

2016 -  
2020

# Valdes Island Conservancy 4-year Strategic Planning Report



Alexandra de Jong Westman, President.

Valdes Island Conservancy

7/6/2016



## Contents

<b>INTRODUCTION</b> .....	3
How did the Valdes Island Conservancy come to be? .....	3
Who governs the Valdes Island Conservancy? .....	3
Why do Strategic Planning and what is it? .....	3
How did the Mission and Mandate of the Valdes Island Conservancy come to be?.....	4
For the Phase 1 meeting, what was the Board’s individual expectations for outcomes of the meeting?4	
For the Phase 2 meeting, what was the Board of Director’s Expectations?.....	4
<b>STRUCTURE OF THE VALDES ISLAND CONSERVANCY</b> .....	5
Board of Directors.....	5
Committees, why do we have them? .....	5
Committees, what do they do? .....	5
Safety Committee .....	5
Legal Affairs Committee.....	5
Lands and Trails Committee.....	6
Conservation and Education Committee .....	6
First Nations Committee .....	6
Membership Committee.....	6
Revenue Committee .....	6
What are some of the past projects of the Conservancy? .....	7
What are some of the current projects? .....	7
What are our future projects? .....	7
<b>WHAT ARE THE VALUES OF THE CONSERVANCY?</b> .....	8
<b>WHAT IS THE MISSION OF THE CONSERVANCY?</b> .....	8
What is a Mission Statement and why do we have one? .....	8
What is the Conservancy’s current Mission Statement and does it work? .....	8
What is the NEW Mission Statement?.....	9
<b>WHAT IS THE VISION OF THE CONSERVANCY?</b> .....	9
What is a Vision Statement and why do we need one? .....	9
What is the Vision Statement of the Conservancy? .....	9
<b>DO THESE VALUES, MISSION, AND VISION, FIT WITHIN OUR CURRENT CONSTITUTION?</b> .....	10
<b>NEXT STEPS?</b> .....	10



APPENDIX A – FIRST NATIONS COMMITTEE APPROACH DOCUMENT..... 11



## INTRODUCTION

This document serves to summarize the outcomes of the Strategic Planning completed by the Valdes Island Conservancy Board of Directors (the Conservancy) on January 17, 2016 and again on April 21, 2016. This is a report that documents the process of strategic thinking, ideas, and direction that the Conservancy will embark on over the next four years (2016 – 2020).

This document is intended to be for circulation within the Board of Directors, Committee volunteers, and all members of the Valdes Island Conservancy, in order to include and collaborate on the future direction of the Conservancy. Without the full support and engagement of the membership, none of the strategies or initiatives are possible.

This document is intended to be read as an outline of the first phase of a larger organizational management activity for the Conservancy to set priorities, and focus our collective energies and resources, to achieve our goals. This report serves as a summation of the discussions, feedback, ideas, and brainstorming that arose from the meeting.

### How did the Valdes Island Conservancy come to be?

In order to address perceived threats by the conversion of the area zoned as RR (recreational reserve) behind most of the Valdes recreational properties to a Woodlot Licence, the Conservancy was formed to act as a unified voice when communicating with the BC government.

### Who governs the Valdes Island Conservancy?

The Conservancy is not a regulatory body, but a community-based, non-profit organization dedicated to the protection and stewardship of natural and working lands of Valdes Island for the public good. The Conservancy is governed by municipal, provincial, and federal rules and regulations, and attempts to provide clarity on these rules and regulations to all islanders.

The Conservancy was formed to serve as a bridge between the land owners and users of Valdes Island, and other government and non-government individuals and organizations with interest in the lands and waters associated with Valdes Island.

### Why do Strategic Planning and what is it?

The Board of Directors is ultimately responsible for the long-term success of the Conservancy. This means that strategy cannot be neglected; it must be one of the central elements of the Board's activities. There are four main objectives to be accomplished through strategic planning:

1. Adding diverse viewpoints to reinforce the quality of the direction of an organization and the related decisions;
2. Improves the Board's understanding of the Conservancy's purpose, role, and accountability to its membership and its Mandate;
3. Helps Board members work in a collaborative rather than confrontational setting in achieving the goals as the Conservancy moves forward with its various initiatives; and,
4. Acts as a reference document for new Board members.



## How did the Mission and Mandate of the Valdes Island Conservancy come to be?

- The Mission Statement was developed to guide the Constitution.
- The Official Community Plan were established by the Thetis Island Local Trust Committee in consultation with many of the islanders of Valdes Island to guide development on Valdes Island
  - The OCP project initiated by the Thetis Island Local Trust Committee was initially started in 1992
  - The OCP and bylaws were finalized in 1998 and amended in 2010 to reflect a climate change statement.
- When the Conservancy Society Constitution was drafted, other conservancies were referred to, and some components of their constitutions, were considered.
- The Mission Statement was designed to be as broad as possible.

## For the Phase 1 meeting, what was the Board's individual expectations for outcomes of the meeting?

Prior to embarking on the Phase 1 meeting held in January, the Board individually stated what they thought the purpose of the meeting was, and their expectations as far as the end result of the day. Below are those expectations:

- Need to have a strategic plan to avoid chaos, particularly around major meetings, decisions and project initiatives,
- To better determine the future direction of the Conservancy
- Prioritize activities and measure them against the Bylaws and the Constitution
- Identify opportunities to massage the current rural land use Bylaws as dictated by the Thetis Island Local Trust Committee, and identify opportunities to work with this group
- A learning experience for all Board members to identify the goals of the Conservancy
- Have a clearer idea of what we do and where we are going without bureaucracy
- Identify more opportunities and direction in the relationship building with other island users, including the Lyackson First Nation, land owners, recreational land users, hunters, etc. while pursuing our Mission Statement
- Director retention, where everyone feels like they have been heard and their thoughts and ideas are honoured
- Find ways to promote positive community spirit within the membership and throughout the Island
- Find clarity in the Vision of the Conservancy, and focus on the purpose and the legal, social, and political regimes that we are governed by and have more clarity on the documentation around these regimes
- Open and active sharing of ideas from all Committees
- Renew team building commitments to task and to fellow Directors

## For the Phase 2 meeting, what was the Board of Director's Expectations?

The Board of Directors had a few months to ruminate on the outcomes of the Phase 1 meeting, and to review the initial report provided for internal review.



The intended objectives of the Phase 2 meeting were to review the outcomes of the Phase 1 meeting, to better articulate the Core Values, and to finalize both the Mission and Vision statements for the Conservancy. These objectives were successfully met at the April meeting.

## STRUCTURE OF THE VALDES ISLAND CONSERVANCY

### Board of Directors

The Conservancy is made up of a volunteer Board of Directors which includes four (4) Officers and eight (8) Directors, all carrying out various tasks, roles, and projects associated with the Conservancy. This is a requirement of the Bylaws, and a recommended method of governance for non-profit organizations.

Through monthly meetings, the Conservancy Board is able to discuss projects, initiatives, ideas, and issues, that may fall under the Mandate and Mission of the Conservancy.

Since its inception, the Conservancy has become more formalized through the establishment of monthly meetings, the development of Terms of Reference for each of the Committees, developing comprehensive Director Expectations, and moving to an online communication platform, called Basecamp. Through these initiatives, the Conservancy has increased its efficiency, increased its transparency within the Board as well as to its members, which are all fundamental to a Board's success and sustainability.

### Committees, why do we have them?

Committees are valuable vehicles used to accomplish many of the Conservancy's projects and initiatives. Committees take on specific and detailed work when the task is too complex and time consuming to handle in meetings of the Board, thus increasing overall efficiency.

What's more, committees provide opportunities for the organization to foster and develop talent to keep the leadership productive. Involving more people, allowing volunteers to use their specialized skills or interests, and addressing work in right-sized groups make committees an asset for non-profit organizations.

### Committees, what do they do?

The Conservancy currently has seven committees, and the roles and objectives are summarized below. Each of these committees is governed by a Terms of Reference, developed by the respective committee which serves to outline the goals of each committee, and how best to conduct that business. Below are discussion points from the strategic planning session:

#### Safety Committee

- Provide information to all islanders without becoming the "go-to" party for safety equipment, or the provision of safety services
- Develop an evacuation plan to assist Islanders in an emergency situation
- Engage committee volunteers to achieve the objectives

#### Legal Affairs Committee

- Be a source to ensure the Conservancy and its Board of Directors complies with all regulatory requirements of a Society and other laws



- Review current bylaws and policies and provide recommendations for any changes
- Carry out special meetings to meet these objectives

#### Lands and Trails Committee

- Conform with the Constitution and Mission Statement
- To abide by the objectives and goals as outlined in the Terms of Reference
- Conform and abide by current OCPs, land use bylaws, provincial and federal regulations
- Preserve and protect the lands and trails of Valdes Island
- Preserve and protect the community as a cohesive unit
- Plan for the worst, hope for the best
- Find an effective system in which to engage and incorporate all properties into the mission

#### Conservation and Education Committee

- Preserve, restore, and conserve the plants, animals and ecosystems of Valdes Island
- Honour biological, cultural, and historical values of the Island
- Remain within the Mission Statement
- Promote active member engagement and community involvement in projects and initiatives
- Increase engagement with Thetis Island Local Islands Trust and other neighbouring environmental non-government organizations
- Conscientiously prioritize projects so as to not be overwhelmed
- Continue to build on existing projects
- Work more closely with the Lands and Trails Committee

#### First Nations Committee

- Work more closely with the Lands and Trails committee in the future
- Remain within the Mandate in the Constitution with respect to the trail network of the Island
- Work towards reciprocal relationships with all First Nations with interests in the lands and waters of Valdes Island, as outlined in the approved “Approach Document”, provided in Appendix A.

#### Membership Committee

- Build and engage with membership
- Be a part of the community
- Build and share membership map
- Engage and involve more actively with the coming generations that are fundamental to the long-term sustainability of the Conservancy and who will need to fill the Board in years to come

#### Revenue Committee

- Generate revenue for the Conservancy
- Coordinate and lead initiatives that serve to increase revenue
- Aim for registered charitable status



## What are some of the past projects of the Conservancy?

- Annual Bioblitz and a growing database of both common and rare wildlife and plant species found on the Island
- GPS mapped trail network
- Recreational trail application to the BC government for the protection of existing trails
- Voice in opposition of dumping of waste material in Porlier Pass
- Annual newsletter development and circulation to membership
- Involvement in Rockfish Conservation Area outreach and research
- Completion of Annual Allowable Cut analysis
- Development of a property owner map
- Relationship building with the Islands Trust, Lyackson First Nation, and other island conservancies
- Voice in opposition for the cancelation of forest fire monitoring of Valdes Island
- Abandoned property initiative
- Successful fundraising activities (silent and live auctions)
- Annual General Meetings

## What are some of the current projects?

- Continued follow-up on the recreational trail application
- Annual Bioblitz (June 4-5, 2016!)
- Construction and installation of bluebird boxes for habitat enhancement
- Engagement with ongoing rock quarry feasibility testing
- Annual newsletter
- Continued relationship building with ENGOs, First Nations, provincial governments
- Revising of island hunting regulations to increase safety of cabin dwellers
- Continued development of property map
- Voice to the Province against abandoned properties on Valdes Island
- Evacuation plan for islanders
- Response to logging on Valdes

## What are our future projects?

- Community cookbook which highlights families and the history of people on the island, along with their favorite recipes (next 2-3 years)
- Annual garbage removal weekend
- Participation in the “Great Ocean Cleanup”
- Trail signage (interpretive signs, directional signs) at areas of particular uniqueness or value
- “Consumers Report” page for the website
- Greater engagement with the Provincial government with respect to land use on Valdes (trails, roads, lands)
- Improve presence and position as a Conservancy
- Valdes Island-specific OCP developed by its inhabitants
- Development of ecosystem maps indicating areas of special interest, including mapped areas of potential restoration, provincially-listed at-risk ecosystems or species
- GIS documentation of biological hotspots
- Identify a Conservancy Board member to act as a Liaison with the Thetis Islands Local Trust Committee





## WHAT ARE THE VALUES OF THE CONSERVANCY?

Core Values describe what the members of the Conservancy believe in. They are the fundamental principles that guide everybody's work inside the Conservancy; as well as their interaction with the outside world. Below are those values as vocalized by its Directors.

- Act ethically, with integrity, honesty, and honour
- Be fair, just, and reasonable
- Act with respect and transparency, without corruption, in both the listening to and relaying of information
- To honour and be guided by evidence-based evaluations
- Be advocates for the Island in face of threats to biological and cultural integrity of the Island
- Be advocates and stewards of the goals outlined in the Conservancy's Mission Statement
- Transparency and full engagement of membership through emails, social media, newsletters, AGMs, and day-to-day conversations
- Encourage a multi-generational approach to governance, planning, and membership

## WHAT IS THE MISSION OF THE CONSERVANCY?

### What is a Mission Statement and why do we have one?

A Mission Statement is a statement that defines the essence or purpose of the Conservancy, and what it stands for i.e. what broad products or services it intends to accomplish and what services for its membership. The Mission Statement also gives members, land users, and other stakeholders, a window on the Conservancy's reason for being and was initially designed as a means by which land owners, occupiers and users of Valdes Island, could understand the purpose of the Conservancy.

The Mission Statement ensures some transparency for all members and non-members of the Conservancy, so they can have some confidence in the interest and objectives of the Conservancy are those that they want to support and be involved in. A Mission Statement is also designed to ensure that all members, non-members, and land users of Valdes Island, are clear on the overarching purpose of the Conservancy so everyone can be focused on the same goals and objectives.

### What is the Conservancy's current Mission Statement and does it work?

The Conservancy's initial Mission Statement established at its inception, was

*To preserve, protect and restore the lands and waters of Valdes Island, and the smaller islands in its surrounding waters, for the plants, animals and natural communities that represent diversity of life and Gulf Island ecosystems, and for the beneficial use and management of the scientific, historical, cultural, scenic and compatible outdoor values of these areas.*

The Board discussed the applicability and effectiveness of the current Mission Statement, and came to the conclusion that it was:

- too wordy, and perhaps not specific enough
- nice and general, and adequately captures initiatives and projects carried out to date
- we may not be completely honest in the application of our Mission



- community as a whole may not be adequately addressed in the current Statement
- appropriate for the Conservation and Education Committee, but not necessarily for all Committees or all Conservancy projects / initiatives
- lacking specific reference to the human community of Valdes Island
- a potential slippery slope, as it may lead us to being in a position of “power” we are not prepared or wanting to be in
- We do not “preserve” anything, so consider removing entirely

## What is the NEW Mission Statement?

Based on the collective discussions of the Board, it was determined that the current Mission Statement may not adequately address or define who the Conservancy is, and suggested potential alternatives. These alternatives were then disseminated and a final version was successfully adopted, and is as follows:

*To conserve and protect the existing biological and cultural communities of Valdes Island and its environs.*

NB: The Board identified that an effective Mission Statement must be:

- simple and defining, and
- like the Mission Statement of the Galiano Conservancy Association was given as a potential example to strive towards<sup>1</sup>
- represent and honour all communities (ecological, cultural, with culture speaking to human culture, historic First Nations culture and current community culture)

Based on two detailed strategic planning sessions, the Board of Directors unanimously agreed the new Mission Statement met these conditions.

## WHAT IS THE VISION OF THE CONSERVANCY?

### What is a Vision Statement and why do we need one?

A Vision Statement is a declaration of the Conservancy’s objectives intended as an internal guide to decision making, and should be outwardly focused, be applicable into the far future, and encompass more than what the Conservancy currently can fulfill. This serves as the Conservancy’s “road map”, indicating both what the Conservancy wants to become, and to provide guidance in these transformational initiatives by setting a defined direction for the Conservancy.

### What is the Vision Statement of the Conservancy?

*That Valdes Island be recognized for its globally-significant and locally-rare biological diversity.*

---

<sup>1</sup> “To preserve, protect and enhance the quality of the human and natural environment on Galiano Island.”



## DO THESE VALUES, MISSION, AND VISION, FIT WITHIN OUR CURRENT CONSTITUTION?

Based on the consultation of the Board of Directors and the facilitated strategic planning sessions, the newly developed Core Values, Mission Statement, and the Vision Statement, it is the position of the Board that these adhere to the current Constitution governing the Conservancy.

General comments from Board of Directors that will be considered in coming meetings, include:

- The Constitution may not adequately capture the human community of Valdes Island and the importance thereof (NB: we have not nor have we ever been trying to conserve a human community)
- Pt. 2a(ii) requires clarification and may need to be revised to better align with the now better-understood direction and future of the Conservancy
- We do not actively “preserve” lands or waters of Valdes which speaks to potentially owning and managing lands in the future, rather we seek to conserve and restore these... consider removing “preserve” completely from the Mission Statement and the Constitution
- need to include “advocate” in the Mission / Vision and Constitution in the future, since we mostly serve as advocates of the environment rather than anything else

## NEXT STEPS?

The next phase of the Strategic Planning of the Conservancy is to use these new Core Values, Mission, and Vision statements to guide and define projects and assign specific timelines for the execution of these initiatives. This will serve as the basis for a larger “work plan” for the Conservancy, which will outline what we hope to accomplish in the coming years, regardless of the make-up of the Board of Directors.

This work plan will seek input and involvement from not only membership, but all land users of Valdes Island.

The work plan will outline tasks, objectives, projects, and goals, for each of the Committees and the Conservancy as a whole, with clearly defined timelines. The most important component of this, is full engagement by our membership, upon which we are entirely dependent!



## APPENDIX A – FIRST NATIONS COMMITTEE APPROACH DOCUMENT



## Relationship Building

### The Valdes Island Conservancy and the Lyackson First Nation

#### *A New Approach*

**November 13, 2014**

**First Nations Communication Committee:**

Douglas Campbell

Alexandra de Jong Westman

Patrick McAlister

**I. Introduction**

In 2007, the Province of British Columbia recognized Valdes Island as part of the Lyackson's Traditional Territory. At that time, the Government entered into a reconciliation and development agreement (2007 Agreement) on the following terms:

A. British Columbia and First Nations Leadership Council, representing the Assembly of First Nations-BC Region, First Nations Summit, and the Union of BC Indian Chiefs ("Leadership Council") have entered into a New Relationship in which they are committed to reconciliation of Aboriginal and Crown titles and jurisdiction, and have agreed to implement a government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights.

B. This Agreement is in the spirit and vision of the "New Relationship".

C. Work is underway regarding the implementation of the New Relationship and that this Agreement may need to be amended in the future to reflect the outcomes of that work.

D. The Lyackson has a relationship to the land that is important to its culture and the maintenance of its community, governance and economy.

E. The Lyackson has Aboriginal Interests within its Traditional Territory.

F. The Parties wish to enter into an interim measures agreement in relation to forest and/or range resource development within the Traditional Territory.

The 2007 Agreement lead the way to the issuance of a Woodlot Licence to the Lyackson to log a Provincially owned "Buffer Zone" between privately owned timberlands and fee simple and leased recreation properties on Valdes. Pursuant to the Woodlot Licence, the Lyackson have developed a proposed logging plan which is currently projected to be implemented as early as 2017.

Between 2008 and 2012, the Valdes Island Conservancy (Conservancy) representing recreation land-owners and lessees raised its preservation concerns about the proposed logging directly with the Lyackson. In March 2013, the concerns were also raised with the Province by way of a formal application to have the Buffer Zone's trail network protected from the proposed logging (Trails Application). Thus far, the Conservancy's expressed concerns have not resulted in any concrete action to alter the Lyackson's logging plan.

The Conservancy's objective is to bring about an alteration to the logging plan to implement its preservation concerns. The following analysis presents a strategy to affect this result.

## II. **The Present Context**

### ***A. Factual***

In 2013, the Province and the Lyackson entered into a further agreement (2013 Agreement) designed "to assist in achieving stability and greater certainty for forest and/or range resource development on Crown lands within the Lyackson Traditional Territory", and in which it is recognized that "the Lyackson First Nation has Aboriginal interests within its Traditional Territory" and "British Columbia intends to consult with the Lyackson First Nation and accommodate its Aboriginal interests".

The 2013 Agreement requires the Province to adhere to the highest level of consultation "with respect to impacts on the Lyackson First Nation's Aboriginal interests arising from forest and/or range resource development activities proposed within the Lyackson First Nation Traditional Territory". The Province has determined that the Trails Application requires this form of consultation.

The Province has also recently confirmed that discussion is taking place with respect to a possible grant of the Buffer Zone to the Lyackson as Reserve lands. This issue engages the Federal Government.

## B. Legal

In June, the Supreme Court of Canada delivered a ground-breaking decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. In public discussion, the decision has been named “the William decision” in honour of the *Tsilhqot'in* First Nation’s Chief who maintained the litigation for some 30 years to a successful result.

The *William* decision is the most recent pronouncement of the Supreme Court of Canada concerning the rights of Aboriginal People to their hereditary lands. The basic underlying legal concepts of this line of cases are as follows.

In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise. In 1984, the Court held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, it was also decided that this title was burdened by the “pre-existing legal right” of Aboriginal People based on their use and occupation of the land prior to European arrival.

In 1997, in the well know case of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, Chief Justice Lamer confirmed the *sui generis* [special] nature of the rights and obligations to which the Crown’s relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*.

Chief Justice Lamer also made the key legal finding that in order to make out a claim for Aboriginal title, the Aboriginal group asserting title must satisfy the following criteria: (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.

The *William* decision is an application of the law to the evidence advanced by the *Tsilhqot'in* First Nation to establish Aboriginal title to its hereditary lands. No only was it decided that the *Tsilhqot'in* were successful, but, as a matter of law, Chief Justice McLauchlin decided that, once Aboriginal title is established, the Aboriginal People concerned have a very high degree of control over their hereditary lands. At the beginning of its lengthy decision, the Supreme Court provides a summary of its findings, which is quoted in the **ADDENDUM** to the present analysis.

### **C. Conclusion**

The Province's willing consideration of the Lyackson's assertion of Aboriginal title to Valdes, and the very serious approach that the Province has already taken with respect to consultation with the Lyackson, is consistent with the findings in the *William* decision. Given the 2007 and 2013 Agreements, read together with the law expressed in the *William* decision, it appears that the Lyackson are on solid ground in their Treaty negotiations with the Province.

In addition, it appears that cooperation exists between the Lyackson, the Province, and the Federal Government with respect to the Buffer Zone being dedicated as Reserve lands. In the present factual and legal context, it also appears unlikely that the Province will act on the Trails Application without the consent of the Lyackson.

### **III. A New Approach to Relationship Building with the Lyackson**

Given the context as described above, as a practical matter, control over the Conservancy's preservation interests rests with the Lyackson. Given the lack of positive response to the Conservancy's preservation efforts to date, a new approach is required to build a relationship with the Lyackson in which the Conservancy's preservation concerns will be listened to, and heard (the Approach).

While the Conservancy's concern is, at large, about logging pursuant to the Woodlot Licence, the specific issue that has been maintained is the preservation of the trail network on the Buffer Zone through the Trails Application. The Conservancy has carefully stated its position with respect to the logging plan in the Trails Application; the objective is to successfully maintain it, both with respect to the Province and the Lyackson.

The Approach must be based on firm principles, be recognized as instructive, and be of a quality that engenders respect.

#### ***A. Viewing the present situation as rights-based***

How the Conservancy approaches the Lyackson in view of the above stated realities will have an immediate and long term impact on the Lyackson's willingness to cooperate with the Conservancy's preservation objectives.

The Conservancy has a right, or perhaps at least a privilege, to consultation on the implementation of the logging plan. In addition, the Conservancy might be provided with consultation opportunities with respect to both the ongoing Treaty process and Reserve lands process. In taking up these opportunities, in good faith, the Conservancy needs to explain "why" in a way that the purpose can be seen as transparent, and understood as worthy. Undertaken in this manner, the opportunity exercised should not be seen as a challenge to Lyackson rights.

The Lyackson's right to log, and their right to expand their Reserve lands should not be directly challenged for two reasons: any move to do so will be seen as an interference with established rights; and the decision-making with respect to these rights is near term and are outside of the Conservancy's control.

However, the Conservancy has produced a strong, verifiable, and compelling argument in the Trails Application, and also has verifiable environmental concerns to present concerning the ambit and outcome of the Treaty and Reserve lands processes in progress. For the reasons expressed above, the degree to which the Conservancy will be successful in having the argument and concerns accepted will depend on the strength of relationship between the Conservancy and the Lyackson.

#### ***B. Viewing the present situation as a precedent***



No doubt across Canada, and in particular in British Columbia where past governments have neglected to engage in treaty making, the Conservancy's efforts towards relationship building can properly be seen as a positive precedent for how Aboriginal and third party land disputes can be resolved without litigation.

Knowledge about the Conservancy's current relationship building efforts shared with the Province and the Federal Government, and the public at large, might be a step to seriously consider. Accountability is a strong force that arises from knowledge. In the present situation, the accountability that would arise would apply to actions by the Provincial and Federal governments, the Lyackson, and, certainly, the Conservancy. This feature of the Approach must be very carefully considered.

### ***C. Viewing the Approach as reasonable***

The Conservancy's primary argument to the Lyackson, the governments, and to the public, is that the Approach is reasonable and should be accepted. As a legal concept, reasonableness is about transparency and intelligibility. It is also about whether a position can be supported on the facts and the law. In all these respects, the Conservancy has a credible argument to make.

The Conservancy's position on the Trails Application does not threaten the Lyackson's right to log nor does it threaten the Lyackson's long-term plan to gain control of Valdes as Aboriginal lands.

The Approach can only be seen by the Lyackson as reasonable within a positive relationship with members of the Conservancy.

### **IV. The Immediate Challenge**

Implementing the Approach is the challenge which lies immediately ahead. As to the urgency to do so, the following is the present state of Treaty Negotiations in British Columbia and the Yukon.

Of the 205 First Nations in British Columbia and the Yukon, 143 are participating in the British Columbia Treaty Negotiation process. Those participating are organized into 58 treaty groups at the following stages of progress: 3 are at stage 6 (treaty implemented); 3 are at stage 5 (negotiating to finalize); 7 are at stage 4 (agreement in principle); 39 are at stage 3 (negotiating a framework); 4 are at stage 2 (readiness to negotiate); and 2 are at stage 1 (intent to negotiate). Thus, 22% of the treaty groups have moved beyond stage 3.

The average times for moving through the negotiating process are as follows: for those First Nations at stage 3, the average time spent at this level is 15.51 years; the average time it takes to move from stage 4 to stage 5 is 4.6 years, and the average time it takes to move from stage 5 to stage 6 is 2 years.

The Lyackson First Nation, together with 5 other First Nations, has been at stage 3 for some 16 years. Thus, based on the evidence of average progress to date, it is reasonable to conclude that the British Columbia Treaty Negotiation process will not complete for the Lyackson within the next 5 years.

No information is presently available with respect to the Lyackson's Reserve lands negotiation with the Federal Government.

Thus, while there appears to be a reasonable amount of time available to the Conservancy to build a solid working relationship with the Lyackson within the present state of affairs, moving forward with deliberation is important.

## ADDENDUM

The Supreme Court of Canada's Summary stated in the opening to the decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 reads as follows:

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

*Held:* The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre- sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only

specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35 framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes

applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.