



CANADA

Presentation to
Delta Council

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INTRODUCTION

A prominent federal Liberal was at my office recently and he informed my staff that Geoff Plant, BC Attorney General and Minister Responsible for Treaty Negotiations, was not happy with Delta Council given their withdrawal from the treaty process. Minister Plant, my staff was informed, did not “suffer fools gladly.”

What I propose to do over the next few minutes is to make it clear who is foolish and who’s not and who’s informed about the implications of treaty settlements and who isn’t.

Now after ten years in federal politics I know my objective is unlikely to be achieved completely, but from the get go, I want you to know I support your withdrawal from the negotiating process, which is fraudulent at best, and a colossal waste of tax payers dollars.

HISTORICAL BASIS FOR TREATY NEGOTIATIONS

In 1995, our Attorney General published an article entitled, B.C. Treaty History. It provides a good starting point for consideration of the Tsawwassen Agreement-in-Principle (AIP).

“It is ... profoundly important that a correct understanding of history inform the treaty-making process,” he said. “Without the facts, how are we to judge the fairness of the bargains made at the treaty table?”

According to Mr. Plant, “the real question for public debate is whether, and how, treaty-making can be a vehicle for restoring certainty to government decision-making, while accommodating the legitimate rights and aspirations of aboriginal people.”

“Treaty-making,” Mr. Plant warned, “will change the face of British Columbia in ways our politicians have not begun to foresee.”

As councillors and as long time participant in the treaty process, it is for you to decide, whether the deal is fair to the residents of Delta and whether it takes into account the results of aboriginal litigation. Does the treaty reflect the unique history in Delta? Does the treaty recognize existing aboriginal rights or does it create new rights?

And most importantly, were your concerns and the concerns of the people you represent addressed? I have yet to be convinced that the federal and provincial governments have considered the effects of this AIP on our community and on the ability of the municipality of Delta to make decisions and operate in the interest of all of its residents.

REDRESS FOR HISTORICAL WRONGS

On Friday morning July 30, 1999 at the Tsawwassen Community Centre Chief Kim Baird outlined the history of her band, the challenges facing the community today and its hopes for the future. I won't attempt to provide you with a complete overview of Chief Baird's comments in the brief time I have, but I do want to draw your attention to some of what she said. For example, Chief Baird's noted that,

“The Tsawwassen First Nation was able to live comfortably and in harmony with the environment for at least four thousand years. We were a rich and healthy people.”

This description of Tsawwassen life is in sharp contrast to the common experience of most hunter-gatherer societies in which life was marked by times of great abundance followed by periods of great scarcity. As noted by Chief Justice McEachern in the *Delgaamuukw* decision, aboriginal life in pre-European contact British Columbia (and many decades thereafter) was “nasty, brutish and short.”

Chief Baird later suggests that all was **not** milk and honey in her ancestors' pre-European contact world:

“Our biggest problem in fact was war and raids from other cultures such as the Kwaguith or Haida who would steal our goods and take our people as slaves.”

Chief Baird's observation that in pre-contact native society “there was no unemployment” is startling in its naivety. There was no unemployment, not because manna fell from heaven; there was no unemployment because, quite simply, if you didn't work you didn't eat. Life was, after all “nasty, brutish and short.”

Contact with European and other societies did improve the life of Indians in British Columbia whether it was iron tools or firearms in times long past or the benefits of today's society with its health care and social safety net. Most importantly, the stability and security guaranteed by the imposition of the British rule of law added a certainty to life in native communities that was lacking in pre-contact civilization.

Life is better.

This is the forgotten part of the historical factual background for the treaty process. The benefits of European contact are rarely discussed and never considered in the calculation of paying redress for past wrongs.

QUALITY OF LIFE CONCERNS

In her July 30, 1999 submission, Chief Baird claimed, "Tsawwassen people have a substandard quality of life.

The BC provincial court ruling in *Regina v. Kapp* earlier this year seriously undermined this assertion. In this decision Judge Kitchen noted:

"From the evidence that was led I conclude that the Musqueam Band is located on a well-situated urban reserve on the outskirts of Vancouver and controls relatively valuable property. This property and other business interests of the band produce a substantial income available to the band for the benefit of the band and its members. As a result, the real estate and personal possessions of the band members, described by the witnesses and evidenced by photographs, are at least of a standard and quality representative of the community at large. There was other less tangible evidence that was consistent in indicating that finances are not a particular problem for band members.

The Tsawwassen Band has a reserve further from the Vancouver metropolitan centre, which is therefore less valuable. The band leases properties and has business ventures however, and there was similar evidence concerning quality of housing and the possessions of band members. The Crown did call a witness regarding the Tsawwassen Band. Frederick Jacobs, former Chief and band councillor, described the band's circumstances. He told of considerable resourcefulness by band members to take advantage of their proximity to the highway and the ocean in developing income-producing properties. It is apparent that there are educational and unemployment problems on the reserve but there was no evidence of housing problems nor of poverty generally. With regard to the Tsawwassen Band also I conclude that in some respects they are disadvantaged, but financial disadvantage is not one of the problems. " (paras. 197-198)

Judge Kitchen's decision is supported by the extent of the federal government transfer payments to the Tsawwassen Band as noted at Appendix I of this submission. In the financial year ended March 31, 2001, for example, federal government payments to the Tsawwassen Band exceeded \$3.1 million or approximately \$54,000 for a family of four.

Not included in this calculation are off-reserve income to band members, the unknown revenues the Tsawwassen band earns from the Stahaken and Tsatsu Shores developments, business operations on the reserve or taxation of non-Band assets on the reserve. Nor does this amount reflect off-reserve income, the tax benefits enjoyed by aboriginal Canadians or the fact that families building houses on the reserve have no cost for land.

In comparison to these known and unknown revenues, the average Delta family had an income of \$67,844 according to Chief Baird (p. 37).

Unemployment:

In her submission, Chief Baird stated “38% of Tsawwassen members surveyed (excluding students and retired people) are unemployed, compared to an unemployment rate of 7.4% in Delta.” (p. 37)

In his testimony to the Court in the *Kapp* trial, former Chief Tony Jacobs informed the Court that of all the commercial operations doing business on the Tsawwassen reserve including Splashdown Park, the Park and Ride, the campground and RV Park, the war games and the billboard operation only one Tsawwassen member was employed.

Mr. Jacobs also advised the court that only one Tsawwassen Band member was employed at BC Ferries and that none were employed at the coal terminal. This was unacceptable, yet Mr. Jacob seemed uncertain as where to lay the blame. Both BC Ferries and the coal port routinely advertise job opportunities, but Band members appear to show no interest in this type of work.

A September 2003 ad in the Delta Optimist (Appendix 2) sought an entry-level employee for the band office. Seeking an entry-level employee from off reserve is unconscionable given the high level of unemployment on the reserve. It should be noted that many, if not most of the employees at the band office, are not band members.

There is a misconception that somehow Indians responded to the advance of European civilization by retreating to their communities and isolating themselves from mainstream economic activities. Those who hold these misconceptions would also tell you that culturally natives have difficulty adjusting to the demands of our regulated society.

The historical evidence is otherwise. Until the early decades of the last century Indians were prominent players in the economic life of British Columbia. They played exemplary roles in the fishing, canning, transportation, long-shoring and forestry industries. Growing transfers of cash to native bands and the requirement for reserve residency to

share in the bounty choked off this enterprising activity. This free flow of cash served to stifle initiative and destroy self-confidence. Native participation in all industries other than fishing declined dramatically.

Mr. Jacobs alluded to the lack of confidence evidenced by the failure of members of his band to seek off-reserve employment in his testimony.

Lack of Land:

The Tsawwassen reserve comprises some 700 acres. As of December 31, 2002, the population of the Band is 234 of whom 160 live on the reserve. Therefore, each Band owns the equivalent of 3 acres of land in one of the most valuable metropolitan areas of British Columbia. Some of this land is taken up by economic development initiatives and some of the land is held by individual members through certificates of possession following decisions by the Band to allocate their land in this manner.

The average family in BC owns a 75 x 100 residential lot. Most often this property is heavily mortgaged and taxes must be paid annually to the municipality, the Province and the school district. These taxes do not have to be paid by Tsawwassen Band members.

It would seem that in comparison to the average BC family, members of the Tsawwassen Band are in an enviable position with respect to the land held on a per capita basis.

It should also be noted that the Tsawwassen sold 88 acres of reserve land. How this sale was factored into today's "obligation" of land transferred in the AIP is unknown.

This does not include the 88 acres of reserve land that was sold by the Tsawwassen Band in 1957 for \$132,000.

Education:

In her submission Chief Baird notes "53% of Tsawwassen members have not graduated from high school compared to 23% in Delta."

While this number is alarming, I am not sure she can hold the community at large responsible. Both the government and the Band offer programs to keep band members in school. Government pays for post secondary education and special provisions are made to encourage and promote native participation in post secondary institutions.

Ultimately, as in society at large, the choice to continue one's education lies with the individual and that choice generally reflects the encouragement received from parents and other significant family or community influences.

LEGAL CONCERNS

Attorney General Plant contends that the treaty will resolve outstanding questions of Tsawwassen legal rights and eliminate the prospect of further litigation by bringing certainty and finality through a treaty. This raises the question of what exactly are the outstanding legal issues arising from the Tsawwassen Band's occupation of parts of the Delta municipality prior to contact.

Fishing and Hunting:

There is no doubt the Tsawwassen have an aboriginal right to fish or hunt certain species for food, social and ceremonial purposes. These rights have already been accommodated by the relevant government departments. In the case of fisheries, for example, the Tsawwassen exercise their right to fish for food in priority to all other Canadians.

The question of an aboriginal right to fish commercially was decided by the Supreme Court of Canada in 1996 in *Regina v. Van der Peet* and *Regina v. NTC Smokehouse* when it rejected aboriginal claims to sell food fish.

The question of who manages the fishery was decided in DFO's favour in a series of Supreme Court of Canada 1996 decisions including *Regina v. Nikal* and *Regina v. Marshall* (1 and 2). There is no aboriginal right to manage the fishery.

The BC fishing industry is content with the state of the law on aboriginal fishing rights as decided by the Supreme Court of Canada. From their perspective, the treaty process and the AIP are a far greater source of uncertainty to the industry than future Tsawwassen litigation on fishing rights.

Aboriginal Title:

After one of the longest trials in Canadian history, the British Columbia Supreme Court ruled against a claim of aboriginal title to land and self-government powers by the Gitksan near Smithers, BC in its *Delgamuukw* decision.

Following the 1991 election of the Harcourt government, and just a month before the Court of Appeal was to hear *Delgamuukw*, the Attorney General fired the winning legal team in favour of lawyers who were "more sympathetic" to the aboriginal litigants. Immediately after, the Government of BC then conceded the question of aboriginal title and aboriginal self-government, which were the very questions before the Court.

Eventually, the matter was addressed by the Supreme Court of Canada where a test of occupancy was established to determine aboriginal title to a parcel of land. No band in BC, including Tsawwassen, has ever attempted to validate aboriginal title to “their” land. Successive governments have simply operated on the flimsy assumption title exists.

That being said, questions of aboriginal title should not be an impediment to development in Delta. However, given recent correspondence concerning the East Ladner bypass, someone may be suffering delusions and given Mr. Plant’s bent, it may well be me.

Self-Government:

The Supreme Court of Canada left unanswered the question of aboriginal self-government raised in *Delgamuukw*. In *Nikal* (fisheries) and *Pamejawn* (gambling), however, the Supreme Court of Canada rejected assertions of aboriginal self-government. Given these rulings it is difficult to imagine that the Supreme Court of Canada would grant an aboriginal right to self-government that would exceed the jurisdiction enjoyed by the Tsawwassen Band under the *Indian Act*.

Conclusion:

In examining the Tsawwassen AIP consideration should be given to the following:

- a. Canadians have a duty to redress wrongs committed upon the Tsawwassen with generosity while keeping in mind, (1), the historical fact that many groups were wronged in Canada’s history, (2), the Tsawwassen received substantial benefits from European settlement, and (3), government transfer payments to the Tsawwassen have in years past been very substantial;
- b. With respect to the quality of life concerns raised by the Tsawwassen we must keep in mind that:
 - I. On an individual basis, Tsawwassen band member land holdings far exceed most other Delta families. The Tsawwassen are already among the largest non-governmental land holders in Delta;
 - ii. Problems with respect to unemployment, education and housing are in significant part the responsibility of the Tsawwassen Band itself, but government has a duty to create an economic and social environment in which all Canadians, including the Tsawwassen can fulfill their potential;

- c. There are minimal questions remaining about the scope and extent of Tsawwassen Band aboriginal rights, so treaty negotiations cannot be justified on the basis that a treaty will settle outstanding legal matters.

It is in this context that we must ask whether the Tsawwassen AIP is a good deal for the people of Delta and the Tsawwassen Band members themselves and whether the people of Delta are well-served by continued participation in the process.

AIP SUMMARY AND COMMENT

The Agreement-in-Principle (AIP) raises more questions than it answers. Many of the sections are vague and difficult to understand or contain requirements for further negotiations. The AIP is in many respects, a skeleton that requires considerable work to complete.

Council has, I'm sure, one or more copies of the detailed summaries of the AIP that are readily available, so I won't trouble you with another. I will, however, highlight some of the concerns that I have:

Fisheries:

The band will be given large quantities of marketable salmon for trade with other bands. The quantity is so large that if similar amounts were given to other aboriginal bands that currently have access to Fraser sockeye, more than 100 percent of the available catch would be taken. This would be the end of commercial and recreational fishing for all other Canadians.

Equally onerous are the provisions allowing trade and barter of "food" fish. The Supreme Court of Canada in *Van der Peet* rejected this practice so the AIP goes far beyond what the court has awarded. Not only does trade and barter introduce a commercial component into what is legally supposed to be a food fishery, but it will also be difficult, if not impossible to enforce.

The commercial fishery component included in the AIP must be considered as a direct assault upon the constitutional equality rights of other Canadians. As was noted by the Provincial Court of BC in the *Kapp* decision:

"201] Finally, if the Department perceived that Aboriginals are at a disadvantage in their abilities to enter the commercial fishery and exercise the general public right to access the fishery, I find this not to be the case. Historical statistics show a fluctuating participation in the fishery, always well above Aboriginal

representation in society. The Musqueam and Tsawwassen Bands in particular are significantly over-represented compared to the population in general in their involvement in the fishery. Since prior to the pilot sales programs there have been preferential government entry programs, lower licence fees, buy back programs and tax-free income as incentives to Aboriginals not available to the rest of society. This has put Aboriginal individuals at an advantage.

[202] My conclusion is that there may be non-financial disadvantages experienced by the Musqueam and Tsawwassen Bands but there is no rational connection between the preferential treatment given these bands in the fishery, and these disadvantages. The program confers an unjustifiable benefit on the individual members of the bands, at the emotional and financial expense of the commercial fishers. It therefore is grossly unfair.

[203] In summary, following the procedure indicated in the **Law Case**, I conclude that the pilot sales fishery draws a distinction and defines two groups on the basis of whether or not individuals have a bloodline connection to the Musqueam, Burrard or Tsawwassen Bands. This is analogous to a racial distinction. The group without the bloodline connection is subjected to differential treatment by having a benefit withheld - their right to participate as equals in the public commercial fishery. This has the effect of promoting the view that these individuals are less capable, less worthy of recognition, and less valuable as members of Canadian society. It also promotes the view that they are not as equally deserving of concern, respect and consideration as the members of the three bands.

In rejecting a separate native commercial fishery, Judge Kitchen expressed concern that the government would do an end-run around the legal prohibition and avoid scrutiny under the *Charter of Rights and Freedoms* by including racially segregated commercial fisheries in treaties:

“ [190] We must keep in mind that the purpose of the Department in implementing the pilot sales program is a contextual factor in the analysis. The perception of the differential treatment by a reasonable person must be considered. The courts so far have generally rejected claims of an aboriginal right to a commercial fishery. Treaty negotiations are occurring in which commercial fishing rights are a central issue. The gratuitous granting of these rights by the Department under such circumstances is reasonably perceived to be rash and imprudent.”

We would be foolish to believe that the AIP covered only salmon and only the shore area near the reserve and its new lands. The AIP recognizes as the Tsawwassen fishing area much of the Lower Fraser from Burnaby seaward, the coastal waters adjacent to Richmond as far south as White Rock and may well include the waters of some Gulf Islands.

Another concern is the level of self-enforcement in the Tsawwassen fishery. The fishing industry has long maintained that there must be independent enforcement of all fisheries. One cannot have a financial interest in a fishery and maintain the independence necessary to

objectively enforce the law. This problem is well-proven by Tsawwassen band member Mike Baird who was convicted of illegally selling food fish, yet maintained his position of Tsawwassen Fishery Manager.

Also according to the AIP, fish farms may be established in these waters.

Land and Land Use Planning:

Real estate agents are always reminding us that land is valuable because they are not making any more. That is doubly true of our world-renowned farmlands on the Fraser delta.

The official summary of the AIP states 427 hectares (1.055 acres) of protected farmland is to be given to the Tsawwassen band. The official summary fails to indicate how many additional acres of farmland are involved where the band will have the right of first refusal if the land is ever sold. It would appear to be about another 400 hectares.

In addition there are several other parcels of land.

The band will control the waterfront from Canoe Passage to the other side of the ferry terminal. In addition all the waters abutting these lands will form a part of the Tsawwassen Fishing Area.

Further the band appears to have the right to buy additional land and it will become part of the Tsawwassen band lands thus eliminating it from municipal zoning authority.

The AIP also provides an avenue to move band-owned farmland out of the Agricultural Land Reserve. This ability to buy low cost farmland and turn it into more expensive industrial or residential land would be a significant windfall for the band. Although the exact means for the removal of land from the AIP is not specified, the AIP says that the means to transfer of the land out of the ALR is pivotal to the conclusion of the final agreement:

The Parties acknowledge that Tsawwassen First Nation concluding a Final Agreement will depend on its satisfaction with the outcome of the process [for excluding land from the ALR] referred to in clause 12.

The band has indicated that it intends to develop such lands.

Governance:

The size of the existing Tsawwassen reserve may well triple. Housing developments on band land can be expected to dramatically increase the number of non-band members living on band land. It is important that

these non-members not end up in some sort of legal limbo. These residents will pay taxes to the band and will no longer reside under Delta's jurisdiction. In similar circumstances elsewhere, such as Westbank and Nisga'a non-Band members are prevented from voting in band elections. Thus a government with substantial jurisdictional powers is unaccountable to the taxpayers who fund the government. Further, these residents would put an increased strain on recreational and other publicly funded facilities in Delta.

Wildlife:

There are three AIP issues with respect to wildlife and migratory birds. Firstly, band members will acquire a constitutionally protected right to hunt wildlife and migratory birds over an expanded area, perhaps significantly larger than Delta. The boundary of the Migratory Bird harvest area is described as Tsawwassen Territory and appears to include Delta, Surrey, parts of Richmond and the lands surrounding Pitt Lake. This may mean a significant expansion in hunting activities into areas where there was formerly no hunting.

Secondly, Band members will be able to kill wildlife and migratory birds for domestic purposes and for trade and barter between bands. Thus hunting becomes a commercial activity that under law was formerly restricted to food, social and ceremonial purposes.

The final issue is the impact of removing farmland from the ALR. Migratory birds depend on Delta farmland. The Delta Farmland and Wildlife Trust works with farmers to provide winter cover crops, grassland set-asides, hedgerow installation and grass margins to improve habitat for birds. As the Band removes land from the ALR for industrial, housing or other projects there will be an equal reduction in migratory birds habitat. Wildlife experts have described the lands as "critical" and the possible loss of the farmland, should it be withdrawn from the ALR and developed, as "highly catastrophic."

TRAGEDY OF COMMUNAL BUSINESS AND BAND GOVERNMENT

In recent years, the federal government has spent as much as \$3 million dollars a year on the 234 Tsawwassen Band members of whom only 160 or so live on the reserve. These high levels of government spending and aboriginal specific tax exemptions have not improved the lot of the average reserve resident. Employment, and other economic and educational opportunities have not been fully utilized by band members.

It is obvious to most that the special treatment of natives inherent in the reserve system has failed. Nevertheless, in this AIP, we are being asked

to support a 200 – 300% enlargement of the reserve, increase the level of federal and provincial support for the reserve and bestow increased powers on the band.

We are being asked to support the establishment of a new super reserve and a Band government that has super powers. This treaty will, we are assured by Minister Plant, make life better for reserve residents and free us of any obligation for past wrongs.

It would do us well to look at other places where treaties have long been settled, and money is no problem. When we do, we see that conferring special status on one group of Canadians does nothing to improve their quality of life.

Let me quote from a March 30, 2002 story from the *Calgary Herald* about the oil rich Samson Reserve at Hobbema:

“What does a Ghetto look like? Most of us imagine the most wretched neighbourhoods of American urban jungles, but a small town in Alberta? That’s not most folk’s idea of a violent, dirt poor, drug-polluted ghetto....

“Hobbema is sick. You can see it in the boarded up windows. You can feel it in the defeat on the streets. Alarming levels of unemployment, crime and substance abuse have been well documented over the years, and the area is cursed by one of the highest suicide rates in North America.

“People kill themselves here 2.5 times more often than in the general population, according to a 1996 study conducted by the Confederacy of Treaty 6 First Nations. This, despite the fact Hobbema is one of the richest reserves in North America. Its inhabitants receive about \$50 million a year in oil and gas royalties and federal money.) ...

“Because of oil and gas wells on the reserve, every member of the community gets a huge royalty payment on his or her 18th birthday. These lump sum payments average about \$100,000 per person; some as high as \$240,000....

“What people don’t understand is these trust funds you get when you 18 can be devastating. ... There’re still the same problems here as there are on other reserves, with the drugs and alcohol. So throw \$100,000 at that kid and you can imagine what’s going to happen.

“In most cases ... all the money does is intensify the problems – speeding up the slow journey to suicide so many natives are on.”

The Globe and Mail on April 24, 1999 in an article entitled *How Money Has Cursed Albert's Samson Cree* observed:

“Samson Cree finds itself in the grips of a financial crisis brought about by overspending and mismanagement.

“The scale of the problem is enormous. Last month, the band withdrew \$50 million from its \$390 million trust fund to pay down a deficit ballooning out of control.

“That was just the latest in a series of withdrawals and financial shufflings performed to keep the ... reserve afloat. Last September, the band cashed in \$16 million from the trust fund.

“In January ... bandleaders voted to take \$11 million from a children's education fund and considered taking \$20 million from a minors' trust fund.

“For the 1998-1999 fiscal year, the band's budget called for revenues and spending to balance at about \$3.3 million per month – but the actual amount spent has averaged about \$7 million per month. In February, the band spent over \$10 million.

“More than eighty per cent of the reserve's members are on welfare, and the unemployment rate is estimated at more than eighty-five per cent.

“As at most reserves, virtually all the wealth at Samson Cree is controlled through the band office, which oversees almost every job on the reserve.

“This has created a political system rife with potential for abuse in access to jobs, money, social services and housing.”

A treaty and revenue from natural resources have not solved the social economic problems in Hobbema and can't necessarily guarantee better results here.

We all wish the Tsawwassen the best of fortune, but simply providing more land and more money for the band leaders will not guarantee an improvement in the lot of Tsawwassen Band members.

DOES DELTA BELONG IN THE TREATY PROCESS

My intention in providing a background to the treaty process and a summary of the Tsawwassen AIP is to help us address the main issue before Delta Council tonight: Does the Corporation of Delta really belong in treaty discussions?

My qualified answer is Yes, but not this treaty process. My affirmative response depends on two conditions:

1. Delta's role must be substantive and meaningful; and,
2. The treaty process itself must be balanced and fair to interests other than the main negotiating parties.

This treaty process has no resemblance to the fair and transparent process that would earn an affirmative answer.

There are two ways to assess whether Delta properly belongs in the process:

1. Is the process itself fair, transparent, representative and accountable?
2. Does the Tsawwassen AIP reflect the interests of the citizens or groups who did participate in various advisory processes?

Let me elaborate on the above two determinants. First, is the process itself fair, transparent, representative and accountable? In my opinion the BC Treaty process is anything but fair, transparent, representative and accountable for a multitude of reasons. I will highlight one important reason:

The Federal Fiduciary Obligation:

Chief Baird noted the federal fiduciary obligation in her July 1999 presentation by citing the Supreme Court of Canada decision in *Sparrow*:

“. . . 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. . . “

What does this mean in the context of treaty negotiations?

It means that the federal government, which is supposed to be representing *all* Canadians in treaty negotiations, actually has a *legal* obligation to act in the best interests of the aboriginal party across the

table that supercedes their obligation to other citizens. Most Canadians would rightly call this a conflict of interest.

To make matters worse, instead of establishing a separate department to handle treaty negotiations on behalf of Canada, Indian and Northern Affairs Canada was tasked with the job of treaty negotiations.

At an advisory meeting several years ago a fishing industry representative asked Ron Irwin, the-then Minister of Indian Affairs, how he resolved the conflict of interest created by the fiduciary obligation. With a flourish of his hands he demonstrated how he changed hats depending on who he was representing at any given moment.

One example of the impact of this conflict is Indian and Northern Affairs failed, but determined efforts to create separate native-only commercial fisheries. This excerpt from the Supreme Court of Canada decision in *Regina v. Nikal* illustrates an 1881 effort by the Department of Indian Affairs to create separate native-only commercial fisheries:

The Directions to Commissioner O'Reilly

XLV. In terms of the instructions Commissioner O'Reilly received, his duties were expressed as:

... ascertaining accurately the requirements of the Indian Bands in that Province [British Columbia], to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes. [Emphasis added.]

(Federal Order in Council of July 19, 1880. Canada. Privy Council. Order in Council No. 1334/1880 in National Archives of Canada, Record Group 2, Series 1.)

XLVI. These instructions were later modified, but the principle that the ultimate decision as to the allocation of fishing grounds remained with the Department of Marine and Fisheries never changed. Thus, on December 20, 1881 the Superintendent General of Indian Affairs wrote to A. W. McLellan, Acting Minister of Marine and Fisheries and stated:

I have the honor to inform you that Judge O'Reilly having been last year appointed Commr. for allotting lands as Reserves in British Columbia for occupation by the Indian Bands and Tribes of that Province I considered it expedient and proper to instruct him, while engaged in assigning these lands, to mark off the fishing grounds which should be kept for the exclusive use of the Indians and he is following those instructions...

It is desirable that the fisheries recommended for allotment to the Indians be not otherwise disposed of without the consent of this Department being first obtained.

(National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

XLVII. The instructions referred to were also given to Indian Commissioners in Manitoba, Keewatin and the Northwest Territories, and they state that the Commissioners are to ascertain what fishing grounds should be reserved in order that application might be made to the Department of Marine and Fisheries to have those areas secured for the use of the Indians. These instructions reveal that Commissioner O'Reilly was not given the authority to allot an exclusive fishery, and that the most he could do was make recommendations.

XLVIII. In response to being informed that Indian Commissioners were receiving such instructions, and making such recommendations, the Acting Minister of Marine and Fisheries made it clear that his department would not act on any such recommendation. He reiterated the position of his department and informed the Department of Indian Affairs that:

. . . fishing rights in public waters cannot be made exclusive excepting under the express sanction of Parliament, and that Indians are entitled to use the public fisheries only on the same conditions as white men, subject to the *Fisheries Act* and Fishery Regulations. The mere assignment of these fishery privileges by Indian Agents, or the abstention of this Department from otherwise disposing of them -- which there was no intention to do pending careful consideration of all the circumstances of each case -- could not legally exclude the public from fishing therein.

(A. W. McLelan, Acting Minister of Marine and Fisheries, to Sir John A. Macdonald, Superintendent General of Indian Affairs, January 30, 1882, in National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

Given this long history of attempts by the Department of Indian Affairs to create separate native-only commercial fisheries, it is not surprising to find that separate native-only commercial fisheries are a component in all BC treaties or AIPs.

Who did the federal officials represent when they agreed to these provisions? We know that it was *not* the vast majority of Canadians because racial segregation of the work place is vehemently opposed from coast to coast.

In conclusion, as long as the line department responsible for aboriginal Canadians is also responsible for treaty negotiations, Delta's place at the treaty table will not be taken seriously.

Regarding the second determinant as to whether or not the Tsawwassen AIP reflects the interests of the citizens or groups who did participate in various advisory processes, another way to assess if participation in treaty advisory processes is worthwhile is to review the actual AIP or

Final Agreement to determine whether it reflects the concerns raised in the various advisory processes.

The Tsawwassen AIP from a Fisheries Perspective:

From a fisheries perspective I can tell you that none of the fishing industries concerns are reflected in the Tsawwassen AIP.

The BC fishing industry's major concerns were that treaties result in:

- a single commercial fishery under one set of rules
- that all enforcement and monitoring be conducted by independent parties
- food fish quantities and management be reasonable and effective.

These concerns have been raised repeatedly throughout almost twenty years of expensive and time-consuming participation in various advisory processes.

The industry has not been successful. All treaties signed to date, including the Tsawwassen AIP:

- contain separate commercial fisheries operating under different sets of rules and regulations
- much of the enforcement and monitoring will be conducted by the treaty signatory, not an independent body
- food fisheries are excessive and unmanageable.

It's a shame that the industry wasn't listened to.

The Tsawwassen AIP from a Municipal Perspective:

The Corporation of Delta was involved in the treaty process until last March. Therefore, if Delta had a substantive role in the negotiations the AIP should reflect their major concerns. Other than attending a series of meetings, were the people of Delta, as represented by their Council, really at the treaty table?

The AIP contains a myriad of racial preferences. Was it council's wish to have a series of racial preferences affecting the daily life in their municipality?

The people of Delta have great concern about farmland. Do they support a process in which the Tsawwassen Band can obtain farmland and have it removed from the ALR through a special process designed for the Band?

In March, Delta Council let it be known that it did not want to continue on with the pretense that it was having a say in the deal the federal and provincial bureaucrats were crafting with the Band. Their withdrawal was the only avenue to advise the parties to the negotiations that Delta considered the Advisory committee a waste of time and wanted their concerns to be heard.

In reality, Delta was never at the table.

DELTA DESERVES A VOTE ON THE TSAWWASSEN AIP

Delta has expended considerable funds and time in an unsuccessful attempt to influence the Tsawwassen AIP. I fully agree with Delta's decision to withdraw from the ineffective and costly so-called consultation process. We should not allow the federal and provincial governments to continue the masquerade of a consultation process by becoming a willing accomplice in this shoddy performance. There is a far better way to spend the funds that Delta was spending on the flawed consultation process because the impact of a treaty based on the current AIP will be immense.

The Tsawwassen AIP, should it become law, will change Delta more than the construction of the Massey Tunnel or the creation of the Agricultural Land Reserve. No municipal bylaw or spending decision has the prospect to change Delta in the nature and scope proposed by the AIP. If the AIP becomes law, Delta will have little or no control on major developments that will affect its community.

If the Tsawwassen AIP becomes law it will forever be protected by the Canadian Constitution. No matter how good or bad the deal it cannot be changed without the consent of all three parties. If one party refuses, the treaty cannot be amended.

According to the federal and provincial governments, it is fair that Delta's one chance to influence the next 500 years of development in their community is participation on the treaty advisory board in the year 2003.

The people of Delta deserve much better.

I believe that the people of Delta deserve a vote on the Tsawwassen AIP and Delta City Council can provide this critical vote through the municipal referendum process.

The members of the Tsawwassen Indian Band rightfully have a vote on the AIP. It will have an equally dramatic impact on their community. The people of Delta have a right to the same fair opportunity.

It is readily apparent that the people of Delta were ignored when the AIP was drafted by federal and provincial bureaucrats. And they are being ignored again when federal and provincial politicians endorse an agreement, which, I believe, most citizens will oppose as they become more familiar with the terms.

The Province of BC promised the people of BC a vote on the treaty process and we endorsed the positions expressed in the referendum. As everyone knows today, the Province of BC is ignoring the referendum results. Once again, the people of BC have been deprived of any say in the treaty process by their senior governments even though it will shape our world for the next 500 years.

It may be that the people of Delta will approve the Tsawwassen AIP - it is their right to do so. The point is that the people deserve a say in a treaty that will change their community forever.

In more than 100 years of failed aboriginal policy making, the people have rarely, if ever, had a voice. It is long overdue.

In closing, it should be remembered that the purpose of aboriginal rights is to reconcile the prior occupation of parts of these lands by its aboriginal inhabitants with the greater society in which we all live today.

A treaty that does not have the support of the vast majority of people whom it affects will not reconcile the interests of aboriginal and other Canadians.

Inquiry of Ministries

Appendix 1

Question Q-62
June 12, 2000

Indian and Northern Affairs Canada

Tsawwassen

1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	Total
\$ 1,430,272	\$ 1,509,732	\$ 1,437,030	\$ 1,997,659	\$ 3,173,569	\$ 9,548,262

Fisheries and Oceans

	AFS	CA	
1996-1997	\$ 85,000		
1997-1998	\$ 85,600		
1998-1999	\$ 90,000	\$ 10,000	
1999-2000	\$ 70,000	\$ 36,000	
2000-2001	\$ 65,600	\$ 44,400	
	\$ 396,200	\$ 90,400	
			Tsawwassen Total
			\$ 486,600

AFS - Aboriginal Fishing Strategy

CA - Indicates funding under contribution agreements for specific projects during this same period.

Health Canada

1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	Total
\$ 123,122	\$ 125,185	\$ 158,887	\$ 144,941	\$ 126,987	\$ 679,122

Human Resources Development Canada

1996-1997	Not Available			
1997-1998	\$ 214,868			
1998-1999	\$ 199,471			
1999-2000	\$ 318,408			
2000-2001	Not Available			
	\$ 732,747			
	\$ 159,338			
	\$ 892,085			
		Estimate	Estimate	
		\$ 111,838	\$ 47,500	
			\$ 159,338	
				Estimate Total Expenditures
				\$ 892,085

Industry Canada-Aboriginal Business Development Program (commercial enterprises)

1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	Total
\$ 15,814	\$ 27,321	\$ 125,217	\$ 110,341	\$ 52,338	\$ 331,031

Justice Canada

Tsawwassen received a Community Mobilization Program grant, under the National Strategy on Community Safety and Crime prevention. Years 1996-97 to 2000-01 inclusive.

Total \$ 15,000

Department of the Solicitor General

Total expenditure for 1999-00 & 2000-01 for Royal Canadian Mounted Police - First Nations Community Police Service Community Tripartite Agreements at Tsawwassen and Semiahmoo was \$91,689.83

\$ 91,690

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Appendix 2



Tsawwassen First Nation

Employment Opportunity

RECEPTIONIST

Tsawwassen First Nation requires a full-time, permanent Receptionist for a diverse front office position with the Band Office. This position will be from Monday thru Friday – 7.5 hours per day from 8:00 a.m. to 4:00 p.m.

This is an entry-level position, however, applicants should be proficient in all facets of office procedures. Working knowledge of computers, particularly with MS Word is needed. You will be comfortable with answering a multi-line phone system, directing calls and greeting visitors to the office. Familiarity with most office machines such as fax, photocopier, postage machine is a prerequisite.

Please fax, mail, or drop off your resume Attention: Ruth Kenny no later than September 11, 2003 by 4:00pm to:

Tsawwassen First Nation
 #131 N Tsawwassen Drive
 Delta, BC V4M 4G4
 Phone: (604) 943-2112
 Fax: (604) 943-9226