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**Treaty Now?  
First, a Closer Look at the British  
Columbia Treaty Process**

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# Treaty Now? First, a Closer Look at the British Columbia Treaty Process

## Abstract

Renewed enthusiasm in Australia for treaties between indigenous people and the settler state has many considering what international experiences there are to draw upon. Frequently mentioned is the British Columbia treaty process, underway since the early 1990s. This paper examines that process and draws some general conclusions for the Australian debate.<sup>1</sup>

## Key words

treaty  
agreements  
British Columbia  
British Columbia Treaty Commission  
self-determination  
indigenous peoples

Is the treaty agenda in Australia back on track? Many indigenous people and their supporters hope that is the case.

The first major push for a treaty in the late 1970s and early 1980s was overtaken by indigenous interest in statutory land rights processes and the fact that a major locus of the treaty campaign had been in a non-indigenous organisation. Later in the 1980s treaties again appeared to be possible, but were overwhelmed by the Labor government's determination to create the Aboriginal and Torres Strait Islander Commission (ATSIC) and their sleight of hand over fundamental political questions in commencing the bipartisan reconciliation process.

Not surprisingly, treaties never went away. The Council for Aboriginal Reconciliation (CAR) suggested in its final *Annual Report* in 2000 that an agreement would be 'most desirable'. ATSIC, under the stewardship of Geoff Clark, has promoted a treaty as the only way forward for land rights after the failure of the Yorta Yorta native title case in the Federal Court in February 2001. An ATSIC Commissioner in New South Wales, Steve Gordon, has said that 54 per cent of Australians want a treaty and reconciliation cannot occur without one. Pat Dodson, former CAR chairperson, gave a lecture at Howard University in Washington where he stressed that the maintenance of aboriginality could only be ensured through a treaty. Academics, doctors and Democrat politicians have stressed that indigenous health may be dependent on the passage of a treaty. Mark Leibler, a board member of the private reconciliation 'foundation', Reconciliation Australia, has argued that the act of negotiating treaties or agreements 'has the great virtue of making the parties equal'. A great deal has already been assumed about what an Australian treaty or treaties would do and how it would be arrived at.

This productivity – perhaps confidence is a better word – may be because treaties are understood as the high-water mark of relations between indigenous peoples and settlers in 'post-colonial' states. There are two aspects to this thinking: firstly the historical and

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<sup>1</sup> An earlier version of this paper was presented to the *Rethinking Indigenous Self-Determination* conference at the University of Queensland, Brisbane, on 25 September 2001. Another version with references and footnotes is available from the author on request.

comparative experience, which has constitutionally-protected treaties at one end of a spectrum, the other end being the doctrine of *terra nullius*. The second aspect is the view that treaties make manifest the inherent right of indigenous peoples to self-determination. Taken together, these senses of 'treaty' rely on the formal recognition of indigenous peoples' rights to land, to cultural practices, and to identity as the necessary next phase of a historical process.

But formal recognition of what exactly? By whom? When and how will this recognition be protected or entrenched? The inclusion of or exclusion from negotiations over a treaty of particular things already characterises any final agreement in particular ways: without, for example, discussions over recognition and implementation of indigenous rights, the resulting document will not be seen as a substantial development on the various 'statements of reconciliation' made in recent years. We should banish any thoughts that treaty-making is a 'ready-made' process; whatever policy might eventuate in Australia, it will be the result of serious political contestation.

This may be a fairly banal point to make, but I think great complexity is concealed here. I want to throw some light on this contention by looking at a process of formal recognition in Canada that has been underway since 1993, the British Columbia treaty process.

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There is a long and rich history of treaty-making in Canada that stretches back to the late seventeenth century. By the time that British North America became Canada with its current external boundaries (at confederation in 1867), over 40 treaties had been reached. In the first 50 years of the confederation, the so-called 'numbered treaties' covered most of the remaining territory in Canada below the 60th parallel.

But these numbered treaties stopped at the Rocky Mountains, the provincial border between Alberta and British Columbia. With the exception of some treaties on Vancouver Island and near Fort George (now Prince George) on the mainland, there were no treaties sought with Natives as the colony of British Columbia expanded into the interior and remote north. With two exceptions – the Nisga'a Final Agreement (which I discuss below) and the McLeod Lake Band's adherence to Treaty 8 – this remains the case in 2002. Essentially this meant that the colony (a province after 1867) operated in a way entirely reminiscent of Australian colonial practices: with the presumption that the land was *terra nullius*.

Of course, Natives never accepted this, and have asserted their sovereignty and at every opportunity have sought negotiated settlements with compensation for alienated lands. This was so consistently the case that the Canadian federal government – which unlike the Commonwealth of Australia has sole legislative authority over 'Indians and lands reserved for Indians' – legislated in 1927 to prevent Natives accessing the courts for the purpose of pursuing land claims; a law not repealed until 1951.

During the first years after confederation, the federal government passed the *Indian Act* to administer Natives' affairs. This legislation was certainly assimilationist in intent, even if its effects were more complex. The Act created Native reserves, and 'bands', which became the administrative units for Canadian policy. In some parts of the country these bands reflected traditional Native organisations and structures, but in many cases they did not. There are some quite serious consequences of this aspect of colonial history for the modern practice of treaty-making, which I will discuss in some detail below.

Land claims were openly pursued again in the 1960s, though political differences between Natives across the province absorbed a lot of energy. One group, the Nisga'a of north-west British Columbia, avoided much of the internecine strife associated with the attempts to

create pan-Indian unity. Their land claim finally resulted in a judgement of the Supreme Court of Canada in 1973. The *Calder* judgement, as it is known, was akin to *Mabo* in its consequences. Its recognition of aboriginal title immediately forced the federal government into adopting bilateral negotiations with Natives across the country. This is known as the comprehensive claims policy.

It is a policy that has produced some significant results, most stunning of which is perhaps the creation in 1999 of a new Canadian territory, Nunavut, as partial settlement of the Inuit people's claim to the Eastern Arctic. Other agreements include the James Bay & Northern Quebec Agreement (1976) and the Inuvialuit (Western Arctic) Agreement (1984). Most recent is the Nisga'a Final Agreement (2000), thus concluding a 25-year negotiation process between the Nisga'a and the federal government. All agreements reached through the comprehensive claims process deal with the claims of indigenous peoples in remote regions, the bulk above the 60th parallel, some of the most remote and sparsely populated regions of the planet.

During these developments, the British Columbia government stubbornly refused to deal with the historical anomaly of outstanding Native claims in the province. Even during a brief period of progressive New Democratic Party (NDP) government in the early 1970s, very little changed: the provincial position remained a denial of both the existence of aboriginal title and any need to negotiate over its terms. But this intransigence was to become untenable in the 1980s.

Few matters pertaining to treaties in British Columbia generate a consensus among all participants, but the reasons the government changed its attitude receive almost unanimous endorsement: Native people openly challenged the legitimacy of the province and its economic foundation in resource extractive industries.

They did so by blockading highways and access roads, particularly disruptive to the logging industry; and they sought and received injunctions halting resource development all over the province. Most notable was the Meares Island case in 1986, in which Justice Seaton drew a stark contrast between lands on which indigenous rights could be enjoyed and those that had been clear-felled (a practice in which the entire forest is demolished). Seaton granted the injunction to prevent destruction of the forest while the issue of title was established; he encouraged this to be done through negotiations, suggesting that this was the community's expectation. By 1990, David Mitchell, a conservative member of the provincial legislature and vice-president of lumber company Westar, was quoted as saying provincial authority over resources had broken down completely: 'it is no longer certain who controls the forests in north-west British Columbia'.

Only one person I spoke to during my research offered an alternative rationale for the change in provincial policy that was to come. Mike Harcourt, NDP premier of British Columbia from 1991 to 1996, took an 'enlightenment' reading, suggesting that the public had become awake to injustice. If that is true, it was a reactive enlightenment to be sure. All across Canada, confrontations and violence characterised relations between Natives and the state. The Canadian Human Rights Commission described the relationship in the aftermath of the Oka crisis in 1990<sup>2</sup> as largely dysfunctional.

By 1989, British Columbia's long-serving Social Credit government had become deeply unpopular and desperate in the face of impending elections. Amongst a number of policy initiatives, it established the British Columbia Claims Task Force in December 1990, charged

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<sup>2</sup> A conflict on a Mohawk reserve at Kanasatake, Quebec, in which Natives were attempting to prevent the development of a golf course on their burial grounds. After a policeman was shot and killed, 1,000 police and 1,400 troops laid siege to the reserve for over two months.

with developing a comprehensive policy solution to the legal and political questions arising from Native claims.

The Task Force report released in of 1991 is perhaps unique in the history of such reports in that the government immediately endorsed all of its nineteen recommendations. Chiefly these were that a process of negotiations be commenced on a tripartite basis (British Columbia, Canada and individual Native groups); that negotiations would be 'open', in that each party would be able to raise any topics for negotiation; that 'third-parties' (resource industries, labour and environmental groups and local governments) would be represented by the provincial government; that negotiations would be 'interest-based', rather than adversarial;<sup>3</sup> and that they would be conducted with a 'government-to-government' character, a presumption of Native authority hitherto unrecognised.

By the time these recommendations could be put into place and the required institutions set up, the provincial government had changed, with Harcourt's NDP taking power. They soon concluded the *British Columbia Treaty Commission Agreement*, a tripartite agreement between British Columbia, Canada, and the First Nations Summit (FNS), a peak body of a majority of Native groups in the province set up largely for that purpose.<sup>4</sup> These signatories are considered the 'three principals', and the agreement itself framed the Task Force report's recommendations, and created the British Columbia Treaty Commission (BCTC) to act as 'keeper of the process'.

Neither the Task Force report nor the Agreement set out an agenda for treaty negotiations. They merely provided the format for a process. Throughout this period, the principle of 'open' negotiations was consistently endorsed by all three principals.

However, treaty-making had some fundamental goals. It would deal with outstanding land claims through a process of negotiation, thereby ending litigation and physical confrontation; treaties would define what aboriginal rights and title actually are (thereby giving content to s. 35 of the 1982 Constitution of Canada which protects aboriginal and treaty rights); and they should create a 'new relationship' between settler and indigenous peoples, allowing the latter to prosper and develop on their own terms.

The BCTC Agreement was enacted as legislation in May 1993, and the Commission began work soon after. Under the terms of the Agreement, there are five commissioners: two appointed by the FNS, one by British Columbia and one by Canada. The Chief Commissioner is appointed by mutual consent of the principals.

The Task Force had described explicitly how tripartite negotiations would proceed between the province, Canada, and particular First Nations: each set of negotiations in the British Columbia Treaty Process (treaty process) – each treaty 'table' – would go through six stages:

1. Filing a Statement of Intent (SOI) to Negotiate a Treaty: the onus on First Nations to provide a rough indication of their traditional territory and a sense of who they were and how they were organised.
2. Preparing for negotiations and assessing 'table readiness': here all parties had to demonstrate their 'mandate', their capacity to negotiate and ratify agreements, and what

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<sup>3</sup> Interest-based negotiations differ from the bargaining model typical in industrial settings. Parties to treaty negotiations in British Columbia are supposed to begin discussions from 'interests', for example, 'We have an interest in that land being protected from inappropriate development', not the 'position' that 'We must own that land so that it can be protected'.

<sup>4</sup> The term 'First Nation' had come into use in British Columbia during the 1980s, but was a novel designation for many Natives and remains disliked by some.

measures for public observation of treaties and consultation would be put in place. Once the BCTC was satisfied this had been set out, each table was declared 'ready'.

3. Framework Agreement Negotiations: initial negotiations were over the table structure, for example, would there be side-tables to deal with wildlife or taxation issues. The main aim here was to get an agenda for future negotiations – a Framework Agreement. This needed to be ratified according to the procedures set out at Stage 2.

4. Agreement in Principle (AIP) Negotiations: the first substantive negotiations on the topics the three parties at each table wished to discuss. The aim is to agree on drafts of the chapters that are to become the final text, and therefore receive constitutional protection under s. 35. A collection of draft chapters is an AIP, which again, requires ratification.

5. Negotiating a Final Agreement: discussions to agree on the final text of Agreement. Here a process of constitutional and legal review is undertaken in addition to the discussions at the table. This stage, effectively the conclusion of negotiations, naturally requires ratification by all three parties, using the approach they had committed to at the outset.

6. Implementation: the transfer of cash and authority over lands and resources as indicated in the Final Agreement.

The BCTC started taking SOIs from First Nations in December 1993. Originally, it was thought that about 20 tables would be established, a figure based on projections from the CCP, but by late 1994 43 SOIs had been accepted. In 2002 there are 49 First Nations at 40 tables (some contiguous groups working on one table). The effect of this miscalculation was most quickly felt by First Nations themselves, as the resources of the process became strained.

One of the key decisions taken by the principals had been to enable First Nations participating to access funds, on a mainly loan basis. Negotiation Support Funding, as this arrangement is known, works as follows: 80 per cent is loan from Canada to the First Nation, and 20 per cent is a grant which Canada and British Columbia split 60/40.

Throughout the process, this system has been managed by the BCTC; by September 2001 \$180 million had been disbursed, \$150 million as loans. \$41 million is available in 2001-02. Loans are due seven years after a table reaches an AIP, and twelve years after the first loan if talks break down. As some have pointed out, this creates certain incentives to stay in the process while making no progress.

Yet most First Nations object to the very principle of loans. Why, they ask, should First Nations incur debt so that settler governments can rationalise indigenous rights into the dominant political system? It is a reasonable criticism, made compelling by the poverty already endured by most indigenous peoples in the province.

One of the reasons that there was an 'over-subscription' to the treaty process was a lack of thought given to the question of who should participate on behalf of Native peoples. The Task Force stressed that the process must be voluntary and representative: 'It is essential that the same people who will ratify the treaty support the organization which is negotiating on their behalf.'

In the BCTC legislation this was tightened: 'first nation means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, that has been mandated by its constituents to enter into treaty negotiations on their behalf with Her Majesty.'

And this was the basis the treaty process operated on and continues to operate on: voluntary, representative, but essentially self-designating. The result is that Native peoples

at treaty tables are represented variously, by tribal councils, by First Nations, and by the bands, the administrative units established under the colonial legislation, the *Indian Act*. No consideration was given to the question of aboriginal title and the necessity for title-holders to be involved in negotiations the outcome of which was certainly going to infringe that title.

This criticism had been made consistently by Native groups who had stayed outside the treaty process, particularly the Union of British Columbia Indian Chiefs (UBCIC) and the Interior Alliance. In 1997, the problem was thrown into stark relief by the Canadian Supreme Court's determination in *Delgamuuk'w*. The case extended the scope and content of aboriginal title, opening its character to include more than simply 'traditional' practices, and setting out a legal approach for the infringement of aboriginal title based on a concept of public economic necessity combined with compensation.

As the treaty process has proceeded, one thing has become clear. The federal and provincial governments see each treaty as an exchange – some lands, resources and powers for the removal of uncertainty over where aboriginal title exists and what it is, with explicit descriptions of both then protected under s. 35. So, in this exchange, First Nations give up title and rights to the bulk of their traditional territory, certainly an 'infringement' of title. A 'five per cent solution' – where the total land held by Natives when all treaties are concluded exceeds no more than five per cent of the province – was openly aired by provincial politicians.

The combination of this approach and the requirements of *Delgamuuk'w* introduces some very difficult issues. In a confidential report prepared for the principals entitled *Strengthening First Nations for Treaty Purposes*, the BCTC raises 'the spectre of negotiations being carried out with a First Nation that is not coterminous with the nation that holds title to a particular territory'. Should this prove to be the case, it would force radical changes to the existing process: it is possible that some tables would have to combine, others perhaps be abandoned. What should happen to existing interim and framework agreements at tables, and the debts already incurred? The report remains confidential and the questions unanswered.

Yet there can be no complacency in government ranks about the problem. The single modern agreement reached in British Columbia, the Nisga'a Final Agreement (reached in 2000 under the comprehensive claims process and not the process overseen by the BCTC), is the subject of extreme contention between the Nisga'a and their neighbours. The Gitanyow and Gitksan hereditary chiefs have consistently argued that the Nisga'a aggrandised their initial territorial claims, the starting-point of their negotiations, and in so doing infringed upon the territory of others. The governments, however, believe that the land discussed in the Nisga'a Final Agreement (NFA) has been made 'certain'. Though the challenge to the NFA in the British Columbia courts on the basis that the Nisga'a had falsely claimed Gitanyow and Gitksan lands was unsuccessful, the general issue is far from resolved. This problem has been built into the structure of the treaty process, a consequence of seeing treaties as predominantly a political and not a legal process.

As I stated, theoretically nothing is ruled out on treaty tables, though this is far from the case. I will demonstrate this by considering several of the main issues the parties have been trying to discuss over the last eight years of the treaty process: land 'quantum'; interim measures; compensation; self-government; and 'certainty'.

**Land** is obviously the most important issue. It was thought by many that the process would result in First Nations gaining inalienable title to some lands – 'treaty settlement lands' – which they would govern. Other lands would be shared, to reflect interests in migratory wildlife, for example.

For their part, the governments have excluded all 'fee simple' or 'freehold' lands from discussion; they have canvassed the '5 per cent solution'; they have insisted that there will be no shared arrangements for environmental and resource management on non-settlement lands; and they have been reluctant to indicate 'quantum' before Stage 4.

Quantum is the package with which the governments are 'buying' the jurisdictional certainty they require. This comprises both what the governments envisage as treaty settlement lands, as well as cash to boost Native expectations. The NFA package was 1,930 sq km and \$190 million, in return for an indemnification against future claims.

First Nations want a clear indication of quantum and they want it early in the process. As one analyst with the Ts'kw'aylaxw Band in central British Columbia told me: 'The issue for the band is regaining control of the land, regaining control over probably about 30-45,000 hectares of land. If they can get that then most of the other stuff can probably be lived with. If they can't get that scale of land it doesn't matter what the rest of it says, it's irrelevant.'

Ts'kw'aylaxw were offered less than 10 per cent of that in March 2000 and voted to disband their negotiations in July that year. Another First Nation, the Lheidli T'enneh, described the offer they received from the two governments after seven years of negotiation as 'a slap in the face'. There is a growing sense that the quantum jointly offered by the two governments is being worked out formulaically; a figure of \$60-65,000 per person is frequently raised by First Nation people who have tried to fathom the rationale. Yet this is not an openly held policy, and is disavowed by provincial and federal politicians.

In urban treaties, particularly in the Lower Mainland around Vancouver, fee simple (freehold) lands may be essential for the conclusion of treaties. There is very little Crown land that the governments have to play with in these areas, and such First Nations in this area are unlikely to accept a larger cash component of the quantum.

**Interim measures** are another major issue. The Task Force had recognised that treaties would take time, and explicitly recommended an 'interim measures' process for the protection and sharing of lands and resources before each treaty was concluded. A spectrum of options from notification of development to full Native consent was indicated. The ruling in *Delgamuuk'w* clearly confirms the wisdom of this policy.

Yet First Nations have been extremely dissatisfied with the interim measure policy. Again, the province has been reluctant to get involved until tables reach Stage 4. As the Chief Treaty Commissioner, Miles Richardson, said in an interview with me in 1999, 'First Nations are largely saying, and I think quite legitimately, "It's just not on that we continue sitting negotiating at treaty tables accumulating huge amounts of debt when the very assets, the very resources, that we're talking about are rolling by our offices on logging trucks".'

A raft of interim measures was reached in 1999-2000, a response to the NDP's deep unpopularity and the perception that treaties were not achieving anything. Yet on examination, there is very little substance to these agreements, and certainly not the indigenous participation in the resource sector envisaged in the Task Force report. Some of the interim measures are to provide basic social services to indigenous communities such as the maintenance of access roads in winter. Many of them appear to be designed to lock First Nations into the treaty discussions, with small amounts of funding to do studies of potential economic ventures. In its 2001 review of the process, *Looking Back, Looking Forward*, the BCTC pointed out that, of 60 interim measures, only one was a land protection agreement.

**Compensation** is the source of even greater disagreement. Task Force recommendation 2 explicitly contemplated negotiations over compensation, yet the parties' positions reveal a

huge gulf. First Nations have maintained that compensation is one of the fundamental reasons they are involved in the comprehensive process. The FNS resolved in May 1998 that no Final Agreements would be reached that did not clearly set out the wrongs committed against First Nations and offer compensation for them.

Canada maintains that 'history has been dealt with' through its response to the Royal Commission on Aboriginal Peoples: *Gathering Strength* provided an apology for the victims of the residential schools policy and \$350 million as a healing fund. Canada insists that the cash component of treaty settlements is an exchange of 'value for value'.

British Columbia takes a 'blend of approaches'. Basically this is an 'agreement to disagree': recognising that while Natives will probably see cash settlements as compensation, the province sees them as providing the basis of future development. The *Delgamuuk'w* judgement insists on compensation where an established title has been infringed, but stresses that negotiations should be the way.

The issue of indigenous **self-government** may be the most complex that treaty negotiations must resolve if there is to be success in the treaty process. A 1995 federal government policy indicates that Canada accepts self-government as an inherent right. *Delgamuuk'w* opened this up considerably: by expanding the notion of title to include 'non-traditional' activities, the ruling implies a strong sense of indigenous autonomy and self-determination. Yet, at tables, two positions seem entrenched. Vine Deloria Jr has characterised this distinction as that between 'nationhood and self-government':

Nationhood implies a process of decision-making that is free and uninhibited within the community...self-government, on the other hand, implies a recognition by the superior political power that some measure of decision-making is necessary but that this process must be monitored carefully so that its products are compatible with the goals and policies of the larger political power...Self-government implies that the people were previously incapable of making any decisions for themselves and are now ready to assume some, but not all, of the responsibilities of a municipality. Under self-government, however, the larger moral issues that affect a people's relationship with another people are presumed to be included within the responsibilities of the larger nation.

If one looks at the only real example on offer from British Columbia, the NFA, a distinct legal entity is clearly there. It is democratic and accountable, and has a wide range of areas of legislative competence for the *Lisims*, the Nisga'a parliament, though it has no criminal jurisdiction and the Supreme Court of British Columbia retains administrative oversight. These are all powers that either already existed under the *Indian Act*, are the subject of intergovernmental agreements, or that deal with aspects of Nisga'a culture that could not conceivably be administered by another institution.

Other powers will arise as British Columbia will allow. But the conclusion in *Delgamuuk'w* is that all of that can be infringed where the Canadian state requires it. Self-government and self-determination may not be as close as many indigenous people had hoped.

**Certainty** is best understood as working out what happens after treaties are concluded. If this means extinguishment of aboriginal title and rights, Natives in British Columbia are unlikely to take up the offer.

A small industry has evolved to take extinguishment phrases out of the argot of agreement-making in Canada. From 'Cede, release and surrender' – the earliest phrasing – to the language of the James Bay and Northern Quebec Agreement, in which First Nations

'release' and then are 'granted-back' their rights, this has been a productive field. The current orthodoxy is 'Modify and release', which has operated since 1998 and is the approach taken in the NFA.

Yet sections 26-31 of the NFA may make this all a mere exercise in semantics. Here the two governments are 'released from future claims'; they have 'a duty to consult' only under the terms of the Agreement itself; they receive an indemnity against all 'acts or omissions' that may have infringed aboriginal title 'before the effective date'; and are provided with an indemnity against any infringements of still existing rights not protected and set out in the NFA.

This is what governments call non-extinguishment. The last Minister for Aboriginal Affairs in the NDP government, Dale Lovick, told Natives who suggested it was indeed extinguishment that they 'misunderstand'. The current Liberal government has a more transparent agenda. While in opposition, members penned a report on the Nisga'a's AIP. The Liberals' understanding of 'certainty' will clearly not depend on an imaginative approach to the drafting process. As that report puts it: 'Whether a more benign legal technique for achieving certainty can be agreed upon remains to be seen, for the issue is not really about the phraseology, but the requirement for extinguishment.'

Against this attitude, Natives are looking for something altogether different. At a Gitanyow table meeting I observed in 1999, the elders spoke of 'living agreements', of partnerships between peoples that were flexible and respectful.

It is clear that no concept in indigenous-settler relations is more fetishised than certainty, but the treaty process lays bare the question: is 'certainty' the recognition of indigenous rights, or an indemnity against their assertion?

On these issues it seems at times that an unbridgeable abyss lies between governments and First Nations. Many other issues are difficult and challenging: these include the use of 'templates', or province-wide approaches to particular issues common to all tables, such as the future fiscal arrangements between indigenous and settler governments. This is an issue some feel is essential to getting negotiations moving in a timely fashion, while others feel this undermines the 'nation to nation' spirit of treaty-making. Similarly, the question of 'good faith' negotiations is now a thorny one for governments: the Supreme Court of Canada has said that, once in negotiations, governments have an obligation to act in good faith. It may be that the refusal to discuss certain topics constitutes a breach of that faith.

The signs in British Columbia are not encouraging. There is one modern treaty which, as I have noted, was not part of the tripartite treaty process I am examining, but was the culmination of 25 years of bilateral negotiations between the Nisga'a and the federal government. Though that agreement dealt with lands that were fairly remote, the contentiousness of the NFA is still significant.

Of the 40 tables actually in the process, none are in Stage 5. Two tables – Sliammon and Nuu-chah-nulth – arrived at an AIP, but these agreements were rejected by the communities. The Sechelt First Nation ratified an AIP in 1999, but have since abandoned negotiations and returned to litigating their claim.

The vast majority of tables are at Stage 4, the first substantive stage, dealing with such conceptual and practical problems as those I have been discussing. According to the Treaty Commission, 12 tables were reported to have made any progress in the last 12 months, and only 15 in the last two years. A large number are described in its 2001 Annual Report as either stalled or working on 'non-treaty' issues.

In the last year, three tables have disbanded: the In-SHUCK-ch/N'quatqua, Ts'kw'aylaxw and Xaxli'p are all communities within the St'at'imc tribe. That tribe went from having about half of its members in the treaty process to having none. This is in addition to those tables, such as the Musqueam in Vancouver, which has disbanded its treaty office without formally leaving the process. Only one table has been set up since 1997 (coincidentally the date of the *Delgamuuk'w* judgement), and that was the Hupacasath, who had previously been part of the Nuu-chah-nulth table, deciding to strike out on its own. More than one-third of all Natives in British Columbia were never represented in the process anyway, a proportion that appears to be growing.

After a fairly passive approach to its role as 'keeper of the process' through the 1990s, the Commission recently decided on a more critical type of management, acknowledging the 'fundamental conflicts' that have emerged. In 2001, it issued a review of treaty-making which calls for substantial reconsideration of many of the issues I have been discussing, although its solutions seem simply to raise further questions. It now talks of 'incrementalism', and the need for 'slim AIPs' that focus on common ground, leaving difficult issues for another day.

In recent times another, more direct approach has become visible. The Westbank First Nation took logs from their traditional territory in 1999, an illegal practice from the province's point of view. Rather than pursuing criminal sanctions, the governments decided to negotiate, 'off the table' as it were, granting Westbank significant logging rights and providing a cash settlement.

Some legal scholars have suggested that the provincial decision not to prosecute Westbank indicates that *Delgamuuk'w* may have shifted the balance of power significantly towards Natives, with an 'onus of proof' of title now being on the provincial government.

Many Native groups are examining such strategies. The peak indigenous body in Canada, the Assembly of First Nations, has been developing a post-*Delgamuuk'w* strategy based on the assertion of rights: the 'Gisday' process takes the stand that if Natives believe their title to exist, they should simply enjoy its benefits, rather than waiting for governments to approve. Mohawk philosopher Taiaiake Alfred has called this type of activity 'self-conscious traditionalism'.

Meanwhile, the Liberals have swept into power in British Columbia, taking 77 seats in a legislature of 79, and have announced a referendum to define the provincial government's 'mandate' at treaty tables. They have been committed to this policy since 1999, to 'give the public a say' in a process they characterised throughout the NDP reign as shadowy, unobserved and undemocratic.

The referendum will ask voters to endorse eight principles. Approval of any of the principles will mean that they become legally binding on the government; no agreements will then be able to be reached in the treaty process that do not adhere to them. The principles are as follows:

1. Private property should not be expropriated for treaty settlements.
2. The terms and conditions of leases and licences should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.
3. Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.
4. Parks and protected areas should be maintained for the use and benefit of all British Columbians.

5. Province-wide standards of resource management and environmental protection should continue to apply.
6. Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.
7. Treaties should include mechanisms for harmonising land-use planning between Aboriginal governments and neighbouring local governments.
8. The existing tax exemptions for Aboriginal people should be phased out.

First Nations and their supporters, including the NDP, are boycotting the referendum. Their aim is to delegitimise the government's populist strategy; the fact that it is to be a postal vote may also distort the result, potentially further reducing the number of ballots cast by those without strong views on treaty making. So, overwhelming endorsements of any of the principles is unlikely to offer greater 'certainty'. Moreover, failure to gain endorsement of any of the principles does not mean that its opposite then becomes policy. However, it may be worth briefly considering the consequences of endorsement of each of the principles, for the general project of building new relationships.

The first two principles would, if endorsed, confirm the majority of private and commercial tenures in the province. That is, no agreement could then be reached through the tripartite process which sought to use state power to redistribute interests in land from those privately held to indigenous peoples. This would leave open the possibility of consensual transactions with appropriate compensation. The consequence on urban treaties would be significant, probably raising the cash component of future settlements to incredible levels. One could expect the federal government to be very concerned by this prospect.

Principles 2 and 5 maintain the status quo over resource industry decision-making and control, while principles 3 and 4 retain provincial control over other forms of land and resource use. That is, future agreements could not legally include any devolution of power to new indigenous governments on these matters.

Principle 7 would mandate that all agreements provide mechanisms for future decisions about land use made by indigenous and local governments together; thereby further delimiting the scope of indigenous governance in advance of such institutions coming into existence. Principle 6 does that rather more explicitly. Principle 8 seeks to bring indigenous communities into the mainstream economy and taxation system, a bold mandate considering that tax exempt status exists largely as a function of the special relationship between indigenous peoples and the federal government.

The passage of any of these principles would certainly result in massive changes to the treaty process. They should not be seen as minor adjustments to make the process more 'democratic'. Very few, if any, Native groups would abide the passage of principle 6; not many more would accept principle 8. Many groups would wonder whether the passage of principles 1 to 5 and principle 7 did not severely undermine their rationale for participation. The main obstacles I identified – land quantum, interim measures, compensation and self-government – are all addressed by this referendum, but not in any way that is likely to lead to their removal and the timely completion of negotiations.

A number of commentators have questioned whether such a referendum may infringe upon constitutionally-protected indigenous rights. The government has frequently said that the referendum will not be a majority vote on minority rights, but this is disingenuous: treaty-making has the intention of defining the undefined, of giving content to s. 35; limiting the scope of negotiations necessarily limits the character of rights defined by treaty, and cannot therefore be seen as anything but a vote on minority rights.

The provincial referendum does not seem to allow for the ‘fundamental recognition’ that at the outset of this paper I suggested was the essential point of making treaties. It appears to offer British Columbia voters the opportunity to confirm the current policies that I have argued are preventing any substantial agreements from being reached. If these policies are confirmed – turned into mandates the provincial government will to adhere to – then I suspect few Natives in British Columbia will wish to stay involved in the process.

A process that had such promise at its beginnings now faces dark days indeed.

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There are several lessons in the British Columbia experience for Australians as a treaty or treaties are pursued here.

Initially, we should think about ‘who treats’. This is not simply a question for the indigenous party or parties to treaties, but in our federal system concerns the involvement of state (and even local) government in addition to the Commonwealth. Are there ways for non-government bodies to be parties to binding agreements with indigenous peoples?

The main issue to consider is whether treaties should be seen as political agreements or legal covenants. Presumably the answer will be both, but the legal aspects of treaties means that holders of title and rights must be at the negotiation table. If treaties do not attempt to offer protection and implementation of indigenous rights, it is difficult to see how they will differ from statements of reconciliation. Substance, I would suggest, means a legal process.

The second and related point is: who, if anyone, should oversee or manage the indigenous involvement in treaties? The First Nations Summit, while established largely for the purpose of treaty-making, does not enjoy the support of all indigenous peoples. It means that provincial (state-wide) or even regional approaches to treaties will be very difficult to arrive at. Though the current indigenous patron of a treaty in Australia – ATSIC – is undertaking extensive consultation in indigenous communities, it is certainly open to such criticism.

On both these questions, indigenous peoples will need to give fairly clear answers. In British Columbia, the political divisions amongst Native groups have, by and large, not been exploited by non-indigenous political figures. One cannot expect the same restraint in Australia, however.

The second set of issues of course is ‘What’s on the table?’. Ruling out certain matters from the outset, while insisting on others, already gives any possible future agreement a particular character.

Ultimatums clearly undermine the possibility of interest-based negotiations, the only way the basic power differential between indigenous and settler peoples can be lessened in discussions. I gave the example of the ‘five per cent solution’ and a formulaic approach to settlements in British Columbia. Australians will have to consider whether Aboriginal and Islander claims are to be settled according to some such economic calculus, or whether a more dignified and respectful solution may be possible.

What happens afterwards? Treaties reached under the British Columbia process will have constitutional protection, but the question being asked by Natives is ‘What if things change for us?’. They are concerned about the inflexibility in the forms of protection being offered by government through the negotiated process. There is absolutely no guarantee that indigenous people in Australia can surmount the obstacles to constitutional change to even gain that level of protection offered in Canada. This may be the case for a long time to come.

Finally, we need to ask ourselves the same question that many people in British Columbia, Native and non-Native, are now reflecting on: how should we conceive of a future relationship between indigenous and settler peoples that is respectful and just? This may be more complex than contriving a new 'best practice' model for indigenous development.