BC Treaty Commission

after DELGAMUUKW

After DELGAMUUKW:
The LEGAL *and* POLITICAL LANDSCAPE

The Supreme Court of Canada decision in late 1997 was widely seen as a turning point for treaty negotiations. The decision confirmed that aboriginal title does exist in BC, that it's a right to the land itself — not just the right to hunt or fish — and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose titles are affected. Everyone involved in treaty negotiations recognized that the decision could have major impacts on policies, on positions and on mandates. It's still too early to know what its full impact will be.

> THE DELGAMUUKW DECISION

The decision strongly favours negotiation as the way to resolve conflicting claims to the land. There are complex issues at stake, the court said, and the negotiating table is the place to resolve them — not the courtroom. Treaties can settle who owns what land, who has rights on the land and who manages the land.

The Supreme Court told us aboriginal title exists in BC and is:

- a right to exclusive use and occupation of land;
- a constitutionally protected right; and
- a burden on Crown title.

But it did not say where in BC aboriginal title exists. That would have to be proven in each case. Depending on the history of a particular First Nation and its use and occupation of its traditional territory, this may or may not be easy to do. The Supreme Court also said that aboriginal title can be infringed by BC or Canada, for certain limited purposes.

One result of the decision is enough uncertainty on all sides to make treaty negotiations a more attractive option than litigation.

> THE TRIPARTITE REVIEW

A review of the treaty process was undertaken by the three Principals in the wake of the *Delgamuukw* decision. The First Nations Summit and the governments of BC and Canada set out, in a series of meetings, to exchange views on the meaning of the decision and to see if they could find ways to improve the treaty negotiation process. The Treaty Commission in its 1998 annual report described the review process as "at a standstill." It urged the Principals to resume the review process and invigorate treaty negotiations.

The Principals did continue the review in the autumn and in an intensive round of meetings developed a series of recommendations which are being considered and adopted as agreed.

The focus of the review has been to find ways to accelerate negotiations around land, resources, cash and the financial components of treaties. First Nations who are borrowing large sums of money to finance their treaty talks have become frustrated. As negotiations drag on, they see the resources in their territories being depleted or alienated and they fear there will be little left with which to meet their treaty expectations. They are seeking assurance that treaties will leave them better off than they now are. *Delgamuukw* and its confirmation of aboriginal title heightened First Nations' expectations that their concerns would be addressed. Resolving

issues around land and resources sooner rather than later will restore confidence in the treaty process.

The Treaty Commission's role in the review

The Treaty Commission played an active role in this review. The Chief Commissioner chaired the meetings and Commissioners attended as observers. As issues arose that needed further analysis, the Treaty Commission undertook to produce working papers, including recommendations, for consideration by the Principals.

At the request of the Principals, the Treaty Commission identified and described certain obstacles to the completion of treaties and suggested ways of surmounting those obstacles. For example:

- The *Delgamuukw* decision made it clear that treaty negotiations must find a way to reconcile aboriginal title with Crown title. A statement of mutual recognition is a starting point.

The governments of Canada and BC and the First Nations Summit have agreed to a statement on aboriginal title.

The parties agree to the negotiation of treaties respecting the following principles:

1. The parties recognize that Aboriginal title exists as a right protected under section 35 of the Constitution Act, 1982.

2. Where Aboriginal title exists in British Columbia, it is a legal interest in the land and is a burden on Crown title.

3. Aboriginal title must be understood from both the common law and Aboriginal perspective.

4. As acknowledged by the Supreme Court of Canada, Aboriginal people derive their Aboriginal title from their historic occupation, use and possession of their tribal lands.

5. The parties agree that it is in their best interest that Aboriginal and Crown interests be reconciled through honourable, respectful and good faith negotiations.

- Interim protection measures are a practical step. If a First Nation has an interest in a parcel of land, then it makes sense to allow that First Nation to share in the benefits from the land while negotiations proceed to define exactly where and how that title will be recognized. When that doesn't happen and First Nations watch loaded logging trucks rolling past the offices where they sit negotiating — then litigation may loom as a more attractive option.
- It's important to successful negotiations that the First Nation has a clear vision of what it wants and needs from a treaty. The treaty process, and particularly its funding arrangements, does not provide for those who need to stand back from active negotiations in order to develop their treaty visions or to build their capacity to negotiate or implement a treaty. A recent initiative will provide some assistance to First Nations. The federal government has committed $15 million over three years towards First Nation capacity building in British Columbia. The provincial government has also contributed $2 million for the 1999-2000 fiscal year. The focus of the funding is on building capacity for lands and resource negotiations and consultations.

> SUPPORTING LARGER INITIATIVES

Could negotiations progress more efficiently if they were undertaken by larger groupings of First Nations? First Nations in the past have rejected the idea of provincial or regional negotiations because they wish to maintain the autonomy of their own negotiations. But the Treaty Commission has continued to look for ways to encourage more efficient and effective negotiations. In recent months, a group of more than 20 First Nations, mostly on Vancouver Island, has come together as the First Nations Treaty Negotiation Alliance to develop a common set of negotiating principles. The Treaty Commission has supported this initiative and is chairing a round of meetings involving chief negotiators from Canada and BC and representatives of the First Nations. The Treaty Commission has also prepared a working paper setting out other approaches that could generate efficiencies for all parties.

> THE NISGA'A TREATY

The first modern treaty in British Columbia was signed in August 1998 at New Aiyansh. Although not part of the BC treaty process (it was in negotiation long before the establishment of the Treaty Commission), the Nisga'a agreement proved that treaties can be achieved. It was celebrated by many as the culmination of the work of generations of Nisga'a negotiators and the fulfillment of a people's aspirations. But the celebration was not unanimous. Some First Nations people felt that the treaty left the Nisga'a with too little land. Some non-aboriginal people felt that the treaty is too costly for Canada and BC to bear. In many ways, the Nisga'a treaty served as a lightning rod for concerns about treaties themselves and about the negotiation process.

Public debate

A rigorous public debate developed around the issue of whether a referendum should be used to gauge public opinion. The

Treaty Commission publicly opposed this use of a referendum for several reasons, including these:

- The governments had already agreed with the Nisga'a on a ratification process that did not include a referendum. To change the rules at the end of the game would undermine the integrity of the process and be inconsistent with the honour of the Crown.
- A referendum cannot accurately reflect public opinion on a complex issue. Most people are likely to find at least one item in a treaty with which they disagree. Since people generally feel more strongly about those issues they disagree with, they will tend to vote 'No', even where most of them agree with most of what is in a treaty.
- Some people have argued that treaties should be settled by a one-time cash payment to each aboriginal person. The *Delgamuukw* decision makes it clear that this is not an option. The reason is aboriginal title. Aboriginal title is found in many parts of the world and it is older than property systems based on common law or civil law. One of the unique characteristics of aboriginal title is that it is held by groups and not by individuals. So when the Supreme Court of Canada confirmed that aboriginal title exists in BC it was clear that governments would have to settle claims with First Nations — the holders of that title — and not with individual members.

Court challenges

The BC Liberal Party challenged the Nisga'a Final Agreement in a lawsuit filed in the fall of 1998. In general terms, the party argues that the Nisga'a Final Agreement is unconstitutional. The BC Fisheries Survival Coalition has also challenged the Treaty in court.

The BC Supreme Court ruled in the spring of 1999 that the applications were premature. They would have to wait until the treaty becomes law before they could be heard. The Nisga'a Final Agreement was expected to be introduced for debate in Parliament in October 1999.

Ratification

The treaty was ratified by the members of the Nisga'a Nation, and then by the BC legislature, after lengthy debate — the longest in the legislature's history — and after the imposition of closure. Canada is expected to ratify the treaty during the fall sitting of the Parliament.

> SECHELT: THE FIRST AGREEMENT IN PRINCIPLE

In April 1999 the Sechelt Indian Band became the first to sign an agreement in principle negotiated through the BC treaty process.

Far less controversy and debate surrounded the signing of the Sechelt agreement than had marked the Nisga'a signing. The high level of public acceptance may be due, at least in part, to the long experience the First Nation and its neighbours have had with Sechelt self-governance which has existed since 1986. Another factor may be the openness with which the negotiation process was conducted and the involvement of the local community. For example, the local mayor was a member of BC's negotiating team and reported regularly to his constituents.

> "GOOD FAITH BARGAINING" AND THE GITANYOW CASE

The Chief Justice of Canada said in the *Delgamuukw* case that the Crown "is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith." In the Gitanyow case that went to the BC Supreme Court this year, the Court was asked to take this statement a step further and declare that the duty is indeed a legal one.

The Gitanyow Hereditary Chiefs are neighbours of the Nisga'a. Part of the lands covered by the Nisga'a treaty are considered by the Gitanyow to be part of their traditional territory. They say that by signing the Nisga'a treaty while continuing to negotiate the Gitanyow treaty, the governments of Canada and BC are negotiating in bad faith.

The Gitanyow Hereditary Chiefs have asked the BC Supreme Court to declare that:

1. the governments of Canada and BC are legally bound to negotiate a treaty with them in good faith; and

2. the governments have breached that duty.

The second part of the application was put off until after the first could be determined.

The Court ruled on the first question that, having entered into the treaty negotiation process, the governments — both BC and Canada — are legally bound to negotiate in good faith and could be supervised by the courts. However, the court clarified that the process is voluntary and so there is no legal duty to enter into negotiations or to actually conclude a treaty.

That decision is being appealed by Canada and BC but the appeal has not yet been heard.

Canada agreed in court that as a matter of honour it must — and will — conduct its negotiations with First Nations in good faith. But it also took the position that the treaty process is not subject to supervision by the courts.

The Province agreed that it is not permitted to enter into negotiations "in bad faith", but it argues that the BC treaty process is a unique regime:

the parties enter it voluntarily and in doing so, agree on the role that each will play. It said that supervision of the process is to be by the Treaty Commission and the courts should not interfere.

In making its ruling, the Court did not define what is meant by "good faith" in treaty negotiations. The Treaty Commission, at the request of the Principals, has prepared a preliminary analysis of what "good faith" might mean in the context of voluntary political negotiations and offered some options for enforcing such a standard.

The court has yet to decide whether the signing of the Nisga'a treaty would be contrary to the Crown's duty to negotiate in good faith. The parties have agreed to place this part of the action in abeyance and in early June 1999 agreed to resume active treaty negotiations on an accelerated basis.

INTERIM MEASURES

Even if treaty negotiations can be accelerated as is hoped, they still take time. Meanwhile, trees are still being cut, ore is being mined and fish are being caught. First Nations, who are taking on substantial debt to negotiate treaties, are increasingly frustrated that they are not sharing enough in the benefits of those resources in their traditional territories.

Interim measures are a tool for ensuring continuing economic development in the province while respecting First Nations' aboriginal rights and title while treaties are being concluded.

The BC Claims Task Force made it clear that interim measures could take many forms. Land use moratoriums and "set-asides" were just one option.

Over the past several years, as negotiations proceed and frustrations and expectations rise, the need for interim measures that protect First Nations' interests in land has become more pressing.

In confirming the existence of aboriginal title, the *Delgamuukw* decision underscored the importance of effective interim measures and escalated First Nations' demands for a role in any government dealings with resources within their traditional territories.

In that decision, the Supreme Court of Canada described a continuum that would range from mere consultation at one end, to the requirement of consent by the First Nation at the other. What's required in any given situation will depend on the nature of the First Nation's right and the activity that is being contemplated by government. Interim measures can take many different shapes.

The Treaty Commission has seen an increase in the political will of public governments to address land-related interim measures. Some examples of interim measures agreements concluded during the past year:

- The provincial government and the Tsawwassen First Nation concluded a protocol over the Roberts Bank backup lands in Delta, freeing 1,085 hectares for farmers and holding 769 hectares aside for possible consideration in treaty negotiations. Tsawwassen also received $1million as part of the agreement.
- The Snuneymuxw First Nation has an agreement with the Department of National Defence and Canada Lands Corporation that reserves about 86 hectares of land until December 31, 2000 or until a treaty is concluded in an area known as old Camp Nanaimo. The First Nation also has an agreement with the Department of National Defence and the Canada Forest Service that gives it an opportunity to develop its forest management expertise through co-management of forest resources on lands within the Nanaimo rifle range.

There is a need for more such examples in the near future, if First Nations are to continue to put their faith in the negotiation process.

The Treaty Commission sometimes is asked to facilitate discussions among the parties on interim measures issues and has been active at a number of these negotiations throughout the province. Political will, compromise and creative solutions are required to resolve these issues and they can be difficult. Land and resources are fundamental to the BC economy. They are also at the heart of First Nations' views around aboriginal rights and title. Ultimately, these sometimes competing interests will be reconciled in comprehensive treaty negotiations.

Meanwhile, the Treaty Commission continues to encourage the parties in their negotiations so that economic development can continue, First Nation rights and title are respected and the parties can build on the relationships that will form the basis of the treaty.

Among the solutions now being offered by the two governments are treaty-related measures. These measures may protect Crown lands for treaty settlements, provide for land purchases from willing sellers, widen First Nation participation in land and resource management and provide for First Nation economic development.

BC Treaty Commission

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