



INTERIM MEASURES:

***GETTING THE TREATY PROCESS
BACK ON TRACK***

**First Nations Summit
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INTERIM MEASURES

GETTING THE TREATY PROCESS BACK ON TRACK

INTERIM MEASURES IN THE TREATY PROCESS

On September 19, 1996, Premier Clark and the First Nations Summit Task Group signed an agreement to extend the Government to Government Protocol on interim measures between the Government of British Columbia and the First Nations Summit until August 1999. At that time, the Premier renewed his government's commitment to the treaty process and to interim measures in particular.

The First Nations Summit welcomes Premier Clark's renewed commitment to interim measures and his commitment to review the British Columbia government's policy on interim measures policy in order to better balance the needs of First Nations with those of other British Columbians.

The purpose of this paper is to provide the Summit's perspective on why meaningful interim measures are essential to getting the treaty process back on track and keeping it there. It is also intended to provide the provincial government with practical recommendations on how to improve the interim measures process.

First Nations are extremely concerned with the current pace of treaty negotiations within their traditional territories and are dismayed at BC's unwillingness to negotiate satisfactory interim measures. In fact, the failure to negotiate satisfactory and timely interim measures is presently the greatest threat facing the treaty process. Interim measures are necessary in order to facilitate the successful negotiation of treaties by protecting and enhancing lands, waters, air and resources which might form part of a treaty settlement and by protecting and enhancing Aboriginal rights, title or interest pending treaty settlement. It is also extremely important at this time to re-establish good faith at the negotiation tables consistent with Recommendation 16 of the British Columbia Claims Task Force Report.

By continuing in a "business as usual" way to renew and grant new interests to third parties in First Nations' territories, the BC government is seriously frustrating First Nations in treaty negotiations and discouraging other First Nations from entering the treaty process. It also encourages First Nations to address their concerns through adversarial means, be it roadblocks or court action, because the treaty process offers them no hope for a timely resolution.

The provincial government's response to First Nations' call for meaningful interim measures has been to point to its consultation process established in response to recent court decisions and to state that it will negotiate "treaty-related interim measures" late in Stage 4 (Agreement in Principle).

The Province's consultation policy is not a true interim measures policy. First, it is unrelated to the treaty process and therefore not "interim" to the finalization of treaties. Second, the policy does not balance the conflicting interests of the parties until the negotiations are completed, as interim measures are meant to do. The current policy protects the interests of British Columbia and third parties, but does nothing to protect First Nations' interests during negotiations. It is unreasonable to expect First Nations to be satisfied with a flawed consultation policy that allows development to proceed at a dramatic rate in their territories and prejudices their negotiating interests, remedies and capacities.

The BC government's refusal to negotiate treaty-related interim measures until "there is substantial agreement among the three parties about the lands and resources components of the treaty" ignores the fact that issues which may undermine the treaty process may arise at any time and need to be dealt with in a timely and meaningful way. This position violates not only the spirit of the British Columbia Claims Task Force Report, but also the Report's Recommendation 16 which, along with the Report's other recommendations, was accepted by the provincial government.

In Recommendation 16, the Task Force recommends that:

- 16.** The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.

In addressing the issue of interim measures, the Task Force noted that "the current legislative framework does not protect aboriginal interests in any meaningful way". This was one of the obstacles which interim measures was supposed to address. To balance the conflicting interests of the parties, the Task Force envisaged broad and flexible interim measures, as the following excerpts indicate:

Interim measures agreements may affect the management and use of lands, sea and resources and the creation of new interests. They may facilitate the access to and development of resources, often a useful means of dealing in a preliminary or experimental way with a contentious issue, or provide transition to implementation of a treaty." (p. 63)

The implementation of interim measures agreements may require changes in existing policies, legislation and regulations. (p. 65)

More recently, the issue of interim measures was raised as an issue of significant concern by the British Columbia Treaty Commission in its 1995-96 Annual Report. The Commission noted that "conflicts about the ability to negotiate interim measures continue to jeopardize the treaty process" (p. 26). The Commission went on to describe the importance of interim measures as follows:

Interim measures agreements are to treaty negotiations what interim injunctions are to litigation. The credibility of the judicial system would be impaired had the law not established the mechanism of the interim injunction to prevent the subject matter of litigation from being destroyed or consumed before trial. (pp. 26-7)

The Commission also acknowledged the failure of the Province's consultation process to meet First Nations' needs and to fulfill the intent of the Task Force's Recommendation 16.

BENEFITS OF INTERIM MEASURES

As the Commission noted in its recent Annual Report, "a procedure for negotiating interim measures is essential to the treaty process" (p. 26). An effective interim measures strategy would lead to significant benefits for both First Nations and the Province.

Interim measures allow the parties to treaty negotiations to begin the process of building a **new and constructive relationship**. Through successful interim measures agreements, the parties can begin to develop trust in, as well as a better understanding of, one another. Many members of First Nations communities are not convinced that the provincial government is committed to concluding treaties. They fear that the negotiation process will not lead to treaties or will lead to treaties that do not improve their circumstances. Interim measures can offer a sign that the provincial government is sincerely committed to resolving lands, waters, air and resource issues through treaties.

Interim measures agreements can produce **tangible benefits for First Nations and the Province** by, for example, allowing economic development to take place on terms that are acceptable to both parties. It also allows both parties to demonstrate to their constituents that treaty-making is an effective process.

Given that it takes considerable time to negotiate treaties, interim measures offer the parties a mechanism to **resolve contentious issues** and provide an **incentive** to First Nations to enter into and remain in the treaty process.

During the negotiation of treaties, interim measures allow the parties to **balance their conflicting interests**. In the case of First Nations, this may mean that they have access to certain lands, waters and resources within their traditional territories or that certain harvesting and culturally significant areas are protected from industrial development. In the case of British Columbia, this may mean that a development

project or a protected area proposal can proceed with the support and cooperation of the local First Nation. The balancing of interests during negotiations is critical to maintaining a level playing field. This in turn increases the likelihood of successfully concluding lasting treaties.

The implementation of the Government-to-Government Protocol process will be more cost-effective than the current approach of ignoring contentious issues until they boil over and then dealing with them on a one-off basis. By implementing interim measures through the process set out in the Protocol and individual treaty tables, there will be more coordination of initiatives across the Province and issues can be addressed in a more **proactive, efficient and rational** manner.

Interim measures are a useful way to **build capacity** within First Nations, both in terms of human resources and organizational infrastructure. In the absence of that capacity, treaties will not provide significant employment and other benefits for First Nations people.

Interim measures allow the parties to move forward **step-by-step**, rather than in a single giant leap at the conclusion of the treaty. This approach will minimize both economic and structural dislocation during the post-treaty period.

ESSENTIAL REQUIREMENTS FOR SUCCESSFUL INTERIM MEASURES

The following elements are the essential requirements for successful interim measures which may be implemented through agreements, legislation or policy.

Interim measures must recognize and reflect the **government-to-government relationship** between First Nations and the British Columbia government. This means that First Nations must be treated as governments with legitimate **jurisdiction** in interim measures negotiations.

Interim measures must allow the parties to **protect certain lands, waters, air and resources** pending the settlement of treaties. As more and more land, water and resources are unilaterally alienated by the Province, the need to protect some of what remains becomes increasingly critical. Otherwise, there will be nothing left to negotiate.

Interim measures must enable First Nations to have **satisfactory access to certain lands, waters and resources** within their traditional territories. This access may, in some cases, enable commercial resource harvesting to take place.

First Nations must have the **opportunity to take part in economic development**

initiatives within their traditional territory through interim measures. This may lead to industrial development by First Nations on their own or through joint ventures.

Successful interim measures enable First Nations to **participate in a meaningful way in decision-making** on land, water, air and resource issues within their traditional territory, and social and policy issues which affect their members. While the negotiation of interim measures is critical to the success of treaty making, interim measures are not a substitute for treaties and should **not displace or jeopardize treaty negotiations**.

CURRENT BC GOVERNMENT POLICY ON INTERIM MEASURES

British Columbia's current interim measures policy is described in a draft policy document entitled "Interim Measures for Lands and Resources: A Summary of British Columbia's Approach" (draft dated June 26, 1996). According to that policy, "interim measures help the Province to meet its legal obligations to First Nations, to provide certainty about land and resource issues and to build fair and honourable treaties". The policy distinguishes "interim measures - under current programs of Provincial ministries" from "interim measures - at the treaty table". While the policy acknowledges many of the benefits of interim measures, the policy contains several important limitations. The most critical limitation is the refusal of the Province to protect lands and resources until late in Stage 4. Other significant limitations include requirements for: consistency with current legislation and policy as well as government priorities; no reduction of provincial authority over land and resources; and no decision-making role for First Nations.

The current provincial policy on interim measures falls short of meeting First Nations' needs and the spirit of the Task Force Report in several ways. In general, by dealing with its consultation policy under the heading of "interim measures", the policy confuses processes the Province must undertake to meet its legal obligations with the forward-looking mechanisms that are required to support the treaty process.

Line ministries are responsible for negotiating interim measures under "current programs". These **line ministries** generally have **very limited mandates and resources**, and no authority to address or accommodate First Nations' concerns. Through these negotiations, the line ministries are essentially asking First Nations to identify and negotiate their aboriginal rights outside the treaty process. When First Nations have tried to address these line ministry consultation issues at the treaty negotiation table, the provincial treaty negotiators have refused on the basis that land and resource issues cannot be dealt with until late in Stage 4. When First Nations attempt to deal directly with line ministries, they are caught in a policy vacuum and find themselves shunted back and forth between regional officials and senior bureaucrats.

The emphasis of the Province's policy has been on meeting its narrowly-defined legal obligations to First Nations. This **legalistic focus** ignores the larger picture of treaty negotiations and the principal reason for interim measures – keeping the treaty process on track.

The Province's refusal to discuss meaningful interim measures regarding land and resources until **late in Stage 4**, as discussed earlier, violates Recommendation 16 of the Task Force Report which states interim measures should be negotiated "before or during" treaty negotiations.

The interim measures policy is also attempting to **force First Nations into a land selection model** which may not be appropriate to their territories and traditions.

BC's **unwillingness to share control and jurisdiction** is evidenced by the requirement that provincial authority not be reduced and that First Nations not receive a veto. The Province's refusal to consider requests by First Nations for meaningful input into decision-making, short of a veto (similar to the arrangement under the Clayoquot Sound Interim Measures Agreement), has led to cynicism and frustration.

The **rigidity** of the Province's policy is exemplified by the requirement that interim measures be consistent with current policy, legislation and government priorities. This is in sharp contrast to the approach taken by the Task Force which recommended that enabling legislation and policy be enacted where necessary to "authorize resource management arrangements not contemplated in current legislative or regulatory schemes" (p. 65).

SPECIFIC RECOMMENDATIONS - POLICY

The First Nations Summit recommends that the Province adopt and implement the following recommendations with respect to interim measures by making the appropriate changes to policy and legislation:

1. Live up to the BC Claims Task Force Report's recommendation to negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.
2. Recognize that the government's consultation process established in response to recent court decisions is not an interim measures policy as it is unrelated to the treaty process and therefore not "interim" to the finalization of treaties. As well, the consultation process does not achieve the BC Claims Task Force Report's objective of balancing the conflicting interests of the parties until the negotiations are completed.
3. Adopt a more flexible approach to interim measures by removing the requirement that all interim measures must be "consistent with current legislation and policy as well as government priorities".
4. Mandate provincial negotiators to deal with interim measures in the treaty process by removing the requirement that interim measures respecting restrictions on land and resources "once there is substantial agreement on lands and resources at the Agreement in Principle stage of negotiations" (Stage 4).
5. Provide timely access for First Nations to information and research respecting land, water, air and resource development issues in their traditional territories and ensure that adequate funds are made available to facilitate this access.
6. Provide treaty negotiators (or, in appropriate circumstances, other government representatives) with a clear mandate to negotiate and implement interim measures during any stage of the treaty process in order to ensure the success of the treaty process.
7. Include the costs of interim measures in the cost-sharing agreement between the Governments of Canada and British Columbia.

SPECIFIC RECOMMENDATIONS - PROCESS

The First Nations Summit recommends that the Province adopt the following recommendations with respect to the process for negotiating interim measures and implementing the Protocol:

1. Implement the "First Nations-Government of BC Forum" described in the Protocol and appoint the appropriate senior officials and politicians.
2. Ensure that provincial treaty negotiators and line ministries are advised of and implement decisions, recommendations and policy directives resulting from the process under the Protocol.
3. Develop processes to coordinate the activities of line ministries with the treaty process and to facilitate interim measures negotiations between First Nations and British Columbia.