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## Treaty Closing and Implementation Activities

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### INTRODUCTION

#### *Background and Scope*

Since time immemorial, first nations governed their lands, resources and peoples in accordance with their own laws, practices and traditions. Despite the arrival of peoples from other places, first nations preserved and protected their traditional territories to the best of their ability. Over the past two centuries through colonization and the assertion of sovereignty by Great Britain, and later Canada, the ability of first nations to govern in their traditional ways became virtually impossible. Their lands were taken from them, the resources and wealth were removed without their consent and even their families were torn apart. The Indian Act, which controlled much of their lives, removed from their control all but the most basic and inconsequential governance decisions. As a consequence of the Indian Act and the Indian Act system, first nations were left politically disempowered, economically disadvantaged and culturally oppressed. This reality should be unacceptable to all Canadians.

Modern treaties and the modern treaty process offers an opportunity for Canadians and first nations to come together to create solutions to this unacceptable reality. One objective of treaty making is to restore governance capacity and ensure that treaty first nation governments are fully functional and accountable. A second objective is to restore sufficient lands and resources to the treaty first nation to enable it to construct a sound and vibrant economy. A third objective is to achieve legal certainty for all parties regarding full recognition of treaty first nations within the Constitutional framework of Canada. Legal certainty decreases the potential for conflicts and the difficult and often repeated litigation necessary to resolve those conflicts. Litigation has its place in addressing specific issues where government is intransigent or refuses to meet its obligations. When litigation is avoided, the significant resources necessary to support that litigation are available to the treaty first nation to be reallocated to establishing modern systems and processes for transparent and accountable government. A modern treaty first nation government is better equipped with the infrastructure and resources necessary to improve the lives and wellbeing of its citizens through its programs and services. With its law-making authorities and the resources and benefits recognized in the treaty, a treaty first nation will be in a better position to preserve and enhance its connection to the past by being able to support its history, culture and traditions. All treaty work has these objectives as its underlying motivation and guide.

Negotiating to meet these objectives involves dealing with a broad range of complex and interrelated issues. These include law-making authorities, governance structures, lands and resources, fiscal matters, harvesting rights, culture and heritage, transitioning out from under the Indian Act and the role of the treaty first nation off its treaty lands within its traditional territory. These negotiations are complex, time consuming and require a high degree of technical expertise and assistance and, most importantly, patience and perseverance. Despite the complexity and time consuming nature of these negotiations, treaty making remains the only viable tool to comprehensively redefine aboriginal peoples' place within the Canadian federation.

Once a treaty has been negotiated, there are numerous activities that must be completed in order to “close” and then “implement” the treaty. “Closing activities” are activities carried out prior to the-effective date in order to prepare a first nation for their new reality after the effective date. “Implementation activities” are activities carried out post-effective date to fully implement the treaty benefits, authorities, rights and obligations provided for in the first nation’s treaty. Closing activities involve a high volume of activity in a relatively short period of time (usually two years) while implementation activities involve a lower volume of activity over a longer period of time (in reality, implementation activities are carried out for decades after a treaty effective date). This overview provides a summary of the activities required of a first nation relating to the closing and implementation of their treaty.

### ***Ratcliff & Company's Experience***

Ratcliff & Company is one of Canada's leading law firms representing first nations on issues of concern to them. Our first nations practice has been a cornerstone of our firm for almost 50 years. We have assisted first nations with successfully asserting and establishing their aboriginal rights and land claims, negotiating and implementing treaties and other landmark agreements, regaining lost lands, and developing profitable and successful business and land development opportunities. Through all of these areas we seek to help first nations increase the wealth and prosperity of their communities and protect and promote their distinct and vibrant cultures.

Ratcliff & Company is the most experienced law firm in British Columbia for treaty negotiation, closing and implementation. Ratcliff & Company has been involved with the negotiation of two of the three modern British Columbia treaties that achieved implementation, and has performed closing and implementation activities for six treaty first nations.<sup>1</sup> We are also currently assisting three other first nations in negotiating their treaties. Based on that experience, the following is an overview of the work involved in carrying out closing and implementation activities.

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<sup>1</sup> The Nisga'a Nation and the five Maa-nulth First Nations, consisting of the Huu-ay-aht First Nations, the Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe and the Yuułu?ił?ath First Nation (also known as the Ucluelet First Nation). The writer's experience with closing and implementation activities is with the Maa-nulth First Nations.

## **CLOSING ACTIVITIES**

### ***Federal/Provincial Settlement Legislation***

An extensive list of both federal and provincial legislation is often required in order to complete the closing activities for a treaty. Specific Final Agreement Acts are required by both the Parliament of Canada and the provincial legislature. Regulations and Orders in Council are also typically required to implement aspects of the treaty. The most recent closing we were involved in required 39 separate enactments ranging from the enactment of the treaty, addressing issues around property transfer taxes, water reservations, forestry tenures, regional district issues and implementing miscellaneous amendments required to other legislation.

### ***Surveying of Treaty Lands (Protocol and Survey Instructions)***

Typically, Canada and British Columbia are responsible for surveying the outer boundaries of the former reserves and former Crown land, respectively. Although a treaty will likely speak to certain of the broader requirements around this surveying, a survey protocol is often required to set out the details around the approval of survey instructions, amendments to those instructions while the surveyors are in the field and processes around approvals of the final survey plans. In our experience, the variables in survey instructions are extensive and professional assistance, both legal and from a surveyor, are required.

### ***Federal Lands Transfers (Former Reserves)***

Each former reserve requires a Crown grant in order to transfer title from Canada to the treaty first nation. These transfers involve environmental disclosure documents as well as addressing any joint reserve issues. Notations to be inserted into the Indian Lands Registry system need to be approved. Registration of the Crown grants may be required in the Land Title Office.

### ***Provincial Lands Transfers (Former Crown Land)***

Former provincial Crown lands require Crown grants to be issued and may subsequently require registration in the Land Title Office. Registrations in the Land Title Office are preceded by a series of filings informing the Land Title Office that the effective date has been achieved. These are followed by the Crown grants or any Form A – Transfers that are required along with the filing of any effective date reference plans.

### ***Replacement Interests***

A basic principle of the treaty process is that when treaty lands are transferred to a treaty first nation on a treaty effective date, the lands will be transferred with existing interests as encumbrances. These replacement interests must be documented and the interest registered. These replacements interests may include statutory rights of ways for public utilities, such as BC

Hydro and Telus, as well as licences of occupation for existing federal or provincial interests, such as forest research installations or growth and yield site research areas for forestry. As well, certificates of possession that were previously issued under the Indian Act (Canada) need to be replaced with some sort of registrable tenure on the effective date. The terms and conditions of each of these replacement interests need to be reviewed to ensure that they substantially provide the interest-holder with the same interest they had prior to the effective date, no more and no less. In our experience, the status of former provincial Crown land is often deficient with additional interests being discovered prior to the effective date that were not contemplated in the treaty, which creates both additional opportunities for a treaty first nation as well as additional complications for closing activities. As well, the treaty first nation may wish to register additional interests not contemplated in its treaty on the effective date. These interests, their terms and conditions, would need to be developed and finalized for the effective date.

### ***Upland Owner Consents***

Upland owner consents may be required in relation to those treaty lands that have as one of their boundaries the high water mark of a stream, river, lake or ocean shoreline. These “uplands” under Canadian common law provide to the treaty first nation certain “riparian rights” or “access to water rights”. These rights include, amongst others, the right of access from the upland across the foreshore (that area between the high water mark and the low water mark) to deep water for navigation purposes. The Province, which under treaty retains ownership of the foreshore adjacent to treaty lands, cannot interfere with that riparian right of access to deep water across the foreshore without the consent of the upland owner, the treaty first nation.

If there are existing interests in the foreshore areas adjacent to the treaty lands of the treaty first nation, the Province typically will require upland owner consents for those foreshore interests that already exist. These need to be carefully reviewed to ensure they impact the treaty first nation’s access over the foreshore as little as possible.

### ***Commercial Recreation Tenures***

Under the terms of the treaty, the treaty first nation may be provided commercial recreational opportunities on provincial Crown land. These are often documented through a memorandum of understanding which will require the treaty first nation to make an application for the tenure over the commercial recreational area under the Land Act (British Columbia). Once the application has been approved, the form of tenure will need to be reviewed and its terms and conditions finalized.

### ***Side Agreements***

A number of side agreements are often necessary under a treaty. Although associated with the treaty, their terms and conditions are not contained within the treaty and therefore do not have

protection under section 35 of the Constitution Act (Canada). These side agreements may need to be negotiated in whole or in part and should be reviewed and finalized to make sure their terms and conditions are consistent with the treaty as well as reflective of the needs of the treaty first nation. As well, these side agreements typically require an “errata” review (a review to identify errors, such as typographical, spelling, grammar, drafting protocol and formatting errors) to ensure that their drafting content and styles is consistent with the treaty and the intent of the parties. The following is a list of the side agreements we have reviewed in the past.

- *Wildfire Suppression Agreement*: This Agreement addresses forest fire management both on and off of the treaty lands of the treaty first nation. Cost-sharing for wildfire suppression is an important aspect of this Agreement.
- *Fish Harvest Agreement*: This Agreement addresses commercial fishing rights for the treaty first nation and the process for issuing commercial fisheries licences under the treaty.
- *Foreshore Agreement*: This Agreement delegates legislative authority from the Province to the treaty first nation over the foreshore adjacent to the treaty land of the treaty first nation. The topics of delegated legislative authorities as well as enactment and enforcement procedures are set out. It is in the interests of the treaty first nation that a fulsome delegation of law-making authorities is accomplished and that the treaty first nation is able to utilize its own law-making and enforcement processes, rather than that of neighbouring municipalities.
- *Fiscal Financing Agreement*: This Agreement addresses the capital transfers and other fiscal arrangements between Canada, the Province and the treaty first nation.
- *Own Source Revenue Agreement*: This Agreement addresses the clawback by Canada from transfer payments made to the treaty first nation based on the treaty first nation developing its own sources of revenue. This Agreement can have significant implications for a treaty first nation in the future as it develops its property tax land base as well as its economic development.
- *Tax Treatment Agreement*: This Agreement addresses taxation of treaty lands as well as the treaty first nation and its corporate subsidiaries and public institutions.
- *Real Property Tax Coordination Agreement*: This Agreement addresses issues around the treaty first nation exercising its property taxation authorities under the treaty.
- *Monumental Cedar and Cypress Harvest Agreement*: This Agreement addresses matters concerning the harvesting of monumental cedar and monumental cypress for traditional and cultural purposes.
- *Protected Area Co-Management Agreement*: If the traditional territory of the treaty first nation includes provincial protected areas or federal protected areas, co-managements agreements may be entered into between the treaty first nation and the respective government that will provide the treaty first nation a voice in the management of those protected areas.
- *Escrow Agreement*: This Agreement addresses issues around how the closing of the treaty on the effective date will be accomplished. Because of the volume of documents necessary to bring a treaty into effect, it is impossible to have a signing of all of the documents on the

effective date.<sup>2</sup> Because these documents do not take legal effect until the effective date but they have to be signed well in advance of the effective date, they must be held in escrow by an escrow agent. This Agreement addresses the retainer of the escrow agent as well as the terms and conditions of the submission of documents into escrow and the release of documents from escrow on the effective date.

- *Closing Letter of Understanding*: This document sets out the understanding between the parties to the treaty on the step by step process for closing on the effective date. Certain steps are required in a particular sequence to bring the treaty into legal effect along with all of its supporting documents and side agreements. These processes are spelled out in greater detail in this side agreement.
- *Delivery Agreement*: This short Agreement sets out the process for how the closing documents will be deemed to be delivered to the parties once the treaty has come into effect.

### ***Forestry Obligations on Treaty Lands***

Former provincial Crown land that will become treaty lands of a treaty first nation on the effective date of the treaty often have existing forestry tenures or licences as well as forestry related infrastructure and silviculture obligations. The liability for the infrastructure and silviculture obligations needs to be addressed. The understandings around how these issues will be resolved are set out in a waiver and assumption agreement. Forestry roads will either need to be decommissioned or the treaty first nation will need to assume the liability for those roads if the roads are going to remain open after the effective date. As well, ascertaining the current state of silviculture operations is important to establish the benchmark of what obligations need to be carried out by the licence-holder after the effective date. As well, interests or agreements may need to be documented if the Province has forest research installations on lands that are to become treaty lands.

### ***Fisheries Matters (Licences and Joint Fisheries Committee)***

Commercial fishing licences as well as licences to allow fishing for food, social and ceremonial purposes need to be issued to the treaty nation on the effective date. Discussions around harvest documents, harvest plans, catch monitoring programs and the fisheries operational guidelines will need to be negotiated and concluded prior to the effective date.

### ***Wildlife Matters***

If the treaty contemplates the designation of wildlife species prior to the treaty effective date, the terms and conditions that would allow the treaty first nation to harvest that designated species will need to be developed and agreed to prior to the effective date.

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<sup>2</sup> In the most recent treaty effective date closing that we have been involved in, there were 570 documents that required execution by multiple parties.

## ***First Nation Laws***

A basic principle of the rule of law in a modern democracy is there is no government action without written authority. Therefore, it is important that legislation be enacted by a treaty first nation to authorize the basic functioning of government necessary for the treaty first nation to assume its responsibilities on the effective date. A treaty first nation will need to prepare these laws in advance to be enacted on the effective date to ensure its government structure is up and functioning with full authority. The laws that we have felt are necessary or desirable in the past for a treaty first nation on the effective date of its treaty are as follows:

- *Effective Date Procedures Act;*
- *Government Act;*
- *Legislative Rules of Order and Procedure Act;*
- *Integrity Act;*
- *Government Personnel Act;*
- *Financial Administration Act;*
- *Administrative Decisions Review Act;*
- *Elections Act;*
- *Referendum Act;*
- *Citizenship Act;*
- *Freedom of Information and Protection of Privacy Act;*
- *Land Act;*
- *Planning and Land Use Management Act;*
- *Resources Harvesting Act;*
- *Environmental Protection Act;*
- *Enforcement Act;*
- *Interpretation Act;*
- *Real Property Tax Act.*

The above effective date legislation is not intended to be exhaustive or to completely draw down all law-making authorities recognized in the treaty. In the first few years of treaty implementation, a treaty first nation government will likely not have the resources, infrastructure, capacity or personnel to fully exercise all its law-making authorities under the treaty. This will likely take some time to develop and put into place before all law-making authorities can be drawn down. The above effective date laws are intended to ensure the treaty first nation government has the capacity and legislative authority to begin operations on effective date and continue for one or two years thereafter without the need for any additional major legislative initiatives. In the interim until all law-making authorities are exercised, in the concurrent law model provided for in the treaty, applicable federal and provincial law will continue to apply to ensure there are no legislative gaps.

As well, certain of the above enactments may require regulations to also be enacted on the effective date. The Effective Date Procedures Act mentioned above is the primary piece of transitional legislation utilized to transition the pre-effective date Indian Band government to become the post-effective date treaty first nation government and is an essential component to establishing the legitimacy of the treaty first nation government activities post-effective date.

### ***Regional Government Matters***

Matters concerning the role of the treaty first nation within the applicable regional district may need to be addressed prior to the effective date. At times, municipal boundaries need to be adjusted to accommodate the exclusion of the treaty lands of the treaty first nation from within municipal boundaries. The terms and conditions and documentation associated with these matters need to be reviewed prior to the effective date.

### ***Indian Estate Matters***

Typically under a treaty, the estates of status Indians who are deceased, minors or who cannot manage their own affairs continue to be administered by Canada post-effective date. Notices need to be sent to all treaty enrollees that, as of the effective date, the Indian Act (Canada) as it applies to estates that arise after the effective date will no longer apply. The provincial estates regime will apply to enrollees after the treaty effective date. The provincial legislative regime is quite different from the federal legislative regime on these matters and it is helpful to the treaty enrollees to understand the new requirements around estate matters. We have developed a workshop and presentation to help a treaty first nation's citizens understand the new legal framework that will apply to them for wills and estates matters after the effective date.

### ***Band Dissolution Matters***

Although the former Indian Band ceases to exist and the treaty first nation is recognized on the effective date by operation of law, certain steps may still be required to transfer assets and record registrations in the name of the treaty first nation as of the effective date. This is particularly so if the treaty first nation is recognized under a different name than the former Indian Band. As well, trust accounts held by Canada in Ottawa on behalf of the former Indian Band will need to be liquidated and the proceeds sent to the treaty first nation.

### ***Fiscal Matters***

There are a series of fiscal matters that need to be addressed immediately before the effective date, such as the capital transfer schedule finalization, negotiation loan schedule finalization in the treaty and conclusion of any outstanding fiscal negotiation issues. As well, if a resource revenue sharing arrangement has been entered into between the treaty first nation and the Province, these calculations for the year of the treaty effective date will also need to be addressed. As well, the FDDIPI<sup>3</sup> values set out in the schedules to the Fiscal Financing Agreement will also need to be confirmed prior to the effective date.

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<sup>3</sup> The "Final Domestic Demand Implicit Price Index" is the price index for all of Canada's demand for final goods and services and is a broad measure of inflation in the economy. FDDIPI is used extensively by Aboriginal Affairs and Northern Development Canada in comprehensive claims and self-government agreements as it is a realistic and



If the treaty first nation intends to assume real property taxation in the first year following the treaty effective date, the proper notices will need to be sent to the Province within the required deadlines in order for this to take place.

### ***Culture and Heritage Matters***

If the treaty provides for the protection of culture and heritage sites of the treaty first nation on provincial Crown land under provincial law or the renaming of geographic sites in the language of the treaty first nation, agreement as to the terms and conditions of the protection and the renaming will need to be documented with the Province.

### ***Establishment of Protected Areas***

If the treaty provides for the creation of provincial protected areas to protect culturally or traditionally important areas for the treaty first nation, consideration must be given to the nature of the protection and the legislation or amendments to existing legislation that may be required to establish those protections.

### ***Treaty Enrolment Matters***

The establishment of the Enrolment Committee and the Enrolment Appeal Board under the treaty requires documentation to be put into place. As well, both these committees may at times require legal advice on various enrolment issues or interpreting the rights and obligations of the treaty as it relates to their function.

### ***Implementation Committee and Plan***

The establishment of the treaty Implementation Committee also requires documentation to be in place documenting the establishment of that committee. As well, the implementation plan contemplated by the treaty also needs to be reviewed and agreed to prior to the effective date. In our experience this can be a very difficult and torturous exercise and we have experienced significant difficulty with both Canada and British Columbia in reaching agreement on the implementation plan.

### ***Settlement Trust***

A treaty first nation may wish preserve a portion or all of its capital transfers, resource revenue sharing payments or other revenues for a period of time and only access the income these funds generate. Many treaty first nations have created settlement trusts which allow these resources to be preserved separate and protected from general government revenues. The drafting of the trust deed to create such a trust and the appointment of nation trustees and an administrative trustee

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convenient way to measure changes in prices (inflation) in the national economy. Payments are adjusted in order to maintain their real or original value as prices in the economy change (positively or negatively) over time.

would be necessary before the effective date in order that the settlement trust be in existence on the effective date to receive the initial capital transfers and other effective date payments if this is the treaty nation's desire.

### ***Incremental Treaty Agreements and Early Land Transfers***

British Columbia has been negotiating bi-lateral arrangements with a number of first nations in the British Columbia Treaty Commission process which they have called "Incremental Treaty Agreements". These "ITAs" have taken a number of different forms but have all typically involved documenting agreement between the Province and the first nation on bilateral matters that will ultimately be incorporated into the treaty. As such, ITAs should undergo careful legal review. In exchange for reaching agreement on these bilateral issues, British Columbia has transferred the fee simple title to one or more parcels of what is to become treaty lands to a designated company of the treaty first nation in order that the first nation can commence economic development or other activities on these "early land transfer" (or "ELTs") prior to the effective date. An ELT is carried out in accordance with a Land Transfer Agreement which also should undergo legal review to ensure the first nation's rights are protected in the event no final agreement is ever reached.

### ***Information Meetings***

Throughout the closing regular update meetings should be held with Chief and Council and membership to keep them informed on how the closing activities are progressing. Meetings with Chief and Council will at times be necessary in order for instructions to be obtained for those issues that have arisen with either Canada or British Columbia as these closing activities are carried out.

### ***Miscellaneous***

There may be a number of other closing activities necessary to fully bring into effect a treaty first nation's treaty. Examples may be withdrawing from Indian Band-related agencies like health service providers or educational boards or tribal councils that are no longer applicable or desirable for the treaty first nation. Working through the terms and conditions of the withdrawal from these agencies would need to be addressed prior to the effective date.

## **IMPLEMENTATION ACTIVITIES**

### ***Outstanding Closing Activities***

A significant effort will be put into ensuring all closing activities are completed before effective date. We have seen in the past, however, that this is not always possible. Those activities that

have been agreed to by the parties to be left until after the effective date will need to be addressed along with the applicable implementation activities discussed below.

### ***Implementation Committee***

The treaty first nation's representative on the Implementation Committee may at times have questions which require legal advice. In the past, we have fielded questions regarding the content of the Implementation Committee's annual report as well as providing advice on the interpretation of treaty provisions as it relates to Canada's and British Columbia's obligations. We have also seen Canada treat treaty implementation much like a divorce and take positions that attempt to absolve it of any further funding obligations to the treaty first nation notwithstanding the treaty stating that a treaty first nation continues to be eligible for other programs and services for aboriginal peoples in Canada. Participation in the First Nations Financial Management Board and the First Nations Emergency Services Society are just two examples. One issue that seems to take quite some time to sort through (in some cases over a year) is the finalization of the closing book of documents. Legal advice may be required to address some of the descriptions of certain documents.

### ***Property Tax Transition***

Under the treaty a treaty first nation may draw down its property taxation authority. If it chooses to do so, certain notices must be issued and a property tax law enacted. There are a number of other transitional issues that need to be addressed, including working with the Provincial assessment authority to ensure the property tax rolls are accurate and reaching agreement with the Province on how it will share property tax revenue during the transition period.

### ***Surveying of Treaty Lands***

If all treaty lands are not surveyed prior to the effective date (which is often the case for former Provincial Crown land), the surveying of the balance of treaty lands becomes an implementation activity. What we have seen in the case of the Province is, once the effective date is reached, their focus and application of surveying resources shifts to other tables whom they are trying to get to closing, rather than completing their obligations under existing treaties that have transitioned into implementation. This has become a significant issue of concern for some of the treaty first nations we are currently working with on implementation.

### ***Enforcement Agreement***

Under the treaty a treaty first nation is responsible for enforcing its own laws, including the cost of that enforcement and any prosecutions that may be required. Particularly in the early years of treaty implementation, a treaty first nation may not have the capacity to place its own enforcement officers in the field or prosecute offenders of its laws. This necessitates entering into arrangements with the Province and local policing authorities to have them enforce the

treaty first nation's laws. There are a variety of enforcement agencies that can be contracted with to provide these enforcement services, such as Conservation Officer Services and Forests, Lands and Natural Resource Operations for the Province and Parks Canada, Department of Fisheries and Oceans, Environment Canada and the Royal Canadian Mounted Police for Canada.

### ***Reasonable Opportunity Agreement***

The treaty typically states that authorized uses and dispositions of Crown lands by the Province cannot deny the reasonable opportunity for the treaty first nation to exercise its treaty harvesting rights. The treaty directs the Province and the treaty first nation to negotiate and attempt to reach agreement on how authorized uses and dispositions of Crown land will be assessed to ensure the reasonable opportunity to exercise the treaty harvesting rights is not denied. This is a fairly complex area and we have seen these negotiations continue for a number of years past the effective date.

### ***Provincial Legislation Consultation***

Because of the concurrent law model provided for in a treaty (where federal law and provincial law continue to apply to treaty lands and treaty first nation citizens), obligations are placed on the Province to consult with the treaty first nation if it is going to enact laws that will affect the law-making authority of the treaty first nation. The Legislature and Cabinet considers hundreds of enactments every year which may or may not impact a treaty first nation's law-making authority. The list of enacted laws needs to be monitored to ensure the Province is living up to its obligations under the treaty. When the Province issues a notice to engage with the treaty first nation on proposed legislation, legal advice may be needed to assess the impact of the proposed legislation on the treaty nation's law-making authorities.

### ***Fisheries Committee/Wildlife Council***

A number of bilateral and trilateral engagement processes or co-management processes may be established under the treaty, particularly in the resource harvesting topic areas. The treaty first nation representatives in these engagement processes may require legal advice from time to time.

### ***Law Making Procedures***

Traditional aboriginal governance practices and how these integrate with the principles of the rule of law and legislative process or parliamentary procedures under the Charter of Rights and Freedoms may be a bit of a learning process for the government representatives of a treaty first nation. This understanding can be developed through a series of workshops and presentations which focus on understanding the rule of law, parliamentary procedure and the reasons for what appears to be very incomprehensible and arbitrary rules. Over the past number of years we have been provided the opportunity by a number of our treaty first nation clients to develop and present these workshops and learn from them to help better structure and streamline their

government processes while maintaining the integrity of their legislative process within the rule of law and a free and democratic society.

### ***Legislative Drafting***

As stated above, it is necessary for a treaty first nation to enact laws on the effective date that are essential for its government to be operational so there are minimal gaps in legislative authority after the effective date. It is not practical, either from a time or financial resources perspective, to draw down all law-making authorities on the effective date as it will take some time (perhaps years) for the treaty first nation to develop the government administration and infrastructure to support all of its law-making authorities. Over time, as part of its treaty implementation programs, a treaty first nation may wish to consider enacting some of the following laws we have worked on with our treaty first nation clients in order for it to draw down the applicable law-making authority associated with that law:

- *Application of Laws to Foreshore Act;*
- *Building and Development Authorization Act;*
- *Business Licensing Act;*
- *Capital Borrowing Act;*
- *Community Services Act;*
- *Compliance Notice and Ticket Regulation;*
- *Economic Development Act;*
- *Education Act;*
- *Forestry Act;*
- *Health Services Act;*
- *Heritage Act;*
- *Housing Authority Act;*
- *Loan Guarantee Regulation;*
- *Official Community Plan Act;*
- *Public Order, Peace and Safety Act;*
- *Public Works and Services Act;*
- *Social Services Act;*
- *Subsurface Resources Act;*
- *Zoning and Structures Act;*
- *Governance and Fiscal Agreement Regulation;*
- *Miscellaneous Amendments Act.*

### ***Government Roles and Responsibilities***

As a treaty first nation, there is a change in the role of the former Band Council and Band Administration as new processes and procedures are developed. Understanding these new roles and responsibilities for both elected representatives and government administration can be accomplished through a series of workshops and presentations that focus on the differences between the executive and legislative branches of government and the role that administration plays.

### ***Structuring Economic Development***

The trend around the world has been for governments to get out of the business of doing business. The last twenty years has seen this trend continue and grow, from the privatization of

airlines, railways and other transportation ventures, to include what have historically been considered common government services, such as the delivery of mail and other communication services. Bucking this worldwide trend are aboriginal governments. More and more, aboriginal governments are investing, and are directly involved, in business ventures. This increasing involvement in business ventures by aboriginal governments has many reasons, such as a desire to provide employment opportunities for members, alternate sources of cash flow as government transfers decline and a desire to share in the wealth of the natural resources taken daily from their traditional territories. This is especially true for treaty first nations as capital transfers and revenue sharing with Canada and the Province seem to be more restricted and on the decline.

Whatever the reason, when a treaty first nation enters the world of mainstream economic development, it should do so keeping in mind three primary considerations:

1. reducing liability exposure;
2. maximizing profits (by minimizing taxes and potentially avoiding own source revenue claw backs by Canada); and
3. separating politics from business decisions.

For over 50 years Ratcliff & Company LLP has been assisting First Nations across British Columbia in structuring their economic development opportunities both on and off their reserve lands or treaty lands. Based on what we have learned from that experience and from our review of the Harvard Project reports, we have developed a model for structuring economic development for first nations that we believe is un-paralleled. Our economic development structuring addresses the above three primary considerations through the following two components:

1. a corporate structure (the establishment of legal entities owned by the treaty first nation to carry out its economic development); and
2. a governance structure (the processes, roles and responsibilities of the key players and stakeholders in the treaty first nation's economic development).

Our corporate structure addresses reducing liability exposure by using corporations and limited partnerships to access the limited liability protection they each provide. We address maximizing revenues by minimizing taxes because our corporate structure preserves the application of a treaty first nation's tax exemption under section 149(1)(c) of the Income Tax Act (Canada) to the treaty first nation's business income. As well, our corporate structure allows the own source revenue claw-backs by Canada under the Own Source Revenue Agreement with the treaty first nation to potentially be avoided. We also utilize a capital assets limited partnership to protect valuable capital assets from seizure in the event a particular business fails and a management services limited partnership to ensure the continued limited liability protection of the various limited partners in this corporate structure is maintained and does not run afoul of section 64 of the Partnership Act (British Columbia).

Our governance structure model implements the findings of the Harvard Project reports and separates politics from business while maintaining the transparency and accountability of the businesses to the treaty first nation as owner by preserving its common law shareholder rights. Through an Economic Development Act, associated Regulation and a Governance and Fiscal Agreement, we set out the roles and responsibilities of the treaty first nation as owner and the roles and responsibilities of the other key stakeholders in its economic development (the corporate boards, CEO etc.) as suggested by the Harvard Project to be key to successful aboriginal economic development. These documents as well set out the processes and procedures for carrying out economic development for the treaty first nation, from concept through the development of feasibility studies and business plans to implementation of a new approved business opportunity. These documents also address such critical issues as capital contributions, reporting and profit sharing requirements as well as employment and training opportunities for the treaty first nation citizens.

We have prepared a series of presentations which provide the rationale for both our corporate structure and governance structure which we have presented to many of our treaty first nation clients. As well, we have developed presentations to assist the various boards of directors to help them understand their unique role and responsibilities in first nation's economic development and how to avoid the liabilities they face as directors.

## **CONCLUSION**

The above is a brief overview of the closing activities and implementation activities we have been involved with in the past. We would be happy to discuss any of the above with you as they might relate to closing and implementing your First Nation's treaty.

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