantzville, B.C: Oolichan Books and Institute for Research and Public Policy 1991), 105.
42. Paul Tennant, 'Aboriginal Peoples and Aboriginal Title in British Columbia Politics' in *Politics, Policy and Government in British Columbia,* ed. R.K. Carty (Vancouver: UBC Press 1996), 52.
43. Borrows, 58.
44. Tennant 'Aboriginal Peoples and Aboriginal Title,' 54.
45. Cassidy, 1991, 89-103.
46. *NDP vs Social Credit: Policies and Priorities*, unpublished 1991, 14-15.
47. Tennant 'Aboriginal Peoples and Aboriginal Title,' 53, 56.
48. Claudia Notzke. *Aboriginal Peoples and Natural Resources in Canada* (North York, Ontario: Captus Press Inc. 1994), 288.
49. Province of British Columbia Legislative Assembly. 'Opening Speech of The Honourable David C. Lam Lieutenant Governor On Opening the First Session of the Thirty-fifth Parliament of the Province of British Columbia' [er://bbs.qp.gov.bc.ca:70//0QP_INFO/SYS%3A/LEGIS/1992/MISC/92THRONE.TXT] March 17, 1992: 5, 6.
50. Province of British Columbia Legislative Assembly. 'Speech from the Throne by The Honourable David C. Lam Lieutenant Governor at the Opening of the Second Session, Thirty-fifth Parliament of the Province of British Columbia' [er://bbs.qp.gov.bc.ca:70/0QP_INFO/SYS%3A/LEGIS/1993/MISC/93THRONE.TXT] 1993: 3.
51. Province of British Columbia Legislative Assembly. 'Speech from the Throne by The Honourable David C. Lam Lieutenant Governor at the Opening of the Third Session, Thirty-fifth Parliament of the Province of British Columbia' [er://bbs.qp.gov.bc.ca:70/0QP_INFO/SYS%3A/LEGIS/1994/MISC/94THRONE.TXT] March 14, 1994: 1,2.
52. Province of British Columbia Legislative Assembly. 'Speech from the Throne by The Honourable Garde B. Gardom Lieutenant Governor at the Opening of the Fifth Session, Thirty-fifth Parliament of the Province of British Columbia' [http://www.legis.gov.bc.ca/96throne.htm] April 25, 1996: 1.
53. Melvin H Smith, *Our Home Or Native Land?* (Toronto: Stoddard Publishing1995), 133.
54. Province of British Columbia, "*Crown Land Activities and Aboriginal Rights Policy Framework*" January 25, 1995: 5.
55. Ibid., 5-7.

Chapter 4 Actual Changes in Policy

The NDP government in British Columbia has enacted a Crown lands policy affecting natural resource development that now requires provincial government ministries, agencies and industry to make best efforts to avoid infringement of Aboriginal rights. This policy resulted from two critical variables: important court cases and NDP government policy discussed in the last chapter. The Crown lands policy plus policies specifically relevant to the oil and gas sector have resulted in dramatic changes to the policy community in the oil and gas industry. This chapter looks at two policies specifically dealing with this sector and the effect these policy changes have had on the policy community and the actors that are now a part of that policy community.

Oil and Gas Handbook

An important policy that the NDP government enacted in November of 1995 was specifically aimed at the oil and gas industry. This policy was released shortly after the Crown lands policy was introduced. It centralized pertinent information about the petroleum industry within one document titled the British Columbia Oil and Gas Handbook (Handbook). The Handbook was designed as a tool for industry to use when planning and conducting activity in British Columbia.[1] Section 3.5 outlined First Nation considerations including avoiding infringement of Aboriginal rights and guidelines on how to conduct consultation with First Nations.[2]

Within the introductory section entitled Regulatory Framework, the Handbook clearly states that the Delgamuukw appeal decision "changed the nature of the legal relationship between the province and First Nations"[3] It went further to state that the

government of British Columbia was responsible to determine if Aboriginal rights exist and if those rights might be unjustifiably infringed. The section defines what Aboriginal rights are and states that they may exist in traditional territories adjacent to reserves as well as on reserves. The Handbook required industry to consult with First Nations to gather information the Ministry may need to make a decision with regard to infringement of treaty and Aboriginal rights.[4] At this time industry including CAPP, the provincial government and a number of First Nation communities in northeast British Columbia were in negotiations to draft consultation guidelines that were mutually acceptable to all parties.[5] Those consultation guidelines were never completed.

The Oil and Gas Handbook was used by the provincial government and by industry for several years but the consultation process with First Nation communities was not clear and was not an easy process for industry to implement. Each community established a different process for consultation that resulted in considerable extra time and expense for industry to complete the application process. The Commission was created to try and address some of these problems and to streamline the consultation and application process.

Oil and Gas Commission

The creation of the Oil and Gas Commission is the final legislative change to be discussed. It is important because its creation was an acknowledgement by the provincial government in Victoria of the importance of the industry in the northeast to the provincial economy. More importantly for the purposes set out herein, during the creation of the Commission, the province recognized the potential affect that oil and gas development

can have on Aboriginal and treaty rights. The provincial government attempted to deal with that potential through Memorandums of Understanding (MOUs) signed with the individual First Nation communities, thus formally bringing the First Nations into the policy community.

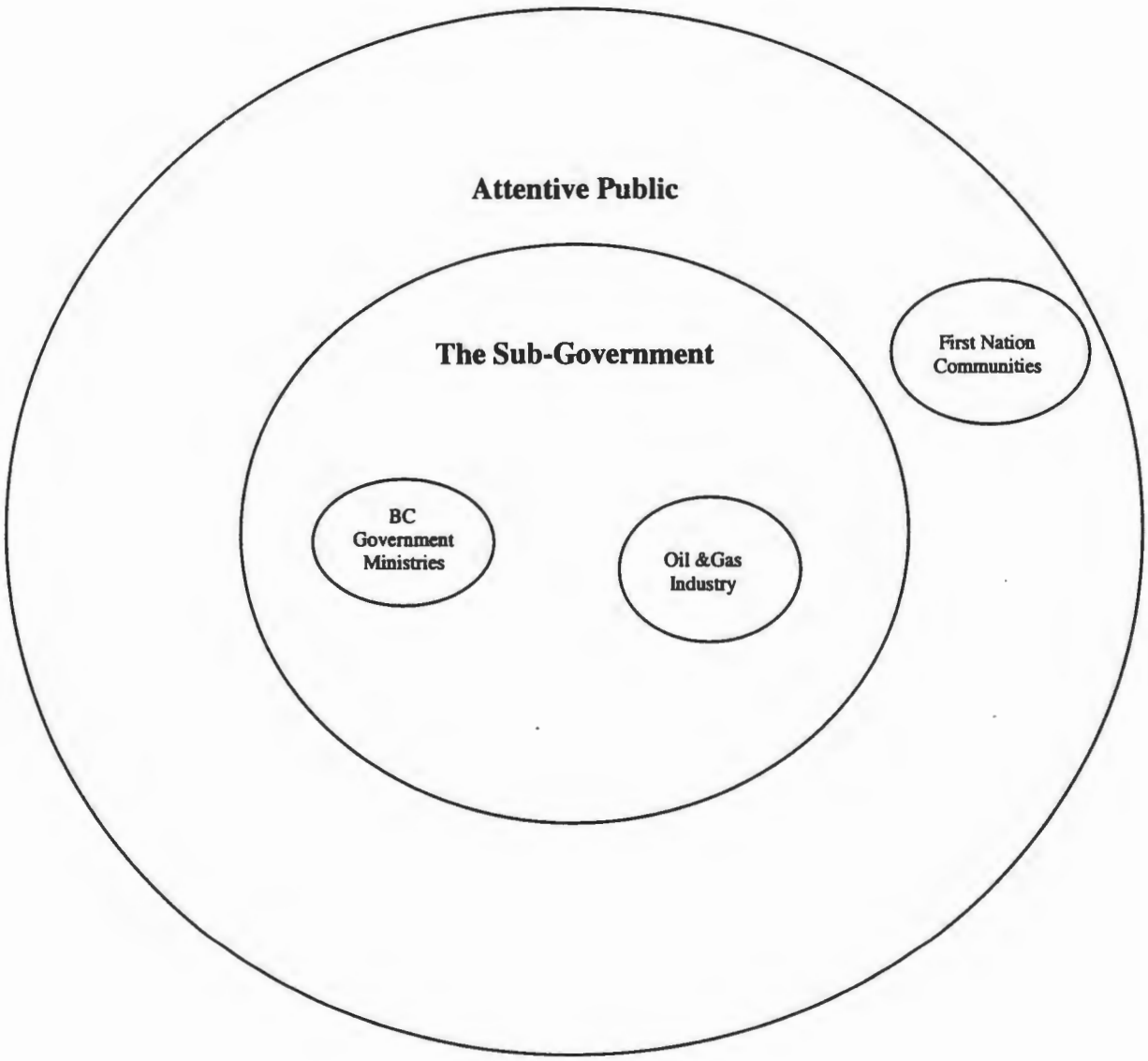
The Commission was formally established and opened for business in October of 1998 after a very brief incubation and development stage of about 10 months.[6] The policy objectives behind the creation of the Commission were to increase production and related industrial activity by reducing oil and gas levies and simplifying the approval process for the oil and gas industry. These simplification and consolidation initiatives were not to be accomplished at the expense of environmental standards or of the provincial government's responsibility toward Aboriginal people.[7] First Nation representatives were consulted during negotiations leading up to the establishment of the Commission. It was during the creation and implementation of this legislation that northeast First Nation communities finally achieved their current status within the policy community in oil and gas development.

The First Nation communities and industry were both consulted regarding the establishment of the Commission as the provincial government held bilateral negotiations with both parties. Industry ultimately agreed to fund the operation of the Commission through user fees. Those fees are considerably higher than the previous fees industry was required to remit under the old provincial application process. A portion of the user fees was to go toward assisting the First Nation communities during the formal consultation process that was established. This included providing capacity funding for the First Nations to hire staff and to assist with the newly developed consultation process. Under

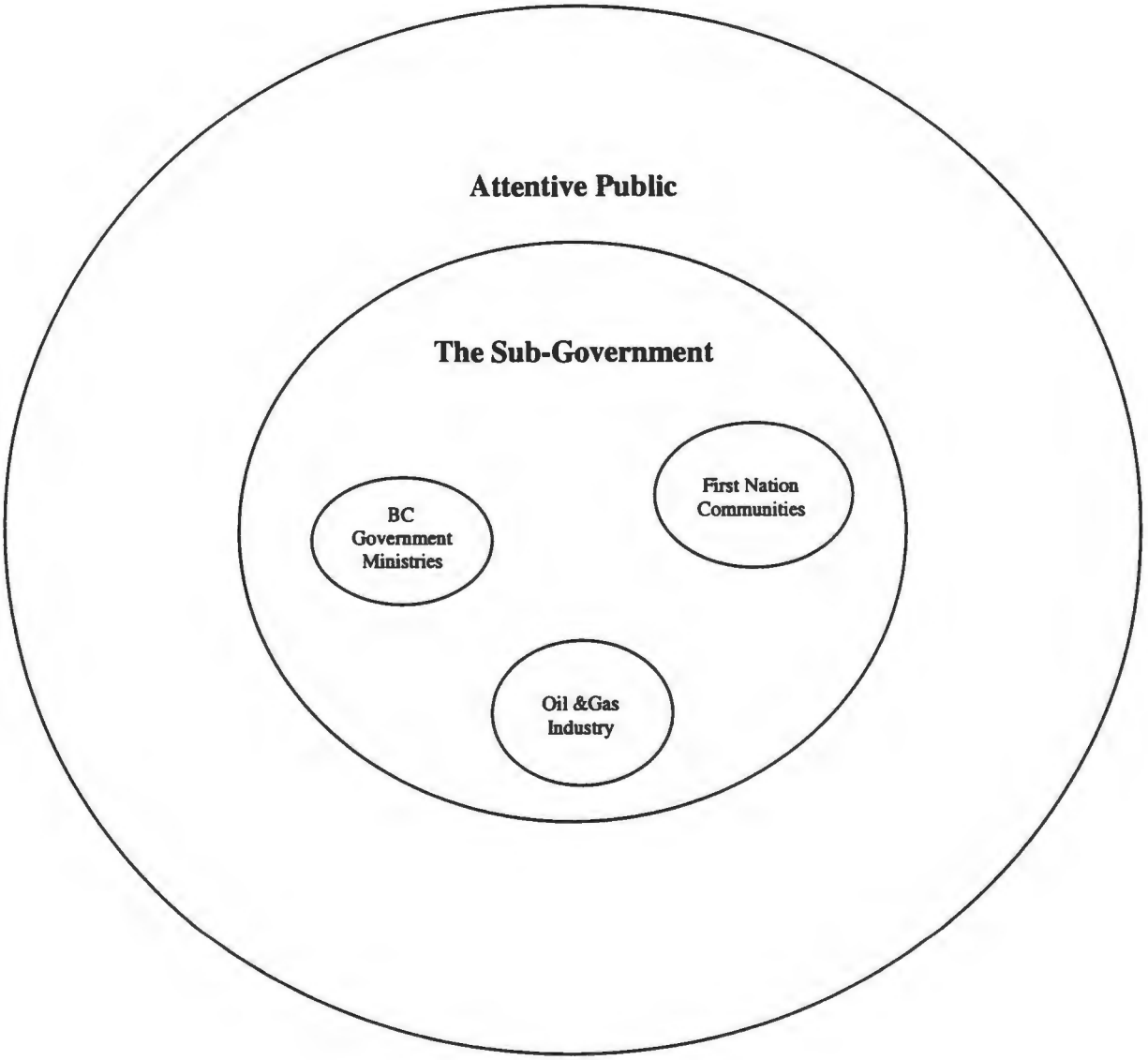
this process, the provincial government agreed to undertake consultation regarding possible infringement of treaty and Aboriginal rights. This was a change; up to this point, industry had been required to consult with the First Nation communities. The former consultation process was a haphazard process fraught with inconsistencies and uncertainties. The MOUs were designed to make the process consistent in all the First Nation communities and to set out time periods and parameters under which all parties would operate. These were welcome changes from industries' standpoint. It was willing to pay more to see this happen and accord First Nations more influence in policy. First Nations in northeast British Columbia now have a direct voice in oil and gas development, more so than any other stakeholder group in the area or the province.

The new Commission consultation process has industry apply to the Commission and the Commission distribute the entire application to the Treaty 8 First Nation communities. The communities then have set time periods in which to reply back to the Commission with any concerns, information, or mitigation strategies. Industry is still expected to discuss specific project details with the communities relating to timing of the development, potential employment, contracting opportunities, and so on. As a result there are two levels of consultation. One level is consultation between the province and the First Nation regarding possible infringement of treaty and Aboriginal rights, the other is between industry and the First Nation regarding the economic and social effects of the project on the area and on the communities.

The Policy Community Before First Nation Groups Were Involved



The Policy Community After
First Nation Groups Were Involved



How These Policies Have Changed the Policy Community

These new policies have changed the policy community by introducing a new actor into the sub-government. The provincial government and industry were the main actors within the sub-government and now the First Nation communities in the northeast are also members of the sub-government. Prior to 1990 the British Columbia government would not acknowledge Aboriginal rights or Aboriginal title and was reticent to deal with long-standing issues that had been articulated by Aboriginal people in the province since before Confederation. The British Columbia government had argued that Aboriginal rights and title had been extinguished. Various events served to change the government's stance on these issues. They include a combination of early court cases which the provincial government did not react to such as the Calder case, the Constitution Act of 1992 and then ultimately the Sparrow and Delgamuukw cases combined with the election of an NDP government that promised to put Aboriginal issues on the agenda and work to resolve those issues. The result has been that the First Nation communities in northeast British Columbia have become members of the oil and gas policy community and the subsequent policies passed by the NDP government have had an effect on all the players within the policy community, especially industry and First Nations.

The First Nation communities in the northeast have been affected by the changes as they have become signators to an MOU that has given them a documented consultation policy, funding to build capacity within the community and to properly consult on applications and a mechanism to give input to the government on the operation of the Commission and oil and gas policy generally. These are some of the goals First Nations in the region have been working toward. During the early 1990s when community

members worked with the Northeast Industry group discussed in Chapter Two, they looked for some of these results. At that time the provincial government was unwilling to consider such policies. The MOU is a bi-lateral agreement between the individual First Nations and the provincial government dealing with oil and gas issues. Signing an agreement of this type is a goal the communities have worked toward for a very long time.

The consultation policy in itself is probably the biggest coup for the First Nation communities. They now receive applications for all proposed activity within a prescribed activity area and are given time and resources to review the applications. In the fiscal year 1999/2000 each First Nation community received $612,827 for capacity funding. [8] This is a critical aspect of the consultation and MOU process as prior to 1998 any funding they received was from the companies that were willing to pay fees to get the community to review the applications. [9] Prior to 1995 there was no specific funding available and little capacity within the communities to look at issues as broad as land use or to comment on sector-type activity like oil and gas proposals. Now under the MOUs they receive funding and are included in the consultation process on all oil and gas applications. A further example is that most communities now have staff to review the oil and gas applications. Some have hired personnel from outside the community while others have hired community members. [10]

The First Nation communities are also consulted by the government on Commission policy and asked to review overall policy initiatives for oil and gas development. They have become an important core stakeholder for oil and gas policy. This is a coveted position toward which they have long worked.

Within the Commission there exists an entire department dedicated to Aboriginal issues. The Aboriginal Relations and Land Use branch of the Commission is staffed with some local Aboriginal people and others who work with the communities to ensure they receive the application information in a timely manner and have an opportunity within the MOU timeframe to give feedback to the Commission on community uses and concerns about development of the land. The Aboriginal department also works with the communities to resolve other issues or concerns not specifically related to applications. For instance, the department assists in organizing an annual gathering where industry, government and Aboriginal people can come together and understand each other better and celebrate Aboriginal culture. The branch has three Senior Aboriginal Program Specialists and four Aboriginal Liaison Communication Officers dedicated to working with the communities to resolve land use issues. The branch also has administrative staff and the Director who deal with Aboriginal issues. [11]

The provincial government's role has also changed as they have now accepted responsibility to consult with First Nation communities on infringement of treaty and Aboriginal rights. They no longer ask industry to consult; they consult directly with the communities. They have signed an MOU with the First Nation bands and have negotiated with industry to provide funding for the bands for capacity and economic development. The have set up the Commission to address Aboriginal and other issues and have staffed an entire department to deal with Aboriginal issues. The government has firmly accepted some of the Sparrow and Delgamuukw findings and incorporated them into broad policies such as the Crown lands policy as well as sector specific policies such as Commission policies. Both the legal findings and policies have changed the way

the provincial government does business and changed the way they interact with the First Nation people in the northeast area of the province. The initial MOUs were signed in 1998. In early 2001 the provincial government renegotiated the MOUs with four of the communities.[12] Some fundamental changes to the original MOU has been made as suggested by both parties. For example, the financial contribution will be calculated using a different formula.

Industry has been affected by the changes in a number of ways. They are no longer required to consult with the First Nation communities regarding infringement of treaty and Aboriginal rights. The government now consults directly with the First Nation. Industry is still expected to work with communities on mitigation strategies, on timing of development and on economic development opportunities. Industry is now required to pay substantially more for application fees as a certain amount of the fees goes to the communities to assist them with consulting on the applications. For example industry now pays $8,400 to file an application to drill a well. They paid approximately $400 in 1997 for a well application. As of April 1, 2001 under the renegotiated MOUs, $4,931 per well goes directly to the communities for capacity funding.[13]

Industry wanted the First Nation communities included in the Commission regulatory process so that it provided a structured consultation process including setting a time limit for application review, setting consistent fees and requiring consistent information. They were willing to pay more to ensure this occurred. First Nation issues are now acknowledged and dealt with by both the provincial government and the industry companies, unlike the early part of the 1990s when some companies were willing to try to work with the communities on issues and the province was not.

The policy community now provides all three actors an arena in which to negotiate and try to resolve issues. Prior to First Nation's entry into the policy community the only way they could have significant input was by using the judicial system. Although that system eventually granted them access to the policy community it provides win-lose results. It is time consuming, costly and the results are not always consistent or what any of the actors really want. For instance the Delgamuukw case began in 1984 and the Supreme Court decision was handed down in December of 1997 at a cost of millions of dollars by all parties involved. The Gitksan and Wet'suwet'en people were ultimately looking for recognition of ownership of their traditional lands, that question was sent back for retrial by the Supreme Court justices and has never been resolved. As Herb George, negotiator for the Gitksan indicated, the use of the courts was simply a means to get the provincial government to negotiate with the First Nation groups, it was not seen as providing the answer the First Nation people were seeking. Indeed it has not provided the answer, for the parties are still negotiating treaties which includes multiple aspects such as resource management and sharing the material benefits of natural resource development. The justices in the 1993 Delgamuukw judgment strongly encouraged the parties to negotiate rather than litigate, recognizing that the courts are not the optimum place to define the scope and content of long-term agreements.

Conclusion

The new policies of the British Columbia NDP have resulted in Treaty 8 First Nation people within the northeast area of the province achieving considerable influence

within the oil and gas policy community. The NDP government responded to significant legal decisions by developing policies that incorporate some of the important outcomes of those decisions. They then totally revamped the regime for approving oil and gas applications and placed the First Nation communities firmly within that regulatory structure. Prior to the NDP coming to power the First Nation communities had little influence on oil and gas policy. Within the MOUs they are consulted at a policy and a regulatory level and have considerable influence over the approvals and policy in that sector.

Endnotes

1. British Columbia Ministry of Energy Mines and Petroleum Resources. *British Columbia Oil and Gas Handbook*, (November 1995): 1: section 1.1.
2. Ibid., 1: section 3.5.
3. Ibid., 3: section 2.1.5.
4. Ibid., 1: Attachment 3-4 Consultation Steps.
5. Ibid., 1: section 3.5.2.1.
6. Murray Rankin, Sandy Carpenter, Patricia Burchmore and Christopher Jones, 'Regulatory Reform in the British Columbia Petroleum Industry: the Oil and Gas Commission' *Alberta Law Review* Vol 38, No 1 (June 2000): 144.
7. Ibid., 145-146.
8. Oil and Gas Commission 'Financial Information Act Report for the Year Ended March 31, 2000', 20.
   Note: Under the 1998 MOU between the Province of British Columbia and Member First Nations of Treaty 8: Blueberry River, Doig River, Prophet River, and Saulteau First Nations www.ogc.gov.bc.ca/documents/firstnations/mou/t8ta-a3htm $235,675 was specifically earmarked for capacity to hire staff and set up an office. The remaining came from contributions from development activities. For instance for every well drilled the First Nations received $3,000 and 1,000 per year thereafter until a certificate of restoration is received.
9. Some companies had agreements with First Nation communities that specified payment of fees per application for review or general funding to review applications. For instance the Blueberry First Nation had agreements with several companies including Suncor Energy.
10. As of January 2001, all the First Nation communities except one have at least one staff person to review applications.
11. Oil and Gas Commission, 'Aboriginal and Land Use Branch Directory', www.ogc.bc.ca/phonelist.asp#abrel.
12. Presentation to CAPP by MEM officials April 2001. Note: Doig River, Saulteau and Fort Nelson First Nations have opted out of the MOUs last year, they have not entered MOU negotiations with the government since then.
13. Ibid.

CONCLUSION

Prior to 1990, no British Columbia government had recognized Aboriginal title or Aboriginal rights. The 1991 NDP government was the first government to change that aspect of Aboriginal history within the province and in essence, to begin the process to re-enfranchise a people that had been disenfranchised for a very long period of time. That recognition did not automatically result in significant changes to the day-to-day life of Aboriginal people. Instead it was the beginning of a series of profound policy changes that began by granting Aboriginal people more influence in policy and regulatory decision-making in natural resource development. These policies are based on important court decisions that have defined Aboriginal rights and defined how those rights must be considered by governments.

What has changed for First Nation people in northeast British Columbia is their role in policy and regulation of the oil and gas industry. Prior to 1995, when the Crown lands policy was introduced, the First Nation communities in the area did not have any input into the development of oil and gas resources on lands they traditionally used for hunting, fishing, trapping and gathering. They did not have any influence in how such activity would affect their treaty and Aboriginal rights. The provincial government changed that with the introduction of the Crown lands policy by instituting a consultation requirement that would apply the Sparrow test for rights and title infringement. Now for the first time Aboriginal people across the province have to be consulted when lands they used for traditional pursuits might be affected by development.

The implementation of the Oil and Gas Commission in 1998 further changed the relationship between First Nations in the northeast, the provincial government and the oil and gas industry. The First Nations communities signed MOUs with the provincial government that provided funding for consultation, a process for their input into development decisions and input into policy around oil and gas development. These are dramatic changes for First Nation communities that have repeatedly tried to gain influence over development decisions but up until 1995 had been unsuccessful.

Chapter One dealt with the Clayoquot Sound case and the need for further examples of cases where Aboriginal peoples have meaningful input into resource management and development in treaty areas as well as in non-treaty areas. The case of First Nation communities in the oil and gas sector in northeast British Columbia is instructive when compared to the Clayoquot Sound case. First, the First Nations in the northeast did not achieve co-management as did the Clayoquot Sound Aboriginals, however they achieved a place in the policy community and are considerably more influential than they were prior to implementation of the Crown lands policy in 1995 and subsequent Commission policy. The First Nation communities in the northeast now have bi-lateral agreements with the provincial government, are consistently consulted on oil and gas development applications and have recourse in the oil and gas policy and regulatory arenas in the event of disagreements or disputes.

Second, in the Clayoquot Sound case the authors discussed the idea of policy intersection occurring between the forestry policy community and the Aboriginal policy community. In the oil and gas sector case the policy community intersection occurred

when the Crown lands policy was implemented. Thus the policy intersection actually occurred across all natural resource policy sectors including oil and gas and forestry.

Third, the Clayoquot Sound case involved a non-treaty First Nation entering the policy community. As was discussed in Chapter One this is not uncommon, for the non-treaty First Nations have unextinguished Aboriginal title and so in a sense they have additional leverage with which to negotiate co-management type agreements that provide them more control over resource development. Often they are in negotiations with a provincial/territorial government and the federal government and so have a forum to address land use and management issues. In the oil and gas case, the First Nation communities are members of Treaty 8 and as the literature review illustrated there are few cases where treaty First Nations are provided the opportunity to engage in resource management agreements. Governments, whether they be federal or provincial are reluctant to engage in negotiations of this type with First Nation groups that have already surrendered Aboriginal title under the terms of a treaty.

Finally, the Clayoquot Sound case resulted in co-management where the First Nation group gained additional control over development of the resource including a joint venture with the forestry company. This moved them from a non-productive actor that does not receive material benefits to a productive actor that does benefit financially from development. The First Nation communities in the northeast remain non-productive actors that do not benefit directly from oil and gas development off reserve in the northeast, except from whatever employment they can gain.[1]

The oil and gas case provides a unique situation where both industry and government have agreed to accept another actor into the sub-government sphere of the

policy community. Industry has also agreed to provide funding to that actor to allow them to develop capacity and organizational structure that gives them additional leverage in policy discussions.

Lessons Learned

The current regime governing policy and regulation of oil and gas development in British Columbia is far from being the ideal regime for the affected actors for several reasons. First, the Commission has within its mandate to increase development of oil and gas resources in the area in the future. This goal will certainly affect First Nations' treaty rights and their ability to practice traditional pursuits on their traditional lands. Several justices in the Metecheah case agreed that any infringement of Aboriginal and treaty rights was a *prima facie* infringement. If the number of these infringements continues to multiply and severely adversely affect the ability of the First Nations to continue their traditional pursuits will such development continue to be approved under the Sparrow test? Or will limitations to development have to be applied to ensure that First Nation people can practice their traditional pursuits in the future? That is will development have to be capped so that the First Nations can be assured they will be able to hunt, fish and trap in their treaty area?

Second, the Commission is mostly funded by industry, a productive actor that receives direct material benefit from the development and by government, also a productive actor that receives revenues from royalties, taxes, licenses and fees. The First Nation actors are non-productive actors who do not receive a direct economic benefit from development that occurs on non-reserve traditional lands, though they would like to

achieve some type of revenue sharing arrangement. At this point the indirect benefits they receive are negligible. Only in the last decade have the communities begun to receive any benefit from employment and contracting and that is largely limited to labour intensive activities such as slashing. If the communities received more of a benefit from the activity as do the Nu-cha-nulth in the Clayoquot case, they would have more of a stake in encouraging development.

Since industry funds a large portion of the Commission they demand quicker approval time on projects and more certainty of access to the land. The provincial government has applied legal concepts such as the Sparrow test and consultation which adds time to the process. First Nation groups want more influence within the decision-making process and material benefits from development. These three actors have seemingly irreconcilable goals. Can all three achieve their goals? If so, how? Possible solutions will be posed later.

The third issue with the process is the question that the justices discussed in both the Metecheah and Amoco cases: Who in government is able to ascertain whether First Nation treaty and Aboriginal rights are being infringed? And what constitutes a meaningful process to ensure that infringement is minimized? Some of the First Nation communities that are signatories to the MOUs argue that the present consultation process is a glorified delivery service where the communities are notified in detail of the development but their concerns are not being incorporated into the approval process. The Metecheah decision spells out what consultation should include. It is worth repeating.

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and

> concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.[2]

The First Nation communities argue that although they are provided the necessary information, they do not have enough time to adequately consider the effects the proposed development may have on their rights, and their interests and concerns are not seriously considered and demonstrably integrated into the plan.

Some solutions to address these issues might lie with the following models: co-management, pre-development planning or pre-tenure consultation. A co-management model may be a workable solution to address some of these issues so that treaty and Aboriginal rights can be protected at an earlier stage in the development plan with First Nation input and cooperation. Co-management usually includes the sharing of resources or revenues. Neither government nor industry wants to give away a portion of their share of the profits. Government is worried about setting a precedent that might be claimed by other First Nation groups. They are especially reticent to set such a precedent in a treaty area where Aboriginal title has already been extinguished.

Pre-development planning with First Nation input would give First Nation communities a more timely opportunity to ensure their rights are protected. The provincial government would ensure that they have met their responsibility for meaningful consultation and industry could be assured access to lands and timely applications as the planning should identify areas of concern and mitigation earlier in the process. The problem with this approach is the nature of the oil and gas industry is not conducive to pre-development planning, unlike the forestry industry that develops five year plans over the life of its tenure. Pre-development planning in the oil and gas

industry is constrained by finding the resource, getting it into production as quickly as possible and most importantly, the extremely competitive nature of the industry. Given the consultation requirements facing industry and the issues around access to lands, pre-development planning whereby the industry proposes plans for the entire development cycle are likely inevitable. This will be a dramatic shift in the way the industry presently conducts its business.

Pre-tenure consultation might be another alternative and could be incorporated into both co-management and pre-development planning. Pre-tenure consultation is a concept whereby consultation is done prior to the tenure being awarded to a resource developer. The tenure is sold to the developer with caveats so that industry has some idea of what limitations might be imposed on development. It could be implemented along with pre-development planning so that development and traditional pursuits could occur in a sustainable manner for future generations. Pre-tenure consultation is constrained by the sheer size of the oil and gas tenures that are sold and by the dearth of information that most First Nation groups have gathered about their traditional practices. Extensive traditional land use plans are generally required so that First Nation groups understand their past and present use of the land and areas of importance. These plans are difficult and expensive to do in a comprehensive and meaningful way and equally difficult to apply to tenure applications so that confidential information is not passed onto industry and meaningful mitigation can occur in specific situations.

Whatever model is applied will have to bring First Nations into the planning stages earlier so that their concerns can be meaningfully addressed. Until First Nation

communities receive some direct benefit from the development, they will be less inclined to support development activity.

As Thomas Berger argued, the goal of any cooperative arrangement between Aboriginal communities and government is not to replace the subsistence economy with a wage economy, which has been the traditional model the industrialized society has tried to impose. Instead a cooperative model should look to ensure that Aboriginal communities are self-sustaining both from a traditional focus and from a resource development focus. This means that Aboriginal peoples must have more control over the lands that provide them sustenance during their traditional pursuits so that natural resource development will not destroy their ability to practice the traditional ways. The First Nation communities in the northeast area of British Columbia have not achieved this level of control yet, but have come a long way toward that goal as active members of the policy community.

Endnotes

1. The Doig River and Blueberry River First Nations are the exception as they receive royalty monies from oil and gas activities on their former reserve, the Fort St. John reserve that is located just north of Fort St. John. The band members were moved to new reserve locations to give returning veterans farmland after World War II. The federal government was to lease the mineral rights for the benefit of the bands but did not do so. In Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern development) (1995) the court awarded damages to compensate for lost past royalties and a share of future royalties. The Fort Nelson First Nation has oil and gas production on reserve but does not receive benefits from development on traditional lands off reserve.
2. *Halfway River First Nations v. B.C.* BC Appeal 1999, 29.

Bibliography

Allan, John. Information Letter E89-14 'Public Consultation Guidelines: Oil and Gas Development,' Energy Resources Division, Dec. 12, 1989.

Anderson, David *Report of the Commission of Inquiry into Fraser Valley Petroleum Exploration.* Province of British Columbia, 1991.

Asch, Michael ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference.* Vancouver: UBC Press, 1997.

Asch, Michael. *Home and Native Land: Aboriginal Rights and the Canadian Constitution.* Toronto, Methuen, 1884.

Atkinson, Michael M. *Governing Canada: Institutions and Public Policy.* Toronto: Harcourt Brace & Company Canada, 1993.

Banshing, Keith ed. *State and Society: Canada in Comparative Perspective.* Toronto: University of Toronto Press, 1986.

Barlee, Bill 'Peace Region cash cow for province: Barlee' *Alaska Highway News* September 22, 1995.

Berger, Thomas. *Northern Frontier Northern Homeland: The Report Of The Mackenzie Valley Pipeline Inquiry.* Volume One Ottawa: Minister of Supply and Services Canada, 1977.

Berger, Thomas. *Northern Frontier Northern Homeland: The Report Of The Mackenzie Valley Pipeline Inquiry.* revised ed. Vancouver: Douglas & McIntyre, 1988.

Berry, Glyn R. 'The Oil Lobby and the Energy Crises' *Canadian Public Administration* 17 (1974), 600-35.

Bickerton, James P. and Alain-G. Gagnon eds. *Canadian Politics.* Peterborough, Ontario: Broadview Press, 1994.

Borrows, John J., Leonard I. Rotman. *Aboriginal Legal Issues: Cases, Materials & Commentary.* Toronto: Butterworths Canada Ltd., 1998.

Bray, Matt and Ashley Thomson eds. *At the End of the Shift: Mines and Single-Industry Towns in Northern Ontario.* Toronto: Dundurn Press Ltd, 1992.

Bridges, G.E. 'Decision-Making Processes and the Energy Sector.' Prepared for the British Columbia Round Table On the Environment and the Economy, June 1990.

British Columbia Energy Council. 'Planning Today for Tomorrow's Energy: An Energy Strategy for British Columbia,' 1994.

British Columbia Ministry of Aboriginal Affairs, 'First Nations Property Taxation' (n.d.).

British Columbia Ministry of Aboriginal Affairs, 'First Nations Taxation' (n.d.).

British Columbia Ministry of Aboriginal Affairs, 'Important Events Leading to Treaty Negotiations in B.C.' (n.d.).

British Columbia Ministry of Aboriginal Affairs, 'Interim Measures' (n.d.).

British Columbia Ministry of Aboriginal Affairs. 'Landmark Court Cases' (n.d.).

British Columbia Ministry of Aboriginal Affairs, 'Provincial Treaty Mandates' (n.d.).

British Columbia Ministry of Aboriginal Affairs, 'Treaty Negotiations in B.C.' (n.d.).

British Columbia Ministry of Aboriginal Affairs. 'The Aboriginal Peoples of British Columbia: A Profile' 1992.

British Columbia Ministry of Energy Mines and Petroleum Resources. 'British Columbia Oil and Gas Handbook,' November 1995.

British Columbia Ministry of Energy Mines and Petroleum Resources 'Drilling and Production Statistics,' 1995.

British Columbia Ministry of Energy Mines and Petroleum Resources. 'Energy Supply & Requirements' 1990.

British Columbia Ministry of Energy Mines and Petroleum Resources. 'Muskwa-Ketchika Area: Planning for Energy and Mineral Resources.' August 1995.

British Columbia Ministry of Energy Mines and Petroleum Resources. 'Petroleum and Natural Gas Title Holdings, Hectares and Revenue,' 1995, 1998, 2000.

British Columbia Ministry of Energy Mines and Petroleum Resources. 'A Program Review: First Nations' Involvement in the Ministry of Energy, Mines and Petroleum Resources' Referral and Project Review Processes.' May 1994.

British Columbia Ministry of Energy Mines and Petroleum Resources. 'Towards Energy Sustainability: Implementing the B.C. Energy Council's Energy Strategy for British Columbia,' May 31, 1995.

British Columbia Ministry of Energy Mines and Petroleum Resources. 'Vision.' Gopher://www.empr.gov. bc.ca: 02/27/96.

British Columbia Ministry of Environment Lands and Parks. 'Guidelines for Pre-Treaty Consultations with First Nations,' May 1994.

British Columbia Ministry of Finance and Corporate Relations. 'Labour Force Survey Data,' 1989.

British Columbia Ministry of Finance and Corporate Relations. 'Infoline: Focus on the Economy.' July 26, 1996.

British Columbia Native Affairs Branch, Ministry of Environment Lands and Parks. 'Interim Guidelines on Aboriginal Use of Fish and Wildlife: Discussion Paper,' March 1993.

British Columbia Oil and Gas Commission and Ministry of Energy and Mines. 'Oil and Gas in British Columbia: Statistics 1988-1998' (n.d.).

British Columbia Round Table on the Environment and the Economy. 'Sustainable Development and Energy,' 1990.

British Columbia Trade Development Corporation. 'British Columbia in the World Economy; Background Paper Prepared for the Premier's Summit on Trade and Economic Opportunity,' June 17-19, 1992.

Brody, Hugh. *Maps and Dreams.* Vancouver: Douglas and McIntyre, 1988.

Brooks, Stephen. *Public Policy in Canada: An Introduction.* Toronto: Oxford University Press, 1998.

Burkey Stan *People First: A Guide to Self-Reliant, Participatory Rural Development.* London, Zed Books Ltd. 1993.

Canada, Royal Commission on Aboriginal Peoples. *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples.* Minister of Supply and Services Canada, 1996.

Canadian Association of Petroleum Producers, Public Relations Department, interview, September 1996, 2001.

Carty, Ken. ed. *British Columbia Government and Politics.* Vancouver: UBC Press, 1996.

Carpenter, A.W. Sandy. 'Issues Under Treaty 8 and the MOU's with the Province' a paper delivered at the conference *Streamlining the Approval of Oil and Gas Operations in B.C.* Calgary: Insight Information Co. December 9, 10, 1999.

Cassidy, Frank, ed. *Aboriginal Title in British Columbia: Delgamuukw v. The Queen.* Lantzville, B.C: Oolichan Books and Institute for Research and Public Policy, 1992.

Cassidy, Frank ed. *Reaching Just Settlements: Land Claims in British Columbia* Lantzville, B.C: Oolichan Books and Institute for Research and Public Policy, 1991.

Chandler, Marsha A. and William M. Chandler. *Public Policy and Provincial Politics.* Toronto: McGraw-Hill Ryerson Limited, 1979.

Citizens' Voice on Native Claims. 'What the Delgamuukw ruling means to B.C.' January 20, 1998.

Coates, Ken ed. *Aboriginal Land Claims in Canada.* Toronto: Copp Clark Pitman Ltd, 1992.

Coleman, William D. and Grace Skogstad. *Policy Communities and Public Policy in Canada: A Structural Approach.* Mississauga, Ontario: Copp Clark Pitman Ltd, 1990.

David Collier "The Comparative Method" in *Political Science: The State of the Discipline II* ed. by Ada W. Finifter. American Political Science Association 1993.

Davidson, James West; Gienapp, William E.; Heyrman, Christine Leigh; Lytle, Mark H.; Stoff, Michael B. *Nation of Nations: A Narrative History of the American Republic*, New York: McGraw Hill, 1990.

Dickason, Olive Patricia. *Canada's First Nations: A History of Founding Peoples from Earliest Times.* Toronto: Oxford University Press, 1997.

Donaldson, T. & Preston, L. "The stakeholder theory of the corporation: Concepts, evidence, implications." *Academy of Management Review, 20*: 65-91, 1995.

Dunleavy, Patrick and Brendan O'Leary. *Theories of the State: The politics of liberal democracy.* London: MacMillan Education Ltd, 1987.

Delgamuukw et al. v. Her Majesty the Queen in Right of British Columbia and The Attorney General of Canada, BC Appeal 1993.

Delgamuukw et al. v. Her Majesty the Queen in Right of British Columbia and The Attorney General of Canada, 3 S.C.R. 1010 1997.

Department of Indian and Northern Affairs, Regional Office, interview September 1996.

Eckstein, Harry. 'Case Study and Theory in Political Science.' in *Handbook of Political Science*, vol. 7, eds. Fred Greenstein and Nelson W. Polsby. Reading, MA: Addison-Wesley. 1975.

Elliot, David W. *Law and Aboriginal Peoples in Canada.* North York, Ontario: Captus Press Inc. 2000.

Evans, Peter B., Dietrich Rueschemeyer, Theda Skocpol eds., *Bringing the State Back In.* Cambridge, Mass.: Cambridge University Press, 1985.

Faulkner, Hugh. 'Pressuring the Executive' in *Canadian Public Administration* Vol 25(2) Summer 1982 pp 240-253.

Fisher, Robin. *Contact and Conflict: Indian – European Relations in British Columbia, 1774-1890.* 2nd edition Vancouver: UBC Press, 1992.

Forester, John. *Planning In the Face of Power.* Berkeley: University of California Press, 1989.

Fossum, John Erik. *Oil the State, and Federalism: The Rise and Demise of Petro-Canada as a Statist Impulse.* Toronto: University of Toronto Press, 1997.

Frideres, James S. *Native Peoples in Canada: Contemporary Conflicts.* Scarborough, Ont: Prentice-Hall, 1993

Freeman, R. E. *Strategic Management: A stakeholder approach.* Boston: Pitman 1984.

Gray, Jarvis. Ministry of Environment, Native Program Officer - Northeast Region, telephone interview November 23, 1995.

George, Herb. Negotiator for the Gitksan, interview, 7 April 1995.

Globe and Mail. "B.C. NDP Recognizes Aboriginal Land Title," December 11, 1991 A1.

Gouge, Ted. 'The Impact of Delgamuukw on Resource Development in British Columbia' Lawson, Lundell, Lawson & McIntosh, January 1998.

Government of Alberta, "Strengthening Relationships: The Government of Alberta's Proposed Aboriginal Policy Framework," 1999.

Guerin v. R 1984

Halfway River First Nations v. B.C. BC Appeal 1999.

Hoberg, George. 'Putting Ideas in Their Place: A Response to 'Learning and Change in the British Columbia Forest Policy Sector' *Canadian Journal of Political Science* XXIX: 1 March 1996, pp 135-144.

Hoberg, George and Edward Morawski. 'Policy change through sector intersection: forest and aboriginal policy in Clayoquot Sound' in *Canadian Public Administration* vol 40(3) Fall 2000, pp 387-414.

Horne, Garry and Lee Robson. 'British Columbia Community Economic Dependencies.' Prepared for the British Columbia Round Table on the Environment and the Economy, March 1993, pg. 10.

House, J.D. *The Last of the Free Enterprisers: The Oilmen of Calgary.* Toronto: MacMillan, 1970.

Howlett, Michael and M. Ramesh. *Studying Public Policy: Policy Cycles and Policy Subsystems.* Toronto: Oxford University Press, 1995.

Jenkins-Smith, Hank C., St. Clair, Gilbert K., Woods, Brian. 1991. "Explaining Change in Policy Subsystems: Analysis of Coalition Stability and Defection over Time" *American Journal of Political Science* 35:851-880.

Judge, David, Gerry Stoker, & Harold Wolman. ed. *Theories of Urban Politics* London: Sage Publications 1995.

Kelly Lake Cree Nation vs Canada, BC Appeal 1998.

'Kelly Lake Cree Nation v. British Columbia (Ministry of Energy and Mines): the Mount Monteith Decision,' in *Alberta Law Review* Vol 38(1) pp 307-311.

Kjelgren, Bert and Terry Barth, Pipelines Division, Ministry of Municipal Affairs, Fort St. John, interview October and November 1995.

Koopman vs. Ostergaard, BCJ, No 1822, 1995.

Kulchyski, Peter. *Unjust Relations: Aboriginal Rights in Canadian Courts.* Toronto, Ontario: Oxford University Press., 1994.

Lawson, Lundell, Lawson & McIntosh 'Aboriginal Law in British Columbia: Current Issues and Implications for Business' presentation to Canadian Association of Petroleum Producers, February 9, 1998.

Laxer, James *Oil and Gas: Ottawa, the Provinces and the Petroleum Industry.* Toronto: James Lorimer and Co, 1983.

Lertzman, Ken, Jeremy Rayner and Jeremy Wilson. "Learning and Change in the British Columbia Forest Policy Sector: A Consideration of Sabatier's Advocacy Coalition Framework" *Canadian Journal of Political Science* XXIX:1 March 1996, pp 111-133.

Lertzman, Ken, Jeremy Rayner and Jeremy Wilson. "On the Place of Ideas: A Reply to George Hoberg" *Canadian Journal of Political Science* XXIX:1 March 1996, pp 145-148.

Maerz, David H. & Leonard A. Coad. *Markets for British Columbia Natural Gas.* Calgary Alta.: Canadian Energy Research Institute, 1990.

McGee, R. Harley *Getting It Right: Regional Development in Canada.* Montreal: The Institute of Public Administration of Canada, McGill-Queen's University Press, 1992.

Masselink, Derek. Ministry of Environment Native Program Officer - Prince George Region, telephone interview, November 23, 1995.

McAllister, Mary Louise and Cynthia Jacqueline Alexander. *A Stake in the Future: Redefining the Canadian Mineral Industry* Vancouver: UBC Press, 1997 draft manuscript.

McAllister, Mary Louise. "Navigating New Waters: A Multi-Stakeholder Approach to Sustainable Mining." *Presented at Stimulating Rural Economies for the 2000s Rural Institutional Restructuring,* Canadian Rural Restructuring Foundation February 1995.

McAllister, Mary Louise. "A Stake in the North: Prospects for Employment in Mining Towns." *Presented at the International Symposium "Gaining Ground: Perspectives on Rural Employment,"* October 11-14, 1995.

Michalos, Alex C. "Decision-Making in Committees." *American Philosophical Quarterly* Volume 7 Number 2 April 1970.

Mitchell, Bruce. ed. *Resource and Environmental Management in Canada: Addressing Conflict and Uncertainty.* Toronto: Oxford University Press, 1995.

Morris, Teresa, EMPR Victoria, interview May and June 1997, 1998.

Morrison, R. Bruce and C. Roderick Wilson ed. *Native Peoples: The Canadian Experience* Second Edition, Toronto: McClelland and Stewart Inc. 1986.

"Northern Hydrocarbon Development in the Nineties: A Global Perspective" proceedings of a conference held Sept. 30 to Oct. 4, 1988 in Calgary and Yellowknife published by Geotechnical Science Laboratories, Carelton University: Ottawa, 1989.

Notzke, Claudia. *Aboriginal Peoples and Natural Resources in Canada.* North York, Ontario: Captus Press Inc., 1994.

Pal, Leslie A. *Public Policy Analysis: An Introduction Second Edition.* Scarborough, Ontario: Nelson Canada, 1992.

Pal, Leslie A. *Beyond Policy Analysis: Public Issue Management in Turbulent Times.* Scarborough, Ontario: International Thomas Publishing, 1997.

Pateman, Carole. *Participation and Democratic Theory.* London: Cambridge University Press, 1970.

Patton, Carl V. and David S. Sawicki. *Basic Methods of Policy Analysis and Planning.* New Jersey: Prentice Hall, 1993.

Phillips Ed, *Guts & Guile: True Tales From the Backrooms of the Pipeline Industry.* Vancouver: Douglas & McIntyre, 1990.

Pocklington, T.C. ed. *Representative Democracy: An Introduction to Politics and Government.* Toronto: Harcourt Brace, 1994.

Poelzer, Greg. 'Aboriginal Peoples and Environmental Policy in Canada: No Longer at the Margins in *Canadian Environmental Policy: Context and Cases for a New Century. 2nd ed.* Debora L. VanNijnatten and Robert Boardman, eds., Toronto: Oxford University Press, 2001.

Prentice, P.E. James. 'Consult, Consult, Consult: Doing Business with First Nations After Delgamuukw,' presentation to *Canadian Association of Petroleum Landman* Conference, Calgary, Alberta, 1998.

Pross, Paul A. 'Pressure Groups: Talking Chameleons' in Whittington, Michael S. and Glen Williams eds., *Canadian Politics in the 1990s, Fourth Edition.* Scarborough: Nelson Canada, 1995.

Pross, Paul A. *Group Politics and Public Policy: Second Edition.* Toronto: Oxford University Press, 1992.

Province of British Columbia, 'Consultation Guidelines' September 1998.

Province of British Columbia, 'Crown Land Activities and Aboriginal Rights Policy Framework' January 25, 1995.

Province of British Columbia Legislative Assembly. 'Opening Speech of The Honourable David C. Lam Lieutenant Governor On Opening the First Session of the Thirty-fifth Parliament of the Province of British Columbia'

[er://bbs.qp.gov.bc.ca:70/0QP_INFO/SYS%3A/LEGIS/1992/MISC/92THRONE.TXT] March 17, 1992.

Province of British Columbia Legislative Assembly. 'Speech from the Throne by The Honourable David C. Lam Lieutenant Governor at the Opening of the Second Session, Thirty-fifth Parliament of the Province of British Columbia' [er://bbs.qp.gov.bc.ca:70/0QP_INFO/SYS%3A/LEGIS/1993/MISC/93THRONE.TXT] 1993.

Province of British Columbia Legislative Assembly. 'Speech from the Throne by The Honourable David C. Lam Lieutenant Governor at the Opening of the Third Session, Thirty-fifth Parliament of the Province of British Columbia' [er://bbs.qp.gov.bc.ca:70/0QP_INFO/SYS%3A/LEGIS/1994/MISC/94THRONE.TXT] March 14, 1994.

Province of British Columbia Legislative Assembly. 'Speech from the Throne by The Honourable David C. Lam Lieutenant Governor at the Opening of the Fourth Session, Thirty-fifth Parliament of the Province of British Columbia' [http://bbs.qp.gov.bc.ca/legis/95throne.htm] March 22, 1995.

Province of British Columbia. '1995 Budget Speech' [http://www.qp.gov.bc.ca/budget95/95bgt_sp.htm #natural resources].

Province of British Columbia Legislative Assembly. 'Speech from the Throne by The Honourable Garde B. Gardom Lieutenant Governor at the Opening of the Fifth Session, Thirty-fifth Parliament of the Province of British Columbia' [http://www.legis.gov.bc.ca/96throne.htm] April 25, 1996.

Purvis, Andrew. 'Whose Home and Native Land,' *Time* Canadian Edition February 15, 1999 pp 16- 26.

Quirin, David G. *Economics of Oil and Gas Development in Northern Canada.* Ottawa: Ministry of Northern Affairs and National Resources, 1962.

R. v. Sparrow, S.C.R. 1990.

Raboy, Marc. 'The Role of Public Consultation in Shaping the Canadian Broadcasting System.' *Canadian Journal of Political Science* XXVIII:3 September 1995 pp 455-477.

Rankin, Murray, Sandy Carpenter, Patricia Burchmore and Christopher Jones, 'Regulatory Reform in the British Columbia Petroleum Industry: the Oil and Gas Commission' *Alberta Law Review* Vol 38(1), June 2000 pp 143-169.

Ross, Monique M. and Cheryl Y. Sharvit. 'Forest Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8,' *Alberta Law Review* Vol 36(3) 1998 pp 645-691.

Sharvit, Cheryl, Michael Robinson, and Monique M. Ross. 'Resource Developments on Traditional Lands: The Duty to Consult' University of Calgary: Canadian Institute of Resources Law, Occasional Paper #6, February 1999.

Sloan, Pamela and Roger Hill. *Corporate Aboriginal Relations: Best Practice Case Studies.* Toronto: Hill Sloan Associates Inc. 1995.

Smith, Melvin H. *Our Home Or Native Land?* Toronto: Stoddard Publishing, 1995.

Stevenson, Mark. Chief Treaty Negotiator with the Province of British Columbia, interview, September 1996.

Sub-committee of the Intergovernmental Working Group on the Mineral Industry. 'Report on Native Participation in Mining: Phase I & II.' December 1990, November 1991.

Tennant, Paul. *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989.* Vancouver: University of British Columbia Press, 1990.

Thorlakson, Steve. Mayor of Fort St. John, Third Vice-President of Union of B.C. Municipalities, Chair of Communities and Resource Committee, interview June 1997.

Toner, Glen and G. Bruce Doern. 'The Two Energy Crisis and Canadian Oil and Gas Interest Groups: A Re examination of Berry's Propositions.' *Canadian Journal of Political Science* XIX:3 September 1986 pp 467-493.

Toner, Glen and G. Bruce Doern. *The Politics of Energy: The Development and Implementation of the NEP* Toronto: Methuen, 1985.

Toner, Glen and G. Bruce Doern. 'Energy Budgets and Oil and Gas Interests,' in Allan M. Maslove (ed.), *How Ottawa Spends.* Toronto: Methuen, 1985.

Union of British Columbia Municipalities. 'Local Government and Native Land Claims.' Item #3(b), B.C. Communities Agenda, September 1991.

Weaver, Sally M. 'The Joint Cabinet/Indian Brotherhood Committee: a unique experiment in pressure group relations in 'Governing Under Pressure: the special interest groups-Fourteenth National Seminar, 1981. A. Paul Pross ed. Toronto: The Institute of Public Administration of Canada, 1982, pp 211-239.

Wilks, Stephen and Maurice Wright, eds. (1987). 'Conclusion: Comparing Government-Industry Relations: States, Sectors, and Networks.' In Wilks and Wright. *Comparative Government-Industry Relations.* Oxford: Oxford University Press: 274-313.

Williams Melissa S. 'Burkean 'Descriptions' and Political Representation: A Reappraisal.' *Canadian Journal of Political Science* XXIX:1 March 1996, pp 23-45.