

**Preparing for the Day After Treaty  
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**Joseph Arvay, Q.C., Arvay Findlay Barristers**

Thank you and good morning everyone, Chiefs, Elders, all members of First Nations, distinguished guests, any members of the bar.

As just indicated, I've acted now for at least three First Nations who are in the very final stages of the treaty making process: the Lheidli T'enneh, the Huu-ay-aht and most recently the Tsawwassen First Nation.

Each of their First Nations have had their final agreements challenged in Court by neighbouring First Nations on the basis of overlapping claims.

Both Lheidli T'enneh and the Huu-ay-aht have been successful in fending off those lawsuits but it will probably be the Tsawwassen litigation that is likely to establish the more enduring legal principles that apply in this area of the law.

When I was asked to give this talk a few weeks ago I'd hoped that by this time there would have been a judgment from the British Columbia Supreme Court in the Tsawwassen case. As counsel for the Tsawwassen, I was and obviously am still hoping that the outcome would be favourable to my clients. But perhaps more than that, I had hoped that I could convey to you what would be the wisdom of an impartial Judge whose message to the First Nations community would be: "do not fear overlaps, they can be resolved in time, they need

not hold up treaty making."

Now judgment has not come down yet, instead the message that I convey to you will be my message not the Judge's, and I appreciate that this message comes from what you will rightly say is a biased place. I am an advocate for my clients. I am not impartial and as such, you're entitled to discount my views if they seem to you to be too sanguine or rosy for your own good. But I'm going to try real hard to give you the facts and laws candidly and as fairly as I can.

The first question is just how did the situation of overlaps arise? The present problem of overlapping territorial claims actually might have a number of reasons and I don't purport to be exhaustive.

One reason is that the treaty process is deliberately one that is not what's called "evidence based". A First Nation is not required to prove by evidence of the sort that would be required in Court that they have Aboriginal rights or Aboriginal title in order to enter into the treaty making process.

A First Nation is required at the first stage of the treaty making process to file a Statement of Intent and with it a description of the First Nation's traditional territory. That description is supposed to be territory that is "generally recognized as their own".

My understanding of the process is that a First Nation is not required to and does not produce any evidence in support of that territorial claim with a possible exception of

when they seek to amend their Statement of Intent.

At the same time, it's my understanding that all First Nations take very seriously their obligations to assert only their territorial boundaries and they consult with their Elders and their own experts in mapping out their traditional territory. It is probably nevertheless the case that some overreaching might occur.

But by far the main reason for the overlaps is because of the historical reality that traditional territories of First Nations did, in fact, overlap. This point needs to be emphasized. In the case of the Tsawwassen First Nation alone, there were at least 53 other First Nations whose claimed traditional territory overlapped with the Tsawwassen.

And if you examine the map with all the Statements of Intents filed with the Treaty Commission, just about every First Nation has many, many overlaps.

Now, are overlaps something to fear? As one of the Elders who is a member of one of the First Nations who was actually challenging the Tsawwassen in Court, said "I don't think that overlapping is as bad as people think. Overlap is the white man's way."

Clearly, in my respectful view, this wise Elder had not lost sight of the traditional First Nation practises of sharing their natural resources with each other. To him, the language of overlap was a foreign concept to British Columbia First Nations. To him, sharing was reflective of their traditional relationships.

And what this means, of course, is that treaties in British Columbia will necessarily involve overlapping territories and that in turn means that the treaties themselves will overlap and there's nothing wrong with that. I accept that once a treaty is entered into the overlap becomes more worrisome; for instance if a treaty was to extend to one First Nation's areas over which they obtained some exclusivity where before there was a sharing of resources.

But my experience, and I accept it's limited, suggests that treaties that are close to being ratified now provide exclusivity only in those areas where the First Nations had historically had exclusive use or occupation such as their village sites or adjacent land. But for the vast majority of the territory that's covered by the treaty the harvesting and gathering rights given under the treaty are non-exclusive just as they were historically.

I don't think I can emphasize this point enough. There's a lot of fear that once, for instance, the Tsawwassen First Nation have their treaty and with it the right to harvest fish and wildlife or gather plants in the treaty area, that this excludes their neighbouring First Nations from either continuing with their Aboriginal rights to harvest fish or wildlife in the same area or somehow precludes the neighbouring First Nations from entering into a treaty that gives them those same harvesting rights. But that's simply not the case. If the Court dismisses the challenge to the Tsawwassen First Nation's treaty I predict it will be mainly for this reason.

In other words, in the cases that are presently before the Courts there seems little, if any, risk that the Tsawwassen First Nation treaty will, when it comes into force, have any adverse affects on the claims of the neighbouring First Nations.

It's also important to add that in the event the Tsawwassen treaty does have some adverse affect on the neighbouring First Nation that it can be rectified without preventing the ratification of the treaty and without causing any harm to the neighbouring First Nations. There are many reasons for this.

First of all, ratification of a treaty is not the same as implementation. Until the treaty is implemented on its effective day, which is a date to be agreed to by the parties and with respect to the Tsawwassen treaty, it will probably be in early 2009, there is nothing that the Tsawwassen First Nation can do that will affect any neighbouring First Nation's interest. So there's still time for the First Nations and the Crown and likewise with the Tsawwassen, to engage in meaningful consultations to resolve the overlap dispute without needing the intervention of the Courts.

Some of you may or may not know, that on the eve of their Court case the Cowichan, who was challenging the Tsawwassen, reached an agreement with the Tsawwassen which provided that these two First Nations would enter into good faith, meaningful negotiations to resolve their overlap claim with respect to very specific aspects of the treaty that were

troubling them and with respect to just the overlap area and they agreed that they would bring in a facilitator, probably someone from the Treaty Commission, and they even agreed that if there was an impasse in the negotiations they would bring in a mediator to help resolve the impasse. And then they agreed that if three months prior to the effective date, i.e. "the implementation", there was a consensus they were making great progress but weren't quite there yet, then the Tsawwassen would consider actually delaying implementation of the treaty in order to allow the negotiations to bear fruit. And failing that, then the Cowichan would be able to go back to Court.

The Sencoten Alliance, who was also one of the Petitioners in the Court were very critical of this arrangement between the Tsawwassen and the Cowichan. The Sencoten say that not only must the Court prevent the Tsawwassen from having their treaty, but that any negotiations undertaken between the Cowichan tribes and the Tsawwassen cannot be recognized by either the Treaty Commission or by the Crown until the Sencoten interest had been confirmed and accommodated.

With the greatest respect to the Sencoten, this can't be right. I appreciate that the Sencoten and others say that it is the Crown and not the Tsawwassen who had the duty to consult with them in order to resolve overlaps. Ultimately, I agree that this is so. But the BCTC process has as one of its fundamental precepts that First Nations resolve issues relating to overlapping traditional territories amongst themselves. This reflects the recommendation of the Task Force which was

comprised of representatives of not only the BC and Federal Government but of the First Nations of British Columbia. This seems to me to make a lot of sense. It's an approach that seems highly respectful of First Nations and their ability to resolve overlaps on a Nation to Nation basis and through processes and protocols that are uniquely their own. To say that the Crown had a duty to resolve the overlaps for the First Nations, as I've heard it argued in Court, struck me as very paternalistic and maybe not even honourable.

I hasten to add that I have no apologies for the Crown. I spend most of my professional life these days battling the Crown in Court including cases where I say the Crown failed in its duty to consult. And I accept that if First Nations are not able to resolve overlaps amongst themselves, then the Crown has the ultimate duty to consult with all First Nations involved in order to assist in the resolution, and in some cases to ensure the accommodations are made to reflect their legitimate concerns.

And one kind of accommodation might even be to require that the treaty be amended if that is the only honourable way to resolve the overlap issue.

I think the Crown recognizes this duty lies on it as well and if the Crown fails in that duty then the Court has an important role to play to enforce it. But it does seem wrong, to me, to say that the Crown has abdicated its duty to consult by allowing each First Nation to attempt to resolve the overlaps themselves, especially since the Crown has insisted

that all treaties contain what are called non derogation clauses to ensure that no lasting harm can come to anyone because of overlaps. Something I'll touch on below.

I have argued in Court that the Court challenges either come too late or they come too soon. What one of my learned friends on the other side of the courtroom claims is "sucking and blowing" at the same time. My point, though, is simply this. If it is true that the Crown did have the duty to consult at an earlier time in the process than is presently thought to be the case, then those First Nations who are challenging the treaty should have brought their challenges much earlier and at a time when it wouldn't have been as destructive or harmful to the interest of the Tsawwassen First Nations and the other First Nations in the final stages of treaty making.

But on the other hand, if the Crown's duty has not yet crystallized to the point of requiring action then those Court challenges are premature.

But even if I'm wrong and the Crown has failed in its duty to consult with the neighbouring First Nations the question still is: is the fair and proper remedy to enjoin the Crown from ratifying the treaty. I'll repeat that again. Even if I'm wrong, and the Crown has failed in its duty to consult with the neighbouring First Nations, is the fair and proper remedy to enjoin the Crown today from ratifying the treaty. It's been my argument that this is not the fair, just or necessary solution.

Much has been talked about in the litigation about the Crown's duty to consult. The Crown, indeed, is said to be the target of that litigation. The "doctrine of the duty to consult" as recognized and confirmed by the Supreme Court of Canada in such important cases as *Haida*, *Taku River* and *Mikisew Cree*, is a new and powerful weapon in the First Nations' arsenal when it comes to fighting off Crown initiatives that threaten First Nations' Aboriginal and Treaty rights. Its purpose is to help First Nations obtain what are, in effect, interim measures or accommodations while the First Nations pursue its treaty claims with the Crown or even its title claims in Court.

But the duty to consult doctrine was never intended to be used by one First Nation against another. No First Nation has a constitutional duty to consult with the other and yet that is how this duty to consult is being used in every real and practical sense in the courtroom in this overlap litigation.

If the Court agrees that the Crown has breached its duty to consult when it failed to resolve the overlap, then it is not just the Crown that gets punished, it's the First Nation that wants its treaty ratified. The First Nation is clearly the meat in the sandwich. It's the one who is getting caught in the crossfire between the neighbouring First Nations and the Crown and that just seems very wrong.

In my respectful submission, it seems a perversion of that great doctrine for it to be used by a First

Nation against a First Nation. It should only ever be used against the Crown.

I want to canvass with you a few scenarios to try to drive the point home that there's no reason to use overlaps as a reason to prevent the ratification of the treaty.

Before I do, I acknowledge the point of the First Nations who are challenging the treaty who say if you leave the consultations until after the treaty is ratified or implemented that the consultation will be illusory or not meaningful. I don't accept that. At most the treaty may complicate the range of accommodation options that the Crown has once it's ratified. It's true that the Crown will not be able to amend the treaty, in the case of the Tsawwassen, without the Tsawwassen's consent. But that's been the case ever since the final agreement was initialled a year ago in December. And the case law is very clear: First Nations who evoke the duty to consult doctrine cannot demand any particular form of accommodation prior to proof of Aboriginal title. The issue in any case where there's a duty to consult is whether the Crown acted honourably and whether the consultations and any accommodation with the First Nations are reasonable having regard to all the circumstances.

So I want you to consider this first scenario. Let's assume that the Court dismisses the present Petitions that are brought against the Tsawwassen treaty and the treaty is ratified by both the Provincial and Federal Crowns. After the treaty is ratified, the Crown will still be required to

consult with neighbouring First Nations on the issue of overlap. Assume that the Crown engages in deep consultation with the neighbouring First Nations and then offers an accommodation agreement but one that does not require an amendment to the treaty. And let us assume that the neighbouring First Nations reject this accommodation agreement. The First Nations could, at that time, commence a lawsuit claiming that they were still properly not consulted and accommodated. The Court would have to decide at that time if the Crown acted honourably.

If the neighbouring First Nations are able to demonstrate following consultations that the only honourable and reasonable form of accommodation is an amendment to the treaty then the Court might direct the Crown to pursue an amendment. And if the Crown was unable or unwilling to amend the treaty, as a last resort, the Court might be able to strike down those provisions of the treaty which are inconsistent with the overlapping rights. This is at least what Justice Wilson suggested in the Lheidli T'enneh case.

In that scenario though, if it comes to that, there's no prejudice to the neighbouring First Nations to allow the treaty to be ratified now. They can get their remedy later.

Consider a second scenario. The Petitions are dismissed and the treaties are ratified. If following ratification and this process of consultation, the Court held that the Crown had actually met its constitutional duties to

the neighbouring First Nations then at that point the neighbouring First Nations would be left with the right to commence an Aboriginal title or rights case if they disagreed with the result.

While this may be regrettable, because no one wants to have to start an Aboriginal rights or title case, in the end, that's the only option. But it flows completely from the jurisprudence. First Nations are never provided with a veto under the doctrine of the duty to consult. It's only when a First Nation proves in Court, in its Aboriginal rights and title case, that the treaty conflicts with their Aboriginal rights and title would they get a veto.

And indeed, the treaty itself contains what are called non derogation clauses which ensure that if after such Aboriginal title case the neighbouring First Nations prove that the treaty conflicts with their Aboriginal rights and title, then the treaty is of no force and effect to that extent.

So, built into the treaty is a protection for those First Nations who, after they go through the consultation process and they don't like what the end result is and they're forced to litigate then, if they win in Court the treaty itself provides them with the assurance that the treaty itself will be of no force and effect to the extent of the conflict.

Another scenario, maybe the worst case scenario, but also maybe the most unlikely scenario is this. The Petitions are dismissed, the Crown engages in consultation with the neighbouring First Nations as it has said it intends to do.

If after consultation the Crown decided that it needed to accommodate the neighbouring First Nations and the only way it could do so was by an amendment of, say the Tsawwassen treaty, it would first approach the Tsawwassen to seek their consent to amend the treaty. The Tsawwassen may or may not consent. As a condition of any consent it may in turn seek some consultation and further accommodation from the Crown. If the Tsawwassen refuse to consent, the Crown could enact legislation that unilaterally amended the treaty. Just as no Aboriginal right or Aboriginal title is absolute, neither is any treaty right. Infringements of Aboriginal treaty rights are allowed if they can be justified in accordance with the test handed down by the Supreme Court of Canada in *Sparrow* and other cases.

A Court might eventually have to decide if the new legislation enacted by the Crown to meet its duty of acting honourably to one First Nation, i.e., the neighbouring First Nations, was a justifiable infringement of another First Nation's, say the Tsawwassen's, treaty right. It's certainly possible, maybe even likely that the Court would so conclude. For the same reason, it is likely that the Tsawwassen would never force the Crown to take that step.

Again, this is all to try to paint different scenarios to say there's no need to stop ratification of treaties now. If you look down the road, any possible scenario, no matter how bleak, has an end point in which the neighbouring First Nations' interests are protected.

And perhaps a final, and maybe a more

constructive scenario, is where one of the neighbouring First Nations would actually prefer to enter into its own treaty with the Crown and devote its energy to resources there rather than negotiating, let alone litigating, the overlaps with its neighbours. As long as the treaties continue to deal with harvesting of resources on a non-exclusive basis, then the treaties themselves can overlap and operate perfectly well. But in the event that the new treaty with the neighbour, does conflict with the treaty, of for instance the Tsawwassen, then the provisions of the treaty itself provides that the Tsawwassen can insist on replacement rights in their treaty and this, too, as it should be.

Most likely, no amendments of any treaties will be necessary as First Nations can resolve overlaps with side agreements and other protocols if they are determined to do so.

So what I tried to do by running through these scenarios is to quell the fears of those who think that the only fair and effective way of resolving overlaps is to stop the ratification of the TFN, of the Tsawwassen treaty. I say that no irreparable harm will come to the neighbouring First Nations if ratification is to proceed.

I'd like to try to defuse what might be the rather unproductive process of finger pointing or blame casting. I think it's fair to say that everyone could have done more and done it sooner. I have mentioned the Crown, but it also includes First Nations on either side of the overlap issue. At the same time, my sense is that there was no

deliberate foot dragging on anyone's part although there may have been some very different views as to how the overlap should be resolved, some irreconcilable differences and maybe even some intransigence on the part of some.

For my clients, who are in the very final stage of the treaty making process, the reality is that treaty making is a very long, complicated and time consuming process. And there's also only so much time, resources and energy that could be devoted to that process. It's hard enough to get a deal with the Crowns, to get a deal done with all one's neighbours is challenging at best; indeed, at some point it might not even be possible.

I do say that for those First Nations who have been critical of my clients in not doing enough, they, too, have to acknowledge that they may have not been as diligent as they might have been in seeing that the overlaps were resolved sooner.

Certainly for those that are in the treaty process themselves, the duty is reciprocal. Even those outside the treaty process have some responsibility, I think, to let their neighbours know that there's an overlap problem and try to resolve it. That they have not been resolved is a function of probably many factors - lack of resources, the usual political and bureaucratic inertia, even within the First Nations community, and maybe even a disbelief that anyone was ever really going to have a treaty or as soon as has now occurred and I obviously emphasize the irony of those words:

"as soon".

But what about the BC Treaty Commission? As the independent and impartial keeper of the process, should it take responsibility for the fact that the overlaps have not been resolved with respect to those First Nations who are now about to have their final agreement ratified?

A review of the Treaty Commission's annual reports over the last ten years demonstrates that the issue of overlaps has always been a concern of the Commission. The Commission has made various recommendations to fix the problem, but in the end all the Commission can do is plead and cajole, which I think it has done fairly well since the BCTC has no coercive powers under the *Treaty Commission Act*. The various policy statements and admonitions of the Commission in its various reports are just that and of no legal significance. The most it is required to do is to assess the readiness of the parties to commence negotiations of a framework agreement and to that end, to ensure that First Nations have identified and begun to address any overlapping territorial issues with neighbouring First Nations. But in the cases that I was involved with, that was all clearly done.

But I make this suggestion to you that perhaps the *Treaty Commission Act* should be amended to give the Commission more coercive powers. I know that idea requires careful consideration before it was to be embraced as it would have transformed the Commission from a "facilitator" to an "enforcer" of sorts. And I leave it to others more

knowledgeable than I as to whether that is a good or bad thing.

But to the extent that the Commission has pled lack of funds or resources to be a better facilitator as I understand it has, then in my view that plea should have been recognized and remedied long ago.

I don't want to end on a sour note, but I feel compelled to inject this dose of reality into the discussion. If the Court enjoins the Provincial Crown from ratifying the First Nation final agreement, and especially if it does so for the reasons that were advanced by the parties in that case, then there is a very real concern that the treaty process will collapse and fail and I say that would be tragic indeed.

Now I suppose I may have just stepped on a land mine, and maybe even departed from my promise to stick to the facts and the law. For some of you in this room, I know certainly in the larger First Nations community, derailing the treaty process would not be a bad thing at all. I don't want to get political in this speech, but then again I do want to declare my bias.

I firmly believe that treaty making is the only way First Nations will achieve any lasting sense of economic prosperity and self determination in this Province. I accept that for some First Nations the treaty that the Tsawwassen First Nation or other First Nations are close to having may not be the treaty that others would want. I accept that the treaty process can be improved. Indeed, I acknowledge my utter ignorance about the treaty process except for the little bit

I've learned in the context of this overlap litigation, but I believe like so many others that it is treaty making and not litigation that is the way to advance the noble goal of recognizing the interests of First Nations with the interests of the Crown.

But if the Court decides against the First Nations in the overlap litigation it will it make near impossible for a First Nation to have a treaty until all the overlaps are resolved. Given this nature of overlaps, as I said for the TFN there were 53 overlapping claims and then multiply that by the hundred or so Bands participating in the treaty process you get some sense of the dimensions of the problem. The difficulty of resolving these overlaps will take many, many years before there is ever a treaty in the process and by then the political will and momentum for treaty making may have been lost.

There's also something, finally, most ironic and most unfortunate about this overlap litigation. Ironic because a number of years ago I acted for the Attorney General of British Columbia, then under the NDP administration alongside with the Nisga'a who was represented by Thomas Berger to fend off a challenge by the then leader of the opposition Gordon Campbell to the Nisga'a treaty. That challenge was seen as representing the view of a significant percentage of the non-Aboriginal population that treaties with First Nations, especially those with vested rights of self government, ought to be stopped by the Courts.

Even though I thought then as I do now that that challenge to the Nisga'a treaty by Mr. Campbell was most unfortunate as it seemed to fan the fires of intolerance and fear against First Nations, there was something, at least, understandable about it. It was clearly a political initiative directed as much against the Government as the Nisga'a and there was nothing surprising about the non-Aboriginal population doing what they had to do to protect what they thought was their land and jurisdiction, however misguided or misinformed they were about their entitlement and their own history.

But that treaties today are being championed by the same Gordon Campbell is one of the ironies, of course, sweet ironies for some. But it is the unfortunate aspects of this litigation that I'm more concerned about.

What is most unfortunate, of course, is that First Nations such as the Tsawwassen, the Huu-ay-aht, having waited over 150 years to have the Crown enter into a treaty with them, are now being attacked, not by non-Aboriginal people, but by other First Nations. This seems very wrong to me. And given the necessary geographical proximity of the neighbouring First Nations in an overlap case, there are often members of First Nations on either side of the courtroom who are actually related, members of the same family fighting amongst themselves, it's not a civil war, but it's starting to get worrisome, if not ugly.

And even if my predictions about there being

dire consequences of the Court enjoins the Crown from ratifying the Tsawwassen are wrong, you need to know at least this: if the Court decides against the Tsawwassen in this litigation, then there's a very real concern that the Court will become the new and super Treaty Commission in this province.

While I obviously have a high regard for our judiciary and the judicial system, I do not think that First Nations should want to relinquish the control they presently have in the treaty process to the Court even if the Court's role is only to monitor and oversee the negotiations. Treaty making is and ought to remain a political process; to invite the Court to oversee and supervise that process of negotiations on the overlap, - overlap today who knows what tomorrow - is to transform the treaty process from one that is a political process, a Nation to Nation process, to one that is rights-based. That may not be the outcome that is in any First Nations interests. The BCTC is said to be the independent and impartial keeper of the process. That is as it should be. And maybe, as I noted earlier, the BCTC should be given more coercive powers or at least should become more proactive than it has in the past in facilitating the resolution of overlaps so that what has occurred with respect to the Tsawwassen First Nation agreement won't repeat itself. This, too, would be a good outcome. But what I don't think First Nations should want is to substitute the Treaty Commission with the Courts when it comes to treaty making.

In closing, if the First Nations who are

bringing the overlap cases do so because they genuinely fear for their own land and resources and Aboriginal and treaty rights, (which I believe is their motivation in bringing this litigation, and not to bring down the treaty process,) then I can only hope that I have been the voice of some reassurance that allowing the Tsawwassen First Nation and other First Nation treaties to be ratified will not cause the neighbours any lasting harm and that in the end all will end well.

Of course, the last word now belongs to the Judge and we should have our Reasons next week. Thank you.

(Since delivering this talk the British Columbia Supreme Court rendered its decision in the Tsawwassen First Nation overlap case and dismissed the Petitions of the neighbouring First Nations that sought to prevent the ratification of the TFN treaty. The Reasons are available on line at

<http://www.courts.gov.bc.ca/jdb-txt/sc/07/17/2007bcsc1722.htm>