CONFIDENTIAL

FINAL REPORT

TO: THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

FROM: JAMES M. LORNIE, SPECIAL REPRESENTATIVE TO THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT (AANDC)

SUBJECT: FINAL REPORT WITH RECOMMENDATIONS REGARDING THE POSSIBILITY OF ACCELERATING NEGOTIATIONS WITH COMMON TABLE FIRST NATIONS THAT ARE IN THE BC TREATY PROCESS, AND ANY STEPS REQUIRED

DATE: NOVEMBER 30 2011

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A. EXECUTIVE SUMMARY

Introduction

The purpose of this Final Report is to provide to you recommendations regarding the possibility of accelerating negotiations with the Common Table First Nations that are in the British Columbia treaty process, and any steps required.

In order to develop those recommendations and steps, I interviewed numerous current and former participants in the BC treaty process, including not only representatives of the Principals but members of related organizations, to seek their views regarding the current constraints on progress and other concerns.

The findings in this report represent their individual and collective responses. I found a remarkable similarity and consistency in those responses across all organizations and individuals, regardless on which side of the treaty table they may sit. With respect to process issues in particular, respondents were typically unanimous in their views as to the reasons for the slowness of progress to date. Most importantly, all respondents were united in their desire to see these issues addressed and for meaningful progress to be made quickly and efficiently.

Acceleration of negotiations is possible

It is clear that there are many challenges facing the Principals in the BC treaty process. Those challenges were clearly articulated in the October 2011 Annual Report of the BC Treaty Commission, in which Chief Commissioner Sophie Pierre emphasized to the Principals the urgent need to make significant progress by September 2012, the twentieth anniversary of the BC treaty process.

I believe that significant progress is possible by that date. The recommendations I have made support improvements in the current federal approach to the process and options for resolving differences between the federal government and First Nations with respect to the application of mandates. All of them offer the opportunity to increase the likelihood of accelerating negotiations not only with Common Table First Nations, but with other First Nations in the BC treaty process.

These steps will, if implemented, have the additional benefits of rebuilding trust in the process, increasing First Nations' capacity to participate in the process, and improving relationships between First Nations both in and outside the process and with the federal government.

Commitment of all three Principals required

It is important not to underestimate the high levels of frustration that have been expressed to me regarding both mandate issues and the slowness and complexity of the

negotiations process. Every participant I interviewed expressed similar sentiments in this respect.

However, it is also important to acknowledge that all three parties to negotiations have contributed to this situation in different ways, whether as a result of limited capacity, limited resources, change of mandate or other factors. As Commissioner Sophie Pierre states in the BC Treaty Commission's 2011 Annual Report, all parties must accept some of the responsibility for the lack of urgency in treaty negotiations.

My recommendations require specific commitment and action by the federal government to initiate change, but they also rely upon the commitment and accountability of all of the Principals to use reasonable efforts to conclude negotiations in a meaningful, timely and effective manner.

The time for action is now

Other efforts have been made over the last ten years to find ways to improve the process. No quantum leap in progress has resulted from any of those discussions, however. It is now imperative for the Principals to take action without further delay. As Commissioner Pierre has noted, the process is at serious risk as a result of the lack of urgency in negotiations to date. She states unequivocally: "Direction is urgently required from the highest level—the Prime Minister, Premier and First Nations Summit Task Group—to shake the status quo."

The benefits of re-committing to the process

I consider that the single most important response that the federal government can make is to re-commit to treaty-making as a federal priority, and to commit to that priority at every level of the federal system.

The benefits of such a commitment are far-reaching. As all of the Principals in the treaty process have stated from time to time, treaties will contribute significantly to the wellbeing not just of British Columbia but of Canada as a whole. They will form the basis of a new relationship between First Nations and their fellow Canadians based on the principles of recognition, reconciliation, trust and equality. They will provide resolution to long-standing conflicts between governments and First Nations, and between First Nations themselves.

Treaties also meet a wide range of federal government objectives, including the advancement of Canada's economic agenda, facilitation of investment, encouragement of economic development, improvement of the cultural, social and economic wellbeing of First Nations, and reconciliation.

Vision in the 1991 BC Claims Task Force Report

In its 1991 report recommending a process for negotiations, the British Columbia Claims Task Force, representing all three Principals, stated: "The process of negotiation to establish a new relationship will be positive for the First Nations and for the citizens of British Columbia and Canada. The status quo has been costly. Energies and resources have been spent in legal battles and other strategies. It is time to put these resources and energies into the negotiation of a constructive relationship."

Those words remain true twenty years later, and the nineteen recommendations of the Task Force that have formed the basis for the BC treaty process continue to comprise a clear vision and robust platform for accountability of all the parties to the process. The recommendations contained in this report are made in the spirit of that vision and with that intent.

Recommendations and steps

This report focuses on the six mandate issues that were discussed at the Common Table, and options to accelerate the negotiations process. Recommendations could be implemented through a collective forum such as the Common Table, through new regional or local collectives, on a province-wide basis or at individual tables. The findings and recommendations contained here apply to all treaty tables, including the Common Table treaty tables.

I have made nine recommendations, with a number of steps to consider with respect to each recommendation. The recommendations are set out on page 11. The main body of the report sets out the suggested steps under each recommendation, the rationale for the recommendation, and a summary of my findings in that regard.

Mandates

While the parties do not differ in principle about the inclusion of the following matters in treaty, the current application of various aspects of the federal mandates relating to certainty and recognition, fisheries and own source revenue present significant constraints on progress. My recommendations offer options for addressing the concerns raised in this regard.

Process

Process issues appear to be at least as significant a barrier to making progress in the treaty process as mandate gaps. It is essential to resolve the mandate issues as quickly as possible, and my mandate recommendations speak to that. However, improvements to process may offer the best opportunities to accelerate progress in both the

immediate and the short to medium term. Five of the nine recommendations in this report offer options for addressing process issues.

Non-treaty environment

Consideration of the non-treaty climate and relationship between First Nations and governments is important. In my opinion, there are practical and reasonable conciliatory steps that can be taken to improve that climate and by doing so, enhance a positive environment in which to discuss reconciliation through treaty-making. Indeed, I consider taking steps to improve the non-treaty environment to be fundamental to improving relationships and making progress and have therefore made an additional recommendation to support that goal.

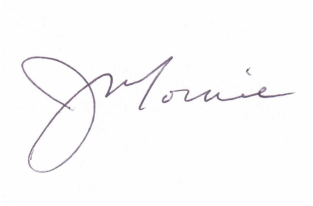
Conclusion

All of my recommendations reflect my opinion that in considering measures to accelerate negotiations it will be important to address process, substantive issues, and non-treaty considerations together rather than in isolation. Being prepared to take steps on federal mandates will be more effective if process issues are resolved; improving the process will support the resolution of outstanding mandate issues; and improving the non-treaty environment will support the treaty process through increased capacity, improved relationships and greater wellbeing in First Nations communities in general.

I believe these are significant steps which will not only expedite negotiations but which will create a more positive climate for resolving outstanding substantive issues. I am optimistic that if these issues are promptly and substantially addressed, that will be helpful in restoring faith in the process and the consequential acceleration of conclusion of mutually satisfactory treaty agreements in British Columbia.

Acknowledgement

I would like to acknowledge the assistance of my associate Katherine Gordon, from Gabriola Island, British Columbia, whose experience, writing skills and organizational capability contributed significantly to the completion of this Final Report.



James M. Lornie
November 30 2011

B. BACKGROUND AND CONTEXT

Common Table

A brief summary of the background to the creation of the Common Table and my appointment to undertake this Final Report in February 2011 is set out in Appendix A.

Interim Report

An Interim Report on my findings was delivered to you, and its contents accepted in September 2011. The Interim Report identified emerging trends from my initial investigations, and the steps required to complete this Final Report to you. The content of this Final Report is consistent with the findings identified in the Interim Report.

Process for Final Report

Format of report

Under each of the nine recommendations contained in this report I set out the steps I suggest for implementation of the recommendation. I then outline my rationale for the recommendations, and provide a summary of the results of my interviews undertaken for the purpose of this report under the heading "Findings." Where statements in the report are statements of my opinion rather than summaries of the responses received, they are identified as such.

I conducted interviews with the Common Table First Nations listed in Appendix B. I also interviewed a number of officials within different departments of the federal government, the British Columbia government, the First Nations Summit, and the BC Treaty Commission, as well as former employees and representatives of those organizations.

The report is based on these interviews and consultations, together with information provided by the federal support team appointed to respond to my queries and a review of the public documents listed in Appendix C, among other materials reviewed during the course of my investigations. My approach to analysis of my findings included:

a. Cross-checking information received and mandate issues as required with the federal support team;

b. Comparing my findings to the vision in the original Claims Task Force report (and goals of the BC treaty process generally);

c. Consideration and assessment of other relevant factors (e.g. opportunities outside the treaty process);

d. Analysis of findings, identification of substantive gaps between the parties, process issues, and viable, realistic options for the acceleration of negotiations.

Certain respondents preferred to remain anonymous, and I have assured them that request will be honoured. In any event, in the interests of soliciting frank responses from the people I have consulted, I have not typically attributed my findings in the report to specific individuals, but rather identified consistent themes within the feedback received and made my recommendations based on those themes.

BC Claims Task Force Report 1991

In assessing the options for acceleration of negotiations, it has been important in my view to measure both the status quo and those options against the original vision for treaty negotiations set out in the BC Claims Task Force Report of 1991.

That Report, and the nineteen recommendations it contains, remains the cornerstone of accountability for the Principals. I have referred to its recommendations in a number of places in this report.

I would also like to take the opportunity to commend the BC Treaty Commission on the efforts of its commissioners and staff over the last nineteen years in implementing the recommendations contained in the Task Force Report, their dedication to supporting the work of the Principals and their perseverance in their ongoing efforts to revitalize the process.

Comprehensive Claims Review Process

The First Nations' Chief Negotiators' Forum expressed a view that Canada's current comprehensive claims policy is outdated, does not reflect current common law and is one of many factors which are impeding the treaty negotiations process. They are hopeful that this report will inform efforts to reform the comprehensive claims policy and the work of the Assembly of First Nation's Ad Hoc Working Group on Comprehensive Claims.

C. RECOMMENDATIONS

i. Introduction

Acceleration of negotiations is possible

Implementation of the following recommendations and the steps associated with each recommendation will, in my view, increase the likelihood of accelerating negotiations with Common Table First Nations and with other First Nations in the BC treaty process.

Objectives of recommendations

The recommendations I have made support improvements in the current federal approach to the process and options for resolving differences between the federal government and First Nations with respect to the application of mandates. All of them offer the opportunity to increase the likelihood of accelerating negotiations not only with Common Table First Nations, but with other First Nations in the BC treaty process.

I believe these steps will, if implemented, have the additional benefits of rebuilding trust in the process, increasing First Nations' capacity to participate in the process, and improving relationships between First Nations both in and outside the process and with the federal government.

Commitment of all three parties to the process is key

I also believe, however, that it is important not to underestimate the high levels of frustration that have been expressed to me regarding both mandate issues and the slowness and complexity of the negotiations process. Every participant shared similar sentiments in this respect.

The task before me in preparing this report is to present options for what the federal government can do to improve this situation, and thereby accelerate progress in negotiations. However, it is also important to acknowledge that all three parties to negotiations have contributed to this situation in different ways, whether as a result of limited capacity, limited resources, change of mandate or other factors. As Chief Treaty Commissioner Sophie Pierre states in the BC Treaty Commission's 2011 Annual Report, all parties must accept some of the responsibility for the lack of urgency in treaty negotiations.

My recommendations require specific commitment and action by the federal government to initiate change, but they also rely upon the commitment and accountability of all of the parties to use reasonable efforts to conclude negotiations in a meaningful, timely and effective manner.

Previous efforts to accelerate progress

The 2002 report of the Tripartite Working Group of the Principals entitled "Improving the Treaty Process," endorsed by the BC Treaty Commission and commonly referred to by officials as the "Blue Sky Report," acknowledged the high cost and slow progress of

treaty negotiations in British Columbia. That report made several recommendations for increasing process efficiencies, including building treaties incrementally, improving mandating processes and addressing the negotiations loans issue, which was already proving to be problematic ten years ago. The Working Group emphasized the compelling need to act expeditiously to address those recommendations.

Other efforts have been made since to examine ways to improve process and speed up negotiations, including through the BC Treaty Commission and the Common Table. Various options have been developed and recommended in addition to those contained in the Blue Sky Report, some of which mirror the recommendations in this report. But few of those options, if any, have been implemented. No quantum leap in progress has resulted from any of those discussions over the last ten years.

The time for action is now

It is imperative for all the parties to take action immediately. As Commissioner Pierre has noted, the process is at serious risk as a result of the lack of urgency in negotiations to date. She states unequivocally in the BC Treaty Commission's 2011 Annual Report: "Direction is urgently required from the highest level—the Prime Minister, Premier and First Nations Summit Task Group—to shake the status quo."

I believe that for new initiatives to accelerate negotiations to be effective, the single most important response that the federal government can make to the BC Treaty Commission is to re-commit to treaty-making as a federal priority, and to commit to that priority at every level of the federal system.

The benefits of such a commitment are far-reaching. As all of the Principals in the treaty process have stated from time to time, treaties will contribute significantly to the wellbeing not just of British Columbia but of Canada as a whole. They will form the basis of a new relationship between First Nations and their fellow Canadians based on the principles of recognition, reconciliation, trust and equality. They will provide resolution to long-standing conflicts between governments and First Nations, and between First Nations themselves.

Treaties also meet a wide range of federal government objectives, including the advancement of Canada's economic agenda, facilitation of investment, encouragement of economic development, improvement of the cultural, social and economic wellbeing of First Nations, and reconciliation.

In its 1991 report recommending a process for negotiations, the British Columbia Claims Task Force, representing all three Principals, stated: "The process of negotiation to establish a new relationship will be positive for the First Nations and for the citizens of British Columbia and Canada. The status quo has been costly. Energies and resources have been spent in legal battles and other strategies. It is time to put these resources and energies into the negotiation of a constructive relationship."

Those words remain true twenty years later, and the nineteen recommendations of the Task Force that have formed the basis for the BC treaty process continue to comprise a clear vision and robust platform for accountability of all the parties to the process. In the spirit of that vision and intent, I make the following recommendations to you.

ii. Nine core recommendations

I am making nine core recommendations, accompanied by a number of subsidiary steps to take to implement those core recommendations:

1. Consider re-evaluating the approach to key substantive mandates under discussion at the Common Table, to look for opportunities to address the concerns of First Nations.
2. Review and re-evaluate the concerns raised by First Nations regarding the application of the existing Own Source Revenue (OSR) policy, to look for opportunities for flexibility in its application.
3. Review aspects of fisheries negotiations that are not implicated by the Cohen Commission of Inquiry into the Decline of Sockeye Salmon on the Fraser River, for opportunities to recommence negotiations (in the context of both comprehensive and incremental treaty agreements).
4. Reconfigure the current federal treaty-related decision-making and mandate development process to introduce greater flexibility, efficiency, authority and capability.
5. Re-evaluate the negotiations loan funding policy with a view to introducing amendments to the policy, subject to a cost-benefit analysis.
6. Engage in tripartite incremental treaty agreements to secure land and resources for First Nations at any stage of the BC treaty process.
7. Engage in discussions between the Minister of Aboriginal Affairs and Northern Development and the BC Minister of Aboriginal Relations and Reconciliation to review existing cost-sharing arrangements and commitments.
8. Provide resources to support effective dispute avoidance and resolution options for all First Nations affected by potential conflict relating to shared territory and overlap issues arising out of treaties, whether or not those First Nations are participating in the BC treaty process.
9. Develop and implement options for engagement in reconciliation measures outside the treaty process with all First Nations.

iii. Relevant considerations

In considering means to accelerate negotiations with Common Table First Nations it is my view that process, substantive issues, and the non-treaty environment should be

considered as interrelated matters rather than in isolation. Being prepared to take steps on federal mandates will be more effective if process issues are resolved; improving the process will support the resolution of outstanding mandate issues; and improving the non-treaty environment will support the treaty process through increased capacity, improved relationships and greater wellbeing in First Nations communities in general.

Clearly, substantive mandate issues have to be overcome. First Nations in British Columbia are also mindful of their options outside the treaty process, including continuing success over the last two decades in the establishment and recognition of aboriginal and Douglas Treaty rights through litigation, the effectiveness of direct action (e.g. in Haida Gwaii), and the merits of impact/benefit agreements with third parties resulting from the assertion of aboriginal and/or Douglas Treaty rights.

In the meantime, process issues appear to be at least as significant a barrier to making progress in the treaty process as mandate gaps. It is essential to resolve the mandate issues as quickly as possible, and my mandate recommendations speak to that. However, improvements to process may offer the best opportunities to accelerate progress in both the immediate and the short to medium term.

I believe there are significant steps which will not only expedite negotiations but which will create a more positive climate for resolving outstanding substantive issues. I am optimistic that if these issues are promptly and substantially addressed, that will be helpful in restoring faith in the process and the consequential resolution of substantive mandate gaps.

I. MANDATE RECOMMENDATIONS

Introduction

I have made three substantive recommendations with respect to the mandate topics under discussion at the Common Table, and included steps on mandate development in Recommendation 4, which deals with process efficiencies.

I do not propose to suggest specific solutions to mandate topics. That is a matter for expert analysis and political consideration in due course. However, my findings strongly support the need to introduce, or reaffirm as the case may be, certain approaches in addressing the key mandate issues under discussion. Those approaches are reflected in my recommendations.

Mandate process issues

The Blue Sky Report reviewed mandate development and identified three significant concerns: flexibility of mandates, transparency and efficiency of mandate development processes. The latter issue is addressed as part of Recommendation 4.

Chief Commissioner Pierre has also endorsed flexibility and transparency in negotiations, stating: “The parties must move away from entrenched positions and move towards the interests of true reconciliation through fair and timely negotiations.” Of the federal government in particular, she states: “We need clarity as to mandate and transparency in delivery. It is vital that the parties give clear mandates to their chief negotiators…there should be no need to subject [agreements] to a long, internal review without an explanation to the other parties.”

I agree with Commissioner Pierre that, in the interests of fairness, clarity and transparency of mandates, commitment to mandates, and willingness to delegate authority to negotiators to allow them to be creative in negotiating the components of an agreement within broad mandates, are all fundamental to success.

Time is of the essence

Time is of the essence, as I have already noted. While mandate reviews can be time-consuming, the issues have been thoroughly canvassed many times and I believe that a review can be based on existing experience and knowledge. I strongly recommend that the work required with respect to Recommendations 1 to 3 take place as a high priority and as quickly as possible, with a view to announcing the outcomes on or before the twentieth anniversary of the BC treaty process in September 2012.

That is the date at which the BC Treaty Commission has signaled significant progress must be shown. My view is that if little has changed at that date, the process as a whole will be at serious risk of failure.

Alternatives to treaty

I believe it is incumbent on the federal government to take a more flexible approach to the core mandate issues that have been raised in order to accelerate progress towards more Final Agreements, and to be prepared to consider other options proposed by the

First Nations to meet the respective interests of all the parties. If this is not done, and as a matter of urgency, it is my opinion that First Nations will increasingly turn to alternative means to achieve their goals of respect for and reconciliation of their rights.

By way of illustration of this point, in a presentation to the Common Table made in June 2008, Chief Robert Louie of Westbank First Nation pointed out that First Nations in British Columbia have access to significant fiscal and self-governance powers and land management jurisdiction under various federal statutes created since 1992[1]. The *Indian Act* also provides opportunities for assumption of taxation jurisdiction.

Many First Nations in British Columbia have taken up these powers, placing them in a position to generate and manage increasingly valuable own source revenue. Louie notes that these First Nations are not required to give up jurisdiction to the provincial government or their tax exemption status and points out: "These positive advancements in fiscal areas should not be undermined or lost by approaches taken by Canada and BC in treaty-making."

In other words, the initiatives that Louie describes are all providing real benefits to First Nations, some of which flow into the treaty process. They support capacity-strengthening, accountability and the building of independent resource capital with which to negotiate treaties. However, as Louie emphasizes, treaty outcomes need to be considered as good, or better, than non-treaty outcomes if they are to remain a priority for First Nations in the process.

Louie's view is that compared to current federal treaty mandates pertaining to fiscal matters and jurisdiction, at present non-treaty options offer benefits that outweigh treaty benefits.

It is a factor that may well apply to other mandate issues as well. In my view, this should be taken into consideration in assessing potential changes to treaty mandates that might provide a greater incentive to move forward in treaty negotiations.

[1] First Nations Fiscal and Statistical Management Act; First Nations Land Management Act; First Nations Oil and Gas and Moneys Management Act; First Nations Commercial and Industrial Development Act; Budget Implementation Act; First Nations Goods and Services Tax Act.

Recommendation 1: Mandates

Consider re-evaluating the approach to key substantive mandates under discussion at the Common Table to look for opportunities to address the concerns of First Nations.

Steps

a) Address recommendations 2 and 3 below, dealing with Own Source Revenue and Fisheries respectively, and the steps required to implement those recommendations.

b) Recognition and Certainty: Engage with the provincial government to address the need to find a model to achieve certainty that:

- Recognizes and affirms existing rights in a way that does not amount to extinguishment, and
- Provides the federal and provincial governments with confidence that they will not be exposed in future to unreasonable legal or financial liability arising from the assertion of undefined or unidentified rights.

c) Governance: Consider options for incorporating traditional methods of governance that will meet First Nations interests.

d) Section 91(24) lands: Promote greater understanding by First Nations of the extent, limits and potential benefits of proposed provincial jurisdiction on future treaty lands.

Rationale

Own Source Revenue and Fisheries are addressed separately below in Recommendations 2 and 3.

The twin subjects of recognition and certainty continue to be ones which the new measures announced by the federal government in March 2010 have not yet resolved. My understanding is that while the federal government is prepared to table a non-assertion model, the provincial government remains hesitant to do so. I also understand that new recognition language has been proposed at the Ktunaxa-Kinbasket treaty table. While I am not privy to that language, it may offer possibilities for a solution in this regard.

The approach to implementation of certain aspects of the Own Source Revenue (OSR) policy, and the suspension of fisheries negotiations, also pose significant barriers to progress.

The highest priority should be given to resolving these issues in order to successfully move forward to closing Final Agreements. My conclusion is that if the First Nations are satisfied with the certainty and recognition model, the way in which the OSR policy is

applied, and a commitment to make progress on fisheries negotiations, remaining mandate issues may be more readily resolved.

Governance

With respect to governance, it is clear that the rights of all Canadian citizens must be protected, including both First Nations and non-First Nations citizens who reside on treaty lands. Provided that such protection is built into the agreed form of First Nations government, it is difficult to see why the inherent system could not be adapted to treaty. The Maa-nulth treaty offers one model for doing so.

Section 91(24) lands

If reconciliation is to be tripartite, it is difficult to envision treaty lands that do not include provincial jurisdiction in conjunction with federal and First Nations' jurisdiction. However, First Nations must be satisfied with the application of their constitutionally-protected rights over their treaty lands, and the governance model that will be in effect, as well as have a clear understanding of the extent and limits of provincial jurisdiction over section 92 treaty lands.

My assessment is that if these matters are addressed to their satisfaction, the section 91(24) lands mandate may be more acceptable.

Findings

i. *Recognition and Certainty:*

The desire of First Nations that all of their existing aboriginal rights be recognized and affirmed in treaties has been a core theme since the beginning of the negotiations process, and their objections to any certainty model that might serve to extinguish those rights, remain as strong today as they did at the beginning.

The desire of the federal and provincial governments for certainty as to what those rights mean in practice, through defining them comprehensively in treaty, is equally strong.

Governments have attempted to find certainty models that meet the concerns of First Nations. The proposed modification model to achieve certainty is however considered equal to extinguishment by First Nations, as it does not recognize and affirm existing rights, nor does it explicitly provide that existing rights are not extinguished.

Existing Final Agreements contain provisions stating that the treaty is a full and final settlement that exhaustively sets outs the First Nation's section 35 rights. The Common Table First Nations (and some others not yet at Final Agreement stage)

have expressed concern about that model, fearing that any rights that are not dealt with in the treaty, which is intended to be comprehensive, will be lost for all time.

The standard Final Agreement preamble to date also states that existing aboriginal rights and title are recognized and affirmed in the Constitution Act, but the parties themselves do not recognize and affirm the First Nation's specific aboriginal rights and title. My understanding of the model preferred by the Common Table First Nations is one in which aboriginal rights and title are expressly recognized and affirmed by the parties to the treaty.

The difference is a subtle one, but of great significance. Rod Naknakin, Chief Negotiator for the Laich-Kwil-Tach Treaty Society, has proposed: "The Unity Protocol First Nations are prepared to engage Canada in developing an approach for recognizing and affirming the existing aboriginal rights and title within the treaty in a manner that can provide certainty for all parties. Should other rights be included, then they will simply be treaty rights."

The Common Table First Nations have also stated they are prepared to provide comfort to the two governments that undefined rights will not be asserted without agreement. Mr. Naknakin proposed: "Any other aboriginal rights that may not be consistent with the Final Agreement or remain unexercised will simply not be exercised until agreed upon otherwise and thereby remain unextinguished."

ii. *Governance:*

Having traditional hereditary (non-elected) governance mechanisms in treaty is a fundamental concern for those First Nations utilizing a hereditary system. The inflexibility of the government mandate in this respect is seen as highly problematic by those First Nations.

The inherent contradiction in the mandate (Canada employs a non-elected Senate and a non-elected Governor-General, reporting to a hereditary leader in the form of Her Majesty the Queen) has not escaped those First Nations.

iii. *Section 91(24) lands:*

Outstanding concerns regarding a change from section 91(24) status with federal jurisdiction only to section 92 status, including provincial jurisdiction on treaty lands, also remain at a high level for First Nations.

The latter concern is due in large part to the historical distrust by First Nations of the motives and behaviour of the provincial government. Some may also not fully appreciate yet the limits of provincial jurisdiction and the extent to which First Nations and federal jurisdiction will prevail in the event of a conflict of laws. As a result, notwithstanding the fact that both the federal and provincial governments

have indicated that this mandate position is fundamental, First Nations continue to resist a change to section 92 status post-treaty.

iv. *Co-Management*

Co-management of the traditional territory was one of the six mandate topics identified for discussion at the Common Table. It remains an issue of significant importance for First Nations both pre- and post-treaty. No issues of concern with respect to this topic were raised during the course of my interviews (but see Recommendation 6, Incremental Treaty Agreements).

Recommendation 2: Own Source Revenue (OSR) Policy

Review and re-evaluate concerns raised by First Nations regarding the application of the Own Source Revenue (OSR) policy, to look for opportunities for flexibility in its application.

Steps

a) Consider undertaking a cost/benefit analysis of revising the approach to application of aspects of the OSR policy to address First Nations' objections, including a review of the phase-in period, current inclusions and exclusions and transfer payment floor levels.

b) Look for opportunities for flexibility to tailor the application of the policy to the specific circumstances of different First Nations.

c) Include in the analysis an evaluation and assessment of the cost-saving benefits of accelerating negotiations by amending the policy to accommodate the concerns, comparing those benefits to the ongoing costs of inactive, slow-moving or failed negotiations.

Rationale

The principles of financial responsibility and accountability that are embedded in the OSR policy, which is a cornerstone of the federal government's policy approach to self-government, are well-understood and accepted by First Nations. First Nations have repeatedly indicated they have no objection to sharing the financing of self-government from their own revenues.

It is the approach to implementation of aspects of the OSR policy (the phase-in period, transfer payment floor levels, and inclusions and exclusions) that has raised objections, not the principle. The application of those provisions in their current form is seen as inflexible and unfair, and a significant disincentive to economic independence.

First Nations are looking for equitable treatment as they work hard to catch up on decades of fiscal imbalance and build the infrastructure, programs and reserve funds needed to support healthy, economically robust communities over the long term. They believe that the inflexibility of the current approach to the mandate does not allow for the different economic circumstances of various First Nations to be taken into account. While consistent standards are important, the flexibility to tailor OSR provisions to the specific situation of an individual First Nation is extremely important.

As matters stand, concerns with the way in which the current OSR policy is to be applied form a significant constraint on further progress in negotiations. From what I have observed, the presentation of OSR policy to First Nations has left them with a lack of

clarity around and understanding of how the policy will apply in practice, an issue which must be dealt with.

From my perspective, the benefit of a thorough review and re-evaluation of First Nations' concerns is that it will either form the basis for building understanding and acceptance that the current way in which the federal government is proposing that OSR policy be implemented is fair and will not be a disincentive to economic independence, or it will demonstrate that the concerns are valid and changes are required to the way in which the policy is to be applied.

Either outcome will in my view assist with progress in negotiations. If the OSR issue can be resolved, it is my view that First Nations will be eager to make substantive progress on other mandate issues to the mutual satisfaction of the parties.

Findings

i. While most of the First Nations can rationalize to their communities the phase-out of the tax exemption on the basis of attaining equality with all Canadians, the application of the OSR policy appears to them, conversely, to contradict the principle of equality.

ii. OSR comes into play too early, operating as a significant disincentive to expansion of economic activities.

iii. This is contrary to the desired goal of all the parties to treaty agreements that First Nations are empowered to gain and maintain fiscal independence and achieve similar standards of quality of life, health, education and employment to other Canadian communities.

iv. First Nations argue that this also will result in costs to Canada over the long term as their ability to gain fiscal independence is delayed.

v. If transfer payments are reduced too quickly and by too much as a result of increasing First Nation economic revenues, the delivery of social and other programs to First Nations citizens will be jeopardized.

vi. Many First Nations are endeavouring to catch up to the standards of quality of life of other Canadian communities and any constraint on their ability to do so is poorly received. The application of current OSR policy falls into this category.

vii. While the principle of OSR is understood and accepted (see Rationale, above) one participant, expressing the sentiments of many, described the current policy approach as "heavy-handed," requiring considerable refinement to accommodate the specific circumstances of individual First Nations.

viii. Concerns with the schedule and the level of OSR transfer payment floors might equally be characterized as concerns that the funding regime is inadequate in the first place. This concern has been consistently expressed by First Nations among their general concerns with fiscal arrangements associated with treaty.

ix. Specific objections to the OSR policy and proposals by First Nations to rectify them, and the federal government's iteration of its commitment to the principles behind the mandate, are contained in detail in the Common Table documents and other correspondence between the Principals, and are therefore not repeated here.

x. OSR principles are now being applied outside treaty in the context of any self-government financing. For example, health services delivery agreements contain OSR provisions. OSR has also recently been introduced into the financing of First Nations operated schools in British Columbia, with respect to those First Nations interested in self-government. The latter initiative has caused concern and is seen as a further erosion of support for First Nations' wellbeing.

Recommendation 3: Fisheries Negotiations

Review aspects of fisheries negotiations that are not implicated by the Cohen Commission of Inquiry into the Decline of Sockeye Salmon on the Fraser River, for opportunities to recommence negotiations (in the context of both comprehensive and incremental treaty agreements).

Steps

a) Identify all aspects of fisheries negotiations that are not implicated by the Cohen Commission.

b) Immediately re-engage at treaty tables with respect to those aspects of fisheries negotiations.

c) Support the building of capacity within Fisheries and Oceans Canada to sustain both accelerated progress in fisheries negotiations and to respond to the Cohen Commission report in due course.

Rationale

All discussions relating to fisheries at treaty tables have been suspended pending the outcome of the Commission of Inquiry into the Decline of Sockeye Salmon on the Fraser River, commonly referred to as the Cohen Commission.

However, the Cohen Commission is not due to report until June 30, 2012. It can be expected that the federal government will require some time after that to digest the content of the report and prepare an appropriate response to it. It is reasonable to assume that will take several months. It may be 2013 before a position on Fraser River sockeye is known and a renewed mandate for treaty negotiations with respect to this fishery is available.

In the meantime, however, accelerating treaty negotiations is impossible with the suspension of all fisheries negotiations in place. Access to fish and fisheries habitat issues are fundamental aspects of treaty for almost every First Nation in the process.

The First Nations interviewed for this report expressed high levels of frustration that progress on other aspects of fisheries cannot be made. It is also difficult, if not impossible, for First Nations to comprehensively assess other key aspects of the treaty, such as governance and certainty, without being able to assess how they will relate to the fisheries component of the agreement.

Findings

i. Fisheries are a fundamentally important component of negotiations at almost every treaty table in British Columbia.

ii. The suspension of fisheries negotiations based on the Cohen Commission has been very poorly received. It is difficult for First Nations to understand why all fisheries negotiations have been suspended based on a review that deals exclusively with the Fraser River sockeye fishery.

iii. Not only are there other unrelated salmon fisheries (the Skeena River fishery, for example) but other species to consider. There are also many issues that could be covered, such as fisheries areas, law-making authorities, monitoring, management, allocation formulae, and environmental issues. First Nations are adamant that they wish to re-engage immediately and make progress in these areas of fisheries negotiations.

II. PROCESS RECOMMENDATIONS

Introduction

My recommendations that focus on process, and the steps I suggest taking in association with each recommendation, are made with the goals of improving the efficiency and timeliness of negotiations and authority of decision-making. They also respond to criticisms previously described in this report about the way in which the federal government approaches its mandate development and structures its decision-making process.

As I have previously noted, criticisms were expressed to me about the latter two issues by participants involved in every aspect of the negotiations process. The findings set out in this section provide greater detail of those criticisms.

The cooperation and commitment of all of the parties to improvements in the process is vital. These recommendations are of course based on steps that the federal government can take. All the same, I consider that the other parties in the process will benefit from implementation of these recommendations in terms of their own decision-making requirements and mandate development, as the outcome should be increased momentum in negotiations, more flexibility and transparency, and greater certainty of the outcome of federal decision-making.

Recommendation 4: Decision Making Process

Reconfigure the current federal treaty-related decision-making and mandate development process to introduce greater flexibility, efficiency, authority and capability.

Steps

a. Provide treaty negotiators with a mandate to represent all federal government departments in treaty negotiations, the authority to make commitments at tables within the scope of their mandates, and streamlined access to central decision-makers.

b. Make British Columbia treaty-making a program priority of all federal government departments and agencies, with goals, objectives and performance measures for British Columbia treaty negotiations included in annual corporate plans.

c. Commission an independent and rigorous third party assessment, to be undertaken and delivered as soon as possible, of the existing federal government treaty-related decision-making processes, with recommendations for changes to improve the timeliness, flexibility, efficacy, coordination and effectiveness of those processes.

d. Review the process for mandate development with a view to improving transparency, flexibility, the solicitation of input from First Nations at an earlier stage in the process, consistency at tables, and timeliness.

Rationale

If negotiations are to be accelerated, it is vital to accord them sufficient priority across government so that decision-making is efficient, timely, authoritative and respected, and place responsibility for the process at a level capable of ensuring that cross-government cooperation and consensus can be achieved quickly and reliably.

There was consensus among those interviewed for this report that the way in which the federal treaty-making bureaucracy is organized and federal decision-making and mandate development processes have contributed to significant delays and disruptions at every treaty table and created high levels of frustration for all three parties. This is a long-standing view that has been expressed publicly from time to time by the First Nations Summit, individual First Nations in the treaty process, participants in the Common Table, and the BC Treaty Commission.

Findings

i. There is no visible federal “champion” of the BC treaty process, either in British Columbia or in central agencies, to support robust and timely decision-making.

ii. Little urgency appears to be accorded by government departments, including AANDC, to reaching agreement at individual tables. No process is in place to "fast-track" treaty decisions or to differentiate them from any other federal governmental decision-making process.

iii. AANDC has negligible authority to make commitments at treaty tables on behalf of other departments and agencies with respect to any matter falling within their program mandates.

iv. Treaty negotiations are not a program priority of other government departments and agencies, making it challenging for federal treaty negotiators to receive attention to their requests as a matter of priority and creating a "silo effect" at the table.

v. Consultation with other departments and agencies is immensely time-consuming. Poor coordination and communication between departments contributes to delays and a lack of ability to close agreements.

vi. Treaty negotiations teams in British Columbia have limited authority to make commitments at tables. Federal mandates are developed in comprehensive detail before being brought to the table to open discussions, inhibiting negotiation of alternative options to meet interests.

vii. There appears to be an "all or nothing" approach on certain issues, for example, fisheries. First Nations state they have been told that they must accept language as presented or that discussions will be terminated.

viii. Recommendation 2 of the BC Claims Task Force Report states that each party is at liberty to introduce any issue at the table which it views as significant to the relationship. First Nations report however that governments will not engage in any discussion on any issue that is outside their established mandates.

ix. All decisions of any substance must be referred through a time-consuming process in Ottawa involving multiple committees of multiple agencies.

x. Numerous inefficiencies result, and time-sensitive opportunities are lost. First Nations cite examples of waiting a year to receive responses to proposal letters and requests, for example. Decisions on any substantive issue typically take five months, usually longer. Agreements in Principle (AIPs) and Final Agreements have taken between nine to fourteen months to review.

xi. The review process has also resulted in policy reversals from time to time, to the immense dismay of the First Nations who have invested significant time and resources in negotiating and generating community support for the agreements.

xii. Negotiations have fallen prey to the temptation to focus on low-hanging fruit rather than tackle the difficult issues upfront.

xiii. For example, negotiators spend time working on "boilerplate" chapter structure and language rather than trying to reaching substantive agreement on significant mandate issues. This looks like "progress," allowing tables to say they have achieved certain milestones in drafting chapters, while in fact there is no actual agreement in principle behind the language in the documents. This can carry on for years.

xiv. First Nations complained that after spending tens of thousands of dollars and extensive time in agreeing on chapters and achieving community acceptance of them, government negotiators will subsequently re-open the chapters for discussion because a different version has been agreed to at another table. Objections are overruled and no progress can be made unless the First Nation accedes to the new language proposed.

xv. Fiscal chapters have been taken off the table by the federal government, for example, to be revised in this manner.

xvi. A historical practice of "punting" substantive issues from AIP to the Final Agreement negotiations as a way of making progress resulted in some AIPs with the majority of substantive clauses simply comprising "agreements to negotiate" the issue in Final Agreement. This includes fisheries allocations, land packages, and other fundamental aspects of the treaty. Once in Final Agreement, First Nations would be faced with inflexible mandates at the table and very little room to negotiate. I understand that this practice proved unsuccessful and has now been abandoned.

xvii. Many respondents commented that treaty negotiations under the umbrella of AANDC appear to have effectively become another program of AANDC rather than a priority process of the federal government in general.

xviii. Some First Nations consider that there is an inherent conflict of interest between the fiduciary responsibility of the federal government under the umbrella of AANDC and the commitment to a new relationship under the treaty process.

xix. Their view is that the two should be separated. A suggestion was made that treaty-making be led by a completely separate agency to remove the conflict. A separate agency or secretariat with central agency authority would also increase efficiency in streamlining decision-making processes.

Recommendation Five: Loan Funding Policy

Re-evaluate the negotiations loan funding policy with a view to introducing amendments to the policy, subject to a cost-benefit analysis.

Steps

The following steps comprise a menu of strategic options for consideration for the implementation of incentive-based amendments to the loan funding policy.

I also see this menu of options as being the starting point of a much-needed discussion on ways to overcome the debt burden facing First Nations in the BC treaty process. I have recommended a cost-benefit analysis for feasibility purposes.

The individual steps provide a range of different ways and incentives for First Nations to reduce their treaty debt, depending on their circumstances and objectives for the treaty process, while supporting federal government goals of making more rapid progress at active treaty tables and prioritizing resources most effectively. Any one of the steps could be implemented and be effective in its own right. In terms of the overall goal of acceleration of negotiations, however, in my view the complete combination would have the greatest effect.

One of the considerations in implementing any of the following options is the willingness of the provincial government to share the cost of doing so (see Recommendation 7 on cost-sharing).

a. For First Nations at marginally active tables demonstrating little or no progress, some of whom continue to draw down negotiations funding, provide financial and resource support to undertake a rigorous cost/benefit analysis, overseen by the BC Treaty Commission, of continuing to accumulate debt and an assessment of whether or not to suspend further borrowing in order to pursue option (b) below.

b. For First Nations who have left or leave the process after undertaking the analysis recommended above, introduce a loan abeyance strategy or a forgiveness program of a fixed annual percentage over a set period.

c. For First Nations who are at active tables but constrained in their ability to make progress because of limited capacity to accelerate the pace of negotiations, provide additional financial and resource assistance for capacity-building so as to support those First Nations to make more rapid progress.

d. For First Nations who are at active tables that are moving forward in the process, introduce a strategic loan forgiveness program geared to significant progress.

e. Strategically raise the contribution component of all future negotiations funding to a significant level.

f. Undertake a cost/benefit analysis of the suggested options.

In my view, the requirements of the BC treaty process and the BC Treaty Commission must be taken into account in considering the possibility of loan principal/interest abeyance. Any abeyance mechanism would require incentives equally compelling to those provided by the other suggested strategic options.

Rationale

Debt burden

It is my view that the accumulated debt burden of the First Nations in the BC treaty process, amounting to more than $420 million to date, has become an insurmountable and unsustainable barrier to progress and a disincentive to completion of agreements.

While all three parties have invested significant financial resources in the negotiations process, First Nations are the only party who will be faced with a debt burden, whether or not agreements are concluded. In effect, they have little choice but to continue in the process, accruing even greater debt whether or not real progress is being made, as exiting the process will simply leave them with the burden of their debt and nothing to show for it. In other words, they currently have no viable exit strategy.

The options I propose are based on my belief that it is vital that this situation be addressed, and that future liabilities must be aligned with progress in the treaty process.

These options will also help allay criticisms, perceived or real, of the federal government's role in the slow progress of negotiations.

Ultimately both parties will reach their goals through their own initiative and efforts: reduction of the full amount of the loans in due course, and either the conclusion of treaty agreements or mutually satisfactory disengagement from unproductive negotiations.

Need for incentives

Incentives are urgently needed to enable First Nations to take advantage of one of three strategies, depending on their circumstances:

- Exit strategy: Stepping aside from the process, ceasing to accumulate debt, and engaging in debt reduction;
- Capacity strategy: Building capacity to make progress in treaty negotiations; or
- Completion strategy: Increasing the pace of their negotiations towards a speedier conclusion of an agreement.

The options I have recommended allow First Nations to choose the best course for their immediate future.

Reducing future debt accumulation will provide an incentive for First Nations at active tables to continue to make more rapid progress.

Allowing First Nations who have left the process the opportunity to reduce and eventually eliminate their debt burden over time will give them the freedom to use that time to build capacity without a heavy debt burden hanging over them. It will also enable them to engage in economic development without the negative credit rating that is currently attached to the unpaid loans.

Abeyance would provide relief from the requirement to make payments and on the accumulation of interest. However, as I have already noted, the requirements of the BC Treaty Commission and the need for incentives have to be considered in this option.

Ultimately, those First Nations can re-enter the negotiations process whenever they feel ready to do so, whether or not the debt has been fully extinguished, but with greater capacity to make progress towards debt reduction through the treaty process.

Incentives for all three parties important

The recommendations for reconfiguration of the loans are based on the task at hand: finding ways to accelerate negotiations with First Nations in the treaty process.

First Nations have stated that all of the existing loans should be forgiven now, and that all future funding must be by way of contributions. Doing so would certainly provide an incentive to the federal and provincial governments to accelerate the progress of negotiations, in order to limit the amount of funding they would be required to provide. However, First Nations would not share that incentive.

The better course, in my view, is to provide clear incentives to all three parties to accelerate the progress of negotiations. Raising the proportion of contributions does provide governments with an incentive to make more rapid progress. Enabling First Nations to control the level of debt they incur in future and the basis on which that debt burden is reduced also meets that goal, by putting the pace at which they reduce their debt burden in their own hands.

Cost/benefit analysis

It is feasible that greater cost-savings may be made in the long run as a result of debt forgiveness. Implementation of the options should result in faster progress at active tables. Some First Nations will decide to stand aside from the process or focus on capacity building. The options will assist the government to prioritize its resources appropriately towards capacity-building or focussing negotiating effort where greatest results are achievable more quickly.

Non-fiscal benefits

The options also support the BC Treaty Commission in its responsibility to apply the highest level of rigour to funding allocations, a very important aspect of the funding process. Non-fiscal benefits include the generation of considerable goodwill and trust. A greater willingness to consider compromise in other areas is a potential result.

Findings

i. As articulated in the BC Claims Task Force Report, funding was critical for the First Nations to be able to commence negotiations on an equal footing. The only option available from governments was loan funding augmented by a relatively small contribution (now 20 percent of the total).

ii. First Nations have made it clear that despite signing up to the original loan process, it has always been their view that negotiations funding should be a contribution by governments, not a debt burden on First Nations.

iii. First Nations have used the funding to develop internal governance and organizational capacity to negotiate, to assist the federal and provincial governments in understanding the issues at stake, to address consultation requests, and to cover the costs of delays in negotiations caused by process approaches of the federal and provincial governments.

iv. Many First Nations believe that, notwithstanding their agreement to take on loans, governments will agree to forgive the debt as part of the financial arrangements in the Final Agreement (a view reinforced by the Task Force Report, which states "The parties may wish to review this matter in the negotiation of the financial component.") Governments have indicated no appetite to date to do so, and no Final Agreement to date contains such a provision.

v. However, the decision to fund First Nations through a loan system has resulted in significant debts that are a heavy burden on some First Nations and which could wipe out any benefit of a financial settlement. Repaying loans may result in there being no money left over from the capital transfer for some. Others may find themselves owing more than the transfer amount. It seems unlikely that it will be possible to conclude treaties with some of the First Nations for whom it has become such an overwhelming burden.

vi. Many First Nations blame the disproportionate size of their debt on the slow progress of negotiations, attributing that slowness in large part to the federal government's processes for negotiations and decision-making.

vii. Consideration was given to the issue of table assessments and the potential for what were described as "time outs" in the 2002 Blue Sky Report, as well as the impact on loan funding. The work done by the Tripartite Working Group in this regard might form a useful starting point for consideration of step (a).

Recommendation 6: Incremental Agreements

Engage in tripartite incremental treaty agreements to secure land and resources for First Nations at any stage of the BC treaty process.

Steps

a) Review the existing options, tools and federal authorities for entering into and implementing incremental treaty agreements (currently limited to post-AIP).

b) Review the 2003 cost-sharing agreement with the provincial government covering arrangements for incremental treaty agreements and recommit to cost-sharing these agreements (See Recommendation 7 on cost-sharing).

c) Discuss with the other Principals in the treaty process the policy and mandate amendments required to facilitate the implementation of incremental agreements at any stage of the BC treaty process.

d) Develop policies for the transfer of key parcels of Crown lands to First Nations in incremental treaty agreements.

e) Develop policies for the holding for future treaty use of other key Crown land parcels that cannot be immediately transferred, subject to existing or new tenures as may be necessary or desirable.

f) Review current policy and procedures relating to the availability and use of federal Crown lands for treaty purposes, and consider amendments as required to provide:

    i. Confirmation that the inclusion of federal Crown lands, surplus or otherwise, in incremental (and final) treaty agreements continues to be or becomes a priority for the federal government use of those lands;

    ii. That if federal lands are declared surplus, their transfer to First Nations in treaty are the highest priority use of those lands;

    iii. That if federal lands are in use or held for other purposes (e.g. as park lands) their use in treaty be considered as having equal priority to those purposes, and that if necessary consideration be given to transferring those lands subject to tenures as required or to specified uses;

    iv. For the streamlining of the process for dealing with federal surplus lands to fast-track its availability for incremental and final treaty agreements.

Rationales

Benefits of incremental agreements

Recommendation 16 in the BC Claims Task Force Report provides for the parties to negotiate interim measures agreements before or during treaty negotiations when an interest is being affected which could undermine the process.

Incremental treaty agreements have also been considered in a number of different fora over the last decade as an alternative means to make faster progress towards treaty.

The 2002 Blue Sky Report espoused an incremental approach to treaty-making, describing the benefits as including the development of process efficiencies and providing tangible results along the way to treaty, and noting that this should "create a more stable social and economic environment sooner, which contributes to building a new relationship." Most recently the BC Treaty Commission endorsed incremental agreements in its 2011 Annual Report.

I agree with those views. Tripartite incremental agreements offer a positive path forward to closure of comprehensive treaty agreements, allow opportunities to demonstrate real progress and provide comfort to First Nations that the lands and resources they require for treaty will be available to them.

The 2008 Tla-o-qui-aht First Nation incremental land agreement with British Columbia illustrates these points effectively. The agreement provides for the transfer of certain land parcels to Tla-o-qui-aht in anticipation of reaching a final treaty agreement. Tla-o-qui-aht report that they feel the agreement has provided great benefits to the First Nation, allowing them to accomplish more towards treaty in the last three years than in all of the previous fifteen years of negotiations. The First Nation intends to use this incremental approach to develop other aspects of its treaty. A similar 2009 agreement provides Klahoose First Nation with forestry resource benefits.

These benefits are also evident in the post-AIP incremental agreements which Canada is currently prepared to negotiate and cost-share with British Columbia. In my view, Canada's participation in similar agreements at any stage of the BC treaty process addressing various aspects of treaty including co-management, will assist with accelerating progress at many tables and will fulfil the intent of Recommendation 16 of the Task Force Report.

Federal Crown land transfers as part of incremental agreements

Being prepared to include federal Crown lands, surplus or otherwise, in incremental and final treaty agreements is fundamental. The availability of federal Crown lands is limited in British Columbia, and particularly on Vancouver Island. All federal land is of high interest to First Nations as a result, whether or not it is in active use by government or subject to third party tenures.

The outright transfer of land parcels has numerous benefits, including building goodwill as a gesture of reconciliation. There are no holding costs associated with First Nations-owned lands, for example, and the parcels will become part of future treaty lands.

Lands subject to tenures, whether held by third parties or federal government departments, may provide much-needed revenue opportunities to some First Nations (for example, federal lands already subject to leases to third parties, or the transfer of federal lands subject to lease-backs to relevant federal government departments using those lands). Transfer of ownership also provides a built-in incentive to make progress towards concluding a treaty so as to take advantage of other treaty benefits related to the land, including governance.

When outright transfer is not possible, but it is critical to ensure the land will be available for treaty purposes, interim holding costs can be mitigated by tenure revenues.

Surplus Federal Crown Lands

When federal land is declared surplus, First Nations place high value on including it in treaty as a priority. However, the current process for dealing with such land once it has been formally declared as surplus does not meet that interest.

At present, once land has been formally declared surplus, First Nations have to compete with other potential competitors for the land, often with little success (for example, the Sto:lo were largely unsuccessful in their aspirations with respect to acquiring the DND Chilliwack lands in the Fraser Valley). This generates ill-will and a lack of faith in government commitment to the treaty process.

Conversely, giving treaty agreements the highest priority for use of those lands will build relationships and demonstrate to First Nations communities that this is a worthwhile process, and lend vigour to the negotiations process.

Findings

Incremental agreements

i. To date, options for substantive interim agreements have been very limited before Stage Five of the BC treaty process. Interim measures have typically been restricted to process (e.g. bilateral treaty-related measures addressing research and planning needs) rather than substantive measures to address the situation envisioned in Recommendation 16 of the BC Claims Task Force Report. As a result, there is little concrete success to show in the process despite close to twenty years of effort.

ii. The provincial government has recently engaged in bilateral incremental agreements, but despite the fact that cost-sharing arrangements for incremental treaty agreements were finalized in 2003, with limited

exceptions no tripartite steps have been taken to prioritize the protection of lands and resources for potential use in treaty.

iii. In the meantime increasing privatization of Crown lands and natural resources continues. First Nations raised serious concerns regarding the lack of protection of land and resources. They have been forced to watch opportunities to acquire highly desired properties slip away because they have to wait until Stage Five of the BC treaty process to enter into interim treaty agreements. Participants raised the following specific issues:

a. Despite Recommendation 16, with only one or two exceptions, governments have refused to protect or to acquire land that is important to the First Nations as part of their future treaty package.

b. Under the BC treaty process, the potential for interim land measures is held out as an incentive to move past AIP and into Final Agreement negotiations. However, it is not guaranteed.

c. On Gabriola Island, land was purchased as an incentive to conclude the Snuneymuxw AIP in 2001, which has made no progress since Chief Negotiators initialled the document. This has likely deterred governments from taking similar steps with other First Nations who are more likely to reach Final Agreement or from considering a broader approach to land banking utilizing existing federal Crown lands.

d. In the meantime, as protracted negotiations have continued over the last twenty years, First Nations in treaty have witnessed the amount of already very limited available Crown land in their territories grow ever smaller.

e. In addition, land prices have skyrocketed in parts of British Columbia. Because governments place a value on land included in the package for both cost-sharing and accountability purposes, this has had a significant impact on the ability to include sufficient land in treaty packages. Anger at this failure to protect land is compounded by the delays in the process attributed to governments, and in particular the federal government.

Federal surplus land process

iv. The federal process for dealing with surplus land is unwieldy. It is not apparent that it has been adapted to the BC treaty process to permit priority to First Nations to acquire surplus land for treaty packages, or to be involved in negotiation of the value of those lands.

v. Despite the principle that all issues should be on the table, federal Crown land that has not formally been declared surplus, even if that land is not in active use, is not currently available for inclusion in treaty negotiations. The same is true of federal land in active use, even if the First Nation is willing to

take the land subject to tenures for continued federal government or third party use of existing facilities (e.g. a long term lease).

Recommendation 7: Cost-sharing

Engage in discussions between the Minister of Aboriginal Affairs and Northern Development and the BC Minister of Aboriginal Relations and Reconciliation to review existing cost-sharing arrangements and commitments.

Steps

a) Jointly review existing cost-sharing agreements with provincial government staff.

b) Identify areas where changes may be required to address the recommendations in this report, including engagement in tripartite incremental treaty agreements, discussion of potential amendments to loan funding policy, and other issues as necessary.

Rationale

First Nations have expressed concerns from time to time that cost-sharing arrangements between the two governments inhibit flexibility in mandate development. The commitment to greater flexibility and transparency in mandate development carries with it an obligation to ensure that related cost-sharing discussions do not have the effect of constraining the creativity of the parties in developing options for treaties.

In particular, it will be important to ensure that robust cost-sharing arrangements to support incremental treaty agreements are in place as soon as possible in order to make timely progress in this regard.

Findings

i. First Nations appear to be less concerned with the impact of cost-sharing arrangements than in the early days of treaty. In large part that is because the two governments have learned from the experiences of the early years and cost-sharing negotiations are more efficient and timely now.

ii. From a federal and provincial perspective, disclosing the details of cost-sharing arrangements would distract from negotiations without any commensurate benefit to the process. Little pushback in this respect has been experienced from First Nations in recent times.

iii. To date, the provincial government has engaged in bilateral agreements, including incremental agreements, at all stages of the treaty process, including prior to AIP. The federal government does not engage in incremental treaty agreements until after AIP. There is merit in the federal government considering engaging in such agreements on a tripartite basis at any stage of the treaty process.

iv. The BC Treaty Commission has expressed some reservations that bilateral strategic agreements between British Columbia and First Nations may distract the parties from treaty negotiations. However, the Commission has also acknowledged the merits of such agreements and has endorsed the concept of tripartite incremental agreements as a means to make more rapid progress in negotiations.

Recommendation 8: Shared territory dispute avoidance and resolution

Provide resources to support effective dispute avoidance and resolution options for all First Nations affected by potential conflict relating to shared territory and overlap issues arising out of treaties, whether or not those First Nations are participating in the BC treaty process.

Steps

a) Support addressing the issue of shared territory resolution much earlier in the process than is current practice.

b) Consider increasing funding to the BC Treaty Commission to support the facilitation of discussions of shared territory between First Nations.

c) Support increased levels of rigour by the BC Treaty Commission in establishing the bases for claimed overlapping interests in shared territories, including in the acceptance of amended or new Statements of Intent, and in the facilitation of resolution of overlap issues.

d) Consider funding for all First Nations to ensure they have adequate resources to engage meaningfully in shared territory discussions.

Rationale

The issue of shared territory conflicts remains a significant problem for all three parties. Recognizing the significance of overlap issues in assessing the prospects for concluding specific treaties is essential.

The BC Claims Task Force states that First Nations should have the primary responsibility for resolution of overlap conflicts. However, to date the success rate for resolution of overlap conflicts to the mutual satisfaction of the parties concerned is low.

Providing facilitation support for discussions would at minimum assist with capacity challenges in this regard. The BC Treaty Commission clearly has a role to play in providing advice and assisting with shared territory dispute resolution, as envisioned in Recommendation 14 in the Task Force Report, in the Commission's 2010 Framework for Resolving Overlapping and Shared Territory Issues, and in its most recent Annual Report in which it states that it is a priority to assume a much larger role in this regard.

For fairness and to be effective, that role needs in my view to extend equally to non-treaty First Nations who may be affected by treaties.

Earlier engagement on this important issue is essential, especially as more and more Final Agreements are concluded. Leaving overlap disputes to be resolved post-Final Agreement results in neighbouring First Nations having little choice but to fight any provisions in the agreement they consider detrimental to their interests. In other cases, the potential for delays in conclusion of agreements arising from the refusal of other First Nations to engage in resolution of the issues is high. Earlier engagement would

provide the opportunity to seek mutually satisfactory solutions, with less cost of time and resources for all concerned.

Some overlap disputes appear to be virtually irreconcilable through discussions and a few First Nations have resorted to the courts to attempt to protect their interests. The court system is however expensive and time-consuming, and typically delivers either an all-or-nothing outcome or sends the parties back to negotiate an agreement. To date, such challenges have proved unsuccessful.

If treaties are to succeed, with the support of neighbouring communities, a more focussed and efficient process must be implemented.

Findings

i. Overlap issues can cause serious conflicts which First Nations find difficult, if not impossible to resolve on their own. The conflict between the Sto:lo Nation and Yale First Nation over access to certain sites is a well-known example.

ii. Another example is Lake Babine First Nation, who are objecting strenuously to provisions in the Yekooche First Nation's Final Agreement which they consider infringe upon their territorial rights. However, neither First Nation enjoys the resources required to engage in meaningful joint resolution of the issues.

iii. Some First Nations (including Lake Babine) feel that insufficient rigour has been applied to assessing claims by other First Nations to their territory, and that the initial acceptance by the BC Treaty Commission of all assertions of territorial rights in Statements of Intent filed with the Commission, without questioning the issue of shared or other First Nation rights, has complicated the issue of overlaps. They assert that these overlap issues did not occur before the treaty process was initiated, and believe it is incumbent upon governments to take responsibility to help resolve the resulting conflicts.

iv. The BC Claims Task Force Report anticipated the need for the Commission to provide advice on dispute resolution services available to resolve overlap issues, and the potential need for funding to carry out the necessary studies to assist in resolving overlaps.

v. In 2010, the Commission signalled its intent to become more active in dispute resolution of overlaps in its report entitled Framework for Resolving Overlapping and Shared Territory Issues, with a range of options for addressing various levels of conflict between First Nations in overlapping areas.

vi. The Commission's recommendations included additional funding, to be allocated by the Commission, to support facilitation, the hiring of expert resources, and capacity to engage in discussions on overlap. The Commission

was clear that funding should be available to First Nations outside the treaty process, a sentiment echoed strongly by the Union of BC Indian Chiefs.

vii. Participants all recognized that this is a priority that must be proactively addressed if progress towards the conclusion of treaty agreements is to be accelerated.

Recommendation 9: Expand Non-Treaty Reconciliation Measures

Develop and implement options for engagement in reconciliation measures with First Nations outside the treaty process.

Steps

a) Review opportunities outside the treaty process for initiatives relating to education, skills training, language revitalization, place name changes, aboriginal tourism, the raising of public awareness of history and culture, and roles in the stewardship of important cultural sites.

b) Work with British Columbia on cost-sharing agreements that may be required with respect to these potential opportunities for reconciliation.

Rationale

As I noted in my Interim Report to you, it is my view that improving the economic, cultural and social wellbeing of First Nations in the non-treaty environment will support the acceleration of treaty negotiations through increased capacity, improved relationships, building trust, greater wellbeing in all First Nations communities and a more positive climate of reconciliation.

Findings

i. Many First Nations expressed concerns about the difficulty of maintaining progress in treaty negotiations when they are faced with enormous challenges in terms of their financial, human resource and governance capacity needs.

ii. At the same time as they must engage in complex and time-consuming treaty negotiations, they are struggling with social and cultural challenges that include high levels of poverty, disappearing language and cultural practices, and extensive governance responsibilities for which they rarely have sufficient funds.

iii. The issue of sufficient funding arises within treaty as well, in the context of OSR discussions. OSR principles are now being applied outside treaty in the context of any self-government financing. For example, OSR has recently been introduced into the financing of First Nations operated schools in British Columbia. This has caused grave concern and is seen as yet another erosion of support for First Nations' wellbeing.

iv. At present, federal reconciliation initiatives are connected most strongly to treaty negotiations. A broader reconciliatory approach would assist in

accelerating the treaty process by building capacity, promoting goodwill, supporting cultural wellbeing and increasing the socio-economic status of First Nations.

v. A broader and inclusive reconciliatory approach may also help diminish criticism by First Nations outside the treaty process that the process is divisive, and resentment that they are excluded from some of the benefits of the process, including interim funding for various measures such as research studies and planning, as well as to support overlap resolution discussions.

APPENDIX A: Background to Common Table and Review Process

In 2007, the federal government agreed to participate in a Common Table with First Nations and British Columbia with the objective of exploring options for expediting negotiations in the British Columbia treaty process. The issues to be discussed at the Common Table have been those identified as major obstacles to concluding treaties: recognition and certainty, the constitutional status of lands, governance, co-management, fiscal relations and fisheries.

In March 2010, the federal government provided a response to the issues raised at the Common Table, indicating that the work of the Common Table appeared to be complete. However, First Nations Common Table representatives stated that they considered there was further work to be done on all of the issues. The First Nations Summit concurred with that view.

At a meeting in October 2010, the Minister of Aboriginal Affairs and Northern Development raised the potential for appointing a Minister's Special Representative to assess and report on the possibility of accelerating the conclusion of treaties with Common Table First Nations that are in the treaty process. That suggestion was received positively, and in February 2011, Jim Lornie was appointed to undertake this task and make recommendations to the Minister regarding the likelihood of accelerating negotiations and any steps required.

APPENDIX B: Consultations

First Nations:

- Ahousaht First Nation
- Ditidaht/Pacheedaht First Nations (2)
- Gitxsan
- Gwa'Sala-Nakwaxda'nw (2)
- Haisla
- Homalco
- Hul'qumi'num Treaty Group (5)
- Hupacasath First Nation
- Laich-Kwil-Tach Treaty Society (3)
- Lake Babine First Nation
- Kitasoo First Nation
- Ktunaxa (4)
- Northern Shuswap Treaty Society (4)
- Nuu-chah-nulth Tribal Council (5)
- Quatsino First Nation
- Snuneymuxw First Nation
- Sto:Lo Nation (7)
- Te'Mexw Treaty Society (5)
- Tla-o-qui-aht First Nation
- Tlowitsis First Nation
- Tsawwassen First Nation
- Westbank First Nation
- Wet'suwet'en First Nation
- Wuikinuxv First Nation

Federal Government:

- Federal Treaty Negotiating Teams – Briefed on Common Table Participants
- AANDC Policy Group – Briefing
- AANDC – Department of Justice – Briefing
- Department of Finance
- AANDC Fiscal Harmonization workshop and fiscal/cost-sharing briefings
- Senior negotiators
- Current and former Chief Negotiators and senior management, Vancouver and Ottawa
- Fisheries and Oceans Canada

Provincial Government:

- Deputy Minister Aboriginal Relations and Reconciliation
- Former Deputy Minister Lorne Brownsey (also a former senior federal treaty manager)
- Former Deputy Minister Aboriginal Relations and Reconciliation Gary Wouters
- Former and current Chief Negotiators

First Nation Summit:

- Grand Chief Edward John, Chief Doug White, Dan Smith (two meetings)
- Staff – Nancy Morgan and Howard Grant
- Attended and presented at First Nation Summit
- Met and did interviews with First Nations at Summit
- Two meetings with Chief Negotiators' caucus

Union of B.C. Indian Chiefs
Grand Chief Stewart Phillip and Executive

B.C. Treaty Commission

- Chief Commissioner Sophie Pierre
- BC Treaty Commission – Full Board
- Dan Gill, Mark Smith (staff)
- Miles Richardson, former Chief Commissioner

APPENDIX C: Bibliography of Public Documents/Resources Reviewed for Report

During the course of my investigations into constraints on progress in negotiations, I reviewed numerous documents. Those that are public include the following (not a complete list):

1. BC Claims Task Force Report, 1991.
2. Report of the BC Treaty Commission on System Overload, 1997.
3. Improving the BC Treaty Process: Report of the Tripartite Working Group, May 2002.
4. Westbank First Nation Self-Government Agreement, October 3 2003.
5. Cost-Sharing Understanding Respecting the Sharing of Resource Revenue Sharing Arrangement Costs, Government of Canada and Government of British Columbia, October 3 2003.
6. Cost-Sharing Understanding Respecting the Sharing of Treaty-Related Measures Costs, Government of Canada and Government of British Columbia, 2003.
7. A New Beginning: First Nations Jurisdiction Over Education, July 2006.
8. Report of the Auditor-General to the House of Commons: Federal Participation in the BC Treaty Process, 2006.
9. Common Table Report, prepared by the BC Treaty Commission, August 1 2008.
10. The Common Table Process: A Report to the Minister of Indian Affairs and Northern Development, Barry Dewar, October 2008.
11. Impact Evaluation of Treaty-Related Measures in British Columbia, INAC, September 15 2009.
12. Speaking Notes for the Minister of Indian Affairs and Northern Development: Canada's Response to the Common Table, August 2009.
13. Backgrounder: Funding First Nations' Participation in BC Treaty Negotiations: Senior Officials Group, Treaty Negotiations Process Revitalization Table, May 2010.
14. BC Treaty Commission Annual Report, 2010.
15. Canada—BC Cost Sharing Overview, Treaties and Aboriginal Government: Negotiations West, January 2011.
16. BC Treaty Commission Annual Report, 2011.
17. UBCIC Opposition to the Treaty Process: archival materials.
18. BC Treaty Commission and individual First Nation treaty table summaries.