Now is a critical moment: The state of BC Treaty negotiations in the history of land claims

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Read at *Aboriginal Neighbours Forum, BC Treaties, First Nations' Perspectives.* Anglican Diocese of BC in partnership with the United Churches of the Victoria Presbytery. Duncan, BC. 22 Sep 2007.

This is an important moment in time in the relationship between First Nations people and mainstream Canadian society. After 13 years of negotiations in the BC Treaty Process, we are on the cusp of having two Final Agreements made into law. We have the provincial Liberal government having declared an era of New Relationships with First Nations people, and have been putting political and fiscal resources behind this declaration. The powerful voice of the Supreme Court of Canada has time and again in recent years held the crown to a high standard of duty and honour, requiring government to develop significant and meaningful relationships with First Nations, extending power and resources to these frequently impoverished communities. The federal government, seemingly inert in the aboriginal policy forum since shelving the 1996 Royal Commission report, has recently implemented significant legislation to allow Indian Bands greater economic development opportunities on their reserves, more flexible means of managing band assets, and in a sweeping move, have this week begun paying compensation to generation of victims of assimilation and abuse in residential schools.

Given these important developments, First Nations leaders find themselves in very dynamic times. The decisions they make in the near-term in relation to their lands, resources and governance, may be as significant as any decisions of First Nations leaders in the past 100 years. This is a time when the future of First Nations communities will be shaped for the short and long-terms.

So, how did we get to this point? The organizers have asked me to begin the day by providing a brief history of how we came to be at this point in the treaty process. They hoped it would provide the groundwork and context for the important discussion to come with these First Nations leaders. I will try to give this history in broad strokes, putting into context why land, governance and natural resources are the critical elements of discussion in the BC Treaty Process.

In the mid-18th century, there were tens of thousands of First Nations people living in large, permanent villages all across Vancouver Island and the Gulf Islands. In this dense inhabitation of the rich Island environments, several languages were spoken: Kwak'wala in the north, Nuu-chah-nulth and Nitnat in the west, and four Coast Salish languages along the south east coast (Island Comox, Pentlatch, Hul'q'umi'num', and Straits Salish).

The speakers of each distinct language lived in villages, closely connected to neighbouring communities through important extended family ties, and practising each region's distinctive cultural traditions.

Throughout these aboriginal Island communities, while the broad strokes of culture were similar – such as the importance of salmon and beach foods, the political and economic institution of potlatching, there were also unique local traditions in the symbolic and social lives of masks, songs, stories and teachings. These people – the ancestors of the leaders who have come to speak with us to day – shared an understanding of their territories and laws, which profoundly shaped the social world in which they lived.

On Vancouver Island, aboriginal territories are large areas, often located in watersheds and island-sheds, where the laws of the communities who used and occupied them are recognized and generally respected. In some areas, sections of a territory are held jointly by two or more neighbouring groups. In other areas within a group's territory, the individual properties of an individual, an extended family or a village are recognized. Sharing the wealth – being hosts whose ethic is to never let guests leave hungry – is a prevalent moral ethos in these communities.

When Europeans first sailed by in the 1790s, they had little understanding of the cultures and practices of the people who were their hosts. They enjoyed the fresh foods and brisk trade in fur and fish for export to their overseas interests. At the moment when Captain Vancouver first entered into relations with his hosts, the English common law concept of aboriginal rights (the special rights of the first people of a land) crystalized, protecting the unique cultures, practices and traditions from the potentially very unequal power of the colonial state.

As the fur and fish trade went on over the next fifty years, Europeans and American nations debated who would become sovereign over this land, settling finally in 1846, when the British Crown finally established their dominion over Vancouver Island. At this moment in history, another aboriginal right – aboriginal title – was distilled at common-law. This title is a property right in land. It is based in part on the British common-law tradition of recognizing the property rights of the long-term users and occupiers of the land, and in part on local aboriginal legal systems. It was at this moment in 1846 – only 161 years ago – that aboriginal title and Crown title came to rest and coexist simultaneously upon this land.

British law, following the directive of the Royal Proclamation of 1763, also insisted that Crown title be made complete by compensating aboriginal communities for their aboriginal title. Though Governor James Douglas did succeed in negotiating 14 treaties with several First Nations in and around Victoria, Nanaimo and Fort Rupert, his efforts were thwarted by a limited political will in London to carry on talks through the rest of the Island and the Mainland.

By the gold rush of 1858 – a critical moment in BC history when 30,000 American miners swept across the border – political priorities changed and the effort to resolve the aboriginal title interests of First Nation transformed into priorities of inscribing Indian Reserves onto the new cartography of BC so that settlement of these new immigrants could be facilitated as rapidly as the colonial government could grant the land.

Small disputes erupted all over the Island between the aboriginal hosts and their guests who, to paraphrase the folk etymology of *xwunitum* (the Halkomelem word for 'white man'), were always hungry, insatiable in their appetite for land and resources.

Gunboats were called to shell villages like Lemalchi Bay on Kuper island, aboriginal resistors were arrested and occasionally publically hung. Fences were erected and the familiar trappings of Victorian racism and romanticism frequently typified interpersonal relationships. Meanwhile, wave after wave of virgin soil diseases (smallpox, influenza, TB) thinned many of the once large, dense villages. More benevolent colonization went hand-in-hand with these more overt

power relations. Catholic and Methodist churches missionized and encouraged 'civilization' into a more European way of life. Soon supported by government policy and finances, these efforts culminated in residential schools which became some of the most colonizing institutions in history.

Through the 1870s, 80s and 90s, governments continued their survey work in British Columbia, setting aside village sites, cemeteries, and fishing stations as Indian Reserves. These small, specific plots of land were not the territories held by the First Nations. They were tiny outcrops – even by the standards of other Indian Reserves set aside in Canada and the US – splintered away while hunting ranges, clam gardens, camas fields, sacred sites and ancestral places became the settled farms, towns and forestry operations of the newcomer society.

During this time, settlement continued to expand, particularly in the south and central Island where coal mining, forestry, fishing and farming all attracted settlers who pre-empted land, obtaining a grant of fee-simple title in these populated areas. One grant, however, dwarfed all others in its size and impact – the 1884 E&N Railway Grant. In exchange for building the railway from Victoria to Courtney, James Dunsmuir was given fee-simple title to the entire southeast coast of Vancouver Island, a strip 20 miles wide and 100 miles long, where there were not already farms, towns or Indian Reserves. No consideration or compensation was ever provided – or even seriously considered – for the newly alienated territories of the First Nations people who owned the area since *time immemorial*. The impact of the grant would be felt for the next 125 years, as logging, mining and urban settlement continued on these private lands, virtually without government involvement or intervention, and almost no First Nations' input.

In 1871, the *Indian Act* became the other very significant government decision which shaped the relationship between First Nations people and Canada for the next century. By 1885 it had been amended to ban the potlatch and winter ceremonials. By 1927 it had also been amended to ban First Nations from hiring legal councils to challenge governments on aboriginal land ownership issues. Governance by chiefs and councils under the *Indian Act* was never recognized as extending throughout territories, only to Indian Reserves.

The land policies and the *Indian Act* worked not only to displace First Nations people from their territories to their Reserves, but also attempted to unseat traditional First nations leaders from their power base. In 1920, the *Indian Act* was amended to allow Indian agents to ban hereditary rule of Bands, and until 1951, First Nations women were not allowed to vote in band elections.

In spite of this history, these significant elements of traditional aboriginal governments persisted, and their use and occupancy of territories, though thwarted, has been maintained. First Nations leaders have been active throughout this time, lobbying, protesting, and petitioning for the recognition of their rights and title. By the 1960s First Nations leaders began pressing the courts for recognition of their rights and ancestral territories. By the mid-70s, the federal government had responded to critical court decisions, established various processes and policies to attempt to hear and resolve the disputes which had mounted over the past 150 years. By 1992, even the province of British Columbia, long having denied even the barest existence of aboriginal title, agreed to sit at the table and negotiate. The Nisga'a negotiations – protracted over 25 years – resulted in a Final Agreement in 2000. Today, we see two more agreements on the cusp of being made into law.

These agreements provide a certain amount of cash, land and fish. They set out a system of governance outside the Indian Act. They detail the long-term legal obligations and relationships between First Nations and other levels of government.

However, the land base these agreements provide is much smaller than the traditional territories of these First Nations communities. The cash component, based largely on a nation-wide formula of a one-time payment of $35,000-$45,000 per person, certainly does not fulfil any calculus of compensation for the loss of these territories and resources. In exchange for these benefits, First Nations must give up their *Indian Act* tax exemptions (something that First Nations with treaties in other areas of Canada have not had to do). They will face considerable uncertainty on the adequacy of the fiscal financing of their new governments (compared to provincial, territorial or municipal governments). They must extinguish their traditional land holding systems over their territories in favour of fee-simple title to the surveyed parcels,

transforming also their existing reserve land to this fee-simple status. Perhaps most significantly, they must legally sign off on all of the historical rights, claims and properties that may have not been described between the covers of these treaty agreements, giving 'certainty' to governments that the courts will not look at other elements of First Nations cultures and declare them as constitutionally protected rights.

So, it is with this context that we can turn with considerable interest to the aboriginal leaders who have come to speak with us today. It is an important opportunity for the public to get a first-hand understanding of their views on the status of their current negotiations and the climate of reconcilation between First Nations, Governments and society-at-large. Most of the representatives here today have been in detailed agreement-in-principle talks for 7 or 8 years, and have plumbed the depths of the gaps between their aspirations and the governments positions. Reflecting on the recent deals being offered to Tsawwassen on the mainland and Maa-nulth on the west coast, these leaders are faced with the critical decision of how to move forward, how to build the bridges and close the gaps.