Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua

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In October 1995, the Awas Tingni community of Nicaragua presented a petition to the Inter-American Commission on Human Rights (the “Commission”) asserting that the government of Nicaragua had breached its obligations under both domestic and international law by failing to guarantee the community’s use and enjoyment of its ancestral lands.1 Those lands, which consist of rain forest located along the northern Caribbean coast of Nicaragua, were the subject of a thirty-year concession for road construction and timber exploitation awarded by the government to a Korean corporation, Sol del Caribe, S.A. (“SOLCARSA”). The Awas Tingni, a Mayagna-speaking people, reside on the lands in accordance with a traditional system of land tenure and subsist on the lands primarily by family and community farming; their culture and social structure are closely tied to their historic occupation of those lands.2

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1. The Awas Tingni’s brief filed before the Commission is reproduced in S. James Anaya, The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua, 9 ST. THOMAS L. REV. 157 (1996).

2. For general factual background to the controversy over development of Nicaragua’s Carribean coast, see Bill Weinberg, La Miskitia Rears Up: Industrial Recolonization...
After a series of unsuccessful mediation attempts, the Commission took up the admissibility and substance of the Awas Tingni complaint in accordance with Article 50 of the American Convention on Human Rights. In October 1997, the Commission issued a request for precautionary measures to be taken by the government of Nicaragua, in particular calling for the suspension of the SOLCARSA concession in order to avoid irreparable harm to the lands in issue. In March 1998, the Commission issued a report calling for the establishment of a legal procedure for demarcation and recognition of the Awas Tingni’s land rights in a manner acceptable to the indigenous community. The case has now been presented by the Commission to the Inter-American Court of Human Rights in accordance with the compulsory jurisdiction granted to that Court under Article 61 of the American Convention on Human Rights.

The Awas Tingni complaint raises a number of significant issues of interpretation and application of human rights law, in particular with respect to Article 21 of the American Convention on Human Rights—the right to property. Protection of the lands occupied by indigenous peoples as a human right is itself recognized in the Nicaraguan Constitution, as well as in various international conventions and proposed international instru-
ments. The conflict between the collective, undocumented land rights of indigenous communities and the resource and development interests of national governments and their corporate partners presents, however, a case of first instance for the Inter-American Court of Human Rights. Accordingly, in addition to the Commission’s own submissions, a number of amicus briefs have been filed with the Court by indigenous communities and advocacy groups on behalf of those communities, both in Nicaragua and elsewhere in the Americas.

What follows is the Amicus Curiae Brief submitted to the Inter-American Court of Human Rights by the Assembly of First Nations, the national representative organization of Canada’s indigenous peoples. The brief canvasses the relevant issues of international human rights law and its domestic applications, as well as Canadian constitutional principles governing indigenous rights and co-management arrangements with respect to resource development on indigenous peoples’ lands. It is presented here in an effort to contribute to the growing body of applied international human rights literature and in the hope that international and comparative law advocacy will become a more prominent feature of the human rights litigation landscape.


10. The brief is as submitted to the Court. It has not been edited by the Human Rights Quarterly.
The Amicus Curiae Brief of the Assembly of First Nations

I. INTRODUCTION

1. The Assembly of First Nations (“AFN”) is the national representative organization of the over 630 indigenous nations (“First Nations”) in Canada. The goal of the AFN is to promote a relationship between the Crown, First Nations, and the people of Canada based on peaceful coexistence, equitable sharing of lands and resources, and ultimately on respect, recognition, and enforcement of the Aboriginal right of self-government.

2. The Chiefs of each First Nation in Canada assemble annually to set national policy and direction through resolution. The National Chief of the Assembly of First Nations is elected every three years by the Chiefs-in-Assembly. The Chiefs meet between the annual assemblies every three to four months in a forum called the Confederacy of Nations. The membership of the Confederacy consists of Chiefs and other Regional leaders chosen according to a formula based on the population of each region.

3. The overall structure of the AFN is based on the Charter of the AFN, adopted in July 1985. The Preamble of the Charter of the AFN declares inter alia:

   • That the First Nations of Canada “are part of the international community;”
   • That the AFN is determined “to establish conditions under which justice and respect for the obligations arising from our international treaties and from international law can be maintained;” and
   • That the AFN is to “employ national and international machinery for the promotion of the political, economic and social advancement of our peoples.”

4. To these ends, the purpose of this Amicus Curae Brief is to offer assistance to the Inter-American Court of Human Rights in its consideration
of the case of the Awas Tingni Mayagna (Sumo) Indigenous Community against the Republic of Nicaragua. Canadian constitutional principles governing indigenous title and resource rights assist in illuminating the “ordinary meaning” of Articles 1, 2, and 21 of the American Convention on Human Rights,¹ and in resolving the dispute between the Awas Tingni and Nicaragua in a manner consistent with evolving principles of international and domestic law.

5. Canadian constitutional principles governing indigenous title and resource rights should be of particular interest and assistance to this Court. Canada is a fellow member of the Organization of American States, and has adopted the American Declaration on the Rights and Duties of Man. Many cases similar to the dispute between the Awas Tingni and Nicaragua have been litigated in recent years in Canadian courts. Canadian constitutional principles offer a number of doctrinal insights to the task of determining the relevance of Articles 1, 2 and 21 to an indigenous land claim.

6. Moreover, forests cover half of Canada’s land mass. Approximately 76 percent of Canada’s mammal species, 60 percent of bird species and 66 percent of animals, plants and micro-organisms are forest-dwelling. There are approximately 418 million hectares of forest land in Canada. Forests have provided and continue to provide indigenous peoples with spiritual, cultural and survival needs. These include, but are not limited to, the following: food, clothing, shelter, construction materials, craft materials, medicine, pigments, tobacco substitutes, ceremonial products, tools, and transportation.²

7. Currently there are many indigenous peoples involved in forestry operations in Canada. It is estimated that there is approximately 600 indigenous forest-based businesses generating approximately 10,000 years of employment.³ One sample, taken over five years ago, shows that there are approximately 120 indigenous forest companies across Canada.⁴

8. Due to its knowledge and long term involvement with the issues of indigenous peoples, land title and resource management, the AFN believes that it can provide valuable information to assist this Court in its consideration of the complaint. Canadian jurisprudence reflects a rights-oriented

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² Harry Bombay, Aboriginal Forest-based Ecological Knowledge in Canada (Ottawa: National Aboriginal Forestry Association, 1996) at 6, 12.
approach to the question of indigenous title and resource management, and offers innovative ways of reconciling the existence of such title with international legal principles and State sovereignty.

II. THE RELATION BETWEEN INTERNATIONAL AND DOMESTIC LAW

9. Canadian constitutional law ought to be regarded as an indicator of the "general principles of international law." The Statute of the International Court of Justice states that "general principles of law recognized by civilized nations," are sources of international law.\(^5\) Where issues of interpretation and implementation of international law arise, international courts may look to domestic decisions to elaborate these general principles.\(^6\) In the instant case, this Court should consider standards for resolving indigenous land claims that have emerged from the regional experience with indigenous title and resource rights. Canada’s experience with indigenous land claims offers important indicia of the substance of general principles of Inter-American law pertaining to indigenous title and resource rights.

10. Specifically, Canadian constitutional law should inform the interpretation of Articles 1, 2 and 21 of the American Convention. Article 1 states that State parties undertake to respect the rights recognized in the Convention and to ensure the full and free exercise of those rights without discrimination of any kind. Article 2 obligates State parties to “adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.” Article 21 states that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

11. When interpreting the various Articles of the American Convention, this Court has traditionally turned to Articles 31 and 32 of the Vienna

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Convention. In its advisory opinion on *Restrictions on the Death Penalty*, this Court reiterated this dependence on the Vienna Convention.

12. Article 31(1) of the Vienna Convention states that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In order to understand the “ordinary meaning” of the American Convention, this Court should look to the experience of the member States of the OAS. In this regard, Canada’s recent constitutional decisions regarding indigenous title and resource rights offer a concrete manifestation of the regional “ordinary meaning” of Article 21.

13. Article 32 of the Vienna Convention pertains to the supplementary rules of interpretation, and authorizes this Court to consider domestic laws of member-States as supplementary means of interpretation. Article 32 states that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

14. In this Court’s advisory opinion on *The word “Laws” in Article 30 of the American Convention on Human Rights*, the Court considered regional variation in usage of the term “laws.” The Court took “into account the fact that the legal regimes of the State Parties to the Convention each have their source in a different tradition.” The Court’s acknowledgment of regional variation is vital to its ability to make decisions that reflect the diversity of cultures and legal systems that make up the member states of the OAS. At the same time, the Court noted underlying comparative commonalities when it appealed to the principle of “legality” enshrined in “almost all of the constitutions of the Americas drafted since the end of the eighteenth century.”

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11. *Ibid. loc. cit.*
12. *Ibid. at para. 23.*
15. This Court also should follow the precedent set by the Council of Europe that relies on domestic law of state parties to establish regional norms. In this regard, this Court should consider the domestic experience of Canada as a means of understanding the regional experience with indigenous title and resource rights and as a model for implementing Articles 1, 2 and 21 of the American Convention. The preamble of the American Convention states that the nature of the rights enshrined in the Convention “justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.”

16. In practice, this may require this Court to give meaning to the enumerated rights of the Convention by consulting the various domestic legal experiences of the member States. The European Human Rights Commission and this Court have extensive experience with this interpretive method.

17. Academic commentators have noted that domestic legal principles have been more important for the interpretation of the European Convention than international law in general for two primary reasons. First, the European Council, like the Inter-American system, comprises a more homogenous group of States than the international community in general. Second, the European Convention, like the American Convention, aspires to common standards for the regional protection of human rights within the Member States. Given these two considerations, commentators have concluded that a “comparative approach seems to be an absolute necessity in order to find common European principles in the legal orders of these States.” This Court ought to adopt a similar approach to the present case. This approach has been used in a wide array of subject matters that deal with complex social issues.

18. In Tyrer v. United Kingdom, for example, the European Court of Human Rights held that “the Convention is a living instrument which must be interpreted in light of present-day conditions . . . the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”

13. American Convention, supra note 1, Preamble.
Through its consideration of the domestic laws of its member states, the European Court has interpreted the European Convention in a manner that reflects the distinct character of the region and an evolving understanding of fundamental rights.

18. In Dudgeon v. United Kingdom, the European Court reemphasized this interpretive approach when discussing the evolution of legal understanding. The European Court noted that as “compared with the era when that legislation was enacted, there is now a better understanding . . . the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States.” Several scholars have noted the utility of this interpretive approach in a wide range of other international contexts, including resolving matters of treaty interpretation as diverse as copyright claims under the TRIPS agreement.

19. This Court has a tradition of considering the developed jurisprudence of the European system. In this regard, this Court has cited with approval the European Court’s use of domestic legal principles as a means of interpreting international guarantees. When assessing the appropriate standard for deciding whether a difference in treatment should be held to be discriminatory, this Court cited a European decision which arrived at a standard after “following principles which may be extracted from the legal practice of a large number of democratic states.” This Court has also cited the European Court for the proposition that a definition of legal terms must derive from their use in particular legal systems. These examples indicate an historical willingness on the part of this Court to consider the domestic experiences of the member States of the OAS when interpreting international guarantees.

III. INDIGENOUS TITLE AND RESOURCE RIGHTS IN CANADA

20. Section 91(24) of the Constitution Act, 1867\(^{22}\) authorizes the Parliament of Canada to make laws with respect to “Indians, and Lands reserved for the Indians.” By s. 92(5) and s. 92A of the Constitution Act, 1867, provincial legislatures have legislative responsibility for management of Crown lands, including forests.

21. However, s. 35 of the Constitution Act, 1982\(^{23}\) guarantees the rights of the indigenous peoples of Canada:

s.35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claim agreements may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The wording of s. 35(3) (“rights that now exist by way of land claims agreements or may be so acquired”) does not limit the freedom of indigenous peoples in Canada to enter into agreements or other arrangements to develop or manage lands and resources in their traditional territories. In fact, the reference to the future acquisition of treaty rights indicates that future agreements with indigenous peoples have constitutional protection.

22. The extent to which the Constitution of Canada protects indigenous title and resource rights (referred to in the domestic context as “Aboriginal title” and “Aboriginal rights”) turns on judicial interpretation of the relationship between federal and provincial legislative authority and the constitutional recognition and affirmation of Aboriginal and treaty rights. The principles that the Canadian judiciary has brought to bear in determining this relationship are relevant to interpreting Articles 1, 2 and 21 of the Convention in three respects. First, they offer an innovative approach to the definition of the nature and scope of indigenous title and resource rights which this Court may find useful when elaborating Articles 1, 2 and 21 in the context of an indigenous land claim. Second, they contain a number of doctrinal techniques that seek to balance State sovereignty and indigenous

\(^{22}\) Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3.
\(^{23}\) Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11.
rights in the context of resource management. Third, they authorize and promote the co-management of natural and forestry resources through the negotiation of co-management agreements whereby indigenous and non-indigenous parties mutually determine the nature and scope of their respective rights and authority over resource development and management.

A. The Nature and Scope of Aboriginal Title and Aboriginal Rights

23. This Court’s interpretation of Article 21 of the American Convention ought to be cognizant of the fact that indigenous title is a form of property right constitutionally recognized and affirmed by the Constitution of Canada. Broadly speaking, there are two forms of constitutional protection afforded to indigenous peoples in Canada. First, indigenous peoples possess Aboriginal rights to engage in customs, practices and traditions that are integral to the distinctive identities of the communities in question. Second, indigenous peoples possess a right of Aboriginal title to their ancestral territories, which is understood as a right to the land itself.

24. Although Aboriginal title and Aboriginal rights are entrenched in the Constitution of Canada as of 1982, the Supreme Court of Canada in Calder v. A.G.B.C. in 1973 stated that Aboriginal title and Aboriginal rights flow from the fact that: when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.24

25. The advent of the Constitution Act, 1982 has significantly changed the constitutional relationship between indigenous peoples and Canada. Since 1982, courts have focused on developing tests to determine the nature and scope of Aboriginal title and Aboriginal rights, when and how such rights have been infringed by State action, whether such infringements can be justified, and the appropriate remedies in the event of an unconstitutional infringement.

26. In Calder and again later in R. v. Guerin,25 Aboriginal title was recognized by the Supreme Court of Canada to be an independent and pre-existing right flowing from historical occupation and possession. Thus, although Aboriginal title and Aboriginal rights receive constitutional recognition and affirmation, they are inherent rights whose source is not dependent on the Constitution or legislation for verification. Aboriginal rights are regarded as sui generis26 and unique in that they are held communally.

26. Id.
27. The Supreme Court of Canada has held, in *R. v. Van der Peet*, that a purposive approach to Aboriginal rights should be taken, namely, that the nature and scope of Aboriginal rights ought to be determined in light of the purposes underlying their constitutional recognition and affirmation, which include the reconciliation of the preexistence of Aboriginal societies and sovereignty of Canada. Accordingly, the scope and content of Aboriginal title and Aboriginal rights are determined by the judiciary on a case by case basis, using a test originally set out by the Court in *R. v. Sparrow*, and refined in later cases, including *Van der Peet*, *Gladstone*, and *Delgamuukw*.

28. With respect to Aboriginal rights, the Supreme Court of Canada in *R. v. Van der Peet* stated that “in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.” As stated in *R. v. Sparrow*, however, the s. 35(1) phrase “existing aboriginal rights” is interpreted to “permit their evolution over time;” aboriginal rights therefore are “affirmed in a contemporary form rather than in their primeval simplicity and vigour.”

29. With respect to Aboriginal title, the Supreme Court of Canada in *Delgamuukw v. British Columbia*, outlined the scope, content and method of proof for Aboriginal title claims. There are three requirements for establishing title. First, the land must have been occupied by the community prior to the assertion of State sovereignty. Second, there must be continuity of occupation over time. This requirement does not demand “an unbroken chain of continuity” but “substantial maintenance of the connection” between the people and the land. Third, at the time State sovereignty was asserted, the community’s possession of the land must have been exclusive. Exclusivity does not refer to the absence of other groups on the land, but rather the “intention and capacity to retain exclusive control.”

30. In *Delgamuukw*, the Court also dealt with a number of evidentiary issues that arise in the context of assertions of Aboriginal title, holding that oral histories are admissible in Canadian courts in order to establish the

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32. *Van der Peet*, supra note 27 at 553.
35. *Id.* at 1103, (citing *Van der Peet*, supra, at para 65).
existence of constitutionally protected Aboriginal rights, including aboriginal title to lands.\textsuperscript{38}

31. Aboriginal title confers a very broad set of rights on indigenous title holders. The Court in \textit{Delgamuukw} defined the scope and content of Aboriginal title as encompassing “the right to exclusive use and occupation of the land . . . for a variety of purposes, which need not be aspects of . . . aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures.” Aboriginal title therefore authorizes an indigenous community not only to engage in practices that would receive independent constitutional protection as Aboriginal rights but also confers on the community exclusive rights to engage in a wide range of activities, including resource development and commercial endeavours, on its ancestral lands. The only limit on the uses to which indigenous lands may be put by an indigenous community is that they “must not be irreconcilable with the nature of the group’s attachment to that land.”\textsuperscript{39}

\section*{B. Balancing Indigenous Rights and State Sovereignty}

32. Although Article 21(1) of the American Convention states that “[e]veryone has the right to the use and enjoyment of property,” it also states that “[t]he law may subordinate such use and enjoyment to the interest of society.” In interpreting this limitation, this Court ought to be cognizant of the principles that the Canadian judiciary has developed to determine the circumstances in which State interferences with Aboriginal title and Aboriginal rights can be constitutionally justified in the name of broader social interests.

33. Specifically, constitutional protection of Aboriginal title and Aboriginal rights in Canada is not absolute. Where an indigenous community can successfully assert an Aboriginal right or Aboriginal title, State action that imposes undue hardship or that denies the community its preferred means of exercising its right will be held to amount to a \textit{prima facie} violation of the Constitution.\textsuperscript{40} The State can nonetheless justify a \textit{prima facie} violation of Aboriginal rights or Aboriginal title where there is a compelling and substantial legislative objective and if the means chosen to

\textsuperscript{38} Id. at 1071–1076.

\textsuperscript{39} Id. at 1083 (“there will exist a special bond between the group and the land in question. . . . [and this creates] an inherent limitation on the uses to which the land . . . may be put . . . if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it”) (at 1089).

\textsuperscript{40} \textit{Sparrow}, supra note 29 at 1112.
accomplish this objective interfere with the exercise of the right as minimally as possible.

34. With respect to the first requirement, namely, that the State demonstrate a compelling and substantial legislative objective, this will be met if the State action in question seeks to preserve Aboriginal rights or Aboriginal title by conserving a natural resource, or seeks to prevent the exercise of Aboriginal rights or Aboriginal title which might be harmful to either the general population, indigenous peoples, or both.\textsuperscript{41} Canadian courts have held that conservation concerns may receive higher priority than constitutionally protected indigenous rights to the use and enjoyment of natural resources. The underlying rationale for such priority is that conservation concerns are consistent with indigenous values and beliefs and ultimately benefit indigenous peoples.\textsuperscript{42}

35. Recent cases have broadened the list of acceptable legislative objectives which can justify a State infringement of Aboriginal rights and Aboriginal title. In \textit{Delgamuukw}, the Court provided an extensive list of legislative objectives which could justify infringements on Aboriginal title:

\begin{quote}
the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.\textsuperscript{43}
\end{quote}

This broad list of potentially acceptable objectives reflects the Supreme Court of Canada’s understanding that the purpose of s.35(1) is to reconcile the prior occupation of North America by indigenous peoples and the assertion of State sovereignty.\textsuperscript{44}

36. However, in addition to establishing the existence of a compelling and substantial legislative objective, the State must also demonstrate that its actions interfered as minimally as possible with Aboriginal title or Aboriginal rights. In this regard, the State must show that the indigenous community in question received priority in terms of the allocation of natural resources, that they were appropriately consulted and involved in relevant planning processes, and that they received adequate compensation for the State action in question. In cases, such as the present one, where the State action constitutes a significant impairment of Aboriginal title, indigenous consent to the State action will also be required.

37. In the \textit{Sparrow} decision, which dealt with the food fishing rights of the Musqueam First Nation in British Columbia, the Supreme Court of

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\footnote{41. Id. at 1113.}
\footnote{42. Id. at 1114.}
\footnote{43. \textit{Delgamuukw}, supra note 31 at 1111.}
\footnote{44. \textit{Van der Peet}, supra note 27 at 539.}
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Canada acknowledged that resource allocation was an integral part of conservation. Recognizing that “[t]he constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource,”\(^45\) the court held that “[t]he nature of the constitutional protection afforded by s.35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery.”\(^46\) Therefore, where a natural resource allocation scheme (for instance, a forest harvest permit or commercial fish licence) interferes with Aboriginal title or Aboriginal rights, it must abide by a “doctrine of priority,” which requires that “any allocation of priorities after valid conservation measures have been implemented must give top priority” to the indigenous community.\(^47\)

38. With respect to Aboriginal title, the Supreme Court has noted that the nature of aboriginal title and the relationship between First Nations and Canada requires that the indigenous community be included in any planning processes which affect the land in question.\(^48\) As stated, indigenous consent will be required where the State action in question results in a significant impairment of Aboriginal title.

C. State Obligations to Protect and Promote Indigenous Rights and Title

39. The judiciary’s emphasis on indigenous consultation and consent in the context of State interference with Aboriginal title flows in part from the existence of a fiduciary relationship between the State and indigenous peoples in Canada.\(^49\) The Royal Commission on Aboriginal Peoples offers the following interpretation on this fiduciary relationship:

The fact that the relationship between the government and Aboriginal peoples is trust-like, rather than adversarial has important implications for the role of government with respect to Aboriginal lands and resources. It requires institutional arrangements to protect them, and it requires government not to rely simply on the “public interest” as justification for limiting the exercise of Aboriginal rights with respect to them. Moreover, it requires government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources.\(^50\)

\(^{45}\) Sparrow, supra note 29 at 1115.

\(^{46}\) Id. at 1114–1115.

\(^{47}\) Id. at 1115.

\(^{48}\) Delgamuukw, supra note 31.

\(^{49}\) Guerin, supra note 25.

\(^{50}\) Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship, Part II. (Ottawa, 1996: Minister of Supply and Services Canada) at 566 [hereinafter RCAP].
40. Commentators agree that there is a constitutional duty to protect indigenous lands and resources. This is again evidenced by the Report of the Royal Commission on Aboriginal Peoples:

The law of Aboriginal title requires governments to take active steps to protect Aboriginal lands and resources. This positive dimension of the law emerges from the text, structure and jurisprudence of section 35 of the Constitution Act, 1982, which together suggest that government action, in the form of negotiations, is central to the constitutional recognition and affirmation of Aboriginal and treaty rights. It is reflected also in case law addressing the Crown’s fiduciary relationship with Aboriginal peoples, which “emphasize[s] the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation.” It is supported as well by emerging international legal norms, which impose extensive positive obligations on governments to recognize and protect a wide array of rights with respect to lands and resources.51

The Royal Commission on Aboriginal Peoples argues that these State obligations:

oblige Parliament to enact fair and effective institutional processes to facilitate negotiated solutions. The law requires government not to rely simply on the public interest as justification for limiting the exercise of Aboriginal rights but to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources.52

41. Moreover, the fiduciary relationship between the State and indigenous peoples in Canada is such that in the event of an infringement of an Aboriginal right or Aboriginal title, the State must involve the indigenous community in question “in decisions taken with respect to their lands.”53 “There is always,” stated Chief Justice Lamer in Delgamuukw, “a duty of consultation.”54 With respect to Aboriginal title, there is a duty to consult with Aboriginal peoples in relation to natural resource allocation if these rights may be affected.55 In addition to the State’s duty to consult when an Aboriginal right is shown to be violated,56 there is also a State duty to consult whenever government decisions may affect the exercise of Aboriginal rights or Aboriginal title.57

51. Id.
52. Id. at 565.
53. Delgamuukw, supra note 31 at 1113.
54. Delgamuukw, supra note 31 at 1113.
42. Courts have held that the fiduciary obligation of the State is not satisfied by meetings between indigenous people and any private company carrying out the actual resource extraction. Other cases have suggested that delegation of the duty to a private entity occasionally might be sufficient, but they also have cited the potential for mistrust and conflict of interest inherent in such an arrangement. Generally, the State must remain in an overseeing role, even when the permit holder is obligated by the State to determine the extent to which the activity in question might infringe indigenous rights. The final responsibility for consultation rests with the State.

43. The content of the duty of consultation will vary with the circumstances. In Delgamuukw, the Court held that:

[[In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.]

44. At a minimum, the duty to consult has been interpreted to include a duty to inform, listen, and to negotiate with indigenous peoples whose land is at issue. The consultation must be meaningful, and the duty includes a requirement to provide full notice and other necessary information to aboriginal groups. In determining whether the duty to consult has been fulfilled, the judiciary will consider whether the State was informed about the practices and views of the indigenous community in question when the consultation period was over.

45. A recent decision of the British Columbia Environmental Appeal Board required the province to meaningfully consult with relevant indigenous communities on a non-adversarial basis to attempt to determine the nature and scope of Aboriginal title and rights in the area, the extent to which those rights would be infringed by the proposed activity, and how

58. Id. at 72.
60. Delgamuukw, supra note 31 at 1113.
61. Delgamuukw, supra note 31; see also Nunavik Inuit, supra note 54.
any infringement might be avoided. In addition, features of the process were to be sensitive to the values of the indigenous community involved, including the possibility of different communication styles, and the necessity of building a relationship of trust, not merely “filling a bureaucratic requirement.”

46. Recently, the judiciary expressly held that the duty to consult includes a duty to negotiate, making it clear that the duty to consult in certain circumstances entails much more than mere information sharing. The fact that the duty to consult emanates in part from the fiduciary relationship between the State and indigenous peoples entails that the duty includes some responsibility to take action to protect and promote indigenous interests.

47. Various levels of government in Canada have instituted policies designed to ensure that State duties owed to indigenous peoples are properly discharged and to minimize the possibility that future State actions will be held unconstitutional. In 1998, for example, the British Columbia provincial government altered its consultation guidelines in order to comply with the Delgamuukw decision. Set out in the British Columbia Consultation Guidelines are several principles which attempt to incorporate the Delgamuukw decision within the structure of statutory decision making. Proposed methods of consultation include:

- meetings and correspondence with indigenous groups;
- exchanges of information related to proposed activities;
- the development and negotiation of consultation protocols;
- site visits to explain the nature of proposed activities in relation to potential Aboriginal rights;
- carrying out traditional use studies; and
- participation in local advisory bodies.

64. Tsilhqot’in National Government, supra note 59.
66. See R. v. Bones, supra note 63 (where the judge suggested that the Crown had some obligation to enter the process prepared to change policies and criticizing the existing policy which “... leads to nothing more than minor amendments. ...”). See also Treaty 8 Tribal Association v British Columbia [Minister of Forests] [1994] B.C.E.A. No.11, Appeal No.92/27 (Environmental appeal board characterized the actions of the Minister as “get permission to spray, then talk,” and stated that such an approach was unacceptable in light of the Delgamuukw consultation requirements.)
67. Available at http://www.aaf.gov.bc.ca/aaf/consult.htm, the web site of the Ministry of Aboriginal Affairs, province of British Columbia.
48. The following consultation principles have since been adopted by British Columbia and apply to all provincial agencies:\(^{68}\)

- The province must assess the likelihood of Aboriginal rights and title prior to land or resource decisions concerning Crown land activities;
- Consultation should be carried out as early as possible in decision making; and
- Consultation is the responsibility of the Crown.

49. Similarly, the *Crown Forest Sustainability Act* came into effect in Ontario 1 April 1995.\(^{69}\) It has several provisions for indigenous participation in forest management practices, referred to as the Forest Management Native Consultation Program. The Program obligates the province to produce a Native Background Information Report with the participation of willing indigenous communities. This report must contain:

- a summary of past use of the timber resources by those indigenous communities;
- a summary of past use of other resources by those indigenous communities, in particular, traditional and commercial hunting, fishing, trapping and gathering;
- an indigenous values map and listing which identifies the location of specific natural resource features, land uses and values which are specifically used by, or of importance to, those indigenous communities. In particular, the following features, land uses and values will be mapped:
  - areas of significance to local indigenous communities, such as areas used for traditional and recreational activities;
  - boundaries of trapline management areas of those indigenous communities (ie., all registered trapline areas associated with individual indigenous communities);
  - Reserves and other indigenous communities;
  - areas that have been identified as being required as Reserve lands or for economic or capital development projects of those indigenous communities;

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68. *Id.*
areas used by those indigenous communities for fuelwood or building materials; and

sites of local archaeological, historical, religious and cultural heritage significance to those communities; including indigenous graveyards, spirit sites and burial sites;

a summary of forest management-related problems and issues specific to those indigenous communities, which arose during implementation of the forest management plan for the past five-year term; and

a summary of the success or failure of negotiations at the local level with indigenous peoples whose communities are situated in the management unit, in order to identify and implement ways of achieving a more equal participation by indigenous peoples in the benefits provided through forest management.  

50. The notice provisions in the *Crown Forest Sustainability Act* are extensive. Notices are to be sent to band councils, indigenous organizations, local and indigenous media, the indigenous community served by the band council or other identified community representative, the appropriate treaty organization, and appropriate tribal councils. Notice must be provided in English and the appropriate indigenous language, unless the band council, indigenous organization or community advises that notice in the indigenous language is not necessary. An invitation to participate in consultations and the creation of a Native Background Information Report is to be sent to each indigenous community, who can choose to participate in the Program or in a standard public consultation. The Ministry of Natural Resource and the indigenous community are to agree on the forum to be used for further discussions. A draft of the Report is to be made available for Stage Two of the public consultation process and for review and comment by the indigenous community at the community meeting if the indigenous community agrees to be involved in the process. The community meeting allows for the addition of further information or the inclusion of future research.

51. Ontario's regime attempts to accommodate the unique value systems which inform indigenous forestry practices. Where an Ontario indigenous community has chosen to become involved with the Program, the planning team must include a Report on Protection of Identified Native

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70. *Id.* at A-9–A-10.
71. *Id.* at A-151–A-156.
72. *Id.* at A-10.
Values, which shows how the identified values in the Native Background Information Report are affected by the proposed forest-management operations, and how the indigenous values should be addressed. This preliminary Report must inform the indigenous community about the proposed project by including:

- a copy of the mapped summary of the proposed areas of operations and alternative road corridors;
- the most current version of the values map(s) and the indigenous values map;
- documentation of the indigenous values identified in the Native Background Information Report which are affected by the proposed operations for the five-year term, including evaluation of alternative prescriptions;
- an evaluation of the alternative road corridors of potential interest to the indigenous community; and
- a comment sheet, and the names of an indigenous community contact person and an governmental contact person.

52. The final Report will include:

- a copy of the summary of the draft forest management plan;
- the most current version of the values map and the indigenous values map;
- in order to communicate the results of previous consultation, the selected prescriptions for the specific areas of concern associated with the indigenous values identified in the Preliminary Report on Protection of Identified Native Values; the reasons for the selected prescriptions; and any associated governmental preliminary required alterations; and
- the selected road locations of potential interest to the indigenous community; reasons for the selected locations and use management strategies; and any associated governmental preliminary required alterations.73

73. Id. at A-139–A-140.
D. Remedies

53. Prior to any final determination of the constitutionality of the State action in question, several interim remedies are available to indigenous communities under Canadian law. Interim relief against the State and third-party activity on disputed territory must be available to serve as an incentive for the State to reach a mutually acceptable agreement concerning lands and resources.

54. An effective form of interim relief is an interlocutory injunction, an order restraining certain persons from engaging in certain activity pending trial or other disposition of an action. The court typically will examine a number of factors to determine whether an interlocutory injunction is appropriate in the circumstances, including the strength of the plaintiff’s case, whether the plaintiff or defendant would suffer irreparable harm, the balance of convenience, and the effect of an interlocutory injunction on the status quo.

55. In order to obtain an injunction, an indigenous community must satisfy the general tests set out in Canadian law for the granting of injunctions. It must prove that there is a serious question to be tried as to the existence of a right and the breach of that right, that irreparable harm will be done without an injunction, and that the balance of convenience favours the granting of an injunction.

56. Canadian courts have granted interlocutory injunctions to indigenous communities in order to prevent logging on indigenous lands. In doing so, the courts have found that such disputes raise serious legal questions, and that the historical, symbolic and cultural importance of forests to indigenous peoples will be destroyed if the government allows logging on traditional lands to proceed pending trial. In comparison, granting an injunction has minimal impact on a forestry company. The Kitkatla First Nation, for example, successfully challenged the grant of a timber cutting permit in an area of historical and cultural indigenous significance. They were granted an injunction which suspended the permit pending proper consultation.

57. With respect to final, as opposed to interim, remedies, an indigenous community whose title or rights have been unjustifiably interfered with would be entitled under Canadian law to a declaration to this effect and an award of damages. Where lands held under Aboriginal title are

74. RCAP, supra note 50 at 564.
75. These tests are set out in the leading Canadian case, RJR. MacDonald Inc. v. Canada (Attorney General) [1994] 1 S.C.R. 311.
77. Kitkatla Band, supra note 62.
being used by corporations in profit making ventures (forestry, mining, real estate development, tourism or fishing, for instance), compensation may include joint management of the resource extraction, profit sharing for the aboriginal community from the resource extraction, or other guaranteed benefits (jobs, training, community benefits) to the indigenous community flowing from the operations of the company’s operations.

58. Courts also have awarded damages in trespass for unauthorized logging. In Shewish v. MacMillian Bloedel Limited,\(^78\) the trial judge held that compensation was valued at the best available price for the timber minus transportation costs, plus restoration costs and prejudgment interest.\(^79\) The case was appealed to the British Columbia Court of Appeal, which also awarded damages. Although there was discrepancy in the trial judge’s formula and the Court of Appeal’s formula, both used as the initial figure the highest possible price obtained for the timber that had been extracted from traditional indigenous territory.

59. Helpful assistance in determining compensation for infringements on title can be found in the recently concluded Nisga’a Final Agreement, where “fair compensation” is defined as follows:

“fair compensation” means in respect of land, compensation as the term is generally applied in respect of a taking by the Crown, and will be based on:

- fair market value of the land or interest that is expropriated or
- replacement value of any improvement on the land that is expropriated or otherwise taken,
- disturbance caused by the expropriation or taking , and
- in the case of Category A Lands, any particular cultural values.\(^80\)

60. Given that Article 1 states that State parties undertake to respect the rights recognized by the Convention and to ensure the full and free exercise of those rights without discrimination, and that Article 2 obligates State parties to adopt measures as may be necessary to give effect to rights guaranteed by the Convention, an interim injunction, a declaration, and damages would not fully do justice to the nature of the claim before this Court. As described below, this Court should also structure its relief in a manner that facilitates negotiation of a co-management agreement between the parties.

\(^79\) Id.
\(^80\) The Nisgaa Final Agreement is available at http://www.aaf.gov.bc.ca/aaf/treaty/nisgaa/nisgaaa.htm, the website of the Ministry of Aboriginal Affairs of the province of British Columbia.
IV. FROM TITLE TO CO-MANAGEMENT

A. Co-Management Described

61. Successful litigation by indigenous communities in Canada often leads to the negotiation of co-management agreements, wherein indigenous and non-indigenous parties reach agreement on their respective rights and obligations concerning ownership and authority over natural resources and the sharing in the profit and other benefits which flow from the activity in question. Co-management agreements are an innovative and important institutional mechanism for the promotion of a relationship of peaceful coexistence between indigenous peoples and the State.

62. Co-management arrangements are congruent with three of the central principles underlying Canadian jurisprudence on Aboriginal title: namely, that Aboriginal title includes the right to choose the uses to which the land should be put; that indigenous consent is required prior to proposed State action that significantly impairs indigenous rights; and that indigenous communities should compensated for infringements of their title.81 These principles entail that consultation and negotiation should proceed with a view to creating agreements providing for the co-management of resource extraction activity.

63. Co-management agreements (sometimes called joint or shared stewardship, joint management, or partnership agreements) can be loosely defined as formal State-indigenous agreements specifying the parties’ respective rights, powers and obligations regarding the management and allocation of resources in a specific territory.82 Such agreements are premised on consultation with members of the public on matters of land and resource allocation and management; the recognition of joint administrative, if not legislative, authority; and multi-party decision making. Co-management is essentially a form of power sharing, although the relative balance among parties, and the specifics of the implementing structures, can vary widely. Co-management does not depend on proof of indigenous title or ownership of the resources, but requires acknowledgment by each party that the other has legitimate interests at stake.

64. A number of co-management agreements have been signed between various levels of the Canadian State and indigenous communities.83

81. Delgamuukw, supra note 31 at 1113–1114.
82. RCAP, supra note 50 at 666.
83. Examples of co-management arrangements in the Canadian context include:
   - James Bay and Northern Quebec Agreement;
   - Inuvialuit Final Agreement;
They typically cover a broad range of land and resource matters. These include power sharing and co-operation relating to fish stocks, wildlife harvesting, natural resource management, the management of parks and conservation areas, environmental screening and review procedures, land use planning and water.\textsuperscript{84} Each agreement creates a board, with members usually appointed in equal numbers by the parties. The responsibilities and powers of the boards fall into two main spheres: allocation, in which they have actual decision-making power; and management, in which they have advisory roles.\textsuperscript{85}

65. Co-management has received support from a number a different quarters in Canadian society. For example, the federal Parliamentary Standing Committee on Aboriginal Affairs and Northern Development cites the following benefits of co-management arrangements:

- greater economic benefit to Aboriginal and local communities,
- improved management, reduction of conflict over resource use and development,
- protection of private interests,
- sustained resources, and
- recognition and protection of existing Aboriginal and treaty rights.\textsuperscript{86}

\begin{itemize}
  \item Yukon Umbrella Final Agreement;
  \item Nunavut Final Agreement;
  \item Beverley-Kaminuriak Caribou Management Board;
  \item Auyuittuq National Park Reserve, Baffin Island;
  \item South Moresby/Gwaii Haanas National Park Reserve, British Columbia;
  \item Wendaban Stewardship Authority, Temagami, Ontario;
  \item Barriere Lake Trilateral Agreement, Quebec;
  \item Interim Measures Agreement between the Algonquin of Golden Lake First Nation and the Government of Ontario;
  \item Whitedog Area Resources Committee, Wabaseemoong Independent Nations and the Province of Ontario.
\end{itemize}

Ontario’s community forestry initiative, described supra note 69, is one form of co-management. Another type is the system of controlled exploitation zones for fish and wildlife in Quebec. A third type involves recent proposals for multi-party stewardship of the Bras d’Or Watershed on Cape Breton Island in Nova Scotia.

\textsuperscript{84} RCAP, supra note 50 at 668.
\textsuperscript{85} Id. at 668.
\textsuperscript{86} Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, Report on the Co-Management of Natural Resources, Chairman Raymond Bonin, December 1995 at 7 (hereinafter Standing Committee Report).
The Aboriginal Justice Inquiry of Manitoba found that “co-management of natural resources is the only suitable method” of reconciling indigenous and State interests. The Canadian Government supports co-management arrangements with indigenous peoples, and agrees that there is a constitutional and legal basis for co-management arrangements.

66. Co-management has also received a strong support from all levels of the judiciary. A spirited defence was provided by Judge Barnett of the British Columbia Provincial Court in *R. v. Bones*:

Some . . . people say that the courts want to give Aboriginal people total control over fish, wildlife and other resources across Canada, and that if this happens our resources will soon be destroyed. Persons making such statements are mischievous scaremongers who have not read or understood what the courts are saying.

The courts have only said that governments can no longer make laws and regulations which ignore or trample upon the special rights of Canada’s first citizens. Those rights must be taken seriously, and government officials must be prepared to show that their policies really do meet that test.

67. Co-management is more than simple profit sharing for indigenous communities. Claudia Notzke has described the impetus for indigenous involvement in natural resource management arrangements:

With regard to Aboriginal people’s thrusts towards a right to resources—no matter whether we are concerned with treaty rights, Aboriginal rights, or rights evolving from comprehensive claims settlements—it is important to realize that native groups do not just want access to and a fair share of the resources in question, but they also strive for participation in the management of these resources. They want to share in the power to make decisions about the fate of the land and the resources it supports. Native people are also interested in opportunities to contribute their traditional knowledge to the resource management regimes they helped to set up. In short, they want to be partners in resource management.

B. Co-Management and the Forestry Industry

68. In Canada, disputes over forest lands, similar to that between the Awas Tingni and Nicaragua, have been resolved through the negotiation of

co-management agreements. This kind of solution has become a part of national forestry policy. On May 1, 1998, several provinces and the Federal Department of Natural Resources signed the Canada Forest Accord (May 1, 1998). The accord pledges that Canada will commit to:

[r]ecognizing and making provisions for Aboriginal and treaty rights, ensuring involvement of Aboriginals in forest management and decision-making, consistent with these rights, supporting the pursuit of both traditional and modern economic development activities, and achieving sustainable forest management of Indian Reserve Lands.91

The Canadian Council of Forest Ministers explicitly linked their support for indigenous participation in forestry management to the recognition of Aboriginal rights and title:

Forest management and planning processes should be designed, as far as possible, with input from involved Aboriginal communities, as well as other affected groups and communities. Final plans should reflect the options considered and actions taken with respect to duly established Aboriginal and treaty rights.92

69. State institutions have also demonstrated their understanding of Aboriginal rights and title by providing funds to ensure indigenous participation in forestry management. The Canadian Forestry Service released a “Policy for Indian Land Forestry Programs” in 1983, which advocated the provision of funding and professional forestry advice to Indian bands.93 Ninety seven indigenous communities were assisted through this program, and the Intertribal Forestry Association of British Columbia was also funded. The 1988 Canadian Forestry Service policy continued the objectives of the 1983 report, including:

- increased indigenous economic self-sufficiency and self-reliance;
- increased indigenous control and responsibility over their lands, resources and economic development;
- development of sustained community-based economic growth for Reserve lands;

91. See Report of the Task Force on Aboriginal Issues (March, 1999) (available at the website of the New Brunswick provincial government, http://www.gov.nb.ca/op_cpm/task/task.htm (confirming that the New Brunswick Government is a signatory to the Canada Forest Accord.)
93. Notzke, supra note 90 at 90.
enhanced opportunities for business and investments by indigenous people;

increased employment and training opportunities for indigenous people.94

70. Supporting indigenous spiritual use of the forest and forest-related resources, the Canadian Council of Forest Ministers has made statements which recognize the spiritual connection between indigenous communities and forests.95 Similarly, the Department of Indian Affairs and Northern Development supports indigenous involvement in the forest sector: “[i]t bears repeating, that no element of Canadian society is more deserving of a place in our forests or in the practice of forestry than are Indian people.”96

71. The preamble to the province of British Columbia’s Forest Practices Code97 includes recognition of the spiritual, economic and cultural needs of indigenous people. Specifically, it states that sustainable use includes:

- managing forests to meet present needs without compromising the needs of future generations;

- providing stewardship of forests based on an ethic of respect for the land; and

- balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including indigenous peoples.

72. The Government of the Province of Ontario has also recognized the need to negotiate and deal equitably with indigenous peoples over forestry management. This understanding is reflected in the Ministry of Natural Resources Class Environmental Assessment for Timber Management on Crown Lands in Ontario, which requires that

During the term of this approval, MNR District Managers shall conduct negotiations at the local level with Aboriginal peoples whose communities are situated in a management unit, in order to identify and implement ways of achieving a more equal participation by Aboriginal peoples in the benefits provided through timber management planning. These negotiations will include but are not limited to the following opportunities:


• Providing job opportunities and income associated with bush and mill operations in the vicinity of Aboriginal communities;

• Supplying wood to wood processing facilities such as sawmills in Aboriginal communities;

• Facilitation of Aboriginal third-party license negotiations with existing licensees where opportunities exist;

• Providing timber licenses to Aboriginal people where unalienated Crown timber exists close to reserves; and

• Development of programs to provide jobs, training and income for Aboriginal people in timber management operations through joint projects with the Department of Indian and Northern Affairs.98

73. Recently, the Canadian Government, represented by the Department of Natural Resources, Canadian Forest Service, Great Lakes Forestry Centre, and the Ontario Government, represented by the Ontario Ministry of Natural Resources, signed a Memorandum of Understanding concerning Cooperation in Forestry.99 This agreement recognizes that both levels of government are obliged to promote the participation of indigenous peoples in forestry. It focuses on co-ordinating federal and provincial information, projects and services in order to enhance the participation of indigenous peoples in forestry, including the enhancement of educational opportunities.

74. In New Brunswick, the provincial government appointed a task force with the mandate of improving its relationship with indigenous peoples and providing guidance as to long-term harvesting forestry practices. The Task Force on Aboriginal Issues reported on cultural awareness, social development, justice, economic development, forest management on Crown lands and Aboriginal participation in the forestry industry.100

75. In its 1994 Final Report, The Forest Round Table on Sustainable Development recommended that “[f]orest management practices and policy must recognize and make provision for the rights of Aboriginal people, reflecting their distinctive position and needs within Canadian society.” Participants included the Association of University Forest Schools of Canada, Canadian Federation of Professional Foresters’ Association, Canadian Forestry Association, Council of Forest Industries of British Columbia, IWA Canada, Miramichi Pulp and Paper, Inc., and the Ontario Forest Industries Association. In its Report, the Round Table stated:

99. Ontario Ministry of Natural Resources and Natural Resources Canada, Memorandum of Understanding concerning Cooperation in Forestry, signed Nov. 18, 1998.
100. Supra note 91 (http://www.gov.nb.ca/OP–CPM/task/task.htm).
The Fur Institute supports Aboriginal programs and has Aboriginal representatives. The Ontario Forest Industries Association accepts that Aboriginal values are explicit components of the forest environment. The Ontario Forest Industries Association resolves to be a major factor in the resolution of Aboriginal issues as they apply to forest management, and a proponent of cooperative ventures with Aboriginal groups. . . . Through COFI, a British Columbia Forest Industry Native Affairs Task Force has been established which supports the settlement of native land claims through negotiations which meet the economic, environmental and social needs of all British Columbians. 101

The industry representation at the Round Table indicates that there is wide-spread recognition of the need to include indigenous participation at all levels within the forest sector.

C. Making Co-Management Effective

76. A number of governmental and nongovernmental institutions in Canada have made specific suggestions about the negotiation, operation and outcomes of effective co-management agreements.

1. Negotiations

77. The structure of negotiations over co-management can be critical to the creation of agreements that respect the legitimate interests of all parties. Indigenous peoples, who not only hold rights with respect to the land, but have unique cultural concerns at stake, should be at the centre of negotiations, even when other interests are also represented (for instance, non-indigenous communities and the resource sector of industry).

78. As discussed above, negotiations must be structured so as to incorporate indigenous cultural values and traditional knowledge. The Standing Committee on Aboriginal Affairs and Northern Development supports combining traditional knowledge, practices and values of indigenous peoples and local communities with government practices towards the goal of sustainable development. The Standing Committee sees the sharing of information and knowledge between government scientists and indigenous peoples as an important first step, but also calls for the consolidation of the two sources of information in order to ensure integrated resource management. 102


102. Supra note 86 at 7–9.
79. The Standing Committee also recommends that traditional ecological knowledge be recognized through training opportunities and hiring practices in the following manner:\textsuperscript{103}

The Committee suggests that all levels of government implement strategies to encourage Aboriginal people with traditional ecological knowledge to pursue training programs in natural resource management.

The Committee further encourages government departments, industry and local co-management boards to actively recruit qualified Aboriginal resource managers and conservation officers.

80. Similarly, the Clayoquot Sound Scientific Panel has recommended that indigenous perspectives and traditional knowledge be formally recognized and that indigenous peoples and perspectives be included in decision-making. In addition, the Panel urged that educational opportunities be provided for non-indigenous forestry workers to learn indigenous histories and indigenous forest management practices.\textsuperscript{104}

81. Adequate funding of indigenous groups is also required, in order that they can properly participate in negotiations and consultations. Sometimes, technical advice must also be made available.

2. Structure and Operations of Co-Management Boards

82. The structure and operation of co-management boards must also be carefully considered. Indigenous representation on the board is of particular importance. The Royal Commission on Aboriginal Peoples recommended that at least half of any board should be indigenous, and that if public servants are there to serve as technical advisors, they should be non-voting participants.

83. Similarly, the Standing Committee recommended that:

the membership of local co-management authorities be composed in the majority of local people knowledgeable about resource use and conservation. The local membership should include an appropriate balance between Aboriginal and non-Aboriginal people such that decisions reached by the co-management board will be respected and adhered to by all local people.\textsuperscript{105}

84. The Royal Commission listed the following factors as critical to the effective operation of a co-management board:

\textsuperscript{103} Ibid. at 10.
\textsuperscript{105} Standing Committee, supra note 96 at 10.
• language of operation;
• recognition of the role of traditional knowledge;
• the location of meetings;
• provisions for training and employment;
• access to independent expertise;
• adequate funding; and
• mutual respect and understanding.  

85. It is also important to ensure that the recommendations of local co-management boards are implemented by the appropriate government institutions. The Standing Committee on Aboriginal Affairs and Northern Development suggests that:

local co-management boards be authorized to conduct environmental and socio-economic impact studies in relation to large-scale developments. The appropriate government officials should then review the boards’ findings and implement their recommendations whenever feasible.  

3. Distribution of Wealth

86. The final important area of consideration for any co-management arrangement deals with the distribution of the benefits, financial and otherwise, of resource extraction.

87. Financial compensation, in the form of a share of the profits of resource extraction is one kind of benefit sharing which co-management arrangements can incorporate. However, there are many other methods which can be used in addition to profit sharing to ensure that aboriginal communities gain from the use of land and natural resources they hold rights in.

88. For instance, indigenous communities can receive additional training and employment opportunities for indigenous peoples related to the resource extraction in their community. Ontario policy, cited above, suggests that raw wood harvested on aboriginal lands should be provided to sawmills in aboriginal communities for processing.

89. Successful co-management arrangements are only possible where the parties are committed to the idea, and the details of implementation

106. RCAP, supra note 50 at 675–676.
107. Supra note 86 at 21.
reflect the principles that co-management is meant to embody, namely, peaceful co-existence and the equitable sharing of lands and resources.

90. The National Aboriginal Forestry Association has suggested the following benchmarks to measure the effectiveness of Aboriginal participation:109

- indigenous community satisfaction with their participation;
- the number of indigenous persons involved;
- indigenous roles in planning, implementation and monitoring of forest management;
- the degree of control in decision-making exercised by indigenous peoples;
- the inclusion of traditional indigenous knowledge in planning;
- economic well being of indigenous communities;
- level of conflict over resource development; and
- employment of indigenous peoples.

These factors parallel the suggestions with respect to negotiation, operation and distribution of benefits noted above.

91. The Canadian experience suggests that regimes which allow resource extraction from indigenous territories must be constructed to allow indigenous peoples choice over the uses of their land, while preventing exploitative deals which are harmful to the long term interests of the indigenous community.

V. CONCLUSION

92. The relationship between the Canadian state, indigenous peoples and the resource sector has been extensively considered by indigenous peoples, Canadian courts, legislative bodies, natural resource industry organizations, and academic commentators. The jurisprudence and practices which have developed out of this experience provide useful approaches to the task of interpreting Articles 1, 2 and 21 of the American Convention in the context of an indigenous land claim against a member State.

93. Canadian law governing the relationship between indigenous

peoples and the State developed out of a colonial experience similar in certain respects to the historical and current situation in Nicaragua. After many years of struggle by indigenous communities in Canada, their rights to property—both physical (land) and intangible (culture)—were enshrined in the Constitution of Canada. The practice of co-management, already widespread and growing in Canada, provides an important model for reconciling the position of indigenous peoples and modern States with regards to land and resource use when it is combined with a principled approach to indigenous title. Canadian law and the development of co-management agreements provide useful models for resolving the dispute between the Awas Tingni and the Republic of Nicaragua, and for resolving disputes between indigenous peoples and states throughout the Americas in a manner consistent with evolving principles of international and domestic law.