

**British Columbia Treaty Commission
Submission to
Select Standing Committee on Aboriginal Affairs**

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Vancouver, British Columbia



**BC Treaty
Commission**

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On behalf of the Treaty Commission I would like to thank the committee for this opportunity to appear before you.

The Treaty Commission is here today to offer the committee a unique perspective on treaty negotiations in British Columbia. As the independent and neutral keeper of the BC treaty process, we hope our comments will be both instructive and constructive to the committee in its deliberations.

Informed by our experience monitoring and facilitating treaty negotiations over the past eight years, our perspective is further enlightened by a review of the BC treaty process, which we recently completed.

The review includes an analysis of the 19 recommendations agreed to by the governments of Canada, British Columbia and First Nations. The recommendations contain the fundamental commitments agreed to in creating the BC treaty process. I understand copies of our report were made available to committee members. We encourage you to read this report on the future of treaty making in this province.

Our review confirms there is a solid foundation for treaty making in British Columbia. However, urgent action is necessary to make the treaty process more effective.

In undertaking the review, the Treaty Commission sought to answer the questions many British Columbians are asking: What has been accomplished? What has gone wrong? And what needs fixing?

The result is a plan that, if followed, will restore faith in the treaty process, bring a measure of certainty to land and resource use and flow benefits to First Nations sooner. We make a number of recommendations and ask the governments of Canada, British Columbia and First Nations to act on these recommendations to make the treaty process more effective.

It is too early to tell if action on these recommendations will come swiftly or slowly. The treaty process has already suffered greatly from delays. Substantive negotiations have been in virtual suspension for much of the past year, by reason of the federal election campaign in the fall of 2000, then the period of uncertainty preceding the provincial election call, the election campaign and now the government's settling in period. This hiatus is further extended by the government's announcement that many important treaty issues will be put aside pending a referendum.

It is our hope and it is a recommendation within our report that the BC government extends as far as possible the range of issues remaining open for negotiation while it awaits the results of its referendum.

Let's not lose sight of how much has been accomplished, the lessons we have learned and the experience we have gained – all valuable experience the parties can now bring to negotiations. Over the past year we did make progress, primarily through interim measures agreements – more than 60 agreements at last count, including the first land protection agreement in these negotiations. Still, we don't want to lose the momentum we have gained or in any way undermine the support for treaty negotiations that already exists.

You face a daunting challenge. You have been asked to frame a question, or questions, that will engage the public in the complex arena of treaty negotiations and elicit meaningful input. As you undertake this task, we ask you to bear in mind that the issues these negotiations must address have largely been laid down in law. Those will not change, whatever the results of a referendum. Nor will the 19 recommendations agreed to by the governments of Canada, British Columbia and First Nations that were recently affirmed by Premier Campbell.

If you should fail in your task, you will pit people against one another and threaten not only the treaty process but also peace in this province.

If you succeed, the referendum and your work leading up to it could provide an opportunity to inform many more British Columbians about treaty negotiations. We trust a major communication effort will be initiated by the BC government to do just that.

If the provincial government is to achieve its stated goal of engaging British Columbians in this historic exercise, it will need to strengthen the processes now in place for public consultation and participation. This issue is addressed in our review of the treaty process. As well, we have attached to this submission a discussion paper we prepared entitled "A Constructive Approach to Consultation" which we shared with your government several months ago.

One of our three primary roles is to provide public information and education on treaty making. Public consultation promotes public education and also depends on it. With limited financial and human resources we have done our best to meet the demands for public information. However, we have no way of knowing what demands will be placed on us during this referendum campaign or if we will be able to meet that demand.

We remind the BC government in our review that these are voluntary, tripartite political negotiations. We have asked the government not to undermine the integrity of the treaty process by taking unilateral action. Unilateral or bilateral actions that run counter to the commitments already made weaken the process and destroy the trust that is so hard-won.

The 19 recommendations and the report from the BC Claims Task Force are there to guide the Principals - the governments of Canada, British Columbia and First Nations - and the Treaty Commission. There are now 43 Framework Agreements between the governments of Canada and British Columbia and First Nations in the treaty process, which set out the substantive issues for negotiation, the procedures and time lines for reaching agreements in principle. The Treaty Commission urges the BC government to use these guiding principles and the agreements that are in place to move forward.

First Nations have borrowed \$150 million to negotiate over the past eight years within the parameters set out in the 19 recommendations and subject to the Framework Agreements I just mentioned earlier. It is entirely appropriate, and even healthy, for any party to refine its mandate and guiding principles and to build support among its constituents. However, if the BC government's commitment is to change in a fundamental way, or violate agreements already reached, there could be irreparable damage to the negotiation process and ramifications for the honour of the Crown.

We acknowledge that change will be needed to make the treaty process more effective. But change must come as the result of tripartite agreement achieved through full, open and honest discussion, not through unilateral action.

The Treaty Commission has repeatedly called for more creativity and flexibility in negotiations to address the gap between First Nations' expectations and the offers put forward by the governments of Canada and British Columbia. We strongly urge this committee to discard any suggestions that would diminish those opportunities for creativity and flexibility. In other words, do not unnecessarily tie the hands of the government. Be constructive in your approach so that we can build on the support we already have for treaty making in this province.

Ultimately, the BC government must have the authority to balance the various interests in this province when it enters into agreements with First Nations and the Government of Canada. There can be no guarantee that each party to a set of negotiations will get everything they want. We must accept treaty making is about change that can be achieved through the give-and-take of government-to-government negotiations. At the end of the day the Treaty Commission believes there can be treaties that give the parties enough of what they do want so that there can be agreements. The goal is durable agreements that create a foundation for a cooperative and inclusive future for all British Columbians.

Through your actions this committee can reinforce the spirit of Recommendation 2 of the BC Claims Task Force Report, which states "Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship."

Through this process, the Government of British Columbia should consider seeking a permissive mandate that allows for the kind of creativity and flexibility we think will be necessary for treaty negotiations to be successful. And when you are thinking about what the question or questions should be, we urge you to think long and hard about where the responses will lead. Any ambiguity around the referendum result may lead to litigation, further delay and disruption in negotiations.

In closing, we should remember that 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. And there is the significant social cost of opportunities lost to consider.

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 future mandate of British Columbia fails to reflect the commitments made in 1991 or the framework agreements reached and cannot lead to fair and acceptable treaties.

END OF ORAL PRESENTATION

I will end the Treaty Commission's comments here, but invite you to read our full written submission to this Committee.

The Treaty Commission feels it should respond to earlier comments made to the Committee which suggest it is biased and not well-suited to some of the tasks it has a responsibility to perform.

As mentioned earlier in this submission, the Treaty Commission is independent and neutral. The neutrality of the Treaty Commission is expressed through its structure and its decision-making processes.

The Treaty Commission is comprised of five commissioners – two appointed by the First Nations Summit, one each appointed by the governments of Canada and British Columbia. The chief commissioner is chosen by agreement of the governments of Canada and British Columbia and First Nations.

The diverse views of the commissioners are given full consideration in the decision-making process. Decisions are by consensus.

It is our responsibility to ensure the tripartite commitments that were made are lived up to and that the policies and procedures are followed in these negotiations. As a result, on more than one occasion the Treaty Commission has been critical of the BC government, just as it has been critical of the Government of Canada and the First Nations Summit when necessary. A review of our eight annual reports will bear this out.

The Treaty Commission must also address the suggestion - and I am quoting directly from the BC Treaty Negotiation Office deputy minister's submission to this committee - that the "Treaty Commission, as currently constituted is ineffective in the sense that part of the role of the commission was to assess the readiness of the parties to negotiate. I believe now, in retrospect, that many parties are not ready to negotiate."

To clarify, the Treaty Commission's mandate is to assess the readiness of the parties to move from Stage 2 into Stage 3 where the parties will negotiate a framework agreement. The BC government signed those framework agreements, which moved First Nations into the Stage 4, the agreement-in-principle stage where the substantive negotiations take place. At no time did the Treaty Commission assess the parties' readiness to engage in agreement-in-principle negotiations. We also rely on the governments of Canada and British Columbia to confirm their readiness to negotiate with each and every First Nation admitted to the process. To date, we have not heard Canada or BC voice any concerns around their readiness.

However, we would agree with the deputy minister in this way: the Treaty Commission should have a continuing role to play in assessing readiness in the negotiations. Our recommendation to the Principals that the Treaty Commission assume this responsibility is yet to be addressed.

The Treaty Commission sees the need for monitoring the parties' readiness throughout the process because the resources and mandate needed to negotiate a framework agreement are quite different from those required for more substantive agreement-in-principle talks. Secondly, community support and political commitment can fluctuate from time to time on all sides, and this is reflected in the level of resources that a party is willing or able to commit to negotiations.

The suggestion from the deputy minister is that we let too many First Nations through the door and the BC government does not have sufficient resources to handle all of these negotiation negotiations. First of all, no First Nation that meets the process' definition of First Nation is to be barred from the BC treaty process. So, until Canada, BC and First Nations agree to revisit the recommendation that the process be open to all First Nations or revise the definition of First Nations for treaty purposes, the parties must honour their commitment, and that means leaving the door open to more First Nations.

At the time these large number of framework agreements were being signed, the Treaty Commission was warning against system overload and advising the governments of Canada and British Columbia to put the necessary resources in place to meet the demand for negotiations. The Government of Canada acted accordingly. The Government of British Columbia actually cut back its resources available for negotiations.

Recommendations within our review of the BC treaty process may alleviate some of these concerns. For example, we suggest there be a shift in focus away from a treaty as a one-time achievement, and see treaties instead as the embodiment of new relationships that can be built over time. Interim measures, ministerial-level discussions to resolve certain issues, slim agreements in principle, governance initiatives, time outs to allow for community development – all of these can be building blocks of treaties. At the same time, these initiatives can reduce the demands on negotiating resources.

Another important issue raised by the deputy minister that the Treaty Commission believes requires a response is the neutrality of our public information materials. The Treaty Commission, as indicated earlier in this paper, has a responsibility through a funding agreement with the governments of Canada and British Columbia to provide province-wide public information.

For the record, a statement made to this committee by the deputy minister for the Treaty Negotiation Office requires clarification. He stated the provincial contribution to the Treaty Commission's public information effort was \$250,000 and the federal contribution was more. In fact, BC contributes \$100,000 and Canada contributes \$150,000 for a total annual Public Information and Education Budget of \$250,000.

At issue, is a paper we prepared on the Supreme Court of Canada's decision in the Delgamuukw case. The Supreme Court decision attracted a great deal of attention, raised many questions and generated a great deal of misinformation. Many of the questions, addressed to the Treaty Commission, and much of the misinformation, focused on the impact the decision would have on treaty negotiations.

The Treaty Commission saw it as important that information be available to the public so they could better understand the ensuing debate, which had brought treaty making almost to a standstill. In preparing its paper to better inform the public, the Treaty Commission relied on assistance from two distinguished professors specializing in aboriginal law, Hamar Foster of the University of Victoria and Patrick Macklem of the University of Toronto. It should be noted, too, that no specific concerns about this paper on the Delgamuukw decision have been raised with the Treaty Commission.

On the larger issue of the Treaty Commission's roles and responsibilities we have asked the Principals to undertake as soon as practicable a tripartite review of the Treaty Commission's effectiveness, as called for in the British Columbia Treaty Commission Agreement.