



October 30, 2007

Tsawwassen Treaty: A Final Settlement?

Is it Over – Or Are There More Demands to Come?

Mayor Lois Jackson, Delta's representative on the Metro Vancouver (Greater Vancouver Regional District) governing board, casts 5 votes on behalf of the 100,000 plus citizens of Delta. The Tsawwassen *Final Agreement* gives the 358 band members living throughout North America one representative and one vote on the Metro Vancouver board.

This over-representation of the Band on the Metro-Vancouver board, where it will participate as a member, pales in comparison to the big stick given the Tsawwassen Band by the Treaty's requirement that governments "*consult*" with the Band government before making a decision on almost anything that affects or could affect the Band's *Tsawwassen Territory*.

In the *Final Agreement* the *Tsawwassen Territory* covers more than just the existing reserve lands and the ALR protected farmland that will be transferred to the Band. The *Tsawwassen Territory* is an area roughly equivalent to Metro Vancouver that stretches from the Gulf Islands to Langley and Maple Ridge with a population of more than a million people.

In the *Final Agreement*, the word "*consult*" is not used in the manner to which most of us have become accustomed. For example when the Department of Fisheries "*consults*," it selects the issues it will consult fishermen on, which fishermen it will consult and the nature of the consultation process. However, the *Final Agreement* sets out when to *consult* and how the *consultation* must operate. The *Tsawwassen Final Agreement* creates a constitutional requirement that there must be:

- Notice of the matter to be decided;
- Sufficient information to permit the Band to prepare its views;
- A reasonable period of time to permit the Band to prepare its views;
- An opportunity for the Band to present its views;
- A full and fair consideration of any views on the matter presented by the Band.

Under the proposed Treaty the Tsawwassen Chief and Band Council will have a constitutional right to demand *consultation* before governments are able to make key decisions. Decisions cannot be taken or work initiated on a wide range of federal, provincial and municipal matters until the consultation mandated by the Treaty is completed. The Band will have:

- The power to bring the establishment or expansion and perhaps even the administration of a National Park, National Marine Conservation Area, Provincial Park, Protected Area or Wildlife Management Area to a halt until its concerns are satisfied;
- The ability to affect environmental assessments, the location of roads, public utilities, land planning and the structure and functioning of local government from the Gulf Islands to Maple Ridge (This could in some instances mean that no significant decision may be made in Metro Vancouver (or the *Tsawwassen Territory*) without the concurrence of the Tsawwassen Band government); and
- The ability to require the federal government to *consult* with the band when formulating Canada's position before international tribunals and in international negotiations on certain matters.

The Treaty-right to *consult* is a show stopper that can conceivably be used as a stick to make demands on other matters thought long-settled. "Agree with us on this or we will demand a long and drawn-out consultation process on that." The right to *consult* or be *consulted* creates a *tit for tat* scenario where there will never be a final settlement and real reconciliation, only continued demands and strife.

An example of where the Band agreed to concede its aboriginal rights for money and future advantages can be found in the *Memorandum of Understanding* it signed with the Vancouver Port Authority. The Band agreed not to raise issues that would derail the environmental assessment of the container port expansion at Roberts Bank:

"Accepts the consultations made and the accommodations proposed herein as adequate for the infringement of its Aboriginal Interests on Roberts Bank that result from the Roberts Bank Facility and the Roberts Bank Port Expansion."

"Commits not to challenge or impede, directly or otherwise, VPA's rights to procure, construct, operate and regulate the Roberts Bank Port Facility and the Roberts Bank Port Facility Expansion on Roberts Bank for port activities and activities necessary to support port operations."

"The TFN shall not raise any Environmental concerns, issues or objections nor make any Environmental comments or submissions that could not legally be raised or made by a non-aboriginal Person.

"For greater certainty but without limitation, the TFN agrees that, with respect to the Environmental Assessments relating to the Roberts Bank Port Facility Expansion, the TFN will not raise any Environmental concerns, issues, or objections nor make any Environmental comments or submissions that are based on, result from or are in any way attributable to aboriginal status, rights or title."

In return the Band got a commitment from the Vancouver Port Authority to fund the development of a band-owned container handling facility on ALR protected farmland and for the Port Authority to pay the Band market rates:

"The VPA and TFN agree that development of a *container handling facility* shall be a priority for a joint investment... Should such a project proceed, the Parties will work jointly to ensure that the TFN Settlement Lands that are required for the project are expeditiously transferred to the TFN and

removed from the application of the Agricultural Land Reserve designation. ... In any case, the land will be leased to the project or the entity managing the project at *lease rates* based on comparable *market rates for industrial lands* associated with port terminal/rail lands.”

With the provisions of the Treaty, the Band government acquires the power to make demands and interfere in matters in which it has no real interest. It is not inconceivable that the Band government might want to block the expansion of a National Park or a highway simply as a bargaining chip to get other governments to concede on some matter of importance to the Band – perhaps the addition of land to the reserve. A future Tsawwassen Chief and Council could use the proposed Treaty-right to *consult* to hamstring any number of decisions by the federal, provincial and municipal governments if they wanted to be bloody-minded. Human nature being what it is, who would not find occasions to veto or stall to get what they want if they had the power to so. We all would, but we all will not have that power.

Another complicating aspect of the *Final Agreement's* requirement to *consult* on a wide range of projects involving activities within Metro Vancouver or the Tsawwassen Territory is that in a decade from now much of the area may also be within the Treaty Territory of several other treaties, such that the requirement to consult would have to be undertaken with several other tribal groups who have the identical or even conflicting rights over the Tsawwassen Territory.

Bear in mind this is a Band government which has about one half of its members living outside the reserve and a significant number residing outside the Lower Mainland, with some as far away as California or Winnipeg, who only have a very tenuous connection to the Band: A Band government elected in part by persons residing outside the Lower Mainland that will conceivably be able to block developments in Delta, Richmond, Vancouver, Langley, Maple Ridge or even the Gulf Islands.

The *Tsawwassen Final Agreement* creates a right for the Tsawwassen government to *consult* or be *consulted* on at least 26 issues, some of them innocuous, but all with the power to bog-down and to force federal, provincial and municipal decision-making to grind to a halt:

- International Relations
 1. Canada's international treaty obligations. (Chapter 2, Clause 30)
 2. Canada's position before an international tribunal. (Chapter 2, Clause 33)
- Deltaport Way Corridor
 3. Authorizing new works within the Deltaport Way Corridor. (Chapter 4, Clause 57)
- Land Use Planning
 4. Participation in provincial land use planning processes affecting any lands within the *Tsawwassen Territory*. (Chapter 6, Clause 16)

- Crown Corridors
 5. B.C.'s regulation of traffic and transportation on a Crown Corridor (for road, highway or public utilities) adjacent to the Tsawwassen reserve or newly created Tsawwassen Lands. (Chapter 7, Clause 12)
 6. B.C.'s development of any new Crown Corridor adjacent to the Tsawwassen reserve or newly created Tsawwassen Lands. (Chapter 7, Clause 20)
 7. Public Utilities (cable, telecommunication, natural gas, electricity) must consult the Band. (Chapter 7, Clauses 20 and 21)
- Public Fisheries Management Advisory Process
 8. Development by Canada or B.C. of a public fisheries management process for the Fraser River watershed that includes any part of the Tsawwassen Fishing Area or Tsawwassen Intertidal Bivalve Fishing Area and if appropriate will provide for participation by the Band. (Chapter 9, Clause 90)
- Marine Protected Areas
 9. Any proposal by Canada to establish, terminate or change boundaries of Marine Protected Areas wholly or partially within *Tsawwassen Territory*. (Chapter 9, Clauses 99-101)
- New Emerging Commercial Fisheries
 10. Establishment of any new emerging commercial fishery, process for participants to enter and allocation within Pacific Fishery Management Areas 14, 15, 16, 17, 18, 19, 20, 28 or 29. (Chapter 9, Clause 106)
- Management of Migratory Birds
 11. Designation of a Migratory Bird Population in order to address a conservation risk and a Total Allowable Migratory Bird harvest of that Bird population. (Chapter 11, Clause 31)
- International Negotiations on Migratory Birds
 12. Canada's position in international discussions or negotiations on migratory birds. (Chapter 11-36)
- Renewable Resource Harvesting in National Parks and National Marine Conservation Areas
 13. New legislation or regulation for harvesting of Renewable Resources (plants, birds, including Migratory Birds, land mammals, traditional foods, clams, mussels, cockles and oysters) in any National Park or National Marine Conservation Area that is wholly or partially within the *Tsawwassen Territory*. (Chapter 12, Clause 29)
 14. Closure of area for harvesting by Band members within a National Park or National Marine Conservation for conservation or research purposes. (Chapter 12, Clause 30).

- Conservation Measures in National Parks and National Marine Conservation Areas
15. The need for, development and implementation of additional conservation measures for National Parks or National Marine Conservation Area in *Tsawwassen Territory*. (Chapter 12, Clause 32)
- National Park Establishment and Boundary Changes
16. Before establishing or changing the boundaries of any National Park or National Marine Conservation Area that is wholly or partly within Tsawwassen Territory. (Chapter 12, Clause 33)
- Planning and Management of National Parks
17. Role of Tsawwassen Band in respect of National Parks or National Marine Conservation Areas wholly or partially within Tsawwassen Territory, regarding planning and management, research and protection of Cultural Heritage Sites, use of the Tsawwassen language in signage and interpretation centres and related documentation, identification of the interests of Band members in economic, employment and training opportunities in or associated with the parks or marine conservation areas. (Chapter 12, Clause 34)
- Provincial Parks Establishment and Boundary Changes
18. Establishment of new Provincial Parks, Protected Areas or Wildlife Management Areas, the modification of boundaries and changes in the use or designation of existing Provincial Parks, Protected Areas or Wildlife Management Areas that might affect the Treaty right to gather plants, harvest wildlife or migratory birds. (Chapter 13, Clause 34)
- Conservation Measures in Provincial Parks, Protected Areas and Wildlife Management Areas
19. Closure of Provincial Parks, Protected Areas and Wildlife Management Areas to hunting by Tsawwassen Band members. (Chapter 13, Clause 35)
- Participation in Provincial Environmental Assessments
20. Participation in provincial environmental assessments. (Chapter 15, Clause 3)
- Participation in Federal Environmental Assessments
21. Participation in Federal Environmental Assessments under the *Canadian Environmental Assessment Act*. (Chapter 15, Clause 4)
- Consultation on Provincial Environmental Assessments
22. Provincial Environmental Assessments within the *Greater Vancouver Regional District* or the *Tsawwassen Territory*. (Chapter 15, Clause 7)

- Block Environmentally Reviewable Projects
23. No Federal or provincial environmentally reviewable project may proceed without consent. (chapter 15, Clause 9)
- Membership in Greater Vancouver Regional District
24. Changes to the structure of regional government in British Columbia. (Chapter 17, Clause 6)
- Ratification of Treaty by British Columbia
25. B.C. legislation implementing the Treaty. (Chapter 24, Clause 12)
- Ratification of Treaty by Canada
26. Federal legislation implementing the Treaty. (Chapter 24, Clause 14)

Clearly the proposed Treaty does not resolve all outstanding issues involving the Tsawwassen Band. However, it does create a whole new series of potential problems that ensure the *Tsawwassen Final Agreement* is not a “final settlement” of historic grievances. In light of the *consultation* requirements imposed on other levels of government, the Tsawwassen Treaty may create more problems than it will ever have solved. What seemed like the right thing to do may turn into a nightmare.

There is a feeling that maybe we should get on with it - that the *Tsawwassen Final Agreement* will end the strife and resolve all outstanding issues and ensure that the Tsawwassen people are treated generously and fairly as equal and full Canadian citizens with the same rights, obligations and responsibilities.

The Supreme Court of Canada has advised that the real reason for recognizing special aboriginal and treaty rights is for the reconciliation of aboriginals with the broader Canadian society. At the end of the day we will all have to ask ourselves, “Is the *Tsawwassen Final Agreement* going to be a *final settlement* that leads to this elusive reconciliation where aboriginals become full citizens in every respect?” Unfortunately, hoping this is the case will not make it so.

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