

Sovereignty and Intervention

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An Argument for Land Use Agreements in the British Columbia Treaty Process

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This paper argues that land-use agreements should be a complementary adjunct to the British Columbia treaty process. It makes this argument by explaining the context of aboriginal sovereignty in British Columbia from British colonial settlement to modern case law. It locates the risks and challenges to successfully negotiating aboriginal title in a lack of public service capacity within First Nations as well as the political sensitivity around economic development and resource extraction. From these considerations, it moves on to recommend that the existing treaty process in British Columbia be expanded to include land-use agreements. This paper then proceeds to examine - and reject - the current model of treaty negotiation in British Columbia. It grounds the argument for land-use agreements by emphasizing their role in advancing the economic interests of First Nations as well as serving as positive auxiliaries to furthering the permanent treaty process. It suggests an implementation strategy that catalyzes the existing British Columbia Treaty Commission. It concludes with practical 'first steps' the Province can take to initiate this process.

Background

Two issues frame this argument – economic development and aboriginal sovereignty. At the moment, it appears that economic development is largely driving the government to secure land-use agreements. The growing global population is creating strong demand for energy. Over the next two decades this demand for energy is estimated to increase by roughly 35% (Emerson, 48, 2011). Most of this demand is expected to come from energy-hungry economies in the Pacific Rim, such as Japan – which has no domestic source of petroleum – and developing markets such as China and India. This regional problem is compounded by a current deficit in pipeline infrastructure to deliver oil to these markets (Ibid). At the same time, energy demands along the American west coast is also expected to rise as they gradually run-down their own stock of oil.

Canada is advantageously positioned to supply these markets. After Saudi Arabia, the Athabasca oil sands in northern Alberta are the second-largest known oil reserves in the world. Transit times between Canadian ports and Asia are two days shorter than

embarking from American ports (Ibid). At the moment, roughly half of Canada's GDP is supported by exports; amongst the Group of Eight (G8), it is the most export-reliant country. A significant chunk – 70.2% - of Canadian exports go to the American market (Foreign Affairs and International Trade, 2011). In light of America's recently weak economic performance, it has become a policy mantra that Canada needs to diversify its export markets (Georges and Mérette, 2010).

A second consideration is the constitutional obligation of government to consult and accommodate First Nations if it intends to make a decision that could affect their interests and title. This is mandated by the Constitution Act, 1982 Section 35. Unlike other Canadian jurisdictions, British Columbia has had until recently a substantively light history of securing treaties with First Nations. There was an initial flurry of treaty-signing under British Columbia's first colonial governor, Sir James Douglas, who negotiated fourteen land agreements with aboriginal communities on and around Victoria. Douglas and his successors, however, did not maintain this treaty process (Stokes, 118, 2000). After British Columbia joined the Canadian Confederation in 1871, the Province maintained that aboriginal title to their territories had been extinguished with the establishment of British colonies on Vancouver Island and the mainland. Subsequently, the only government relevant with regards to First Nations was the Dominion government – under British Columbia's terms of union, the Dominion agreed to assume all responsibility for status Indians. By 1924, the Dominion had finished drawing the boundaries of all British Columbia's Indian reserves (Stokes, 119, 2000).

This history reminds us that policy-making is in many ways an interrogative process. Policy-makers must identify the normative values that not only identify a problem but also inform their choice of policy instruments (Pal, 2001). This exercise is often controversial because of perceived subjectivities and ideological disagreements. In the case of aboriginal sovereignty, however, the law of the land has coordinated a constellation of values to frame proper responses to problem identification and resolution. Section 35 of the Constitution Act, 1982 pledges that:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “Aboriginal Peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. Subsequent Court law has clarified understanding of this provision.

In *R. v. Sparrow* (1982), the Supreme Court affirmed the continued existence of aboriginal rights. Importantly, it also imposed a fiduciary duty upon the federal government to act with restraint when interfering with these rights. *R. v. Van Der Peet* (1996) subsequently defined aboriginal rights as “A practice, custom or tradition, to be recognized as an aboriginal right need not be distinct, meaning “unique”, to the aboriginal culture in question. The aboriginal claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture” (S.C.C. 1996).

In 1997, the Supreme Court definitively ruled in *Delgamuukw v. British Columbia* that aboriginal title in British Columbia had never been extinguished, putting to rest the long-standing legal theory that British settlement had supplanted it. The Court noted: A provincial law of general application cannot extinguish aboriginal rights. First, a law of general application cannot, by definition, meet the standard “of clear and plain intention” needed to extinguish aboriginal rights without being ultra vires the province. Second, s. 91(24) [Constitution Act, 1867] protects a core of federal jurisdiction even from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indianness”. (S.C.C. 1997)

In 2004, the Supreme Court defined the obligation of government to consult and accommodate aboriginal interests in land use in *Haida Nation v. British Columbia (Minister of Forests)*. Grounding their ruling in the ‘honour of the crown’, the court ruled that the Crown has a “duty to consult with Aboriginal peoples and accommodate their interests” even if title is unproven (S.C.C 2004).

Cumulative case law thus spells out clear and normative understandings for government interaction with aboriginal sovereignty. Since 2005, the government of British Columbia has interpreted this legal obligation as a suitable instrument for advancing its policy of reconciliation with the province's aboriginal peoples (British Columbia, 4, 2010). In 2010 the province updated its procedures manual for consulting and accommodating aboriginal interests to emphasize four goals consistent with reconciliation. The province aims to use this process to realize the following:

1. Respect for aboriginal and treaty rights: the Province wishes to ensure that the claimed or proven aboriginal rights (including title) and the treaty rights of its First Nations citizens are respected. Through the process of consultation, the Province is seeking a better understanding of aboriginal and treaty rights, and how its decision-making processes may be influenced by them.
2. Improved relationship between the Province and First Nations. Through the process of consultation, the Province is seeking to improve its relationships with First Nations.
3. Predictable and transparent process. The Province wishes to engage First Nations in a predictable and transparent way.
4. Reconciliation of rights and interests. The province wishes to reconcile the respective Aboriginal interest of First Nation communities and government's other objectives. (British Columbia, 7, 2010).

Until 2011, the Province preferred to resolve aboriginal title through negotiating permanent treaties with First Nations. This approach, however, was time-consuming and expensive and resulted in only three treaties. In November 2011 Premier Clark announced that province would shift its negotiating priority from securing permanent treaties to signing land-use agreements with First Nations. Ms. Clark explained the policy-change by referencing the persistent poverty that afflicts many aboriginal communities: "Lots of first nations are fed up with waiting for economic development. And frankly so am I... We have to find other ways of getting there sooner." (Hunter, 4 November 2011). The Province is now determined to secure ten land-use agreements by 2015 (Hunter and Bailey, 5 November 2011).

Risks and Challenges

There are sizable risks and challenges inherent to negotiating land-use agreements with First Nations. At the moment, the topic of natural resource management is highly

sensitive for many communities as they grapple how to properly respond to proposed developments. Quite a few First Nations worry that the type of development proposed – mineral extraction and pipelines, for example – are environmentally dangerous and inimical to the survival of their culture. This debate is currently gripping the Gitksan First Nation, which recently signed an agreement with Enbridge allowing the Northern Gateway Pipeline to cross their traditional territory in exchange for equity in the project (CBC News, 6 Dec. 2011, Web).

Another challenge is that many aboriginal leaders worry that an exclusive preference for land-use agreements would cause the Province to ignore First Nations that are not immediately attractive for investment. Chief Douglas White of the Snuneymuxw First Nation told the Globe and Mail, “This is not a pathway for unleashing the potential of this province...There may be scenarios where the stars line up and a proponent’s project lines up with a first nation’s interests. But for the most part, the uncertainty and conflict will remain” (Hunter, 4 November 2011).

The greatest challenge, however, is the current lack of public service capacity within First Nations. As Neil J. Sterrit notes, “For first nations, with limited resources and administrative capacity, the challenges [of negotiation] can be overwhelming.” (6 January 2012, Vancouver Sun). The British Columbia First Nations Public Service Development Secretariat reports that First Nations public services experience great difficulty in attracting and retaining qualified workers (British Columbia F.N.P.S.D.S., 6-9, 2010). The National Centre for First Nations Governance also enumerated the following challenges causing, or arising, from insufficient capacity:

- Conflict between the vision of communities and government programs and policies
- Inadequate resourcing
- High turnover and burnout of public servants
- Poor compensation and lack of job security
- Significant diversity in size of First Nations communities leading to a broad range of needs and challenges between communities
- Low success rates in formal education
- Lack of relevant formal education opportunities (N.C.F.N.G., 54, 2009).

These public service deficits can ultimately result in a crisis in legitimacy. The National Centre for First Nations Governance expressed this concern by emphasizing that: The current nature of most First Nations communities makes transparency and fairness a difficult challenge. In some cases, policies and procedures are just not in place. In others, the existing policies and procedures just don't meet the needs of the community. (N.C.F.G., 28, 2009).

A combination of all of the listed risks has resulted in such a crisis for the Gitksan First Nation. Lacking a fully bodied public service, the First Nation's treaty auxiliary – the Gitksan Treaty Society – not only negotiated an agreement with Enbridge but also signed it. It is the latter action that is generating controversy, with some alleging that the Society over-stepped its boundaries, while others claiming it was a natural extension of its mandate (Sterrit, 6 January 2011). Similar problems should be expected in other First Nations, as their under-resourced public services grapple to craft an appropriate response under increased pressures to permit development.

Recommendations

The treaty process is necessary to achieve meaningful reconciliation with British Columbia's aboriginal peoples. By the same token, reconciliation must also deliver opportunities to aboriginals to fully participate in the general prosperity of the province. To date the treaty process has not delivered this outcome. The Province's new preference for negotiating land-use agreements is therefore understandable and appropriate. However, in the interest of fairness and equity, the Province should commit itself to negotiating with every First Nation in British Columbia. The British Columbia Treaty Commission is already on hand to facilitate and expedite this process through the experience and bridges it has built with its aboriginal partners.

Importantly, this approach should not be construed and implemented as a replacement to the treaty process. In light of established case law, such an approach would not only fail judicial review but would also violate the spirit of natural justice itself. Rather, land-use agreements should be structured into the existing treaty process as ladders towards the final goal of securing permanent treaties.

Other Options

Pursuant to *Haida v. British Columbia (Minister of Forests)*, the province is obliged to consult and, if possible, accommodate, aboriginal interests vested in land use. This requirement results in only two realistic options for the Province: negotiating permanent treaties with First Nations or temporary land-use agreements. The former option was until recently the preferred strategy of the provincial government. Under the Campbell Government, treaty negotiations were a strategic policy aim for the Province. During its ten years in office, three treaties were formally ratified and seven Agreements in Principle were drafted – the final stage before treaty ratification (British Columbia Treaty Commission, 2011). The advantage behind this strategy is creating permanent and reliable frameworks that economically, socially, and politically enables First Nations to succeed. At the same time it creates stable land use rules, giving capital the confidence to invest. As the British Columbia Treaty Commission explains, “Achieving certainty is the primary goal of the BC treaty process. Certainty in a treaty means ownership and the rights, responsibilities and authorities of all parties are clear and predictable. The process for reviewing and amending the treaty must also be fair and predictable” (British Columbia Treaty Commission, Website, 2011).

The disadvantage behind this system, however, is that it has so far proved to be time-consuming and expensive. Since 1993, when the treaty-process was resumed in British Columbia, only three treaties have been secured. Negotiations with the remaining 108 First Nation bands are ongoing. To date, \$533 million has been spent on the entire treaty process (British Columbia Commissioner of Treaties Annual Report, 28, 2011). The high cost and delay in negotiations is explained by the convergence of two factors. Firstly, the sheer number of negotiating partners and the inherent complexity of negotiating necessarily make this a slow process. Secondly, the treaty process is fundamentally colored by the proposed permanency of treaties themselves - despite the presence of amending formulas, both sides are understandably cautious to do their due diligence so as to not be unpleasantly surprised by possible consequences from a finalized treaty. In a rather unusual move, the Chief Commissioner of the British Columbia Treaty Commission, Sophie Pierre, used her most recent Annual Report (2011) to criticize the

slow pace of negotiations. She wrote:

The lack of urgency in treaty negotiations, for which all parties must accept some of the responsibility, remains a concern of the Treaty Commission. Direction is urgently required from the highest level — the Prime Minister, Premier and First Nations Summit Task Group — to shake the status quo. (British Columbia Treaty Commission, 1, 2011).

Thus far the principals have yet to publically recommit to the 1992 British Columbia Treaty Commission Agreement as urged by the Chief Commissioner (British Columbia Treaty Commission, 1, 2011).

Accordingly, given the slow pace of negotiations, its high cost, and increased global interest in British Columbia's economic potential, it is appropriate for the Province to temporarily emphasize land-use agreements over the treaty process as an expedient method to establish certainty for capital. It is only by assuring certainty that capital can create economic opportunities for First Nations and British Columbians. It is important to emphasize that this approach does not imply a rejection of the treaty-process but rather serves to complement it in delivering positive outcomes.

Rationale

Pursuing land use agreements are not necessarily prejudicial to the ultimate goal of securing treaties with British Columbia's First Nations. In fact, land-use agreements can usefully prep the treaty process by serving as a temporary living laboratory. Since these agreements are time-stamped with an expiration date, negotiating pressure on both partners to secure the most advantageous deal for themselves is lightened. Partners can also use the lifetime of a land-use agreement to assess the viability of its conditions. Should these conditions prove acceptable to both partners, they can subsequently become common touchstones upon which a permanent treaty is built upon. At the same time, land use agreements create certainty for capital. Speaking on behalf of the British Columbia Business Council, Jerry Lampert stressed the importance of certainty for the investment community:

No treaty issue has been as important to the Business Council since the beginning of the treaty process as certainty. In our view, the very purpose of the treaty process is to achieve certainty for British Columbia and all its citizens in terms of the effect of aboriginal rights and title on lands and resources. (British Columbia Treaty Commission, 18, 2004).

Land-use agreements can condition economic development to accommodate First Nation concerns. Land-use agreements to date have included environmental protection, cultural recognition, and economic inclusion for First Nations. In the most recently signed land-use agreement – the Atlin Taku Land Use Plan – the Taku Province and the Taku River Tlingit First Nation specified the core vision of the agreement. The Atlin Taku Land Use Plan describes itself as a:

- A framework for culturally and ecologically sustainable management grounded in ecosystem based management practices including principles, goals, and objectives for critical habitat and ecosystem management; and
- Designated resource management zones, defining the scope of acceptable activities, including:
 - Areas for protection from major industrial development due to their cultural, ecological, wildlife, or fisheries values; and,
 - Areas available for ecologically sustainable and culturally appropriate development. (Atlin Taku Land Use Plan, 2, 2011).

To manage the Atlin Taku Land Use Plan, it was necessary for the Province to also negotiate a Strategic Engagement Agreement. This was necessary as the Atlin Taku Land Use Plan was exclusively focused on delineating acceptable and unacceptable land use practices. Operational features, such as allocation of wildlife resources, private property interests, resource revenue sharing were specifically not addressed in the Land Use Plan (Atlin Taku Land Use Plan, 3, 2011).

The resulting Strategic Engagement Agreement with the Taku River Tlingit First Nation – Wóoshtin yan too.aat / Land and Resource Management and Shared Decision Making Agreement – was designed to address the management of the terms of the Atlin Taku Land Use Plan. It was set-up to create a collaborative framework between the Province

and the First Nation for implementing the Land Use Plan. Additionally, the Strategic Engagement Agreement commits the Province to protecting 800,000 ha. of land as a natural reserve, funding economic opportunities for the Taku River Tlingit, as well as entrenching resource revenue sharing. In exchange, the Taku River Tlingit First Nation agreed to not oppose the economic development of 3 million ha. of land expected to prove rich in mineral resources (Wóoshtin yan too.aat / Land and Resource Management and Shared Decision Making Agreement, 2011). Both the Province and the Taku River Tlingit further agreed to joint decision-making procedures over managing the resources of the outlined territory (Wóoshtin yan too.aat / Land and Resource Management and Shared Decision Making Agreement, 11, 2011). Importantly, land-use agreements typically do not take as long as treaties to negotiate and implement. Furthermore, land-use agreements satisfy the Province's obligations as outlined in several court rulings, but especially *Haida v. British Columbia (Minister of Forests)*.

It is also important to stress the economic benefits that could accrue from a comprehensive system of land-use agreements with First Nations. For example, it is projected that the Northern Gateway Pipeline by itself would create 5,500 person-years of direct, on-site employment and 57,200 person-years of indirect employment. In British Columbia alone this would generate a labour income figure of approximately \$2.5 billion while the rest of country would earn \$5.5 billion. Over a thirty-year span, this pipeline would add \$270 billion to the national gross domestic product. Finally, governments at all levels could expect to raise \$85 million in tax revenue from the pipeline and its associated activities alone. (Emerson, 50, 2010). Such activities would naturally involve First Nations because of the need to negotiate land-usage consent from them. Land-use agreements are therefore expedient instruments through which to secure solid and reliable employment for aboriginal communities and begin to raise their standard of living to the provincial average.

Implementation

The Province should pursue land-use agreements on systemic basis. To facilitate this, the British Columbia Treaty Commission should be catalyzed in crafting and implementing

these agreements through using their treaty process. The British Columbia Treaty Commission has structured the treaty process into six stages, from introductory talks all the way to treaty ratification. Stages one to three could be used for fact-seeking and negotiating a land-use agreement with First Nations. Phase Four of the process – negotiation of an agreement in principle – is the most apt level for land-use agreements to be implemented. The rationale behind this implementation strategy is that it harvests the substantive work already accomplished by the British Columbia Treaty Commission and First Nations in identifying their respective key concerns over natural resource ownership and management. Furthermore, land-use agreements could serve as valuable vehicles in which to test the logistics of negotiated agreements in principle between First Nations, the Province, and the government of Canada before moving into the treaty ratification stages.

Implementing land-use agreements into the existing treaty process would not require renegotiating the 1992 British Columbia Treaty Commission Agreement amongst the principals. Sufficient latitude is given in the wording of the text that it could be easily imported into the treaty process. However, it is essential to note that requiring First Nations to accept a land-use agreement before securing a treaty is untenable. No obligation could be imposed unless every party to the talks gave individual consent. Accordingly, the Province and the government of Canada must instruct their agents to push for this option but realize that they cannot force it.

Finally, it may prove necessary from a practical point of view to divide land-use agreements into two packages. The first package would be solely concerned with defining the boundaries of the land in question and acceptable environmental practices. After securing common agreement, the Province and First Nation can then move on to the business of negotiating an operational model to manage the land-use agreement.

Next Steps

Accordingly, the Province should confer with the government of Canada to win their support for this option. If the government of Canada declines to support the importation

of land-use agreements into the treaty process the Province should continue to push for it in their talks with First Nations. At the same time, the Province must recognize that this is a fraught time for securing land-use agreements. Concerns over resource extraction and pipelines from Alberta to the West Coast have heavily politicized this issue in many aboriginal communities. Handling this topic will require sensitivity, transparency, and accountability to give it legitimacy.

Thus far the Province has made significant steps in this direction. 'Open houses' have been held on aboriginal reserves to discuss the details and significance of land-use agreements their leadership negotiated with the Province. This tactic, however, has been showed wanting in several cases. Indicative of this insufficiency is the dissent amongst the Gitksan First Nation over the Northern Gateway Pipeline agreement their band signed with Enbridge. The legitimacy of this agreement has been strongly challenged, in that it did not follow traditional protocols to secure support (CBC News, 6 Dec. 2011, Web). This example is instructive for the Province in securing land-use agreements with First Nations. Accordingly, the Province should identify the appropriate protocols used by its First Nation partner and shape its implementation strategy accordingly.

In many cases, First Nations lack public services resources to effectively participate in negotiations. The Province has already suggested that the federal government should forward funds to First Nations to build-up their capacity to negotiate with the Province (Hunter and Bailey, 5 November 2011). If the federal government is unwilling or forwards insufficient monies, the Province should make-up the difference.

Finally, this process requires strong signals of political support from the Province's leadership. The Premier and the Ministers of Aboriginal Relations and Reconciliation; Energy and Mines; Forests, Lands, and Natural Resources; and Jobs, Tourism, Tourism and Innovation should be actively involved.

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