

**A Commitment Worth Preserving:
Reviving the
British Columbia Treaty Process**

**Report of the
Standing Senate Committee
on Aboriginal Peoples**

The Honourable Gerry St. Germain, P.C.

Chair

The Honourable Lillian Eva Dyck

Deputy Chair

June 2012

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MEMBERSHIP

THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES
41th Parliament, 1st Session
(June 2, 2011 -)

The Honourable Gerry St. Germain, P.C.
Chair

The Honourable Lillian Eva Dyck
Deputy Chair

and

The Honourable Senators:

Salma Ataullahjan
Patrick Brazeau
Larry Campbell
* James S. Cowan (or Claudette Tardif)
Jacques Demers
*Marjory LeBreton, P.C. (or Claude Carignan)
Sandra Lovelace Nicholas
Don Meredith
Jim Munson
Dennis Glen Patterson
Nancy Greene Raine
Nick G. Sibbeston
*Ex officio members

Other Senators who have participated in this study:
The Honourable Senators Jean-Guy Dagenais, John D. Wallace and Charlie Watt

Committee Clerk:
Marcy Zlotnick

*Analyst from the Parliamentary Information and
Research Service of the Library of Parliament:*
Shauna Troniak

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Thursday, June 16, 2011:

The Honourable Senator St. Germain, P.C. moved, seconded by the Honourable Senator Champagne, P.C.:

That the Standing Senate Committee on Aboriginal Peoples be authorized to examine and report on the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Metis peoples and on other matters generally relating to the Aboriginal Peoples of Canada;

That the papers and evidence received and taken and work accomplished by the Committee on the subject during the Third Session of the Fortieth Parliament be referred to the Committee; and

That the Committee submit its final report no later than December 31, 2012, and that the Committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

The question being put on the motion, it was adopted.

Gary O'Brien

Clerk of the Senate

I. INTRODUCTION

September 2012 will mark 20 years since the establishment of the British Columbia (B.C.) treaty process. In that time, significant efforts have been made to come to a just and equitable settlement of the land question in B.C. Collective efforts have culminated, to date, in the ratification of two comprehensive treaties, with several more expected to follow in the coming months and years. While progress has been made, the parties to the process have also faced and continue to face significant challenges in connection with the negotiation, ratification and implementation of treaties within the process. Focused attention and a renewal of efforts are required, at this stage, to address and overcome these challenges.

On the occasion of the upcoming 20th anniversary of the B.C. treaty process, the Committee agreed to review and report on the status of the B.C. treaty process. The Committee convened three hearings on this matter and has agreed to report the following.

II. BACKGROUND

Unlike many other parts of Canada, the majority of territory in British Columbia was not subject to historic treaties between Aboriginal peoples and the Crown. In December 1990, the governments of Canada and B.C. and representatives of First Nations created the B.C. Claims Task Force to define a process for negotiations toward the resolution of outstanding land claims in B.C. The June 1991 report of the Task Force made a total of 19 recommendations toward the creation of such a process, all of which were endorsed by the three parties.¹

In September 1992, based on the recommendations of the Task Force, the British Columbia Treaty Commission (BCTC) and the B.C. treaty process were established by agreement among the First Nations Summit (representing First Nations involved in the process) and the governments of Canada and British Columbia.² The three parties to the agreement are collectively known as the “Principals” of the B.C. treaty process.

The role of the BCTC, as set out in the 1992 tripartite agreement, is to facilitate the negotiation of treaties under the six-stage B.C. treaty process.³ The BCTC is responsible for, among other things, monitoring and reporting on the progress of negotiations, assisting in dispute resolution at the request of the parties to negotiations, and allocating funding to First Nations to support their participation in the process. Between May 1993 and March 2011, the BCTC disbursed

¹ [*The Report of the British Columbia Claims Task Force*](#) (June 1991).

² [*British Columbia Treaty Commission Agreement*](#), September 1992. The agreement was subsequently ratified by federal and provincial legislation and confirmed by a resolution of the First Nations Summit.

³ British Columbia, Ministry of Aboriginal Affairs and Reconciliation, [*British Columbia Treaty Commission Agreement Six-Stage Treaty Process*](#).

\$533 million in negotiation support funding to more than 50 First Nations – \$422 million in the form of loans and \$111 million in the form of non-repayable grants.⁴

The BCTC reports that there are currently 60 First Nations participating in the B.C. treaty process. Two treaties negotiated under the B.C. treaty process – the Tsawwassen First Nation Final Agreement⁵ and Maa-nulth First Nations Final Agreement⁶ – have come into effect. Of the remaining First Nations involved in the process, as of January 2012, 40 First Nations are engaged in active negotiations at varying stages of the process, while another 18 First Nations are not currently negotiating a treaty.⁷

The three First Nations at the penultimate stage of the process, having concluded substantive treaty negotiations with Canada and B.C., are the Lheidli T'enneh First Nation, the Sliammon First Nation and the Yale First Nation. Each has experienced challenges in connection with the ratification of their proposed treaties. In particular:

- The Lheidli T'enneh First Nation Final Agreement, completed in 2006, was rejected by members in a 2007 ratification vote. The First Nation has reportedly indicated that further community consultation will be required before a second ratification vote is held.⁸
- The Sliammon First Nation Final Agreement was completed in June 2010. In July 2011, the First Nation gave notice of its intent to litigate a claim of bad faith against Canada unless it was prepared to initial the draft agreement in the very near future. In October 2011, following the completion of a compulsory federal review, the treaty was initialled by the three parties. A community ratification vote is planned for June 2012.⁹
- The Yale First Nation Final Agreement was ratified by members in March 2011 and by the B.C. legislature in June 2011; federal ratification legislation has not yet been introduced.¹⁰

⁴ According to the BCTC, 80% of each allocation is available to First Nations in the form of loans from Canada, and 20% in the form of contributions from Canada and B.C. Of the contribution funding, 60% is provided by Canada and 40% is provided by B.C. See B.C. Treaty Commission, [Fact Sheet – Negotiation Support Funding](#).

⁵ The [Tsawwassen First Nation Final Agreement](#) was concluded in 2006–2007 and came into effect on 3 April 2009.

⁶ The [Maa-nulth First Nations Final Agreement](#) was concluded in 2009 and came into effect on 1 April 2011.

⁷ British Columbia Treaty Commission, [Treaty Commission Update – January 2012](#).

⁸ See Lheidli T'enneh First Nation, [Lheidli T'enneh Final Agreement – General Overview](#) and B.C. Treaty Commission, [Annual Report 2011](#), p. 16.

⁹ Sliammon Treaty Society, [News Archive](#).

¹⁰ British Columbia Ministry of Aboriginal Affairs and Reconciliation, [Yale First Nation](#); [Yale First Nation Final Agreement Act](#), S.B.C. 2011, c. 11.

Several Stó:lō First Nations are claiming joint title to areas covered by the proposed treaty, and are calling for the conclusion of a shared territory agreement prior to the federal ratification of the treaty.¹¹

Many of the negotiations (or “tables”) have not steadily progressed through the treaty process for a variety of reasons. In 2008, in response to growing discontent with the slow pace of negotiations, the Principals agreed to establish a Common Table to collectively negotiate certain issues that had stalled at various tables.¹² Over several days, negotiators for more than 60 First Nation communities met with representatives of Canada and B.C. in sessions chaired by the BCTC. The 2008 Common Table Report, prepared by the BCTC, outlines the consensus achieved by the parties on substantive issues and on opportunities for future action.¹³

Recent reports on the B.C. treaty process have highlighted both challenges and opportunities associated with the process, including the following.

- In a 2006 report on Canada’s participation in the B.C. treaty process, the Auditor General found that processes for obtaining or revising specific mandates (or detailed instructions for each treaty) were lengthy, which in turn slowed the pace of negotiations with First Nations. To address delays in the negotiation process, the Auditor General recommended, among other things, that the federal government “develop a more expeditious and coordinated process for ongoing policy development and review” and “better defin[e] the results to be achieved at each table, and the time and resources required ... to achieve these results.”¹⁴
- In a 2009 financial and economic impact study commissioned by the BCTC, it was estimated that the settlement of treaties in B.C. could bring net financial benefits of over \$7 billion to B.C. First Nations and other British Columbians. In addition, economic impact benefits across B.C. of approximately \$14.3 billion, mainly in the form of increased investment and employment income, could accrue over 40 years.¹⁵

¹¹ See websites of the [Stó:lō Nation](#), [Stó:lō Tribal Council](#), and the [Stó:lō Xwexwilmexw Treaty Association](#) (representing several Stó:lō First Nations in the B.C. treaty process).

¹² Six key issues were identified for discussion at the Common Table: (1) Certainty and recognition of Aboriginal title; (2) Constitutional status of lands; (3) Shared decision-making arrangements (e.g. co-management); (4) Fisheries; (5) Governance; and (6) Fiscal relations (including own-source revenues and taxation).

¹³ British Columbia Treaty Commission, [Common Table Report](#) (2008).

¹⁴ Office of the Auditor General of Canada, [November 2006 Report of the Auditor General of Canada – Chapter 7: Federal Participation in the British Columbia Treaty process](#), pp. 21 and 26.

¹⁵ PriceWaterhouse Coopers LLP, [Financial and Economic Impacts of Treaty Settlements in BC](#) (November 2009).

- The 2011 Annual Report of the BCTC noted that “significant challenges” facing the B.C. treaty process included overlapping and shared territory issues among First Nations, and a “federal freeze on fish negotiations” during the ongoing Cohen Commission of inquiry.¹⁶ The report also noted, however, that the upcoming 20th anniversary of the creation of the process provided “an ideal time to think about changes in treaty negotiations that will result in greater progress towards treaties,” and, in this vein, called for a “public recommitment by all parties to the BC treaty process.”¹⁷

III. ISSUES RAISED IN TESTIMONY

Representatives of Canada, B.C. and the First Nations Summit appearing before the Committee unanimously acknowledged the importance of the treaty process to resolving longstanding land and governance issues in B.C., and all pledged their firm recommitment to the B.C. treaty process. The BCTC additionally called for “[a] message of recommitment to support negotiations as opposed to litigation ... directly from the prime minister, from the premier, and from the First Nations Summit.”¹⁸

While these witnesses acknowledged that measures were needed to reinvigorate the treaty process, they presented varying views on the nature of the main challenges to the process and the measures needed to overcome these challenges.

- Joëlle Montminy, Acting Senior Assistant Deputy Minister, Treaties and Aboriginal Government, Aboriginal Affairs and Northern Development Canada (AANDC), acknowledged that federal processes could be streamlined, but stressed that AANDC’s central challenge was to negotiate multiple treaties across Canada, in an evolving legal environment, whilst ensuring that federal interests and the interests of several federal departments are addressed in each.
- Mary Polak, Minister of Aboriginal Relations and Reconciliation, Government of British Columbia, noted that provincial efforts to reinvigorate treaty negotiations were focused on pursuing bilateral “pre-treaty” agreements aimed at demonstrating the potential economic benefits of treaties and thus helping to build momentum for the treaty process.¹⁹
- Grand Chief Edward John, Member, Political Executive, First Nations Summit, stressed the fundamental importance of respectful and good faith negotiations to the fair, equitable and expeditious resolution of the B.C. land question. In this regard, First Nations involved in the

¹⁶ The Cohen Commission is formally named the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River.

¹⁷ B.C. Treaty Commission, [Annual Report 2011](#).

¹⁸ Proceedings, 25 October 2011.

¹⁹ These bilateral agreements are discussed in more detail later in this section.

process were mainly concerned with overcoming the Crown's positional or "take-it-or-leave-it" approach to negotiations that reflected, from their perspective, "fixed, unilateral and self-serving policy standards."²⁰

A. Federal Role in Negotiations

An area of significant concern to all witnesses appearing before the committee was the scope of the mandates of federal treaty negotiators. Sophie Pierre, Chief Commissioner of the BCTC, noted that federal chief negotiators must obtain approvals from Ottawa at multiple stages in the process, and recommended that Canada take steps to increase the flexibility and authority of federal negotiators to conclude treaties.²¹ Minister Polak echoed both the concern that federal negotiators' mandates remain too narrow, and the recommendation that negotiators be able to engage on substantive issues "without needing to return to Ottawa for an amendment to their mandate."²²

The First Nations Summit expressed a broader frustration with the overall policy framework governing the Crown's approach to negotiations, of which the narrow mandate of federal negotiators is one element. Chief Douglas White, Member, Political Executive, First Nations Summit, stated that respectful and good faith negotiations are "the only way to achieve meaningful reconciliation of pre-existing Aboriginal sovereignty with the assumed sovereignty of the Crown," and that further success in the treaty process would be compromised without substantive changes to "[t]he impoverished mandate of the Crown ... that is not aimed at reconciling sovereignties."²³

Witnesses from AANDC stressed that Canada has defined its interests more precisely in areas where federal negotiators have less flexibility in the conduct of negotiations. Ms. Montminy explained that these positions are brought to the table and their rationale is explained openly and transparently. Ms. Montminy also acknowledged that the criticism surrounding Crown mandates was at the root of the 2008 Common Table discussions. In response, the federal government introduced treaty language within the B.C. treaty process to replace the former requirement that First Nations agree to "cede, release and surrender" Aboriginal rights or title with language that affirms that Aboriginal rights and title continue to exist and may be exercised insofar as they are in accordance with the terms of the treaty. The language was piloted at one table, with plans to

²⁰ Proceedings, 15 February 2012.

²¹ Proceedings, 25 October 2011.

²² Proceedings, 1 February 2012.

²³ Proceedings, 15 February 2012.

expand the language to other sets of treaty negotiations in B.C. and potentially elsewhere in Canada.²⁴

B. Overlapping Claims

All witnesses addressed the need to develop better processes to deal with overlapping claims (or claims to lands or resources involving two or more First Nations on the same territory). Witnesses from the First Nations Summit stated that the complex issues surrounding overlapping claims are within the purview of First Nations themselves to address, and pointed out that the 1991 report of the B.C. claims task force stated that the BCTC, “where requested by First Nations, will provide advice on dispute resolution services available to resolve overlap issues.”²⁵

In practice, however, some First Nations have experienced significant challenges in resolving disputes on overlapping claims. Minister Polak addressed the example of the *Maa-Nulth First Nations Final Agreement*, one of the two treaties completed under the B.C. treaty process to date. In particular, two days before the effective date of the *Maa-nulth First Nations Final Agreement*, an accord was signed between the Tseshahht and Maa-nulth First Nations on their respective rights in an area known as the Barkley Sound, after the Tseshahht First Nation had unsuccessfully sought an injunction against the treaty.²⁶

Chief Commissioner Pierre stated that more resources are needed for the BCTC to provide either direct mediation support to First Nations or assistance in obtaining mediators to facilitate the resolution of disputes. For example, a harvesting agreement between the Tsawwassen and Lake Cowichan First Nations was mediated by a former B.C. Court of Appeal judge prior to the completion of the Tsawwassen First Nation Final Agreement.

The governments of Canada and B.C. acknowledged that processes to facilitate the resolution of overlapping claims were required but were still in developmental stages. Ms. Montminy noted that AANDC is engaging, with B.C. and the BCTC, in “discussions and pilot projects to identify efficient and effective models to facilitate the resolution of overlapping claims.”²⁷ Minister Polak indicated that preceding agreements to resolve overlapping claims in B.C. would contribute to the more efficient resolution of such future claims. In addition, she said that while there is general agreement that First Nations must resolve these issues amongst themselves,

²⁴ Non-assertion language was also included in the 2003 [Tlicho Agreement](#) among the Tlicho and the governments of Canada and the Northwest Territories.

²⁵ Proceedings, 15 February 2012.

²⁶ Proceedings, 1 February 2012.

²⁷ *Ibid.*

“[w]e are still navigating our way through the question of who is ultimately responsible to guide that process.”²⁸

C. Agreements Outside the Treaty Process

Agreements outside of the treaty process are another means through which First Nations and the provincial Crown are engaging on treaty-related issues. Minister Polak and the BCTC stressed that non-treaty agreements concluded in advance of a final agreement are not intended to replace treaties, and may indeed complement the treaty process by building capacity, economic opportunities and First Nations support. For example, "strategic engagement agreements" may deal with expected means of consultation, timelines for land permitting, and other matters associated with shared decision-making on the land. While these agreements are all bilateral, Minister Polak stated that they would be improved with federal participation. Chief White cautioned, however, that any agreements dealing with treaty-related issues must be approached cautiously, since they represent “an important first initiative of shared decision-making ... that needs to be replicated and considered by the federal government” in other areas, including in the implementation of the Crown’s duty to consult First Nations on projects that may affect their Aboriginal rights or title.

Witnesses from the B.C. Government and AANDC noted that they are also currently considering the potential of “carve-out” language on fisheries, which would allow treaty tables to deal with fisheries after the conclusion of their final agreements. The BCTC supported this approach as superior to the current one employed by the federal Crown, which, for most sets of negotiations under the B.C. treaty process, imposes a deferral of negotiations related to fisheries until the release of the Cohen Commission report.

D. Costs and Benefits of Treaties

The net financial and economic benefits of the treaty process were an issue of concern raised by most witnesses. While treaties carry potential financial benefits and positive economic impacts,²⁹ such positive effects are tempered by the costs of treaty negotiation borne by the parties.

²⁸ Proceedings, 1 February 2012.

²⁹ British Columbia Treaty Commission, [*Unfinished Business*](#).

With respect to the potential positive economic impacts of treaties, Chief Commissioner Pierre stated that the treaty process is a crucial element needed to further the economic potential of First Nations and other communities in B.C. The Chief Commissioner referred to the 2009 study commissioned by the BCTC, which found that the conclusion of treaties would bring several billion dollars to B.C. in the form of various financial and economic impacts. Minister Polak noted that treaties, in general terms, “bring predictability for First Nations, for governments, for business and investors, and they support continued development and economic growth throughout the province.”

The level of costs remains, however, a significant barrier to First Nations’ entry and continued participation in the process. Chief Commissioner Pierre told the Committee that First Nations have, to date, invested approximately half a billion dollars to participate in the B.C. treaty process, with 80 per cent in loans and 20 per cent in contributions. Minister Polak further indicated that some First Nations are reluctant to participate in the treaty process, given the huge costs and the often uncertain outcome. While the money borrowed by First Nations to participate in the treaty process is taken out of the capital transfer that the federal government would eventually put forward at the end of a final agreement, Minister Polak explained, some First Nations are “reaching debt levels that might indeed surpass what their eventual capital transfer might be, or at least reduce it significantly.”³⁰ In addition to the financial costs, Chief White stressed, are the significant investments in the form of time, effort and opportunity costs associated with participation in negotiations, some of which have been ongoing since the treaty process was created.

IV. OBSERVATIONS AND RECOMMENDATIONS

Members of the Committee note that the settlement of the B.C. land question is an issue of importance to all British Columbians, and indeed to all Canadians. The conclusion of treaties provides important benefits both within and outside First Nations, including a solid legal basis for future economic development. While great costs are incurred by the parties to negotiations, these may be justified on the basis of such future benefits and opportunities.

Committee members wish to recognize the significant efforts the Principals have made in the twenty years since the establishment of the B.C. treaty process. We also acknowledge the unique and important work undertaken by the BCTC in its role as the “keeper of the process.”³¹ In view

³⁰ Minister Mary Polak, Proceedings, 1 February 2012.

³¹ Chief Commissioner Sophie Pierre, Proceedings, 25 October 2012.

of their significant efforts and results achieved to date, the Committee fully supports and encourages the Principals and the BCTC in their continued work within the B.C. treaty process.

The upcoming 20th anniversary of the B.C. treaty process is an important milestone, and an occasion on which the Principals and the BCTC may publicly demonstrate their recommitment to the process and their participation therein. In their testimony before the Committee, the Principals and the BCTC clearly articulated their continued commitment to the treaty process, and shared their perspectives on what is needed to constructively move forward within the process.

In addition, the Committee acknowledges that the Minister's Special Representative to the B.C. Treaty Process presented a report to the Minister of Indian Affairs and Northern Development which was released publicly in May 2012. This report and its recommendations may well assist the Principals and the BCTC in renewing their commitment to the process, both now and into the future.

In order to contribute to a renewed approach to treaty negotiations, the Committee urges the federal government to address certain procedural barriers to the conclusion of treaties under the current process.

Bureaucratic federal decision-making structures and narrowly defined negotiation mandates are causing unnecessary delays in the treaty process. The Committee notes with concern that negotiation mandates which require that federal negotiators obtain clearance from Ottawa at multiple stages of negotiations contribute to delays and a lack of transparency in the treaty process. Federal negotiation mandates that emphasize a positional, take-it-or-leave-it approach to negotiations further compromise the fairness and efficiency of the treaty process.

The Committee is concerned that delays in the treaty process are imposing an additional financial burden on First Nations, much of it in the form of loans, to participate in the treaty process. Treaties should provide a strong net financial benefit for the parties, not saddle First Nations with high levels of debt. The Committee strongly concurs with the position, expressed by most witnesses who appeared before us, that the costs of entering and remaining in treaty negotiations are too high for many First Nations. Situations where, as Minister Polak explained, First Nations are "reaching debt levels that might indeed surpass what their eventual capital transfer might be, or at least reduce it significantly," are creating a disincentive to entering and remaining in the treaty process.

Delays within the treaty process have also created conditions for the negotiation of interim agreements between the Government of B.C. and First Nations. Such agreements, while addressing a range of treaty-related issues, are not intended to replace negotiations under the treaty process.

The Committee is also concerned with the lack of resources and institutional supports for First Nations in the negotiation of overlapping claims. Disputes related to overlapping claims have caused, and may continue to cause, delays impeding the conclusion of treaties. The Committee recognizes that First Nations must engage in direct mediation to address the complex issues surrounding overlapping claims. While the BCTC may provide or hire such dispute resolution services, it is unclear which of the Principals is primarily responsible for the provision of resources in this regard.

In view of the above-noted concerns, the Committee urges the federal government to give immediate consideration to the following issues, and, where appropriate, develop timely responses and action plans to address these issues:

- That federal decision-making processes and negotiation mandates be revised to accord federal negotiators sufficient flexibility and authority to engage in open, genuine and interest-based negotiations with First Nations.
- That the federal government work closely with the Government of B.C. and the First Nations Summit to determine what First Nations need to resolve overlapping claims within the B.C. treaty process and to determine each party's responsibility in this regard.
- That adequate resources be available to the BCTC to provide or appoint dispute resolution services to assist First Nations in the resolution of overlapping claims within the B.C. treaty process.

Moving forward, as the list of concluded treaties grows, we urge the Principals to give further consideration to the provision of institutional supports to assist treaty parties in implementation and management of the treaty relationship. The BCTC, whose mandate is presently focused on overseeing complex treaty negotiations, may eventually transition into such a role. While operating in very different circumstances, the work of the Office of the Treaty Commissioner in Saskatchewan in facilitating a common understanding and proper implementation of historic treaties may be instructive.

The Committee feels strongly that a renewed commitment by the parties to engage in open, good faith and efficient treaty negotiations is essential to the effective functioning of the B.C. treaty process. We therefore request that the Minister of Indian Affairs and Northern Development regularly provide the Committee with updated information on the efforts of the federal government to renew its approach to treaty negotiations in view of the above recommendations.

APPENDIX A – WITNESSES

Meeting Date	Agency and Spokeperson	Brief
February 1, 2012	Government of British Columbia: The Honourable Mary Polak, Minister, Aboriginal Relations and Reconciliation; Steve Munro, Deputy Minister, Aboriginal Relations and Reconciliation. Aboriginal Affairs and Northern Development Canada: Joëlle Montminy, Acting Senior Assistant Deputy Minister, Treaties and Aboriginal Government; Anita Boscarior, Director General, Negotiations – West.	X
February 15, 2012	First Nations Summit: Grand Chief Edward John, Member, Political Executive; Dan Smith, Member, Political Executive; Chief Douglas White, Member, Political Executive; Howard Grant, Executive Director; Nancy Morgan, Legal Counsel.	X