

Treaty Commission presentation  
By Chief Commissioner Steven Point  
Reconsidering R. v. Gladstone Conference  
*First Nations House of Learning*  
*University of British Columbia*  
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I am new to this role of chief commissioner.

Previously, I was a provincial court judge for five years.

So, I will have to be careful what I say about any court decisions, as I am still a judge.

Today, I am here in my capacity as chief commissioner to talk about court decisions and their impact on the BC treaty process.

### **Legal decisions are the foundation for treaty making**

Landmark court judgments were the catalyst for a federal land claims process. Landmark court judgments were the catalyst for the BC treaty process (*Calder, Sparrow*).

The recognition of aboriginal title in *Calder* as legal right was sufficient to cause the federal government to establish a lands claim process.

The aboriginal right to fish for food and ceremonial purposes was confirmed in the *Sparrow* decision.

The aboriginal right to sell fish was established for the Heiltsuk in *Gladstone*.

The *Delgamuukw* decision confirmed aboriginal title exists in British Columbia, that it was never extinguished.

The *Haida* and *Taku* decisions established a general framework for the duty to consult and accommodate, where indicated, before aboriginal title or rights have been decided. In reconsidering *Gladstone*, and the long line of court decisions regarding aboriginal rights and title, one message continues to emerge – negotiate.

Many current cases are related to a lack of consultation and accommodation and involve First Nations both inside and outside the treaty process.

This is happening at a time when there is a growing recognition of the aboriginal rights that First Nations continue to have in their traditional territories.

So, these rights are being defined through both negotiation and litigation.

We have witnessed firsthand the need for a delicate balance between the two – between negotiation and litigation.

We have been critical, at times, of the federal government for their “litigate or negotiate” policy.

We have also seen where the threat of litigation can poison negotiations rather than provide some needed leverage for a First Nation.

The conundrum is this: First Nations may feel they are forced to take legal action to protect their rights. And then they can't negotiate a resolution of their rights because they have taken legal action. It's catch-22. This issue remains unresolved and continues to plague treaty negotiations.

In our facilitation efforts we have encouraged Canada to be more flexible in its policy around litigation. In acknowledging the First Nation's rationale for filing a writ, we have encouraged the parties to manage the legal issues around confidentiality and without prejudice while allowing negotiations to proceed. One option is to put in place an abeyance agreement. This is done in tandem with a work plan that sets out a process for addressing the issues in negotiations, which are the subject of the writ. Or conclude an interim measures agreement that temporarily protects the First Nation's interest pending resolution.

In our view there really is no alternative to negotiations. Litigation may be seen as an alternative.

While it is certainly true that litigation can inform negotiations, at the end of the day a government-to-government relationship, with all of its complexities, must be negotiated. Relationships cannot be built in court. And treaty making is about building new relationships.

In most cases, negotiations should be able to continue while litigation is going ahead. The exception would be where a First Nation is seeking a declaration of aboriginal title.

There are those who are saying there continues to be denial of aboriginal rights but, in fact, there is a greater degree of recognition — certainly more so than in the past. And there is recognition of aboriginal rights now by our Premier after 134 years of denial.

Our challenge is to bring the latest direction of the Supreme Court to bear on treaty negotiations. We see the court rulings in *Haida* and *Taku* as helpful to the treaty process. The court continues to press the need for treaty negotiations to be part of the process of reconciliation. The decision underscores once again the need for interim measures agreements.

Interim measures agreements protecting land and resources have been the exception rather than the rule.

Interestingly enough, the Heiltsuk and Canada signed an interim measures agreement in 2001, on a without prejudice basis, aimed at resolving issues related to the amount of Herring Spawn on Kelp that the Heiltsuk will harvest.

The interim measure was intended to avert a crisis for the 2001 season and create a better atmosphere for negotiations regarding a long-term solution to the implementation of the *Gladstone* decision.

The onus is on the governments of Canada, BC and First Nations to try and reach an accommodation, an interim one, as well as a lasting one. The court said the parties must exhaust all reasonable efforts to reach agreement.

When they cannot, as a first step, they should consider some process of alternate dispute resolution. There is no such process and we can only go so far in our facilitation efforts.

The decision in *Haida* sets out an obligation on the part of the Crown to negotiate. Does that mean through the treaty process? That's a discussion we have to have.

The Supreme Court said the honour of the Crown requires that aboriginal rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.

The court said, "Honourable negotiation implies a duty to consult with aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights."

We expect there will continue to be court action. However, given recent court rulings, there may be a bigger appetite for negotiations by the governments of Canada and BC.

The BC government has signalled its intention to work toward a new relationship of reconciliation with First Nations across British Columbia.

We are at a changing point.

These recent and significant developments signal that, today, reconciliation has a meaning closer to the long-held First Nation view of an ongoing multi-faceted relationship than the federal and

provincial view of reconciliation as the full and final settlement of outstanding aboriginal rights in a treaty.

The willingness to achieve a new relationship between First Nations and the Crown is reminiscent of the leadership and commitment that was shown when the treaty process was launched in 1992.

Now, once again, we have the Prime Minister and the Premier saying they are resolutely behind a process of reconciliation that includes treaty making as a central element.

Political will, and the necessary commitment that springs from it, should create better conditions for negotiations and encourage the parties to seize new opportunities.

Sectoral agreements may be a possibility. The Treaty Commission has for many years been a proponent of sectoral agreements, and sees them as a potentially important part of treaty making, for example on fish.

We are encouraged by the work that has been done by the BC Aboriginal Fisheries Commission in developing the Inter-Tribal Fisheries Framework.

One of the objectives of the framework is to form the basis for joint action by First Nations on the protection and implementation of aboriginal fishing rights, both inside and outside the BC treaty process.

The aboriginal fisheries commission's goal is to ensure full recognition and implementation of aboriginal fishing rights. And we think that should be done through negotiation.

Thank you.