

**BC TREATY COMMISSION**

Commissioners Adam and Harcourt's presentation to  
Supreme Court Justices  
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Simon Fraser University Morris J. Wosk Centre for Dialogue

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**BC Treaty  
Commission**

## INTRODUCTIONS:

We are pleased to be here today and we thank the organizers for inviting us.

First, let me tell you about the Treaty Commission and the treaty process that we oversee.

The Treaty Commission and the treaty process were established in 1992 by agreement of Canada British Columbia and the First Nations Summit.

The parties in the treaty process are guided by their agreement and by the 19 recommendations of the BC Claims Task Force, the blueprint for this made-in-BC treaty process.

We believe those 19 Task Force recommendations remain the cornerstone of the treaty process and that adherence to them is essential to effective negotiations and the achievement of fair and honourable final agreements. One of the tasks we take very seriously is monitoring adherence to these recommendations.

One of the recommendations was that a six-stage treaty process be established as the means by which negotiations could be advanced and fair and durable treaties achieved.

Another recommendation was that a Treaty Commission be established as “keeper of the process.” The treaty process is open to all First Nations and the other two parties, Canada and BC, are obligated to commence negotiations as soon as the First Nations are ready.

We have three complementary roles: facilitation, funding and public information.

We spend much of our time and resources on facilitation to move negotiations forward at a number of treaty tables.

We allocate negotiation support funding so that First Nations can negotiate on a more secure footing with the governments of Canada and BC.

As the independent voice of treaty making we provide information across BC using a variety of communications tools.

We don't take our marching orders from any one of the Principals. New or altered marching orders must come from all three Principals acting together. Our accountability is to all three Principals.

As commissioners we do not represent the Principals who appoint us but act independently. Decisions require the support of one appointee of each of the Principals and decisions are generally made by consensus.

Our authority is limited and is generally restricted to process issues. We can make recommendations but we can't compel the Principals or parties to act. However, we will often step in to resolve a dispute at the invitation of one party. And at times we've been critical of one or more of the Principals.

So, that's our role: facilitation, funding and public information.

**Now, let me turn my attention to the situation today.**

There are currently 55 First Nations in the treaty process representing approximately two-thirds of the aboriginal people in British Columbia.

Four First Nations are actively involved in negotiations to conclude a treaty: the Lheidli T'enneh of the Prince George region, the Sliammon near Powell River, the Tsawwassen here in the Lower Mainland, and the Maa-nulth First Nations on the west coast of Vancouver Island.

The parties at these four tables are in intensive negotiations to conclude final agreements in 2005. There is momentum but we need to temper our optimism with caution. It's not over until it's over and tough issues lie ahead.

An encouraging sign is the fact these First Nations in advanced negotiations are negotiating together on governance issues, on financial arrangements, and on taxation. They are getting down to the final detail. There has been a wide gap between the parties in negotiations but that gap is closing.

Much of the groundbreaking negotiation is limited to a handful of tables. And that's an obvious problem for those First Nations who are not fully engaged in negotiations.

The Treaty Commission has been critical of the BC government's decision to concentrate resources at a handful of tables. We have urged the government to provide adequate resources to treaty tables where First Nations are ready willing and able to negotiate.

There are 40 First Nations seeking to conclude an agreement in principle. Of this large group about a dozen First Nations hope to conclude agreements in principle in 2005 or 2006.

Aided and informed by the courts there is a growing recognition of the aboriginal rights that First Nations continue to have in their traditional territories.

Several court rulings have had a direct bearing on the issues that are the subject of treaty negotiations and the manner in which they are negotiated. So these rights are being defined through negotiation and litigation.

We've witnessed firsthand the need for a delicate balance between the two – between negotiation and litigation. The challenge for us is to manage the issue.

We've been critical at times of the federal government for their uncompromising litigate-or-negotiate policy.

We've also seen where the threat of litigation can poison negotiations rather than serving as an incentive to move the negotiations forward.

The conundrum is this: First Nations may feel they're forced to take legal action to protect their rights; and then they can't negotiate a resolution of their rights because they've taken legal action. It's catch-22. In our view most negotiations should be able to continue while litigation is going ahead.

This negotiate-or-litigate issue continues to crop up. In several instances the parties have, with our assistance, entered into abeyance agreements. 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 it provides a process for concluding interim measures to temporarily protect the First Nation's interest

pending resolution.

In other instances the parties have, again with our assistance, found ways to confine the application of the policy. For example, negotiations could continue on a more limited range of subjects. Or the negotiations could continue with constituent bands within a tribal council that are not party to the litigation.

In all of these facilitation efforts we have persistently encouraged Canada in particular to be more flexible in its policy around litigation.

The creators of the treaty process envisioned a range of interim measures, from notification through consultation to a restriction or moratorium, on the alienation of land or resources. Any party must be able to initiate the negotiation of an interim measures agreement at any time in the process.

Interim measures are a good example of how the treaty process as it was originally conceived is sound and the fundamental commitments were fair and appropriate for resolving the land title dispute in British Columbia.

For the treaty process to succeed the parties must adhere to those fundamental commitments. That's essential. And that means following the agreed-to negotiation process. Political will and commitment is required to ensure the process for recognition and reconciliation is fair and effective and results in agreements.

Flexibility and creativity are also essential if the parties are to reconcile their interests and overcome the obstacles through the give-and-take of good faith negotiations.

**Several barriers remain to be overcome if we are to be successful in concluding treaties.**

The parties continue to struggle with the issue of certainty. First Nations and the governments of Canada and British Columbia share the common objective of achieving certainty in their relationship, particularly concerning the ownership of, and jurisdiction over, land and resources.

The creators of the treaty process rejected blanket extinguishment of First Nations' rights, title and privileges to achieve certainty in a treaty. And on that basis we reject extinguishment.

All parties are seeking clarity and certainty of First Nation territorial boundaries and rights within a territory. So First Nations must have a means to address such conflicts as arise out of overlapping territories and rights.

Insofar as overlaps may affect negotiations it's the responsibility of First Nations to resolve them. Unresolved overlaps are assuming greater significance as treaty negotiations intensify for those First Nations approaching treaties or agreements in principle.

When a First Nation files a statement of intent with the Treaty Commission to enter treaty negotiations it must say whether there are any First Nations with whom it may have overlapping or shared territory. Because treaties will identify specific territories the First Nation must provide a map to its First Nation neighbours. The map must show the boundaries of its traditional territory, the areas considered to be shared territories, and areas that are disputed.

The First Nation is required to make best efforts to establish an agreed process for resolving over-

laps with each of the affected neighbours. Overlap disputes should be resolved before there is an agreement in principle although in practice such resolution is more the exception than the rule.

Despite the fact there has been a voluntary, three-step protocol in place since May 1997 formally adopted by the First Nations Summit it remains a little-used tool.

Where treaty negotiations will be hampered by unresolved overlaps the Treaty Commission will step up its facilitation efforts.

A further challenge will be the self government provisions. The model sketched out in the finalized agreements in principle anticipates that some self government provisions will fall into the final agreement. Other provisions will be captured in a self government agreement outside the final agreement. The placement of specific authorities across the two agreements and the relationship between the First Nations' constitution and the self government agreement are issues that the parties will have to grapple with.

Another obstacle is the scarcity of Crown land for treaty settlements. This is an issue taking on greater urgency as treaty negotiations gain momentum in southern Vancouver Island, the Lower Mainland, and the Fraser Valley.

We are urging the governments of BC and Canada to protect available Crown land, both surplus and underutilized land, on an interim basis pending the settlement of treaties and to consider potential economic opportunities for First Nations in buildings now owned by either the federal or provincial governments.

Another obstacle is the allocation of fish in treaties. Many First Nations expect treaties to provide an allocation of fish to be used for either domestic use or sale.

In agreements in principle signed to date it is proposed that fish caught under treaty provisions are for food, social or ceremonial purposes. Fish caught under harvest agreements signed separately from treaties are for commercial use. This is the case in the Nisga'a treaty.

### **In conclusion...**

There is progress but there are problems yet to solve.

We're committed to assisting the four tables we mentioned earlier to achieve treaties and we will support through active facilitation all those tables where the First Nations are ready and committed to moving forward.

Last year we pronounced that treaties were within reach if the parties could clear the remaining, significant hurdles. As the views we've gathered in our 2004 annual report show that process is underway and the new relationship being sought is beginning to take shape for some First Nations.

Thank you.