

An Incremental and Measured Approach to Reconciliation

A. Introduction

The BC Treaty Process is a comprehensive 6-Stage process of negotiations mandated to conclude treaties with Aboriginal peoples in British Columbia who had not previously ceded their rights or title to the Crown. In recent months, there has been much evidence to suggest that the parties in the process (Canada, BC and the First Nations) are unable to resolve their differing approaches to the issues arising at the negotiation table. In particular, First Nations are frustrated with the inability of the senior governments to accommodate interests outside of their current mandates. Numerous forums, workshops and events on the subject of the BC Treaty Process have also underscored a growing belief that the process is stalled and in need of revitalization.

The model presented below articulates a new, more flexible approach to revitalizing the negotiations; one which recognizes the importance of creating “pilot relationships” and acknowledges that the BC Treaty Process (as currently formulated) may be only one of several means to bring about resolution to the issues of Aboriginal rights and title.

The following model envisions negotiations as a fluid set of incremental relationships that over time can accomplish the same holistic objectives that are typically part of comprehensive negotiations. Unlike the current BC Treaty Process which is based on linear stages of negotiation, this model outlines the benefits for operationalizing Stage 6 (Implementation) of the current BC Treaty Process during Stages 3 (Framework) and 4 (Agreement-in-Principle) of negotiation. Under the approach proposed, agreements would be first tested and assessed rather than being immediately added to the Constitution.

B. General Objectives

- Find an approach to treaty-making which achieves certainty while recognizing the challenges of casting comprehensive treaty provisions in ‘constitutional concrete.’ Once ratified, treaties will receive constitutional protection under s. 35 of the *Constitution Act, 1982*.
- Help to expedite stalled treaty negotiations and build public support for the process of reconciliation by developing incremental agreements that focus on measurable objectives and that can be adjusted to changing circumstances prior to the agreement being given constitutional protection.
- To ‘test drive’ agreements that, after an assessment process, are determined to be feasible and that could potentially be added to the treaty; those not determined to be feasible could be modified or discarded.
- Encourage engagement between the parties and raise their comfort level to try new approaches to the resolution of issues of Aboriginal rights and title.
- Explore a staggered approach to implementation in order to achieve reconciliation in a timely manner.

C. Approach

This model is not intended to provide solutions to significant areas of disagreement arising between the parties, such as competing definitions of title, inflexibility of government mandates, or the need for compensation of past wrongs. Rather, this model offers a new *process* to better address these issues in a low risk environment – an environment that enables the parties to have the latitude to find solutions to key issues and provides incentive to try alternate approaches.

There have been numerous reports regarding the appropriate means to realize treaty agreements or other methods of reconciliation. A consistent recommendation in these reports is that the parties to the negotiations will need to reach agreements and determine a mutually acceptable legal mechanism for achieving certainty that best meets their unique circumstances (*Statement On Certainty Principles For Treaty Negotiations In British Columbia*, First Nations Summit, April 28, 2000).

While acknowledging that treaty or related reconciliation agreements can take on a number of different characteristics and forms, the model suggests that there should be specific elements that frame any such agreement. These elements are as follows:

Elements of A Successful Incremental Agreement

- Specific (i.e. to a defined project, policy field or issue)
- Well-defined (e.g. geographically delineated)
- Time-limited
- Have measurable benchmarks (e.g. specific socio-economic indicators to test outcomes)
- Include an assessment process at the end of the term of the agreement that enables the parties to decide whether the agreement should be part of the treaty
- Include a specific procedural framework and communication protocol (see below) developed by the parties.

Since this model focuses on process and not defined outcomes, it is applicable to a variety of negotiations each with their own unique circumstances. Including the above elements in the agreement is necessary to better empower the parties to take incremental steps towards reconciliation. These elements help create a low risk environment and enable the parties to have the latitude to find solutions to key issues.

Parties to An Incremental Agreement

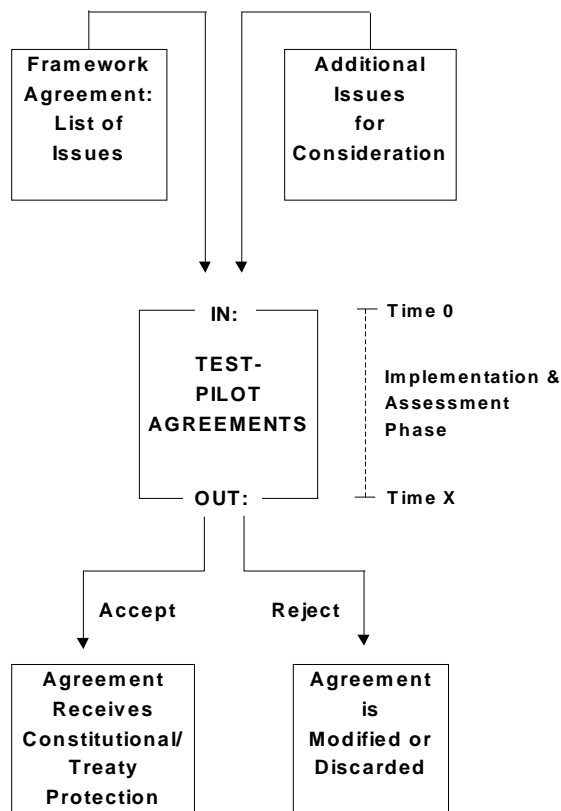
For the purpose of this report, it is envisioned that the parties to the agreements would be public governments (federal, provincial or local) and Indian Bands. The incremental model could however equally be applied to agreements signed between Crown agencies, private corporations, or other legal entities and Indian Bands.

Examples of Incremental Agreements

- Resource and land management / coordination initiatives
- Intergovernmental arrangements
- Environmental assessment and protection mechanisms

- Education and social services provision

Incremental Model: How an Incremental/Measured Approach Would Work



D. Questions

What incentive is there for the parties to enter an agreement if it is not linked directly and explicitly to the treaty?

The issue of whether the agreement is directly and explicitly linked to the treaty is less important than the need to ‘test drive’ agreements to see whether they are feasible. While the long term objective is to hopefully have agreements that could form the basis of a treaty (or be part of some other formal process of constitutional reconciliation), the more immediate short-term goal is begin a process of *engagement* with Aboriginal peoples in a measurable and defined way.

There are many reasons for the parties to participate in this approach:

- Outstanding issues of Aboriginal rights and title exist even in the absence of treaties. As these issues are dealt with in the courts, or via treaty negotiations, the relationship between First Nations and other levels of governments will ultimately change. Engagement with First Nations makes practical sense even in the absence of legal and political certainty on the issue of Aboriginal rights and title.

- Raise the trust and comfort level of the parties in working cooperatively.
- Create a foundation for the parties upon which incrementally greater roles and responsibilities can be added and which in turn will assist the parties in preparing for treaty implementation.
- Build First Nations capacity.
- Enable First Nations to have more roles and responsibilities in their internal affairs
- Realize new opportunities for intergovernmental partnerships/linkages.
- Provide net social and economic benefits to both the Aboriginal and non-Aboriginal communities

What happens if the BCTC process fails? Is the incremental model based on the assumption that the BCTC process is the only means of meeting the objectives of the parties?

The incremental model applies to any reconciliation process. Emphasis is not placed on ‘fitting’ or inserting into the treaty process, the incremental agreements reached between the parties. Rather, the key objective of the model is to build low-risk, measurable agreements that achieve real outcomes. The model underscores that the vehicle or mechanism used to achieve reconciliation (whether constitutional or not) is less important than the need to meet objectives in a timely way. In sum, the objectives are the focus, not the mechanisms used.

Will the development of individual, incremental agreements cause us to lose sight of the overall vision the parties want to achieve (i.e. a comprehensive treaty)?

Under the current BCTC approach, a comprehensive treaty is not attained until the parties have conclusively agreed on the amount of land (and where it is located), the amount of cash, and the nature of self-government powers over the land. Comprehensive treaty negotiations do act as positive leverage for the parties to reach agreement, and provide the parties with added certainty that when the treaty is finally reached, all outstanding issues (identified at the time of treaty) will be resolved.

The incremental model, however, envisions a ‘bottom-up’ rather than the ‘top-down’ approach of the current BCTC process. The BCTC process attempts to simultaneously address all of the elements of the party’s visions, and in doing so often causes the parties to become overwhelmed, frustrated and entrenched in increasingly competing and unreconcilable positions.

The incremental model recognizes the importance of a holistic approach to reconciliation, and envisions that measured steps be taken with the long-term vision in mind. The long-term vision acts as the ‘frame’ for the negotiations.

In utilizing an incremental approach, there is some risk of not creating sufficient leverage for the parties to agree when ‘enough is enough’. In other words, in the absence of a pre-agreed cap of land and cash, incremental agreements could confer more and more benefits to the parties without ever creating the motivation to compel them to agree that their outstanding differences

have finally been adequately addressed. If the incremental approach is pursued, the parties must, openly and in good-will at the outset, identify the limits and ‘givens’ of the negotiations (e.g. federal and provincial governments could set out the general quantum of land and cash to be transferred to the First Nation).

Can the incremental model be implemented concurrently within the current BC Treaty Process?

Yes, but with some important pre-conditions. Since the incremental model recognizes the importance of a holistic approach to reconciliation, and envisions that measured steps be taken with the long-term vision in mind, the end results or outcomes as sought through the BC Treaty Process can continue to act as the on-going reference point or ‘frame’ for incremental agreements. The parties can, upon evaluating the performance of an incremental agreement, decide what (if any) linkage is needed to the future treaty.

It is possible that, in some cases, successful incremental agreements could become future treaty chapters or the model for a mechanism to be added to a future treaty chapter, while other less successful incremental agreements would not. Ultimately, this decision would be up to the parties. No incremental agreement would automatically become part of a treaty.

To help clarify the process for dealing with successful incremental agreements that the parties wish to include in treaty discussions, it is recommended that a procedural framework be developed at the outset of the initial negotiations. This procedural framework would identify the specific steps the parties could take to link the incremental agreement to the treaty process, and might include provisions to seek independent advice from external professionals and technicians skilled in the subject of the agreement. Because of the BC Treaty Commission’s close linkage to the current treaty process, it is not envisioned that they would play a role in facilitating the linkage.

In addition to developing a procedural framework, it is recommended that the parties also develop a communication protocol that sets out a specific mechanism for sharing information on the incremental agreement with other parties involved in the treaty process. For example, on incremental agreements reached between Local Governments and First Nations, an information report could be brought to the treaty table. Such reports help to build broad support for the incremental initiative and act as ‘best practices’ guide on relationship building.

In the absence of the treaty process and a formal reporting structure, the parties to an incremental agreement need to develop a defensible communication protocol with other stakeholders (public and private) affected by the agreement. Ultimately, the goal of developing a communication protocol with the incremental agreement is to ensure that information sharing and consultation is a key component of every incremental agreement reached.

Is 'certainty' and clarity regarding the scope and extent of Aboriginal rights and title not one of the key objectives of the BC Treaty Process? Is 'certainty' only achievable through the constitutional entrenchment of treaties and the exhaustive listing of Aboriginal rights?

This model challenges current assumptions about "certainty".

"Certainty" within the BC Treaty Process typically means clarity of rights and responsibilities and delineation of ownership over lands and resources. This form of certainty exchanges undefined Aboriginal rights for defined treaty rights and responsibilities. While certainty in this form is a valid and important objective, if the vehicle to achieve it (i.e. the BC Treaty Process) is either stalled or proceeding at a pace that will take a long time to achieve, then the parties should find it more advantageous to achieve certainty now, rather than later. Certainty is not a time-limited objective, but rather can be developed incrementally over time and evolve based on the experiences of the parties and on the outcomes achieved.

A process is needed to ensure that the rights and responsibilities negotiated in the treaty process are in fact practical, measurable and self-sustaining. It is through the process of test-driving and assessing incremental agreements between the parties that, ultimately, greater certainty will be achieved.

Does the Indian Act constrain First Nations from entering into Agreements?

Section 81 of the Indian Act, (Powers of the Council), lists the purposes for which the Council of a band may make bylaws. This section does not explicitly confer the ability to enter into agreements. However, as a result of the Provincial Indian Self-Government Enabling Act and section 83 of the Federal Indian Act, (Money by-laws), First Nation's within British Columbia may enter into a service agreement with local governments. Bylaws under section 83 require the approval of the federal Minister of Indian and North Affairs. The intent here is to illustrate that First Nation do have the ability to enter into certain agreements.

As noted in the *2000 Annotated Indian Act and Aboriginal Constitutional Provisions*, "the Act is silent on the legal capacity of the Band...[T]he trend now is to recognize that Bands and Band Councils have legal capacity in a wide range of situations." (Pg.3). Some additional light on the matter may be found in the Case Law section of the *Annotated Indian Act* regarding the Legal Capacity of a Band Council. In the *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135* (1992), the Court found that, "In addition to the exercise of those powers expressly set out in the Act requiring ministerial approval, a band council is free to contract in the same way as any other party, subject to the laws of general application." (Pg.8, 9).

The legal status and capacity of First Nations that enter into a treaty with Canada and BC is clear. Such First Nations will not longer be subject to the Indian Act and under their treaty will be recognized as separate and distinct legal entities, with the capacity, rights, powers, and privileges

of a natural person, including the ability to enter into contracts and agreements. (See the Nisga'a Final Agreement, Chapter 11, section 5).

First Nations that have not entered into a treaty with Canada and BC remain subject to the Indian Act. Given the above mentioned trend to recognize that Bands and Band Councils have legal capacity in a wide range of situations, existing uncertainties as to the status and ability of First Nation to enter into contracts could be mitigated by amendments to the Indian Act that would more easily enable the First Nation to enter into agreements with other parties.

What is the difference between the incremental model and Interim Measures or Treaty Related Measures?

Incremental agreements and Treaty-Related Measures or Interim Measures are not the same. There are several important differences. The first difference centres on the relationship between these approaches and the six-stage treaty process. Treaty related measures, and to a lesser degree, interim measures are directly linked to treaties. In addition, First Nations are not eligible to access treaty related measures until they have substantially reached agreement with Canada and BC on the terms of a treaty. By contrast, the incremental approach is not dependent on the treaty process.

Secondly, it is envisioned that incremental agreements will address substantive issues between the parties (e.g. intergovernmental arrangements, land use coordination, specific governance powers, etc.) by implementing treaty-like provisions immediately, rather than at the end of a lengthy negotiation process.

Thirdly, a hallmark of the incremental approach is the inclusion of specific mechanisms within the agreement to help assess its feasibility and practicality. For example, incremental agreements contain explicit performance criteria, measurable benchmarks, and include an assessment process at the end of the agreement's term. Incremental agreements also include a specific procedural framework and communication protocol to help clarify the agreement's linkage with the treaty-process and to help share information with impacted third parties and stakeholders. By contrast, Treaty Related Measures and Interim Measures rarely contain these features. Treaty Related Measures and Interim Measures most often do not contain the same extent of clearly defined, time-limited elements as described in Section C of this paper as well as provide a specific avenue by which the parties can revisit those initiatives that have not met the intended objectives.

Finally, there is the issue of constitutional entrenchment. Ultimately, the importance of Interim Measures and Treaty Related Measures is to provide First Nations with interim opportunities on the road to treaty. Some Interim Measures and Treaty Related Measures may be implemented prior to the conclusion of a treaty, and therefore not immediately be constitutionalized. However, senior governments have repeatedly emphasized that the overall objective is, in large part, to import Interim Measures and Treaty Related Measures directly into treaties. Former Minister of Aboriginal Affairs Dale Lovick has, for example, publicly surmised that Interim Measures could be "bundled together" to largely comprise a treaty (UBCM Convention,

September 1998). Federal Minister of Indian and Northern Affairs Canada, Hon. Robert Nault, has also stated that "TRMs are intended to be time-limited and hard-wired to eventual treaties."

Admittedly, there continues to be some debate as to the extent to which Interim Measures and Treaty Related Measures will be integrated into final treaty settlements. By contrast, the relationship between incremental agreements and treaties is very clear; incremental agreements will not be considered for inclusion within a treaty until the parties have had sufficient time to assess the feasibility of the initiative they have agreed upon. Constitutional entrenchment is explicitly avoided until after the initiatives have been thoroughly tested and assessed.