GETTING TREATY TALKS OFF SQUARE ONE

POLICY OPTIONS POLITIQUES

Bernard Schulmann

Negotiations currently underway between First Nations and the Governments of British Columbia and Canada suffer several fundamental flaws that explain why little progress has been made despite seven years of very expensive work. One is that there is little or no agreement on existing aboriginal rights. A second is that too many negotiations are taking place simultaneously; a third that the agreements that are made generally cannot be understood except by legal specialists. The entire process needs to be re-thought.

Les négociations actuellement en cours entre les Premières Nations, le gouvernement de la Colombie-Britannique et le gouvernement du Canada souffrent de vices fondamentaux, qui expliquent la lenteur des progrès accomplis malgré sept années de travaux fort coûteux. Premièrement, on ne s'entend pas, ou peu, sur les droits aborigènes existants. Deuxièmement, on mène trop de négociations à la fois. Troisièmement, les ententes que l'on conclut ne sont généralement compréhensibles que pour des juristes spécialisés. Il y a donc lieu de repenser tout le processus.

For the last seven years, British Columbia's aboriginal peoples, its provincial government and the federal government have undertaken the largest, most comprehensive and most expensive treaty negotiations in Canadian history. These negotiations cost Canadians well over $100 million a year. Despite the time and expense, only one *Agreement in Principle* has been signed, and it has since been repudiated by the First Nation in question (the Sechelt Band of BC). The negotiations are falling apart. What went wrong and how can it be fixed?

From 1975 to 1993 the only negotiations that took place in British Columbia were between the Nisga'a (north of Prince Rupert) and the Government of Canada. Without British Columbia at the table to discuss issues related to lands, the talks made little progress. Following widespread aboriginal unrest in 1990, however, the BC Government joined the Nisga'a talks and commissioned a new British Columbia Claims Task Force to issue a report on "land claims." The task force recommended that British Columbia and Canada settle treaties with the first nations, and set up a Treaty Commission to act as "Keeper of the Process." In late 1993, the British Columbia Treaty Process was initiated, and numerous first nations came forward to negotiate with the Crown. By 1995 about 75 per cent of the province's aboriginal peoples were represented at one of approximately 50 negotiations.

It didn't take long for hurdles to appear on the road toward treaty settlement. Among them were a lack of consensus on the meaning of aboriginal rights and title; the Department of Indian Affairs' conflicting duties between getting a treaty settlement and fulfilling fiduciary responsibility to native peoples; the diminishing scale of settlements; the limited mandates and high turnover of government negotiators; and the complexity of and lack of certainty in the treaties that are agreed. All of these factors have contributed to the slow pace and convoluted course of the treaty talks, and the result is that ten years after the unrest that prompted the process, native people feel that all they have gained are large debts.

One of several fundamental flaws in the process involves the recognition and definition of aboriginal rights and title. In the past, because the Crown recognized aboriginal rights and title, it insisted that the First Nation it

was negotiating with "cede, release and surrender" those rights to create a legal *tabla rasa*. If the First Nation did so, the government would then grant it certain rights. This strategy has never been popular with the aboriginal side and certainly does little to create a healthy relationship between the Crown and First Nations. It caused the collapse of the Dene negotiations in 1990 and was seen as a potential problem for any British Columbia-based process. The British Columbia Treaty Process therefore abandoned the requirement that First Nations prove who they were and why they had the right to come to the table in order to begin to negotiate:

> *In the past, blanket extinguishment of First Nations' rights, titles and privileges was used to achieve certainty. The BC task force rejects that approach. Section 35 of the* Constitution Act, 1982 *gives express recognition and affirmation to aboriginal and treaty rights. As a result, First Nations should not be required to abandon fundamental constitutional rights simply to achieve greater certainty for their bargaining partners. Those aboriginal rights not specifically dealt with in a treaty should not be considered extinguished or impaired... (*Report of the British Columbia Claims Task Force, *June 28, 1991)*

Here is where the problem begins. The passage just cited is fairly clear, but without an agreed definition of aboriginal rights, it is effectively meaningless. The First Nations assumed that removing the need to prove who they are meant the Crown implicitly accepted their existence and the extent of their territory and rights. On the contrary, the government position has been that aboriginal rights and title are undefined: The First Nations have proved nothing and therefore bring nothing concrete to the table and have nothing to extinguish. In negotiations, it has been made very evident that the only aboriginal rights left at the end of the day will be those defined in whatever treaty emerges. And once a treaty has been signed it will be too late for a First Nation to take an undefined and nebulous aboriginal right before the courts. This one difference of views has kept many bands from entering the treaty process at all, and is crippling the negotiations for those who did come to the table.

Not only does the government's refusal to recognize aboriginal rights look like extinguishment in disguise, it also sets up an absurd bargaining situation between the Crown and first nations. The government simply denies that the other side has any bargaining chips. Instead of creating a formal and respectful relationship between nations, the Treaty Process is one in name only; Canada will not even allow the negotiations to fit under the Vienna Convention on Treaties.

Without agreement on aboriginal rights and title, the process begins to look like just another economic development programme. In fact, much of what is coming forward is already available outside the Treaty process through a myriad of Department of Indian Affairs programmes. Of course, DIA's mandate has always been to fulfil the federal fiduciary obligation to aboriginal people—creating programmes to help the natives is what the ministry is about. But after having spent five years in "Indian country" myself, it has become very clear to me that government is unable to create any sustainable economic development and that the best answer would be to reduce government interference and instead create a positive climate for First Nation entrepreneurs. What's more, the DIA mandate puts the ministry in a conflict of interest where treaty settlement is concerned.

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A second serious problem with the negotiations is that since the *Sechelt Agreement In Principle* in 1999, and in the series of offers that have followed, the scale of settlements has been significantly smaller than anyone had expected. All assumptions by "Indian industry" experts and accountants placed the value of land and cash settlements in the range of $80,000 to $100,000 dollars per aboriginal person in British Columbia, which had been the pattern of federal offers for 15 years. Instead, since the fall of 1999, government offers have been closer to $50 000, and, in 2000, as low as $30 000.

In August 2000, the Lheidli T'enneh near Prince George were given a formal offer of $28,000 to $35,000 in land and cash, far less than had been proposed by Canada and British Columbia in a visioning exercise held with Lheidli T'enneh before the Supreme Court of Canada's *Delgamuukw* decision. Rick Krehbiel, a Lheidli T'enneh negotiator, reacted as follows: "We have no idea where they came up with their offer from. We look northwards to McLeod Lake and try to reconcile the huge differences in the negotiations." The McLeod Lake Band, which is roughly the same size as Lheidlei T'enneh, managed to get a much better land settlement last year though adhesion to Treaty 8, one of the "numbered treaties" settled in the 19th century—from which they argued, successfully, they had been left out in error in 1899-1900.

Specific claims also fare much better in settlement offers, since the First Nation bargains with a well-defined area of land. For instance, in August 2000, on the eve of a court decision, Canada and the Squamish Nation came to a settlement over a specific claim dealing with a number of small former reserves in and around Vancouver. The settlement is worth roughly $92million, a figure that is likely comparable to what the Squamish would receive as a financial component of a treaty, when and if that much broader negotiation were completed.

The negotiations are also seriously hampered by the very limited mandates the government negotiators bring to the table. With 50 different negotiations running concurrently in British Columbia, the job of representing government has been given primarily to lower-level bureaucrats. This is fine, so long as the agreements resemble those that have already been struck, such as the *Sechelt Agreement in Principle* or the *Nisga'a Treaty*. But as soon as someone proposes an innovation, talks stall while the negotiators get permission from higher up. Not only does this slow down the process, it puts the government negotiators in the awkward position of representing First Nations before their superiors, instead of having the First Nation take its interests directly to the decision-makers.

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If nothing changes, the courts will decide

In addition, the frequent turnover of negotiators further erodes their expertise and ability to negotiate. At Ts'kw'aylaxw, 18 different individuals in five years have negotiated for the federal and provincial governments. Each change has meant a setback of several months, as the new negotiator has learned terminology and history unique to the table.

From the start, the governments have stated that one of their overriding interests is the creation of certainty in relation to lands, resources and jurisdictions. This simply will not happen in the current negotiations. The documents are becoming so complex they are bound to cause large-scale disputes in the future. The best example of this is the complete ambiguity of the status of Nisga'a lands in the *Nisga'a Final Agreement*. Nothing in the agreement defines whether land is provincial, federal or some form of *sui generis* aboriginal title protected by virtue of having been included in a treaty. All that is clear is that the lands are not reserved for the use and benefit of Indians. Nobody knows who holds the allodial (i.e., absolute) title, and until this is tested in the courts uncertainty will abound. This ambiguity is repeated throughout the *Nisga'a Final Agreement* and the *Sechelt Agreement in Principle*. The Ministry of Indian Affairs' own fact-finder, Justice Alvin Hamilton, formerly Associate Chief Justice of Manitoba and of the Court of Queen's Bench, highlighted the problem in his 1995 report on certainty in treaty negotiations by admitting that although he is a judge with extensive knowledge of aboriginal issues, in many of its provisions he could not understand what the *Yukon Final Agreement* meant.

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The inclusion of self-government clauses on top of the land and cash settlements adds yet another level of complexity to the negotiations. Banging out a self-government model that can take in every future eventuality is an exercise in second guessing that adds dozens and dozens of pages to an agreement and guarantees that the treaty will be outdated almost as soon as it is signed. The Ts'kw'aylaxw band of the southwest interior of BC has already experienced a taste of this: They were given the power to solemnize marriages in their *Agreement in Principle*. Shortly thereafter, however, government policy changed to accept same-sex marriages, and as a result, Ts'kw'aylaxw were asked to change the *AIP* to include this change as well.

Even when they don't change almost as soon as they are signed, modern treaties have become understandable only to a tiny elite group of lawyers, bureaucrats and "Indian Industry" con-

sultants. But it is frequently the case that even the elites cannot agree on what the treaties they have written mean. To the lay public or to First Nations people, who must approve them in referenda, treaties can be all but incomprehensible. When Justice Hamilton admits to trouble in understanding what the Yukon agreement says, it seems clear that treaties have become a public make-work project for lawyers.

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Whatever else comes out of the process, there must be a recognition of and closure with the past. First Nations need to feel that their grievances have not been "extinguished," but heard, acknowledged and settled. If this does not happen, their grievances will rise again, and impede good relations with governments and fellow citizens. One approach to achieving closure is to write a side document that lays out the history of the First Nation and what happened to them, and provides a negotiated apology from the Crown. The apology would also include some sort of release or indemnity for the governments, along the line of the New Zealand-Maori settlement, or Canada's settlement with Japanese-Canadians interned in WW II. The goal of the process would be true reconciliation.

Treaties themselves need to deal with the existing aboriginal title and rights and describe them succinctly. No treaty need be longer than 30 or 40 pages. (In fact, Tony Penniket created such a treaty template in 1998/99 for use in British Columbia. Not only was it not adopted, but the model has never been allowed to be discussed by any negotiating table.) The shorter the document and the simpler the language, the more understandable it will be to the public and to First Nations members—which is crucially important if people are to approve and accept it. By contrast, previous negotiations have bogged down in attempts to define the meaning of words used in definitions.

For the sake of simplicity, self government should be taken out of the Treaty context and negotiated separately between the Federal government and the relevant First Nation. There is the further advantage for native peoples that any form of self government that is negotiated in a treaty will be irrevocably entrenched and very difficult, if not impossible to change. First Nations will be expected to live with a turn-of-the-millennium concept of governance that, with time, may become as fossilized a relic of the past as many of our current laws.

The negotiations also need to proceed much faster. There is no reason for the process to take more than 24 to 30 months. A faster process means less money is wasted by all sides on keeping a large negotiating structure in place. Moreover, the longer the negotiations continue, the less likely they are to keep the community on board and in agreement with the process.

It is time to consider running a single overarching set of negotiations. The reality is that the governments are not going to create 60-plus highly individual settlements in British Columbia. Governments need to sit down with the collected First Nations of British Columbia and create the base document that will form the template for individual negotiations. This idea is very unpopular with the First Nations, as they are extremely reluctant to give any real power to a province-wide organization, but by now they should understand that it is the only way to lure government negotiators with real heft to the negotiating table.

To improve the standard of living for all British Columbians, aboriginal title and rights issues need to be settled as soon as possible. The current process is doing nothing to ensure timely, lasting and affordable settlements. If nothing changes more and more issues will be taken to the courts, more uncertainty in the resource sector and a continued resentment on the part of First Nations.

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Fighting the last war Central bankers [gathered at a conference] in Jackson Hole largely agreed with the new consensus that in a world of highly mobile capital, countries must opt for either a fully fixed exchange rate ... or floating exchange rates. Any halfway arrangement will sooner or later hit the rocks. European montary union aside, many countries have opted to float in recent years. But here's a funny thing: if they really intend to stick to a free float, why are central banks still sitting on massive foreigh-exchange reserves?

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