Transcending the B.C. treaty process

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In a recent *National Post* column, Vaughn Palmer detailed the dismal state of the British Columbia treaty process. After eight years in which federal, provincial and aboriginal authorities have invested half a billion dollars in research and negotiations, exactly zero agreements have been concluded. (To be fair, one agreement in principle has been reached, but the Sechelt Nation has decided to shelve it in favour of litigation.) Nor is there a prospect of a breakthrough any time soon.

Meanwhile, the uncounted costs are enormous, probably much larger than those that can be counted. When the Supreme Court of Canada ruled in its 1997 Delgamuukw decision that aboriginal rights and title have never been surrendered in British Columbia, except in the northeast corner covered by Treaty 8, it cast a cloud of uncertainty over land titles and tenures in the province. Who knows how many mines, logging projects, ski resorts and other potentially profitable economic developments have been cancelled or postponed because of the uncertainty. As the new Premier Gordon Campbell scrambles to cut taxes, reduce expenditures and balance the budget, he must wish these phantom investments could be realized in order to help the provincial economy grow again.

The B.C. treaty process isn't working because the underlying conditions are not propitious for success. Negotiating treaties to acquire aboriginal title was a workable strategy in the Canadian West in the late 19th century and in the north in the late 20th century, because populations were small and most of the land was not yet dedicated to other purposes. By contrast, 21st century British Columbia has a large population and the land is either held in fee simple or, if still Crown land, is covered by a dense network of leases, licences, permits and tenures of all kinds. Trying to negotiate several dozen modern-day treaties is doomed to fail under such conditions.

Is British Columbia condemned to wallow forever in an economic slough of despond while treaty negotiations grind endlessly and fruitlessly onward? No, there is another way.

British Columbia assigned Indian reserves and proceeded to authorize development of the remaining land. This history of adverse dealing by the province was once thought sufficient to extinguish aboriginal rights and title, but the Supreme Court nullified that view in Delgamuukw. According to the Court, only the federal Parliament had the power to extinguish aboriginal rights at the time that the provincial government of British Columbia was taking actions.

Properly understood, Delgamuukw is a vintage example of that classic brand of Canadian jurisprudence, a federalism decision. In denying Victoria's jurisdiction, the Court affirmed Ottawa's. There is a long line of earlier decisions, both American and Canadian, upholding the proposition that the national sovereign may extinguish aboriginal rights and title not only by treaty but also by other means including conquest and legislation. The Supreme Court said nothing to the contrary in Delgamuukw.

The federal government does not have to let the B.C. treaty process go on forever. It can and should set a time limit, say three years, for obtaining results. The very existence of the deadline will probably encourage quite a few First Nations to sign agreements.

Claims not settled by the deadline should be turned over to a commission appointed by the federal Cabinet. The commission will receive the evidence and recommend to Parliament a settlement that reconciles and provides compensation for all the aboriginal claims, many of which conflict with each other as well as with non-aboriginal usage.

The House of Commons and the Senate, after due deliberation and possible changes, will then pass legislation to enact the settlement. British Columbia will also have to legislate because provincial Crown lands and resources will be involved. These two pieces of legislation will satisfy constitutional purists, who may wish to argue that Section 35 of the Constitution Act, 1982, requires a constitutional amendment in order to extinguish "existing aboriginal rights." If that is true, the requirement can be satisfied by federal and provincial resolutions, which will meet the standards for a bilateral constitutional amendment set out in Section 43 of the same act.

The bilateral procedure is appropriate because only one province is involved. It's the same procedure used in the last decade to entrench official bilingualism in New Brunswick and to terminate confessional school boards in Newfoundland and Quebec.

Superficially, it may seem to be in my interest as an Albertan to have people and business enterprises move here from British Columbia, driven out by economic uncertainty in their home province. But that would be a short-sighted view. "Beggar thy neighbour" is never good policy in the long run. Everyone in Canada will eventually be worse off if the investment-destroying uncertainty over land titles in British Columbia is allowed to drag on and on.

It is time for Ottawa to admit this is not just a local problem that can be left to fester in British Columbia. It is a national issue that affects all Canadians, and after Delgamuukw only the federal government has the constitutional power to break the deadlock.

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