“Comprehensive Land Claims in British Columbia: A Worthwhile Pursuit?”

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ABSTRACT

The 1973 Calder decision by the Supreme Court of Canada marked the beginning of a new era of government-Aboriginal relations in Canada. With Frank Calder’s recourse to litigation, the perennial and unsolved issues of land claims, Aboriginal title and self-government were projected into the national political consciousness. In response, the federal government instituted that year a land claims policy that would encourage the negotiation and settlement of modern treaties between the Crown and Canada’s First Nations. In British Columbia, the situation was unique and complex: Aboriginal title had been denied since before Confederation, and unlike with most of Canada, the lack of treaty history meant that almost all of the province’s territory had competing claims of rightful ownership. This essay details the specific experience since 1973 in the context of the B.C. comprehensive land claims process. Almost forty years later, the remarkable lack of progress and costs associated with the land claims settlement endeavour have led many to reject the current approaches. For the governments of Canada and British Columbia, reaching treaties entails surrendering such commodities as land title and legislative authority. Without the fundamental reform of the current process, or a meaningful search for alternative approaches, comprehensive land claims settlements will remain frustratingly elusive in B.C.
Introduction

From before Confederation to the present, Aboriginal peoples of British Columbia have had a unique status in the Canadian federation. Their historical exclusion from the provisions of the Royal Proclamation meant that their administration was not originally a federal responsibility, and that the provincial government could deal with Aboriginal title and land claim issues as it saw fit. As such, British Columbia did not engage in treaty-making as the federal government did, and Aboriginal title was ignored for a century. When the prospect of a national policy for the assimilation of Aboriginal peoples was proposed in 1969, B.C. bands rose up to fight for their recognition and protection as distinct peoples. The Calder decision, rendered by the Supreme Court in 1973, changed the course of Aboriginal policy in Canada: a national land claims policy was instituted, with the absence of treaties in British Columbia to be remedied with Comprehensive Land Claim Agreements (CLCAs).

What has been achieved in the four decades since the beginning of the Comprehensive Land Claims process? This is the question at the basis of this essay, which will be answered by considering the evolution of Aboriginal affairs in British Columbia—with reference to the Canadian context—from Confederation to the present day. Overall, the two levels of government dominate the treaty process, and since the objectives of Aboriginal bands largely run contrary to government priorities, the process has been effectively stalled in most cases. Only through recourse to litigation have B.C. Aboriginal peoples succeeded in offsetting the established power dynamic, but this course of action has only compounded feelings of hostility between negotiating parties. Alternatives to the current approach must be sought if comprehensive land claims are to be settled in British Columbia. This essay considers several alternatives, including litigation, interim measures, and the potential of the B.C. Treaty Commission as a third-party mediator.

Historical Background: Confederation to the 1973 Calder Decision

From the point of contact with Europeans to the mid-twentieth century, the legal situation of Aboriginal peoples in B.C. was one of forced submission and the rejection of title by Crown representatives. Aboriginal title, in general, refers to rights to land or territory. Title is often described as inherent, not requiring acknowledgement from external sources. (University of British Columbia, 2009)

A key event from this early historical period was the late entrance of British Columbia into the Canadian federation in 1871. Four years prior, at Confederation, the Government of Canada had inherited the provisions of the Royal Proclamation of 1763. Significantly, the Royal Proclamation stated that “title to Indian territory was not to be considered extinguished or transferred merely by conquest or occupation but only through voluntary cession” (Roth 1999). The federal government was thus responsible for Canada’s Indians, as per the Constitution Act of 1867. The federal government’s responsibility was first established in order to protect
Aboriginal peoples from “great Frauds or Abusers’ committed by purchasers of Aboriginal lands, but it soon evolved into a fiduciary relationship. Aboriginal peoples, then, are wards of the state, “whose care and welfare are a political trust of the highest obligation”. (Hurley 2002) Since British Columbia was not a part of the federation at this point, B.C. Aboriginal peoples were to remain under the control of the B.C. provincial government.

Ultimately, the policy trajectory followed by the B.C. Government did not diverge radically from the federal government, since both maintained the submission of Aboriginal peoples and envisioned eventual assimilation. Unlike the B.C. Government, however, the federal government undertook a process of treaty-making from Confederation into the early twentieth century, which conferred upon treaty bands certain benefits in exchange for land (Standing Senate Committee 2008). Aboriginal peoples in B.C. were excluded from this process, and so it was during this period that permanent movements of resistance on the part of Aboriginal bands were sparked in response to their perpetually undefined and unacknowledged status. Reaching a land claim settlement would mean that certain inalienable rights to land or territory would be officially recognized. Christopher McKee writes that B.C. Aboriginal peoples have been protesting their collective neglect for over a century (Dacks 1997), refusing to relinquish their entitlement to land.

Though consistent, Aboriginal resistance in B.C. did not yield concessions on the part of the government, and formal organization and fundraising for land claims purposes was banned prior to the 1951 (Roth 1999), preventing the fragmented voices of dissent from uniting. This changed unequivocally in 1969, when Jean Chrétien, then Minister of Indian and Northern Affairs in the Trudeau government, issued a White Paper. This document proposed the abolition of the Indian Act and an end to the special relationship between Aboriginal peoples and the Canadian state. The result would be full equality and undifferentiated citizenship. The prospect of assimilation—construed as a certainty—galvanized Aboriginal peoples across the country; a concerted effort for rights and recognition could be discerned for the first time. Faced with assimilation, Aboriginal peoples preferred to revisit the relationship with the federal government. Ideally, special status within the federation would be maintained, without the paternalistic and fiduciary implications. In the case of B.C., the strategy of resistance of the Nisga’a would have the most lasting implications for the subsequent nature of government-Aboriginal relations.

The Nisga’a, a First Nations band of the northwest coast of B.C., were the first to press their claim to litigation (Miller 1998). Their case was brought to the Supreme Court of Canada, and in 1973 the “Calder decision” established that Aboriginal title pre-existed the assertion of British sovereignty in the province (McKee 2000). This landmark decision had a great effect on Canada-wide Aboriginal policy. The Trudeau government instituted a land claims policy, and in 1974 the Office of Native Claims was established within the Department of Indian and Northern Affairs Canada (INAC). Land claims—either specific or comprehensive—renewed the process of treaty-making with Aboriginal peoples. For Aboriginal bands that had already concluded a treaty with the federal government, “specific” land claims would be negotiated, regarding the
fulfilment of responsibilities or compensation for past unfulfilled duties. Since British Columbia was mostly without such treaties, “comprehensive” land claims would be pursued “based on the assertion of continuing Aboriginal rights and title that have not been dealt with by treaty of other legal means” (Standing Senate Committee 2008).

From the earliest history of contact to the Calder decision, the most important issue for Aboriginal peoples in B.C. was establishing the Aboriginal title that should never have been denied. Frank Calder’s successful recourse to litigation held great symbolic significance for Aboriginal peoples in B.C. and the rest of Canada, since it showed that the current power arrangement was not unshakeable, and that Aboriginal affairs could be approached differently.

Once Aboriginal title was recognized by the Supreme Court, negotiations with broad and varying objectives should have begun in earnest in B.C. However, as McKee demonstrates, the provincial government consistently failed to recognize title until 1991, “sequestering itself until overwhelmed by a combination of legal requirements, political imperatives, and historical precedents” (Miller 1998). The cycle of continued frustrations and stalled action was eventually broken with the establishment of the British Columbia Treaty Commission (BCTC) in 1993 by the First Nations Summit, the federal government, and the B.C. government (Hurley 2009B). It seemed as though both levels of government were finally on board to move forward in the relationship with Aboriginal peoples, especially in light of two other advances at the federal level—Aboriginal peoples’ rights were entrenched in the 1982 Constitution Act and a Comprehensive Land Claims Policy was enacted in 1986, promising to “provide certainty and clarity of rights to ownership and use of land and resources” (Department of Justice, Standing Senate Committee 2008).

From the Nisga’a Treaty to the Delgamuukw Decision

The Nisga’a comprehensive land claim settlement, although enacted in 2000, is not considered within the B.C. treaty process context. Nevertheless, many aspects of the negotiation and post-settlement process have informed other negotiating tables in B.C., as well as the decision for some First Nations to opt out of the treaty process.

The issue associated with the Nisga’a treaty with the most serious implications is the extinguishment of Aboriginal title. It is almost ironic, but mostly disheartening that the recognition that was sought for so long was soon being measured and commoditized, to be surrendered in return for other rights in the negotiation process. Ultimately, the agreement stipulated that Nisga’a Aboriginal title would be extinguished, and eight percent of the claimed land would be awarded, in exchange for such provisions as limited self-government, taxation and justice rights, a cash settlement and release from the Indian Act (Roth 1999). The Nisga’a final agreement was the first in the country explicitly extending Section 35 protection (Constitution Act, 1982) to land rights and self-government in the same agreement (Hurley 2009A).

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1 Treaty Number 8 extends partly into northern British Columbia from Alberta.
Scholars have varied in their responses to the Nisga’a treaty. In general, it is portrayed as a very positive step for Aboriginal peoples. Within the comprehensive claims landscape, there have been far fewer successful negotiations than anticipated. In 2004, BCTC Commissioner Mike Harcourt said that within the next three to five years the province would see fifteen treaties completed (Penikett 2006). There have been two completed treaties (BC Treaty Commission).

Tom Flanagan is a supporter of the Nisga’a treaty: in the second edition of his controversial book *First Nations? Second Thoughts*, Flanagan writes that he approves of the provisions that require the Nisga’a First Nation to pay taxes, to own its land, and for the Charter of Rights to apply while the Indian Act does not anymore. However, he acknowledges the arguments of unconstitutionality of the agreement, since it accords power outside the jurisdictional divides of Sections 91 and 92 (Flanagan 2008).

To refer to the two of the themes of this essay, both the recourse to litigation and the influence of power dynamics are quite evident in the Nisga’a treaty. For one, the eventual outcome, an agreement that is generally seen as positive, owes a great deal to the Calder decision of 1973. The use of litigation arguably allowed the comprehensive land claim to be possible at all, and the self-government provision was an added victory. With regards to power dynamics, the Nisga’a concessions demonstrate the implicit deference to provincial and federal government prerogatives. Even if the final agreement was to represent unprecedented gains, they were won according to terms set by the government.

This idea of a government advantage became abruptly apparent on December 11th, 1997, when the Delgamuukw decision was rendered by the Supreme Court of Canada. In this, another landmark decision, it was established that the Royal Proclamation of 1763 did apply to British Columbia, and that Aboriginal title had never been extinguished (Roth 1999). Suddenly, there were grave doubts that too much in the way of Aboriginal title had been surrendered in the soon-to-be ratified Nisga’a agreement, and that the federal government was not in the position to demand extinguishment of rights. Mary Hurley writes that observers believed the same Aboriginal title status could have been achieved from a “modified rights” approach that would have exhaustively defined Nisga’a Section 35 rights. Such suspicions are rampant in the discourse surrounding the implementation of the Nisga’a treaty, and at the time, it became less of a “benchmark”—as Tom Flanagan suggested—than a warning. The treaty process was then irrevocably tainted, and treaties were perceived as a “certificates of conquest”, taking rights rather than granting them (Roth 1999).

Overall, and especially since the Delgamuukw decision, uncertainty has reigned. Paul Rynard argued that the treaty deserves support, countering the public view that “too much” had been given to the Nisga’a First Nation, but rather that far too many concessions were demanded by the federal and provincial governments. He went on to charge that Canadian political and

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2 The Nisga’a treaty is criticized for giving the Nisga’a First Nation a status that is superior to municipalities, with the ability to “pass enactments to override provincial or federal laws”. This is described as unconstitutional, since sections 91 and 92 of the Constitution Act divided powers exclusively between federal and provincial governments.
corporate elites were not interested in dealing with evolving concepts of Aboriginal rights to land. (Rynard 2000) These arguments reveal a balance of power that was stacked in opposition to Aboriginal interests. For one, Canadian public opinion—when mentioned at all—is often characterized in the literature as hostile or suspicious, which surely only detracts from the responsible government’s commitment to just and progressive treaty negotiations. Secondly, the reference to political and corporate elites alludes to a dynamic somewhat removed from the government-Aboriginal relationship, suggesting that actors were pushing for the preservation of the status quo (of politics or business) in B.C.

Over a decade later, doubts endure regarding Nisga’a, and the B.C. Treaty process has hardly advanced. Gurston Dacks argues that the Delgamuukw decision hardened the position of both the provincial and federal governments, contributing to the recent impasse. For one, the ruling suggested that First Nations may be entitled to the possession of extremely valuable land and resources, where Aboriginal title can be proven to exist. The costs of compensating bands for such resources would be beyond the provincial capacity to pay. Furthermore, since the Supreme Court did not “definitively compel” governments to change their offers, they have not done so, gauging the costs as too high for this (Dacks 2002). Since First Nations now expect more from governments, the result is paralysis at the negotiating tables.

What can be learned from the Nisga’a Treaty experience and legacy, with regards to the B.C. treaty process? For one, the risks of litigation and treaty negotiation are perhaps deemed as comparable: the former approach has led to monumental advances in Aboriginal legal position in Canada (in addition to other Supreme Court decisions not discussed here), and has influenced treaty negotiations in favour of better recognition of Aboriginal rights. However, the costs of litigation are enormous, and there is the possibility of unfavourable rulings. The negotiation approach, then, is characterized by a lack of trust in governments—the expectation is that self-interest or a preservation of the status quo will be pursued by governments. The negotiation approach is also prohibitively expensive. Since First Nations feel at a disadvantage against the two levels of government with either approach, hesitation to act in any direction is understandable, even if important and unprecedented gains could be achieved, as they were with the Nisga’a Treaty.

The Prominent Issues of the Negotiation Process

This section will concentrate on subsequent comprehensive land claims negotiations in British Columbia, explaining the issues at stake. The “issues” refers to the prominent objectives or principles of the treaty process, flavouring the political discourse and guiding action on the part of the three main participants.

The first major issue associated with comprehensive land claims is self-government. For the Nisga’a to secure a degree of constitutionally-protected self-government in the 2000 treaty was a momentous step, and there were attempts to facilitate the possibility of attaining this goal
during the constitutional conferences of the 1990s. With the failure of the Charlottetown Accord, though, self-government was not entrenched in the constitution (Hurley 2009A). Nevertheless, self-government seems to have found its place in the negotiations: the Government of Canada now states that it recognizes the “inherent right of self-government” as an existing Aboriginal right under Section 35 of the Constitution Act, 1982. The government prefers that this right be clarified through negotiations, and not through “lengthy, costly” litigation. (Aboriginal Affairs and Northern Development Canada) Negotiations were opted for in both the cases of the Tsawwassen and the Maa-nult First Nations, resulting in final agreements with self-government exhaustively defined. Many of the current outstanding agreements-in-principle have self-government provisions. (Hurley 2009A)

Self-government is most often framed as an approach that would empower First Nations. However, two points are worth making here. First, there is a concern in Aboriginal communities that self-government only empowers specific creations of the Indian Act, Band Councils. These bodies have sometimes been charged with elitist governance and self-interested action at the expense of community well-being. (Dacks 1997) Next, Aboriginal self-government can be pursued outside the context of the B.C. treaty process. A case in point is the Westbank First Nation near Kelowna, B.C., which obtained self-government in 2003 (Alcantara 2008).

Overall, it is clear that self-government is available at the negotiating table and outside of the treaty process, and First Nations are vigilant now—especially thanks to the Delgamuukw decision—so that “blanket extinguishment” of Aboriginal title does not accompany self-government provisions (Hurley 2009B). Although self-government is not to be considered indisputably good in all cases, it is certainly a worthwhile objective for B.C. First Nations. Fortunately, they are not forced to remain in the B.C. treaty process to reach this point; the appeal of self-government cannot be wielded as leverage to ensure continued Aboriginal involvement in the arguably dysfunctional process.

The next issue has the potential to become very prominent, that is, the relationship between land claims and economic development. Based on the official discourse of the B.C. treaty process, settlement of comprehensive land claims is the key to unlocking economic development in British Columbia, by virtue of the inclusion of First Nations “in the broader economy” (Cairns 2001) and the end of uncertainty over resource ownership.

Stemming from the Delgamuukw Supreme Court decision of 1997, the province must recognize potential Aboriginal title over lands not yet settled by treaty. Following the Haida Supreme Court decision of 2004, the province must also meaningfully consult with First Nations about any projects for economic development set to take place on potential treaty land. Furthermore, the interests of the affected Aboriginal group should be accommodated, and the consultations should take place in good-faith on the part of both parties. (Alcantara 2008) These two decisions illustrate the fact that Aboriginal peoples in B.C. have the potential to become major economic players if land settlements include title over such land and resources. This helps
to explain the remarkably slow pace of treaty negotiations: the province is clearly forestalling the official recognition of title and delaying a shift in the balance of power. In the meantime, small measures of economic development are being pursued, in part to appease a frustrated Aboriginal population.

The tension between land claims and economic development is not new—the provincial NDP government of the late 1990s vowed that it would not yield any more than five percent of the total area of British Columbia to land claims, in line with the proportion of the total population made up by Aboriginal peoples (Dacks 2002). The stakes are high, and the assumption that the balance of power is permanently weighted toward the government is contestable: B.C. Aboriginal peoples consider the land base as the foundation of their future economic prosperity and the factor that will permit their survivals as respective communities. Furthermore, Supreme Court judgments, including Delgamuukw and Haida, have tended to recognize Aboriginal entitlement. Whether the dynamic will be settled through the B.C. treaty process, litigation or other methods remains to be seen, but if the province’s lack of serious commitment to negotiations holds, litigation may be the popular recourse.

A third issue at stake in the B.C. treaty process is prominent in rhetoric and quite understated in practice: the objectives of mutual recognition and respect. The amount of agreements that have been concluded on the character of the relationship between governments and Aboriginal peoples suggests that upholding these objectives is of great significance: in 2005 the tripartite Transformative Change Accord was enacted and the B.C. “New Relationship” accord was signed, in 2006 the Unity Protocol Agreement was signed by First Nations leaders (Hurley 2009B). The “New Relationship” was part of B.C. Premier Gordon Campbell’s remarkable turnaround regarding Aboriginal affairs—in 2000 he had contested the Nisga’a Treaty as unconstitutional and vowed to protect B.C. sovereignty against Aboriginal claims (Penikett 2006). His “New Relationship” accord was signed by leaders of the regional Assembly of First Nations, the First Nations Summit and the Union of British Columbia Chiefs, and although addressing the relationship was conceivably politically significant, the accord made no specific commitments for treaty negotiations. Overall, this accord reflects the general sense of mutual recognition and respect in British Columbia: superficially pleasing, projecting brotherhood and consensus into the relationship, but ultimately hollow, underwritten by suspicion and frustration.

The B.C. Treaty Process Experience

Frustration is certainly evident in the experience of the B.C. treaty process. To give a few specific examples, B.C. Aboriginal peoples are aggravated by continued alienation from their land while land claims settlements are pending, by the protracted nature of negotiations, and by the exorbitant costs associated with the process (Hurley 2009B)—in some cases, the amount of funds borrowed from the federal government has equalled or exceeded the amount set to be received with a settlement (Alcantara 2008). The general discontent is best illustrated by the fact
that in 2009, forty percent of B.C. First Nations were not participating in treaty process at all. Do these frustrations and abandonment of negotiations reflect a flawed process or unfeasible objectives? Viewing the B.C. treaty process experience as an exercise in power relations leads easily enough to the conclusion that the current impasse has been designed, or at the very least that the impasse suits the objectives of the federal and provincial governments.

If attention is turned now to the two levels of government involved in the B.C. treaty process, perhaps it is unfair to portray them superficially as two imposing powers in cahoots—there have certainly been important actors, such as Gordon Campbell, within these structures. Government representatives like him put a face on the B.C. treaty process, relentlessly articulating desires for progress. However, the sum of general governmental action speaks volumes compared to the isolated rhetoric of any one Premier or Indian Affairs Minister. The impression given is of two levels of government consistently engaged in obstructionism, motivated by self-interest and paternalistic mindsets.

In his analysis of the governments’ role in Aboriginal policy, Jonathan Malloy takes issue with the “contradictory mandates” of both governments. In the context of comprehensive land claims, the governments act as Crown representatives and negotiators over land claims and self-government. Simultaneously, they are responsible for coordinating government policies that affect Aboriginal peoples. (Malloy 2001) How could this conflict (or confusion) of interest be rectified? Especially since the motives of both levels of government have been described here as rational and self-serving, the “double identity” Malloy describes is problematic.

Evidence of power dynamics in the government-Aboriginal relationship is pervasive. In terms of spending responsibilities, the federal government bears most of the cost of concluding treaties, while the province has a great deal of revenue to be potentially lost if Crown lands are transferred to First Nations (McKee 2000). These are both either real or potential negative revenues, but demonstrate that financial authority is currently held by government. With agenda-setting, the federal government is in charge: for B.C. First Nations that hope to launch comprehensive land claims negotiations, they must first satisfy established criterion to prove that they have legitimate claim to land (Alcantara 2008). The federal government, then, has the power to deny entry into negotiations altogether, if a First Nations band does not provide acceptable evidence to support its claim.

This leads to the power dynamic of the comprehensive land claims negotiations, which favours the governments, and more specifically, Western legal practices. Aboriginal claimants must “adopt Western forms of knowledge, proof and discourse if they want negotiations to proceed”, including the hiring of white, English-speaking anthropologists, linguists, historians and lawyers to prove their cases (Alcantara 2008). Finally, the sense of identity of governments versus Aboriginal peoples in the comprehensive land claims context is incompatible: while Aboriginal leaders see themselves as engaging in nation to nation discourse based on equality
between First Nations and the Crown, government leaders see themselves as “representatives of the Crown meeting with minorities within Canada” (Alcantara 2008).

The examples of disconnection and fundamental imbalance are endless. Alcantara also views the overall dynamic in terms of power relations. He argues that the two levels of government, as “dominant actors”, benefit from the current regime where there is a lack of treaties. Their action is therefore directed toward the maintenance of their “preference”, the status quo (2008). Dacks’ argument is similar: “The governments of Canada and British Columbia seem confident that they do not need to offer First Nations more at the land claims negotiating tables, provided that they can contain the frustrations that the First Nations feel as a result of this lack of movement” (2002).

Following these arguments and this essay’s depiction of the B.C. treaty process—with two levels of government disproportionately influential at the expense of Aboriginal influence—perhaps it is relevant to ask whether government-Aboriginal relations should be based on equal standing. This is not addressing any imbalances between the federal and provincial governments, but just their stances towards Aboriginal representatives. There seems to be no compelling reason why the espoused principles of mutual recognition and respect cannot be applied to this situation. Aboriginal peoples in the treaty process should be able to expect to be treated with dignity. Certainly, it would be possible to include examples of Aboriginal leaders that engage in obstructionist behaviour, or that display a lack of respect for the negotiations or the government representatives, but the intention here is to emphasize the dominant role of the government, not examples of behaviour of the dominated.

Also casting Aboriginal peoples as dominated in the relationship with government, Alcantara argues that they have no choice but to continue negotiating until viable alternatives to the B.C. treaty process emerge (Alcantara 2008). The figure of forty percent of B.C. First Nations as absent from the treaty process suggests that meaningful alternatives have surfaced, perhaps accelerating the downfall of the B.C. treaty process as “verging into irrelevance given its inability to generate actual treaties” (Penikett 2006).

Alternatives to the B.C. Treaty Process

The growing popularity of alternatives to the B.C. treaty process is partly evidence of its growing reputation as dysfunctional, but also encouraging evidence that some manner of progress is possible outside of the comprehensive land claims route. The alternative of litigation has been discussed; although fraught with risk and financial cost, seemingly the most important gains for Aboriginal rights have been made through appeals to the Supreme Court. It is argued that litigation may be the only tool powerful enough to unblock the current impasse (Dacks 2002). Certainly, the more recent Supreme Court decisions in 2004 regarding Haida nation and the Taku River Tligit First Nation have shown that comprehensive land claims are not the only way to protect B.C. Aboriginal interests in traditional land. In these decisions, the court ruled
that the Crown must meaningfully consult with Aboriginal groups and seek to accommodate their interests (Alcantara 2008).

Another alternative to the treaty process is the use of interim measures. These focus on the resources or sectors that are being neglected or underused during the negotiations period, such as co-management of wildlife on Aboriginal land, or resource management to ensure that the land is not stripped of its potential while Aboriginal peoples remain alienated from it (Dacks 2002). On one hand, it may be charged that the province supports interim economic measures in order to shirk its duty to resolve Aboriginal title and land claims definitively—in order to continue benefitting from its ownership and authority over resources. On the other hand, interim measures relieve some of the stress of unfinished claims, while allowing some development and progress that will hopefully advance the state of the Aboriginal communities involved.

Another avenue that has increasingly been pursued by First Nations disenchanted with negotiations is that of bilateral agreements. For example, the Carrier Sekani First Nation of B.C. withdrew from the treaty process after thirteen years in 2007 and signed with a private company to develop resources on their lands (Alcantara 2008). The downside to this alternative measure is that the gains made are not permanent and are limited in scope (perhaps to the extraction of one natural resource). Nevertheless, actual progress is seriously lacking in many Aboriginal communities, so a move beyond impasse is welcomed. A last alternative to the treaty process was mentioned above, that is the pursuit of self-government arrangements outside a comprehensive land claim. Negotiations would be more easily carried out, since they only involve the Aboriginal community representatives and the federal government. Self-government overall is seen as a way to break out of the status quo and hopefully enhance local capacities to govern and develop (Alcantara 2008).

What is encouraging about the alternative measures is that they are fundamentally constructive, with objectives of economic, political and social development—the ideas projected are not about undermining the Canadian state or confronting it through protest or civil disobedience. Despite repeated failures on the part of the governments to offer and secure for Aboriginal peoples a defined stake in their futures—which has led to the ultimate abandonment by many of the government sanctioned treaty process—Aboriginal objectives have remained consistently constructive. Drawing attention to this is worthwhile, to reveal that the despite persistent letdowns and enduring critical-level problems on Aboriginal reserves and in communities, there is leadership showing steady resolve and flexibility as it seeks to secure a better future.

Beyond the B.C. Treaty Process

In this last section, the current status and legacies of the B.C. treaty commission are considered. To begin, several observers of the general comprehensive land claims issue recommend that greater weight and influence be accorded to other actors. Beyond the
governments and Aboriginal claimants, “third parties” have not made a very notable impact on the overall process. Above, corporate actors are referred to, as consistently applying pressure “to demand that the lands of Aboriginal peoples be brought into the familiar and predictable reach of Crown sovereignty and Canadian property law” (Rynard 2000). As a force acting in favour of the status quo, it is understandable that governments would cater to the commercial and industrial elites. Public opinion as a force affecting the process can also be considered here: as mentioned, the literature describes Canadians in general as a static body of suspicious and separated interests. A tendency to favour paternalistic practices is also evident, Canadians want controls to be imposed on the funds awarded to Aboriginal communities in settlements (Penikett 2006).

The third party that is seen as most disappointing for its lack of action in the treaty process is the B.C. Treaty Commission (BCTC) itself. Its establishment in 1993 marked the beginning of the treaty process in the province, but since then it has been likened to the Governor General of Canada by one treaty negotiator; it is a “public figure with mainly ceremonial duties”. Tony Penikett argues that the BCTC has great potential, if only it were more financially independent and more seriously involved in negotiations (Penikett 2006). The presence of another actor at the negotiating tables could help influence the atmosphere in favour of more meaningful participation, demonstrations of respect and recognition and overall democratization.

A significant, and negative, legacy of the B.C. treaty process is the failures of implementation. A 2008 report by the Standing Senate Committee on Aboriginal Peoples concentrated on this issue, offering several recommendations to remedy the perceived problems. The lack of federal structures and organizational capacity to manage the implementation of modern treaties must be addressed; policy and practice must better reflect the nation to nation relationship that treaties represent; and an independent review body separate from the Department of Aboriginal Affairs should be established, such as the Auditor General’s office, which would report to Parliament (Standing Senate Committee 2008).

The Nisga’a example illustrates how such recommendations would be useful: despite self-government provisions and great independence afforded by their treaty, social, political and economic challenges remain. A report from the (formerly named) Department of Indian Affairs also acknowledges that the government should be more involved in the implementation phase; working in “partnership with Aboriginal signatories”, setting objectives, monitoring progress and taking remedial actions as required (Indian and Northern Affairs Canada 2009). Such an approach would make the conclusion of a treaty less comparable to a divorce, where all ties of partnership and good will are severed. Ultimately, B.C. Aboriginal peoples and Canadian governments will always be linked; a high level of respect and recognition should be the aim not just in the negotiations process, but also beyond.

With regard to current issues, it is worthwhile to draw attention to the November, 2011 decision of B.C. Premier Christie Clark to break with the “decades-long pursuit of treaties with First Nations, saying that the process has failed to deliver either economic growth for Aboriginal
communities or security for business investors”. Her government’s focus will instead be on striking economic development deals with Aboriginal leaders who are “willing to do business”. (Hunter 2011) In this essay, the use of interim measures—like for economic development—was considered an appropriate strategy for dealing with the obstructionism of government at the treaty tables. However, shifting all attention to economic development is a troubling notion, since it demonstrates that the province intends to maintain its hold over land and natural resource development. Some First Nations will certainly benefit from the strategy, but overall, the provincial government will reinforce disconnection and conflict.

In 2002, Dacks hypothesized about this very possibility and the consequences that would follow. His argument is obviously relevant here, namely that a decision by the “provincial government to abandon the negotiating process or drive First Nations away from it by lowering the existing level of its offers—offers that First Nations already consider inadequate”—would lead to an increased recourse to litigation for the recognition of title, the heightening of social tensions and exacerbated uncertainties related to resource development (Dacks 2002). Applied to the current situation, it seems that the province is engaging in brinkmanship. The absence of other actors that can influence negotiations and general public discontent is capitalized upon here by the Premier. B.C. can obviously show almost no commitment to the treaty process at very little political cost, and the pursuit of economic development—especially during a recession—will never be opposed too strongly, it seems. This strategy is not surprising based on the analysis in this essay, which demonstrates the predominance of economic motivations for the government and the remarkable power the government has to pursue its own interests within the B.C. treaty process or outside of it. Even those vague principles of recognition and respect can be manipulated to mean almost anything; the Premier could certainly argue now that she intends to maximize the recognition of Aboriginal rights by pursuing economic development alongside First Nations communities.

Hopefully the current situation does is not perceived as a trade-off between economic development and participation in the B.C. treaty process. Ultimately, the provincial government’s actions exhibit a lack of accountability to First Nations, a lack of commitment to concepts of justice and the principles of mutual recognition and respect that are supposedly the foundation of the B.C. treaty process, and a lack of interest in the sustainable future of Aboriginal peoples in Canada. The dismal socioeconomic indicators and overall lower standard of living reflect directly on the leadership of Canadian governments. That alternatives continue to be sought on the part of government that do not involve meaningful engagement in treaty negotiations is both disheartening and exasperating.

Conclusion

In conclusion, the British Columbia treaty process can be characterized similarly to the historical relationship between Aboriginal peoples in B.C. and the two levels of government, as tension-filled and a consistent showdown between conflicting interests. In considering the
historical evolution of government-Aboriginal relations, it becomes apparent that the relationship has not been exclusively competitive. A first example followed the Calder decision in 1974, when the Trudeau government recognized the importance of Aboriginal title by implementing a land claims policy. A second example was with the tripartite establishment of the B.C. treaty process in 1993, when comprehensive land claims would finally address and institutionalize Aboriginal inclusion and recognition in Canada. These two examples of responsiveness and goodwill, however, are greatly overshadowed by the suspicion, self-interested action and exasperations that have characterized most relations between the two levels of government and Aboriginal peoples in B.C. Although Aboriginal peoples today have a much more varied set of tools at their disposal to address the lack of defined title of rights—such as self-government agreements, the recourse to litigation, and bilateral agreements—they remain fundamentally disadvantaged in relation to government authorities.

The outlook for the future of the B.C. treaty process seems quite bleak, especially if the exclusively-economic agenda of Premier Christie Clark is considered. However, there is a great deal of potential for the tide to turn, and for the power dynamic to reach a more balanced position. Through litigation, Aboriginal communities may gain the right to the vast tracts of British Columbian territory that they lay claim to—and upon which future economic development will be based. Meanwhile, alternative measures can be pursued to help empower Aboriginal communities from the bottom-up. Outside of Aboriginal communities, the BCTC can assume its role of mediator more vigorously, so that the treaty process is not definitely abandoned. Finally, public opinion could become less resentful, and even constructive. The two levels of government have a hold on the process now, but this does not have to continue to be the case if other centres of power such as these are exploited to the fullest.
References


