

Review of the Treaty Process

Speaking Notes for Miles Richardson, Chief Commissioner, BC Treaty Commission
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Speaking Truth to Power II

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**BC Treaty
Commission**

203 – 1155 W. Pender St., Vancouver, B.C. V6E 2P4. Tel 604 482 9200. Fax 604 482 9222. info@bctreaty.net. www.bctreaty.net

From an early age, a Haida child knows it is the duty of every Haida person to protect Haida territory and rights.

Ten years ago, as a member of the BC Claims Task Force, I participated in designing a tripartite treaty process for British Columbia. I've spent a lot of time since then defending the treaty process and the progress that has been made. I still believe in it and I am asking British Columbians to believe in it.

The treaty process is not perfect but it is fundamentally sound. It's a work in progress.

Ten years later, it is proper for the players in the process and other interested parties to recall the fundamental issues that the treaty process sought to address; to acknowledge its achievements and shortcomings; and, most importantly, to identify the steps needed to reinforce the commitments that were so solemnly made in 1991.

That's why the Treaty Commission has convened this forum. At last year's forum, we were able to clarify some of the underlying challenges to the treaty process. Now, we want to re-examine where we are going, so that the potential of the treaty process can be more fully realized.

The fundamental commitments agreed to by Canada, BC and First Nations are in the 1991 *Report of the BC Claims Task Force*. Its opening recommendation is that "First Nations, Canada and British Columbia establish a new relationship based on mutual trust, respect and understanding – through political negotiations."

The new relationship must recognize and reconcile aboriginal rights and title with the Crown's title.

It must respect the fact that First Nations were self determining and distinct nations with their own spiritual values, histories, languages, and territories, systems of government and ways of life.

Economic opportunity and greater economic self sufficiency, along with traditional and cultural activities, lie firmly within the parameters of the new relationship.

The Supreme Court's decision in *Delgamuukw* has underscored the Task Force's message. It shows us the Crown has an obligation to consult with, perhaps obtain the consent of, and provide compensation to First Nations for the infringement of aboriginal rights. The Supreme Court has, in effect, highlighted the imperative need for First Nations to be partners in economic development and share in its benefits and not be, as has been the case, its most persistent victims.

Greater access to natural and other resources is needed to promote First Nation prosperity and self government. But as we are also learning from experience in the United States and elsewhere, self government, more especially sound, culturally appropriate self government, is at least as crucial a precondition as more resources for achieving economic success. One obvious lesson is that treaties must provide both more land and resources for First Nations and also meaningful self government if they are to successfully address long-term economic issues.

In 1991, the Principals made a clear commitment to political negotiations as the preferred means of addressing the differences that separated them.

Given the experiences of the province in the 1970s and 1980s, the Principals were acutely aware that other choices were available to the parties to assert and secure their rights. Those avenues remain available. Indeed, the *Delgamuukw* judgment of 1997 seemed to vindicate the litigation route, and make it more accessible to First Nations by affording oral evidence the same standing as documentary evidence. To date, there has not been a flood of new aboriginal title litigation.

First Nations recognize that litigation is costly, cumbersome, and unpredictable, and generally will yield only piecemeal answers that need to be fleshed out through negotiations. That perception could change if First Nations have reason to believe that the mandates of Canada and British Columbia do not reflect the commitments they made in 1991 and cannot lead to fair treaties.

All of us here today have a role to play in revitalizing and safeguarding the negotiation option. We can all appreciate that a breakdown in negotiations will lead to continued economic and social uncertainty and more litigation, confrontation and expense as well as lost opportunity.

In the past, the cost of our collective failure to properly address and resolve the BC land question has been borne almost entirely by aboriginal people and First Nations. That is no longer the case. All of society will bear the cost of our failure, now.

A breakdown would be unfortunate in itself, and doubly so given the commitments of time, money, and sheer human effort that have already been made to the treaty process, and given its achievements to date.

It may be unfashionable to talk about the achievements of the treaty process, but it would be misguided to overlook them.

Ten years ago, only the Nisga'a were negotiating a modern-day treaty. Now, all First Nations in British Columbia have that opportunity. Many First Nations have chosen to negotiate, with the majority working towards agreements in principle.

Throughout the province, negotiations are continuing, elements of sub-agreements are being reached, and First Nations are resolving many of their overlaps.

The treaty process has succeeded in bringing the parties together to identify, better understand, and try to overcome their differences, as they attempt to build the new relationship.

And while completed treaties are the goal of the negotiations, they are not the whole story. The negotiation process has itself provided opportunities for aboriginal people and has served as a catalyst for strategic planning, needs assessments and skills development.

The Treaty Commission, too, can claim some successes within the limits of its mandate.

- It has prodded Canada and British Columbia to carry through on their commitments to interim measures and to create treaty-related measures;
- It has prompted them to be more flexible in applying their policy of suspending negotiations when First Nations initiate litigation;

- It has encouraged the parties to address certain key subjects - fiscal relations, certainty and compensation - on a province-wide basis rather than at 42 tables;
- It has re-examined its funding role and successfully lobbied Canada and BC for more negotiation-support funding for First Nations and for the commitment of more personnel to negotiations; and
- It has managed to help resolve or ease a number of disputes at individual tables.

Although the Treaty Commission does not have the power to compel the parties to act, it has the authority as “keeper of the process” to address issues, with the parties, that are obstacles to efficient and effective negotiations.

No overview of the achievements of the treaty process would be complete without mentioning its openness. I know of no other negotiations of similar scope and gravity that provide so many avenues for third party consultation or offer such a wealth of public information.

The Treaty Commission has encouraged the parties to ensure information is readily available to anyone who wants it and that consultation efforts allow for meaningful participation. It should be noted, too, that local government representatives are part of the provincial negotiating teams.

Yet, when all is said and done, the parties have to demonstrate the firmness of their commitment to the treaty process by bringing mandates flexible enough to reach agreement across their differences. That will be the ultimate litmus test for the treaty process.

The differences are now clear precisely because negotiations have begun to seriously address the most difficult challenges.

I would leave the wrong impression if I did not mention the earnestness with which these gaps in vision are being discussed by the parties and the seriousness with which they are trying to address them.

Nonetheless, a lack of common understanding of the parameters of negotiations is detrimental to agreement-in-principle negotiations. This is particularly true with regard to land and financial matters, governance and certainty.

First Nations regard the land and cash quanta as inadequate compensation for past infringements and for the trade-offs within a treaty, and an inadequate foundation for economic self-sufficiency. There is concern Canada and BC are too inflexible and do not take sufficient account of the differences in First Nation needs.

Canada and BC believe that the expectations of some First Nations are unaffordable and would compromise Canada’s obligation to deal equitably with First Nations right across the country.

There is substantial common ground in negotiating First Nations’ governance authority over their own people, on settlement lands that First Nations will own exclusively. However, there are major gaps in other areas. Notably, First Nations are looking for jurisdiction and management authorities off settlement land to protect their interests, in lieu of outright ownership of those lands. Canada and BC are reluctant to move this far, since this approach is inconsistent with their model of certainty, and because of the potential impact on government revenues.

A significant debate is needed to reach a better and common understanding of First Nation roles in relation to lands and resources, along a spectrum from ownership and jurisdiction through management, revenue-sharing and access to consultation. This understanding could ease and expedite the task of negotiating individual treaties.

Interim measures, including treaty related measures, pilot projects and even joint ventures, may be a useful way of testing some of these ideas and assumptions on the ground. In this way, interim measures can help the parties better understand each other and the elements that set their visions apart and find concrete ways to bridge those gaps.

Notwithstanding the progress made, First Nations have criticized the treaty process for being too slow and costly. These sentiments are echoed in the wider community. (This, of course, begs the question of how slow and costly the alternatives to negotiation might be in developing a new relationship.)

There are those, too, who warn of the danger of rushing into constitutionally-protected arrangements with First Nations that may not yet be ready to make such far-reaching decisions, or to implement the terms of a treaty.

There may be new approaches and techniques that will help tables to complete agreements in principle more quickly. Several tables have already adopted a more modest version of the agreement in principle. This approach focuses on land, cash and resources and defers detailed negotiation of other matters until after the agreement in principle is concluded. The time may also be ripe for the parties to reconsider the idea of a "generic agreement in principle."

In thinking about the proper pace at which treaty-making should proceed, I recall the words of the late Chief Joe Mathias, one of the authors of the Task Force Report. "Treaty making," he said, "is a process, not an event." These words sit well with the consensus that emerged from last year's *Speaking Truth to Power*: treaties are the basis of a complex network of relationships that will be built over time, not just a quick one-off agreement. The building needs to begin before the treaty is signed and will continue within the overarching framework of the treaty after the ink has dried.

Many First Nations are still re-consolidating themselves after years of political disruption under the Indian Act. These First Nations need time to build their capacity to negotiate and implement modern-day treaties. The full scale of this issue was not clearly apparent in 1991.

Several steps have already been taken to address the often interrelated issues of First Nation capacity and definition. The Treaty Commission will hold First Nations who enter the process to a higher standard of readiness in the early stages of negotiations. It has also adopted measures to ensure that First Nations obtain the approval of their members, irrespective of where they live, to proceed with negotiations in a way that the other negotiating parties can rely upon.

Canada and BC have now begun to be much clearer at the outset of negotiations about the scope of the issues they are prepared to negotiate with smaller First Nations and the broad range of land and cash amounts that they have in mind.

Even where there are comprehensive agreement-in-principle offers, the offers and the associated fiscal transfer arrangements are often so framed that many governance powers could only be exercised where there is cooperation among First Nations.

One of the most persistent First Nation criticisms of the treaty process since its inception is that land and resources continue to be alienated while treaty negotiations grind on. This has prompted protest, threats of direct action, litigation, and repeated calls that Canada and BC negotiate interim measures agreements when an interest is being affected which could undermine the process.

Treaty negotiations are taking time – and more time than many assumed. There is a clear need to balance and protect the parties’ interests until negotiations conclude and there is a clear need for the parties to demonstrate their continuing commitment to negotiating treaties. Interim measures can help to build trust and serve as a means of dealing in a preliminary or experimental manner with a contentious issue and so make treaties easier to negotiate.

First Nations tend to approach interim measures with the goal of securing vetoes and jurisdiction. BC and Canada, by contrast, often favour information sharing. As a result, frustration and distrust mount and the negotiations suffer.

But there are encouraging developments. Local governments, business and industry now support the call for interim measures, see the economic benefits for communities, and recognize that some certainty is better than no certainty at all. Pressed by the Treaty Commission, Canada and BC have provided new tools in the form of treaty-related measures and have agreed to share the cost of interim measures equally.

Additional personnel are being assigned to negotiate agreements and the provincial government has allocated additional money for this purpose.

Several treaty-related measures have been agreed to, as have a significant number of other interim agreements. These have spanned such fields as fisheries, aquaculture, forestry, culture and heritage, economic development, capacity building and so on, and have often taken the form of studies.

However, there is a clear need for still more concrete action on the ground. The parties need to look beyond the recently agreed studies and accords and protocols towards more concrete agreements.

From our perspective, interim measures initiatives should focus on protection, consultation, co-operation and co-management, on resource allocation and land use planning, and on capacity building, specifically in the area of governance.

This concludes our brief survey of the status, achievements and needs of the treaty process.

In our view, the treaty process cannot be abandoned because the alternative is a grim one. The price would be too high, the lost opportunities too great. It should now be apparent that the ways to build treaties are within reach, with commitment, political courage, goodwill and innovative ideas from all interested parties.

We have invited you to engage in a dialogue at this two-day forum to map out ways by which the promise of the treaty process can be more fully realized.

Thank you.