



DONOVAN & COMPANY

Barristers and Solicitors

6th Floor, 73 Water Street
Vancouver, BC V6B 1A1
Telephone (604) 688-4272
Fax (604) 688-4282
Website: www.aboriginal-law.com

Reply to:
Email

Allan Donovan*
Karim Ramji*
Jennifer Griffith
Niki Sharma

Merrill W. Shepard†
Chris Roine
James Hickling
Shayla Point

*Denotes Law Corporation
†also of the NWT Bar

THE BRITISH COLUMBIA TREATY MAKING PROCESS: STRATEGIC PERSPECTIVES

I. INTRODUCTION

Treaties have been described in a variety of ways by the Courts. Justice Finch of the British Columbia Court of Appeal explained that “treaties with aboriginal peoples have always engaged the honour and integrity of the Crown”.¹ Justice Cory, writing for the majority of the Supreme Court of Canada, characterized treaties as exchanges of “solemn promises”, and as “sacred” agreements.² The common denominator running through these descriptions is that a treaty is an agreement of fundamental importance between an Aboriginal Nation and the Crown.

So what sort of sacred agreements does the Crown have in mind in the British Columbia Treaty Process? As presently conceived by British Columbia and Canada an exchange of rights lies at the heart of the current process. The First Nation is giving up its unresolved ownership claim to the land throughout its entire Traditional Territory (aboriginal title) and its claim to a wide range of other aboriginal rights within its Territory (e.g. hunting rights, fishing rights, gathering rights, governance rights). In return the First Nation obtains a more clearly defined set of constitutionally protected land, resource use and other rights as set out in the treaty.

In addition to the exchange of rights there is a monetary element which, in essence is also an exchange. The First Nation receives a sum of money – typically to be paid out over time. The treaty will also enshrine certain First Nation taxation powers. In return

¹ *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 178 D.L.R. (4th) 666 at para. 127.

² *R. v. Badger*, [1996] 1 S.C.R. 771.

the First Nation abandons its legal claim for compensation for past and continuing infringements of its aboriginal rights, including title. Further, if the Nisga'a model is followed the First Nation gives up, over time, its members' existing tax exemptions with respect to income tax, GST and PST and other taxes.

The treaty negotiation process creates a unique opportunity for Aboriginal Nations, British Columbia, and Canada to creatively resolve outstanding legal claims. It also creates a unique set of challenges. The process is long and cumbersome. The mandates of the two governments are narrow, shifting and often in conflict with each other. Government negotiators can be changed as frequently as participants in a game of musical chairs. Nonetheless the process has given rise, of late, to a number of Agreements-in-Principle and may ultimately produce treaties.

This paper will provide some thoughts on the relative merits of the present British Columbia Treaty Process and the alternatives. It will look briefly at the basic treaty structure that appears to be emerging from the British Columbia Treaty Process to date. It will comment on the risk benefit assessment process that First Nations should continually consider as they approach and engage in the treaty process. Finally, it will provide some concrete suggestions for those actively involved in negotiations.

II. THE BASIC STRUCTURE OF THE TREATIES EMERGING FROM THE BC TREATY PROCESS

While the British Columbia Treaty Process has not yet resulted in a single treaty³, it has produced a number of Agreements-in-Principle ("AIPs") and a few Final Agreements ("FAs"). Some AIPs and FAs have been rejected, formally or otherwise, by the First Nation constituents⁴; others have been accepted with varying degrees of enthusiasm⁵. Still others have been finalized but have not yet gone to the people for acceptance or rejection.⁶ While Agreements-in-Principle shift a wide variety of very significant issues

³ The Nisga'a Treaty was negotiated outside of the BCTC process.

⁴ Sechelt First Nation and Nuu-cha-nulth Tribal Council.

⁵ Maa-nulth First Nation, Sliammon First Nation, Lheidli T'enneh First Nation, and Tsawwassen First Nation.

⁶ Snuneymuxw First Nation.

to the final stage of treaty negotiation⁷, there is enough meat on the bones to sketch out the basic elements of the types of treaties that may well emerge from the process.

A. The Exchange of Rights: Aboriginal Rights and Title for Treaty Rights

The old numbered treaties, entered into over a century ago, contained within them a provision that the Aboriginal Nations would “cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors forever all their rights, titles and privileges whatsoever to the lands included within the following limits...”. The treaty description that followed would typically include all of the traditional territory of the Aboriginal Nation. In return the Crown would undertake to set aside Indian reserves for the Nation and provide a range of benefits including annual payments to individual members. The numbered treaties also typically provided that the First Nations’ “right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered”.⁸

Modern day treaties in British Columbia have used different language to describe the exchange of rights. The official position of Canada and British Columbia is that modern day treaties do not require the “extinguishment” of aboriginal rights and title. The current model, embodied in the Nisga’a Treaty, has been described as the “modification and release” model. This approach sees aboriginal rights “continuing” but only to the extent that these rights are identical to the rights set out in the treaty. To the extent that the pre-existing aboriginal rights and title were different from the agreed upon treaty rights, these aboriginal rights are released. In other words the aboriginal rights are “modified” to correspond exactly to the rights set out in the treaty.

The new model doesn’t use the words “cede, release, surrender and yield up” as the original numbered treaties did but the result is, in essence, identical. The First Nation rights post-treaty are those that are set out in the treaty document. All other rights are

⁷ Some of the AIPs leave so much for future negotiation that the “yes” vote may simply mean “proceed with negotiations” rather than “we approve of the deal”.

⁸ Litigation will eventually determine the extent to which the official Treaty document captures the actual agreement that was made between the Aboriginal Nation and the Crown.

abandoned. To suggest that the modification and release model is, in any significant way, different from the original surrender and replacement model is, in our view, fundamentally misleading. The two approaches appear to yield exactly the same result. This isn't to say that the exchange of rights agreed to in the Nisga'a Treaty and advocated by the Crown in other treaty negotiations is a bad thing. That is a decision for each First Nation to make. There is, however, considerable merit in being frank about what the treaty actually does.

All of the recent British Columbia AIPs and FAs include provisions reflecting a release and modification model. They also, however, provide that the entire issue of how existing aboriginal rights and title will be dealt with is moved over into the final stage of treaty negotiations. These "certainty" discussions will be of great importance. At present, however, First Nations involved in or contemplating involvement in the British Columbia treaty negotiation process should be aware that the existing "certainty" model envisages the trading of their existing claims to aboriginal rights and title for a set of defined treaty rights.

B. The Cash Component

First Nations in the treaty process have urged Canada and British Columbia to compensate them for the history of fundamental and unjustified infringements of their aboriginal rights and title. This position is consistent with that taken by the Supreme Court of Canada in *Delgamuukw*; compensation will ordinarily be payable for infringement of aboriginal title.⁹ While Canada and British Columbia have been unwilling to use the term "compensation" they have been willing to include significant monetary components in treaty negotiations:

⁹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 169.

Financial Transfer to be Provided by AIP or Final Agreement (FA)			
First Nation	Population ¹⁰	\$	\$ Per Capita
Tsawassen - FA	272	\$13,900,000	\$51,102.95
Yale -AIP	143	\$6,500,000	\$45,454.55
Lheidli T'enneh - FA	321	\$14,405,369	\$44,876.54
Ka:'yu:'k't'h'/Che:k:tles 7et'h' - FA	493	\$22, 048, 046	\$44,722.20
Ucluelet - FA	602	\$25,848,275	\$42,937.33
Snuneymuxw - AIP	1497	\$64,065,000	\$42,795.60
Huu-ay-aht - FA	623	\$26,424,233	\$42,414.50
Sechelt - AIP	1189	\$48,200,000	\$40,538.27
Uchucklesaht - FA	189	\$7,179,939	\$37,989.10
Toquaht - FA	119	\$5,454,000	\$35,831.93
Yekoochie - AIP	212	\$6,500,000	\$30,660.38
Sliammon - AIP	939	\$24,400,000	\$25,985.10
In-SHUCK-ch -AIP	907	\$21,000,000	\$23,153.25

Financial Transfer Provided in Completed Negotiations			
First Nation	Population	\$	\$ Per Capita
McLeod Lake Treaty Adhesion	409	\$32,650,000	\$79,828.85
Nisga'a Treaty	5411	\$196,100,000	\$36,240.99

There is a significant discrepancy in the per capita cash component within First Nations within the British Columbia Treaty Process. If one adds in the McLeod Lake Treaty Adhesion Agreement into the mix there is a significantly greater disparity. Some, but by no means all, of the discrepancies may be explained by the variations in the land component. The range of cash components negotiated to date should be kept in mind by all First Nations negotiating or contemplating the negotiation of a treaty.

C. The Land Component

The land component within the Nisga'a Treaty, the McLeod Lake Treaty Adhesion, and recently negotiated AIPs and FAs is equally variable:

¹⁰ The population statistics listed are the number of status Indian members of a First Nation as opposed to the number of members of the particular First Nation.

Land Base to be Acquired Through the Treaty Process			
First Nation	Population	New Land Base Acquired Through Treaty (hectares) (excludes pre-existing reserves)	New Land Base Acquired Through Treaty Per Capita (hectares)
Yekoochie - AIP	212	5,960	28.1
Uchucklesaht- FA	189	5,147	27.2
In-SHUCK-ch -AIP	907	13,208	14.5
Ka:'yu:'k't'h'/Che:k:t les7et'h' -FA	493	5,920	12
Huu-ay-aht -FA	623	7,181	11.5
Lheidli T'enneh -FA	321	3,598	11.2
Toquaht -FA	119	1,293	10.9
Ucluelet -FA	602	5,239	8.7
Sliammon -AIP	939	5,000	5.3
Snuneymuxw -AIP	1497	4,824	3.2
Tsawassen - FA	272	434	1.6
Sechelt -AIP	1189	933	0.8

Land Base Acquired Through Treaty Negotiations (outside the BCTC process)			
First Nation	Population	New Land Base Acquired Through Treaty (hectares) (excludes pre-existing reserves)	New Land Base Per Capita (hectares)
McLeod Lake Treaty Adhesion	409	19,567	47.84
Nisga'a	5411	193,000	35.7

Thus the land component has ranged from a high of 47.84 hectares per capita – the McLeod Lake Treaty Adhesion - to a low of 0.8 hectares per capita – the Sechelt Agreement-in-Principle.

Some of the discrepancy is explained by the wide disparity in the market value of land. Land within Tsawwassen's Traditional Territory, for example, will have per unit value that vastly outstrips that of relative remote rural land.¹¹ This explanation itself, however,

¹¹ A recent British Columbia Treaty Commission analysis [British Columbia Treaty Commission, *An Update to the Financial and Economic Analysis of Treaty Settlements in British Columbia* (March 12, 2004), at page 26] put the dollar value of the lands that Tsawwassen will obtain through treaty at \$136.55 million. Although, the BCTC notes that the methodology used to derive the Tsawwassen land value is different from other agreements and cautions that this figure should not be used for direct comparative purposes.

raises the question why urban First Nations – whose pre-treaty land base has been most damaged and eroded – should see this very erosion serve as a basis for reducing the size (although clearly not the value) of their post-treaty land base.

It is instructive to compare the per capita land component of the proposed treaties to the existing reserve base of a number of interior British Columbia and Prairie First Nations:

Examples of Existing Reserve Land Base – Non-Treaty British Columbia			
First Nation	Population	Reserve Lands (hectares)	Reserve Land Per Capita (hectares)
Osoyoos	403	13,052.3	32.4
Penticton	875	18,698.6	21.4
Little Shuswap	294	3,112.7	10.6
Lower Nicola	927	7,128.2	7.7
Okanagan	1674	11,282.5	6.74

Thus these First Nations have a larger per capita reserve base pre-treaty than that envisaged post-treaty in many of the current AIPs and FAs. Further, the aboriginal rights and title of these interior First Nations remain intact and they have not been required to give up the significant tax exemption and other advantages inherent in reserve status.

Examples of Existing Reserve Land Base Prairie			
First Nation	Population	Reserve Lands (hectares)	Reserve Land Per Capita (hectares)
Lucky Man	84	3,078.6	36.6
Chiniki	1425	48,621.3	34.1
Athabasca	766	21,205.1	27.7
Fond du Lac	1566	36,812.1	23.5
Heart Lake	273	4,600.7	16.9

The reserve base of these prairie First Nation substantially outstrips the post-treaty reserve base of all embodied in all of the current AIPs except Yekoochie.

D. Governance Authority

The Nisga'a Treaty sets out a range of governance powers to be enjoyed by the Nisga'a Nation, post-treaty. The recent AIPs and FAs also provide that the treaty will include a range of governance authorities. This element of treaty negotiation should not be minimized. First Nations outside of the treaty process have certain governance authorities delegated to them by way of the *Indian Act* or other legislation.¹² They may enjoy constitutionally protected self-government rights pursuant to s. 35 of the *Constitution Act* but the case law has not yet evolved sufficiently to make any strong conclusions on this point. As long as treaty governance provisions appear in a treaty itself, rather than in a side agreement that does not enjoy constitutional protection, then the First Nation can proceed with relative certainty that no future government of Canada or British Columbia will have the legal authority to unilaterally remove or unjustifiably infringe their law making powers.

E. Resource-Based Rights

The developing British Columbia Treaty Process model sees First Nations as continuing to have constitutionally protected rights to hunt, fish and gather for traditional purposes. The existing treaty model reigns these rights by subjecting them to numerical or formula driven limits. Today the aboriginal right to fish for food, social and ceremonial purposes is limited only by considerations of conservation and public safety. If the First Nation needs 10,000 salmon to feed its members, for example, and only 10,000 salmon are available for harvest after conservation needs are met then the First Nation will, at law, have the priority right to take all of these 10,000 salmon.¹³

The model developed in existing AIPs and FAs involves a partial recognition of the First Nations protecting their priority right to fish for key species to a numerical or formula

¹² The Sechelt First Nation and the Westbank First Nation have negotiated self-government agreements outside of the *Indian Act*.

¹³ *R. v. Sparrow*, [1991] S.C.R. 1075.

based limit.¹⁴ The danger involved in this approach is obvious. As a First Nation's population grows its need for fish will likely increase. Its priority right to take these fish, however, will be limited by the terms of the treaty itself.

A similar numerical or formula based approach is applied to hunting of significant species.¹⁵ The inherent problem is identical. The priority hunting right is no longer limited by need (subject to conservation). It is now bounded by an arbitrary upper limit set out in the treaty.

Another troubling development is the "reasonable opportunity" language that has made its way into the treaty process. AIPs and FAs routinely include "reasonable opportunity" clauses that permit the use or Disposal of provincial Crown land in ways that might negatively "affect the methods, times and locations of" activities resulting from the exercise of Aboriginal rights. British Columbia is authorized to do this as long as it ensures that the First Nation in question has "reasonable opportunity" to exercise those rights elsewhere.

The Supreme Court of Canada has rejected this argument: "This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province...".¹⁶

"Reasonable opportunity" effectively circumvents the Supreme Court's decision on this issue, freeing the Crown to reallocate land use even if that use is incompatible with the exercise of constitutionally protected Aboriginal rights. Just what constitutes a "reasonable opportunity" is not clearly defined, nor is any limit placed on how often and to what extent the Crown can resort to this form of infringement. Furthermore, while a consultation process is contemplated, the language remains weak and the advantage lies squarely with the Crown.

¹⁴ Snuneymuxw First Nation AIP.

¹⁵ Maa-nulth First Nations AIP.

The approach to gathering rights set out in the existing AIPs and FAs is even more restrictive. These agreements would permit the First Nation to continue to exercise the right to gather traditional First Nations products and medicines on Crown lands. The treaty would protect this right, however, only to the extent that its exercise does not interfere with other Crown granted activities (e.g. forestry, mining, land alienations etc.). This takes the existing case law – which gives priority to aboriginal rights – and turns it on its head. In effect the aboriginal right to gather exists but only to the extent that the Crown decides not to interfere with their right. AIPs and FAs provide no meaningful protection to the right to gather. Instead the existing agreements enshrine the Crown's entitlement to infringe.

F. Aboriginal Rights and Title

As discussed above, the British Columbia Treaty Process to date sees First Nations exchanging their undefined claims to aboriginal rights and title for the specific rights set out in the treaty. This is a decision of enormous consequence.

Aboriginal rights protect the ability of First Nations to undertake activities that played the integral role in the distinctive culture of the group holding the right. An authoritative definition of aboriginal rights is found in Chief Justice Lamer's decision in *R. v. Van der Peet*: "...in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."¹⁷

One particular type of aboriginal right is aboriginal title, which confers the right to the land itself. The foundation of aboriginal title is exclusive occupation of land at the time that the United Kingdom asserted sovereignty over what is now British Columbia (generally seen to be 1846). Aboriginal title includes the right to exclusive use and occupation of the land, and also the right to choose uses for the land. Further, aboriginal title includes an inescapable economic component.

¹⁶ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 at para. 45.

¹⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 46.

These are the fundamental defining rights of Aboriginal peoples; rights that, after a very long struggle, received constitutional protection in 1982.

All of this is not to say that it is unwise for a First Nation to enter into a treaty along the lines of the AIPs and FAs recently negotiated. It is entirely possible that the overall package of rights negotiated in the treaty process will more than make up for what is given up. Rather it is to say that this decision is a momentous one and it has to be made with enormous care and consideration.

G. Reserve Based Rights

While First Nations in the treaty process typically retain all of their reserve lands, under the existing British Columbia Treaty Process model the status of the lands changes. These are no longer Indian reserve lands under federal jurisdiction but are rather First Nations settlement lands under provincial jurisdiction.

There are advantages and disadvantages to reserve land. The disadvantages are well known and are often emphasized by the federal and provincial negotiators during the treaty negotiation process. Management and development of reserve lands can be difficult and cumbersome. The Department of Indian Affairs is often seen as standing in the way of, or at least significantly slowing down the implementation of, rational land use decisions.

Reserve land status, on the other hand, carries with it significant potential benefits. Indian reserve status is the foundation of the *Indian Act* tax exemption for personal property (including income) situated on reserve. Further, reserve lands can be easier to develop being under federal jurisdiction rather than provincial jurisdiction. The ability of First Nations to tax (and set tax rates for) non-First Nations users of their reserve lands can be both a major source of revenue and a significant economic driver in Aboriginal communities. The *Indian Act* protections from seizure are also linked to the reserve status of lands. Accordingly the loss of reserve status may, depending on the First Nation involved, be a significant price to pay for reaching a treaty.

H. Tax Exemption

As noted above the elimination of reserve status eliminates the variety of tax exemptions currently afforded to First Nations and their members. The emerging British Columbia treaty model sees these tax exemptions being phased out over eight or twelve years depending on the nature of the tax involved. First Nations who are not part of the British Columbia Treaty Process are not required to abandon the tax exemption. Neither are British Columbia First Nations who entered a treaty a century ago. Elsewhere in Canada, First Nations living under treaty have not been asked to abandon these significant tax advantages.

In British Columbia both levels of government are taking a very strong position that these tax exemptions must be abandoned. This position has often been justified by reference to "equality". This justification rings hollow. First, it fails to take into account the century-and-a-half of injustice to Aboriginal peoples in British Columbia. Suddenly treating everybody the same way will not make up for this history of unequal treatment. This approach draws to mind Tommy Douglas's description of capitalism: "Every man for himself, as the elephant said, dancing amongst the chickens".

Further, it puts into place arbitrary distinctions between First Nations within and outside of British Columbia and even First Nations in British Columbia. The McLeod Lake First Nation, for example, which, as we have seen above, has received a considerably greater financial benefit and land base than any First Nation involved in the British Columbia Treaty Process, will also retain their Indian reserve based tax exemption.

Be that as it may, the abolition of the tax exemption is part of the current treaty landscape. Barring any significant change in this position, it is something that all First Nations must factor into their treaty analysis.

The question that each First Nation must ask itself before starting treaty negotiations, as treaty negotiations proceed, and again as they approach a treaty, is, simply put, whether a treaty is worth it.

I. Own Source Revenue

“Own Source Revenue” is a concept advanced by Canada and British Columbia that would see a certain percentage (as high as 50 or even 60%) of federal transfer funding clawed back for each dollar of revenue the First Nation generates through its own enterprise. This remarkable position presents a huge disincentive to First Nations to focus on independence and economic development. It is a one-way street – the governments are not proposing to increase funding in years when First Nations have negative own-source revenues. It is, however, also a part of the current treaty “package” that First Nations must examine very carefully.

III. ASSESSING THE OPTIONS

Almost every decision we make in our day-to-day life involves some sort of balancing of the pros and cons. Whether to watch television or go jogging, whether to buy a car, lease a car or use public transit, whether to get up early in the morning or sleep in – all of these decisions involve, however unconsciously, an assessment of the alternative options.

This assessment of options, or benefit/cost analysis, is even more explicit when the consequences of the decision are large. If someone is buying a major asset such as a house or a piece of land, a person will normally seek information concerning what the reasonable purchase price would be (by getting expert real estate advice and by examining the price of comparable properties elsewhere). The buyer would shop around at different financial institutions to identify the best available mortgage terms – thereby determining the real cost of purchasing the property. The buyer will determine whatever he or she can about the seller’s circumstances and motivations. The seller would have done the same sort of research. There will certainly be some negotiation over the purchase price and other terms but the negotiation will normally occur within a range dictated by the market and the special circumstances. If a deal is reached both the buyer and the seller will feel content, based on their research, that a reasonable bargain has been struck.

Similarly, when legal rights are involved a careful risk analysis is required. If someone is seriously injured in a car accident they will determine in consultation with medical experts the extent of the injury, they will obtain advice from vocational experts and perhaps economists concerning the economic implications of the injury. They will need advice from a lawyer specializing in personal injury litigation as to the amount of compensation that they would likely achieve in court, the chances of success, and the costs involved in obtaining this result. It is only after this analysis is done that appropriate settlement negotiations can be undertaken. The other side will also have done its homework. It is this informed understanding of risk and benefit that allows the vast majority of personal injury cases to settle out of court.

Obviously a treaty is a vastly more important decision than buying a house. It is enormously more legally significant and complicated than the settlement of a personal injury claim. All of this serves to underline that no First Nation can safely enter into, participate in, or conclude treaty negotiations without having a very good idea of what it is being asked to give up.

A. Aboriginal Rights and Title Assessment

As noted above, a treaty under the British Columbia Treaty Process will mean an exchange of an undefined claim to aboriginal rights and title for specified treaty rights. The issue cannot be simply whether the treaty is “good enough”. How can a First Nation assess whether a treaty offer is good, bad or neutral without having a detailed analysis of its likelihood of establishing its aboriginal rights and title in court?

This points to the requirement for a detailed analysis of the evidence a First Nation can amass that will establish its aboriginal rights and title. It points to the need for a detailed assessment of this evidence to determine in which areas of the First Nation’s Traditional Territory the claim to title is strong and in which areas the claim to title is weaker.

This analysis should not pretend to have a greater degree of legal certainty or precision than is realistic. It will only be possible to review a portion of the evidence that may become available in an aboriginal title trial. It will not be possible to anticipate all of the evidence and arguments that the Crown would put forward at trial. Further, while judges are honourable, intelligent, experienced individuals they are human beings. Their personalities and backgrounds vary widely. Thus the judge assigned to hear the case will be an important factor in its outcome.¹⁸

Nonetheless, a First Nation can obtain a reasonable understanding of their potential for success in aboriginal title litigation and weigh this, along with other factors such as the cost and delay involved in both the title litigation and the treaty negotiation process. The First Nation will then be in a better position to determine whether the current treaty process makes sense for them.

B. Tax Exemption Assessment/ Own Source Revenue Analysis

In very concrete terms it makes sense for a First Nation to determine whether, from a financial perspective, it is giving up more by entering into a treaty than it stands to gain. An assessment can be made of what would be given up if the tax exemptions from income tax and transaction taxes were brought to an end. The loss that may be occasioned by an own source revenue clawback may be estimated. Similarly, assessments can be made of the overall value of the fiscal benefits flowing from the treaty. It would be hard to see how a First Nation could reasonably vote on a proposed treaty without a clear understanding of the financial costs of the treaty as well as the financial benefits. Without this information in hand, a treaty would be a shot in the dark.

C. Risk Analysis

Before the First Nation assesses whether to enter into the treaty process or proceeds through the treaty process, the First Nation should always be reviewing and revisiting

¹⁸ J.A.G. Griffith, *The Politics of the Judiciary*, 5th ed. (London: Fontana Press, 1997).

these issues. The question isn't – or at least shouldn't be - whether the treaty package is one that the First Nation can “live with”. The question is whether, on balance, the First Nation has decided that the treaty package is better than the alternatives. That is a decision that each First Nation has to make on its own, but one that it can only realistically make once it has properly informed itself of the legal and financial benefits and costs inherent in signing a treaty.

IV. SUGGESTIONS FOR TREATY NEGOTIATORS

The treaty negotiation process is incredibly challenging involving, as it does, almost every facet of the relationship between Aboriginal peoples, Canada and British Columbia. Everyone involved in this process will have their own suggestions as to how best to move ahead in the process, what to push towards and what to avoid. It makes a great deal of sense to consult widely to get a variety of perspectives on this complicated process. The following are some of our suggestions:

1. Understand Community Wishes and Expectations

If you don't know where you would like to end up, it isn't very likely that you will ever get there. The chances of a successful treaty process are greatly enhanced by a candid and open back-and-forth discussion between the First Nation leadership and its members concerning the nature of the treaty process. Although not all of the community's goals and aspirations will be met through the treaty process, discussions will enable negotiators to know what they are aiming for and will keep the community apprised of what is being achieved.

2. Develop your own Treaty Road Map

The Province and Canada have a pretty clear idea of what they would like treaties to look like. Their concept of a treaty is informed largely, and not surprisingly, by their own interests. Each First Nation, as it moves through the treaty process, must have its own objectives clearly in mind. Absent this, British

Columbia and Canada are much more likely to capture the agenda and guide the process towards their preferred outcome which may or may not coincide with the best interests of the First Nation.

3. Exercise Your Rights During the Treaty Negotiation Process

While a First Nation cannot simultaneously litigate a full-fledged aboriginal title battle while participating in the British Columbia Treaty Process, there is absolutely no reason that a First Nation must ignore its aboriginal rights and title during the years that it takes to develop a treaty. Indeed, if a First Nation actively asserts its rights and demands that Canada, British Columbia and third parties respect, affirm, honour and accommodate aboriginal rights (including title), a First Nation will see benefits in terms of a share and a say within their Traditional Territory well in advance of the treaty. Finally, the treaty ultimately negotiated can include measures and approaches that have been developed and “test driven” prior to the final signing.

4. Avoid Useless Clauses

All too often AIPs and FAs include provisions that are equally true whether you say them or not. For example, if a clause provides that the parties “may work together to develop agreements dealing with transboundary environmental issues”, the provision is at best useless as it isn’t doing any real work in the treaty. At worst, it is dangerous because it creates the impression that something substantive has been agreed to on the transboundary pollution issue while in reality nothing has been. Every single treaty clause should pull its own weight. If a clause isn’t doing any work then strike it out, acknowledge that the underlying issue has not yet been addressed, and look for alternative language, or an alternative approach.

5. Avoid Leaving Items to be Negotiated Post-Treaty

Leaving an item to be negotiated post-treaty is like a union ending a strike and signing a collective agreement and then hoping that additional concessions can be won later. The reality is that it isn't likely to happen unless the employer wants it to. This metaphor is not exact given that the union can wait until the collective agreement expires and put the unresolved issue back on the table. A First Nation who has signed a treaty has no such luxury. The treaty should be assessed on its own terms and little or no value should be assigned to the possibility of negotiating add-ons at a later date.

6. Insist on strong dispute resolution provisions

While one hopes that treaties will be honoured, common sense indicates that treaties will be both honoured and breached. It is in instances of breach that the dispute resolution provisions are of key importance to the First Nation. The dispute resolution provisions in existing AIPs and FAs are generally quite weak. The weakness derives from the fact that they are, in the end, optional. They do create a method for the quick, inexpensive and informal resolutions of disputes. This option will only be available, however, with the consent of the party whose conduct is in issue.¹⁹

This leaves the potential for Canada and British Columbia to force First Nations to take their treaty issues to Court. Given that Canada and British Columbia have substantially deeper pockets than First Nations, the expense and delay involved in the Court process favours Canada and British Columbia. It is clearly in the First Nation's interest to develop binding, fair, inexpensive and swift approaches for alternative dispute resolution and to enshrine these approaches in the treaty.

¹⁹ *Lheidli T'enneh Agreement-in-Principle*, Lheidli T'enneh, Canada and British Columbia, 26 July 2003, Dispute Resolution Chapter, s. 27.

7. The Devil is in the Details

When a First Nation enters into treaty negotiations with British Columbia and Canada, the task may look simple and promising initially. Completing a treaty can, however, be time and cost-consuming because there are numerous details to be worked out. First Nations should ensure the process is worth it for them. Once they embark in negotiations, they should carefully analyze every provision of the treaty to ensure that it is the very best they can achieve.

8. Side Agreements: Handle With Care

British Columbia and Canada have increasingly advocated resolving issues by way of side agreements that do not receive treaty protection. The difficulty with this is that it is the treaty protection itself – and specifically the constitutional nature of treaty protection – that puts considerable impediments in the way of Canada and British Columbia simply breaking the deal. If Canada and British Columbia are insisting that something be placed in a side agreement rather than in the treaty is it because they wish to retain the flexibility to dishonour these provisions should these provisions, at some future point, prove to be uncomfortable or inconvenient? Demand explicit explanation for any suggestion that some negotiated treaty right or benefit should not be included in the treaty itself.

9. Work Through All Formulas

The treaty may control the rights to fish, hunt and gather by subjecting them to numerical or formula driven limits. Although the numbers may appear to be adequate, a First Nation must fully consider whether these fixed upper limits will address the long-term needs of the population as it grows. Once the treaty is entered into, there will be no room for growth. Similarly formulae should be worked through using both historical and hypothetical worst case data.

10. Think Long Term

Treaties are negotiated on behalf of future generations, so they should continue to benefit the First Nation in the long term. As noted above, a First Nation must assess whether the treaty will assess the future needs of the population. It would be helpful to reflect on what the economic and social landscape of British Columbia will look like decades or even generations from now. A treaty should grow, rather than shrink, as the Province grows. One suggestion is to include provisions for indexing and adjusting to deal with variables such as inflation. Further, the treaty should not contain any provisions that have the potential to erode the First Nation's rights.

11. Don't Forget Your Other Options

First Nations should keep in mind that there are several alternatives to concluding a treaty with the provincial and federal government. One option is to negotiate a compensation package directly with industry for use of the territory and resources, based on the First Nation's asserted aboriginal rights and title.

First Nations may also choose to opt out of treaty negotiations altogether and simply litigate their aboriginal title. Before launching such an action, the First Nation must gather a large amount of evidence and assess the strength of their claim.

Further, while a First Nation cannot actively litigate an aboriginal title action and at the same time participate in the treaty negotiation process, one alternative would be to file a "friendly" aboriginal title writ. The writ could stay in the background and provide leverage for the First Nation in the treaty process in case negotiations appear to be going off the rails.

Finally, another option available to First Nations is simply to continue in the status quo, especially if they believe, after a careful assessment of their

situation, that neither treaty negotiation nor aboriginal title litigation would be reasonable options for them at this time.

V. CONCLUSION

There is no doubt that, all other things being equal, a negotiated resolution to any problem is better than a resolution imposed by a third party – including a court. The question that each First Nation must ask itself is whether all other things are equal. It is fine to talk, in glowing generalities, of “building a new relationship” or “forging a better partnership”. The real issue is the relative strengths and weaknesses of the treaty being negotiated. The First Nation must have a detailed awareness of what it is getting, what it is being asked to give up, and what its alternatives are. You can use this knowledge strategically to advance your position in the treaty process, in the Courts, or elsewhere. You can strive, through the treaty process or outside of it, to find “the mind’s opportunity in the heart’s revenge.”²⁰

²⁰ Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986).