UBCIC RESEARCH
500-342 Water Street ~ Vancouver, BC ~ V6B 1B6

FEBRUARY 25, 2002 LOUISE MANDELL, Q.C. *RECOMMENDED REFERENDUM BALLOT: A LEGAL ANALYSIS*

500-342 WATER STREET • VANCOUVER, BC • V6B 1B6
TEL: (604) 684-0231 • FAX: (604) 684-5726
Email: research@ubcic.bc.ca Web: http://www.ubcic.bc.ca

Mandell Pinder
Barristers & Solicitors

500 – 1080 Mainland Street, Vancouver BC V6B 2T4
Tel: (604) 681-4146 Fax: (604) 681-0959

Recommended Referendum Ballot: A Legal Analysis

prepared by
Louise Mandell, Q.C., of Mandell Pinder
February 25, 2002

1. Introduction

The B.C. Liberals made an election promise to "give all British Columbians a say on the principles that should guide B.C.'s approach to treaty negotiations, through a one-time, Province-wide referendum. The Select Standing Committee on Aboriginal Affairs recommended 16 principles of treaty negotiations to be framed as questions to be put before the people of British Columbia. The Government has not committed itself to whether the referendum would be conducted under the *B.C. Referendum Act* (hence, whether it would be legally binding or not); however, Premier Campbell has publicly stated that the Government will be bound by the results, which will become the Province's mandate in treaty negotiations.

This opinion addresses one aspect of the debate on this referendum, which is the legality of the questions posed. In our opinion, many of the questions are unconstitutional, in the sense that the area and scope of the questions falls outside the jurisdictional powers of the Province. Should the Province accept a mandate to implement principles based on answers to the questions it has no jurisdiction to determine, the positions which will be taken by the Province at the Treaty table may very well embroil the Government in Court challenges which would open the Province up to litigation for years to come.

The Courts have said that the Governments have a duty to negotiate Treaties in good faith.[1] This is what the Chief Justice said at the conclusion of the *Delgamuukw* case:

> ...**Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.** Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... "the reconciliation of the pre-

[1] *Gitanyow First Nation v. Canada* [1999] 3 C.N.L.R. 89

> existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.[2] (emphasis added)

Yet, how can the B.C. Government conduct good-faith negotiations with a mandate to take contentious positions on questions which are constitutionally beyond its power?

In this analysis, we first set out the unique constitutional position of the Aboriginal Peoples, which establishes clear limitations on Provincial Crown title, and the Province's jurisdiction to determine the issues addressed by certain questions. We next address the problematic questions.

2. The Unique Constitutional Position of the Aboriginal Peoples

Under the constitutional arrangement, the Province's power as it affects Aboriginal Peoples and the right to land is limited in four ways. First, the Province's power is limited by unextinguished Aboriginal title, which burdens the title of the Crown. Second, Provincial legislative power is limited by the Federal Government's exclusive jurisdiction over Indians and lands reserved for Indians. Third, the Provincial legislative power is limited or controlled by the fiduciary relationship between the Crown and Aboriginal Peoples. Fourth, the provincial power is limited by Section 35 of the *Constitution Act, 1982*. We deal with each of these limitations in turn.

i) The Province's power is limited by unextinguished Aboriginal title, which burdens the title of the Crown.

The constitutional position of Aboriginal Peoples begins with the simple fact that Aboriginal Peoples were here first. The Supreme Court of Canada described Aboriginal (or Indian) title as follows:

> ...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...[3]

---

[2] *Delgamuukw v. The Queen* [1997] 3 S.C.R. 1010, para 86

When Britain settled Canada, the law governing acquisition of new territories required that the Crown respect, as legal rights, the pre-existing rights of the Aboriginal Peoples to occupy and possess their land. These legal rights continue upon the assertion of Crown sovereignty and constitute a burden on Crown title, removable through a process of treaty making. These principles – the continuation of pre-existing legal rights of Aboriginal occupation, and treaty-making to acquire these rights by the Crown – were embodied in the *Royal Proclamation of 1763* and applied throughout Canada. BC refused to give effect to these principles.

The *Royal Proclamation of 1763* states:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories **as, not having been ceded to or purchased by Us, are reserved to them**, or any of them, as their Hunting Grounds. (emphasis added)

In other words, Aboriginal Peoples are to be respected in the possession of their land until the Crown concludes treaty with them.

The Supreme Court of Canada has affirmed the pre-existing and continued right of possession which Aboriginal Peoples enjoy to their territories on many occasions:

> ...They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion...[4]

> ...when the Nishga people came under British sovereignty...they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.[5]

---

[3] *Calder v. A.G.B.C.* [1973] S.C.R. 313 at p 228
[4], *Guerin v. The Queen*, [1984] 2 S.C.R. 378, citing with approval *Johnson v. McIntosh & Wheaton* 543 (1832).
[5] *Calder v. A.G.B.C., supra* p 402

> ...Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s.18(1) of the *Indian Act*, or by any other executive order or legislative provision.[6]

The Supreme Court has also rejected arguments made by the Governments that these pre-existing rights are traditional practices, such as to pick berries or to hunt; or that these rights to land are site-specific relating only to areas of existing Indian reserves. The Court has concluded that these pre-existing legal rights are very broad rights in land.

> First, Aboriginal title encompasses the right to *exclusive* use and occupation of land; second, Aboriginal title encompasses *the right to choose* to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and third, that lands held pursuant to Aboriginal title have an inescapable *economic component.*[7]

Until extinguished, Aboriginal title is a legal burden on Crown title. This has been clearly stated in law since the *St. Catherine's Milling* case in 1888, where the Privy Council described the legal burden on Crown title in this way:

> ...there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.[8]

The constitutional burden on Crown title by unextinguished Aboriginal title was continued at Confederation by the division of powers between Canada and the Province.

Canada acquired:

> **Section 91**...the exclusive Legislative Authority ... to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say...
>
> 24. Indians, and Lands reserved for the Indians.

---

[6] *Guerin, supra*, p 379
[7] *Delgamuukw* v. *The Queen, supra*, para 166
[8] *St. Catherine's Milling and Lumber Co. v. The Queen* [1889], 14 P.C. 46, p. 55

The Province acquired ownership of Crown lands. Section 109, provided:

> **109.** All Lands, Mines, Minerals, and Royalties belonging to the several Provinces...shall belong to the several Provinces...subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

In the *St. Catherine's Milling* case, the Privy Council determined that unextinguished Aboriginal title was "an interest other than that of the Province". The Court also interpreted how Section 91(24) and Section 109 interact to give effect to the burden of Aboriginal title on the title of the Crown:

> ...the fact that the power for legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent **with the right of the Province to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.**[9] (emphasis added)

Said in another way, it is only when the Crown has rid itself of the burden of the Aboriginal title, through Treaty concluded by Canada, that the lands become open for disposition by the Province. The converse of this proposition is that if the estate of the Crown has not been disencumbered – that is – if the Aboriginal title to it has not been extinguished – such lands are **not** available to the Province as a source of revenue.

The constitutional burden of Aboriginal title on Crown title has been repeatedly upheld by the Supreme Court of Canada, as recently as 1997 in the *Delgamuukw* decision.[10]

ii) The Province's power is limited by Canada's exclusive legislative authority for Indians and lands reserved for Indians

Not only is Provincial Crown title burdened by Aboriginal title, the Province has no power to legislate in relation to Indians and lands reserved for Indians, because this power is assigned exclusively to Canada.

---

[9] *St. Catherine's Milling & Lumber Co. v. The Queen, supra,* p. 59
[10] See, for example, *Delgamuukw v. The Queen, supra,* paras 172 to 176

In the *St. Catherine's Milling* case, the Privy Council held that the Federal Government (and not the Province) had the power to accept a surrender because Canada had exclusive legislative power over Indians and lands reserved for Indians. In the language of constitutional law, accepting a surrender is at the core of Section 91(24) and the Province has no power under the constitutional arrangement to affect this core. Only Canada may do so. The Courts have concluded that the core of Section 91(24) includes Aboriginal rights in relation to land, including hunting and fishing rights and Aboriginal title. The Province has no power to define or to extinguish that core[11], and its power to affect the core is limited.

iii) The Province's power is limited by the fiduciary relationship between the Crown and Aboriginal Peoples

The *Royal Proclamation of 1763* reflected principles of British justice, which became rooted in the common law of Aboriginal title. As the Supreme Court of Canada noted:

> In respect of this Proclamation, it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America.[12]

This relationship between the Crown and Aboriginal Peoples has been described by the Courts as a fiduciary relationship. This means that Governments are bound to treat Aboriginal Peoples and their land, different from other Canadians. The Crown must safeguard and protect the Aboriginal right of occupation, and ensure a fair process if and when Aboriginal Peoples choose to give up land rights to the Crown. This is because of the legal nature of the Indian interest in land which, unlike other tenures, is inalienable, except upon surrender to the Crown. The Crown's original purpose in declaring the Indian interest to be inalienable was to facilitate the Crown's ability to represent the Indians in dealing with third parties and to prevent the Indians from being exploited.[13]

---

[11] *Delgamuukw v. The Queen, supra*, at para 177; *Paul v. Forest Appeals Commission*, 2001, B.C.C.A. 411
[12] *Calder v. A.G.B.C., supra*, p. 395

The Supreme Court has described this fiduciary relationship as non-adversarial, and always involving the honour of the Crown:

> ...the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[14]
>
> ...The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake.[15]

And so, the Province's power is limited in the sense that the Province may not act contrary to this fiduciary relationship.

iv) The Province's power is limited by Section 35 of the *Constitution Act, 1982*

Aboriginal rights are entrenched in the *Constitution*. Section 35(1) provides:

> Part II
> Rights of the Aboriginal Peoples of Canada
>
> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

As the Supreme Court has pointed out, the entrenchment of Aboriginal rights was remedial, designed to bring a measure of justice to the history of the Government's disregard of the legal rights of Aboriginal Peoples.

> For many years, the rights of the Indians to their aboriginal lands – certainly as legal rights – were virtually ignored...
>
> ...It is clear, then, that s.35(1) of the *Constitution Act, 1982,* represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights...Section 35(1), at the least, provides a solid constitutional base upon which subsequent

---

[13] *Guerin v. The Queen, supra,* at page 376
[14] *R. v. Sparrow* [1990], S.C.R. 1075 at 1108
[15] *R. v. Vanderpeet* [1996] 2 S.C.R. 507 at 536-537

> negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power...[16]

The Supreme Court has concluded that Aboriginal title is incorporated in Section 35(1) and enjoys constitutional status and protection:

> ...Aboriginal title at common law is protected in its full form by s.35(1).[17]

The Court also has concluded that the fiduciary relationship is entrenched in Section 35(1).

> ...Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.[18]

The Courts have created the shape of the relationship between Aboriginal Peoples and the Crown to be governed by Section 35 of the *Constitution Act*. This relationship continues the constitutional features discussed above – the limits on Provincial Crown title by unextinguished Aboriginal title and the limits on the Province's jurisdiction by Section 91(24). But, the Court has articulated in more detail how Aboriginal Peoples and the Crown can co-exist together, with Aboriginal rights accommodated when the Province wants to grant interests in land to others.

The co-existence is based on a recognition that Aboriginal Peoples have broad rights in land, including the right to make decisions about how the land is to be used. The Province can infringe Aboriginal title and other rights to land under certain circumstances, which we summarize.

1) The infringement must be for a compelling and substantial objective, which must accommodate Aboriginal and non-aboriginal interests

> ...compelling and substantial objectives were those which were directed at either one of the purposes underlying the recognition and affirmation of Aboriginal rights by s.35(1), which are...:

---

[16] *R. v. Sparrow* [1990] 1 S.C.R. 1075, p 1103, 1105
[17] *Delgamuukw v. The Queen, supra,* para 133
[18] *R. v. Sparrow, supra,* p 1109

> the recognition of the prior occupation of North America by aboriginal peoples or...the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.[19]

2) The infringement must be consistent with the honour of the Crown. The Court spelled out the steps that the Province must take for the infringement to be lawful:

(a) Aboriginal Peoples must be given a priority in decisions affecting natural resources:

> ...What is required is that the government demonstrate "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of Aboriginal title in the land.[20]

(b) Aboriginal Peoples must be properly consulted:

> ...There is always a duty of consultation...The nature and scope of the duty of consultation will vary with the circumstances...**consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue.** In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.[21] (emphasis added)

(c) Aboriginal Peoples must be compensated for infringements to their interests in land:

> ...In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is

---

[19] *Delgamuukw v. The Queen, supra,* para 161
[20] *Delgamuukw v. The Queen, supra,* para 167
[21] *Delgamuukw v. The Queen, supra,* para 168

infringed.[22]

Although the Province can infringe Aboriginal title and rights, it still may not intrude on the core of Section 91(24); nor may it grant interests in land it does not own. Crown title remains burdened by unextinguished Aboriginal title.[23]

What the Privy Council said in the *St. Catherine's Milling* case bears repeating:

> The fact that the power of legislating for Indians and [their lands] has been entrusted to...Parliament is not in the least degree inconsistent with the right of the province to a beneficial interest in these lands, *available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.*

Before a province can treat land that is subject to Aboriginal title as a source of revenue, the federal government must first extinguish, or obtain a surrender of, Aboriginal title. British Columbia avoided this effect by maintaining that B.C. was *terra nullius* – that there was no Aboriginal title in British Columbia which needed to be extinguished. Aboriginal Peoples were clearly present in B.C. before the assertion of sovereignty, but the Government's *terra nullius* argument was based on Aboriginal Peoples being so low on the scale of civilization that their rights to land need not be taken into account.

The Province gave effect to its position of *terra nullius* for more than one hundred years. The Province argued this position in the *Calder* case. In 1970, Davey, C.J.B.C., in the *Calder* case, rejected the plea of the Nisga'a for a declaration that their Aboriginal title in the Nass Valley had not been extinguished in the following terms:

> . . . the Indians on the mainland of British Columbia . . . were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property.
>
> I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind

[22] *Delgamuukw v. The Queen, supra,* para 86
[23] *Delgamuukw v. The Queen, supra,* paras 173-183

> that it should be assumed that the Crown recognized them when it acquired the mainland of British Columbia by occupation.
>
> If I be wrong and the Indians of British Columbia did acquire any aboriginal rights, I agree with my brother Tysoe that the historical and legislative material which he has cited shows they have been extinguished.[24]

This decision, and its Reasons, were firmly rejected by the Supreme Court of Canada, in 1973. Aboriginal title came out of legal eclipse and the Supreme Court unanimously held that Aboriginal title existed in British Columbia, and that it survived the assertion of Crown sovereignty. But, the Court divided on whether Aboriginal title had been extinguished.

The Province's response was to maintain a position that the *Calder* case stood for the extinguishment of Aboriginal title in British Columbia. The B.C. Court of Appeal in 1996, in *MacMillan Bloedel v. Mullin*, and in *R. v. Sparrow* put an end to the Province's reliance on this interpretation of *Calder*, and held that the jurisprudence leaves open for decision the question of the extent of Aboriginal title in British Columbia.

Yet, the Province continued to deny the existence of any Aboriginal title in British Columbia, arguing that Aboriginal title had been extinguished in British Columbia. Various new extinguishment arguments were advanced from 1986 to 1997, until in *Delgamuukw*, in 1997, all these extinguishment arguments were rejected by the Supreme Court.

In *Delgamuukw*, the Supreme Court created the shape for a relationship based on coexisting titles and accommodation. From an Aboriginal perspective, the relationship was not perfect; the Governments had power to infringe Aboriginal title, but the Court provided a path for a better future, and Aboriginal Peoples looked forward to the application of accommodation principles articulated in *Delgamuukw* in the Province's decisions regarding natural resources and through treaty making.

---

[24] *Calder v. A.G.B.C.* (1970) 74 W.W.R. 481, pp 483 and 486

Yet, once again, the Province ignored aboriginal title by maintaining that the *Delgamuukw* decision does not apply until a First Nation proves their title in Court. This position has recently been rejected by the B.C. Court of Appeal[25], where the Court concluded that the duty to consult arises **before** an Aboriginal Nation proves their rights or title in Court. The B.C. Court of Appeal, in the *Taku* case, concluded that the Ministers, in making decisions affecting Aboriginal rights and title,

> ...had to be "mindful of the possibility that their decision might infringe aboriginal rights" and, accordingly, to be careful to ensure that the substance of the Tlingits' concerns had been addressed.[26]

What the Court said in the *Taku* case had been said by the Supreme Court in *Sparrow* (decided in 1990), and it is consistent with the law governing Canada since 1763; but, British Columbia has not departed from its policy of denial and non-recognition.

Now, the citizens of this Province are being asked by the Government to justify the continuation of positions the Province has taken for over a century to deny Aboriginal Peoples' rights -- their right to occupy their land - positions which have been repudiated by the Supreme Court of Canada.

3. The Specific Questions

With this constitutional background in mind, we review below some of the questions on the recommended Referendum ballot.

We deal first with the "Whereas" clauses.

Whereas, the Government of British Columbia has committed to providing the public with a one-time, Province-wide Referendum vote on the Provincial principles guiding treaty negotiations.

---

[25] *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* [2002] B.C.J. No. 155

[26] *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, *supra*, para 193

The power to conclude treaty rests with Canada, not with British Columbia, because treaty-making is at the core of Section 91(24). This Whereas clause does not bring this constitutional fact to the public's attention. Further, this Whereas clause fails to mention that there are already legal principles guiding treaty negotiations, which have been part of the common law since at least 1763, and which cannot now simply be ignored. These principles can be summarized as follows:

- Aboriginal Nations are under the protection of the Crown. This means that British Columbia cannot treat Aboriginal Peoples as if their rights are at the Province's pleasure.
- Aboriginal Nations are not to be "molested or disturbed" in the territories they occupy, which are reserved for them. This means that British Columbia cannot simply ignore the rights of Aboriginal Peoples or choose what rights, if any, they will seek a mandate to respect. Until treaty, their rights of occupation must be respected.
- The Crown must conclude treaty to unburden Crown title. This means that, until treaty, the Province does not have full power to dispose of the resources of the Province and third-party interests derived from the Crown remain uncertain as to their scope and legal effect.

These principles are obligations on the Crown, assumed when the Crown asserted sovereignty in British Columbia. They are not principles which can be altered or abrogated by public opinion.

Whereas, a clear definition of Aboriginal rights and title and new relationships with Aboriginal Peoples are best established in treaties.

An old B.C. excuse for not recognizing unextinguished Aboriginal rights and title has been B.C.'s claim that Aboriginal rights and title are so vague so as to make it impossible to give effect to "uncertain rights". This drove Aboriginal Peoples to the Courts to have their rights defined. After three decades of litigation, the Supreme Court, in *Delgamuukw*, has now clearly

defined both the nature and scope of the rights and the rules to govern the relationship between Aboriginal Peoples and the B.C. Government.

In *Delgamuukw*, the Chief Justice took great pains to state that he was defining the rights because this had not been done in previous cases:

> ...Although cases involving Aboriginal title have come before this Court and Privy Council before, there has never been a definitive statement from either court on the *content* of Aboriginal title...
>
> ...I have arrived at the conclusion that the content of Aboriginal title can be summarized by two propositions: first, that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land...[27]

As discussed in the earlier section, the Court also laid down clear guidelines as to the circumstances under which an infringement of this right could be legal.

The Province does not tell the citizens of British Columbia that the Court has already spoken, and that they do not have a mandate to define the rights and relationship contrary to the law, which is now clearly established.

While there remain a large number of issues which can and should be determined by treaty, the definition of Aboriginal rights and title and the shape of the relationship between Aboriginal Peoples and the B.C. Government are not some of those issues. The real question for Treaty talks is how to implement the rights and the relationship the Courts have taken great pains to articulate.

---

[27] *Delgamuukw v. A.G.B.C., supra,* paras 116 and 117

Whereas, the Canadian *Constitution* and *Charter of Rights and Freedoms* will continue to apply equally to all British Columbians.

Non-aboriginal Canadians were not here first; they do not have pre-existing legal rights that survived the assertion of sovereignty, and they do not have collective rights to land and to law-making institutions of government that are entrenched in the *Constitution;* nor is their relationship to the Crown fiduciary in nature.

The individual rights entrenched in the *Charter of Rights and Freedoms* will apply differently in the context of the collective rights of Aboriginal Peoples. This is what the *Charter* says. Section 25 of the *Charter* provides:

> Aboriginal rights and freedoms not affected by Charter
>
> **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired:..

It is a complex question to determine how *Charter* rights and Aboriginal rights interact, and negotiations to conclude a treaty are a good forum to address such issues. However, the Province cannot offer to the people of British Columbia the possibility of providing a mandate which is contrary to the express terms of the *Constitution*.

We deal now with the questions as framed.

Openness # 3: Local government participation in the treaty process is guaranteed.

This issue raises two problems. One is the issue, already discussed, that the power to conclude Treaty lies with Canada. When the British Parliament debated the question of which level of government (Provincial or Federal) should be entrusted with jurisdiction to maintain Crown obligations to Aboriginal Peoples, the conclusion was that the Province should not have the

power because local interests are in conflict with the duty of the Crown to protect Aboriginal Peoples. The Report from the Select Committee on Aborigines (British Settlements), 1837, concluded

> The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Government, as administered either in this country or by the Governors of the respective Colonies. **This is not a trust which could conveniently be confined to the local Legislature.** In proportion as those bodies are qualified for the right discharge of their proper function, they will be unfit for the performance of this office. For a local Legislature, if properly constituted, should partake largely of the interest, and represent the feeling of settled opinions of the great mass of the people for whom they act. But the settlers in almost every Colony, having either disputes to adjust with the native tribes, or claims to urge against them, **the representative bodies is virtually a party, and therefore ought not to be the judge in such controversies.**[28] (emphasis added)

The Province now not only wants a mandate to determine matters in the Treaty process which should not "conveniently be confined to the local legislature", but asks for a mandate to include a subordinate local legislature, the municipal governments which the Province created by Provincial statute. This mandate goes far beyond the Province's jurisdiction.

A further legal problem arises with this question. It is the problem of fair dealings and good-faith negotiation. Aboriginal Peoples who have participated in the British Columbia Treaty Commission ("B.C.T.C.") process have borrowed multi-millions of dollars to negotiate a treaty, based on terms for the B.C.T.C. process, which had been agreed to through tri-lateral negotiations between the Federal Government, the Province and representatives of Aboriginal Peoples. This agreement was reflected in the Task Force Report on which the B.C.T.C. process is based. Recommendation #10 specifically states that third parties should **not** have an independent seat at the Table.

---

[28] U.K. Select Committee on Aborigines, *Report from the Select Committee on Aborigines (British Settlements): With the Minutes of Evidence, Appendix and Index. Ordered, by the House of Commons, to be Printed, 26 June 1837* (London: [s.n.]. 1837) at 77 [hereinafter Select Committee]. Found also as "report from the Select Committee

If the proposed question means that the Province wants to create an independent seat at the table for local governments (over and above their participation, which is already guaranteed as part of the B.C.T.C. process), this will contravene the agreement upon which the Treaty process is based. This could be an expensive about-face. To the extent that any of the founding principles for the B.C.T.C. process are changed, without the consent of the affected Aboriginal Peoples, a legal challenge is invited to question whether money borrowed in reliance of a process which has now been unilaterally changed by one party must be repaid. In our opinion, it would be open to Aboriginal Peoples to challenge whether they must "pay back" borrowed money when the terms for the negotiation process have been unilaterally changed to their detriment.

Property and Interest Issues #4 – Private property is not negotiable unless there is a willing seller and willing buyer.

How Aboriginal title and the interest of those who hold fee simple title can or cannot co-exist is a complex one. The Courts have held that certain Aboriginal rights can co-exist with fee simple. For example, certain hunting rights can co-exist on private property[29]. Courts have also granted injunctions preventing holders of land in fee simple from using the land, inconsistent with treaty rights.[30]

Generally, Aboriginal Peoples have been sensitive to ensure that their neighbours who hold land in fee simple are not affected in their efforts to have the Crown recognize and respect their rights. For example, in the *Delgamuukw* case, the Aboriginal Peoples in that litigation exempted fee-simple interests from the relief sought in the case. However, there will be instances in the Province where a fair settlement must consider private lands, such as where sacred areas are located on private lands, or where a private land owner (or owners) occupy the vast extent of an Aboriginal Nation's traditional territory.

---

on Aborigines (British Settlements)" in *Irish University Press Series of British Parliamentary Papers, Anthropology Aborigines,* vol. 2 (Shannon, Ireland: Irish University Press. 1968), session 11837.

[29] *Regina v. Bartleman* (1984) 55 B.C.L.R. 78 (B.C.C.A.)

[30] See, for example: *Saanichton Marina Ltd. v. Claxton,* (1987) 18 B.C.L.R. (2d) 217 (B.C.S.C.)

In *Delgamuukw*, the Province argued that a grant in fee simple extinguished Aboriginal title. The Court rejected this argument both because Provincial Crown title was burdened by Aboriginal title under Section 109 and also because the Province lacks the power to extinguish Aboriginal title because of Section 91(24).

This question, in effect, asks the citizens of British Columbia to provide a mandate contrary to the decision of the Supreme Court of Canada on an issue which was legally contentious for over a decade, and where the Courts decided the issue against the Province.

Question #5: Continued access to hunting, fishing and recreational opportunities will be guaranteed for all British Columbians.

Hopefully, there will be sufficient resources available in the Province for all British Columbians to have access to hunting, fishing and recreational opportunities. However, the Supreme Court in the *Sparrow* case confirmed that because of the entrenchment of Aboriginal fishing rights in the *Constitution,* and flowing from the fiduciary relationship, the Government must give effect to a priority in its management of the resource, as follows:

- First, the resource is managed for conservation;
- Second, the requirements of Aboriginal Peoples to fulfil their constitutional rights are met;
- Third, others share in the resources.

The question, as posed, suggests that even if the resource is incapable of sustaining itself, and fulfilling the rights of Aboriginal Peoples, nevertheless, all British Columbians should share in what little there may be. This question runs contrary to the priorities established by the Supreme Court of Canada.

Question #6: The Province will maintain parks and protected areas for the use and benefit of all British Columbians.

This may or may not be problematic, depending upon the history of the park. Some parks have been created without consultation with First Nations, in violation of what the Court in the

Delgamuukw and the *Taku River* case has determined must occur. These decisions establishing parks will need to be reviewed and proper consultation occur. After consultation, some of these lands may or may not remain park lands, depending on the outcome of the Province substantially addressing the concerns of Aboriginal Peoples. The Courts have been clear that it is bad-faith negotiation for the Government to create a park without proper consultation, when the lands are the subject of land-claims negotiations.[31]

Question #7: All terms and conditions of Provincial leases and licences will be honoured.

Because the Province had disregarded Aboriginal rights and title for a century and has refused to accept a duty of real consultation, there are now many third-party leases and licences granted by the Province, which are probably illegal. Not all leases and licences are problematic, but some will need to be reviewed because, by their terms, the tenure granted has the capacity to create further injustice to Aboriginal Peoples extending well into the future.

For example, long-term forest tenures, such as tree-farm licences, grant exclusive rights to a company to completely transform the landscape from old-growth forest to 90-year rotational crops without any benefit to Aboriginal Nations over many decades.

The mandate the Province seeks suggests that all tenures, no matter how completely they prevent any accommodation of the interests of Aboriginal Peoples should continue.

Question # 9: The Province will negotiate Aboriginal government with the characteristics and legal status of local governments.

These two governments are different in origin and purpose. Local governments are created by Provincial statute. Aboriginal governments arise from the pre-existing laws and legal institutions of Aboriginal Peoples and are not created by statute or governmental recognition. Local governments manage the business of municipalities, as these powers are delegated by the Province. Aboriginal governments carry forward the laws and institution of Aboriginal Peoples

[31] *Nunavik Inuit v. Canada* (1998) 164 D.L.R. (4th) 463 (F.C.T.D.)

maintaining their cultural survival as distinct peoples on their territories. The Province has full jurisdiction to create a municipal government and no jurisdiction to define an Aboriginal government.

The Province lost its legal challenge in the *Campbell* case[32], where it argued virtually the same legal position that is assumed in this referendum question. The Court affirmed, among other things, the continuation of a right of self-government in Aboriginal Peoples, who were recognized as political communities, whose law-making powers could not be illegally intruded upon by the Governments. The Province's referendum question runs contrary to this decision.

Question # 11: Province-wide standards of resource management and environmental protection will continue to apply.

The Supreme Court of Canada has taken great pains to define principles for reconciliation, which should assist the parties in negotiating the terms of treaty. The mandate the Province seeks, in effect, requires that whatever laws First Nations' governments pass must conform to laws passed by the Province. This is not reconciliation. Aboriginal laws will likely be tougher in the area of environmental standards, and will require more sustainability of the resource in areas of resource management. This conclusion is in keeping with Aboriginal Peoples' cultural preoccupation spanning centuries to teach and practice respect and protection of the land; it is also in keeping with the definition of Aboriginal title, as determined by the Supreme Court of Canada, that the land cannot be used in a manner which is unsustainable for future generations.

The Province's question undermines the Courts' careful articulation of reconciliation principles and stands to deprive all of British Columbia with the contribution Aboriginal Peoples can make to preserve the landscape of B.C. for future generations.

Question #13: Affordability should be a key factor in determining the amount of land provided in treaty settlements.

No land is "provided" in treaty settlements. Aboriginal Peoples have a legal right to occupy and possess their land. Treaties can determine areas over which Aboriginal Peoples will have exclusive rights, and areas over which certain shared rights and jurisdictions will operate. But, to say that a treaty "provides" land is to turn the doctrine of Aboriginal title on its head.

Question #14: Treaties must ensure social and economic viability for all British Columbians.

The necessity for treaties arises from colonization and the laws governing the Crown when this land was settled. Today, treaties must also address historic wrongs and provide a path for Aboriginal Peoples to come out of the shadows of economic marginalization that has been created by the Government policies of denial of benefits to Aboriginal Peoples from their lands and resources. Treaties are not legally about benefiting the economy of British Columbia, although some studies indicate that this is a likely consequence.

Question #15: The existing tax exemptions for Aboriginal People will be phased out.

The jurisdiction to govern taxation exemption is squarely within the domain of Canada under Section 91(24). The Federal Government has legislated in this area through the provisions of the *Indian Act*. The Province has no jurisdiction in this area.

Summary

The questions are as problematic not only for what they include, but also for what they exclude. Many of the questions are recycled positions which the Province has advanced through the Courts, and which have been resoundedly rejected by the Supreme Court of Canada.

---

[32] *Campbell v. B.C. (A.G.)* [2000] 4 C.N.L.R. 1

Absent is any reference to a mandate to give effect to Crown obligations owed to Aboriginal Peoples or to try to do justice to a century of denial of rights and title; nor is there a mandate to take steps as can be negotiated to ensure the survival of distinct First Nations within their territories - by focussing on language survival, or to facilitate education for non-aboriginal people about Aboriginal Peoples, and provide access to higher education for Aboriginal Peoples. The right of self-determination is entirely absent from the mandate. Nor do the questions reflect a mandate which addresses how reconciliation will occur between the pre-existence of Aboriginal societies and the assertion of Crown sovereignty; how Aboriginal Peoples can make decisions as to how the land will be used, while at the same time, co-existing with Federal and Provincial laws. No attention is paid in the mandate to providing a path for Aboriginal Peoples to decolonize or to repair their political institutions.

The affordability principle is a red flag, which attracts unprincipled and fearful discussion. Take, for example, the Nisga'aa Treaty, which Gordon Gibson, representing views promoted by the B.C. Liberal party criticized publicly as being costly, "compared to past practices, creating an unrealistic floor for expectations within British Columbia"[33]. The cost/benefit analysis of the treaty was never undertaken, but we explore some comparisons.

Compare, for example, the approximately 2,000 square kilometres of Nisga'a settlement lands, where several thousand Nisga'a must make their homes and economic future, with the land assets of the Douglas Lake Cattle Co., which at its height controlled four million acres of land[34], or with MacMillan Bloedel, which, at the time of the Weyerhaeuser takeover last year, was reputed to "manage" 1.1 million acres in British Columbia[35]. Compare the limited powers to govern the Nisga'a land base and citizens with the authority given to Alcan when in the 1950s it acquired among other benefits, water in the entire drainage system of the upper Nechako River, roughly 5,475 square miles[36]. The company was also granted municipal status for its dams,

---

[33] *B.C. Studies: The British Columbian Quarterly 1998-99*, Volume 120 (Special Nisga'a Treaty Issue), edited by Cole Harris and Jean Barman

[34] Campbell Carroll, *Three Bear: The Story of Douglas Lake* (Vancouver: Mitchell Press, 1958), at p. 18

[35] "U.S. Firm Says Its Takeover of MacBlo Creates a Global Leader", *Vancouver Sun*, pp. A1, A4, June 22, 1999

[36] B.C. Water Rights Branch. "Water Powers, British Columbia, Canada," 1954, p. 64, British Columbia Archives, GR 884, box I, file 24

hydroelectric developments and the village of Kemano. Alcan does not pay any provincial or regional taxes on these lands. The effect of the agreements has been described as creating a form of "sovereignty association"[37]. Compare the estimated $200 million to $400 million in cash to be paid to the Nisga'a over the next decade with the estimated $478 million in compensation and penalties paid by the Liberal government in 1993 to cancel the Conservative government's prior agreement to purchase 50 EH-101 helicopters.

The point being, that when a Province has denied the existence of Aboriginal title for a century, and has received the benefits from this denial, there is a big problem. The task of treaties is to do justice to the parties in keeping with established legal principles, while at the same time fashioning solutions which are sustainable to Aboriginal and non-aboriginal people alike.

The referendum questions seek a mandate to perpetuate an outdated colonial relationship, many features of which have been expressly repudiated by the Courts.

[37] Bev Christenson, *Too Good to Be True: Alcan's Kemano Completion Project* (Vancouver: Talonbooks, 1995), pp. 73-75