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April 18, 2017

VIA EMAIL

British Columbia Treaty Commission  
700 – 1111 Melville Street  
Vancouver, BC V6E 3V6

**Re: Treaties and the Sharing of Sovereignty in Canada**

Dear Acting Chief Commissioner and Commissioners:

You requested our opinion regarding the status of treaties negotiated under the British Columbia Treaty Process, and their allocation of jurisdiction among Treaty Nations and governments.

In our view, a treaty represents a constitutionally-protected sharing of sovereignty among the signatories to the treaty. This status is inherent in the nature of a treaty, and is most clearly demonstrated by the “prevailing law” rules in the treaty: the provisions that specify which government’s laws apply in the event of a conflict. Under treaties that have been negotiated in the B.C. Treaty Process to date, there are significant areas of jurisdiction in which the Treaty Nation’s law prevails over inconsistent B.C. or federal law. These spheres give primary authority to the Treaty Nation’s government, and are subject to constitutional protection. Any infringement of the Treaty Nation’s law in these areas by the government of British Columbia or Canada would have to be justified in accordance with stringent requirements set by the Supreme Court of Canada. This legal structure, in our respectful view, provides substantial clarity and protection for Treaty Nations’ self-government.

Like treaties, aboriginal rights and title are also protected by section 35 of the *Constitution Act, 1982*. Unlike treaties, however, the precise content of aboriginal rights and title tends to be less certain. As discussed in our September 29, 2014 opinion letter regarding the impact of the *Tsilhqot’in Nation* decision of the Supreme Court of Canada, courts are ill-equipped to address in detail the elements of self-government of aboriginal title lands. Self-government is only effective insofar as it is either recognized by governments (typically in the form of an agreement) or enforced by courts. A treaty significantly reduces this uncertainty by specifying the Treaty Nation’s self-government powers.

We set out below our analysis of these issues.

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## Cases and Commentary regarding Shared Sovereignty

Characterizing treaties as a sharing of sovereignty is consistent with longstanding Canadian and antecedent jurisprudence. The very notion of a treaty presupposes that each party has the ability to enter into the compact; non-sovereign entities such as individuals and corporations do not have such rights.<sup>1</sup> As Chief Justice Marshall of the United States Supreme Court held in 1832 in *Worcester v. State of Georgia*, upon arrival of the British in North America, the Crown considered aboriginal peoples to be “nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.”<sup>2</sup> More recently, Canada’s Chief Justice McLachlin wrote in *Haida Nation v. British Columbia* that “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”.<sup>3</sup>

The most comprehensive discussion of shared sovereignty emanates from the 1996 final *Report of the Royal Commission on Aboriginal Peoples*, in which the Commission wrote as follows (at vol. 2, pp. 240-241):

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

Justice Binnie, writing for the concurring minority in *Mitchell v. M.N.R.*, quoted and expanded upon this passage. In his view, “aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort.”<sup>4</sup> In short, aboriginal peoples are “full participants with non-aboriginal peoples in a shared Canadian sovereignty. Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are part of it.”<sup>5</sup>

Bringing the discussion into the context of a modern treaty, the B.C. Court of Appeal held in respect of the Nisga’a Treaty that “the model of government established by the Treaty recognizes concurrent jurisdiction”.<sup>6</sup> While the court in that case referred to jurisdiction, not sovereignty, the theme of the court’s decision is consistent with the prior discussions of sovereignty. Note also the court’s statement that the Treaty “recognizes” (as opposed to “establishes” or “creates”) concurrent jurisdiction. The Treaty acknowledged, affirmed and specified Nisga’a jurisdiction which was already in existence. Again, the concept of “recognition” is consistent with jurisprudence affirming the existence of systems

<sup>1</sup> See Paul Nadasdy, “Boundaries among Kind: Sovereignty, the Modern Treaty Process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations”, *Comparative Studies in Society and History* 2012; 54(3) 499-532 at 501.

<sup>2</sup> *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) at pp. 548-549. See also *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 105301054.

<sup>3</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 20.

<sup>4</sup> *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 129 [emphasis in original].

<sup>5</sup> *Ibid.* at para. 135.

<sup>6</sup> *Sga’nism Sim’augit (Chief Mountain) v. Canada*, 2013 BCCA 49 at para. 86.

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of aboriginal law – an essential component of self-government – before the arrival of Europeans in North America.<sup>7</sup>

**Sharing Sovereignty via the B.C. Treaty Process**

Of the three treaties negotiated under the B.C. Treaty Process and presently in effect, the Tla’amin Final Agreement is the most recent; it took effect on April 5, 2016. It has extensive provisions addressing which level of government’s laws will prevail in the event of a conflict. We have compared the Tla’amin Final Agreement provisions summarized below with their counterparts in the other two treaties currently in effect (Tsawwassen and Maa-nulth). The prevailing law rules in all three treaties are nearly identical, and as such we consider this model to be representative of treaties negotiated to date under the B.C. Treaty Process.

The following table summarizes key areas of jurisdiction in which the Tla’amin Final Agreement provides that Tla’amin laws will prevail over BC and Canadian laws in the event of a conflict:

<b>Chapter and Section</b>	<b>Subject of Prevailing Tla’amin Laws</b>
C-3, Lands, sections 116, 118	Use of Tla’amin lands, including management, planning, zoning and development; and the creation, allocation, ownership and disposition of estates or interests in Tla’amin lands, including fee simple, mortgages, leases and other interests
C-5, Access, section 17	Public access on Tla’amin lands for the prevention of harvesting or extraction of resources and protection of heritage sites
C-9, Fisheries, section 66	Tla’amin fishing rights
C-11, Migratory Birds, section 27	Tla’amin right to harvest migratory birds
C-12, Plants, section 25	Tla’amin right to gather plants
C-14, Culture and Heritage, section 4	Tla’amin culture, language and heritage sites
C-15, Governance, section 47	The election, administration, management and operation of Tla’amin Government
C-15, Governance, section 53	Tla’amin citizenship
C-15, Governance, section 56	Use, possession, management and disposition of assets of the Tla’amin Nations
C-15, Governance, section 62	Adoption of Tla’amin children
C-15, Governance, section 73	Child protection services on Tla’amin lands

<sup>7</sup> *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at para. 114. 51033604.3

Chapter and Section	Subject of Prevailing Tla’amin Laws
C-15, Governance, section 82	Practice of aboriginal healers on Tla’amin lands
C-15, Governance, section 86	Provision of health services on Tla’amin lands
C-15, Governance, section 101	Tla’amin language and culture education
C-15, Governance, section 103	K-12 education on Tla’amin lands
C-15 , Governance, section 121	Marriage, and ceremonies of Tla’amin culture

The table above is indicative of the range of jurisdictional areas in which self-government is at its highest: matters of culture, identity and governance. Treaties enumerate many areas in addition to those summarized above in which the Treaty Nation may make laws. However, in the other areas (such as highway regulation, forestry, environmental assessment and post-secondary education), B.C. or federal law will prevail to the extent of conflict with the Treaty Nation’s laws. Hence, while treaties result in a broad-based sharing of sovereignty among Treaty Nations, B.C. and Canada regarding a great number of topics, that sharing is most significant in respect of the topics over which Treaty Nation laws predominate.

Treaty settlement land is a topic of particular interest. In general terms, Treaty Nations have two types of interests in treaty settlement land:

- (a) *public* rights: jurisdiction to make laws governing the use and disposition of the lands; and
- (b) *private* rights: ownership of the lands.

Treaty Nations may dispose of their *private* interests in treaty settlement land to others, or grant mortgages or other interests over those lands; but even where that occurs, the Treaty Nation’s *public* rights to govern that land remain intact.

That is, the Treaty Nation could permit a non-aboriginal party (such as a corporation) to acquire treaty settlement lands, and operate a business on those lands. The corporate landowner could also mortgage its lands to a bank. By virtue of the Treaty Nation’s public rights over the land, the rights of the bank and the corporation over the land would be subject to the Treaty Nation’s land-use and other laws, in accordance with the Treaty.

This distinction, between Treaty Nations’ private and public rights over treaty settlement lands, provides important commercial flexibility to Treaty Nations while enabling them to maintain their governance rights in respect of treaty settlement land.<sup>8</sup>

Treaty settlement land may be expropriated by the federal and provincial governments.<sup>9</sup> However, these rights are only to be exercised in exceptional circumstances, and are subject to the general

<sup>8</sup> See further Nadasdy, *supra* at 511.

<sup>9</sup> See Tla’amin Final Agreement, c. 3, ss. 122-129.  
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principle that treaty settlement lands will not be expropriated.<sup>10</sup> Where treaty settlement lands are expropriated, only the most limited interest may be taken, for the shortest possible time.<sup>11</sup> Further, the Treaty Nation may acquire Crown land in place of compensation for the expropriated land (unlike the ordinary law of expropriation, which only requires the government to pay compensation).<sup>12</sup> These constitutionally-protected processes provide significant security to treaty settlement land.

The legal status of treaty settlement land is also a distinction between treaties and aboriginal title. Lands subject to aboriginal title cannot be sold or encumbered; the title-holding Nation can use and govern the lands, or surrender their title to the Crown.<sup>13</sup> The title-holding Nation cannot sell its title and retain jurisdiction, other than by way of an agreement negotiated with the Crown.

In the British Columbia context, the result is that the Tsilhqot'in Nation, which succeeded in obtaining a declaration of aboriginal title by the Supreme Court of Canada in 2014,<sup>14</sup> signed the Nenqay Deni Accord with the B.C. government in 2016, establishing a framework to negotiate a comprehensive agreement over the following five years concerning Tsilhqot'in aboriginal title and rights. The accord reflects the longstanding recognition that negotiations are necessary to address the details of aboriginal governments' jurisdiction; the type of legal reasoning employed by courts cannot effectively resolve such details.<sup>15</sup>

Aboriginal rights and title are also subject to an ill-defined degree of regulation. As we discussed in our 2014 opinion, in the *Tsilhqot'in* case, the Court held that the *Forest Act* did not apply to the Tsilhqot'in Nation's aboriginal title lands. However, the Court left open the question of which other provincial and federal laws would apply to the aboriginal title lands held by the Tsilhqot'in Nation. The nature of provincial and federal regulation of aboriginal title lands remains uncertain, and will need to be determined through further litigation or negotiation.

In this respect, aboriginal title lands are unlike treaty lands, which have a highly structured and constitutionally protected regulatory regime under the treaty. This negotiated regime provides much greater certainty and clarity to Treaty Nations as they move forward with governing their lands.

### **Limits to the Jurisdiction Recognized in Treaties**

Courts have been called upon to adjudicate the effect of prevailing law rules enumerated in treaties. In short, while a treaty may recognize a Treaty Nation as having primary jurisdiction over certain topics, provincial or federal law could validly infringe that jurisdiction if the infringement can be justified.

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<sup>10</sup> See Tla'amin Final Agreement, c. 3, ss. 122 and 127.

<sup>11</sup> See Tla'amin Final Agreement, c. 3, s. 126.

<sup>12</sup> See Maa-nulth First Nations Final Agreement, s. 2.11.

<sup>13</sup> *Delgamuukw v. B.C.*, *supra* at para. 113.

<sup>14</sup> *Tsilhqot'in Nation v. B.C.*, 2014 SCC 44.

<sup>15</sup> Peter Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can. Bar Rev. 187 at 190.

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This issue was addressed by the B.C. Court of Appeal in respect of the Nisga'a Treaty, in *Sga'nism Sim'augit (Chief Mountain) v. Canada*.<sup>16</sup> In that case, members of the Nisga'a Nation alleged that the Treaty was invalid because it amounted to an "abdication" of legislative power by the provincial and federal governments in favour of the Nisga'a government. The abdication was particularly problematic and hence unconstitutional, they argued, in jurisdictional areas over which the Treaty provides that Nisga'a laws prevail to the extent of any conflict (such as those listed above from the Tla'amin treaty).<sup>17</sup>

The court rejected this argument. The federal Parliament and the provincial Legislature retain the authority to infringe Treaty rights, including prevailing-law rules, if the infringement can be justified in accordance with the test established by the Supreme Court of Canada in the *Sparrow* and *Badger* cases.<sup>18</sup> The law-making powers of the Nisga'a government are not exclusive, and do not have absolute constitutional protection.<sup>19</sup>

In this respect, treaty rights are similar to aboriginal rights and title, which may be justifiably infringed by federal and provincial governments in accordance with the test set out in *Sparrow* and *Badger*. As we discussed in our 2014 opinion, the Court's decisions in *Delgamuukw* and *Tsilhqot'in* have confirmed that the Crown may justify infringements of aboriginal title lands for a broad range of compelling and substantial public purposes.<sup>20</sup>

Despite the comprehensive nature by which treaties address the rights of the parties, a treaty is not a "complete code", as the Supreme Court of Canada commented in *Beckman v. Little Salmon/Carmacks First Nation*. In that case, the Court held that the Yukon government was required to consult with the First Nation in respect of a disposition of land over which its members have a treaty right of access for hunting and fishing. Consultation was not prescribed by the treaty in such circumstances, but the Court held that it was required in order to fulfill the honour of the Crown. Essentially, the Crown cannot contract out of its duty to act honourably. The Court thus rejected Yukon's argument that the treaty was a "complete code" governing all interactions between the First Nation and the Crown.<sup>21</sup>

The reality is that no agreement, even a carefully-negotiated treaty, can envisage every possible circumstance in which the rights and obligations of the parties will apply. While clarity in the form of a detailed treaty can and should eliminate a significant number of potential conflicts over the extent of aboriginal self-government, courts will still be called upon to interpret the meaning of treaties and their implementation in particular instances.<sup>22</sup> This is and always has been the role of courts when parties to a treaty or other agreement differ as to its meaning.

The fact that treaties are subject to judicial interpretation, and that federal and provincial laws could infringe treaty rights, does not diminish the value of the sharing of sovereignty that a treaty entails. The scope of self-government achievable under treaties is arguably greater, and certainly clearer, than

<sup>16</sup> *Supra* note 6.

<sup>17</sup> *Ibid.* at paras. 62, 74, 83.

<sup>18</sup> *Ibid.* at paras. 70, 78; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771.

<sup>19</sup> *Sga'nism Sim'augit (Chief Mountain) v. Canada*, *supra* at para. 86.

<sup>20</sup> *Tsilhqot'in Nation v. B.C.*, *supra* at para. 83.

<sup>21</sup> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 5, 38, 52.

<sup>22</sup> See e.g. *Quebec (Attorney General) v. Moses*, 2010 SCC 17 at paras. 6-7.

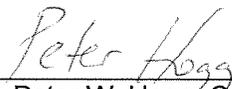
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what is available through litigation.<sup>23</sup> If anything, the continuing role of the courts emphasizes the importance of treaties in defining self-government. Courts interpret laws and agreements daily; it is their core function. By setting out the various parties' rights and obligations in the solemn agreement of a treaty, subject to constitutional protection, the parties record their intentions and enable the parties and if necessary courts to interpret and implement those intentions. The resulting treaty is, in our opinion, a lasting and comprehensive resolution that advances reconciliation within the unique Canadian constitutional context.

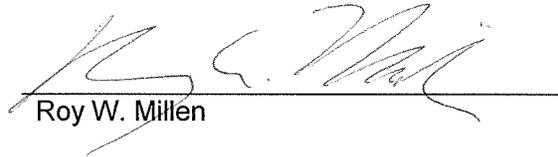
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We thank you for the opportunity to advise the Commission on these important matters. Please contact us if you have any questions or concerns regarding the foregoing opinion and analysis.

Yours very truly,



Peter W. Hogg, C.C., Q.C.



Roy W. Millen

<sup>23</sup> Murray Browne, "The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia", in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (Canada Law Book, 2009), 465-505 at 474.  
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