ested in how the history of native title informs current practise. The site is listed at www.aph.gov.au/library/intguide/SP/mabo.htm. The site includes direct links to: caselaw on the internet (such as the *Croker Island* decision); native title publications; media releases; and, native title institutions.

The National Native Title Tribunal have compiled the *10 years of native title* information kit. The information kit, available at www.nntt.gov.au, lists current statistics on native title agreements and determinations, and also has a chronology of caselaw and other key developments in native title. If you would like to receive a hard copy of this kit, contact the NNTT media unit at 08 9268 7315.

New staff member

Sarah Arkley has joined the NTRU as the new administrative assistant, and will be helping out on this Newsletter.

FEATURES

An update on the British Columbia Treaty Process

By Mark McMillan*

Is the treaty process that exists in the Canadian province of British Columbia in a state of flux? Has this flux has been caused by the recently elected "Liberal" government, including the Premier of British Columbia Mr Gordon Campbell who has a history of "disagreements" of views that run against the interests and rights of First Nations in Canada? This paper will give a brief overview of the history of British Columbia, the Treaty Commission, and will look at the current referendum before the people of British Columbia. The referendum relates to how the provincial government should negotiate treaties with First Nations within the borders of British Columbia.

History

Canada was not only colonized by the United Kingdom. France has had a major influence in the colonizing process of what is today – Canada. Both colonizing countries actively sought treaties between themselves and the Indigenous nations in what is now eastern Canada. One reason as to why the colonizing powers undertook to enter into treaties with Indigenous nations of eastern Canada may be attributable to the disproportionate number of Indigenous Canadians to the British and French settlers.

Brand sets outs his reasons why this was the case when he said, "Initially given superior numbers, relative equality of power and military necessity, British and French colonial authorities treated Canadian native societies as roughly equal. Only later did the first nation's "succumb to the growing power of the settler communities."'[1]

In the province of British Columbia both the provincial and Federal governments took a very different view of their respective relationships with the First Nations of British Columbia.

In 1763 the Royal Proclamation[2] decreed that only the Crown could acquire land from

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[1] Brant R 'British Columbia's approach to Treaty Settlement' in Meyers D ed. *The Way Forward Collaboration and Cooperation 'In Country'* NNTT 1995 at 131

[2] The Royal Proclamation signed by the King was the cornerstone of modern treaties. However this method of treaty making would appear to be unfair in that it requires Aboriginal nations to cede all their undefined Aboriginal rights for more defined treaty rights. This has been proved to deceptive as the 'undefined' rights are interpreted by non-Aboriginal people. The concept of Aboriginal groups "ceeding,

the First Nations and this could only be done by treaty. However, as the colony of British Columbia was not established until 1849 some argue that the Royal Proclamation did not apply as British Columbia was not in existence at the time of the Royal Proclamation. Upon the establishment of the colony in 1849, the colony was granted to the Hudson's Bay Company by royal charter.[3]

Questions still exist regarding the legitimacy of the mode of acquisition and the appropriation of First Nations' lands. The result of this confusion – and way that British Columbia has progressed – is that only small areas of British Columbia have been subject to treaties. These include small areas on Vancouver Island and a small portion of northeastern British Columbia that is covered by Treaty 8.[4]

The relationship between the provincial government and the government of Canada has also led to some of the uncertainty of the land issues relating to the First Nations. British Columbia did not join Canada until 1871 some twenty years after the colony was established and run by business, namely the Hudson's Bay Company. The British Columbia Claims Task Force Report stated:

> When British Columbia joined Canada in 1871, aboriginal people, who were the majority of the population in British Columbia, had no recognized role in political decision-making. The Terms of the Union made no mention of aboriginal title, but ensured provincial control over the creation of further Indian reserves. Canada assumed responsibility for "Indians and Lands reserved for Indians"[5]….with confederation, the First Nations of British Columbia were subjected to federal control, notably the Indian Act. The "band" system of administration was imposed on First Nations and bands were made subject to detailed supervision by federal officials. The governments outlawed the great, traditional potlatches which were the heart of the First Nations' social and political system. Throughout the province, the authorities removed children from their families and communities, and placed them in residential schools. [6]

Since the establishment of the colony in 1849 and confederation in 1871, First Nations in British Columbia have resisted much of the imposed structures and ideologies. Over time First Nations have developed political organizations, mounted court challenges, conducted blockades and held negotiations with federal governments.' This agitation over time and use of institutionalized recognition of 'rights' led to the three parties coming together in 1990 to try and forge a new way forward with respect to rights issues. This culminated in what is now known as the British Columbia Treaty Process.

BC Treaty Commission

In 1990[7] the three parties to the British Columbia Treaty process were the First Nations, the Government of British Columbia and the Government of Canada. The parties set up a task force that would advise and make recommendations that allow for the advancement of relationships between the

releasing and surrendering" is tantamount to extinguishment of Aboriginal rights, including title. The language used by governments for justifying such concepts is for the sake of "certainty".

[3] The report of the British Columbia Claims Task force that was required to report on how the three parties to a treaty process – namely First Nations, The Federal Crown and Provincial Crown- could not explain why the policies of the Royal Proclamation was not extended to areas west of the Rocky Mountains.

[4] The "numbered" treaties cover the bulk of the Canadian land mass. The numbered treaties cannot be discussed here because of space limitations; they will be discussed in a forthcoming paper. .

[5] This relates to section 91(24) of the British North America Act - the first Canadian constitution, this was later replaced by 91(24) of the Constitution Act of 1982.

[6] British Columbia Claims Task Force Report at http://www.aaf.bc.ca/aaf/pubs/bcctf/intro.htm accessed 12/05/2002

[7] The British Columbia Claims Task Force was created on 3 December 1990.

parties on issues relating to land and resources. This British Columbia Claims Task Force made 19 recommendations, one of which was to establish the British Columbia Treaty Commission[8] (the Commission). The three main roles of the Commission are:

- facilitation;
- public information; and
- funding.[9]

A formal agreement was signed creating the Commission in September 1992.[10] Importantly, from the formal agreement that created the Commission, Canada and British Columbia were required to legislate to establish the Commission.[11] The First Nations Summit passed a resolution agreeing to the establishment the Commission.

The task force report that led to the formal agreement covered many issues. The report dealt with among others:

- making recommendations;[12]
- discussion of natural resources;
- financial matters;
- how the negotiations should proceed; and
- how the BC Treaty Commission should operate.

Funding of the Commission and the process

One of the more important yet seemingly innocuous aspects of the role of the Treaty Commission is that of funding the First Nations to be in the process. This question raises serious implications for all the parties involved. The funding arrangements are contained in the formal agreement. From the agreement it is Canada's responsibility to fund the Commission "subject to appropriations by Parliament and approval by the federal Treasury Board."[13] Similarly the provincial government funds the Commission subject to legislative appropriations and "approval by the provincial Treasury Board."[14] The First Nations would appear to be in an unenviable position with respect to how they maintain, financially, their involvement within the treaty process.

The funding arrangements appear that the federal government contributes 80 percent and the provincial government 20 percent. The federal government funds their contribution by way of a combination of loans (88 percent of funding) and grants (12 percent) to the First Nations. In contrast the provincial government funds their contribution by way of a grant to the First Nations.

The way that the federal government funds First Nations to be active in the treaty process, that is through a loan system, could be challenged on philosophical, moral and legal grounds.

The federal government has authority under the Constitution to have exclusive power with respect to Indians and land reserved for Indians. What this has meant in relation to a "loan" for involvement in the treaty process underscores the true relationship between Canada and First Nations. As one of the most valuable assets that are held by First Nations is the land itself, usually land held as a reserve. If the First Nations have to use the only asset they have – the land – to be involved in the process then this makes a mockery of the federal governments obligations under the constitution. A hypothetical situation may arise where the

[8] This was Recommendation 3 of the Task Force. The other Recommendations can be found at http://www.aaf.gov.bc.ca/aaf/pubs/bcctf/conclsn.htm at pp5-6.
[9] BC Treaty Commission *FACT SHEET – Negotiation Support Funding* dated June 1, 2001. http://bctreaty.net/files/funding%20fact%20sheet.html accessed 12/05/2002.
[10] The Agreement was dated 21 September 1992. The Agreement was signed by the First Nations Summit (a coalition of many, but not all, First Nations of British Columbia), the Government of British Columbia and the Government of Canada.
[11] 2.1 (a) and (b) of the formal agreement dates 21 September 1992 states: "Canada shall introduce legislation to Parliament to establish the Commission as a legal entity to carry out the purposes of the agreement." and "The Minister of Aboriginal Affairs shall introduce legislation to British Columbia Legislature to establish the Commission as a legal entity to carry out the purposes of this agreement".
[12] There were a total of 19 recommendations.
[13] Article 5.2 of the formal agreement.
[14] Article 5.2 of the formal agreement

First Nation having agreed to be in the process – by having a loan under the auspices of the BC Treaty Commission – may have their reserve seized by the federal government in settlement of monies owed under the 'loan'.
How the above situation would play out under the current arrangements poses very vexing situations for all parties concerned. Under the current First Nations and Canadian government arrangements that exist, for a loan to be called in would require a decision of the Band Council and then the decision can only be made to dispose of the land back to the federal crown. This situation would seem to be untenable given that the federal government has social programs that are funded on the basis of the reserves. Therefore if the government is using 'loans' to coerce First Nations to be in the process then there is a risk that the underlying foundations of entering the process is flawed.

Another way that the loans may be called in is by way of with holding grant funding. Instead of Band Councils and First Nations receiving funding to implement essential programs, those funds may be diverted to repay the loans. The result is equally untenable for the First Nations involved.

Similarly, the Treaty Commission – as part of its role to control the funding to the First Nations – must turn its attention to the fact the even on a rudimentary level the onus of the First Nations to take out such 'loans' makes the power imbalance between the parties very undesirable. As funding the process is critical in any practical sense, the funding arrangements that are in place and controlled by the Treaty Commission makes it a very influential and overly powerful with respect to the First Nations' participation. How the loans and grants are structured seem to be glossed over by the literature.

Since the creation of the Treaty Commission in 1992 the total amount spent by the federal and provincial governments has been in $180 million Canadian dollars. The amount of that has been contributed by the provincial government is $36 million Canadian dollars. This money has been contributed by way of a grant to the First Nations with obviously some funds being utilised to keep the Treaty Commission functioning for salaries and other administrative costs. The federal government has contributed the remainder of the funds. As mentioned earlier the federal government provides the monies to the First Nations by a combination of grants and loans. As with the provincial government's contribution to the administrative costs of the Commission, some of the contribution of the federal government also goes to the administrative costs of the Commission.

British Columbia Referendum

When the Liberal party was elected to office in British Columbia in 2001, one of its election promises was to put a referendum to the people of British Columbia relating to how the province would proceed with negotiations in the BC Treaty Process.

The Government of British Columbia has kept its promise of a referendum. The questions that have ultimately been put to the people effectively extinguish any rights that First Nations may have within British Columbia. The questions are:

1. Private property should not be expropriated for treaty settlements.

2. The terms and conditions of leases and licences should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.

3. Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.

4. Parks and protected areas should be maintained for the use and benefit of all British Columbians.

5. Province-wide standards of resource management and environmental protection should continue to apply.

6. Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.

7. Treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighbouring local governments.

8. The existing tax exemptions for Aboriginal people should be phased out.

It is important to note that the referendum results will be binding on the Province. Even more frightening for onlookers of the process is that the decision will be made on the basis of the majority or 51 percent of the returned votes. So in contrast to Australian referendums where it requires a majority of the voters (as voting is compulsory in Australia) – effectively a result that could have serious effects on the treaty process, governmental relations with First Nations and inter-governmental relations – could be achieved with a relatively low return. As voting is not compulsory in British Columbia, this process is attracting a considerable amount of interest. As at 10 May 2002 there had been over 683,000 returned votes.[15] The referendum process was to be conducted over a six week period with votes being required to be returned by 15 May 2002.[16]

The referendum has caused, and if accepted by the people voting, will further cause, a serious erosion in the relationship that exists between the government of British Columbia, the people of British Columbia and First Nations.'

If the referendum questions are answered in the affirmative, this will have a serious impact on the treaty process itself. One of the philosophies that underpin the treaty process is for the parties to act in good faith. The question that must be asked is, can the BC Government, with a negotiating position of denial of Aboriginal rights and title, negotiate treaties in good faith?

The referendum has placed the treaty process in a state of flux. The only way that this situation can be rectified is to see a restoration of the previous positions of the three parties – including all the First Nations - to the process. That is to negotiate in good faith.

Yorta Yorta – Court Report

By Dr Lisa Strelein, NTRU

History of the case

In February 1994, the Yorta Yorta Nations began their case in the Federal Court for a determination that native title exists in relation to land and waters along the Murray River in northern Victoria and southern New South Wales.

While the traditional boundaries of the Yorta Yorta claim appear quite large, the public land where native title may still exist within those boundaries, that is, where no extinguishing acts have taken place, remains quite limited (more recent maps produced by the National Native Title Tribunal reflect this smaller area). The Yorta Yorta people have maintained a presence in the area through continuous occupation of the former settlement at Cumeragunja, and constant use of areas within the Barmah forest and along the Murray River.

The judge at first instance, Justice Olney, found that despite the ongoing presence in the area, the Yorta Yorta Nations had ceased to occupy the land 'in the relevant sense', that is, they had ceased to observe the traditional laws and customs observed by their ancestors. He found therefore, that native title could not be determined because the foundation of the claim had been 'washed away'.

The appeals

15 www.gov.bc.ca.tno

16 *ibid*