Treaty Daze: Reflections On Negotiating Treaty Relationships Under The British Columbia Treaty Process

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Introduction[1]

In Canada, the historic treaties between First Nations and the Crown were an attempt to resolve early conflicts over land ownership and open up the country for settlement. Modern treaties are also about the reconciliation of different world visions and overcoming the deadlock in the struggle between competing views. The history of double talk and broken promises related to treaties is well documented.[2] In recent times, a number of institutions have been developed to resolve land issues related to the historic treaties and facilitate the negotiation of modern treaties. In particular, the British Columbia Treaty Commission (BC Treaty Commission) is overseeing attempts to resolve land claims. While the British Columbia (BC) treaty process is a heroic undertaking, the process is in trouble. After close to two decades of negotiations, there are few success stories and the debt load of First Nations is becoming unmanageable. The failure of the *Lheidli T'enneh Final Agreement* ratification[3] and the growing support by First Nations and chief negotiators for fundamental changes to the mandates of governments are signs of a need for change. Recent statements by Sophie Pierre, Chief Commissioner of the BC Treaty Commission, suggesting that the process be shut down if it cannot be improved, magnify the need for changes to both the substance and process of treaty negotiations in British Columbia.[4]

Background

a) Federal claims policy: failure of imagination

The federal government has the exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians", pursuant to section 91(24) of the *Constitution Act, 1867*.[5] This would include the development of policy for claims based on Aboriginal

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[2] Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 137–91.

[3] BC government online: http://www.gov.bc.ca/arr/firstnation/lheidli/down/final/lheidli_final_agreement.pdf, ratification vote March 30, 2007.

[4] Judith Lavoie, "Speed up treaty process or shut it down commission chief says" Times Colonist (13 October, 2011).

[5] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No, 5. "Indian" was the term commonly in use at that time. Its meaning is a complex legal question.

rights and title, or "comprehensive claims". Comprehensive claims are based on the fact that there are continuing Aboriginal rights and title to the lands and natural resources within Canada. For the most part, these claims arise in parts of Canada where Aboriginal title or the land question has not been resolved through historical or modern treaties. Comprehensive claims negotiations encompass a wide range of issues such as: land (including surface and sub-surface rights), water, language, culture and heritage, fishing, forestry, wildlife, environmental management, tax and fiscal matters, revenue sharing, social and economic benefits, the administration of justice, and self-government.[6]

In 1996, the Royal Commission on Aboriginal Peoples (RCAP) reviewed the claims policies and process and identified significant weaknesses.[7] The RCAP report (RRCAP) itself and the recommendations in it continue to be relevant. According to RCAP, little or no effective interim measures are in place to protect Aboriginal interests either before or while negotiations are being conducted.[8] In British Columbia, thanks to an evolution in the approach by the Province regarding land protection, this concern now applies primarily to those negotiations that have not achieved an Agreement in Principle. However, during the course of negotiations where there is no agreement on the land package, governments may create, on traditional lands that have been identified as potential settlement lands, new third party interests which will then take precedence over rights included in final agreements.[9] This tends to diminish any sense of urgency on the part of non-Aboriginal parties around the settlement of claims. There are also numerous substantive difficulties that arise at the negotiating tables. Most importantly, government mandates often seem too narrow for reaching agreement because the price that Aboriginal peoples must pay for entering into a final agreement is too high. "Extinguishment", or the more fashionable term "certainty", is one of the more difficult issues to reconcile in the treaty or land claims negotiations.[10] Because of the threat of extinguishment, whether

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[6] See for example the *Nisga'a Final Agreement* (August 4, 1998) or *Lheidli T'enneh Agreement-in-Principle* (October 29, 2006). See also the Comprehensive Land Claims Policy (Department of Indian and Northern Development, December 16, 1987), discussion online: Canadian Arctic Resources Committee http://www.carc.org/pubs/v15no1/4.htm.

[7] See generally Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) [*Restructuring the Relationship*].

[8] *Ibid*. at 538–39. However, it should be noted that as to interim and treaty-related measures, both British Columbia and Canada have policies that attempt to grapple with these issues. But these policies do not address in a genuine way the substantive issues that were at the basis of Recommendation 16 of the *British Columbia Claims Task Force Report* (June 28, 1991), online: BC Treaty Commission http://www.bctreaty.net [*Task Force Report*].

[9] *Restructuring the Relationship*, *ibid.* at 538.

[10] Traditionally, treaties have been characterized as an exchange of undefined Aboriginal rights for more defined treaty rights. Historically, upon entering into a treaty, the Aboriginal group would have to "cede release and surrender" all rights not included in the treaty. This surrender of rights results in extinguishment. The policy behind the "cede release and surrender" language or the "certainty" provisions (terms common to the old numbered treaties) has been a cornerstone of modern treaties. The language in

perceived or real, the land and cash volumes offered by governments seem miniscule. And, in an economy that is growing each day, the per capita formula that governments bring to the table is diminishing in value compared to the increase in land values and cost of living. There are other difficulties too, some of which will be addressed in more detail further on.

Indeed, the current federal claims policy is outdated and cries out for change. Since it was announced in 1986, it has continued to guide federal land claims negotiations, although some adjustments have been made for the BC treaty process.[11] Since the policy was announced, there has been a dramatic shift in the law. The shift has been of a magnitude that the early claims policy makers could not have foreseen. *Sparrow* [12] had not been decided by the Supreme Court of Canada and the consequences of section 35 were barely understood. At the time the policy was announced, it was still unclear whether and how Aboriginal rights and title could be extinguished in the post-section 35 era. The concepts of justification and infringement were barely explored, and *Gladstone*[13] had not yet decided on the existence of a commercial right to harvest herring roe on kelp. More importantly, the claims policy did not contemplate that the fiduciary relationship, first articulated in *Guerin*[14] just a few years earlier, would be incorporated into section 35. *Delgamuukw*[15] had not yet been decided, and Aboriginal title had not been recognized as an interest in land somewhat akin to fee simple ownership and under the exclusive jurisdiction of the federal government pursuant to section 91(24). Also, the law had not decided that infringements of title would ordinarily require compensation, and the *Haida Nation*[16] decision had not yet determined that the duty to consult and accommodate arises prior to proof of a right. *Sappier*[17] had not determined that harvesting timber for domestic purposes is a section 35 right, and *Mikisew Cree*[18] had not yet determined that the honour of the Crown is always engaged in addressing Aboriginal issues and that breach of that honour is an independent cause of action. And, as regards

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the *Nisga'a Final Agreement* and other final agreements departs from the objectives of the "cede release and surrender" language.

[11] These changes have been more of process than of substance.

[12] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*].

[13] *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [*Gladstone*].

[14] *Guerin v. R.*, [1984] 2 S.C.R. 335, [1984] 13 D.L.R. (4th) 321, (*sub nom. Guerin v. Canada*) 55 N.R. 161 (S.C.C.) [*Guerin*].

[15] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, S.C.J. No. 108 [*Delgamuukw*].

[16] *Haida Nation v. British Columbia (Minister of Forests)*, [2005] 1 C.N.L.R. 72.

[17] *R. v. Sappier*, [2006] 2 S.C.R. 686, S.C.J. No. 54.

[18] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, S.C.J. No. 71 [*Mikisew Cree*].

the Métis, the historic decision in *Powley*[19] had not yet confirmed that the Métis have Aboriginal rights with the same constitutional status as the section 35 rights of the "Indians" and the Inuit. Yet, astounding as it may seem, Canada's policy continues to be driven by the 1987 Comprehensive Land Claims Policy[20], and key federal policy initiatives continue to be driven by the same old twentieth-century mindset.

b) British Columbia Treaty Commission

Though the federal government has the exclusive jurisdiction to make laws for "Indians, and Lands reserved for the Indians", the provinces have jurisdiction over property and civil rights, pursuant to section 92(13) of the *Constitution Act, 1867*. The provinces also have jurisdiction over non-renewable natural resources, forestry resources, and electric energy, pursuant to section 92A. In addition, the provinces have jurisdiction over education, the administration of justice, hospitals, the management and sale of public lands, local works and undertakings, and a host of other matters that are an intimate aspect of a self-governing regime.[21] A successful resolution of land claims in BC will necessarily involve the Province.

In 1990, Canada, BC, and the BC First Nations Summit created the British Columbia Claims Task Force (Task Force) to address the land question. In 1991, the *Report of the British Columbia Claims Task Force* (*Task Force Report*) made nineteen recommendations on how to negotiate and resolve the settlement of comprehensive claims in BC.[22] Recommendation 3 of the *Task Force Report* was to establish the Treaty Commission (Treaty Commission) in order to facilitate treaty negotiations. In 1992, Canada, BC, and the BC First Nations Summit reached the *British Columbia Treaty Commission Agreement* (*Treaty Commission Agreement*), which established the BC Treaty Commission and supported the process of treaty negotiations recommended in the *Task Force Report*.[23] The purpose of the Treaty Commission as set out in both the *Task Force Report* and the *Treaty Commission Agreement* is to facilitate the negotiation of treaties among one or more First Nations, Canada, and BC. As part of its role, the Treaty Commission determines whether the parties are ready to commence negotiations, allocates funding for negotiations, encourages timely negotiations, attempts to facilitate the resolution of disputes, provides the public with status reports with respect to ongoing negotiations, and performs other related duties.[24]

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[19] *R. v. Powley*, [2003] 2 S.C.R. 207, 4 C.N.L.R. 321.
[20] *Supra* note 6.

[21] For details, see provincial legislative authorities listed under s. 92 of the *Constitution Act*, *1867*.

[22] *Supra* note 7.

[23] See generally *British Columbia Treaty Commission Agreement* (Sept. 21, 1992), BC Treaty Commission online: <http://www.bctreaty.net/files/bctcagreement.php [*Treaty Commission Agreement*].

[24] Ibid.

Treaty Daze

When originally announced, the *Task Force Report* and the *Treaty Commission Agreement* were met with much fanfare. At the outset, the Treaty Commission process eliminated a number of the problem areas in other claims. The use of an independent treaty commission and a chief commissioner agreed to by all three parties gives the process more legitimacy. Making the Treaty Commission responsible for funding eliminates some of the blatantly disproportionate discretion exercisable by the federal government. The use of a statement of intent of the First Nation to be filed with the Treaty Commission, and the requirement that within forty-five days of the filing the Treaty Commission convene a meeting of the parties, eliminates costly and time-consuming research to establish exclusive use and occupancy and long delays before the first meeting. In addition, the language of the recommendations with respect to "interim measures"[25] and the agreement to allow any of the parties to put any agenda item on the table is refreshing.[26] But other realities of the Treaty Commission process have proven to be very different.

More than fifty First Nations are participating in the Treaty Commission process. Most of these are labouring on substantive negotiations in Stage 4 (Negotiation of Agreement-in-Principle), while some are still in Stage 2 (Preparedness for Negotiations) and Stage 3 (Negotiation of a Framework Agreement).[27] A number of First Nations have negotiated and ratified their Agreement-in-Principle (AIP), and several have negotiated their Final Agreement (Stage 5).[28] But many tables are stalled, with no prospects of success in the foreseeable future.

After years of dithering, even the Treaty Commission has said that the Treaty Commission process and the current treaty model require some fundamental changes.[29] The complexities of the negotiations are beyond what was originally anticipated, and the negotiations themselves are taking much longer than was expected.[30] In 1998, the Treaty

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[25] Recommendation 16 of the *Task Force Report*, *supra* note 7, provides that interim measures are to be negotiated when an interest is being affected that may undermine treaty negotiations.

[26] See Recommendations 2 and 16 of the *Task Force Report*, *supra* note 7.

[27] *Where Are We?* BC Treaty Commission Annual Report (2003), BC Treaty Commission online: <http://www.bctreaty.net> at 37. See also *Looking Back Looking Forward: A Review of the BC Treaty Process* (Special Report of the BC Treaty Commission, September 2001), BC Treaty Commission online: <http://www.bctreaty.net> at 4 [*Looking Back, Looking Forward*].

[28] See generally *Maa-Nulth First Nations Final Agreement*, BC government online: http://www.gov.bc.ca/arr/firstnation/Maa-Nulth/down/final/mna_fa.pdf [*Maa-Nulth Final Agreement*]; *Tsawwassen First Nation Final Agreement*; BC government online: http://www.gov.bc.ca/arr/firstnation/tsawwassen/tfn_fa.pdf [*Tsawwassen Final Agreement*]; *Lheidli T'enneh Final Agreement*, *supra* note 3. Also, on October 21, 2011, the Sliammon First Nation, British Columbia and Canada initialled the Tla'amin Final Agreement.

[29] See generally *Looking Back Looking Forward*, *supra* note 26.

[30] *Ibid.* at 3–5.

Commission advised the governments of the "serious consequences" of this for First Nations and predicted that the situation would likely worsen.[31] It has now been more than fourteen years since these concerns were raised, and still not much has changed.

Likewise, with the exception of modest breakthroughs accomplished at the Final Agreement tables[32], there have been no fundamental changes to treaty policies. In fact, over the years the federal government has narrowed its mandates and treaty policies rather than broadening them. Canada's policies are outdated and inflexible. There is very little dialogue. Canada tables positions and leaves it to First Nations to either agree or disagree. For instance, a fisheries agreement package similar to that negotiated by the Nisga'a is no longer on the table. Elements of what was negotiated in chapter 11 (fisheries) of the *Lheidli T'enneh Final Agreement* are no longer on the table. For the most part, Canada is not negotiating fisheries matters, and is awaiting the results of the Cohen Commission to determine whether or not to return to fisheries negotiations. Canada's fiscal policy is also narrowing, so that the negotiation of the fiscal chapter and fiscal side-agreements is a frustrating experience. As in fisheries negotiations, Canada's fiscal negotiators come to the table with a take-it-or-leave-it mentality. This is not good faith negotiations by almost any standards.

Just as troubling is a growing doubt about the capacity and commitment of First Nation and Crown representatives to deal with the numbers of complex issues involved through treaty negotiations.[33] While these and other issues in the negotiation process continue to challenge all parties, the success of a number of court decisions has revived the question—with considerable validity—whether litigation is more effectual than negotiation. This is particularly true in light of the judgement of the Supreme Court of British Columbia in *Tsilhqot'in Nation*, in which the Court, while not making a declaration, stated in obiter that there was sufficient evidence for a finding of Aboriginal title over approximately 2,000 square kilometres of land traditionally used by the Tsilqot'in Nation.[34]

The reasons for the lack of progress in negotiations, documented in 2001 in *Looking Back, Looking Forward: a Review of the BC Treaty Process*, are valid today.[35] Chronic understaffing of the provincial negotiation teams continues to be a problem. In addition, the Province has an unclear mandate in some matters, and provincial chief negotiators are sometimes left to depend on the personal whims of senior officials in line

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[31] *BC Treaty Commission Annual Report* (1998), BC Treaty Commission online: http://www.bctreaty.net/files/annuals.php at 5.

[32] In this paper, the term "Final Agreement table" refers to those treaty negotiations where a Final Agreement has been negotiated, or where a Final Agreement is near completion.

[33] *Looking Back, Looking Forward*, *supra* note 26 at 6–8.

[34] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R.112 [*Tsilhqot'in Nation*].

[35] *Looking Back, Looking Forward*, *supra* note 26 at 6–11.

ministries as to what can be on the table. The situation is worse in the federal government. Federal government chief negotiators are frequently replaced by new and untested negotiators, and this has an impact on the issue of trust—a key ingredient required to achieve lasting agreements. And some federal mandates, particularly those related to the tax and fiscal issues, are simply unworkable for most First Nations. On other matters, the federal government in its policies seems uncaring and inflexible. Often, after the parties have reached agreement on language, new positions are tabled and the federal chief negotiators have no mandate to deviate from the new language that has been pre-determined by Ottawa mandarins. And more often than not, the new positions or language brought forward seem irreconcilable with the language of court decisions and some of the key objectives Aboriginal peoples are trying to achieve. This would appear to be because the treaty or land claims policies of the governments, and in particular the federal government, are simply out of step with the times and the law. They are status quo policies that reflect a failure of imagination around how treaties should look in the twenty-first century. All of this provides fodder for the cynics who believe the Crown has no intention of negotiating honourably.

Tough Issues

a) Certainty

Of all the issues that negotiators have to deal with, the topic of "certainty" may be the most gut wrenching and enmity provoking. It touches the core of what treaty making is all about, and seems to deeply affect the rights of Aboriginal and non-Aboriginal peoples alike. RCAP published a report on certainty entitled *Treaty Making in the Spirit of Co-Existence*, which provides a detailed analysis of the problems associated with the certainty paradigm preferred by governments and third parties.[36] The report also proposes solutions that try to balance the need to recognize and affirm the rights of Aboriginal peoples in a manner consistent with the language of section 35 of the *Constitution Act, 1982*, and at the same time address the needs of governments and industry. Shortly afterwards, the Hon. A.C. Hamilton released his report on the same subject.[37] Both these reports agree that the fundamental problem is there are two diametrically opposed views of what certainty is and how it should be achieved.

Certainty, from the point of view of the Crown and third parties, is to be achieved by the exchange of undefined Aboriginal rights for defined treaty rights. In the past, treaties have commonly required that the Aboriginal claimant "cede, release and surrender" all rights to past and future claims with respect to the undefined rights not included in the treaty.[38] This type of certainty is referred to as "extinguishment". Both

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[36] *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment* (Ottawa: Supply and Services Canada, 1995).

[37] *A New Partnership: Report of Hon. A.C. Hamilton, Fact-Finder for Minister of Indian Affairs and Northern Development* (Ottawa: Minister of Indian Affairs and Northern Development, 1995).

[38] See generally BC Treaty Commission (*Aboriginal Rights: The Issues*) online: http://www.bctreaty.net/files/issues_rights.php.

reports seek to eliminate the concept of extinguishment from the certainty paradigm. The technique in modern land claims agreements has generally been to include a full release from all past and future Aboriginal rights and title claims. In addition, there are indemnity provisions that provide that if the Crown does not get it right in the certainty provisions, the First Nation will have to indemnify the Crown for any costs to the Crown associated with the exercise of rights that are not included in the Final Agreement but were not caught by the certainty provisions. Adding insult to injury, there has also been a requirement for a "backup release" in the event that the key certainty provisions and the indemnity provisions do not cast a broad enough net.

Aboriginal people view certainty differently than the Crown and third parties. Generally speaking, Aboriginal people see the treaty as breathing life into existing rights and defining a new relationship. Aboriginal people also want to ensure that the treaty promises are kept in order to provide certainty for their future and for future generations. And, while the language in modern treaties attempts to provide certainty for governments and third parties, particularly those in the resource sector, there has been very little certainty of the kind envisioned by First Nations. The certainty provisions, with some variations, appear to amount to a release forever of claims for past and future infringements of Aboriginal rights and title in exchange for an untested treaty.

If treaties are to succeed in the twenty-first century, the approach to certainty will have to work for all parties. All aspects of the extinguishment model must be rooted out. Any certainty model must respect the fundamental values and beliefs of the particular Aboriginal community, and reflect the recognition and affirmation language of section 35. As a result of the *Nisga'a Final Agreement*, the current certainty model in BC uses the language of "modification" and "continuation" so that Aboriginal rights and title are modified and continue as reflected in the Final Agreement. The model attempts to balance the First Nation's aversion to extinguishment with the Crown's need for a release from future claims related to past infringements. Even so, if the certainty model results in the cessation of rights that are considered sacred and immutable, then the treaty likely will not work. In the development of a certainty model, all parties need to keep in mind the clear directions from the court, which requires courts to consider, in those situations where infringements have occurred, "...whether there has been as little infringement as possible in order to affect the desired result".[39]

RCAP and others have advocated a non-assertion model that would have all parties agree in clear and plain language that the concept of extinguishment is not a part of the treaty. At the same time, the only rights to be exercised would be those agreed to by the parties in the Final Agreement, and the First Nation would agree not to assert any other rights. There would also have to be a process in place to address rights that may arise in the future but had not been contemplated by the parties, and consequences for a fundamental breach of treaty obligations. This non-assertion model is more in keeping with the parties' stated common intention to root out all aspects of extinguishment.

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[39] *Sparrow*, *supra* note 11 at para. 82.

In the context of discussions around certainty it is important to note that Canada has stated repeatedly that it rejects extinguishment as a method for achieving certainty. Yet ironically, Canada insists that federal Crown lands be excluded from areas where First Nations can harvest pursuant to a section 35 right. In other words, while Canada is quite eager to agree to First Nation citizens exercising section 35 rights on provincial Crown lands, Canada's position is that, with minor exceptions, section 35 rights should not be exercised on federal Crown lands and that federal Crown lands should be, for the most part, excluded from the harvest areas where rights are to be exercised. For all practical purposes, this amounts to extinguishment on federal Crown lands. This begs the question of whether Canada is negotiating in good faith.

b) Section 91(24) of the Constitution Act, 1867 and the tenure of Treaty Settlement Lands

As noted earlier, the federal government has the exclusive law-making authority over "Indians, and Lands reserved for the Indians". One of the issues linked with this authority is the question of the nature or tenure of Treaty Settlement Lands—those lands that the First Nation will own after the effective date of a Final Agreement.

The matter of the tenure of Treaty Settlement Lands has become a problem area for some First Nations because of the dogmatic insistence by both the federal and provincial governments that the lands set aside as Treaty Settlement Lands not retain their status as section 91(24) lands, or "Lands reserved for the Indians". Canada holds Indian reserve lands essentially in trust for and on behalf of the "Indians", and as such, Indian reserve lands can only be alienated or sold following a "surrender" under the *Indian Act*. The relationship between Indians and the federal government is said to be "fiduciary". This broad fiduciary or trust like relationship between Canada and Aboriginal people flows, at least in part, from the status of Indian lands and the discretion that Canada exercises over those lands.[40] By analogy, the same principles apply to unceded Aboriginal title lands since both Indian reserve lands and Aboriginal title lands fall within Canada's jurisdiction over "Indians and Lands reserved for the Indians". While it is difficult to engage federal negotiators in discussions around the reasons behind their mandates, it seems that Canada's approach to treaties may largely be driven by the desire to remove itself as a fiduciary.

The provincial position is largely driven by a desire to see provincial land-use laws apply to Treaty Settlement Lands acquired through treaty negotiations. Under the existing *Indian Act* regime, the provinces cannot regulate the use of "Lands reserved for the Indians".[41] From a provincial perspective, this creates a legislative void that the Province would like to occupy in order to have its own land-use laws apply. The Province wishes to have its land-use laws apply to Treaty Settlement Lands, including the

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[40] See generally *Guerin*, *supra* note 13.

[41] *R. v. Dick*, [1985] 2 S.C.R. 309, 23 D.L.R. (4th) 33 at 49.

designation of Agricultural Land Reserve (ALR), so there is a consistent legislative regime in BC with respect to land-use planning and regulation. This may be a reasonable objective from a provincial point of view. However, it is also anathema to some First Nations, particularly in regard to the application of the ALR. It is also an objective that can be achieved in other ways. In fact, the provincial objective has been achieved as a result of the "section 88 analogue" clause in the General Provisions chapter of Final Agreements, which allows provincial laws to apply on Treaty Settlement Lands.[42] So both the Province and Canada have insisted that Treaty Settlement Lands not be "Lands reserved for the Indians". However the constitutionality of the positions put forward by both BC and Canada is questionable.

Structuring arrangements that would change the nature of Indian lands to something other than "Lands reserved for the Indians" raises constitutional difficulties.. Over the years, the courts have looked at the meaning of the words "Lands reserved for the Indians" in section 91(24), and some questions about this now appear settled. It would appear that the words used are "sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation." This passage by Lord Watson speaking for the Privy Council in *St. Catherine's Milling and Lumber Co*.[43] was quoted with approval by former Chief Justice Lamer, in *Delgamuukw*.[44] More recently, the BC Supreme Court adopted this position in *Tsilhqot'in Nation*.[45] With fairly clear and consistent direction from the courts, it is difficult to understand why Treaty Settlement Lands held for a First Nation pursuant to a treaty should not fall within section 91(24). In some cases this will cause more of a problem of legal theory than a problem on the ground. However, many First Nations wish to maintain the special link with the federal government that section 91(24) offers, including Canada's exclusive law-making authority. The law seems to be in agreement.

Ironically, the federal claims policy is also in agreement. The current federal claims policy is not incorporated in a single document. It is a series of policies beginning with the policy first announced in August of 1973 following the decision in *Calder*.[46] Canada's comprehensive claims policy was mandated by Cabinet Document No 570-73 entitled *Indian and Inuit Claims Policy* (June 5, 1973).[47] That policy specifically states "Federal jurisdiction and responsibility would continue under section 91(24) of the BNA Act [now *Constitution Act, 1982]*—'Indians, and Lands reserved for the Indians".

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[42] For example, clause 29 of the *Nisga'a Final Agreement* (*supra* note 5), "Provincial Law", is analogous to s. 88, General provincial laws applicable to Indians, of the *Indian Act*. See discussion in text referenced by notes 52 and 53 below.

[43] *St. Catherine's Milling and Lumber Co. v. R.* (1888), 14 App. Cas. 46 at 59.

[44] *Delgamuukw*, *supra* note 14 at para. 174.

[45] *Supra* note 33.

[46] *Calder v. British Columbia (Attorney General*), [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

[47] Obtained pursuant to an application under the federal *Access to Information Act*.

Notwithstanding the above, each of the Final Agreements and Agreements-in-Principle being negotiated in BC includes a clause identical to this:

> There are no "lands reserved for the Indians" within the meaning of the *Constitution Act, 1867* for the [First] Nation, and there are no "reserves" as defined in the *Indian Act* for the use and benefit of [the First Nation], and, for greater certainty, [First Nation] Lands . . . are not "lands reserved for the Indians" within the meaning of the *Constitution Act, 1867*, and are not "reserves" as defined in the *Indian Act*.[48]

Though it is sloppy language and somewhat redundant, it has been agreed to at a number of tables. Constitutional theory does not support the language, but the practice of negotiation invokes the art of the possible. This often involves engaging in interest-based negotiations to find a solution that will work for all parties.[49]

Treaty Settlement Lands in Final Agreements are said to be fee simple lands. In Canada, the most common form of fee simple ownership is that in which such lands are held by individuals and registered in the provincial land title system. The underlying or "allodial" title of such lands is usually vested in the Province. The provincial fee simple title system has several limitations that make the traditional concept of fee simple lands unattractive to First Nations

Fee simple lands are normally subject to escheat (reversion); that is, when there are no known heirs and the owner dies intestate, the lands normally escheat (revert) to the Crown in right of the Province. Lands owned or held in fee simple are usually subject to forfeiture to the Crown in certain circumstances, such as if the land owner fails to pay the property taxes. In addition, under the common law certain crimes against the state, such as treason, result in the forfeiture of the individual's estate to the Crown. Normally, fee simple lands are subject to the property tax regime of the Crown.

For these and other reasons, Final Agreement negotiators did not want to have Treaty Settlement Lands held as provincial fee simple lands. Absent a Final Agreement, First Nations lands will continue to be Indian Reserve Lands under the *Indian Act*. But ownership as Indian Reserve Land also has limitations:

Indian Reserve Lands are under the exclusive jurisdiction of the federal government and cannot be readily registered in the provincial land registry system. Normally, traditional mortgage financing depends on being able to register a mortgage against the title that is registered in the provincial system. "Indians" living on reserve often find it difficult to obtain personal loans because the lender will want to be able to seize the goods purchased if the loan payments are not made. Normally, personal property on Indian reserves cannot be seized by a lender because specific provisions of

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[48] See for example *Nisga'a Final Agreement*, *supra* note 5 at c. 2, s. 10, General Provisions.

[49] Notwithstanding the fact that the language is agreed to, it is difficult to reconcile the position that Canada and British Columbia bring to the table. That is, that extinguishment is no longer a part of the certainty model, but there will no longer be "Lands reserved for the Indians".

the *Indian Act* prevent assets located on Indian Reserve Lands from being seized. Under the *Indian Act*, almost all transactions conducted on Indian Reserve Lands, including the securing of permits and licenses, require the permission of the minister of Indian affairs. This can make transactions more costly and time-consuming.

These limitations make it difficult for "Indians" living on reserve to participate in the commercial mainstream. However, some of these problems have been addressed by both the *First Nations Land Management Act* and the *First Nations Fiscal and Statistical Management Act*[50]. The latter enactment allows for First Nations to access the bond markets and makes and facilitates systems of financing that would not normally be available to First Nations. The former gives greater autonomy to First Nations by removing the role of the Minister in the permit approval process and makes traditional financing more readily available.

With respect to the creation or use of a land registration system for registering title, the Final Agreements currently in negotiation provide two options: either the authority to make laws for the establishment and operation of a land title or land registry system, or a mechanism to allow for lands to be registered in the provincial land title system.[51] Even after such lands have been registered in the provincial land title system, they remain Treaty Settlement Lands. There are some advantages to having lands registered in the Province's title system. The provincial land title system facilitates commerce because when lands are registered in the land title system it is easy to get traditional financing such as mortgages. The provincial land title system also creates a system of priorities for creditors and guarantees indefeasible title through an insurance scheme.

Under the current treaty model—the model agreed to by Tsawwassen, the Maa-nulth, and others, —Treaty Settlement Lands would be owned as First Nation fee simple lands. Treaty Settlement Lands are not provincial fee simple lands and they are not lands under the exclusive jurisdiction of the federal government pursuant to section 91(24). They are unique (sui generis) First Nation fee simple lands protected by section 35 and subject to First Nation law-making authority.

The current model for Treaty Settlement Lands seems to work well for those First Nations with Final Agreements. However, because it is preferred by some First Nations should not be a pretext for imposing it on all others. Many First Nations are far more comfortable with the notion that Treaty Settlement Lands are "Lands reserved for the Indians". From a constitutional point of view, these First Nations are on safer ground. However, both Canada and BC seem to be locked in to a model that has somehow crept into their comfort zone even though it poses constitutional risk. But Treaty Settlement Lands are what they are, and Canada and BC should not impose a model which may be flawed, simply because it suits them. If First Nations prefer that Treaty Settlement Lands

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[50] *First Nations Land Management Act*, R.S.C. 1999, c. 24; *First Nations Fiscal and Statistical Management Act*, R.S.C. 2005, c. 9.

[51] See for example Land Title chapter in *Maa-Nulth* and *Tsawwassen*, *supra* note 27.

continue as “Lands reserved for the Indians”, then the only logic to resisting this approach from the federal point of view is linked to Canada’s role as a fiduciary. But the fiduciary relationship does not end with treaties; it is renewed by treaties, and Canada must realize this.

The Province’s interest is linked to the application of provincial land-use laws on “Lands reserved for the Indians”, but this can be resolved in other ways. In fact, both Canada and British Columbia are likely able to meet First Nations preferences that Treaty Settlement Lands remain “lands reserved for the Indians” without risk to the underlying interests of the Crown.

c) Self-government and the concurrent law model

Self-government has been a politically volatile issue in the context of treaty negotiations in BC. The political debate had turned on whether or not treaties should recognize a right to self-government thereby providing such right with constitutional protection. The provincial government and then Premier Gordon Campbell made this a political issue by refusing to include self-government as a treaty right. Indeed, the clumsy manner in which the early Campbell regime addressed Aboriginal issues was surprising. The provincial Liberals even managed to box themselves into a corner by committing to hold a referendum on Aboriginal matters including the treaty right to self-government, and tying their political agenda to the results. Not surprisingly, as the result of a skewed referendum question, a low voter turnout, and the politics of fear, the citizens of BC voted against allowing self-government to be a treaty right. And this was allowed to happen despite a decision by the BC Supreme Court finding that self-government is an inherent right and that the right has not been extinguished. Here, several passages from the Court are relevant.

At paragraphs 95 and 96, Williamson J. said:

> In summary, these authorities mandate that any consideration of the continued existence, after the assertion of sovereignty by the Crown, of some right to aboriginal self-government must take into account that: (1) the indigenous nations of North America were recognized as political communities; (2) the assertion of sovereignty diminished but did not extinguish aboriginal powers and rights; (3) among the powers retained by aboriginal nations was the authority to make treaties binding upon their people; and (4) any interference with the diminished rights which remained with aboriginal peoples was to be "minimal".
>
> A review of the cases in which Canadian courts, since Confederation, have considered enforcing laws which have their origins with aboriginal peoples rather than with Parliament or a Legislative Assembly, discloses that the above four points have been accepted.

And at paragraph 179, Williamson J. said:

> I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished.[52]

So, notwithstanding the law, the BC government held dogmatically and somewhat irrationally to the view that self-government is not a right and should not be protected as a treaty right. But politics makes strange bedfellows, and all of this is history. The right to self-government is now a part of treaties in British Columbia and former Premier Gordon Campbell is remembered by some as one of the strongest advocates of Aboriginal and treaty rights in the country.

However, treaties involve negotiations, and the exercise of the right to self-government in the context of Canadian federalism is complex. So while self-government is a treaty right, the concurrent law model provides that First Nation, provincial, and federal laws all apply on Treaty Settlement Lands. The First Nations have no exclusive law-making authority. Federal laws are applicable because of Canada's jurisdiction over "Indians and Lands reserved for the Indians". Provincial laws apply to "Indians" on Treaty Settlement Lands because such laws are general in nature and by virtue of the section 88 analogue provision found in the Final Agreements.[53]

Section 88 of the *Indian Act* provides that provincial laws of general application apply to "Indians" either on their own or by virtue of section 88, which incorporates by reference valid provincial laws that touch upon the "core of Indianness". The result is that such laws apply as federal laws. The section 88 analogue clause is found in the General Provisions chapter and is duplicated in all the Agreements-in-Principle and Final Agreements negotiated in BC. The clause states:

> Canada will recommend to Parliament that Federal Settlement Legislation include a provision that, to the extent that a Provincial Law does not apply of its own force to [the First Nation, the First Nation Government, the First Nation Public Institutions, the First Nation Corporations, the First Nation Lands or the First Nation Citizens], that Provincial Law , subject to the Federal Settlement Legislation, any other Act of Parliament and this Agreement, will apply to [the First Nation, the First Nation Government, the First Nation Public Institutions, the First Nation Corporations, the First Nation Lands or the First Nation Citizens], as the case may be.[54]

This clause is analogous to section 88 of the *Indian Act*, but with two important exceptions. Section 88 applies only to provincial laws "of general application" and not to all provincial laws, and section 88 does not apply to those laws that purport to regulate the use of land. The section 88 analogue clause advanced by the Crown in treaty

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[52] *Campbell v. British Columbia (Attorney General),* [2000] B.C.J. No. 1524, 2000 BCSC 1123.

[53] See *supra* note 41.

[54] See for example, *Lheidli T'enneh Final Agreement*, *supra* note 3, c. 2, s. 50, General Provisions.

negotiations goes far beyond section 88 of the *Indian Act* in incorporating the application of provincial laws.

While some First Nations have justifiably expressed concern about the scope of the section 88 analogue clause, Final Agreement tables decided to focus on the issues linked to the scope of law-making authority and paramountcy rather than on the issue of concurrency. At this point, it is difficult to determine whether concurrency will be more than a theoretical problem. But not knowing creates a great deal of uncertainty—something that First Nations and the Crown have tried to eliminate from treaties. If treaties are truly intended to create certainty for all parties, then the concurrent law model needs revisiting.

As for the question of paramountcy, it is important that First Nations laws have paramountcy over key matters such as the management and administration of their own government and public institutions, education, children, language and culture, and lands, including land use planning and regulations. For the most part, the Final Agreements have been successful in this regard.[55] On the other hand, the Crown maintains paramountcy over some key matters, including health, social services, post-secondary education, and the administration of justice.

As for the scope of the law-making, BC has tried to insist that most First Nations laws apply only to First Nations citizens. This race based approach would have non-citizens subject to a different set of laws and different standards than First Nation citizens. At the same time, in the negotiations the Province fought hard to allow non-citizens to be elected to First Nations government. These seemingly irreconcilable policies are merely a residue of the politics of fear in which reason is overruled by political expediency. Fortunately, negotiators at the Final Agreement tables were able to find solutions that call for the application of First Nations laws to First Nations institutions. For example, if an individual is attending a First Nation's health or education institution, that individual will be subject to the First Nation's laws, regardless of race. Though the negotiated solutions will work, the positions tabled by the Crown are nevertheless bizarre, and the undercurrent of racism that drives some policies is frightening.

It would make much more sense if First Nations laws on Treaty Settlement Lands were to apply to "persons" and not just First Nations citizens, so that the model would be based on geography rather than on race. In addition, both Canada and BC need to reconsider the section 88 analogue language so that the application of provincial laws becomes much less intrusive within Treaty Settlement Lands. The current section 88 analogue language, being proposed in treaty negotiations in British Columbia, gives the Province more constitutional authority over "Indians, and Lands reserved for the Indians" than exists under the Indian Act, in the non-treaty world

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[55] None of the Final Agreement tables has been able to secure paramountcy with respect to the BC Agricultural Land Reserve (ALR) legislation, or paramountcy over child care. The ALR issue was addressed by ensuring that the ALR is removed on critical lands.

d) Fisheries Negotiations

For many First Nations, particularly those that are on the coast, fisheries negotiations are the most critical aspect of reaching agreement. Fisheries issues are extremely complex, and stakeholders on all sides are seeking mandate changes to Canada's allocation model and fisheries management. In addition, many First Nations are passionate about ensuring that a section 35 commercial fishery is included as part of their treaty package. To date, both the federal and provincial governments have reacted by adamantly refusing to include a constitutionally protected commercial fishery in treaties. From the Crown's perspective arrangements that allow the sale of fish under section 35 is simply not on the table. The reason for this has nothing to do with fisheries management. Rather, it is a question of political expediency catering to the voice of the radical right.

The government mandates on this issue seem out of touch with the Supreme Court of Canada's decision in *Gladstone,* though more recent court pronouncements have had mixed results.[56] More importantly, it is out of touch with aboriginal culture and current practices. In many aboriginal communities, there is a strong belief in the right to sell fish. In some cases, First Nations individuals will sell fish regardless of any treaty language. However, this does not seem to matter to policy makers. So, at least until now, the Crown has been willing to agree to treaty protection to fish for food and for social and ceremonial purposes (FSC), and even to provide a non-treaty protected volume of fish that would be available for commercial purposes. The Crown steadfastly refuses to allow for the constitutional protection of an aboriginal commercial fishery. Ironically, from the point of view of the stocks, whether they are consumed pursuant to a constitutionally protected right or by an industrial licence is irrelevant. Once again this has become a matter of the politics of fear driving policy.

In the few Final Agreements negotiated under the BCTC process, the commercial volume for fish is mostly housed in a document called a Harvest Agreement. The Harvest Agreement is not a part of the Treaty nor is it a typical commercial licence. It is like a licence to sell fish for commercial purposes. But the Harvest Agreement is "evergreen" (perpetually renewable) and if not renewed, it is compensable. At the same time, as with other licences, the minister must authorize the fishery under the Harvest Agreement each year. If the minister does not, there will be no allowable commercial harvest. In fact, each year the minister must authorize both the section 35 FSC fishery and the commercial fishery under the Harvest Agreement. So, under the fisheries component of the treaty negotiations, negotiations involve giving up an undefined Aboriginal right to fish in exchange for the privilege to fish at the discretion of the minister, subject to some negotiated checks and balances.

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[56] See *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 which ruled against the Lax Kw'alaams claim of a commercial fishing right. But also see *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237 where the Court of Appeal upheld a finding of an Aboriginal right to harvest and sell fish, but excluded the geoduck fishery.

A unique feature of the language negotiated in the now-stalled *Lheidli T'enneh Final Agreement* was the ability to move up to 50 per cent of the FSC allocation into the Harvest Agreement or the commercial allocation. But as the mandates of governments narrow, particularly of the federal government, this option will likely no longer be available. It was not included in either the *Tsawwassen* the *Maa-nulth or the Tla'amin Final Agreements*[57], and it will likely not be included in others. In fact, fisheries negotiations are stalled to such an extent that mutterings of "bad faith" negotiations on the part of the federal government are never far from the surface. Continued delay of fisheries negotiations because of the Cohen Commission does not help matters.

e) Tax powers and exemptions

One of the more difficult and highly public issues in modern treaty negotiations is the question of First Nations tax powers and removal of the section 87 *Indian Act* tax exemptions. Status Indians—Indians registered under the *Indian Act*—have historically not paid taxes on personal and real property located on Indian Reserve Lands. The section 87 tax exemption flows from the special relationship between Aboriginal peoples and the Crown and from the unique nature of Indian Reserve Lands. In 1983, the Supreme Court of Canada reaffirmed the tax exemption and determined that income is personal property and the section 87 exemption includes taxes on income earned on reserve.[58] The section 87 tax exemption is one of the few economic tools Aboriginal peoples have that can provide an edge in a market economy. For political reasons, rather than reasons based upon valid Indian policy objectives, Canada has insisted that modern treaties must eliminate the section 87 exemption.

The Final Agreements under negotiation provide First Nations with authority to tax within Treaty Settlement Lands, create tax exemptions for the First Nations government, and remove the section 87 tax exemptions. Collectively, these provisions provide First Nations governments with the authority to levy direct taxes, including property tax, sales tax, and income tax for persons living on Treaty Settlement Lands. This includes provision for the negotiation of Tax Agreements to include tax authority over non-citizens and the harmonization of tax laws. The Tax Agreements also ensure that while the First Nation is taxing, federal and provincial tax laws over the same subject matter are inapplicable. The tax revenues raised are retained by the First Nation government, subject to some important exceptions to be discussed later.

The mechanics of the Tax Chapter requires the First Nation to enact a tax law and enter into a Tax Agreement for the corresponding federal or provincial tax. The tax levy will have to be harmonized with any corresponding federal or provincial tax. For income tax, the revenues will actually be collected by Revenue Canada, and then transferred to the First Nation government. This will all be done through a Tax Agreement. The mechanism works the same way for the provincial share of income tax, except the Province will transfer back only 50 per cent of the provincial share of income tax

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[57] *Supra* note 27.

[58] See generally *Nowegijick v. R.*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193.

revenues to First Nations. This seems to be because both Canada and BC are of the view that once a modern treaty is in effect, and subject to any transition periods negotiated, First Nations ought to be sharing a greater burden in the costs of services provided to their citizens. BC will accomplish this by way of Tax Agreements that will ensure 50 per cent of what is considered to be the provincial share of income tax and sales tax revenues is retained by the Province. Canada achieves the same purpose by way of its Own-Source Revenue policy, which will be discussed later.

The mechanism for sales tax is slightly different. After the First Nation has enacted a sales tax law, and provided such laws are harmonized with the government sales tax, the Crown will withdraw the application of its corresponding sales tax as it applies to the First Nation citizens (or a broader category of tax payers, depending on the scope of the Tax Agreement) on Treaty Settlement Lands. Unlike income tax, in which the actual amount collected (or a percentage of the actual amount collected) is transferred back to the First Nations, a formula for sales tax is negotiated so that an estimated amount of the sales tax is returned, rather than the actual amount. This is because revenues from sales tax are harder to track than revenues from income tax. As in the case of income tax, the Province is willing to share only 50 per cent of the sales tax revenues collected, and the federal portion is subject to Canada's Own-Source Revenue policy.

Property tax is normally divided into three areas: the local government tax, the regional tax, and the provincial or school tax. After the effective date of the Final Agreement, the First Nation will be the taxing authority for all three taxes. The local tax is to pay for municipal services. The regional tax is to pay for services provided by the regional government, and would normally be transferred to the regional government if that is the service provider. The provincial share, or the school tax, normally goes to the provincial consolidated revenue fund. In the case of property tax, the Province has backed out of the field entirely and the First Nation keeps the full tax amount, but the actual amount collected will be offset by the cost of municipal services and services provided by the regional government.

In addition to the tax authorities negotiated, there are provisions that exempt the First Nation government from being taxed. These are contained in a Tax Treatment Agreement. The Tax Treatment Agreement essentially provides for the application of the exemptions under section 149(1)(c) of the *Income Tax Act*[59] to the First Nations Government because it is a public body performing governmental functions. The Taxation Chapter in Final Agreements also provides for the removal of the section 87 tax exemptions after the expiry of a transition period—normally eight years for a consumption tax and twelve years for income tax. While this tax regime has been reluctantly agreed to at the Final Agreement tables, it is not acceptable to most First Nations. In fact, the way the tax issue is addressed in Final Agreements was one of the reasons for the failure of the Lheidli T'enneh ratification process.

[59] 1985, c. 1 (5th Supp.).

The most controversial issue of the tax model proposed by the Crown is the unilateral insistence that the exemption be removed within a fixed time period, regardless of the desires of the First Nations government or those being taxed. A model that would likely be more acceptable would involve the continuation of the equivalent of the section 87 tax exemption until the First Nation chooses on its own to exercise its tax authority. Once the First Nation becomes a taxing First Nation, then the exemption would be removed for the particular tax levied by the First Nation. The incentive for the First Nation government to tax is the much needed revenues. The Province would also have to agree to allow the First Nation to retain 100 per cent of the provincial share of sales and income tax. However, there is absolutely no need or policy rationale to force the elimination of the tax exemption within a fixed time period—be it eight years, twelve years, or twenty years—as a treaty pre-condition. The exemption can be removed when the First Nation begins to tax, pursuant to its own time frame. All parties' interests could be achieved through this mechanism.

f) Federal Own-Source Revenue policy

Notwithstanding the difficult issues described above, the Final Agreement tables have made the political decision to move forward in treaty negotiations in order to bring to their communities the immediate and tangible benefits that come with a treaty. The First Nations with Final Agreements are focussed on creating an environment within their communities that will foster economic development and greater independence. These communities seem ready to make the necessary compromises they hope will eventually lead to greater economic prosperity and freedom from the *Indian Act* regime. But Canada insists on drawing more blood from stone. And this insistence was another reason for the negative outcome of the Lheidli T'enneh ratification process.

In addition to the loan repayment requirements, one of the most difficult challenges in the negotiations is the federal Own-Source Revenue (OSR) policy. Subject to some exclusions and the transition period, the federal OSR policy essentially requires that 50 per cent of any revenues generated by the First Nation in the post-treaty environment be clawed back through a corresponding reduction in the annual fiscal finance agreements (FFA).

In its most basic form and once fully phased in, the federal OSR policy reduces the transfer payments that a First Nation would receive to provide services to its members by a percentage of the revenues that the First Nation earns from its own sources. For example, if a First Nation has a revenue stream of $10,000 in one year from the equivalent of the federal share of income tax, the annual transfer payments would be reduced by 50 per cent of the $10,000 (the inclusion rate), or $5,000. The same applies to income from tax-paying First Nations corporations that is transferred to a First Nation government. In other words, wherever a First Nation demonstrates initiatives to generate revenue streams, the transfer payments are reduced by 50 per cent of the revenues generated, or by whatever the inclusion rate is on the particular revenue stream. The OSR policy is to be applied to all sources of revenues generated by the First Nation unless those revenues are specifically excluded. In fact, the OSR policy is to be applied to all potential revenue sources, though these cannot be calculated. The policy also applies to

interest earned on the capital amount received in the settlement and to income earned on the revenue-sharing portion of the treaty assets.

It is important to understand that the policy will have different implications for different First Nations, depending on factors such as the level and nature of funding from Canada, the amount of owned source revenue generated, the sources of the revenue and the manner in which the First Nation can structure itself to avoid own source revenue offsets. However, a number of potential significant effects of this policy can be foreseen: The OSR policy reduces the real value of the settlement funds, reduces the potential economic advantages of Treaty Settlement Lands, discourages economic growth, and drives the manner in which First Nations will choose to develop their resources. In addition, combined with the loss of the section 87 tax exemption, the OSR policy will likely reduce the incentive of First Nations governments to earn revenues. The consequent reduction in transfer payments to First Nations may undermine their ability to provide core social programs. In particular, this may compromise the ability of First Nations governments to fund the universal social programs that all Canadians are entitled to. In effect, the citizens of First Nations with modern treaties would then be disadvantaged in comparison with other residents of BC. The OSR policy seems intent on keeping First Nations poor. Unless it is changed, the policy could lead to lost economic opportunities, slower economic growth rates, and greater reliance on federal transfers.

At the same time, there is no disagreement around the need for all governments to offset the costs of services through own-source revenues. That each government needs to pay its fare share is a corner stone of self-determination. But, where there is a severe fiscal imbalance, it is unhelpful to slavishly apply an untested model. An approach needs to be developed collaboratively by the parties to the negotiations and not imposed unilaterally. During the negotiations, some First Nations have suggested the use of comparability indicators as the trigger for the OSR offsets. This could include comparable wage levels, employment levels, child mortality rates, education levels, health statistics, and so forth. When comparability is achieved, then there would be a policy rationale on the part of the federal government for the reduction of transfer payments.

There are of course ways of circumventing the federal OSR policy. First, it is important to note that the policy applies only when the income or income potential is generated by the First Nation government. In other words, as long as income is retained by the First Nation's corporations or in a partnership, the OSR offsets will not take effect. This can be achieved by OSR planning and through the proper structuring of business arrangements. Second, a number of important exclusions to the OSR offsets have been negotiated. For example, revenue streams that would normally accrue to the Province but now go to the First Nation are excluded. The exclusion includes revenues derived from property tax or the provincial share of income tax and provincial sales tax. This would also include revenues from natural resource negotiations in which the Province provides funds linked with consultation and accommodation. In addition, there are exclusions for the assets negotiated in the treaty, including the sale of Treaty Settlement Lands, the initial capital transfer and resource revenue sharing, and the special purpose funds as well as the income on portions of these funds. Funds received pursuant to the settlement of

specific claims are also excluded from the policy. So while the policy itself is draconian, the Final Agreement tables have managed to negotiate around or are positioning themselves to avoid some of the negative economic aspects of the policy its more harmful aspects. However, this does not detract from the undercurrent of pettiness and the lack of sensitivity to First Nations concerns respecting the policy by those in Ottawa responsible for the development of the fiscal mandate. It is perhaps with these mandarins in mind that the Supreme Court of Canada made the following comments in the decision of *Mikisew Cree*:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.[60]

g) Shared decision making

While the Supreme Court of Canada has made numerous rulings on Aboriginal rights and title and the duty to consult, with few exceptions none of these decisions on its own has had a significant impact on the conduct of the Crown. Undoubtedly, *Delgamuukw* was the case that should have had the most impact because the plaintiffs sought a declaration for Aboriginal title, and had they been successful, the jurisdiction of the Province over lands and resource decision making would have been severely restricted. But *Delgamuukw* was sent back to trial for technical reasons. Since that time, the Gitksan and the Wet'suwet'en have been labouring away in negotiations without much progress.

Meanwhile, the Crown continues to have a pre-determined treaty model in which it is offering a small amount of Treaty Settlement Lands, particularly in less remote areas,with self-governing powers primarily over members, but very little control over lands off Treaty Settlement Lands. This is because the Crown continues to see itself as the only owner of the lands, and it views Aboriginal title as merely a "burden on the title of the Crown" that needs to be dealt with. All of this should have changed as a result of the decision in *Tsilhqot'in Nation*[61]. For the first time in BC, a court has stated that the test for Aboriginal title has been proved, though the Court did not provide the declaration sought. In addition, on the basis of earlier decisions of the Supreme Court of Canada, the BC Supreme Court made a non-binding commentary that the Province must reckon with

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[60] *Supra* note 18 at para. 1, Binnie J.

[61] *Supra* note 34.

when making lands and resource decisions over Tsilhqot'in traditional lands. Among other things, the Court stated that the Tsilhqot'in people were able to prove Aboriginal title over an area of approximately 2000 square kilometres and that the provincial *Forest Act* cannot constitutionally apply to Aboriginal title lands as these are "Lands reserved for the Indians" under s 91(24). The court also noted that where the legislative scheme under the provincial *Forest Act* does apply (where title has not been proved), the application of that regime does infringe Aboriginal rights as BC was unable to justify that infringement.

Though the opinion of Mr. Justice Vickers was non-binding, the decision has serious implications for the Province of British Columbia's ability to manage lands and resources on Aboriginal title lands. The decision should have been a shot in the arm for the much beleaguered treaty process and should force the Province to get creative about lands and resource management issues, particularly co-management arrangements off Treaty Settlement Lands.

While the Province has generally been more flexible in negotiations and has attempted to engage in creative interest-based problem solving, it has been reticent around sharing decision-making power over lands and resources that are not a part of the Treaty Settlement Lands. This has not been helpful, particularly because the amount of lands the Province is prepared to put on the table is relatively small when compared to negotiations that have taken place in northern Canada, Quebec, and Labrador.

The Province is generally prepared to negotiate joint management arrangements in certain parks or protected areas. In addition, in the Lheidli T'enneh negotiations the Province agreed to negotiate and attempt to reach agreement on "shared decision making" in two specified watersheds. Unfortunately the Lheidli T'enneh negotiations have not been able to bear fruit and enable a more detailed discussion of what the shared decision making would look like. As much of the concern among BC First Nations is generally linked with oil and gas development, forestry, and mining, it seems that genuine shared decision making should involve a decision-making role by First Nations in determining the annual allowable cut in a particular forest district, the approval of land-use plans, and a decision-making role in the environmental assessment process. These areas are critical to any notion of shared decision making and joint stewardship of the land. Additionally, it seems that where there is a proposed project that requires an environmental assessment or has a significant economic impact, a part of the project approval process should be a requirement for the proponent to enter into an impact-benefit agreement with the affected First Nation(s). This does not necessarily mean that First Nations would have a veto over all development, but arrangements could be made over specific watersheds that are important to a particular First Nation, and joint decision making would force serious negotiations around proposed projects. Much of this has been accomplished by the Haida[62] outside of treaty, but very little joint management or shared decision making is offered at the treaty table.

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[62] Haida Gwaii Reconcilliation Act, R.S.B.C. 2010 c. 17

Another area in which the Province should be able to show more creativity is the establishment of Wildlife Management Boards and Water Boards. Currently, the Province is refusing to engage in discussions that would require the establishment of management boards because of a fear that the minister's discretion will be fettered or that the costs might be prohibitive. This is old thinking, since the minister's discretion is already fettered by the constitutional protection of Aboriginal and treaty rights. As to the threat of increased costs, this is little more than a red herring. The fact is that the management boards established under the *N'isga'a Final Agreement* have proved cost efficient, and the costs of not having treaties will be much more challenging to the Provincial treasury. Again, this is an area in which creative solutions can be found, but this would require the requisite political will to honestly engage in interest-based problem solving, and this will is often lacking.

Interest-Based Negotiations

Cooperative interest-based negotiations play an important part in the negotiation process. Treaties cannot be successfully negotiated unless the parties are willing to come out from behind their positions and join together in dialogue. There are many instances in which the parties engage in a genuine structured problem-solving process in order to resolve issues in a manner that meets the interests of all. This happens in an atmosphere of trust and cooperation.

Yet, there are some tough issues, including the ones discussed above, in which the parties bring positions to the table that are illogical and that interest-based negotiations have not resolved. This is because there are structural impediments that do not easily lend themselves to interest-based problem solving. These structural impediments arrive because the negotiators, particularly the federal negotiators, do not have the decision-making authority required to allow the interest-based approach to work. The real decision makers are the mandarins in Ottawa who never appear at the table. They set the mandates, and once these mandates are set, there is very little that federal chief negotiators can do to change things. This is particularly true in relation to tax, fiscal issues and fisheries. These structural impediments are the cause of much of the frustration at the negotiation table on the part of all parties, including the federal chief negotiators themselves. While Final Agreement tables have concluded that the positions brought by the Crown are not necessarily irreconcilable with their own interests, many First Nations have concluded that not reaching an agreement or litigation would be better alternatives. The number of First Nations that have come to this conclusion is rapidly growing. This trend could prove fatal to the BC Treaty process unless the structural impediments are removed.

Conclusion

Aboriginal title remains unextinguished in BC, and the rights of First Nations and the settler populations remain to be reconciled. The Treaty Commission process is a brave undertaking in that it has made a sincere attempt at the process of reconciliation.

But notwithstanding some successes by the Final Agreement tables, including the recent initialling of the Tla'amin Final Agreement[63], the process has stalled.

The success achieved at the Final Agreement tables should not be underestimated. Their efforts successfully encouraged BC to change its policies in some important areas[64], but at the current pace, it will be another century or two before the majority of land claims in BC are resolved. Resistance to negotiations under the status quo mandates is growing each day. By far, the great majority of First Nations are seeking fundamental changes to the mandates currently brought to the table by the Crown. This does not mean that First Nations are necessarily against the treaty process, but it does mean the status quo is unacceptable to most. It also means that it is time for change, and some of the following policy changes need to be considered:

- The parties need to revisit the certainty model to ensure that all aspects of extinguishment have been rooted out. A preference should be given to the non-assertion model as suggested by RCAP and Justice Hamilton.

- Canada and BC need to be more flexible around the question of the status of Treaty Settlement Lands by giving due consideration to First Nations preferences including the continuation of Treaty Settlement Lands as section 91(24) lands.

- With respect to self-government, the concurrent law model and the section 88 analogue provisions need revision to ensure workability and to allow for greater autonomy by First Nations from the mechanical application of federal and provincial laws.

- Canada should adopt an approach to taxation that would allow the section 87 *Indian Act* tax exemptions to apply until First Nations governments are ready to draw down their own tax powers.

- Canada's fiscal policy needs revision. The loan repayment requirement is draconian as is the OSR policy. In particular, the OSR exclusions need to be broadened and the OSR trigger should be linked to First Nations achieving socio-economic parity.

- Canada's conduct and mandate at fisheries negotiations must change and treaties will need to include a constitutional priority of the Aboriginal fishery, including an Aboriginal commercial fishery.

- BC needs to be more flexible in its approach to shared decision making off Treaty Settlement Lands, including giving First Nations a decision-making role in

[63] Tla'amin, British Columbia and Canada initialed the Tla'amin Final Agreement on October 21, 2011.

[64] Self-government, resource revenue sharing, tax sharing, and shared decision making

> determining the annual allowable cut, approving land use plans and the creation of parks, and approving projects that require an environmental assessment.

Clearly, it is now time to do some constructive damage to the status quo when it comes to treaty making. BC has shown some leadership in making modest changes to its mandates, but it must do better. Canada needs to be prepared to follow BC's lead in risk taking and policy change. The federal land claims policy and the policies applied to the BC Treaty Commission process cry out for change. They are tired and outdated twentieth century policies that seem out of step with the law and out of step with what is actually happening on the ground. Regardless of whether several more Final Agreements are concluded, it is time for an honest assessment of the policies and the process governing treaty making in BC and elsewhere. But the honest assessment must be backed with the audacity of imagination and the political commitment required for making changes to the status quo.