

# DECONSTRUCTING THE BRITISH COLUMBIA TREATY PROCESS

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The emergent consensus of indigenous people involved with the British Columbia Treaty Commission (BCTC) is that the current process has failed. The shared rational and emotional foundation of this consensus is a realization that the Treaty Commission process is at its core morally bankrupt and driven by the twin objectives of placating natural resource industry lobbies and the coercive imposition of the federal and provincial governments' shared assimilationist agenda. It is a coherent and general conclusion among indigenous people that the failed attempt to negotiate a structural recognition of their constitutional rights to land and self-government within the BCTC is proof that the federal and provincial governments have neither the determination or sincere desire to resolve the fundamental sources of racial and political conflict that exist in British Columbia.

This is a severe and regrettable concluding statement on a process that began with so much hope for the peaceful reconciliation of the existence of indigenous peoples and contemporary Canadian society on the land we share. Yet the sombre death knell of peaceful cooperation and political reconciliation is abundantly clear to those who pay attention to news headlines, read opinions expressed in the indigenous media, listen to input from consultations at the community level, and take part in informal discussions in homes. One disappointed community negotiator from the northwest region who has been involved in the BCTC since the start of the process recently admitted that she and her colleagues had decided that it was time to quit the negotiating table and to, 'get back to asserting their rights on the ground'. The sentiment she expressed is common among those presently working in the process:

I don't care anymore. It's all a farce anyway. We'd rather spend more time with the community and in the bush anyway; it's where we should have stayed in the first place<sup>ii</sup>.

The point of clarity for indigenous community representatives is that the BCTC process is structurally and politically incapacitated; it has not been able to provide a resolution to the tense physical confrontations over jurisdiction, costly and drawn-out legal battles over the meaning and scope of Aboriginal title, and socially disruptive political conflicts over the nature of

indigenous rights that forced the federal and provincial governments to establish the process in 1991. As a potential bridging institution between indigenous people and Canadians, and as a forum for reconciling the continuing existence of indigenous nations and the Canadian state on a shared territory, the unfortunate conclusion in most peoples' minds is that the process is effectively dead.

The cause of death is clear: the federal and provincial governments' lack of integrity has killed the process – this fact has been demonstrated on a macro level in terms of reactionary policy responses to recent court decisions enhancing the recognition of indigenous rights in law, and on a micro level in the day-to-day and personal conduct of most federal and provincial representatives (whose duplicity, stupidity and arrogance are staple subjects of frustration for indigenous negotiators). As a result of this the process continues to function as a formality, but it has been gutted of any real meaning. In fact, it is quite apparent that most communities remain in the process only because of the personal stake negotiators have in continuing to meet with their federal and provincial counterparts – the process has spawned an amply staffed bureaucratic complex of its own centered in Vancouver, and has well-funded nodes located at band council offices in participating communities. The other monetary factor acting as an incentive to prop up the process is an explicit threat made by the federal government to call in loans that were extended to band councils to fund the establishment of 'treaty negotiation offices' should they quit the process.

In spite of all this, the BCTC process remains, as a matter of federal and provincial government policy, the sole avenue for indigenous communities to engage the federal and provincial governments in formal political discussions on land title and governance issues. Thus, blatant compulsion rather than any sense of hope, trust or good faith explains the indigenous peoples' continued presence in the negotiations, and is in fact the only reason the BCTC process remains a feature of the political landscape today. But the simmering discontent that prompted the establishment of the process in the first place also remains on the political landscape, and has again become a prominent feature as the BCTC process has lost all credibility. After such profound failure, in the absence of meaningful avenues of reconciliation, facing conflict and confrontation, the crucial question for people concerned with peace and justice is: What do we do now?

In looking to the future, it is clear that there needs to be a fundamental reorientation of the movement to reconcile an indigenous political existence that is distinct from that of Canada. Events have borne out the fact that, with rare exception, indigenous peoples do not accept the founding premise of the BCTC process: indigenous nations must surrender their independent political existence and ownership of their lands to Canada. In their continuing activism and opposition to this premise, indigenous peoples have clearly rejected the concept of extinguishment that under girds Canada's entire approach to what it terms reconciliation. The main lesson of the BCTC experience is that Canada must abandon its goal of domesticating indigenous nations if we are to avoid conflict and achieve the sought after peaceful reconciliation of our co-existence. In the BCTC process, reconciliation was conceived of as a final colonial act (normalizing the outcome of oppression) that would rationalize and make legal Canada's presumption of governing authority. The central fact of post-BCTC era politics is that indigenous people will not allow Canadians to erase history and build a future on their final demise as nations. After the failure of imagination, the failure of pragmatic power politics, and of interest-based negotiations within the established political order, if we are to move forward at

all, the process of negotiating a political and social reconciliation will have to conform instead to the higher principles of justice.

With the imperatives of principle and respect in mind, this paper is an attempt to provide a useful set of reflections on the intellectual, structural and political features of the BCTC process. The objective is to deconstruct the British Columbia treaty process and understand its failure as a bridging mechanism, and to outline an alternative approach to achieving peaceful co-existence and the reconciliation of indigenous nations and Canadian governments' authority in British Columbia.

### **The Philosophical Core of the BCTC Process**

One of the most serious problems with the BCTC process has been the dishonest characterization of the whole endeavor from the start. Especially in the aftermath of Canada's promotion of the Nisga'a Final Agreement as a model solution (as well as the benchmark agreement in terms of the scope of their recognition of indigenous rights<sup>iii</sup>) observers have begun to examine the labeling of the reconciliation effort as a 'treaty' process more closely. In using the term 'treaty', those who designed the BCTC made what now appears to be a transparent attempt to imbue the process with a rhetorical significance that cannot be justified in reality.

A *treaty* is, according to standard academic and political usage, a formal agreement between two or more recognised, sovereign nations operating in an international forum, negotiated by designated representatives and ratified by the governments of the signatories<sup>iv</sup>. By this standard definition, the BCTC process is not about negotiating treaties at all. In fact, when examined at its structural and philosophical core, the purpose of the process is evident: to accomplish what a United Nations report on indigenous rights recently called the 'domestication' of indigenous nationhood. In essence, the BCTC process is designed to solve the perceived problem of indigenous nationhood by extinguishing it and bringing indigenous peoples into Canada's own domestic political and legal structures with certainty and finality. The federal and provincial governments did not enter the BCTC process to negotiate treaties, which if they were pursued would usher in the start of a new political relationship between the original peoples and the newcomers to this land. Far from seeking to reestablish the nation-to-nation treaty framework which framed the indigenous-state relationship in earlier eras (and which guided the interactions between indigenous peoples and settlers in those areas where treaties for the most part were not signed, such as on the west coast and what is now called British Columbia except for Vancouver Island), the federal and provincial governments are evidently seeking to consolidate the assimilation and control they have gained over indigenous peoples and their lands since the collapse of indigenous social and political strength as a result of the mass dying by epidemic diseases – a tragedy that began to recede only in the early part of the 20<sup>th</sup> century. Thus, by consciously ignoring questions on the fundamental principles upon which Canada bases its relations with indigenous peoples, as well as basic questions of the status and rights of indigenous nations outside of Canadian law as it has evolved, the process perpetuates and is oriented towards further embedding the colonial frame of mind and practice, and all of its incumbent assumptions, prejudices and biases.

The BCTC process builds on the history of past centuries' injustices without questioning the fairness or rationale of past policies, laws or politics. It uses the present manifestation of colonialism (the state of relations with indigenous peoples and preset status of indigenous

communities) as a starting point for future discussions. There is no concept of redress, responsibility, reform or even true reconciliation in the BCTC process because there is no questioning of the Canadian assumptions about the justice of the past and the present. There is no effort to deconstruct the sources of conflict or the imposed wardship status of indigenous communities that have resulted in the basic problems of indigenous-state relations. In essence, stripped of its rhetorical 'treaty' façade, the BCTC uses a base form of manipulation of indigenous peoples' post-epidemic poverty and weakness in the attempt to validate and legitimize the conditions and structures that are an inherent part of the economic dependency foisted on them, and to achieve a final and crucial degree of control over the futures of indigenous peoples by binding and subsuming their identity and political existence to that of the Canadian state.

Given its actions on the international stage and refusal to discuss the historical roots of indigenous nationhood, Canada evidently fears real treaties with indigenous peoples, and is seeking instead to negotiate the opposite of treaties – if an essential element of treaties is a respect for the independent existence of the treaty partner and recognition of the need for a continued co-existence. The BCTC process is structured and intended, in its promotion of federal and provincial legal supremacy, to terminate the heretofore independent political existence of indigenous nations, and to force indigenous peoples to accept a politically subservient status in accord with their weakened social condition and economic dependency (conditions which the federal and provincial governments have themselves created). Canada's objectives and its fear of real treaties with indigenous peoples is evident in its strong resistance to the internationalization of indigenous issues, its denial of the validity or legal standing of previous treaties negotiated in a nation-to-nation framework and the aggressive efforts currently underway to impose legal 'extinguishment' and 'surrender' clauses in its negotiations with indigenous communities.

The pattern of using 'agreements' framed within the context of Canadian law as a substitute for mechanisms of nation-to-nation relations is relatively new. The most prominent example of the non-treaty treaty strategy employed by Canada is the Nisga'a Final Agreement – the word 'treaty' is not even mentioned in the legal agreement. The use of 'treaty,' and all the connotations it invokes, in the BCTC process is simply a manipulative tool to imbue an empty process of surrender with some sense of respect and honor. As a recent United Nations study explains in detail, 'agreements' such as the with the Nisga'a and the Inuit of Nunavut are put in place by states as a substitute for treaties; they are the mechanism used when settler governments feel sufficiently confident in the trend of assimilation to disregard the inherent political rights of indigenous peoples and impose a final internal solution to the problem of colonization. When states decide to embark on a policy built on the denial of indigenous nationhood, they promote what the United Nations report called 'agreements and other constructive arrangements'.<sup>v</sup> Previously, settler governments negotiated treaties in the full sense of the word with indigenous peoples, but these same governments now advocate 'agreements' that involve state-imposed stipulations and which embed indigenous nationhood into the state's own sovereignty.

But treaties are in fact what indigenous peoples should be pursuing. Treaties with indigenous nations are the means by which settler states gain legitimate governing authority over territory in North America. European settler governments in other parts of North America first gained their legitimate political existence out of the nation-to-nation relationships they formed with indigenous peoples. The original treaties of peace and friendship between indigenous peoples and the Dutch, French, and English peoples who settled in their territories were the

instruments of consent that allowed the colonial states to begin an existence that eventually led to their autonomous statehood.

Without such treaty relations with indigenous nations, there cannot be any legitimate occupation of territory by subsequent authorities, only colonial imposition. In British Columbia, again, substantially without treaty relations between the indigenous peoples and the settler states, the society remains in a perpetual colonialism-resistance dynamic; aside from very limited areas governed by the Douglas Treaties, there are no founding documents to validate the Crown's claim to the land.

Thus, in a de-colonized rationale unbound from the self-supporting internal logic of Canadian property and constitutional law, there is no legitimate basis for British Columbia's existence outside of racist arguments rooted in obsolete social doctrines of European racial superiority, which allow for a claim of legitimacy and authority based on the inherent right of white peoples to impose their order on non-white peoples. The compelling need for treaties in British Columbia arises from the imperative (recognized by the federal government since at least the *Calder* decision) to legitimize Canada's occupation and governance in this territory and to engage for the first time in post-colonial relations with the indigenous peoples of the land. To accomplish what would be a post-colonial project, Canada would have to transcend the framework of colonial relations rooted in racist justifications of the claimed white right to dominate and build a new relationship with indigenous peoples based on truth rather than the mythical notions of conquest, superiority and subservience which have sustained it for so long. Failing to gain the recognition and consent of indigenous peoples through treaties, Canada will suffer the consequences of maintaining colonial relations rooted not in legitimate governance but coercion and the application of force – the implication being that the inevitable development of indigenous resistance strategies will form to that order itself.

### **Structural Problems**

The BCTC process stands as a pure representation of the problems indigenous peoples have faced in attempting to overcome colonialism: racism and ignorance in the mainstream, apathy in indigenous communities, co-optation of leadership, and aggressive manipulation of the process by the state.<sup>vi</sup> An examination of the basic assumptions embedded into the process and the basic policies developed by the state to relate with indigenous peoples are illustrative of the difficulties inherent in the struggle to overcome the Canadian state's prejudice against indigenous peoples.

As with all land claims in Canada, the BCTC process is founded on a mistaken premise of Canadian law: Crown title (the principle that Canada owns the land it claims as its territory). As discussed above, where indigenous people have not surrendered ownership of the land, valid title simply does not exist outside the narrow frame of Canadian law. To assert the validity of Canadian Crown title in areas where the indigenous population has not surrendered land through treaties is to rely on a racist intellectual frame created in previous centuries. Having the modern understanding that indigenous peoples were and are human beings formed into civilised communities, how can Canada proceed without confronting the fact that those human beings never gave up the right to live on their ancestral lands? The only possible rationale is an intellectual premise that prioritises European peoples' rights over American peoples' rights. Bluntly speaking, but truthfully nonetheless, those who do not accept the idea that indigenous peoples ownership rights in their traditional territory continue unless it they were surrendered by

treaty are either ignorant of the historical reality or racists who ignore that reality in order to impose a hierarchy of rights based on outmoded and mistaken notions of an assumed conquest.

On the federal level, the state has long enforced a policy of forced assimilation of indigenous peoples, and in the wake of the Supreme Court's *Delgamuukw*<sup>vii</sup> decision, the federal government has re-committed itself to policies and programs designed to carry out the basic objective of assimilation. As stated in the federal government's own materials, the objective of federal policy is achieving 'certainty about rights of ownership and use of land and resources' by engaging in a process to 'exchange constitutionally-protected but undefined common law Aboriginal rights for constitutionally, clearly defined treaty rights and benefits'. The issue of long-term certainty is a valid concern because all agreements between nations are founded on trust. But it may be asked especially in the context of the present situation: what certainty does any accord, agreement or treaty give without a commitment of respect and honour on each side? In truth, any document is not in itself the instrument of trust, but a mere symbol of commitments made with the intellect and the heart, an object of remembrance for agreed upon principles. To be sure, certainty is an important issue; but the real question is whether it is Canadians who should be justifiably concerned with certainty in the process. It is Euro-Americans, after all, who have the dismal record when it comes to keeping their promises. So in the BCTC process, it is the particular definition of 'certainty' that is the problem – as it does not reflect the essence of trust and mutual respect, but instead it is meant to impose legal constraints and artificial limitations on an evolving relationship, capture an historical moment freezing indigenous peoples' dependency in time, and legally enshrine the present subjugation of indigenous nations.

Canada's final solution to the problem of reconciling indigenous nationhood with state sovereignty is to force indigenous peoples to do what no other people in the world must do: formally define themselves and seal their rights in a document which is not subject to evolution or alteration as the group responds to the shifting realities of the political and economic environment. This form of certainty is required to satisfy the Canadian government's interest in securing an economic and political climate that promotes corporate investment and a stable context for business on indigenous lands. In Canada, the right of self-determination for indigenous peoples exists only when its definition coincides with the interests of the state as defined by its non-indigenous constituents and corporate funders.

As if the construction of the process around a peculiar and self-serving form of 'certainty' has not guaranteed enough of a limitation, Canada has sealed the lid on a just and fair reconciliation by insisting on rigid conformity to existing domestic laws and refusing to discuss the foundational principles of Canada's sovereign claims (a crucial issue given that Crown title and sovereignty are founded on historically faulty premises and counter-factual precedents). This position would definitely lead to 'certainty' in the end– but only from a Canadian perspective, in the minds of a people who confidently state their objective as gaining certainty and control over the 'legal and political evolution' of indigenous peoples' rights. The shocking arrogance of asserting an ownership right over the identity of another people apparently being lost on Canadians! This is the basic negotiating position of the Canadian government vis-à-vis indigenous nations in the BCTC process. Certainty as a mechanism of dominion is manifested in what Canada terms protecting its 'interests' and those of the province's non-indigenous population. A closer look at the federal and provincial governments' conception of their *interests* (as stated in their policy documents and the documentation explaining their negotiating positions) further reveals the unjust colonial premises underlying the BCTC negotiations.

### *An Interest in Ensuring a Fair and Democratic Process?*

Committed to a narrow belief in the superiority of western European forms governance, Canada has forced its own particular form of democratic participation and decision-making on the negotiation process itself and the ratification of agreements and limits. The federal and provincial governments also deny the validity of indigenous forms of consultation and political representation in potential agreements, and predicate their agreement on indigenous conformity to western European notions of democratic representation as well as the Canadian Constitution's provisions on individual rights and entitlement. In this, Canadians' have once again revealed their unfounded cultural arrogance by presuming to own the proper concept of democracy – something indigenous peoples have possessed since time immemorial. The Canadian position is blind to the fact that their system of government is deeply flawed, and has been the main cause of the fragmented polity, governmental paralysis and deeply corrupt political process found in British Columbia today. In forcing an ineffective, inefficient and inauthentic governing process upon indigenous communities (yet this is not an original feature of the BCTC process, but an unthinking continuation of the logic of the *Indian Act* ), Canadians seem to have forgotten that the original people of this country were practicing indigenous forms of democratic government long before the notion of 'the people having power' had surfaced as even an ideal in Europe, and for millennia before Britain's first real experiments with non-dictatorial forms of government in North America. Indigenous people have their own systems of government, and do not believe that the modified western European form of liberal democracy set up in Canada is the best form of government, and they most certainly do not share the Canadian perspective that Canada's institutions represent a universal good. Thus, by insisting on its own standard of fairness and forms of democratic participation, Canada has in effect imposed an ethnic form of government and culturally-specific system of government on indigenous peoples; in the process the quality of indigenous rights have been degraded by their subjugation to Canadian values.

Beyond this subtle form of imperialism, which has taken some indigenous groups years to recognize as a reality within the BCTC process, the federal and provincial governments have not countered the practical problem of a mainstream mentality which views indigenous people as ethnically-different citizens who are subject to the same majoritarian principles as other groups in society. Indeed, the provincial government's overall approach to the process has encouraged this view, with the predictable result that general public opinion has been gradually shaped to form a bulwark against the recognition of (in the provincial vernacular, 'race-based') collective or individual rights for indigenous peoples that differ from those of the non-indigenous population. At this point, it has become all too apparent to indigenous groups that the insistence on protecting the general 'interest' in a 'fair and democratic' process is nothing more than a coded guarantee to the provincial electorate that non-indigenous people will have final say over whether or not and to what degree the rights of indigenous peoples are recognised. In the context of British Columbia society and politics, this is a virtual veto on progress for the bigoted and emotional majority who are irrationally attached to Canada's existing institutional structure, and for the unprincipled but organised racists that dominate the province's media, local governments and political parties.

### *An Interest in Ensuring the Affordability of Settlements?*

The countervailing argument to one rooted in the high principles and justice is that in order for there to be a settlement at all, the financial cost of settlements must be acceptable to contemporary British Columbians (putting aside, for argument's sake, the fact that people in the

province are already over-taxed and negatively inclined toward government proposals because of the huge standing problem of waste and corruption). The question of fairness should not even enter the discussion here, because no one has adequately addressed the question of compensatory damages or restitution owed to indigenous peoples by the Crown for historical and contemporary abuses, in any legal sense. Justice and fairness are not in Canadians' interest, in this case. Canada has clearly identified its 'interest' as a strictly practical one impacting on the ability of the federal and provincial governments to sell the proposed agreements to their electorates.

The Canadian government claims that it represents 'all Canadians in the negotiations' (with the apparent exception, given the adversarial approach it inevitably takes in court cases, land claims and self-government negotiations, of the citizens it claims among indigenous peoples) and that any settlement must fall within a certain financial range, one that is acceptable to the general population. This is strategic decision: framing the issues within the contemporary fiscal situation of the Canadian state. Indigenous peoples' prime objective has always been to secure the return of stolen lands; the notion of a cash settlement in lieu of land is in fact Canada's proposal, and to the degree it is accepted by indigenous groups it represents a compromise made in the context of negotiations. It is Canada that is proposing to redress historic injustices by paying cash rather than by giving back land; and it is Canada that at the same time has limited the scope of redress by claiming that the resolution must be monetarily affordable to a population already saddled with high taxes, a bankrupt government and little potential for the economic recovery of the province's resource-based economy. Indigenous groups have come to see the blatant manipulation of this position.

#### *An Interest in Imposing Taxation on Indigenous People?*

By imposing taxation on indigenous nations and individual indigenous people, Canada is insisting that indigenous people integrate into the state's system of financial administration and begin to impose taxes upon their own people. Federal policy states that 'As First Nations take on more responsibility for managing their own affairs, it is expected that the federal role will be reduced proportionately'. Theoretically, this is a good thing. But in the context of Canada's recent broad assault on the indigenous nations' independent existence, the practice in negotiating agreements in the BCTC process has been to insist that indigenous governments become the Crown's tax agents even as Canada abdicates its constitutional trust obligations and requires indigenous peoples to surrender that key remnant of their autonomy and nationhood, immunity from taxation (reflected in status Indians' legislated *Indian Act* tax exemptions). The failure of the federal and provincial governments' strategies in the BCTC is in no small part due to indigenous peoples' refusal to surrender their immunity from Canadian taxation, both as a practical consideration and as a matter of principle.

#### *An Interest in Imposing Provincial Laws on Indigenous People and Lands?*

The logic of the Canadian vision of self-government for indigenous peoples is entangling: What can self-determination and can self-government really mean for indigenous peoples if all federal and provincial laws apply on indigenous lands? The assumption that makes this requirement seem plausible is that Canada possesses a rightful jurisdiction over indigenous peoples and lands, and that self-government for indigenous communities is a simple matter of delegation. In the Nisga'a Final

Agreement, the Nisga'a nation's governing authorities operate within the larger jurisdictional frame of federal and provincial authority. But what logic demands that Canada should be the one whose jurisdiction and laws form the basis of authority within that territory? Again, as discussed above, unless a nation has transferred its lands and authority to the Crown, that nation still retains by right if not in practice all its governmental powers. In British Columbia, where no indigenous nations except for the Nisga'a and Sechelt have formally surrendered their autonomous governing powers and land ownership to Canada, a clearly rational process would have indigenous peoples negotiating the delegation of land rights and governing powers to the Crown, not the other way around. Indigenous groups have come to recognize the illogic of the BCTC process in this regard.

#### *An Interest in Guaranteeing Public Access to Indigenous Land?*

Canada has attempted to negotiate the recognition of what it calls an 'Aboriginal interest' in traditional territories; but in order to have this recognition extended, the indigenous nation must concede to the privileges of non-indigenous access and free public recreation use, continued access and use by government, business, industry, the military, and maintenance of all roads and expropriated passages through those traditional territories. Canada has also explicitly stated that the 'arrangements' resulting from the negotiations 'will not involve the exercise of Aboriginal or treaty rights in established national parks'. Thus, Canada's position is that it is in its interest to protect non-indigenous people's free and general access to indigenous lands. The implication of this is that the land that may become part of an agreement is limited to those areas not of sufficient beauty, importance or accessibility to Canadians. This watered-down notion of 'Aboriginal interest,' severely limited both in potential and scope, is most certainly not recognition of an interest based on Aboriginal rights and unsurrendered Aboriginal title. 'Aboriginal title' has become a concept gutted of any real meaning; it makes sense only in terms of a residual (read: leftover) interest once every other non-indigenous interest has been satisfied.<sup>viii</sup>

Faced with the ultimate prospect of having such a minor degree of control in their own lands, indigenous people have come to recognize how meaningless Canada's notion of indigenous self-determination is to them and what a weak an instrument it would be in the preservation of their identity and culture.

#### *An Interest in Promoting Business as Usual on Indigenous Lands?*

Canada's interest in maintaining the status quo is evidenced as well in the non-negotiable points it insists on leaving off the negotiating table. Canada states that it 'will retain final authority over the management of all fisheries,' will seek to 'minimise disruption, where possible, of all existing fisheries,' and will seek to ensure that 'holders of subsurface rights have access to settlement lands.' Simply put, it's business as usual on indigenous lands before and after any agreement in the BCTC process: mining, forestry and commercial fishing companies can continue to pillage indigenous resources and continue their destruction of the natural environment. But the federal policy goes even further: the government of Canada 'will also seek to retain those expropriation powers required to fulfil its obligations as a national government'. Indigenous people know that

in retaining legal powers to further dispossess indigenous people in the agreements, Canada' is attempting to ensure that it has the ultimate ability to enforce federal and provincial policy decisions in support of non-indigenous notions of economic development and corporate access to indigenous lands, even in the face of other lower forms of indigenous legal tenure built into the agreements. The retention of such an instrumental and situational power makes mockery of Canada's feigned interest in promoting 'certainty' and 'finality' through the BCTC process, and has helped convince indigenous peoples that the governments of Canada and British Columbia are insincere in seeking to reconcile their land rights and the mutual recognition of Aboriginal title with Crown title.

In the context of the BCTC process, as distinct from but in cooperation with the Government of Canada, the government of British Columbia has assumed responsibility for negotiating with indigenous nations those aspects of the agreements that pertain to land tenure and land use issues (among other program delivery issues in its realm of authority within the Canadian system, such as education and social services). Given the present entrenchment of the provincial government in regulating economic and other activities on indigenous lands, it is of central importance to note that British Columbia did not alter or respond in any significant way to recent Supreme Court decisions on Aboriginal title and rights (the only provincial reaction being a minor revision of its policy on consultations after the *Delgamuukw* decision). Indigenous people anticipated significant changes to the provincial land tenure system, or at least interim measures to protect their rights until agreements were concluded, as a result of court decisions that have enhanced their legal rights to meaningful consultation and compensation for resources extracted within their traditional territories. But the provincial government has retrenched itself and implemented a strategy of defiance of the law of Aboriginal title, comfortable that the general public and corporate users of indigenous lands would support a legal and physical stand against indigenous rights, and confident that indigenous groups will be worn down to accept the provincial government's authority over their lands *de facto*, as a result of the legal and political intransigence.

The basic commitments stated in the province's negotiating position support this strategy, and parallel the federal 'interests' outlined above. Combined with the federal position, the provincial policy on the BCTC negotiation process is intended to provide Canadians with an iron-clad guarantee that indigenous rights will be subsumed to the interests of non-indigenous people who have come into unlawful possession of indigenous lands or who use them without indigenous consent at present:

- No recovery of indigenous lands held by private individuals.
- Municipalities retain present legal authorities in indigenous territories.
- Non-indigenous people have access to indigenous lands.
- Non-indigenous people not subject to indigenous laws.
- No new budgetary allocations for agreements.
- Federal government pays most of the costs of negotiations and agreements.

- Non-indigenous companies on indigenous lands will be paid a settlement.
- Province keeps control resource management and environmental protection.

The province's position further limits the potential for a mutually agreeable reconciliation by putting an arbitrary cap on the total amount of land open to negotiation and by denying the right of indigenous people to re-acquire possession of traditional lands currently held by settlers. The province has also stated that tenures already granted from indigenous lands, such as commercial leases and licenses to extract resources, 'will not be expropriated as a result of treaty negotiations'. Indigenous people have asked themselves, 'What's left for us?' Indeed, a closer examination of the proposed nature of lands granted through the BCTC process settlements implies extensive controls by the provincial government.

There are three main legal characteristics of so-called 'treaty lands' under the land claims rubric and the BCTC approach arrived at in both previous settlements and the process' current structure. First, indigenous peoples must surrender their Aboriginal title to the Crown, whereupon it becomes vested in the province. Second, the provincial government has legislative power over indigenous peoples and their lands subject to the protections afforded indigenous peoples in s. 35 of the *Constitution Act, 1982*. Thirdly, under a so-called 'land selection' model, indigenous peoples retain site-specific harvesting rights or access to lands for traditional purposes in designated areas. The political implications of these characteristics are clear: indigenous identity and rights are surrendered and then delegated through the established governmental process, where indigenous people are an extreme minority, leaving no substantial or effective protection of their continuing existence as nations.

In addition to arbitrarily capping lands open to the settlement process, the federal and provincial governments have also cooperated to institute so-called 'advisory councils' of non-indigenous people and commercial interests as a means of further limiting the parameters of the treaty negotiation. The non-indigenous population and interests are represented through various established corporate, regional, special interest and local government advisory bodies, and by the provincial government's policy of accepting any input from the public on any issue related to the overall process by way of a toll-free telephone line. The organized non-indigenous interests that work with the Canadian governments to develop mandates and, in the case of local governments, sit on provincial negotiating teams is extensive and includes, for example:

- The 31-member Treaty Negotiation Advisory Committee (TNAC), includes provincial organizations whose members may be directly affected by settlements. Committee members come from business, labour, environmental, recreational, fish and wildlife groups and municipal governments.
- Local government Treaty Advisory Committees (TACs) enable local government representatives to discuss issues and interests, advise provincial

negotiators on local government issues and participate on provincial negotiating teams.

Even if viewed in an idyllic frame – as a well-intentioned effort to involve citizens directly affected by the outcome of negotiations – the end result of this input by so-called 'third party interests' is unpalatable from an indigenous perspective. On top of the limitations imposed by the basic federal and provincial positions detailed above, the Canadian governments design the general and specific mandates used by their negotiators in conjunction with the same settlers and organised commercial interests who currently occupy and use the lands being negotiated. This is unfair and indigenous people have generally refused to accept extinguishment documents and terms of surrender developed by their immediate oppressors in this manner.

The Nisga'a Final Agreement, a result of a related negotiation process with the same underlying principles and approach, is such an outright surrender, lock stock and barrel (to turn a BCTC phrase). The former BCTC commissioner Barbara Fisher has stated this fact in a succinct fashion:

In all other treaties [sic] so far entered into in Canada (with some exceptions in the Yukon Agreements), the First Nation surrendered its aboriginal rights and title in exchange for specified treaty rights. The Nisga'a Treaty [sic] does something different. Instead, the Treaty [sic] modifies the existing rights and title of the Nisga'a Nation, continues those rights as modified, and sets out to exhaustively define all of the rights that are protected under s.35 of the *Constitution Act, 1982*. The practical effect – in the sense of defining the rights that the Nisga'a Nation will exercise – is the same.<sup>ix</sup>

### **The *Delgamuukw* Decision's Effect on BCTC process?**

The *Delgamuukw* decision is generally seen as a moderately progressive expansion of indigenous rights, highlighted in the basic definition of Aboriginal title given by the court: 'the right to exclusive use and occupation of land'. The Court pronounced that Aboriginal title is 'inalienable' except to the Crown and that indigenous peoples have a constitutionally protected right to be consulted and compensated on title infringements that will affect the indigenous peoples' access to or use of the lands for purposes that are integral to their cultural survival.

But the decision's positive sounding words are deceptive. The Court has also determined that in order to access rights to land under an Aboriginal title framework, indigenous people must prove their exclusive and consistent occupation of the territory concerned from the date of the assertion of European sovereignty. Indigenous nations may gain recognition of their title to traditional lands as well as access to the rights included therein only once the onerous and multi-faceted criteria for proof of aboriginality are satisfied, and each exercise in satisfying the court-mandated proofs is site specific and limited in applicability to each particular indigenous group. Further, by the Court's definition, 'title' is not strictly-speaking 'ownership', and the resulting governing authority mandated in the decision reflects this limited conception. Indigenous peoples are in fact severely constrained by Canadian law after *Delgamuukw* in the exercise of these delegated rights within the territories to which they may be determined by the courts to possess title.

The meaning of Aboriginal title as defined in *Delgamuukw* does prevent individuals, corporations, municipalities and provinces from themselves infringing on the most important aspects of indigenous culture within traditional territories (something they have done in the past with blatant disregard for the law and morality). Yet, though it legally removes individuals, corporations and the provincial governments as agents of dispossession, the *Delgamuukw* decision is can still be seen as a mere refinement of the logic of dispossession that has lain beneath Canadian policy for generations. This point is contained in the Court's further elaboration on the nature of Aboriginal title and the lengthy list of 'valid legislative objectives' which may justify federal infringements of Aboriginal title. According to Chief Justice Lamar's majority opinion:

the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that...can justify the infringement of aboriginal title.<sup>x</sup>

The principle that only the federal government may usurp indigenous rights may be seen as progressive in the specific provincial context of British Columbia, where the provincial government has always presumed a local imperium. But stemming from the Crown's misinterpretation of ancient treaties, the Royal Proclamation of 1763 and even the *Indian Act*, the federal-only prerogative for infringement of Aboriginal title has been a legal principle for many years in other parts of Canada and has done nothing to prevent the alienation of huge areas of land from indigenous nations. In addition, the lengthy list of 'justifiable' infringements once again substantially contracts the area of actual indigenous self-governance control.

Federal government collusion with corporate interests to seize and use indigenous lands and rivers for industrial development, hydroelectric dams, transportation routes and raw resource extraction continues to be just as much a danger as gradual small-scale encroachments by individuals for settlement and pastoral or agricultural purposes. The *Delgamuukw* conception of Aboriginal title is ultimately weak because it does not afford indigenous peoples real protection from federal government land seizures. In fact, at its logical extension the decision perpetuates the faulty logic that indigenous rights can be put aside when faced with all of the traditional excuses for dispossession.

Indigenous groups in British Columbia are now starting to adhere to the general indigenous evaluation of the decision in other parts of the country. The common view of *Delgamuukw* is reflected, for example, in a recent article by long-time indigenous activist Roger Obonsawin, who wrote that *Delgamuukw* 'has done little to divert Canada from its long entrenched extinguishment goal'. Obonsawin concluded that the Canadian Supreme Court:

stopped short of actually challenging Canada's right to sovereignty on unextinguished Aboriginal lands. The effect of their decision is that a mutually beneficial accommodation is needed between a province's presumed right to Crown lands and Aboriginal title. The possibility of such a resolution however is threatened in the face of federal and provincial power plays intended to protect the interests of the 'White population.'<sup>xi</sup>

The indigenous consensus on *Delgamuukw* is further elaborated by Gordon Christie, an Inuk law professor at Osgoode Hall Law School, who has seized upon the conception of the Crown's 'fiduciary' powers embedded in the decision, and its complementary notion of an inherent limitation to Aboriginal title and rights. He argues that the decision's refinement of the law of Aboriginal title is a complicated exercise in rationalizing assimilation – it legitimizes the past frauds and abuses which have led to the occupation of indigenous lands by white settlers and the later assumption of Crown title over those lands. Far from being a progressive re-statement of reconciliation, Christie's argument demonstrates that the *Delgamuukw* decision constitutes at its root a modern yet *post-facto* Canadian justification for the illegal seizure of indigenous lands by previous generations of European colonizers.

for the entire notion of a fiduciary relationship was brought in to account for the fact that the Canadian government has seized control of Aboriginal peoples and lands. What's really troubling is that the court doesn't feel it has to consider the wrongful manner by which power was seized, both through openly deceitful practices, and by subverting the sacred agreements known as treaties. It simply accepts the contemporary power imbalance, and attempts to regulate it by means of this notion of a fiduciary relationship.<sup>xii</sup>

Further, Christie argues that the remedies prescribed by the Supreme Court to resolve the apparent conflict between Aboriginal title and Crown title are entirely reflective of the assimilationist program (in this case specific to the objective of moving indigenous people into the economic mainstream, promoting a commodification of the land, and undermining the collective nature of indigenous peoples' attachment to their traditional territories); he sees nothing more than a further elaboration of the doctrine of conquest in the logic of the vaunted 'we are all here to stay' rhetoric employed by Justice Lamar in mandating a negotiated compromise between what is existing and what should be:

Now this is the line of thought applied at the end of *Delgamuukw*...If Aboriginal land-owners really have an exclusive right to their land, then that spells out into a right to make some money. But then it's got to be controlled, and by the same mechanism used in *Gladstone*, the Crown, as the fiduciary in this situation, has in its hands fundamental power over Aboriginal lands, and so has to act as a good fiduciary is instructed to act by the Supreme Court. But in *Gladstone* these instructions were laid out. The Crown simply has to think of Aboriginal peoples as peoples with legitimate economic interests in the land. They should have the same sort of access to the economic use of the land as any other party with a valid interest in the land. They should be compensated with money when their interest is unduly interfered with. And so on.<sup>xiii</sup>

In another recent article, constitutional lawyer Kent McNeil,<sup>xiv</sup> also of Osgoode Hall Law School, recognizing the weakness of the *Delgamuukw* decision's protection of indigenous land rights, has attempted to draw attention away from a reliance on the notion of Aboriginal title to the potential of using the law itself to force courts to recognise indigenous peoples' rights to their lands. Clearly stating that *Delgamuukw* falls short of achieving the goal of legally recognizing indigenous ownership, McNeil's insight focuses on the need to overcome the latent prejudices

still evident in the *Delgamuukw* decision, including assumptions reflecting the old justification of *terra nullius* and an unwavering defence of the European right to impose a sovereign rule on non-white peoples.<sup>xv</sup> In fact, the power in McNeil's analysis is quite different than most interpretations of *Delgamuukw*. He specifically recommends staying away from assertions of Crown-defined Aboriginal title because of the political and practical complications created by Justice Lamar's formulation of the doctrine. Occupancy and assertions of ownership, both tactics McNeil recommends over assertions of Aboriginal title, have been used successfully elsewhere since the 1970's by indigenous peoples. His recommendation of bringing legal action for trespass against federal and provincial authorities as a tactic grows out of that activism, and a commitment to forcing a political-legal resolution, not a strict reliance upon the adjudication of the Aboriginal title concept developed in *Delgamuukw*<sup>xvi</sup>. This inherent and activist concept of Aboriginal title, as opposed to the derivative and sublimated *Delgamuukw* concept, has gained enormous credence in indigenous circles recently and caused many indigenous groups to re-think their participation in a negotiation process whose premises are two steps back of where the courts and leading legal scholars are telling them they should be at this point.

Despite the insufficiency of the *Delgamuukw*, it is true that the decision can be read to constrain the federal and provincial governments in their exercise of jurisdictional authority in traditional indigenous territories affected by Aboriginal title claims. In that sense, within the range of action above the status quo and below ultimate recognition of indigenous rights, the decision is of some use for indigenous groups and should have had some effect on the BCTC process. It has legally invalidated some of the basic negotiating positions taken by the federal and provincial governments.

There are three major implications for the BCTC process flowing out of the imperatives contained within the *Delgamuukw* decision: 1) interim measures to effect consultation on infringements must be implemented; 2) the 'land-selection' settlement model must be abandoned, and 3) extinguishment of Aboriginal title must not be a precondition to settlement. Yet thus far, neither the federal or provincial government has made a substantial movement away from their initial pre-*Delgamuukw* positions. The practice of granting tenures permits and licenses for resource exploitation against the stated will of the indigenous nations in lands affected by Aboriginal title claims also continues unabated despite the decision of Canada's high court against such actions.

The fact that the Crown, as represented by the two levels of government now recognized in Canada, has yet to alter its policies is a salient point *theoretically*. But *practically* speaking it is supremely important. Legal victories must be followed by action to defend the principles enshrined in the law and to ensure that politics does not lead governments away from implementing the decisions. The *Marshall* decision, out of an indigenous treaty-rights case in Nova Scotia, proved that even liberal readings of history and treaty rights will be rendered meaningless when Supreme Court decisions are gutted of any practical significance by federal and provincial governments who manipulate both public ignorance and the political situation. Thus, it is important to consider the practical ways that the apparatus of government counters the evolving law of Aboriginal title, and how government personnel (most notably in the federal and provincial Justice ministries) develop strategies to undermine even minimal court-mandated recognitions of indigenous rights.

Recent interviews conducted with provincial public servants and legal advisors to both the federal and provincial governments illustrate the depths to which both governments are entrenched in their positions. University of Alberta professor Gurston Dacks' analysis of the lack

of a substantive provincial or federal response to the *Delgamuukw* decision<sup>xvii</sup> centred on the simple question of, Why hasn't the federal or provincial government responded to *Delgamuukw*? This is of course, cognizant of the token measures put forward in terms of increased funding for the BCTC itself and a refinement of the provincial government's policy on consultation with indigenous groups. Dacks did consider what would actually constitute a substantive response, and concluded that indigenous groups were expecting two things as a bare minimum after the *Delgamuukw* decision: good faith substantial negotiations and discussions of compensation. But in his conversations with public servants involved in the BCTC process and an extensive review of documents from the negotiations, Dacks found that the federal and provincial governments have concluded that responding to *Delgamuukw* in even this minimal fashion would be too expensive politically and financially, and that the *Delgamuukw* decision in and of itself does not compel them to make any changes in the position they have held from the start of the process. So, to be clear, Dacks' research indicates both governments have taken a cost-benefit analysis and made a considered decision to engage indigenous groups in a 'war of attrition'<sup>xviii</sup>. Thus: Canada's firm position in the context of the BCTC process is that extinguishment is still the policy objective in force, and that the *Delgamuukw* decision allows it.

The two governments' strategy in the war of legal attrition is founded on the belief that Aboriginal title will be too difficult for indigenous groups to prove in court, centred on three of the crucial criteria for proof of title outlined in *Delgamuukw*: 1) 'occupation' as discussed in the decision is too vague a concept to allow easy proof. The federal and provincial governments believe that there are a number of questions that cannot be answered with any degree of clarity and which will allow government lawyers to discount any attempt by indigenous groups to establish their proof of title – what counts as occupation? What evidence may be used to prove occupation? What of coastal peoples who used land beyond 100 metres into the woods only intermittently? 2) 'Continuity' is an impossible standard when applied to the whole extent of traditional territory. The federal and provincial governments believe that it will be very difficult for indigenous groups to defend the notion of a continuous use and occupation of their territory since the onset of intense white settlement and use of the land. As well, government lawyers are confident that the notion of continuous use and occupancy as outlined in the decision will be seen by the courts to apply only to existing Indian reserves. 3) 'Exclusive' use is viewed as another improvable standard for most indigenous groups. The federal and provincial governments recognize that most if not all modern 'First Nations' pressing Aboriginal title claims were actually formed out of the collapse of true indigenous nations and are amalgamations of more than one historic group, and that the 'First Nations' are thus inherently saddled with irresolvable overlapping claims to the exclusive use of land.

Out of this analysis of the legal issues, the provincial government at least has officially (though not publicly) adopted a comfortable and confident post-*Delgamuukw* strategy based on the following conclusions and principles<sup>xix</sup>:

- a) courts will award only the approximately area of present Indian reserves;
- b) indigenous groups will eventually rationalize and accept the Nisga'a model (especially if another agreement on this model is signed soon);
- c) indigenous groups are reluctant to litigate out of fear that an adverse court decision will weaken their position in the BCTC process;
- d) court judgements will be of limited general effect and will not impact significantly on government policy, due to the specificity of each individually argued case;

- e) in being forced to litigate individually for recognition of their Aboriginal title, the financial burden and time factor will prove too costly for indigenous communities;
- f) the provincial government may win some cases.

The war of legal attrition strategy is designed specifically to force indigenous people into accepting the Nisga'a Final Agreement template, but even with the Machiavellian strategic calculus detailed above as an integral element of Canada's approach, it has been and will continue to be difficult to move indigenous groups closer toward the acceptance of the Nisga'a model. The Nisga'a surrender is generally viewed by indigenous groups in the province as an unfair trade of rights for cash. While the Nisga'a leadership continues to stand by their deal, many Nisga'a people (it should be noted that no more than 40% of the Nisga'a people voted for the agreement) and most other indigenous people do not consider the monetary package offered to the Nisga'a to be either fair or attractive. The monetary incentives offered to the Nisga'a for their surrender of land and rights (the same funding formula and ratios will be used for other groups negotiating agreements in the BCTC process) are insufficient when worked through in terms of their practical implications. Much has been made of the sum of money included in the Nisga'a Final Agreement, but the \$190 million paid to the Nisga'a tribal Council will actually work out to much less than \$150 million as lawyers' fees are subtracted from the total, and as well \$2 million per year must be repaid, with interest, to the federal government for money loaned to fund the negotiation process itself (after 6 years the annual amount may be renegotiated). The money will be paid out over 15 years, to a fast growing population which is at present standing at 5500. The Nisga'a will also get \$40.4 million for transition costs, \$11.5 million for fishing, and a \$10 million trust fund (which is cannot be touched and \$3 million of which will be contributed by the Nisga'a themselves).

If the total money owed to them in the agreement were to be paid in lump sums, the first two amounts would give them \$29,284.84 per capita in the first year, and \$1939 per capita the second year. When paid out as specified in the Agreement over a period of 15 years, they will receive \$12,513 per capita the first year, and \$2103 for the years after. Increases in the Nisga'a population reduce the amount of available money further, and with the surrender of their tax exemption status under the *Indian Act* and little economic growth potential in the Nass Valley, it is difficult to see how the Nisga'a people will find the money to survive as a nation. Most likely, Nisga'a people will find themselves having to sell off land, mineral, fish and timber rights to fund their government and social programs. As a Carleton University professor who has done an economic analysis of the Agreement has concluded, the long-term effect of the Nisga'a Agreement on the Nisga'a people is that they will most likely become 'assimilated into the mainstream [as a] dispossessed, overtaxed, lower class.'<sup>xxx</sup>

This is not the future that indigenous groups envisioned when they entered the BCTC process. And as the federal and provincial governments have failed to respond significantly to the *Delgamuukw* decision and remain committed to the imposition of this assimilative model on all future agreements, indigenous communities have simply rejected the process itself.

### **Beyond Domestication**

The BCTC process is structurally flawed and has been politically co-opted by the federal and provincial governments. It is beyond repair. In considering the BCTC process as a potential vehicle to resolve the conflicts that have plagued the province in its relationship with indigenous

peoples, it has become obvious to all but a few people who have experience working within the process that it must be abandoned; and it is equally obvious that the parties must take a substantially different route to achieving peace and reconciliation. As it stands, there is no potential for good in the BCTC framework. Beyond this, given the experience and attitude of people in most indigenous communities today, there is no chance of any agreement negotiated in the current framework ever being approved.

But having made such a conclusion and figuratively deconstructing the BCTC process – coming to understand the reasons for its failure – there still remains the question of the future, and the demand for a viable alternative. Having rejected the BCTC model and the political values it was based on, what is it that indigenous people want of the future? Put simply, in order for future agreements to have integrity in the eyes of indigenous peoples and communities, and thus constitute lasting agreements and a true reconciliation, the proposed framework for settlement must be founded on principles that resonate with indigenous peoples' core values. Thus far, only non-indigenous people's interests and values have been considered. This lack of respect and mutuality is another simple yet profound reason for the BCTC process' failure to provide a bridge to the future. Canadians must come to understand that indigenous peoples have values which should not and will not be compromised, and commit themselves to the idea that it is possible to live in harmony with indigenous people and with respect for indigenous rights.

The first step in building an alternative to the failed BCTC process is to jettison the adversarial and imperial premises that went into constructing it. There must be, on a basic level, a spiritual renewal the process of reconciliation: the goal must be re-cast from 'certainty and finality' to the achievement of a respectful co-existence between peoples, manifested in a set of mutually agreeable institutions that enshrine both the integrity of each partner, and promote agreed upon means for sharing and cooperation. Here, the values of traditional indigenous cultures are invaluable tools. Traditional indigenous cultures share a commitment to basic values in the promotion of just relationships. As the foundations of a social, political and legal relationship between peoples, a 'just relation' can be understood in terms of the achievement of a respectful coexistence – an acceptance of each others' self-determined identity, respect for each other's freedom and commitment to maintain institutions that ensure cooperative interaction and commerce. This indigenous notion of a just relation has less to do with minute considerations of money and bureaucratic authority or jurisdiction – these are the secondary and administrative mechanics that follow the more basic agreement on the terms of the relationship, and things which are easily negotiated in an environment in which people are committed to coexistence.

Specifically, what are the values that must be reflected in this new relationship if it is to be indigenous, and if the agreements that come out of that relationship are to be seen as just and lasting settlements to the problems besetting our peoples? A commitment to *peace* as manifested by the continuous struggle to work for a harmonious coexistence. Having *respect* for all human beings and the environment – honoring all of creation. The challenge of transcending the shameful history of racism, hatred and prejudice that now plagues our relationship and facing that challenge with integrity requires *courage*. And only with *honesty* can the reliance upon using shameful lies and self-serving myths to rationalize crimes of theft be abandoned.

Each one of these core values has an opposite, and if we consider how engaging in a mainstream Canadian political process has affected the indigenous people named as representatives of their communities, it cannot be denied that as a result of the confrontation on politicians' and bureaucrats' own ground, indigenous representatives have become less like their own people and more like mainstream politicians. The BCTC process, of its own logic, seeks to

complete the assimilation process on many different levels. Whatever the amount of money put on the table by the federal and provincial governments, can anything that comes out of the BCTC process be seen to be a success when the fundamental outcome goes against indigenous peoples' basic values of peace, respect, courage and honesty? The BCTC process surely aims to take indigenous people away from these values and bring them closer to the selfish materialism that dominates mainstream society. It is not peaceful: it purposefully promotes divisions among indigenous peoples and conflicts between indigenous peoples and their neighbors in the zero-sum calculus of a solution to the problem of history. It is not respectful: it denies indigenous nationhood and rights and seeks to subdue the first nations under the authority of settler governments. It is not courageous: it makes excuses for generations of crimes against indigenous peoples, and shirks away in fear from the ignorance and bigotry of the majority. It talks of honesty, yet it walks the path of lies, duplicity, and self-deception.

Yet there is a way beyond this situation that does not imply a wholesale re-education and a multi-generational time span. The high principles and values identified above can be realized in a new relationship if the reconciliation process is re-thought as the implementation of an alternative set of assumptions and premises to guide our relationships. The notion of indigenous nationhood with its independent political powers and rights for indigenous communities is not outside of the political universe in a liberal democracy, nor is it a threat to others' peace or prosperity. The United States has constitutional recognition of a form of indigenous sovereignty recognized through treaties; and New Zealand has moved to restructure itself as a bi-cultural society founded a treaty relationship between Maoris and Europeans. People simply need to transcend their socialization into a colonial mentality, and recognize the promise of letting go of their ingrained (though certainly not genetic) predisposition against the notion of indigenous people living differently, free and authentically in their homeland. The single requirement of peaceful co-existence is for Canadians to expunge the remnants of colonialism from their collective consciousness; reconciliation will happen if and when non-indigenous people begin to see their country in plural terms and as a regime of respect and toleration rather than one of assimilation, dominion and control, thus completing its transformation from a colony of Europe, to its dysfunctional present state as a colonizing force, to finally a regime of respect and toleration.

Such a transformation is within reach. There are many non-indigenous people in Canada who have transcended the colonial mentality and reflect the principles of respect and toleration in their philosophy and in the conduct of their lives. Intellectually, there are strong currents in western political thought that counter the dominant Canadian perspective and which may be accessed in the reformation of Canada's political culture to counter justifications of the status quo and to defeat arguments for assimilation. A recent essay by one of Canada's leading political philosophers, James Tully of the University of Victoria, examined the common philosophical justifications used within western political theory for the denial of indigenous self-determination.<sup>xxi</sup> In denying the validity of these false justifications, Tully reached into the western political tradition itself and used its basic precept that in international relations among independent nations, the principle of consent is paramount. Tully effectively argued that in Canada, the position of the Crown actually fails to recognize the status of indigenous nations as self-determining peoples and rather incorporates and subordinates them without justification, rendering negotiations conducted under the existing policies illegitimate. The implication of Tully's important analysis is that indigenous nations have the moral and legal right to appeal to international law to seek justice.

In the same way that Kent McNeil<sup>xxii</sup> advocates actively challenging the presumptions of the Canadian constitutional system, Tully shows that indigenous peoples can actively use the most basic principles of international law to press for self-determination and political rights including self-government. Indeed, the international arena offers the potential for a diverse series of strategies that range from charging Canada with human rights violations, to forming strategic alliances with non-aligned and other non-western states to advocate addressing the treaty issue at a higher level within the UN, or pressing for the eventual revision of the 1960 UN declaration which prohibits the de-colonization of indigenous peoples within established states.<sup>xxiii</sup>

While the *Draft Declaration on the Rights of Indigenous Peoples* remains bogged down in the UN system,<sup>xxiv</sup> Miguel Alfonso Martinez's *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* (Martinez was a Special Rapporteur for the UN Commission on Human Rights) is the strongest statement on indigenous peoples rights within UN system to date.<sup>xxv</sup> Commissioned in 1987 and completed in 1999, the *Study* offers a detailed analysis of the nature of treaty relationships between indigenous peoples and their colonizing states. Taken as a whole, Martinez's study offers a set of principles and a framework for action that is respectful of the diversity in politics, capacity and intention of the indigenous peoples, and is founded on a commitment to the truth and to reconciling the twin realities of indigenous nationhood and state sovereignty:

Any attempt to explore and understand indigenous representations and traditions regarding treaties, agreements and other constructive arrangements must be carried out so as to favor a decentred view on culture, society, law, and history, and to deal critically with ethnocentrism, eurocentrism and the evolutionary paradigm. (98)

This internationalist approach holds much promise as an intellectual and political strategy for decolonisation. Tully and Martinez' positions recognize the advantage indigenous peoples gain when Canadians are forced to justify their institutions and the relationship that exists between indigenous and non-indigenous peoples in their country to broad standards of fairness, equality and justice, as opposed to justifying them in a self-supporting internal logic constructed within the domestic legal and cultural paradigm. Stripped of the insulating layers of patriotism, socialization and self-interest, subjected to an analysis using the core principles of the western liberal tradition, and basic international standards of fairness and ethical conduct in negotiations, Canada's overall approach in relating to indigenous peoples, and specifically the BCTC process, appear in high relief as unjust. The requirements for fairness in the development of a reconciliation between indigenous rights and state sovereignty outlined in the United Nations treaty study are a) meaningful consideration of historical context, b) the true representation of indigenous nations by mandated representatives; c) the absence of duress and the free and informed consent of the indigenous people; and d) separation of the ethical issues involved with negotiating a renewed indigenous-state relationship from legal issues adjudicated by domestic courts. On all counts, Canada has thus far failed to meet basic international standards.

### *Historical Context*

To have any potential for success, a negotiation process must take place within an intellectual framework founded on a clear understanding of the particular historical context that has given

rise to the need for the negotiation. An appreciation of the historical context is not only imperative to understanding that treaties validate Canadian claims to jurisdiction in North America,<sup>xvii</sup> but to understanding that the inherent nature of the colonial undertaking and its accompanying philosophy make it intrinsically different than the expansion into adjacent territories which was common in pre-colonial North America. The context of the colonial process and the history of interaction between indigenous peoples and settlers in Canada provide the BCTC process its impetus, its meaning, and its end goal. The ahistoric frame promoted by the process lies in stark contradiction to this historically based negotiation process. If the constitutional coherence and legal validity of the Canadian state's claims of authority over unsundered lands and the injustices and illegalities of the past are not added to concerns of about the contemporary manifestation of these issues in the process, one may wonder what necessitates the negotiation process at all.

#### *Mandated Representatives*

In his discussion of the characteristics of a treaty, Martinez cites the need for mandated representatives to engage in negotiations as one of the 'commonly shared fundamental principles of treaty-making' (61). The non-recognition of this principle in the BCTC process would cause the agreements signed in this framework to be invalid in international law, and possibly within Canadian law as well, if pressed by non-*Indian Act* traditional governments or dissident groups within the indigenous community. Band councils, which purport to represent the indigenous peoples in their full international character and historic identity, are not the appropriate institutions to convey representation of the rights of indigenous nations. Land title and the right of self-determination are vested in traditional indigenous nations, and all but rare instances band councils and tribal councils do not have to legitimacy or legal capacity to affect those rights. To the extent that the band councils have in fact gained a mandate to engage in negotiations, in no case has that mandate been extended with the informed consent of the people to include the power to extinguish their nationhood or to surrender their ownership of lands.

In addition, the agreements could be invalidated because they are premised on the act of the Crown signing a contract with itself. The structure and logic of *Indian Act* precludes the validity of any agreement signed by an institution that is itself a creation of the Canadian government. Band councils enjoy no inherent or autonomous existence outside of the delegated authority of the *Indian Act*; thus an agreement in the BCTC framework would be at its root an act whereby the Canadian government is signing an agreement with an extension of itself to affect the existence and rights of another party (the indigenous nations).

#### *Non-duress with Free and Informed Consent*

The principle of non-duress requires that all parties to a treaty enter into negotiations and accept the final product of those deliberations willingly and freely without feeling coerced or otherwise forced. Martinez notes that whenever the threat of extinguishment of indigenous rights to land is an issue in a negotiation, there is an element of duress imposed on the indigenous party (143). He specifically cites the James Bay and Northern Quebec Agreement as a case where one must question the 'efficacy of treaty negotiations in a situation of economic, environmental and political duress resulting from one-sided government policies' (138). Agreements such as this, which are negotiated to address the economic and resource needs of the Canadian government rather than to end internal colonisation of or to recognize the right of self-determination of indigenous peoples, raise the spectre of duress and invalidate any BCTC agreement under

international law – indigenous communities' involvement in the BCTC process regularly sends nations into crippling debt, this introduces the issue of duress specifically as a serious consideration in the process.

Implicit in the idea of non-duress is the fundamental principle of international law already cited by James Tully: free and informed consent.<sup>xxvii</sup> Just as parties cannot be forced into an agreement, neither can an agreement be forced on them. The principle of free and informed consent seems self-evident, but its violation is embedded in a process where one side arrives at the negotiating table with 'non-negotiables' not previously agreed to by the other party. This is the situation in BCTC process negotiations.

### *Ethical and Legal Issues*

Advocates of the BCTC process and Martinez agree that the judiciary is not the proper forum to resolve the outstanding issues between indigenous peoples and their colonising nations, but for very different reasons. Martinez notes that:

with rare exceptions, the discourse of law itself, including that on treaties and treaty-making in the context of European expansion overseas and that of their successors in the territories conquered, are not impervious to anachronism and *ex post facto* reasoning, thus condoning discrimination of indigenous peoples rather than affording them justice and fair treatment. (101)

What this points to is the fact that domestic courts (including those in Canada) regularly perpetuate the myths and comfortable rationalisations of the countries of which they are a part. At an even more basic level, the indigenous 'problematique' is an ethical issue, a result of the unjust and injurious treatment of one people by another, which can only be resolved between peoples, not within the limiting confines of one peoples' rule of law.<sup>xxviii</sup> The BCTC process, as described above, seeks to promote agreements with indigenous peoples outside of the courtroom, but for reasons of perceived political and monetary expediency, not out of an ethical concern for justice.

There are some indigenous groups that have begun to test the international approach in practice. An excellent example of the potential of pursuing Canada's violations internationally and in their potential for success in at least drawing attention to issue is the recent Carrier-Sekani Tribal Council appeal to the Organization of American State's Inter-American Commission on Human Rights (IACHR). In response to a Carrier-Sekani Tribal Council's petition, the IACHR has agreed to investigate the Carrier-Sekani complaint against Canada for breach of good faith in treaty negotiations and for other human rights violations, particularly with respect to Canada's ignorance of Aboriginal title law and the province of British Columbia's granting of land rights and timber in their unsurrendered traditional territories.<sup>xxix</sup>

As with the success of the James Bay Cree in resisting further expansion of Québec's Great Whale project in their territory, indigenous women's groups forcing Canada to eliminate gender discrimination in its *Indian Act*, and the inclusion of constitutional protections for indigenous rights in the repatriation of the Canadian Constitution, it is international politics, not the confines of domestic law, that has proven to be the most appropriate forum for achieving results in advancing those indigenous political goals that present a significant challenge to

Canada beyond demands for increased recognition or entitlements. By engaging in strategic alliances and increasing awareness of the Canadian government's extinguishment policy, indigenous peoples may bring international pressure on the individuals and entities that promote those policies.<sup>xxx</sup>

## **Conclusions & Recommendations**

The BCTC process has the conclusion of politically expedient settlements as its primary and only goal while overlooking the deeper issues surrounding indigenous/non-indigenous relations in Canada. Preparing the ground for just settlements requires the restoration of strength within indigenous communities, as well as (and perhaps more importantly from a non-indigenous perspective) working to remove the prejudice and racism that continues to form the basis of the Canadian perspective on indigenous peoples. A precondition of any just settlement is a basic philosophical agreement by all parties on the nature and source of the rights of indigenous peoples. The process should be one of reconciliation, and this entails a basic agreement on the desired foundations of the reformed relationship. In fact there are different notional presumptions among the parties. As has been described above, not only are they acting according to different agendas, their agendas are completely opposite in intended effect.

For generations, indigenous peoples have maintained an historic opposition to the doctrine of extinguishment in relations with the Crown. In spite of recent agreements accepting extinguishment and the surrender of nationhood,<sup>xxxi</sup> the people of the indigenous nations remain committed to a position on their identity and rights which is in direct opposition to the basic policy of the federal and provincial governments. The three major indigenous organisations representing communities in British Columbia have publicly stated positions which, if respected in practice, will not allow them to engage the federal or provincial governments in agreements under the charter terms of the BCTC process.

The Union of British Columbia Indian Chiefs (UBCIC) has maintained the position stated in its 1976 *Declaration* that:

negotiations will be based on the principle that Native Title and Aboriginal Rights exist and will continue to exist, and that any compensation benefits, resource royalties, or payments will not be a purchase or extinguishment of Native Title or Aboriginal Rights but will be a part of an on-going and perpetual recognition of Native Title and Aboriginal Rights, that such negotiations will determine the specific methods of putting Native Title and Aboriginal Rights into practice...

This provision within the larger *Declaration* is indicative of the principled position that has prevented most Interior communities affiliated with the UBCIC from participating in the BCTC process thus far. Recall the BCTC's foundational premises: it is based on the principle that indigenous peoples' title and rights will be extinguished and then partially granted back by the Crown to be exercised under Canadian authority and with strict stipulations as a constraint. In describing this concept, the federal and provincial governments promote the use of the legalistic double-speak terms 'modify and release' in the negotiation of agreements. The UBCIC's statement clearly states the obvious: a truthful 'treaty' vocabulary would have to include the term

'surrender and assimilate' to describe the crux of what is being demanded of indigenous nations in the BCTC.

The First Nations Summit has been partnered with the federal and provincial governments in designing and promoting the BCTC and the negotiation process, but even the Summit's leadership has come to recognise that the Canadian governments' fundamental position is very far away from what can ever be justified to their people. Speaking for the First Nations Summit in October 1999, the late Chief Joe Mathias explained the wide gap between the first nations and the Canadians:

The Governments of Canada and BC have continued their attempts to force First Nations into giving up existing aboriginal rights as a precondition to negotiations. This is unacceptable. Let it be clearly stated, First Nations in BC will do everything in their power to protect their existing aboriginal rights.<sup>xxxii</sup>

In addition to the problem of principle, the First Nations Summit has identified a number of practical problems that have continued to stall the progress of negotiations. These problems have all arisen out of the conscious manipulation, duplicity and bad faith displayed by the federal and provincial governments in their conduct of the negotiations.

- Failure to provide effective interim measures.
- Failure to provide negotiators with sufficient mandates.
- Intransigence in refusing to discuss compensation issues with communities.
- Intransigence in continuing to set preconditions to negotiations.
- Failure to provide sufficient resources to the process.

This evaluation was recently reinforced by the Summit's Chief Ed John<sup>xxxiii</sup>. Although John would not renounce the BCTC process, he did re-state the frustration those cooperative indigenous leaders still involved with the process feel with the continuing intransigence of the federal and provincial governments. Putting the onus of proof of Aboriginal title upon indigenous communities, failing to provide interim measures, a continuing policy of extinguishment and the refusal to discuss compensation were all listed by John as major obstacles to progress within the BCTC process.

Shortly after John's public statement of frustration with the federal and provincial positions, the Ts'kw'aylaxw First Nation walked away from negotiations for having grown frustrated with the federal and provincial governments' unwillingness to address any of the key problems identified in this paper and above by the BC First Nations Summit, and in particular in the failure of the process to bring them some protection of their Aboriginal rights and legal interests in the lands of the Pavilion watershed, in over five years of trying. In their notice to the Treaty Commission, in addition to the political impasse, the Ts'kw'aylaxw cited an unwillingness on their part to take on further debt load to fund the unproductive negotiations.<sup>xxxiv</sup>

In January 2000 the BC Regional Vice-Chief of the Assembly of First Nations was clear in stating that the current formulation of the Comprehensive Claims Policy – the Canadian framework for negotiating Aboriginal title issues and a pillar of the BCTC process – also must be rejected:

the CCP has to respect and affirm the Aboriginal title of all First Nations. The current policy does not do so. It is designed to achieve certainty for the Crown. As such, it is focused on terminating the title of non-treaty nations. Meanwhile, treaty nations are considered as having had their title extinguished<sup>xxxv</sup>.

It has been shown in this paper that rather than responding to the BC First Nations Summit and the Assembly of First Nations' calls to save the BCTC process by revising their positions, the federal and provincial governments have in fact retrenched further into those positions and have calculated and begun to implement a strategy designed to force indigenous groups into a war of legal attrition. The governments of Canada and British Columbia have proven that they are prepared to defend their policies of assimilation and extinguishment.

Facing this political reality, indigenous leaders must be inventive, imaginative and resourceful in designing a particular strategic responses for their own nations. Uniting the indigenous responses should be a prime objective of the province's indigenous organizations. It is evident that the solution to the frustrating impasse does not lie within the framework of the BCTC process itself, or even the intellectual and political paradigm that indigenous activism has been located in thus far. Cooperating with the colonizer has not worked as a strategy of decolonisation. There is hope for achieving a true reconciliation and a lasting peaceful resolution to these problems only in transcending the entire structure of colonization: the promotion of a spiritual renewal and the internationalization of the struggle. Facing intransigence, ignorance and denial on the part of the federal and provincial governments, further discussion and negotiation would no doubt be a futile waste of financial and human resources. The time has come to stop talking and to take action. It is a time for movement, not words.

Indigenous people in British Columbia clearly have a responsibility to themselves and to the future generations to devise and implement a plan of action to counter Canada in the war of attrition the federal and provincial government's have constructed out of the BCTC process. The price of not doing so would be the eventual success of Canada's goal of assimilation and extinguishment, and the end of any meaningful indigenous political or cultural reality. The spirit of survival and energy behind any future resistance lives within each indigenous community in the province, and appropriate responses to the situation facing indigenous people in British Columbia can only be determined by the people themselves in consideration of their specific capacities and orientations. The following recommendations are cognizant of the analyses outlined in this paper, and integrate all of its key theoretic and practical points; they represent a coherent synthesis of the paper's decolonizing logic and perspective. It is hoped that these recommendations, respectfully offered, will provide at least the basics of an approach and rational strategy which indigenous leaders can draw upon in discussion of their communities' responses to the ultimate failure of the BCTC process.

***Recommendation #1:*** Withdraw from negotiating until such time as the federal and provincial governments abandon extinguishment and assimilation as policy objectives, agree to compensate indigenous peoples for lost lands, and recognize the nation-to-nation basis of the indigenous-state relationship.

***Recommendation #2:*** Reorganize and unify around traditional pre-colonial identities and governing structures.

***Recommendation #3:*** Focus internally on strengthening communities' social fabric, the recovery of indigenous languages and culture, and the development of human resource capacity by promoting higher education and skills training.

***Recommendation #4:*** Act to assert governmental powers and land rights, and work together with other indigenous nations to develop coordinated strategy to engage in direct political action to force a re-evaluation of the cost-benefit analysis supporting the federal and provincial positions.

## NOTES

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<sup>ii</sup> Personal communication to the author, February 29, 2000.

<sup>iii</sup> Federal and provincial politicians are loath to admit publicly that the Nisga'a Final Agreement is the template for land and self-government agreements for all other indigenous groups, but this has been made clear on many occasions in private and in closed meetings as part of the negotiation process. Canadian politicians disingenuously claim that each agreement will be different, when in fact the differences are only in the amount of settlement moneys, the array of federal and provincial authorities decentralized to the band level, and in the selection of lands that are specific to each group – the basic political and legal terms of all agreements are to follow a mandated form and content on core questions. In relation to the Nisga'a Agreement being a benchmark for recognition of indigenous rights: upon sealing his deal with Canada and British Columbia, Nisga'a Tribal Council head Joe Gosnell reportedly told members of the BC First Nations Summit in a closed meeting that the Nisga'a agreement was the 'high water mark' and that the federal and provincial governments had made clear to him that 'other groups were not going to get any more than this'.

<sup>iv</sup> While there is obviously no universal agreed upon wording for the definition of a treaty, this definition is drawn from the Oxford English Dictionary and is consistent with current scholarly usage. The Government of Canada has been consistent in denying full recognition and respect to treaties signed by indigenous nations with the French and British Crown, and in fact denied the legal existence and any obligation on its part to the terms of such treaties until it was forced to alter its interpretation by the Supreme Court of Canada. The Supreme Court has enhanced in a limited way the fictive denial of indigenous treaties, most notably in *R. v. Sioui*, (1990) where they suggested that an agreement between the Wendat Nation and the British authorities in the early 18<sup>th</sup> century would be a treaty for the purposes of Canadian law, but not in the international law sense. And in *R. v. Marshall* (1999) where the 18<sup>th</sup> century treaty provisions on hunting and fishing for the Mi'kmaq Nation were recognized and the federal government forced to change its policies, although it was still permitted to regulate the Mi'kmaq fishery in question. These are both consistent with the Government of Canada's interpretation of the numbered post-confederation treaties it signed with the nations between the Great Lakes and the Rocky Mountains. A case now before the Supreme Court and awaiting ruling, *R. v. Mitchell*, dealing with a provision in the Jay Treaty of 1794 guaranteeing indigenous mobility rights and

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immunity from customs duties in border crossing, will test for the first time the Supreme Court of Canada's opinion on specifically international character indigenous treaty rights. It is interesting to note that on these questions, the United States Supreme Court has long recognized the Jay Treaty's guarantees (stemming from the US Court of Appeals *Diabo* decision in 1927).

<sup>v</sup> UN Commission on Human Rights, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, Final Report by Miguel Alfonso Martinez, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51<sup>st</sup> Session, 22 June 1999.

<sup>vi</sup> The analysis of the BCTC contained herein is drawn from Taiiaki Alfred, *Peace, Power, Righteousness: an indigenous manifesto* (Oxford University Press, 1999). For complete and up-to-date information on the structure and progress of the process, see the Commission's web site: [www.bctreaty.net](http://www.bctreaty.net). Also see [www.aaf.gov.bc.ca/aaf/](http://www.aaf.gov.bc.ca/aaf/) for policy documents relating to British Columbia's treaty policy and mandates.

<sup>vii</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [hereafter *Delgamuukw*].

<sup>viii</sup> In addition, Canada has extended its notion of protecting non-indigenous people's access to sacred and culturally important material objects as well. Canada refuses to discuss the return of sacred objects or aspects of indigenous peoples' material culture stolen, seized or pilfered over the years and ensconced in private and public collections: 'Canada will seek to safeguard the integrity of collections of cultural artefacts for the enjoyment of all Canadians'.

<sup>ix</sup> Barbara Fisher, 'Impact of Land Claims and Treaty Negotiations on Land Management', paper delivered at the *Land Management and Property Development Strategies for Aboriginal Communities* conference (Vancouver, December 1999), 2.

<sup>x</sup> *Delgamuukw* at 165.

<sup>xi</sup> 'The Racist Origins of Contemporary Extinguishment Policies', *Anasazi* 6(1) 13.

<sup>xii</sup> Gordon Christie, 'The Nature of *Delgamuukw*,' *Windspeaker* (August 2000).

<sup>xiii</sup> *Ibid.*

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xiv Kent McNeil, 'The Onus of Proof in Aboriginal Title' *Osgoode Hall Law Journal* (forthcoming).

xv For more on the use of out-dated anthropological and historical 'facts' in Canadian judicial decisions, see Michael Asch and Catherine Bell, "The Impact of Precedent in Aboriginal Rights Litigation," in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays in Law, Equity, and Respect for Difference*. (UBC Press, 1997), 38-74.

xvi Although it may be interesting to consider the question of whether or not the broad powers assigned to the Minister of Indian Affairs in the *Indian Act* to dispose of and affect Indian lands would meet the criteria for justification of infringement of aboriginal title as outlined in *Delgamuukw*.

xvii Gurston Dacks, "Litigation and Public Policy: Lessons from the Delgamuukw Decision", paper presented at the Annual General Meeting of the Canadian Political Science Association, Quebec City, August 1, 2000.

xviii *Ibid*, p. 19 (Interviews with BC public servant).

xix *Ibid*, p. 12.

xx The financial calculation, economic projection and quote on the Nisga'a nation's future are taken from, Foster Griezic, 'Assimilation and Sellout: BC's Bill 51, the Nisga'a Final Agreement Act', *Anasazi* 5(3) 12.

xxi See Tully's full discussion of the development of a post-imperial political theory supporting indigenous notions of rights and nationhood in 'The Struggles of Indigenous Peoples for and of Freedom' in Paul Patton, ed., *Political Theory and Indigenous Rights* (Cambridge University Press, 2000).

xxii See discussion above.

xxiii *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 1514 (XV), 14 December 1960, GA Official Records, 15<sup>th</sup> Session, Suppl., No. 16. See principle IV, stating 'Any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. This principle is also reinforced throughout the *Draft Declaration on the Rights of Indigenous Peoples*. For a full description of international law as it relates to indigenous peoples see James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996). And for the current status of the politics surrounding the development of international legal instruments

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affecting indigenous peoples see Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Theytus Books, 1998).

<sup>xxiv</sup> Provisions of the Draft Declaration are currently being debated in a working group of the Economic and Social Council designed especially for that purpose. See Venne, *ibid*.

<sup>xxv</sup> UN Commission on Human Rights, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, Final Report by Miguel Alfonso Martinez, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51<sup>st</sup> Session, 22 June 1999 [hereafter *Study on Treaties*].

<sup>xxvi</sup> See discussion above.

<sup>xxvii</sup> See above.

<sup>xxviii</sup> See *Study on Treaties* para. 254-255.

<sup>xxix</sup> Carrier-Sekani Tribal Council, personal communication to author (February 2000).

<sup>xxx</sup> At the Union of BC Indian Chiefs' conference, 'Protecting Knowledge: Traditional Resource Rights in the New Millenium' (February 2000), Russell Barsh of the University of Lethbridge suggested that indigenous peoples should take legal action against corporations under international trade law for refusing to pay indigenous nations for the resources extracted from their territories – constituting an unfair and illegal subsidy.

<sup>xxxi</sup> Such as the Nisga'a Final Agreement.

<sup>xxxii</sup> Canadian Newswire, 'First Nations Summit challenges governments to deal honourably with First Nations in treaty negotiations,' October 29, 1999.

<sup>xxxiii</sup> Ed John, 'Aboriginals are passionate about ending acrimony', *Vancouver Sun*, August 10, 2000, A11.

<sup>xxxiv</sup> Press Release, British Columbia Treaty Commission, July 28, 2000 (Vancouver).

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<sup>xxxv</sup> Assembly of First Nations, Office of the BC Regional Vice-Chief (Satsan), *Changing Canada's Comprehensive Claims Policy: Developing a Negotiation Strategy* (January 2000), 2.