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**Negotiation is the Key, Referendum is not for me!**

## **ANALYSIS OF THE PROPOSED REFERENDUM QUESTIONS**

### **Generally:**

The referendum saga continues. With the release of the report of the standing committee things are only getting worse and not better. The document begins with a recommendation that BC make a statement of reconciliation of regret. Why is it so hard for governments to say apologize and better yet, to make amends for their wrongdoing, that is the taking of our lands and resources. That is what the treaty process was supposed to be all about reconciling these past wrongs, and now instead of reconciling the parties, the referendum has caused great friction and a feeling that the process as we now know it is dead.

Looking at the report of the standing Committee, in no way do they link what was said to them in these hearings to how they formulated the questions. Again, it makes you realize these questions were formulated a long time ago and this was only for the show of public consultation.

Not only that, the government has not determined if the referendum is a referendum, maybe it is only an opinion poll, or a plebiscite, or an exercise in futility. The importance of the referendum has been reduced to mail in ballots that cannot control who is an eligible voter and how many times they vote. The Attorney General is still looking at putting a legal mechanism in place on how this will be done. This from a government who is slashing regulations by one third and now they will be passing a new law to suit their purpose. There is already a Referendum Act, but they don't want to use it because the referendum act makes things legally binding, they only want politically binding. To have done this properly, there should have been a clear mechanism in place to assist the committee in how questions were formulated. As citizens of this province, does it sit well with you that the referendum that was promised is being manipulated in this manner?

**1. Treaties should be negotiated in as transparent a manner as Possible. Yes or No?**

**Commentary:**

This question begins with putting in the public's mind that the process has not been open and transparent. Negotiations need to be as open as possible to the public so that the public is informed on what is being negotiated. Currently, every table has an Openness protocol that provides that all meetings are held in public unless there is something that would prejudice the negotiations. But when decisions are made, or the rough spots are gotten over, items go back to public. Documents for the table are also available. Meetings are advertised in the paper, but people rarely attend. How many negotiations are you aware of that everything is negotiated in public? Unions and governments are not into negotiating in public. Since most treaty negotiations occur in public, this is a status quo question and really does not redefine or revitalize the process in any way.

If the majority answer yes, that would mean that every single meeting would be in public. Oftentimes in negotiations, you need to do some good bargaining in a closed session where people are not so positional. Negotiations need to be flexible.

If the majority answer no, this would mean that there would be accusations of behind closed door negotiations and people would feel that they are being excluded. The object of treaty making is to have every one's support in the final document that will benefit everyone.

What really needs to be done is that every treaty table meets with all interested third parties and develop a consultation protocol that lays out what issues will be brought to third parties, and when they are brought to third parties. The Protocol should include a forum that is developed where third parties can address their issues with the three parties and these concerns can be addressed. This way the people in the area can feel they are consulted in a way they want to be consulted.

**2. Treaty Negotiations should be responsive to the input of local community and economic interests. Yes or No.**

**Commentary:**

Is this not supposed to be what the government is already doing? They are the elected representatives and are to be putting forward the interests of the people they represent. In reading this question you have to ask what does this actually mean and how would it be accomplished? The treaty process clearly sets out three parties, the Federal Government, the Provincial Government and First Nations. No new parties can be added to the table. Each government has an advisory team of which several members accompany them to negotiations as well as meetings with the whole advisory team.

Mandates are shared and created by this team. Members of these advisory teams represent various sectors of the public. They are responsible for obtaining direction and reporting to their groups. It is the same way that First Nations operate in obtaining mandates and reporting. It is through this way that local community and economic interests can be taken into consideration.

If the majority answer yes to this question, it is uncertain as to how the provincial government intends to achieve this. Do they intend to add more parties to the table? Any changes to the parties would alter the course of negotiation and the agreement of the parties. It is unlikely that First Nations would accept such a change. Answering yes does not give anyone the knowledge of how their input would be obtained. People are only guaranteed a one time input through the referendum.

If the majority answer no to this question, it would again mean that other interests would take precedence over local interests. As First Nations live in and contribute to the economy of the local communities, this would not make sense. If communities do not think they are being involved in negotiations, they should be working with their local treaty advisory committees and negotiators to design a better process to obtain mandates. Each party must be responsible for consulting with their constituents. Because the provincial government has not been effective in consulting with local communities, they are now using the referendum process to penalize First Nations for their own failures.

### **3. Local Government participation in the treaty process is guaranteed. Yes or No?**

#### **Commentary:**

Local government participation is already guaranteed as part of the RAC and TAC in the BCTC process. The proposed question must mean that the Province is proposing an additional level of participation above what is already guaranteed. If the Province is proposing to unilaterally create an independent seat at the Table for local governments, it will be violating the terms of the BCTC process. The Task Force report on which the BCTC process is based specifically states that third parties should not have an independent seat at the Table (see the Task Force comments under Recommendation #10).

There are also legal and constitutional problems with giving a delegated government a seat at the Table or a veto over land selection by First Nations.

A majority voting yes on this question would mean that the whole treaty process will have to altered on different conditions than was established many years ago if the intent is to add another seat. Participation could mean many things and it will be the government and not the people through this question determining what that is. Adding a seat would be a show of bad faith to First Nations and one that would not be acceptable.

Do local governments have the time, energy and resources to be at every negotiation session and is this the best way for local government participation?

A majority voting no would be the status quo, because local government's are part of the advisory team and often sit at the table with the Province, but just not as spokesperson's or with the right of consent or veto. Or the government could do what they want as there is no mandate with a no vote.

**4. Private property is not negotiable, unless there is a willing seller and a willing buyer. Yes or No?**

**Commentary:**

This basically is the status quo in negotiations and definitely the position of the provincial and federal governments. Where this becomes an issue is in a couple of instances. For example, in some instances, some First Nation's territories are inundated with city property, crown tenure and there is no available crown lands. What happens if there is not a willing seller and a piece of property is all that is needed for settlement. This leaves no flexibility. Another instance is where there is a sacred or heritage site on privately owned lands and a First Nation would like to own it. What happens if the owner will not sell and that property is critical to a First Nation.

If the majority vote yes, this gives no flexibility to negotiations to look at other options to acquire a key parcel of land in order to settle a treaty.

If the majority vote no, this gives no security to a property owner and this is not the intent of First Nations. But it does allow for other options that could help settle a treaty.

Either way you answer this question it is problematic to negotiations.

**5. Continued access to hunting, fishing and recreational opportunities will be guaranteed for all British Columbians. Yes or No?**

**Commentary:**

What the government's position is at the negotiating table is that they want a clause in the treaty guaranteeing access on lands First Nations will have under treaty to all British Columbians for hunting, fishing and recreational opportunities. This is a double standard. People who own lands now do not have to allow public access on their property, but if First Nations own it, they have to allow everyone on to hunt, fish and engage in recreational activities. You can look at some of the larger tracts of land that are privately owned by Forest Companies and ranches in British Columbia and they are not required to allow public access. Why should First Nations? In some instances, the amount of land being offered to First Nations under treaty is very small and allowing

public access is ludicrous. How does a First Nation protect their lands for residential purposes from hunters, or people ski-doing if people are allowed access. On larger tracts of lands this might be feasible if First Nations can control access, but this question does not allow for that.

If the majority answer yes to this, this means First Nations will not be allowed to have control over their own lands for the public accessing their lands for hunting, fishing and recreation. Zoning would not be possible. Standards being set or permits with fees could be perceived as denying access to the public and be illegal. The province has in some treaties allowed the First Nation to charge reasonable fees, set hours, etc for access, and keep out the public from sacred areas or residential areas, but this question does not allow for that flexibility.

If the majority answer no, First Nations will be allowed the same rights as other property owners. This would also give First Nations the right to if they so wished, allow access to a recreational area they develop on whatever terms they consider appropriate.

**6. The Province will maintain parks and protected areas for the use and benefit of all British Columbians. Yes or No?**

Commentary:

This is very problematic. In some First Nations territories, there may be little or no unencumbered Crown land. Parks and protected areas may be the only place where land could be accessed. This would bar that kind of solution to make available land. Additionally, sacred sites or archaeological sites that a First Nation wishes control over that is within a park or protected area, would not be able to be considered. Not being able to have these lands could stop the negotiations and this type of mandate does not allow the flexibility you need. If this mandate is interpreted narrowly, it could possibly mean that any joint management over parks could not be entertained if it in anyway interpreted as not allowing the use for British Columbians. Some parks have been created without proper consultation with First Nations or in violation of aboriginal rights and title. This means that these situations could not be remedied and that is what the treaty was supposed to be about, to reconcile interests.

If a majority vote yes, this means that in some cases, there will not be enough land to settle claims with First Nations. It could also be a barrier to completing treaties with First Nations who have a sacred site in a park or protected area that needs to be under their control. It is also important to be aware that the Province could use a “yes” vote on this principle to justify creating new parks to remove from the Table parcels of land proposed by First Nations as Treaty Settlement Land. Also a yes votes means that provisions already negotiated allowing First Nations management over their lands regarding access and controlling hunting, fishing and recreation will need to be renegotiated. Already, Marine Protected areas are being created without First Nation consent, so in reality this is already happening.

If a majority vote no, then parks and protected areas will not be maintained. Or the province could come up with another mandate, since no direction is given for a no vote. This is a classic example where the questions are designed for a yes vote, because to vote no does not give any direction to the government.

**7. All terms and conditions of provincial leases and licences will be honoured. Yes or No?**

**Commentary:**

What this means is that all existing and future leases and licences will be honoured. What is available to First Nations? This question ties up everything in the province. What happens if a trap line, or a foreshore lease is part of the land being offered to a First Nations and this is not compatible with their intended use. It has always been the position of the provincial government that they would compensate these holders of licences if a First Nation did not agree with that lease or licence on their land. Their first preference of course was to keep the lease or licence, but they recognized that this may not be possible. This now changes that and anything negotiated to date on this line will have to be renegotiated. Leases and licences are privileges, resolving aboriginal interests deal with rights. Why is it that privileges take precedence over settling rights. Having such a hard and fast mandate would not accommodate the settling of treaties. This does not allow First Nations management over their lands. If they so wish, they could re-issue a licence holder on their terms, but this question would not give that flexibility.

If the majority vote yes to this question, then there may not be treaties. In some territories of First Nations there are many leases and licenses and would be a bar to treaties. To allow these leases and licences to remain would mean that the use of those lands would be limited and could create liability to the First nation to what happens on those licences in their lands. Also it does not allow for management of lands by First Nations.

If the majority vote no to this question, it again causes uncertainty and fear to people who hold those licences. That is not the intent of First Nations by any means. But it does give the government the ability to work with First Nations in clearing their chosen land of encumbrances so that land could be settled.

What is needed is the flexibility for the province to compensate any leases and licences not acceptable to First Nations or replace the leases or licences in a different area. Also a dispute mechanism should be established that would allow licence holders to have a forum where they do not agree with the compensation.

**8. Fair compensation for unavoidable disruption of commercial interests will be assured. Yes or No?**

### **Commentary:**

First Nations have no problem with compensating people for disruption of their commercial interests. But First Nations want equal treatment. We want compensation for disruption, infringement of our rights and title. The governments to date have refused to negotiate compensation and say it is not on the table. It is interesting they are willing to give compensation to people who were granted a privilege, but not to people who have a right. There is definitely a double standard here as well. One has to wonder if this is inconsistent with question 6 where it says unequivocally that leases and licences would be honoured. Now they are contemplating disruption of commercial interests. Is this something different?

If the majority vote yes to this question, this will create a right of third party compensation. It would be unfair for the Province to create a right of compensation for third parties while still refusing to negotiate compensation with First Nations.

If the majority for no to this question, this would put people at a disadvantage who have their livelihood interrupted or stopped due to settlement with First Nations and this would not be fair to them. Also the province could pick and chose what terms and conditions they would honour. But it would give the First Nations and governments the opportunity to be flexible in negotiations and settle treaties.

### **9. The Province will negotiate Aboriginal Government with the characteristics and legal status of Local Government. Yes or No?**

### **Commentary:**

This is by far the most dangerous question of the sixteen and one that is destined to kill the treaty process. The provincial government is well aware of the First Nation position that they want the inherent right of self government. Self government is a right guaranteed under s. 35 of the Constitution Act. The province has no right to define aboriginal rights. This has been stated in several legal cases one from the Supreme Court of Canada. The Highest court of the land has said the province cannot define aboriginal rights. Premier Campbell promised that the questions would not define or interfere with s. 35 rights. The mandate of the Standing Committee proposing these question said they could not define aboriginal rights, yet this very question seeks to define and limit the right of self government. This is a violation of s. 35 of the Constitution. It relegates the status of self government to a delegated form of government with power from the province.

If the majority vote yes, the treaty process is over. First Nations will never accept a delegated form of self government that is like a local government. Many treaties have negotiated powers beyond what local governments have. This would mean all those chapters in treaties would have to be renegotiated and the millions of dollars that have been spent to negotiate those chapters would have been wasted. This is the key to the

treaty, the governance provisions. This does not allow for negotiation, which is the intent of the treaty process.

If the Majority vote no, the province has no mandate on what to negotiate for self government and they will do what they want any way. So a no vote is meaningless, there will be no mandate, and this in no way revitalizes the treaty process as was promised by the Liberal Government.

**10. Treaties must strive to achieve administrative simplicity and jurisdictional clarity amongst various levels of government. Yes or No?**

**Commentary:**

What in government is simple? Can administration be made to be simple is that possible? This is putting a huge task on negotiators to come up with an administration for government that is simple. Saying an administration must be simple could wipe out traditional governments or systems of governments. This is a very limiting type of question. Combining administrative simplicity and jurisdictional clarity in one question mixes two different thoughts. Treaty making is about creating certainty and clear definitions of who has what power. There is no question that the treaty would clearly state who had jurisdiction over what, but this concept is complicated by its combination with a requirement for administrative simplicity. What we are trying to do is put in place Self government, this type of mandate could stand in the way of what First Nations would want.

If the majority answer yes, it will mean that any administrative arrangements that could be construed as being complex could not be considered. This could be wiping out traditional governments. It is not possible to state in general terms that things must be simple. Jurisdictions over subject matters will be laid out clearly.

If the majority answer no, the government does not have a mandate, and does one assume that people want complex administrative processes and no clarity for jurisdiction?

**11. Province-wide standards of resource management and environmental protection will continue to apply. Yes or No?**

**Commentary:**

Who says the standards or resource management and environmental protection of the province are the best. In many instances, provincial laws are not up to international standards. Look around you, how have the forest been managed, the waters, the wildlife, the fish. There is much room for improvement. There is no recognition that as First Nations we have a great body of ecological knowledge. We need to be able to use our knowledge in how we manage the environment and our resources. This does not allow

for that. To date, provisions in many agreements negotiated allowed First Nations to meet or beat the standards or have comparable standards. This question goes against that. These provisions would have to be renegotiated in almost every treaty. This question does not allow for reciprocity. Everything compares our standards to the provinces, not the other way around. The best system must be used in order to preserve and protect mother earth and all that grows from her.

If the majority vote yes, any flexibility in First Nations having higher standards, different ways or protecting the environment would not be possible. This does not in anyway allow for reconciliation or revitalization of the process.

If the majority vote no, what is the mandate, does it allow the government to be flexible in what they negotiate? It is really unclear what mandate the government would have if people voted no.

## **12. Treaties should provide mechanisms for harmonization of land-use planning between Aboriginal Governments and Local Governments. Yes or No?**

### **Commentary:**

Many First Nations have been proposing harmonized land-use planning even prior to treaty. Some local governments have been receptive (e.g. Sechelt and Westbank). Other local governments have been strongly opposed (e.g. Nanaimo and the Regional District in Powell River). Mechanisms for harmonized land-use planning make a lot of sense, with two conditions. Firstly, the mechanisms should also address harmonizing provincial land-use planning (such as LRMPs) with First Nation land-use planning. This must ensure that First Nations interests are incorporated is a must. In the past, provincial land use planning has overlooked First Nations and this cannot be successful unless this is done properly. Secondly, there must be a two way negotiating process without any veto to local governments. One bigger problem with this is that it is so specific and can be an impediment to change and better processes. A broader provision in the treaty for a First Nation to enter into agreement with other governments to deal with land, resources and other issues which impact on each others lands would be much broader and capture many more instances and possible changes needed over many decades to come. A treaty needs to provide change without having to go through the onerous process of amending the treaty.

If the majority vote yes to this question then this is a condition to treaty. What happens if there is an uncooperative local government and it cannot be achieved. This should not be a condition, but only when there is a willingness on all parts. What happens if there are other ideas to deal with land use planning? This limits creativity.

If the majority votes no, what does it mean? A no vote means there will be no harmonization of land use planning and issues that exist today will not be able to be

resolved. Treaties could not provide for First Nation and Local governments working together and why does that make sense?

### **13. Affordability should be a key factor in determining the amount of land provided in treaty settlements.**

#### **Commentary:**

Affordable to whom? And by what standards? Who determines what is affordable. The province by their laws own 95% of existing lands. (First Nations do not agree with this of course) Why would they not be able to afford to return lands to First Nations that were illegal taken in the first place. What happens if First Nations and the province do not agree on affordability, then this limits the amount of land made available to First Nations.

What the key factor for determining the amount of land, is the amount of land a First nation needs now and for the next 100 years to live on, and to create enough revenue to make us economically independent. Small amounts of land do not allow for this. This is just totally in opposition to First Nations values and needs. Also another key factor is the size of territory that a First Nation has, and their lands must be reflective of that size.

The problems that have arisen with respect to land is the Federal and Provincial government entered into a memorandum of understanding regarding among other things the value of land. Values are on 1993 terms, and values for land and forestry are very inflated and have not been changed to reflect values today. Also greater values are placed on urban lands as opposed to remote lands. This means that First Nations in remote areas get more land because it is not as highly valued as urban areas and how is this acceptable? Why is a First Nations problem that a city grew up next to them. Also the government will not take into consideration population growth, only base land needs on today's population. This makes no sense.

If the majority answer yes, then other key factors cannot be considered. If not enough land is offered, the only option for First Nations is to go to court. That is not affordable to any party. Land claims would tie up the court system and be costly. Also risking the possibility that First Nations might get more than what was considered affordable by the government.

If the majority vote no, other key factors could be looked at, but it would be at the government's discretion as no other options are given.

What should be carefully analyzed is can BC not afford to offer enough land to First Nations? The loss of investment dollars and job creation due to uncertainty in lands and resources is huge. Affordability should include what revenue BC is losing because they have not settled equitably with First Nations.

**14. Treaties must ensure social and economic viability for all British Columbians.**

**Commentary:**

This puts the focus of treaties on British Columbians. It is my assumption that we are not part of British Columbia until a treaty is accepted. The treaty process was put in place to reconcile the interests of First Nations. It was to address the historic wrongs of taking our lands and resources and not getting any kind of a share in those resources that British Columbia has received and became a rich province. Clearly, the focus is wrong with this question. British Columbians will benefit from the treaty and will obviously get social and economic benefits from what is created by the treaty, but it should not be the focal point of the treaty.

If the majority vote yes to this, then cash, land, and resources will be limited. The government will be looking at providing for all British Columbians and not First Nations and this could prevent treaties from being completed.

If the majority voted no, there is no mandate to do anything else.

**15. The existing tax exemptions for Aboriginal people will be phased out. Yes or No?**

**Commentary:**

Tax exemption for First Nation people is provided in the Indian Act. The Indian Act, and reserve lands are not within provincial jurisdiction, nor does the provincial government have any say on this matter. For many First Nations this is a key issue. This question does not allow for creative solutions in this area, but gives only one option. Clearly this is not acceptable.

If the majority answer yes, there are no options, there is only one solution. This will create issues at the negotiating table. There is no room to negotiate. There is too much simplicity in this question. The whole issue of taxation and fiscal matters is far too complex to put into a simple yes or no question.

If the majority answer no, there could be room to be creative, but again, there is no mandate to government as to what they could actually negotiate.

**16. Treaty benefits, including cash and land, should be distributed and structured to create economic opportunities for all, including those living on and off reserve.**

**Commentary:**

This question is telling First Nations what to do with what they receive under treaty. This is no one's business but the First Nation's and in infringement on the right to self government. Not only that, how does one actually implement this type of provision in a treaty. How does a First Nation provide land and cash that belongs collectively to all members to one member in Kamloops, or two members in Toronto, or ten members in Victoria? How are economic opportunities created off reserve to few members in different cities around the world? This is ludicrous to expect First Nations to do this.

If the majority vote yes on this, this would create an incredible burden on First Nations to provide economic opportunities for all members no matter where they live. This would be an impediment to treaty making. It would be like telling British Columbia that anybody who lived in BC and moves to Alberta, Must ensure that they have economic opportunities.

If the majority vote no, there would not be this condition, but does not provide a mandate for governments.

### **Conclusion:**

The questions posed by the Committee were designed to be yes questions. Any no to these questions do not provide any mandate to the government on what to negotiate. Also, the questions are designed to put into the minds of the public that these situations exist and they must therefore ask the question. This is best illustrated in the question regarding transparency and private/fee simple lands. The questions do allow them to negotiate what they want to negotiate which is why it becomes increasingly obvious that the questions were designed before the committee went around. It will be further interesting to see how much these questions change during the debate in the Legislature. They will negotiate what they want to negotiate. But remember this was to have been the one time opportunity for British Columbians to be involved in the treaty process and give a mandate to the government. But as you can see, you are not really giving the government a mandate, and where you could give them a mandate, those areas are fated to destroy the treaty process and thus economic certainty in British Columbia. One must also remember that the election promise was for a referendum. Everyone presumed it would be a referendum under the Referendum Act. It bears repeating that no one knows for sure if it is a questionnaire, a plebiscite, or an opinion poll but it is certainly no longer a referendum. And the liberals say they are not breaking election promises!