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ANALYSIS OF 8 QUESTIONS IN REFERENDUM ON TREATY PRINCIPLES

Introduction:

Treaties are about maintaining a way of life. Treaties are about ensuring there are benefits to all parties at the table. Treaties are about knowing who owns what, who does what and how disputes are resolved. Treaties are about bringing certainty to all British Columbians. That certainty will bring investment and jobs to the province.

The referendum on treaty principles has been established under the Referendum Act. This means that a majority vote will make the results legally binding. Once you have a legally binding result, the negotiators come to the table with carved in stone positions. They cannot negotiate. It is a take it or leave it position for the First Nations and cannot be considered good faith negotiations, nor does it do anything for the honour of the Crown. Therein lies the tragedy of this referendum. We are no longer in negotiations, but in a situation where one party is dictating what they want. If First Nations do not want to accept it, which we won't, (based on the proposed questions) treaty negotiations will come to an end. Years of time, hope, and money will be for naught.

We do have our rights as First Nations that are protected under s. 35 of the Constitution Act. These cannot be taken away. What we were attempting to do at the treaty table was to define them and make them more understandable. Some rights have not yet been decided by the courts, or if they have are not well enough defined. We as First Nations were willing to do negotiations instead of going to court to define every single right. We will not negotiate away those rights. So when these questions seek to limit our rights, such as the right to self government, which includes the right to tax, the right to manage our lands, the right to control our lands and resources, set standards, we will not compromise. These questions seek to limit our rights even though the province says that is not what they are attempting to do.

This is not intended to be a legal analysis, but rather a practical approach as to how a majority yes vote would affect negotiations. After having sat at the negotiations table for

over 9 years, I believe we have a good insight to what is happening. If this brings up any questions, please feel free to call me or e mail me and discuss them. If you have anything you want to add, please let me know.

1. **Private Property should not be expropriated for treaty settlements.**

This question assumes that expropriation has been an option for treaty settlements. Both the federal and provincial government has said that "fee simple lands" are only available on a willing selling, willing buyer basis. This was never an option for governments where land would be expropriated and is therefore misleading to the voter.

The problem with this question is how the voter and the government defines private property. To the homeowner, it is the lands that their homes are on, which are more appropriately defined as fee simple lands.

To companies like Weyerhaeuser, Interfor, Timberwest, BC Hydro, their Tree Farm Licenses, licences for property or use of property is their private property.

To First Nations, Private property is our entire territory and all the resources in it.

Everyone is correct. Private property is any interest in land. Not just owning fee simple land as was the intent of the question, or at least so we assume. If the definition of private property is the legal definition which is any interest in land, that would mean that there may not be any land or resources on the table unless a person, or corporation sells them. What needs to be understood is that almost every piece of Crown land in this province has some kind of lease, licence, tenure, granted to individuals or corporations. Therefore, there may not be any land on the table unless the person or corporation that has an interest in **crown** land consents, this would make negotiations impossible. For First Nations people voting, assuming that their territories would not be expropriated is a good thing and may vote yes, totally misunderstanding the question.

Issue: Gives a power of consent to individuals and corporations who have interests in crown land, when this should not be the case. There are too many interpretations as to what private property means to give a clear mandate to the government on a yes vote.

If people vote no to this question, then they agree that private property should be expropriated for treaty settlements, one would assume only if required, but it leaves it wide open to interpretation. This would include people's homes on fee simple lands and this was never the intention of First Nations or the governments. The question framed in this way, to give this kind of mandate to the government on a no vote, makes the whole question ludicrous.

2. **The terms and conditions of leases and licences should be respected, fair compensation for unavoidable disruption should be ensured.**

What does respected mean? This is such a broad term and open to interpretation to the government. Any lease or licence issued in British Columbia is a privilege. It is based on a certain term in years. A person/corporation being issued such as lease or licence must keep the laws and regulations and any conditions set out in the licence. Failing to do that, would mean cancellation of the lease or licence. No guarantees to anyone that this would be an ongoing lease or licence. So does respect mean keeping to the term of the lease or licence. This has always been the position of the province. They have asked at the treaty table, if we did not agree with, say for example a trap line, that we allow the term of the licence to run out and then we can take over that land without encumbrance. If we cannot wait for whatever reason, then compensation would be available. This of course is deducted from the parcel of money the governments have allocated to each First Nation for treaty settlements.

Again, who defines what fair compensation would be? The government? The First nation, the lease holder? This leaves it open.

This language is permissive that is the government "should", not the government "must", and leaves it discretionary to the government as to when they "should" respect leases and licences.

What is unavoidable disruption? Again, leaving lots of discretion in the government to decide what they should disrupt and not disrupt.

The other issue here for First Nations is that we have been asking for compensation for our lands and resources since day one in the treaty negotiations and have never been able to negotiate it. First Nations like Musqueam have refused to move past Stage 3, because compensation is not listed as an item to negotiate in the Framework agreements. The Supreme Court of Canada has said where infringement of our rights is unavoidable, compensation should be paid. This sets a double standard for First Nations and lease or licence holders which is unfair.

As First Nations, we agree if someone has a lease or licence that will no longer continue, they should be compensated, by the government, for it was the government who created that interest without the consent or consultation of First Nations.

Saying yes to this question means that you have to agree to many concepts which are as follows:

Terms of leases should be respected. Terms of licences should be respected..
Conditions of leases should be respected. Conditions of licences should be respected.
Fair compensation should be paid when there is unavoidable disruption.
Fair compensation should be ensured.

What if you do not agree to one of these six concepts that are set out in this question? This question does not allow you to give any direction to the government on treaty principles because the questions are so complex in nature with so many concepts..

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3. **Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.**

This question implies that hunting, fishing and recreational opportunities were not ensured prior to this when in actuality they were. In fact, the province was obtaining provisions that on treaty land, non First nations people and companies would be allowed access on treaty lands for hunting, fishing and recreational opportunities.

Does this question mean occupied or unoccupied Crown land, because they each create different situations for British Columbians entering for these kind of opportunities. It leaves a person to assume that it is all Crown land.

Right now, reserve lands are federal crown lands, held for the use and benefit of the people of the particular First Nation. This question would allow people to come on reserve for hunting, fishing and recreation opportunity, which is not permitted unless the First Nation allows it. Right now a yes vote would mean this would be the negotiating position of the province, even though they have no jurisdiction over reserve lands, that is exclusively with the federal government.

What status will the lands that First Nations hold be negotiated as? Will they be considered a type of crown land? Will they be provincial crown lands? Federal crown lands? Because if they are, then this would mean people could access these lands for hunting, fishing and recreational opportunities. Management and access to First nations lands, no matter what the status, must be with the First Nation. A yes vote to this question could prevent this being negotiated. Also, if treaty settlement lands, are lands held for the use and benefit of First Nations people under s. 91(24) of the Constitution Act, 1867, the province again has no jurisdiction or say over those lands, making this question beyond the power of the province.

Again, this is a very loaded question. Are you agreeing to hunting, fishing or recreation opportunities, or all three? Something like hunting puts different safety standards, and what if you agree to one or two, but not all three, there is no opportunity to express your preference to the government.

If crown lands are how First Nations will hold their treaty settlement lands, and if First Nations cannot have control and management over their own lands, this question would stop negotiations cold. First Nations need to decide, what if any of their lands can be accessed by the public for hunting, fishing and recreation. First Nations need to be able to consider safety, privacy in their residential areas, protection of sacred and significant sites and other areas that are valuable to them, which is why jurisdiction over our lands is key to negotiations.

A no vote could mean that access to crown lands should not be ensured for hunting, fishing and recreational opportunities but would be the discretion of the government. Would that mean all crown land, or some crown land in a no vote, it is not specified in

this question. It is not clear what mandate that would then give the government to follow on a no vote. Even now, some crown lands are blocked to people for safety reasons, gates block some roads, prohibitions are present on different signage. Where government has crown lands with some particular facility or function, it is not always open to the public now.

4. **Parks and protected areas should be maintained for the use and benefit of all British Columbians**.

What the biggest issue with this question is that no parks and protected areas can become treaty settlement lands ever. This causes several problems. The first problem is that there is not enough crown land in some First Nations territories to make a fair settlement with First Nation. So as not to disrupt any fee simple land owners, the next available lands become those with interests on them such as Parks and protected areas. There are a fair number of parks in British Columbia. This government is off loading all the smaller parks they can and not providing services in others because they cannot afford to maintain them.

Oftentimes Parks and protected areas have sacred sites, archaeological sites, burial sites, middens, or other areas of significance to the First Nations. In order to manage and protect these areas, making them treaty settlement lands is key. This would not allow that. Many of these sites are so significant to First nations, that unless they get these areas back, there would not be a settlement. This is one of those questions that would be a deal breaker if the province comes to the table with an iron clad position of no parks or protected areas on the table. Even if a First Nation negotiated joint management, it does not mean that certain areas of parks are off limit to the public, this just does not happen, so joint management agreements would not solve this issue.

A no vote would mean that all parks and protected areas should not be maintained for the use and benefit of British Columbians. This is one of those questions that you know has been designed for a yes answer as a no answer would give you a result nobody would like. But a yes vote would bring all kinds of problems to the negotiating table and prevent many treaties from being resolved.

With the more recent court cases by the Haida and the Taku River Tlingit, the courts have set out some very stringent standards for consultation. Most of the parks or protected areas that are set aside today(with the exception of those established by or with First Nations such as the Spirit Bear Park in Northern BC) were established without any consultation with First Nations. First Nations would then have to take these issues to court challenging the establishment of these parks and protected areas. We are supposed to be resolving these issues by negotiation, not by litigation, but these kind of questions forces First Nations to use the court system. Realize that court cases cost the province millions of dollars as well as slow down other cases due to limited court time and judges.

Again, this is one of those questions where you have to agree to both parks and protected areas being maintained. What if you don't mind parks or a portion of a park being used for treaty settlement, but not protected areas. Or vice versa. You are not given the

freedom to express your opinion. So much for consultation with the public. Even if this question had said substantially, or most of parks and protected areas, it would have given negotiators some flexibility at the negotiating table to work on lands which are important to First Nations for very valid reasons.

5. **Province-wide standards of resource management and environmental protection should continue to apply.**

So who said province wide standards of resource management and environmental protection are the right ones? One only has to cast one's eyes about to see that the provincial standards have not really done their job. Look at our forests, our waters, at the quality of air we breathe? Why can't we as First nations set out own standards that are better than provincial standards? This question infers the provincial government standards are superior to ours.

This flies in the face of self government and our ability to manage and control our own lands. This does not leave room to say that our standards should meet their standards. This has been their position to date and we have said we would beat their standards. Now there will be no room to be able to negotiate this. This question leaves no room for recognition that we as First Nations managed our resources in a sustainable way. There were always so many fish that you could walk over their backs across the river. We took only what we needed to survive. We knew how to look after our resources so they would always come back to sustain future generation. We have great knowledge on how to protect the environment as this was our responsibility. Now, with this question, we will not be able to use this knowledge and experience. This is not negotiations.

Resource Management and Environmental Protection are two entirely different concepts being thrown together in one question. Resource management, is how do we use our resources. Environmental protection is how do we preserve our environment for today and future generations. Such wide ranging topics make it difficult for the voter to determine what exactly they are agreeing to.

Does anyone know what the standards for resource management are right now, or for that matter environmental protection? The province is undergoing comprehensive changes right now. The softwood lumber dispute calls for radical changes to resource management. Total revisions to the Forest Practices Code, Environmental Assessment, a new Energy Policy, lifting of moratoriums on grizzly bears, fish farms and now possibly oil and gas moratoriums and other related acts laws and action are happening. Does this question stop the government from doing revamping their laws and standards? Does it mean the standards that were applicable when the questions were asked or the new standards to be passed in the fall. There is so much discretion and leeway to the government.

One also has to remember that the province cannot pass any laws relating to reserve lands and these laws and standards do not apply to reserves. This question lets the voter assume that they do. In some instances, First Nations can pass by laws to cover these issues, in others, the Indian Act provisions apply.

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6. Aboriginal self-government should have the characteristics of local government with powers delegated from Canada and British Columbia.

What does this actually mean? All of the characteristics? Some of them? A repeat of the local Government Act?

Local Governments do not have authority to define who its electors are. First Nations can and need to define their members/citizens. Local governments do not have jurisdiction over key areas like education, child welfare, management of lands and resources, and justice. These areas are key to the success of First Nations progressing and are elements of our traditional governments that we have always enjoyed. Our right to self government is protected by s. 35 of the Constitution Act.

The Constitution Act protects our right of self government. It is not a form of delegation from the federal and provincial governments, but is of itself a government. Saying that it is a delegated government demeans our governments that have existed since time immemorial.

The First Nations Summit which is an organization that represents the First Nations involved in the treaty process, has passed a motion that says that if the inherent right of self government is not on the table, they will not be at the table. This is by far the most important question in the referendum.

There is a long history behind our governments. As First Nations we had organized governments, we had leaders, a justice system, everyone had roles and responsibilities to fulfill in the community. When the colonizer arrived they did not recognize our forms of governments or spirituality because it was not like theirs. They made the assumption that we did not have any. The various Indian Acts has tried to decimate our systems of governance, but has not been successful as yet. Our governments have always had complete jurisdiction over our lands, our people, our resources and it is this that we need to reinstate in order to become economically independent. Giving us the characteristics of local governments is in some respects less than what we have under the Indian Act. This is not acceptable.

I really must point out the recent court cases of Tom Paul from the Court of Appeal of BC that state that BC does not have the authority to define aboriginal rights. Limiting the right of self government to a delegated, local government style government is seeking to define our rights. It is this question that will be in front of the courts this week under the new court case being launched against the government regarding the referendum by 4 First Nations people.

A yes vote means the end of negotiations, a no vote would mean the government could look at other forms of self government that are not delegated . Again, because this question has many prongs to it, does a no vote mean no to the Characteristics of local government, or no to the delegated form of self government?

Additionally one has to point out the Provincial government cannot bind the federal government. Mentioning the federal government is misleading because it lets you think that you can have a say in delegation from the federal government. Only the federal government can decide this. This is another part of the question that will be challenged on a constitutional basis in the next court case against the referendum.

7. **Treaties should include mechanism for harmonizing land use planning between Aboriginal governments and neighbouring local governments**.

This question assumes that there will be cooperation between the parties and that harmonization can be done. But in cases like my Nation, and others like it, we have two local governments, the City of Port Alberni and the Regional District. How do you harmonize three plans? Whose has priority? This isn't just a simple question, but a whole complex issue of competing jurisdictions. We as First Nations think that we should have priority in the case of a conflict or in the case of a disagreement that cannot be resolved. We hope that all governments will be able to work together, but we know in cases like Nanaimo and Powell River, this has not been the case. You cannot force good relations.

This question doesn't take into consideration what happens if our lands are bordered by a licence, like a tree farm licence, or a park, all of which is possible. Why don't they have to harmonize their plans to ours?

A no vote to this question would mean that there would not be harmonization of land use planning. What in actuality is harmonization? This is a new term. Establishing protocols of working together, sharing development plans, and other land use with one another, meeting one another's concerns could be another way of dealing with this. Is it really necessary to have land use plans that harmonize?

8. The existing tax exemptions for Aboriginal people should be phased out.

This question lets the voter think that the province has jurisdiction over current tax exemptions for Aboriginal peoples. This is totally misleading. The current tax exemption is found under the Indian act, to which the province has no jurisdiction. Coming to the table with such a position to which the province has no say, would cause major issues..

Tax exemption are for salaries earned on reserve, and products or services purchased on reserve. These tax exemptions are pretty minor for our community.

Under the Indian Act, a First Nation can pass taxation by laws that allows them to exempt certain classes of people from the taxation, such as its members. The province is now saying this should be phased out even though there are many valid by-laws that are in force in Canada.

This particular question does not allow for flexibility and creativity regarding taxation. As First Nations, we realize it is a good source of raising revenue, but it has to be done in our own time and in our own way. This was one of our goals as First Nations was to find ways and means in our treaties to reflect our values, our ways of life. But the province and federal government for that matter, want the status quo, their status quo, they believe that is the best way of doing things. They cannot let go of the paternalism. But seeing how things have been managed and handled, how their programs and services have failed miserably in our communities lets us know that their way was not the right way. We need to be able to find the right way for ourselves.

The more recent court case out of Treaty 8 says that those First Nations individuals in treaty 8 do not have to pay tax in their treaty area. This only confirms what First Nations

have been saying with regard to taxation all these years. This case is obviously being appealed and more will follow. But if exemption from taxation is an aboriginal right, this question cannot stand. (Treaty 8 covers northern Alberta, Part of Northern BC and NWT, there is a specific provision in that treaty that has a tax exemption for First Nation people)

This is not a proper question for this referendum as it is outside provincial jurisdiction and deals directly with an aboriginal right which the province promised they would not do.

Conclusion:

All of the 8 questions asked are complex and problematic to negotiations. A yes vote would mean inflexible negotiating positions from the province. If we as First Nations know that this is their mandate and one we cannot accept, why would we waste any more time, energy and money in trying to negotiate. We know they are bound to these mandates legally under the Referendum Act. Even if we could convince the negotiators to go beyond these mandates, it would be predictable that some person would challenge our treaty in court, stating that the province went beyond its mandate as established under the Referendum. These questions paint a bleak picture for negotiations.

Apart from all that, why would we want to negotiate with a government, who does not negotiate in good faith, who comes to the table after 9 years with new mandates, and does not uphold the honour of the Crown.

As for you as voters, realize that if you vote yes, your mandate being given is totally open to interpretation by the government and they are really only doing what they want to do with the appearance of your say so. If you vote no, there is no real mandate for the government to negotiate anything substantial. The province was doing this referendum to "consult" with the people of British Columbia. Do you really feel consulted? The province has completely cut out the money for consultation in the treaty process, there will no longer be Treaty Advisory Committees or Regional Advisory Committees. This is your one and only say in the process and the questions are so misleading, with so many concepts in them, that you cannot really tell the government what you think about treaties and this is not what was promised in their New Era document.

This government is not serious about negotiating treaties. Negotiations went on hold over a month before the election. For well over a year, no substantive negotiations have taken place. Some tables have or are negotiating interim measures, but they do not constitute treaty negotiations. The province removed all substantial issues off the table, certainty, governance, land holding, general provisions and revenue fiscal. They will not be back on the table until after the referendum and new mandates are established.
The Province unilaterally cut 25% of the BC Treaty Commission (BCTC) budget. 51 staff in the treaty office was cut. Consultation dollars were cut. Jack Weisgerber a vocal opponent to the Nisga'a treaty was appointed as the provincial treaty Commissioner at BCTC. All actions of the government of this referendum indicates this government is

trying to stop treaty negotiations in this province, the referendum is only one tool to do that. They say differently, but they do not walk their talk.