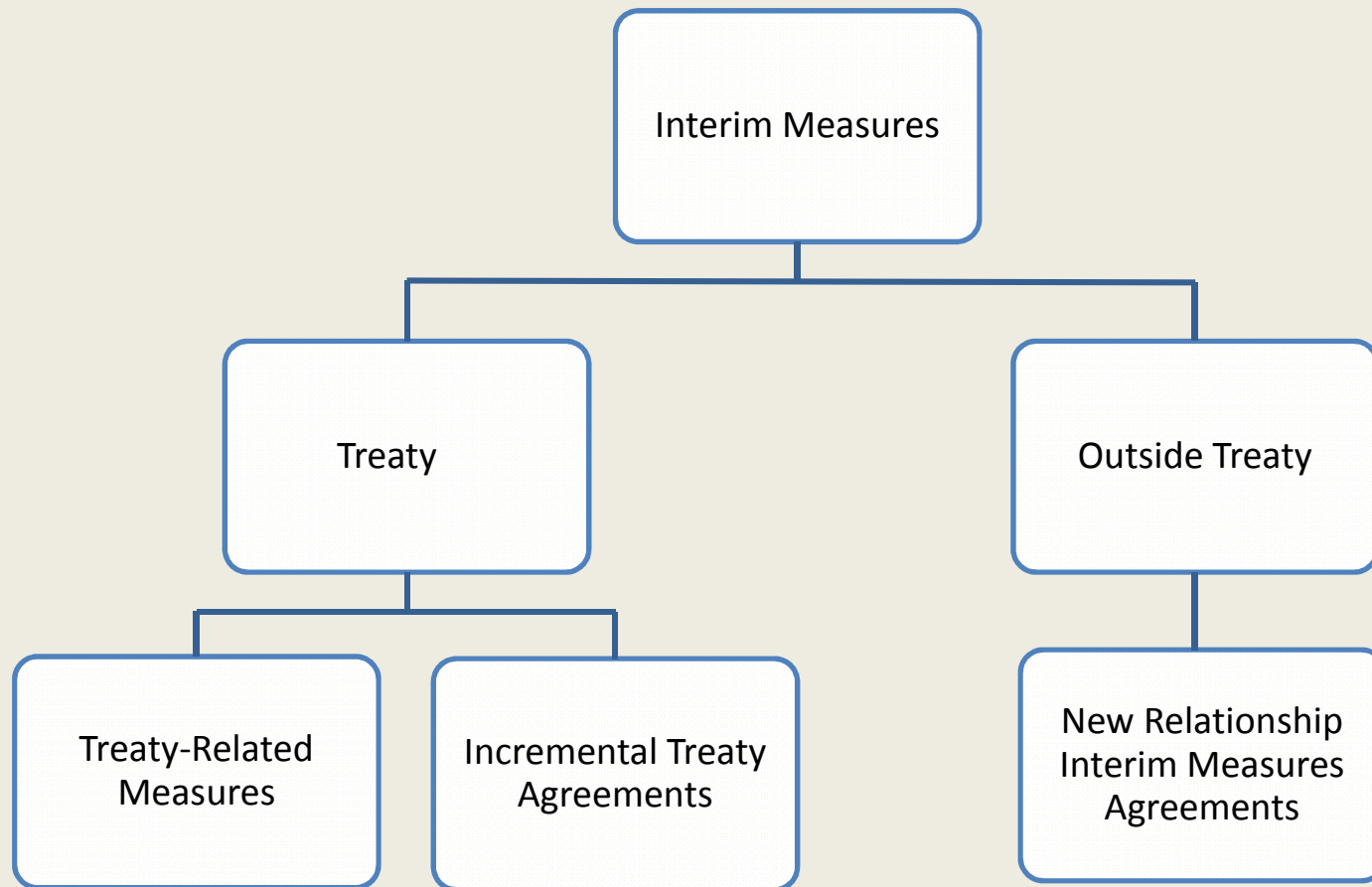


# Native Courtworker and Counselling Association Aboriginal People and the Law Programme

## **INTERIM MEASURES**

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# INTERIM MEASURES



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## TREATY

**I. Treaty Related Measures:**  
Canada, BC and FN

**II. Incremental Treaty  
Agreements:** BC and FN

## OUTSIDE TREATY

**III. Interim Measures Agreements**

- BC and FN – New Relationship
- Forest Consultation and Revenue Sharing Agreements
- Strategic Engagement Agreements
- Reconciliation Agreements
- Economic and Community Development Agreements
- Other

# INTERIM MEASURES MOVING OUTSIDE TREATY

- Treaty Process – Recommendation 16
- *Delgamuukw*
- Development of Treaty Related Measures
- *Haida / Taku*
- BC response – New Relationship
- BC measures to foster operational certainty

# I. TREATY RELATED MEASURES

- Characteristics
  - Tied directly to treaty topics under negotiation
  - Designed to facilitate treaty
  - Temporary, negotiated within treaty process
  - Generally available in later stages of treaty – stage 4
  - May or may not become part of the treaty
- Requirements
  - Costs shared by Canada and BC, so participation by both required
  - Must be directly linked to treaty

# I. TREATY RELATED MEASURES contd.

- Examples
  - Studies to generate information
  - Land and resource and economic development studies
  - Land and resource management processes
  - Archival research re cultural artifacts
  - Development of measures to support self-government
  - Establishment of governance structures
  - Protection of Crown land
  - Acquisition of fee simple lands

## II. INCREMENTAL TREATY AGREEMENTS

- Characteristics
  - Between BC and FN
  - Generally, Canada expected to participate eventually, through allocation of Treaty costs
- Examples
- Tla-o-qui-aht Incremental Treaty Agreement
  - four year agreement
  - provides approx. 63 ha land and capacity building and communications funding totalling \$600,000
  - considered an advance by BC of a portion of the provincial share of a future treaty settlement package

## II. INCREMENTAL TREATY AGREEMENTS contd.

- Klahoose First Nation Incremental Treaty Agreement – March 5, 2009
  - Klahoose will receive \$2.1 million, which they will use to purchase Tree Farm Licence 10
  - Klahoose will receive \$150,000 in two instalments to advance treaty negotiations and build economic development capacity
  - Funds to be transferred to become an element of the final treaty
  - Identifies reconciliation goal, addresses BC's need for certainty, recommits both parties to treaty negotiations



## II. INCREMENTAL TREATY AGREEMENTS contd.

- ITA Negotiated but incomplete:
  - Over 1000 ha crown land transferred to FN in fee simple
  - Commitment by BC to implementation planning
  - Recognized by FN as a contribution by BC toward reconciliation and toward treaty
  - Commitment by FN and BC to expedited treaty process

### III. INTERIM MEASURES AGREEMENTS OUTSIDE TREATY

- BASIS – Reconciliation
  - *Delgamuukw*: “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay” (para. 186).
  - *Haida*: “I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation” (para. 38).
  - *Post-Haida / Taku*: Requirement for consultation and accommodation drives BC’s New Relationship with First Nations

### III. INTERIM MEASURES AGREEMENTS OUTSIDE TREATY contd.

- Driven by requirement for consultation / accommodation
- Not tied to treaty, driven by BC's requirement for operational certainty
- Examples
  - Forestry Agreements: FRAs / FCRSAs
  - Strategic Engagement Agreements (SEAs)
  - Reconciliation Agreements
  - Economic and Community Development Agreements (Mining Revenue Sharing)
  - Other – Land Use Planning / Historic Grievances

### III. INTERIM MEASURES AGREEMENTS OUTSIDE TREATY FORESTRY

- FRA/FRO – now Forestry Consultation and Revenue Sharing Agreement (FCRSA)
- FRA was BC's response to Haida – the first bilateral interim measures agreement
- Provided economic accommodation, set out framework for consultation, and generated certainty
- Economic benefits formula based on population
- Newer version is FCRSA – significant differences
  - economic benefits tied to forestry activity levels
  - Establishes consultation matrix with pre-determined levels of consultation effort
  - Requires FNs to account to government how economic benefits are used
  - Linkage to new forestry opportunities resulting from legislative amendments

### III. INTERIM MEASURES AGREEMENTS OUTSIDE TREATY HIGHER-LEVEL AGREEMENTS

- Strategic Engagement Agreements (SEAs)
  - Between BC and groups of FN's or Tribal Councils
  - Establish process for engagement – ie consultation matrix
  - **Ktunaxa** (4 FNs), **Tsilhqot'in** (5 FNs), **Nanwakolas** (7 FNs)
- Reconciliation Agreements
  - Establish process for engagement
  - Shared decision-making; sharing of resource revenue
  - **Musqueam** Reconciliation, Settlement and Benefits Agreement – settled three court actions and transferred land - called a reconciliation agreement, but given nature of territory not focused on future land use decisions
  - **Coastal First Nations** Reconciliation Protocol – collaborative land and resource decision making, engagement framework, carbon offset sharing, economic opportunities
  - **Haida** Reconciliation Protocol – incremental step to negotiation of Reconciliation Agreement – shared and joint decision making framework, carbon offset sharing, forest tenures, resourcing

### III. INTERIM MEASURES AGREEMENTS OUTSIDE TREATY REVENUE SHARING

- Economic and Community Development Agreements – specific to new mines or significant upgrades
  - McLeod Lake – revenue sharing = 15% of taxes paid by mine proponent under *Mineral Tax Act* (Treaty 8 Adhesion) – payments to be used for socio-economic objectives
  - Stk'emlúpsenc of the Secwepemc Nation – revenue sharing = 37.5% of *Mineral Tax Act* payments – payments are to improve social, cultural and economic wellbeing
- Economic Benefits and Resource Management Agreements
  - Blueberry River – Economic Benefits and 7 Resource Management Agreements
  - Treaty 8 - Economic Benefits and 8 Resource Management Agreements

### III. INTERIM MEASURES AGREEMENTS OUTSIDE TREATY OTHER

- Land Use Planning Agreements:
  - harmonization of FN land use plans with provincial plans
- Historic Grievances:
  - Kwadacha and Tsay Keh Dene Agreements with BC Hydro and BC, to address past and present infringements resulting from WAC Bennett Dam / Williston reservoirs, and to create future certainty
  - Tse Key Nay Reclamation Agreement

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## **Recommendation 16**

### BC Claims Task Force Report 1991

- Recommendation 16:  
“Negotiate interim measures agreements before and during the treaty negotiations when an interest is being affected, which could undermine the process”.

## ***Delgamuukw* decision**

- “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay” (para. 186).

## Treaty Related Measures

- New negotiation tool, in response to issues arising from *Delgamuukw*
- Canada, the Government of British Columbia and the BC First Nations Summit Task Group tripartite working group report in 1999 recommendations:
  - Develop better options to protect land and resources for treaty
  - Find ways to offer FNs benefits from land and resources exploitation
  - Pre-implement measures and benefits which would likely be components of eventual treaty settlement

## ***Haida / Taku* decisions**

- *Haida*: “I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation” (para. 38).

## BC's Response

- New Relationship
- FRAs – now FCRSAs
- Incremental Treaty Agreements
- Other Interim Measures Agreements

## CANADA'S EVALUATION OF TRMs

- Have not adequately addressed Recommendation 16
- Tend to be focused on information gathering to support treaty negotiation rather than interim protection of resources
- Designed to accelerate treaty, but really just help to maintain momentum
- Under-utilized for a number of reasons, including lack of FN involvement in selecting/designing
- Is attempting to revitalize TRMs

## CANADA'S EVALUATION OF TRMs contd.

- Case law developments have “overtaken” the federal treaty initiative in BC
- Consultation / accommodation provides an alternative to treaty negotiation
- BC is striking off on its own with a broader strategy to foster operational certainty through New Relationship agreements

## RELATIONSHIP BETWEEN TREATY RELATED MEASURES, INCREMENTAL TREATY AGREEMENTS, AND INTERIM MEASURES AGREEMENTS

- BC cannot wait for certainty pursuant to treaties
- IMAs are doing, outside treaty, what the TRMs were originally conceived to do inside treaty –“keeping the peace in the forest”
- BC’s ITAs are designed to encourage continued participation in the treaty process while providing a measure of operational certainty



## OVERLAP ISSUES

- Principles applicable to consultation apply: potential impact to asserted right triggers consultation
- In the treaty context - courts have identified time for substantive consultation to be in the implementation phase (*Cook v. Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722)
- Treaties include non-derogation clauses re other FN rights
- to the extent a TRM is early implementation and has potential to infringe, may trigger requirement for consultation/accommodation
- Prejudice/impacts could result from granting of specific resources to which there are competing claims
- Most agreements are based on asserted territorial claims; do not on their face prejudice the rights of overlap claimants; challenge would be based on impact / potential impacts
- FCRSAs address overlaps by pro-rating revenue sharing component based on overlap

# CONCLUSION

- Interim Measures:
  - Provide for *modus vivendi*, or means to live together despite different views of ownership and jurisdiction of resources.
  - Can address BC's need for certainty and provide valuable opportunities for FNs to participate in decision making and economic aspect of resource use.

Thank You

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