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### Commentary

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*aboriginal policy studies*, Vol. 1, no. 2, 2011, pp. 171-181

This article can be found at:

<http://ejournals.library.ualberta.ca/index.php/aps/article/view/11688>

ISSN: 1923-3299

Article DOI: 10.5663/aps.v1i2.11688

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# **Away from the *Indian Act* - Treaty Governance at Tsawwassen First Nation**

Chief Kim Baird  
Tsawwassen First Nation

I am very pleased to write here on moving away from the Indian Act, and on Treaty governance at Tsawwassen First Nation. In my view, Tsawwassen First Nation (TFN) has made significant progress in these areas—though much more work remains—since the Effective Date of our Final Agreement on 3 April 2009. Our modern treaty provides for constitutionally protected self-governance, which has removed the Indian Act from our community.

I'm going to start by talking about reconciliation, which is a difficult word to break down but an important term that defines what we are going through. Then I'll describe my community and our realities a bit, and what opportunities the Treaty provides. After that, I'll discuss what we have done under the Treaty, and the impact this has had on our people—the most significant effect involving the restoration of a direct accountability link between our new governance systems and our people. This link had been broken under the Indian Act.

First, a bit about reconciliation. In my opinion, transforming the relationship between First Nations and the Crown—and I think, between First Nations and broader Canadian society—is a process of reconciliation. Everyone will have a different view about what reconciliation is and, of course, modern treaties are only one form of reconciliation. However, I do want to spend a moment talking about what reconciliation means to me, which is as much about internal resurrection as it is about the external mending of relationships and external recognition of First Nations as legitimate, self-governing communities.

## **Reconciliation Model**

To me, reconciliation can be viewed as a hierarchy of three specific components. The first, most basic element is compensation and redress; the

*aboriginal policy studies*, Vol. 1, no. 2, 2011

ISSN: 1923-3299

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second, next-level element is relationship-building; and the third and most important component, while often overlooked, is governance.

The first component is all about correcting historical wrongs. Redress is so important, because we cannot move forward until we can turn our backs on the terrible injustices of the past. I would argue that while agreements with provisions of compensation for redress are important, they are really only the first step, because I do not believe that they finish the work of correcting historic wrongs. Ultimately, long-term harm must be addressed by overcoming the systemic problems our people face with good governance. The second aspect of reconciliation consists of a new relationship component, involving other levels of government and third parties, and includes a public validation of a First Nation's jurisdiction.. In my view, this aspect is really about external governance elements and the external recognitions of our government. Relationships are important to First Nations, whether it's with business, government, or others. The challenge for us has been to figure out who we are as Tsawwassen First Nation: as a legal entity, as a government, and as a people, all within the context of the Canadian federation. Seeking this answer has meant redefining how we relate without the Indian Act to the federal government; to the provincial government; to the Municipality of Delta; to the Metro Vancouver Regional District; and, ultimately, to people living around us.

In Tsawwassen's case, ultimately, it was the Treaty that gave us certainty in respect to how we relate to others and integrate with local, regional, and provincial governance systems. Some of the key elements of the Treaty that provided us with that certainty include, among other things, a seat at the Metro Vancouver table; our municipal plus-type status in provincial legislation, which provides for us to be treated as at least equivalent to municipalities by the province; and self-government jurisdiction that removed us entirely from the Indian Act. This legal framework helps us to legitimize our constitution as a distinct community.

I really believe the third, most often overlooked component of reconciliation is governance. The righting of wrongs in most cases is not accomplished through the simple stroke of a pen and redress or compensation. The colonial toolkit was very sophisticated and effective in severely compromising our communities in every way imaginable. Specific agreements can provide some financial redress or other compensation, but ultimately correcting historical wrongs means looking after our own community. It means trying to build trust again within our own community.

By trying to restore the elements of accountability and self-government that the Indian Act destroyed, we are ensuring that our members' decisions are reflected in community actions. Ultimately, this will lead to a healthy community and a stronger community.

In my view, this governance element is the most critical to achieving full reconciliation. While I fully support the other approaches that some First Nations are trying in order to seek reconciliation, I feel that the tools for fulsome governance—which in BC, at the moment, are only achieved through a modern treaty unless you are Sechelt or Westbank—are the most important ones to use. Again, in my view, any efforts along the self-government continuum—from taking on more powers within the Indian Act to, as in our case, constitutionally protected self-government through agreement with the provinces and Canada, to those that are successfully implementing an inherent right model—are key to our future as First Nation peoples. And, in my humble opinion, ultimately purging the Indian Act is the best chance of success we have.

### **Community Background**

Reconciliation, as I've described, was an important tool for community development and nation building. In addition to the fundamental aspects of reconciliation that are core to moving forward as a people, we need to develop our own lands at Tsawwassen First Nation for some very practical reasons as well. To explain that statement, let me narrate a bit of background about Tsawwassen First Nation, starting with some early history. The urban context of Tsawwassen First Nation has had an enormous impact on our history as a people. Traditionally, Tsawwassen were an extremely wealthy people—a consequence of living at the mouth of one of the most productive rivers in the world. We hunted, fished, and gathered plants and berries on our traditional territory, which covers Delta, Surrey, most of Richmond, Coquitlam, and land up into the Pitt Lake watershed. We had at least three major sites that we moved to according to the seasons, the coming of animals, and food. In conjunction with other nations inhabiting what would come to be known as the Lower Mainland, we exercised sustainable harvesting practices, showing tremendous respect for the lands and waters of the region as the source of our wealth and livelihood.

While we are now in an urban setting, we were unable to participate in the decades-long boom that saw Vancouver grow from a rough logging

town to a sophisticated metropolis that is one of the most livable cities in the world. Part of this development included a ferry causeway and terminal that bisected our community and took down our last ancient longhouse in the process. It also included building Canada's largest West Coast container port directly to the north of us, which resulted in the construction of a second causeway, needed to access the port. The construction of both causeways disrupted the strong tidal flow up the Georgia Strait that had brought so much sea life to our beaches and in between. With no tidal flow, our beach and much of our livelihood turned into a swampy marsh, with no harvest potential. Ironically, after all this development, the Province decided that there had been too much development, and that we needed to protect the scarce land that was left for farming—so they created the Agricultural Land Reserve.

I say all of this not out of bitterness or with any malignance or ill will towards anyone. I have accepted this history simply as fact, and the challenge now is to figure out a way to get beyond the history and move forward so that we can participate in the ongoing wealth creation of the region.

This history has left our community with some significant challenges. According to recent data, half of our adult community is earning less than 30,000 dollars annually; just a third have part-time employment; only 54 percent have attained a high school diploma; and just 5 percent have attained a university degree. Clearly this is unacceptable. We're a suburb of Canada's richest city—barely thirty minutes away from Vancouver's downtown core. We're on a major provincial highway and we've got massive provincial and national transportation infrastructure dwarfing our community. There are three million people in the Lower Mainland—we're but 430 people, and somehow there isn't room for us to share in all this wealth? I refuse to accept that.

### **Treaty Opportunities**

With all the economic opportunity around us, it became ridiculous to be caught in a situation where, because of the Indian Act and some unfriendly neighbours, we could not access the servicing, and therefore the economic opportunities, that we needed to be successful. So, we have come to see the Treaty as a toolbox that provides us with the means to improve the sustainability of our community. For us, sustainability means being able

to create and maintain a community, for us and for future generations, that balances an active and vibrant economy, a strong and supportive social network, a rich cultural fabric, and a healthy environment. We have a lot of work to do to balance those four pillars. And, while we are doing things in all these areas, it's a lot easier to build culture with money than without money as Chief Louie of Osoyoos recently said. The same can be said of better social programming, which is something that we are evaluating now, and plan on implementing once we've generated some revenue through economic development. So, we see economic development as a key foundation element to strengthening our social and cultural programming.

We realized early in the Treaty process that our economic opportunities are different than many other First Nations: different because of our urban nature. In fact, our location is so good that we likely could have done some work on increasing wellness in our community—but we wouldn't have the transformation we're seeing now. We will be successful by building a sustainable community that reflects responsible and judicious land development. We're talking about developments in all sectors—industrial, commercial, and residential—because there are opportunities for us in each of those areas. With some of the financial modeling we currently are undertaking, we think that we can be completely self-sufficient—and by that I mean be independent of any funding from Indian Affairs—within fifteen years. That is the time we think it will take to create enough annual revenue on our own to sustain and build our community.

### **Community Engagement**

So how did we get to this point in the process? Without a doubt, our most important resource for nation building was the strength and belief of our own people. It was absolutely critical for the Tsawwassen people to agree with the vision of the band leaders and to lead the work to make it become possible. This is no easy thing, particularly when our people are mistrustful of their government partly as a result of the systemic problems in our and other First Nations communities. The Indian Act had set us up to fail and that was our only experience for 140 years or so. To overcome this mistrust, we have excelled at community engagement at Tsawwassen. This whole treaty process—culminating in the ratification of it and our new constitution, and which has set up a more collaborative governance structure—has been a community-building exercise twelve years in the making. I had to ask

the members of my community to agree to a three-hundred-page legal document that modified their legal rights forevermore. How many people feel comfortable with that kind of change? Seventy percent of my members agreed to take that risk. And there's been no looking back. We have had community members examine and play leadership roles in the development of every piece of legislation; we have community votes on the largest major decisions that will impact our people; and we have a functioning legislature and advisory process that incorporates more opinions and perspectives into the decision process than we have ever had. There is no doubt that we are stronger now because we took the time to engage with everyone; that has allowed us to move forward.

### **Moving Into Treaty**

So, on the Effective Date, 3 April 2009, we set out on our journey, with our Constitution as our guide. We implemented twenty-three laws and over fifty regulations on the Effective Date, following a massive eighteen-month push to prepare for Treaty. Our constitution committee was morphed into a treaty implementation committee to provide input on these laws. We decided to jump into self-government with both feet—we took down almost every head of power that the Final Agreement provided, in terms of jurisdiction, as we wanted to assert our self-governance, independence, and separation from the Indian Act as early as possible. We wanted it to be a transformational experience. Many other communities with Treaties, including those in the Yukon, have followed a more incremental approach to the design and implementation of laws. We did it all at once, with the community's support and with the help of an incredible team of experts and advisors. I am convinced, two years into our Treaty, that this was the right way to do it. We have never looked back, not once, and the "fresh start" aspect of the Effective Date took on a very important meaning. It was a real separation date for our people, more so than if we had adopted a more incremental approach. I should note that, due to development pressures on our lands, we also needed to take this time to get our house in order, so to speak, on our land and regulatory regime. To not get this component right would have meant a real risk of squandering our opportunities.

Since that date, we have seen the operation of all our institutions, including the Executive Council, Tsawwassen Legislature, Advisory Council, and Judicial Council. And, I think what I am seeing emerge is what

I'd like to call a new "culture of governance," which has fundamentally changed how our people, and how our governments, react to Treaty.

### **Culture of Governance**

The most important observation about our culture of governance on the reserve has to do with our legislature. It has basically replaced the other levels of government, over which we had no control, with respect to dictating our legislative environment—the set of rules that surround us and prescribe our permitted actions. Our legislature has sat four times now, and we have just recently wrapped up our spring session. I have watched with great interest as the members of the legislature have been elected, have explored their roles, and have begun to assert their authority. The thirteen members who were elected ended up being representative of almost every large family grouping at Tsawwassen—which is an argument for democratic elections resulting in outcomes similar to a traditional or hereditary process. We spent quite a bit of time discussing process surrounding the legislature, with respect to its operations, and we have quite a few cultural elements to it. One of the most successful has been a talking feather, a concept generated by our community, which legislators pass to one another before speaking. This an important cultural element to include in our new government structure, but it has also elevated the level of discourse by forcing members to interact directly with one another while engaged in debate.

The reaction of the sitting members of the legislature to our debates has been very powerful. We have now, in this past session, finished the second year of the process of passing our annual Budget Bill—which, once passed, becomes a law of the First Nation, and which is required to provide TFN with the authority to speak. The act of discussing that bill has really showed the legislators that they do have the power to make decisions. In some cases, decisions were made to reduce spending in certain areas, and to revisit the budget part way through the year to assess whether additional spending could be made in targeted areas. The tone of the debate was civil, though it was clear that all were clearly engaged. I expect debates will be more difficult and contentious in the future, but so far the tone of our legislature is very respectful. In addition to passing laws, the legislature has an opportunity to make resolutions, which serve as powerful indicators to the government and Executive Council as to the priorities of the membership. Last year, they asked for strategies on community safety, and for reports

on benefits accruing to members—both important and relevant pieces of work that motivated the Executive Council to undertake substantial pieces of work in these areas. And, at the end of the latest session, when we asked for feedback on the operations of the legislature, what we received was a powerful endorsement of the process—most members said they finally felt that our families were back at the decision table and that they have a voice with respect to our community's most important decisions.

We also have an advisory council that advises us on laws, budgets, and policy, and this is yet another check and balance that encourages community participation. We have created important feedback and accountability loops with our executive council and our legislature to ensure that their input is more than token.

Other institutions and governance processes have also been transformed. We are required, by our own laws, to hold an Annual General Meeting, which takes place shortly after we've concluded an annual audit, and I am impressed with how it is evolving. As knowledge by the community increases on areas such as the budget and decision-making processes, and as we become used to our new accountability and reporting structures, meetings are becoming much more relaxed and respectful. For example, the largest concern voiced at past AGMs has been about the funding envelope that we provide to both post-secondary and K-12 students, but the concern was voiced in a manner as to suggest that we really need to increase and open up our budget in that area as soon as possible. The example demonstrates a forward-thinking approach that reflects the members' knowledge that they can impact decision processes—in other words, a productive discussion where their input will be responded to. And, now, we do have the capability and tools to respond to that knowledge.

We continue to see how this evolves around us, and we continue to communicate with our community as much as possible. We are now seeing our institutions, and their processes, become entrenched in our members' minds. The opportunities in our Acts are becoming real options for them, including such alternatives as the Judicial Council in respect of appeals, or for the Freedom of Information request procedure.

We have also concerned ourselves with enforcement and conflict resolution in relation to our laws and to that regard other institutions we have set up are a special prosecutor integrated with the provincial courts system to enforce TFN laws, and a judicial council, currently headed up by a retired judge to ensure TFN members have recourse over decisions

or laws made by Tsawwassen government. Luckily we haven't had to use these 2 institutions yet, though they are set up and ready to go.

One of our key concerns with respect to all these institutions was to ensure that we were integrating culture back into our processes, as it had largely drifted out of our institutions over decades of INAC oppression. To that end, we formed a Standing Committee on Language and Culture, whose aim is in part to encourage, monitor and support us in our on-going efforts to make our systems culturally relevant. We will do this bit as we go, as we now have the luxury of time to think through these processes and relate them to our traditions.

### **Key challenges faced in Nation-building**

Those are some of the ways in which we are building this culture of governance, and restoring some of the accountability deficit that the Indian Act creates, by making Band Councils answerable to the Department and not to their own people. I've described some of our successes, and some of the good processes we've put into place. But that's not to say that this Treaty hasn't been without its challenges. One of the biggest challenges is just the sheer level of change and transformation that is involved in such a short time. Change isn't easy—it is a gritty, dirty process that drags all the energy out of you. TFN has faced the worst kinds of opposition, from all fronts. From our MP and Mayor, to environmentalists and the public, and to my own peer Chiefs—we have had opposition. And for all the external critics, we also had some very strong opponents within our community. It is challenging to keep moving forward in the face of all that questioning, in the belief that what we are doing is the right thing for everyone. But much of this criticism is part of the point—moving forward takes pragmatism, and not letting the perfect get in the way of the good. Waiting for the perfect in Tsawwassen would have meant opting for the status quo, and failing another generation of our people—totally unacceptable.

And still, many First Nations continue to criticize Tsawwassen for settling this treaty. I have a number of opinions about this criticism—the first being that sadly most of it is uninformed. The second is of course people are entitled to their opinion—but my community's decision was clear and should be respected. Finally, we need to think about our own expectations of what we want to accomplish in our communities—my vision is to have comparable socio-economic rates with other British Columbians. That

vision is now within our reach and success won't have been the result of having assimilated or waiting for the perfect storm. Our treaty is an avenue to integrate, not assimilate. We have integrated into some systems—but through our own choice because we have other priorities than creating obscure legal systems that don't impact the day to day lives of Tsawwassen people. And the change in our community is exciting. Our youth have hope. We are actively reviving our culture and we have Indian Affairs off our backs (mostly).

The change that I am seeing is not just at the level of governance, but at more fundamental levels that demonstrate a level of optimism and belief in the future that hasn't been there for some time. Our applications for post-secondary education have skyrocketed in the past two years. We have more Members working than ever before—and now our Members don't just want jobs—they want good jobs, ones that require a higher level of skill and that involve training and education development. These are the most positive signs of long-term change.

## **Conclusion**

So, we are moving forward beyond the Indian Act, as you can see from some of the examples I've provided above. But we are not without our challenges. With so many opportunities for institutional or economic development, comes a need for better capacity. We need to make sure that our members continue to drive our vision—and, more importantly, are willing to spend their valuable time with action to help make this vision a reality. When you are building capacity, you need good help and a way to retain some of the skills within your own community. I've already done my best to hire my best and brightest members from near and far—but we need to continue to search out, identify, and integrate our members in ways that truly and meaningfully involve them.

I should also say that our people are still suffering from the terrible legacy of the Indian Act, and will be for generations until we are far enough away from it that the generational impacts can start to fade and we can fully recover and reach our full potential. We are hoping to accelerate that process by building our economy and providing state-of-the-art programs and services—but one important reflection, for all First Nation communities and people, is that the Indian Act really and truly is holding us all back. Implementation of self-governance is a lot of work, but it is so worth it.

We at TFN cannot lose courage on our journey towards fully implementing it—we must keep sight of our vision. After seeing how other political frameworks work in our region and otherwise, and having been out from under the Indian Act for almost two years now, it has really demonstrated to me how the Indian Act has set First Nations up for failure.

I want to close by reinforcing the idea that nation-building is a process, but it is also a choice. First Nations need to think big, and for the long term, to truly reach transformation in your communities—indeed to decolonize. The Indian Act is a terrible thing, and so difficult to break away from—because for most communities, there is a greatly unknown—and a lot of risk—associated with that move. At Tsawwassen, there was also that fear. But my people chose to take that risk. They chose to step into the unknown, a future without the Indian Act, governed by laws they were to make themselves. The responsibility is enormous, but the opportunity is even greater. I am confident that we are moving in the right direction, and that with the Treaty—and without the Indian Act—Tsawwassen First Nation, as well as all First Nations willing to go down that path, will see a bright, bright future ahead.