Giving effect to the "spirit and intent of Treaties": abandoning treaty rights

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My following opinion is intended to discuss the issues and policy surrounding the BC Treaty Process and existing treaties and to elaborate on the discussions which we have had. This opinion does not provide full reference to all legal precedent, particularly where dealing with international precedent, which would require significantly more time to prepare.

CONCLUSIONS

Her Majesty (the Crown) has a duty to conclude treaties with those Aboriginal peoples with whom She has not treated. Her Majesty entered into the "Numbered Treaties"[1] in parts of "Canada" which recognized, respected and preserved the inherent rights of the tribes/nations of Aboriginal peoples who are parties to those treaties. These "Numbered Treaties" are treaties as defined by the international understanding of the term "Treaty" and have the protection of international law as it may exist or be established while these "Numbered Treaties" are in effect. The 1969 Vienna Convention on the Law of Treaties[2], in effect in 1980, is of particular importance.

Aboriginal rights not surrendered nor abandoned also have the protection of international law as it may exist or be established. Currently for example, the international community is working on finalizing the *Declaration on the Rights of Indigenous Peoples.* Canada continues to raised objections to the current draft, particularly opposing the use of the term "Aboriginal peoples" and lobbying for the use of the term "Aboriginal people", which action buys time for Canada to implement its "Aboriginal Agenda" prior to the *Declaration* taking effect.

Her Majesty has a duty to live up to the "Numbered Treaties" She has made and is under the duty to deal with Aboriginal peoples in a region ("Canada") in a consistent and fair manner. This means that She is under a continuing duty to negotiate treaties of the same nature and legal effect as She has negotiated in the past, i.e. She must negotiate treaties legally consistent with those She has already negotiated.

[1] "Numbered Treaties" is used simply for ease of reference and is intended to refer to all treaties entered into by Aboriginal peoples "in Canada" dating from 1725 and includes the Upper Canada Pre-Confederation Treaties, the Robinson-Huron and Robinson-Superior Treaties, the Douglas Treaties, in addition to Treaties numbered One to Eleven.

[2] 1155 UNTS 331, (1969) Int. Leg. Mat. 679

Aboriginal peoples can however waive their right to these duties owed to them by Her Majesty and decide not to insist that Her Majesty live up to Her responsibilities. The BC Treaty Process is intended to serve as just such a waiver.

Aboriginal peoples are being asked under the BC Treaty Process to agree to negotiate "modern-day treaties" which are in fact "Land Claims Agreements". The federal government has not changed its Comprehensive Land Claims Policy implemented in 1973 subsequent to the *Calder* [3]case and revised in 1981 and in 1986. The Comprehensive Land Claims Policy produces Land Claims Agreements which do not have the same legal effect that the "Numbered Treaties" have. These Land Claims Agreements are not "Treaties" as defined by and understood in the international context. These are merely settlement agreements, such as are entered into between parties who do not wish to continue the expensive exercise of going to trial once litigation has been commenced; they are simply local domestic agreements between two parties instituted under a local governmental policy; they do not have the protection of international law, particularly the 1969 Vienna Convention on the Law of Treaties.

Land Claims Agreements create Land Claims rights and not "Treaty rights" in the international sense or sense of the existing "Numbered Treaties"; this is notwithstanding whatever label Her Majesty gives those Land Claims Agreements rights. Including Land Claims Agreements rights under the definition of "treaty rights" in the Canadian Constitution does not make those Land Claims Agreements rights something more than they are. Rights under Land Claims Agreement cannot become internationally understood, recognized and protected treaty rights any more than calling a cup of coffee an "apple" actually makes that cup of coffee an apple. A cup of coffee will always remain a cup of coffee having the characteristics of a cup of coffee and not those of an apple, for example, regardless of what you label that cup of coffee. It is trite common law that labelling a document an agreement does not in and of itself make that document a legally binding agreement under the common law. The elements of an agreement which make an agreement in common law must be present. You can have a legally binding agreement which looks like a letter if that letter contains the elements of an agreement. "A rose by any other name is still a rose".

Aboriginal peoples who are parties to the "Numbered Treaties" are also being asked to waive their right to have Her Majesty comply with their "Numbered Treaties". The Liberal Party "Red Book" promise to give effect to the spirit and intent of the treaties likely encouraged Aboriginal peoples who are parties to the "Numbered Treaties". The "Aboriginal Agenda" of the federal government as revealed in the "Secret Document"[4] is however to replace the existing "Numbered Treaties", that is, replace existing treaty rights, with "a new partnership", that is, with new agreements: Land Claims Agreements.

[3] *Calder v. A.G.B.C.*, [1973] S.C.R. 313

[4] Memorandum for the Honourable Ronald A. Irwin Dated April 20, 1995 copied to Jack Anawak, MP and released by Mike Scott, MP (Skeena) on May 4, 1995.

The "Aboriginal Agenda" is thus the extinguishment of existing Aboriginal rights and existing treaty rights, and the replacement of those rights, rights having international meaning and protection, with strictly local domestic rights, rights having no international meaning nor protection, and categorized as Land Claims Agreements rights.

To more clearly differentiate between Aboriginal and treaty rights and rights under Land Claims Agreements, the "Aboriginal Agenda" promotes the use of new terminology: the term "First Nations" rather than Aboriginal peoples, Indigenous peoples, tribes or nations thereof. "First Nations" is not a term used nor understood internationally. There is no draft declaration of First Nations rights being pursued in the international community. The Royal Proclamation of 1763 does not describe "First Nations" nor anywhere is there described "First Nations rights". The "Numbered Treaties" were not made with "First Nations".

The idea is to create new legal entities called "First Nations", which are capable of creation only under the Land Claims Agreements, which have Land Claims Agreements rights. The "Aboriginal Agenda" desires to achieve an abandonment of historical identity (and thus an abandonment of Aboriginal and treaty rights) by Aboriginal peoples through their voluntary adoption of this name "First Nations".

Everyone is encouraged to believe that to use the expression "First Nations" is politically correct and respectful, some kind of assertion of identity. I recall my confusion when first being introduced to the practice of Aboriginal law while employed with the Department of Justice, as to how to properly refer to "the Indians". What was most respectful? I was promptly informed that I was to use "First Nations", the preferred terminology and policy of the Department. The strictness and nature of the reply was to remain a curiosity to me for many years until I was to come to understand its significance.

"First Nations" does not respect the Aboriginal peoples, it replaces and extinguishes them. I have never insulted anyone by referring to, for example, "Indian country". An assertion of Aboriginal identity is achieved through the use of one's Indian name and description of one's tribal, ancestral peoples and territories using reference to the actual Indian placenames, all preferably in one's original language, and where treaties exist, in reference as well to the appropriate treaty.

The "Aboriginal Agenda" must achieve two parts to be successful; it must replace both existing Aboriginal rights and existing treaty rights in order to achieve fair and consistent treatment of Aboriginal peoples in Canada and to insulate Canada from international scrutiny. Since former Prime Minister Brian Mulroney's unsuccessful bid for leadership of the United Nations, there is a higher probability of an ultimately successful conclusion for the rights of Indigenous peoples. It is just a matter of time, even though it may be a lengthy period of time before success. "The draft *Declaration of the Rights of Indigenous Peoples* was not intended to be a synthesis of current practice, but a beacon of hope - a beacon of hope for the justice indigenous peoples seek as they shed the fears, humiliation, and

despair of centuries of oppression."[5] Canada's current practice falls significantly short of this beacon of hope.

The deadline of the year 2000 for resolving the Aboriginal problem expressed by the federal government after "Oka" in 1990 seemed overly ambitious and completely unachievable to me at the time. I now understand just how possible it can be achieved. Unfortunately, many Aboriginal peoples are either blinded to the realities by carrot sticks or mislead or through undue economic and other duress, including terrorism such as the responses of the RCMP to Gustafson and Ipperwash, are pressured into compliance; they are the key components to the achievement of the "Aboriginal Agenda".

Look at the deception and misrepresentation the BC Treaty Commission can represent. It purports to concern itself with treaties, not defined in the BC Treaty Commission Agreement to **not** have the ordinary meaning of treaty i.e. not defined as only land claims agreements under the federal policy which are not treaties, and the provincial and federal governments represent that they are capable of entering into an agreement to govern treaty negotiations, where jurisdiction to enter into treaties has been reserved by Her Majesty and delegated to the Governor-General, who is the only person capable of signing such an agreement if the intent which exists on the face of the BC Treaty Commission Agreement is to be followed. Same could constitute fraud; however, the answer to such allegations will likely be that there is the use of independent legal counsel thus "First Nations" knew full well what they were getting themselves into. Further, that at all times the federal government has clearly stated that it was not going to change its Comprehensive Land Claims Policy.

Did those "First Nations" really know what they were getting into when they submitted their Statements of Intent? My serious question of that has led to our discussion and this opinion and the question some Aboriginal peoples are quite appropriately asking themselves is, is this "trick or treaty". I submit that it is a trick.

Where no recourse to international standards and protection is possible, in the event of a breach of a Land Claims Agreement right, the only recourse is to the Canadian court system. Land Claims Agreement rights will be protected rights under the Constitution; however, infringement of these rights can be justifiable. Unlike the United States, for example, where their Constitution is fixed, Canada's Constitution allows for the courts to shape its ultimate form. The judiciary is appointed by the government. In a time of fiscal restraint and deficit concern, it is not unreasonable to suspect that the government could in the future consider the cost of compliance with Land Claims Agreements to be difficult and an excessive burden to the public; settlement amounts could be tempered by public need should the courts determine that fiscal problems can be the basis for a reasonable infringement.

[5] Dr. Erica-Irene A. Daes at Palais Des Nations, Geneva, August 9, 1995. Dr. Daes is Chairperson of the Working Group on Indigenous Populations and U.N. Joint Inspection Unit, and Special Rapporteur on the Protection of Cultural and Intellectual Property of Indigenous Peoples.

It is important to note that international law allows a right to terminate or suspend important treaty terms where there exists a supervening impossibility of performance. Consider how much easier it would be for Canada to argue this in local domestic courts rather than before the world community where in practice such ground for termination or suspension of obligation is rarely invoked.

RECOMMENDATIONS

Aboriginal peoples having the benefit of the existing "Numbered Treaties" should insist upon Her Majesty's compliance with the "Numbered Treaties" and can consider seeking compensation for breaches of the "Numbered Treaties" without having to treat the "Numbered Treaties" as being at an end. Where a breach of a treaty occurs, the party not in breach has a choice: treat the treaty as the case may be as at an end or insist on specific performance or adherence to the terms of the treaty; in both cases damages for the breach can be sought. There may as well be cases where unlawful force was used which renders a treaty void. The choice must be clearly made and expressed. These Aboriginal peoples must be careful to voice and place in writing their position and make formal demand on Her Majesty as represented by the Governor-General, not the parliament of Canada, to comply and compensate. There may be the need to exhaust local domestic court possibilities and ultimately approach the international arena in time. These Aboriginal peoples need to express formally the spirit and intent of the "Numbered Treaties" (i.e. retention of Aboriginal and sovereign rights) to assist with the ultimate resolution, which may take significant time, perhaps even generations. This needs to be done before more Elders pass. The oral history must not be lost. Oral promises can and need to be enforced as protected treaty terms.

Critically, the "spirit and intent" of the "Numbered Treaties" is that they are agreements entered into between states which are binding in international law. Ensure that these treaties are registered with the United Nations and thus are ensured the protection of the 1969 Vienna Convention on the Law of Treaties. Do not release Her Majesty from Her obligations under the "Numbered Treaties". ". . . the basic principle is that a party cannot walk away from its legal obligations except in accordance with the express provisions of the treaty. . ."[6] however, " . . . the Vienna Convention provides that a treaty may be terminated by mutual agreement of the parties which in fact frequently happens as part of a scenario to replace or substantially modify an existing treaty regime with a new one."[7]

Query the government as to why the publication of the texts in the Canada Treaty Series has been temporarily suspended resulting in no readily available source of Canadian treaty texts and why the periodical, "Treaties in Force: A List of Bilateral and Multilateral Treaties of Canada in Force on January 1, 1988", the only public source of treaties actually in force, has been suspended? Query what exactly, given the "Numbered Treaties" which pre-exist NAFTA, was Canada able to agree to in NAFTA? Consider just how important to Canada the successful implementation of the "Aboriginal Agenda" is in the context of NAFTA.

[6] Copithorne, "Canadian Treaty Law and Practice", *The Advocate*, Vol 54 Part 1 January 1996 at page 38

[7] Copithorne, "Canadian Treaty Law and Practice", *The Advocate*, Vol 54 Part 1 January 1996 at page 38

Aboriginal peoples without the "Numbered Treaties" desiring to have treaties must insist that Her Majesty enter into treaties and not accept the parliament of Canada entering into Land Claims Agreements. These treaties must be true treaties in the international sense legally consistent with the "Numbered Treaties".

Remember that "[i]n Canada the making of treaties is one element of the foreign affairs power which in British constitutional custom is a prerogative power remaining with the sovereign. The exercise of the prerogative powers for Canada has been delegated by the sovereign to the Governor General in Letters Patent, the most recent being dated 1947. It follows that the Canadian Parliament has no legal or necessary role in the making of treaties."[8]

The mere act of submitting a Statement of Intent could be argued by Her Majesty as an abandonment of rights and waiver of Her obligations. However, that argument does not hold if the act of submitting a Statement of Intent was the result of being seriously mislead (by the BC Treaty Commission Agreement) to believe that true treaties were going to be negotiated. (Her Majesty will then be quick to argue that where independent legal advice is readily available, there can be no misleading.) Insist that Canada revoke the Comprehensive Land Claims Policy and comply with the laws under which the "Numbered Treaties" were authorized (i.e. The Royal Proclamation of 1763[9]). Insist that Aboriginal rights be recognized and specifically are not extinguished by the "Numbered Treaties" or any step leading up thereto.

Aboriginal peoples not desiring treaties must continue to exercise their Aboriginal rights or risk their rights being abandoned and no longer existing.

In all cases, knowledge of the Indian names and places must continue and be passed on. Do not be intimidated by exaggerated statements of expense for computerized mapping and thus defer to the province to create and maintain a GIS (Geographic Information System). The province is telling Aboriginal peoples that GIS will cost upwards of a million of dollars and it would be better if they used their GIS already in place. The fact remains that a state of the art GIS can be implemented for about the same price as a new vehicle. Changing maps has historically been a successful tactic used to control ownership of land and resources, since maps are intrinsically trusted, people believe them to be true when they are used as evidence. Think about the effect of a provincial GIS used as evidence in court where Aboriginal peoples have no similarly, technologically impressive rebuttal evidence, say, fifty years hence. Aboriginal peoples must continue to exercise their various rights despite government attempts to encourage abandonment. Her Majesty must demonstrate consistent, good faith effort and be held accountable for anything less. Threats of closing off the tap if Aboriginal peoples do not enter into the BC Treaty Process can be actionable. Distribution of the hundreds of millions of dollars of federal government contracts to flow to "First Nations" announced recently to be the result of the efforts of

[8] Copithorne, "Canadian Treaty Law and Practice", *The Advocate*, Vol 54 Part 1 January 1996 at page 37

[9] or the "Indian Bill of Rights", as Lord Denning, M.R. describes it *in R. v. Foreign Secretary, Ex p. Indian Association of Alberta*, [1982] Q.B 892 at 912 (C.A.)

people such as Calvin Helin seeking economic opportunities, should it only occur to those willing to sign Land Claims Agreements, would be an unfair exercise and I submit further evidence of the serious economic pressure being brought to bear on Aboriginal peoples today. But after all, that's only money Aboriginal peoples will be losing out on, the ancestors had to give their lives to preserve their peoples. I invite Aboriginal peoples to remember and continue to be strong.

LEGAL ANALYSIS

Due to the lengthy nature of full legal analysis on these subjects, the following are excerpts from only some relevant materials, with at times my comments thereon.

"The Royal Proclamation provides an example of how aboriginal land rights may be created or expressly recognized by the executive act of the Crown as sovereign. Aboriginal land rights may also be created or recognized by express agreement between governments and aboriginal peoples. Such agreements may be styled treaties or may take some other form, such as a modern day comprehensive claim agreement."[10]

To "style" something is to simply label it, which label does not create legal rights, as I have discussed above. Here I submit is another lawyer acknowledging that the Land Claims Agreements are not treaties recognizing Aboriginal rights.

Professor Hogg describes a treaty as "an agreement entered into between states which is binding in international law". . . "all agreements between states which are intended to be binding international law, by whatever name they are called, are treaties."[11]

The 1969 Vienna Convention on the Law of Treaties came into force in 1980 and Canada describes as "laying down the fundamental principles of contemporary treaty law. . . [it] must be viewed as virtually the constitutional basis, second in importance only to the UN Charter, of the international community of States."[12]

[10] P. Geoffrey Plant, Russell & DuMoulin, Vancouver, B.C., "Aboriginal Land Rights in British Columbia", for the Asia Pacific Institute, February 4, 1993 at page 2.5

[11] Hogg, Constitutional Law of Canada, 3rd ed., 1992 at page 11.1

[12] Kindred, *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed., 1993 at page 82

In response to the assertions by some Aboriginal peoples that promises were made in addition to the written terms of treaty, Copithorne provides a basis for enforcement: "[f]inally, although the Vienna Convention provides that a treaty is in written form, there have been a few cases of obligations being held to exist even when they were not in writing."[13]

There can be no doubt that the "Numbered Treaties" were intended to be treaties as understood in international law. Copithorne describes "[a]ccession [as]a traditional method by which a state becomes a party to a multilateral treaty after it has been drafted . . . Typically a state that was not a signatory to the convention at the time it was drawn up expresses its consent to be bound by depositing a single instrument of accession."[14] There are examples of accession by Aboriginal peoples to the "Number Treaties".

Copithorne describes that "[s]ince 1945 the world community has been moving towards the fulfilment of the UN Charter provision that the use of force is unlawful. This development has been recognized in Article 52 of the Vienna Convention, which declares that a treaty is void if its conclusion has been procured by the threat or use of force in violation of principles of international law embodied in the Charter."[15]

The Privy Council in 1937 in *Re Labour Conventions Reference*[16] held that the division of powers under sections 91 and 92 of the *Constitution Act* applies to the implementation of treaties. Thus the responsibilities to implement the existing Numbered Treaties where they have not been implemented or only partially implemented falls primarily to the federal government; however, where treaty rights impact provincial areas, the provinces must take the necessary implementing action.

Subsections 1 and 3 of section 35 of the *Constitution Act, 1982* read as follows:

> "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> . . .
>
> (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."

"The First Nations within British Columbia have, through their participation in the Task Force, and the creation of the Treaty Commission, stated their desire to pursue modern treaties."[17] This supports my

[13] Copithorne, "Canadian Treaty Law and Practice", *The Advocate*, Vol 54 Part 1 January 1996 at page 35

[14] Copithorne, "Canadian Treaty Law and Practice", *The Advocate*, Vol 54 Part 1 January 1996 at page 36

[15] Copithorne, "Canadian Treaty Law and Practice", *The Advocate*, Vol 54 Part 1 January 1996 at page 38

[16] *A.-G. Can v. A.-G. Ont*. (Labour Conventions),[1937] A.C. 326

[17] Harry Slade, "The Honour of the Crown: The Constitution Act, 1867, Section 35, and Treaties", for Asia Pacific Institute, February 4, 1993 at page 4.20

concern about arguments being planned as to abandonment of rights, only here it suggests that abandonment may be argued at a stage much earlier than the submission of a Statement of Intent.

"As a matter of law, treaties can only be made between the Crown and First Nations"[18] This can be misleading even if the intention was that "First Nations" is the politically correct way to refer to tribes/nations given the precedent developing around the use of the term "First Nations".

"The establishment of the Treaty Commission, with the participation of the federal and provincial governments, is an important first step toward the discharge by the Crown of Her duty to conclude treaties with the First Nations of British Columbia."[19] Recall that the duty is to Aboriginal peoples and not to "First Nations" which are not legal entities until a Land Claims Agreement is concluded. Some "First Nations" are actually Indian Bands and no duty to treat with Indian bands exists. Duties owed to Indian bands are set out in the *Indian Act*.

"These treaties would enshrine and enhance the spirit and intent of the new relationship and be incapable of unilateral amendment. Only those who made the treaty may change it. . . it must be recognized that this approach is a reflection of the policy of the British Crown set out in the Royal Proclamation of 1763 which led to the treaty making processes between the First Nations and the Crown in Eastern Canada and in the western advance of European settlement to the Rockies. It was a policy which received only brief recognition prior to the institution of colonial government in British Columbia. Once colonial government was in place, treaty-making was ignored by everyone except the leaders of the aboriginal people who have consistently pressed the governments of Canada and British Columbia to enter into the process which the Treaty Commission Agreement now makes possible."[20]

Treaties were entered into with tribes/nations, not "First Nations". Her Majesty did not decide to not continue with making treaties in the west. Her Majesty simply stated that She would not provide any more money for payments flowing from the treaties in the west. She stated this on the basis that the wealth of the resources in the west could be used to make such payments. Since the resources could not be liquidated at the time or on a very limited basis and because of the greed of the settlers, treaties were not concluded. This continues today in that daily money is obtained from the resources and that money could easily be used to make payments under treaties, which treaties do not have to include a surrender of rights. This is how theft from the Aboriginal peoples has occurred and continues today.

Section 1.1 of the BC Treaty Commission Agreement defines "First Nation": "means an aboriginal governing body, however organized and established by aboriginal people within their traditional

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[18] Harry Slade, "The Honour of the Crown: The Constitution Act, 1867, Section 35, and Treaties", for Asia Pacific Institute, February 4, 1993 at page 4.24

[19] Harry Slade, Ratcliff and Company, "The Honour of the Crown: The Constitution Act, 1867, Section 35, and Treaties", for Asia Pacific Institute, February 4, 1993 at page 4.27

[20] L.Allan Williams, Q.C., Davis & Company, "Treaty Negotiation Process and the Role of the Treaty Commission", for the Asia Pacific Institute, February 4, 1993 at page 6.9

territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia." This definition makes no reference whatsoever to a tribe/nation having Aboriginal rights.

The Nisga'a Comprehensive Land Claims Framework Agreement dated for reference March 20, 1991 states in its preambles: "Whereas the Nisga'a has never signed a treaty or land claims agreement with the British Crown, Canada or British Columbia" and section 12.1 "Legal Nature of the Final Agreement" reads as follows:

"12.1 The final agreement shall constitute a land claims agreement within the meaning of s.25 and s.35 of the Constitution Act, 1982."

The preamble shows a treaty and a land claims agreement as being two separate creatures. Reference to section 25 is to clarify that the reasonably justifiable infringement of a land claims right can occur since section 25 will apply.

Minister Irwin is reported in The Province January 16, 1996 as having said the following: "He also had a warning for natives who aren't in the settlement process: Get in. It's the only way to resolve longstanding disputes. Confrontation and violence will accomplish nothing." But federal negotiator Wendy Porteous is reported by The Province on January 18, 1996 to have said "the treaty process is not intended to address historic grievances." Minister Irwin is misleading; Ms. Porteous is correct in her statement of the policy.

Bill C-33, An Act to *inter alia*, approve, give effect to and declare valid land claims agreements entered into by Her Majesty the Queen in right of Canada, the Government of the Yukon Territory and certain first nations in the Yukon Territory, contains the following preamble:

"Whereas agreements may be entered into with respect to aboriginal claims to lands in British Columbia and the Northwest Territories by persons enrolled under final agreements as well as aboriginal claims to lands in the Yukon Territory by certain people outside the Yukon Territory." These are words that copy the style of a litigation settlement agreement; here the "land claims" are not recognized but simply settled without liability implied.

"first nation" is defined in Bill C-33 as "means a first nation named in the schedule" and the schedule lists for example, Dawson First Nation and Teslin Tlingit Council; they reflect Indian bands and that other DIAND[21] creation, Tribal Councils.

The Secret Document[22] states in paragraph 14 on page 3 that

[21] The Department of Indian and Northern Affairs, also referred to as INAC, Indian and Northern Affairs Canada

[22] Memorandum (Draft #6) for the Honourable Ronald A. Irwin Dated April 20, 1995 copied to Jack Anawak, MP and released by Mike Scott, MP (Skeena) on May 4, 1995.

"[w]e need to consider how the province will be involved, and what links there should be, if any, between the treaties and the arrangements which will implement the new partnership we all seek to build."

The Secret Document[23] states on page 4 that

"The proposed plan, which is not a treaty process per se, includes four main elements: . . . It would also be designed to help move the discussions towards future relationships, which are not concentrated on past grievances, by exploring opportunities to channel deeply-felt and divergent views into more practical and productive forward-looking arrangements. . . . Fourth, I will propose links between treaties and the inherent right to self-government. The inherent right of self-government, which is also a treaty-making process, can address a great number of issues arising from the historical treaties."

Further on page 4,

"This approach also allows an opportunity to bring high expectations of the Aboriginal community to manageable levels through an honest exploration of realistic possibilities with particularly interested groups."

On page 6 the admission is made that treaties were made dating back to 1725 and that "[s]ince 1975, comprehensive claim agreements have dealt with aboriginal land and resource rights."

Addressing the need for a policy to address treaty issues, the Secret Document states that

"[t]he approach will emphasize the building of a new TFN/government relationship instead of concentrating on past grievances which are difficult to assess and resolve in modern-day terms. It will also draw on the authorities proposed in the forthcoming inherent right Memorandum to Cabinet."[24]

The Secret Document further confirms the position of the federal government:

"Indian treaties, which originate as far back as the early 17th century, are legally-recognized solemn agreements between the British Colonial government, or Canada, and a group of Indians, which were intended to create lasting arrangements. They are legally *sui generis,* or of their own kind, and contain constitutionally-protected legal obligations on the part of the Crown (since 1982) in return for peace, neutrality, friendship or land cession. The courts [note, only the domestic courts] and the federal government do not regard them to be agreements between sovereign powers in international treaty law."[25]

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[23] Memorandum (Draft #6) for the Honourable Ronald A. Irwin Dated April 20, 1995 copied to Jack Anawak, MP and released by Mike Scott, MP (Skeena) on May 4, 1995.

[24] found on page 44 of the 45 page facsimile of the Secret Document sent by Mike Scott, MP on May 4, 1995

[25] found on page 45 of the facsimile of the Secret Document sent by Mike Scott, MP on May 4, 1995

If the position of the federal government is held to be the correct view, then it is an admission of the intent of Her Majesty to fraudulently misrepresent to the tribes that treaties in the normal understanding of that term, i.e. having international meaning and protection, were being entered into. In such case those treaties are void and have no effect on the underlying Aboriginal rights. Simply put then, why was the label "treaty" used if not intended to mean a true treaty? Memoranda of Understanding are used between the provinces and Canada because they are intended not to attract international law. Land Claims Agreements are used because they are intended not to attract international law. Surely, if the intent as described by the federal government were in fact the real intent, some effort would have been made not to be misleading and some other title to the document would have been used. I submit that had some other title been used the Aboriginal peoples would not have entered into the "treaty". Aboriginal peoples understood and continue to understand what "treaty" means. They would not, I submit, have entered into the equivalent of today's Land Claims Agreements.

The use of the word "treaty" in the BC Treaty Commission Agreement is thus either a continuation of the deception, using the word treaty knowing that same would be misleading, or an attempt to suggest the "Numbered Treaties" while although called treaties but also were nothing more than Land Claims Agreements. This does not explain though why the current Land Claims Agreements need to be supported with legislation referring to "Land Claims Agreements" and not referring to "treaties".

The best available evidence as to the intention leading to the "Numbered Treaties" is the oral evidence of the Elders.

The response of the author of the Aide-Memoire forming part of the Secret Document to his having "travelled extensively across Canada to meet with Treaty Chiefs and Aboriginal communities to discuss the new partnership that we must strive for with the First Nations" and having "written and corresponded with a number (sic) Treaty groups and individuals on how best to achieve this new relationship" is as follows:

"In general, the TFN proposals lacked detail on practical aspects or specific contents for the proper development of a treaty process."[26] I submit the consultation was merely an exercise and the views provided are not of interest to the federal government.

The Aboriginal peoples who are parties to existing treaties have not been asking for a new treaty process. They want their existing treaty rights complied with, specifically the "spirit and intent" of the treaties complied with. The federal government response appears will be to offer Land Claims Agreements to replace the treaties.

Arguments can be raised that Statements of Intent registered under the BC Treaty Process provide clear evidence of the intention of the Aboriginal peoples (the "constituents of the First Nation") to consider themselves only as these new creations which in turn is evidence of abandonment of the nations/tribes.

[26] found on page 45 of the facsimile of the Secret Document sent by Mike Scott, MP on May 4, 1995

Giving effect to the "spirit and intent of Treaties": abandoning treaty rights

When a "First Nation" opts out of the nation/tribe, the nation/tribe is reduced in size and effect. Aboriginal rights are collective rights of the tribes/nations. These tribes/nations do not loose their rights but the opting out "First Nation" does. As long as the nation/tribe continues to exist, the Aboriginal rights continue to exist except to the extent that particular Aboriginal rights are no longer exercised. For example, if no one remaining in the nation/tribe hunts, then their Aboriginal right of hunting has been abandoned and no longer exists.

What does the "First Nation" in this example get? Only rights under the Land Claims Agreement. What if no Land Claims Agreement is concluded? The argument can be raised that the Aboriginal rights have been abandoned and there is no need to enter into a treaty or a Land Claims Agreement to extinguish those Aboriginal rights. Since these people do not consider themselves part of the nation/tribe, they would have a difficult time attempting to argue differently after the fact. They may have arguments for damages if they for example relied on misrepresentations or negligent legal advice but once there is abandonment of rights, abandonment cannot be reversed.

The BC Treaty Commission has stated that it has no power to command a party to return to the negotiating table. Thus there is nothing to prevent the province from a decision to not conclude Land Claims Agreements.

Finally, I make the point that The Assembly of First Nations is reported to take the position that "First Nations" derives from the reference in the Royal Proclamation of 1763 to "nations"; many Indian Bands substitute the term in place of "Band" and there is reference today to "Canada's 604 First Nations"[27]. It is trite common law that the same words must be used if there is an intention to refer to the same "thing". Deriving a name shows intention to refer to a new "thing". Without questioning the intentions of Aboriginal peoples in choosing to use "First Nations", Aboriginal peoples must understand the serious legal implications of such use. "First Nations" does not equate to "nations" in the Royal Proclamation. There were not 604 nations "in Canada" in 1763. There were created numerous Indian bands out of the relatively few tribes/nations. Looking at the size of the boundaries of the "Numbered Treaties" demonstrates the size of the nations/tribes. To suggest that Indian bands given a new label constitute the modern nations/tribes is an abandonment of the nations/tribes and acceptance of the Indian band. Legally a "First Nation" can only be achieved through the legislative implementation of a Land Claims Agreement. Indian bands can also register a name change with DIAND such as "ABC First Nation Band".

If representation across "Canada" is to continue under, for example, Ovide Mecredi's suggestions of grassroots involvement, then serious attention must be given to the name of the administrative organization and perhaps is should not be confined to the Canadian border. It should not refer to "First Nations" but to, only as an example, the "Confederation of the Indigenous Peoples of Turtle Island".

[27] " . . . about the Assembly of First Nations", *The First Perspective*, February 1996 ed., at page 16