BC TREATY COMMISSION

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Introduction

The British Columbia Treaty Commission was appointed on April 15, 1993 under terms of an agreement between the Government of Canada, the Government of British Columbia and the First Nations Summit, whose members represent the majority of the First Nations in British Columbia.

The terms of agreement require the Commission to submit annually to the Parliament of Canada, the Legislative Assembly of British Columbia and the First Nations Summit "a report on the progress of negotiations and an evaluation of the process."

The annual financial data has been prepared to coincide with the fiscal year-end of the Governments of Canada and British Columbia and is submitted as a separate document.

It is my pleasure to submit the third Annual Report of the British Columbia Treaty Commission. As Chief Commissioner, I wish to express my thanks to my fellow Commissioners, and to the men and women who comprise the Commission's staff, for their hard work, commitment and support.

Alec Robertson, Q.C.
Chief Commissioner

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Annual Report 1996

Executive Summary

As the independent and impartial keeper of the process, the British Columbia Treaty Commission is pleased to report that significant progress has been made over the past year in those treaty negotiations which it facilitates.

There are 22 First Nations tables in Stage 3 framework negotiations and 11 in Stage 4, agreement in principle negotiations. One year ago, there were seven tables in Stage 3, and none in Stage 4. In the year ahead, most of the current 47 First Nations are expected to be in Stage 3 or 4 and some may well conclude agreements in principle.

The diversity of First Nations in B.C presents a special challenge to all parties. As more tables enter Stage 4, and the focus is on jurisdiction over lands and resources, all parties must show flexibility.

"The treaty-making process is firmly established and is working well in this province."

This rapid progress has engendered problems of its own. One problem facing the process is the real potential for system overload. To ensure the continued success of treaty making, Canada and British Columbia will need more human resources and the Principals will need to discuss more options to manage and pace the negotiations effectively.

That success must continue. Treaties offer the best avenue for fair and honorable resolution of historical grievances that have led to costly litigation, social conflict and economic uncertainty.

Success also depends on fair and adequate negotiation support funding. The Commission is concerned that existing funding levels will fall short as more First Nations enter the treaty-making process and others move through the more complicated and costly stages.

Conflicts about the lack of an adequate process to negotiate interim measures jeopardize treaty making. Interim measures are the appropriate mechanism to address circumstances arising before treaties are finalized which place the interests of First Nations and those of public governments, particularly the province, in conflict. The Commission strongly recommends that British Columbia reconsider its refusal to negotiate the full range of options for interim measures during the early stages of negotiations.

The signing of the Nisga'a agreement in principle brought into sharp relief another pressing problem: territorial overlaps between two or more First Nations. First Nations are responsible for resolving overlaps themselves. Through the First Nations Summit, they must play a major role in developing protocols for resolving overlap disputes. The Commission is available to provide advice on dispute resolution. In consultation with the Principals, it intends to provide new policies about its role in addressing this critical issue. One troubling note: despite the best efforts of parties at the table, negotiations sometimes break down. Consequently, the Commission's role has begun to change. It has taken a more active role in dispute resolution. This was the case last February when talks with the Gitxsan Hereditary Chiefs

were suspended by the province. The Commission investigated the circumstances leading to this suspension and made recommendations in a special report.

Interest in the treaty process is high. In some areas, there are critics of the public consultation mechanisms adopted by Canada and British Columbia. However, in many areas of the province these mechanisms are working well. Effective consultation can take place and is taking place.

Public information is a necessary component of successful treaty negotiations. Significantly more information is now available on the progress and process of negotiations. Many main tables are open to the public. The Commission is pleased to note one major milestone in the field of education with the launching of the First Nations Studies Grade 12 curriculum in British Columbia's schools.

These advances are promising, but information must reach even more people. The Commission recognizes its role in helping to create understanding of the treaty process, and is determined to meet this challenge.

B.C. is at a critical juncture in its history. In 1996, the Nisga'a Tribal Council signed an historic agreement in principle with Canada and B.C. The Treaty Commission played no role in these negotiations, which began in the mid-1970s, but fully recognizes the significance of this event. It marks the first time that a First Nation in B.C. has freely entered into an agreement leading to a treaty with Canada and British Columbia.

As evidenced by the entry of First Nations in unpredicted numbers into the process, and rising public interest as a result of the Nisga'a agreement in principle, British Colombians seem to be prepared to advance toward solutions to long-outstanding problems. There is no turning back. The alternatives to the process in place are too stark to consider. Treaty-making is unglamorous and arduous work. It requires the goodwill and commitment not only of the Principals and the parties at each table, but also of the public at large.

The Commission urges the Principals to address the problems identified and the recommendations made in its third annual report to ensure that results are achieved in the years ahead.

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Annual Report 1996

Role & Composition of the Commission

The British Columbia Treaty Commission is the keeper of a treaty making process unprecedented in this province. Its role is to facilitate the negotiation of treaties. It is a working Commission. Commissioners play a major role in developing policy and in monitoring the treaty tables. They regularly travel to all regions in British Columbia.

The Commission is not an arm of any government and it does not negotiate treaties. This is done by the three parties at each table: that is, each First Nation, Canada and British Columbia.

The Role of the Principals

The three Principals to this process are Canada, British Columbia and the First Nations Summit. They established the B.C. Claims Task Force in December 1990 and later agreed to create the B.C. Treaty Commission and the treaty process. This agreement is now supported by federal and provincial legislation and by a resolution of the First Nations Summit.

The Task Force anticipated that the process would require the periodic attention of the Principals. It also recognized the need for the Principals to meet with the Commission to recommend improvements to the process or to resolve causes of delay. The Principals meet approximately every six months. In 1995 the Commission recommended that they meet more frequently in order to tackle some of the difficult issues that arise. The Principals agreed to this but so far have been unable

to do so. The Commission again urges the Principals to schedule more frequent meetings in order to address, with the Commission, the problems identified in this report.

The Commission's impartiality and ability to provide a balanced perspective is reflected in its composition and the manner of its decision making.

There are five members of the Commission. one of them being the Chief Commissioner. The First Nations Summit appoints two Commissioners and the federal and provincial governments appoint one each. The Chief Commissioner is appointed by all three Principals. Commissioners do not represent the Principals that appointed them. Decisions require a quorum of one appointee of each of the Principals plus the Chief Commissioner.

The Commission does:

- Accept First Nations into the treaty making process, assess when parties are ready to start negotiations:
- Monitor progress of negotiations, identify problems, offer advice:

- Assist parties to resolve disputes through facilitation or dispute-resolution;
- Allocate funding to First Nations.

The Commission does not:

- Act like a court or make binding orders;
- Determine the boundaries of First Nations' traditional territories;
- Arbitrate disputes among parties;
- Negotiate on behalf of any party.

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Annual Report 1996

History and Progress

June 28, 1996	Third BC Treaty Commission Annual Report Statements of Intent accepted. First Nations in Stage 3 First Nations in Stage 4
March 1, 1996	BC Treaty Commission Act proclaimed by provincial and federal governments and First Nations Summit resolution
December 1995	BC Treaty Commission Act Passed by Parliament
June 12, 1995	Second BC Treaty Commission Annual Report Statements of Intent Accepted First Nations in Stage 3 No First Nations had reached Stage 4
June 1994	The First BC Treaty Commission Annual Report Statements of Intent Accepted
December 15, 1993	BC Treaty Commission opens its doors Statements of Intent Received
May 1993	First Nations Summit Resolution establishing BC Treaty Commission BC Treaty Commission Act passed by the BC Legislature
April 15, 1993	First Treaty Commissioners Appointed
September 21, 1992	BC Treaty Commission Agreement established by First Nations Summit, BC and Canada
June 1991	BC Claims Task Force issues report
December 1990	BC Claims Task Force Formed

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Annual Report 1996

Current Commissioners

Left to Right: Barbara Fisher, Miles Richardson, Alec Robertson, Wilf Adam, Peter Lusztig

ALEC ROBERTSON, as is the Chief Commissioner He was born in Victoria and earned a Bachelor of Commerce (4955) and Bachelor of Laws (1957) from the University of British Columbia and a Master of Laws (1958) from Harvard University. He was admitted to the bar in B.C. in 1959 and was a partner with Davis and Co. until his appointment as Chief Commissioner on May 45.1995. Among his many community activities. Mr. Robertson has served as President of the B.C. Branch of the Canadian Bar Association; Chair of the Law Foundation of B.C.; and as a member of the Gender Equality Task Force of the Canadian Bar Association.

WILF ADAM one of two First Nations Summit nominees; was born in Burns Lake and raised at Pendleton Bay. He became a Commissioner in April 1995. In 1985; he completed a course in Business Management at the College of New Caledonia in Prince George. A former Chief Councilor of the Lake Babine Band; he chairs the Burns Lake Native Development Corporation. He is a co-founder of the turns Lake Law Centre.

BARBARA FISHER is the Government of B.C. appointee. She earned her Bachelor of Laws (1981); her Bachelor of Fine Arts (197ti) and her Diploma in Education (1977) from the University of Victoria; and her A.R.C.T from the Royal Conservatory of Music. Formerly General Counsel and Vancouver Director of the Office of the Ombudsman; Ms. Fisher currently practices part-time as counsel to the B.C. Information and Privacy Commissioner She is now in her second term as Commissioner

PETER LUSZTIG is the Government of Canada appointee. He earned a Bachelor of Commerce from the University of B.C. (1954). a Masters of Business Administration from the

University of Western Ontario (1955) and a Ph.D. from Stanford University (1965). A former Professor of Finance at the University of British Columbia. he served as Dean of the Faculty of Commerce and Business Administration. In addition to his academic experience. Mr. Lusztig has played an active role in public affairs as a member of two Royal Commissions and Commissions of Inquiry and has served with numerous community and business boards.

MILES RICHARDSON First Nations Summit appointee; served as President of the Council of the Haida Nation and; from 1991 to 1995, as a member of the First Nations Summit Task Group. He was also a member of the B.C. Claims Task Force and is a signatory of the Claims Task Force Report; whose recommendations are the blueprint for the treaty negotiation process. He holds a Bachelor of Arts (1979) from the University of Victoria.

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The Treaty Process

1	Alkali Nation	**STAGE 2**
2	Burrard Nation (Tsleil-Waututh First Nation)	**STAGE 3**
3	Cariboo Tribal Council	**STAGE 3**

4	Carrier Sekani Tribal Council	**STAGE 3**
5	Champagne and Aishihik First Nations	**STAGE 4**
6	Cheslatta Carrier Nation	**STAGE 2**
7	Comox Indian Band	**STAGE 2**
8	Council of the Haida Nation	**STAGE 2**
9	Ditidaht First Nation	**STAGE 4**
10	Gitanyow Hereditary Chiefs	**STAGE 4**
11	Gitxsan Hereditary Chiefs	**STAGE 4**
12	Haisla Nation	**STAGE 3**
13	Heiltsuk Nation	**STAGE 3**
14	Homalco Indian Band	**STAGE 4**
15	Hul'qumi'num First Nations	**STAGE 2**
16	ln-SHUCK-ch/N'Quatqua	**STAGE 3**
17	Kaska Dena Council	**STAGE 4**
18	Katzie Indian Band	**STAGE 2**
19	Klahoose Nation	**STAGE 2**
20	Ktunaxa/Kinbasket Tribal Council	**STAGE 2**
21	Kwakiutl First Nations	**STAGE 2**
22	Lake Babine Nation	**STAGE 3**
23	Lheit-Lit'en Nation	**STAGE 3**
24	Musqueam Nation	**STAGE 3**
25	Nanaimo First Nation	**STAGE 3**
26	Nazko Indian Band	**STAGE 2**
27	Nuu-chah-nulth Tribal Council	**STAGE 4**
28	Oweekeno Nation	**STAGE 3**
29	Pacheenaht Band	**STAGE 1**
30	Qualicum Indian Band	**STAGE 2**
31	Quatsino First Nation	**STAGE 2**

32	Sechelt Indian Band	**STAGE 4**
33	Sliammon Indian Band	**STAGE 4**
34	Squamish Nation	**STAGE 3**
35	Sto:Lo Nation	**STAGE 2**
36	Taku River TIngit First Nation	**STAGE 3**
37	Te'Mexw Treaty Association	**STAGE 3**
38	Teslin TIngit Council	**STAGE 4**
39	Tsawwassen First Nation	**STAGE 3**
40	Tsay Keh Dene Band	**STAGE 3**
41	Tsimshian Nation	**STAGE 3**
42	Ts'kw'aylaxw First Nation(Pavilion Indian Band)	**STAGE 3**
43	Westbank Indian Band	**STAGE 3**
44	Wet'suwet'en Nation	**STAGE 4**
45	Xaxlip (Fountain Indian Band)	**STAGE 3**
46	Yale First Nation	**STAGE 3**
47	Yekooche Nation	**STAGE 3**

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The Six-Stage Process

STAGE 1 Statement of Intent

A First Nation files with the Commission a Statement of Intent to negotiate a treaty. After the Commission accepts the Statement of Intent, it forwards the Statement to the federal and provincial governments. The Statement need not be lengthy hut it must do four things: identify the First Nation and the people it represents; confirm that it has a mandate from those people to enter the treaty process; describe the geographic area of the First Nation's traditional territory in B.C.; and identify the First Nation's formal contact person.

STAGE 2 Preparation for Negotiations

Within 45 days of accepting a Statement of Intent, the Commission must convene an initial meeting of the three parties. For many First Nations, this will he the first occasion on which they sit down at a treaty table with representatives of Canada and British Columbia. This meeting allows the Commission and the parties to exchange information, consider the criteria that will determine the parties' readiness to negotiate, and generally identify issues of concern. These meetings usually take place in the traditional territory of the First Nation. After the initial meeting, the parties begin working toward the third stage of the process When the Commission determines that all three parties have met the criteria for readiness, it will confirm that the table is ready to begin the negotiation of a framework agreement.

STAGE 3 Negotiation of a Framework Agreement

The framework agreement is, in effect, the "table of contents" for a treaty negotiation. It is a negotiated agenda that identifies the subjects to be negotiated, the goals of the negotiation process, procedural arrangements, and a timetable for negotiations. At this stage, the parties are expected to embark upon a program of public information pertinent to their table that will continue throughout the negotiations.

Canada and B.C. engage in public consultation at the local level through Regional Advisory Committees and sometimes through Local Advisory Committees, as well. At the provincial level, consultation occurs through the 31-member Treaty Negotiation Advisory Committee which represents the interests of business, labour, environmental, recreation, fish and wildlife groups.

STAGE 4 Negotiation of an Agreement in Principle

This is the stage at which the parties begin substantive negotiations. The goal is to reach the major agreements that will form the basis of the treaty. During this stage, the parties examine in detail the elements of the framework agreement. The agreement in principle will confirm the ratification process for each party and lay the groundwork for an implementation plan.

The ratification process allows each party to review the emerging agreement and to approve, reject, or seek amendments to it. The process is also intended to provide the negotiators with a mandate to conclude a treaty.

STAGE 5 Negotiation to finalize a Treaty

The treaty will formalize the new relationship among the parties and embody the agreements reached in the agreement in principle. Technical and legal issues will be resolved. The treaty will be signed and formally ratified at the conclusion of this stage.

STAGE 6 Implementation of the Treaty

Long-term implementation plans need to be tailored to specific agreements. With continuing goodwill, commitment and effort by all parties, the new relationship will be brought to life at this stage.

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Why There Is A Treaty Process In BC

During the past year, the Treaty Commission has noted that public confusion continues about the legal nature of aboriginal interests in British Columbia. Some people have said that aboriginal title has been repudiated by the courts in Canada. They have also said that aboriginal rights are not property rights, and are of such minor consequence that those rights deserve only some compensation for their loss. The conclusion drawn is that there is no legal basis for treaty negotiations that transcend compensation to include land and resources.

With the help of two legal experts in the field of aboriginal law, Professor Hamar Foster of the University of Victoria and Professor Patrick Macklem of the University of Toronto, the Treaty Commission has prepared the following legal perspective on these important questions.

As long ago as 1823, the Chief Justice of the United States gave a simple explanation of aboriginal title under British colonial rule. The original inhabitants of the Americas, he said, were regarded as "the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion." The Crown however, had "the exclusive right of purchasing such lands as the natives were willing to sell." He observed that the United States followed the same legal principles.

The Louisiana Purchase illustrates these principles. In 1803, France ceded its sovereignty over the Louisiana Territory to the United States for $15 million. Yet, over the succeeding decades, the United States paid the Indian tribes inhabiting the territory more than 20 times that amount for their aboriginal title to the lands they occupied.

The law provides but one narrow perspective. There is a larger one. Aboriginal Social Justice Commissioner Mick Dodson stated on the second anniversary of the Native Title Act in Australia:

"...we all need to understand that native title is not solely a legal issue. Native title is a question about the kind of community we are and the maturity with which we view our history. The debate may have begun in the courts but the questions it raises cannot be answered purely by legal decisions."

The Supreme Court of New Zealand recognized aboriginal title in 1846. Prior to Confederation in 1867, the British Crown recognized that First Nations possessed aboriginal title to their traditional territories within Canada. So did the government of the new Dominion of Canada in the 1870s after it acquired Rupert's Land from Britain. Before opening the area for settlement, Canada made treaties with the tribes between the Great Lakes and the Rocky Mountains. Those treaties acknowledged, and then extinguished, aboriginal title, but the tribes retained their aboriginal rights to hunt, fish and trap, even on the lands they had surrendered.

Except for the first few years under James Douglas, there were no treaties made in British Columbia in the pre-Confederation era. By 1871, when the colony of British Columbia joined Confederation, the

new province's policy was set: British Columbia did not recognize aboriginal title, so there was no need for treaties to extinguish it. The new Dominion expressed concern about the legality of British Columbia's policy, but was unwilling to force the issue. Consequently, no treaties were made in British Columbia after Confederation, other than one in the northeast corner of the province.

The aboriginal peoples of British Columbia protested, but they were effectively prevented from pursuing their claims. Under the law of the day, they could not sue British Columbia without its consent. They could not run for political office or vote. From 1927 until 1951, the Indian Act made it effectively illegal to raise funds to pursue land claims. Not until the 1970s was a First Nation able to ask the Supreme Court of Canada to do what the courts in the United States and New Zealand had done over a century earlier: to rule on the status of aboriginal title as a legal right.

The Nisga'a of northwestern B.C. were the first to reach the Supreme Court of Canada in the Calder case (1973). They conceded that the Crown's sovereignty over their traditional lands gave the underlying title to the Crown. But they argued that the Crown's underlying title was subject to the Nisga'a's aboriginal title to occupy and manage their lands until otherwise provided in a treaty.

The Supreme Court's decision in Calder was a legal turning point. Six of the seven judges confirmed that aboriginal title is "a legal right derived from the Indians' historic... possession of their tribal lands" and that it existed whether governments recognized it or not.

However, the Court then split; three judges found that the aboriginal title of the Nisga'a had been implicitly extinguished by colonial legislation prior to Confederation while the three other judges adopted a more stringent test for extinguishment and found that the Nisga'a still had title. The seventh judge would not break the tie, but ruled instead that the court action was improper because the law still required that British Columbia consent to be sued.

The recognition by Canadian law of aboriginal title as a legal right was made clear by the Supreme Court of Canada in a number of subsequent cases. One such case was Guerin (1984), where it was stated that "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown."

The Court's recognition of aboriginal title in Calder as a legal right, despite the 3-3 split on the question of extinguishment, was sufficient to cause the federal government to establish a land claims process. However, British Columbia refused to participate. As British Columbia held underlying title to virtually all Crown land in the province, the land claims process was doomed without the province's participation. But the question remained: had aboriginal title been extinguished before British Columbia joined Confederation, or not?

Two court decisions since Calder have addressed this question. In Sparrow (1990), the Supreme Court of Canada adopted the more stringent test for extinguishment used by the three judges in Calder who said that the Nisga'a still had title. They said that legislation must have had a "clear and plain intention" to extinguish aboriginal rights. Applying this test to fisheries legislation, the Court concluded that a century of detailed regulations had not extinguished the Musqueam people's aboriginal right to fish for food and ceremonial purposes. Sparrow however dealt with fishing rights, not rights in land.

Then, in 1993, the B.C. Court of Appeal had to decide in Delgamuukw whether the same colonial legislation considered in Calder had extinguished the Gitxsan and Wet'suwet'en peoples' aboriginal rights and title. The judges applied the Sparrow test and unanimously concluded that there had been no such "blanket" extinguishment.

This finding has important consequences for all First Nations in British Columbia. Upon joining Confederation, British Columbia had transferred to Canada its authority to legislate the extinguishment of aboriginal title and rights. In 1982, aboriginal and treaty rights were entrenched in the Constitution of Canada. After that date, governments had to justify before a court of law any interference with aboriginal and treaty rights. This had to be done in accordance with strict tests laid down by the Supreme Court of Canada.

The majority of the Court in Delgamuukw held that the aboriginal plaintiffs had asked the Court to determine only two issues: "ownership" in the conventional sense, which had not been proved: and "nonexclusive aboriginal rights" to engage in particular activities and practices, which had been proved. It was not appropriate, they said, to rule on anything that fell between.

They made no determination as to whether the plaintiffs might have been entitled to a finding of aboriginal title of the type described in Calder and the Supreme Court of Canada decisions: that is a title less than full ownership but greater than the non-exclusive aboriginal rights that they did accept.

The result is that no court has yet made a finding of aboriginal title in British Columbia beyond rights to engage in particular activities and practices. But Delgamuukw repudiated the notion of blanket extinguishment. So the door is open to other First Nations to attempt to establish aboriginal title if they decide to litigate, and if there is supporting evidence.

Thus, when treaty negotiations began in 1993, the following situation existed. The courts had confirmed that aboriginal rights still exist in B.C., that these rights are unique and unlike conventional property rights, and that the rights are constitutionally entrenched so that neither the federal nor the provincial government can interfere with them, let alone extinguish them, without meeting strict constitutional standards.

Although aboriginal rights are unique and do not fit into the rigid classification of conventional property rights, this does not make them a significantly lesser right. In common with property rights, aboriginal rights directly connected to land can invoke the courts' protection against unlawful infringement by others claiming an interest in that land. That is why these rights have been described by the courts as a "burden" on the title of the Crown. It is also why there can be no certainty about the nature and extent of the Crown's title to land and resources, except through a process of negotiation designed to reconcile the respective rights of the Crown and First Nations. That is one reason First Nations expect lands and resources to be on the negotiating table and why their claims cannot be satisfied by compensation only. And that is why the British Columbia Court of Appeal has urged Canada, British Columbia and First Nations to negotiate their differences, observing that "treaty making is the best way to respect Indian rights."

It is important to appreciate that the process of coming to terms with rights that existed before colonization, and that differ from the laws brought by the colonists, is not limited to British Columbia, or even to Canada.

In the United States, the courts have recognized that Indian Nations enjoy a limited sovereignty over their lands and members. In some cases this sovereignty is enforced by tribal police and tribal courts.

A succession of U.S. Presidents has reaffirmed that a government-to government relationship exists between the United States and Indian Nations.

In New Zealand, the Waitangi Tribunal investigates alleged breaches of the 1840 Treaty of Waitangi between the Maori and the government of New Zealand. Its recommendations have been accepted by government and its reports have influenced the courts. The result is that compensation has been paid to the Maori and land and fishing rights have been transferred to them.

Australia, like British Columbia, long denied the existence of aboriginal title or rights. It claimed that the land was terra nullius meaning that the aboriginal inhabitants were not civilized enough to have legal rights in land. In Mabo (1992), the High Court of Australia followed Canadian and United States decisions and international law to recognize aboriginal title. In response to the argument that a reversal of more than 150 years of terra nullius would lead to disruption, the current chief justice commented that to continue to deny aboriginal title "would destroy the equality' of all Australian citizens before the law.' The law he said, "would perpetuate injustice if it were to persist in characterizing the indigenous inhabitants as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land."

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Treaty Making is Hard Work

The treaty-making process in B.C. is working well. While there are constant challenges, the Commission is fully convinced negotiations offer the best avenue for fair and honorable resolution of the historical grievances that have led to costly litigation, social conflict and economic uncertainty.

The Negotiation Process

Negotiations should be efficient. One of the Commission's key roles, particularly now that so many negotiations have begun, is to monitor progress, identify problems and offer advice to the parties. In doing this, the Commission uses two criteria - the process should produce a fair agreement and the process should improve the relationship among the parties.

These criteria are particularly important in treaty negotiations, whose broadly stated goal is to create new and constructive relationships between aboriginal and non-aboriginal people.

One: Fair Agreements

A fair agreement is one that meets the legitimate interests of each side to the greatest extent possible, resolves conflicting interests fairly, is durable and takes community interests into account.

The most common form of negotiation depends upon successively taking, and then giving up a sequence of positions. At times this is useful. It tells the other side what you want, and it provides a clear basis upon which to negotiate. Positions

may be based on a party's interpretation of its legal rights. One party's positions and rights generally conflict with those of another party.

However, in complex negotiations such as treaty negotiations, joint problem-solving is often required. This allows negotiators to consider and discuss the interests underlying each party's position. More options for resolution may then emerge. Indeed, sometimes opposing positions mask similar underlying interests.

Interests are underlying principles or fundamental goals. If the parties do not understand each other's underlying interests, then the chances of reaching fair agreements are substantially reduced.

Two: Improve Relationships

The process should improve the relationship among the parties. This relationship is the foundation of treaty negotiations. The parties are trying to negotiate new and better ways of coexisting. Successful negotiations depend on mutual respect and trust. The negotiation process must recognize this requirement and provide the best possible chance for trust and respect to survive and flourish.

The parties must be able to negotiate in a climate conducive to trust. This helps them to discuss their underlying interests, to open up possible options and to objectively assess the results of the negotiations.

Dispute Resolution

The Commission encourages the parties to engage in a negotiation process suitable to the task of treaty making. Positions are important. They help to clarify the issues to be negotiated, but if they are rigid or unchangeable then there may be very little to negotiate. When parties cannot negotiate beyond their positions, the process becomes a battle of wills. One side may see itself as bending to the rigid will of the other, while its legitimate concerns are not addressed. Particularly where there is an imbalance of power, such a battle is harmful to the relationship among the parties.

During the past year, the Commission has taken a more active role in dispute resolution. In some cases the Commission chaired and facilitated meetings at the request of certain parties. When B.C. suspended negotiations with the Gitxsan Hereditary Chiefs in February 1996, the Commission investigated the circumstances leading to the suspension. It later issued a special report and a number of recommendations. The Commission has received other requests for fact-finding and facilitation where parties are experiencing difficulties.

In order to meet anticipated requests for dispute resolution as negotiations proceed, the Commission is identifying qualified people who may be available to mediate disputes. Referrals may be made by the Commission, but the mediators will be chosen and retained by the parties directly.

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Annual Report 1996

Practical Implications

When framework negotiations began in late 1994, negotiators for all the parties generally took the approach of identifying and exploring interests, underlying goals and visions. While the resulting framework agreements do not always reflect the content of these discussions, the fact that the discussions took place is itself significant. In most cases, the parties gained a better understanding of their mutual interests.

As more First Nations move into framework negotiations, less and less time is being devoted to exploring interests. In some cases, the First Nation is anxious to move into agreement-in-principle negotiations. To federal and provincial negotiators, there often appears to be less need to repeat exploratory discussions of underlying interests at each table.

Furthermore, some standardization of the provisions of framework agreements was developing. Some standardization is positive and understandable; it eliminates the need for each group to revisit each issue. However, it leaves less room for table-specific negotiations, and it can entrench and solidify federal and provincial positions at the table. Consequently tension and distrust will increase by the time the parties enter agreement-in-principle negotiations. Just as with framework agreements, the components of one agreement in principle will not be suitable for all First Nations.

With more tables entering Stage 4, it is critically important that Canada and British Columbia consider and negotiate other options to account for the diversity of First Nations in British Columbia This flexibility will be particularly important when the parties negotiate jurisdiction over lands and resources, Achieving certainty on this issue is a principal objective of treaty negotiations.

Mandates

In order to negotiate effectively, negotiators should have sufficient authority and a flexible mandate. In framework negotiations during the past year, the Commission has observed that Canada's and B.C.'s negotiators have demonstrated limited authority and worked with mandates that are rigid and often unchangeable.

By definition, a First Nation in the treaty process must have a mandate from all its constituents, wherever they live, in order to enter treaty negotiations. In addition, First Nations negotiators work "closer to home." Therefore they generally have substantial authority to shape negotiations. However, their mandate is sometimes not clearly formulated.

In some cases over the past year, discussions have been interrupted because of these asymmetrical approaches. Either the federal or provincial negotiators could not move from their positions or First Nations negotiators had to spend considerable time in caucus. Clearly the solution lies somewhere in between. In the early stages of negotiations it may be appropriate to have free-ranging discussions without pressure on the parties to make

commitments. But as negotiations progress, negotiators must be able to make recommendations and commitments.

System Overlord

The treaty process is intended to be open to all First Nations in B.C. These First Nations are entitled to organize themselves in the manner of their choice.

The task of negotiating treaties with B.C. First Nations is one of increasing complexity. In 1991, the B.C. Claims Task Force estimated there could be up to 30 separate negotiations in the province. By June, 1994 41 First Nations had joined the process. Currently, 47 First Nations are involved.

The estimates of parties entering the process were low in 1991, in part because some First Nations have chosen to organize themselves differently than expected, resulting in more discrete groups. Some are organized in large, regional tribal groups, some in small local band structures, and others in hereditary systems.

Also, progress is being made more rapidly than estimated in 1991. Significant progress has been made in the past year. The parties generally moved quickly through Stage 2. There are 22 First Nations tables in Stage 3 framework negotiations and 11 in Stage 4 agreement-in-principle negotiations One year ago, there were seven First Nations in Stage S, and none in Stage 4. In the year ahead, most of the current 47 First Nations are expected to be in Stage S or 4 and some may well conclude agreements in principle.

In the spring of 1996, in order to meet these rising demands, the federal government began hiring additional chief negotiators and other staff. So far, however, the provincial government has not followed suit.

The process is a good one, the problem is a potential system overload. The ability of Canada and B.C. to meet this challenge must be examined carefully by the Principals and the Commission.

If resources are not increased to meet the demands of all tables, Canada and B.C. can set their own agendas by moving quickly with some First Nations and more slowly with others. Considerations for "fast-tracking" would then be controlled by Canada and British Columbia.

In the Commission's view, the pace must be set by the parties at each table, based on realistic assessments of the time required and the resources available.

Solutions can be found. In some cases, differential speed provides benefit to those First Nations in need of more time. In addition, groups that follow may benefit from work achieved by another group.

In other cases, First Nations within a common area, with common issues, may agree to have certain discussions at a multi-party table. This would enable First Nations with some common interests to influence the direction of subjects under discussion. If all parties agree, such discussions could become regional negotiations.

The federal and provincial governments have expressed interest in negotiating some issues on a regional basis. This makes sense. However, all parties in the negotiations must agree to this. If federal or provincial governments have a specific proposal for a regional table, and

the affected First Nations wish to consider it, the Commission will be available to facilitate discussions and assist in designing the process.

The issue of system overload, the unexpected number of First Nations at advanced stages, and the number of discrete First Nations in negotiations, must be addressed by the Principals. Otherwise the success to date of the treaty process, and its overall integrity, will be jeopardized.

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Fair-Share Funding

A major responsibility 0f the B.C. Treaty Commission is to allocate negotiation support funding to First Nations. Canada and British Columbia provide these funds.

Eighty per cent are a loan from Canada, and the remaining 20 per cent are a contribution, 60 per cent of which is from Canada and 40 per cent From British Columbia. A total of $23.846 million was provided for the 1995-96 fiscal year.

In order to guide the Commission, funding allocation criteria were jointly developed by Canada, B.C. and the First Nations Summit. These criteria are very general and take account of factors such as population, number of communities in a First Nation, size of traditional territory, location and travel requirements, number and complexity of territorial overlaps, and the anticipated complexity of issues to be negotiated.

Canada and British Columbia have also developed more detailed funding guidelines. These guidelines group First Nations into several ranges based on most of the above criteria. They also specify maximum funding amounts, or review limits, for each stage in the treaty process. When a First Nation reaches a review limit the Commission must assess whether circumstances justify further funding for that stage. However, in making allocations, the Commission has full discretion to consider other relevant factors. Over time, the Commission has refined its approach toward allocations to ensure that the allocations are as fair as possible.

The Commission uses building blocks" as its basic tool in making fair share allocations. These blocks represent varying dollar values, based on the size and number of communities in the First Nation. The blocks are amassed into an overall dollar value for each First Nation. Allocations are then proportioned to the dollars at hand. Now that negotiations are advancing into the more expensive stages of the process, the Commission multiplies the identified dollar amounts by a factor of 1.75 for First Nations in Stage 3 and in Stage 4 of the process. (This is less than the Stage 4 weighting of 2.5 called for in the funding guidelines. Given limited funding, a weighting of 2.5 would unacceptably skew allocations away from those First Nations in Stage 2.)

The funding levels contemplated by the guidelines would require almost twice the actual funding presently available to the Commission.

There are two factors that help to explain this shortfall. First, initial funding levels were apparently based on the expectation that 30 First Nations would enter the process, not the current 47. Second, the process has been working well, and progress through the early and less costly stages has been quicker than anticipated.

Last year, the Commission highlighted the effect of funding on the fairness of the process, and urged the Principals to review and resolve various funding issues. Intensive negotiations involving Canada, B.C., the First Nations Summit and the Commission followed. As a result,

the legal and other paper work was greatly simplified, and negotiation support funding levels are expected to rise, subject to Treasury Board approvals. The Commission encourages the Principals to continue this process of review to ensure that funding arrangements reflect a fair treaty process.

Of the $23.846 million available for allocations in 1995-96, $3 million was carried forward into 1996-97. The Commission decided to carry these funds forward because of the increasing needs of First Nations as they move into the more expensive phases of the process. As a result, a total of ~28~3 million ($25.3 million in table on previous page plus the $3 million) is available for allocation in 1996-97. The carry-over exists because, for various reasons, some First Nations were unable to use their allocations fully

The Commissioners continue to be concerned that the amount of negotiation support funding will fall short of what is needed for fair, efficient and effective negotiations. This is a possibility as more First Nations enter the treaty process and as more reach the complex Stage 4. The shortfall will increase, as is already foreseen at certain tables, if Stage 4 negotiations take longer than the two years assumed in the funding guidelines.

The Commission is currently engaged in a cost study that will help it to make more definitive four-year funding projections to the Principals. In the meantime, the Commission urges the Principals to remember Recommendation 11 of the 1991 Report of the B.C. Claims Task Force: "The First Nation, Canadian and British Columbia negotiating teams be sufficiently funded to meet the requirements of negotiations."

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Interim Measures

Conflicts about the ability to negotiate interim measures continue to jeopardize the treaty process. This issue primarily involves the provincial government because of its refusal to consider interim measures until late in Stage 4. In the Commission's view this policy does not reflect the intent of the B.C. Claims Task Force, which recommended that the parties negotiate a range of interim measures before or during the treaty negotiations when an interest is being affected which could undermine the process.

The Treaty Commission believes that a procedure for negotiating interim measures is essential to the treaty process. It will take time to negotiate treaties, and interim measures are the appropriate mechanism to address circumstances in which the interests of First Nations and those of Canada or B.C. are in conflict. The negotiation of interim measures agreements is an important sign that the federal and provincial governments are committed to resolving land and resource issues.

Interim measures are also a means to avoid blockades and litigation by First Nations. Canada and B.C. have a policy of not negotiating with First Nations who blockade or proceed with litigation on aboriginal rights. Therefore, interim measures are integral to treaty negotiations.

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 being destroyed or consumed before trial.

But the ability to negotiate interim measures does not mean that such measures are always required. They are not substitutes for a treaty They can provide varying degrees of protection for First Nations' interests. The extent of that protection must be negotiated. B.C. must consider a First Nation's stated interests and balance those interests with other competing interests. The range of options spelled out in the B.C. Claims Task Force Report is broad. Interim measures may include:

Notice to the affected First Nation before action is taken, on matters that are, or may become the subject of negotiations;

- Consultation with the First Nation affected by a proposed action:
- Consent of the First Nation before action is taken
- Joint management processes requiring consensus of all the parties:
- Restriction or moratorium on the alienation of land and resources.

The degree of protection may justifiably increase as the parties move farther into negotiations. B.C.'s policy allows for full protection, such as restriction on alienation, when the parties have substantially agreed on the lands and resources that are likely to form part of the final settlement. But the policy provides little, if any protection at earlier stages of the process.

Provincial treaty negotiators have no mandate to negotiate interim measures before substantive agreements are reached. So when these issues arise at the table and they often do, there is no way to resolve them, except to refer the First Nation to the appropriate line ministry.

The line ministries are instructed to consult with First Nations in accordance with their legal responsibilities to avoid infringing upon aboriginal rights. Different ministries, and different sections of the same ministries, seem to apply these legal tests inconsistently.

Consultation with line ministries is separate from the treaty process. It does not fulfill the intent of Task Force recommendation. All too frequently, First Nations have not been successful in negotiating interim measures with line ministries.

The Commission understands the concerns of third parties. When a First Nation raises an issue that conflicts with B.C.'s interest, the province has an obligation to balance the conflicting interests and in so doing, take into account the interests of affected third parties.

If these interim measures agreements are made in accordance with the Task Force recommendation, and if the need for them and their terms are properly explained, then the Commission is confident that third parties and members of the public will support interim measures.

"THE COMMISSION STRONGLY RECOMMENDS THAT BRITISH COLUMBIA RECONSIDER ITS REFUSAL TO NEGOTIATE THE FULL RANGE OF OPTIONS FOR INTERIM MEASURES DURING THE EARLIER STAGES OF TREATY NEGOTIATIONS"

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Overlapping Claims

The signing of the Nisga'a agreement in principle in March 1996 brought into sharp relief another critical challenge facing the treaty process: the issue of territorial overlaps between two or more First Nations.

Should Canada and B.C. conclude an agreement with one First Nation concerning lands still subject to claim by another First Nation? Is it fair that one First Nation should hold up another from concluding an agreement? What are the alternatives?

First Nations are responsible for resolving overlap disputes. Thus, while all parties wrestle with these problems as they affect individual treaty negotiations, it is the Commission's view that the First Nations themselves must play, through the First Nations Summit, a major role in developing overlap protocols for resolving these disputes.

The Commission is available to provide advice on dispute resolution. It also has a duty to monitor the progress of overlap negotiations. In the coming year the Commission, in consultation with the Principals, intends to develop new policies about its role in addressing this critical issue.

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A Question of Openness

In December 1995, an independent consultant commissioned by the provincial and federal governments presented the Case Study Analysis on Social and Economic Impacts of Aboriginal Land Claim Settlements This analysis considers the nature and impact of modern treaties and land claim settlements elsewhere in Canada, as well as in Australia, New Zealand and the United States. The overall conclusion of this study is that contemporary agreements are best understood as "evolutionary in nature, rather than revolutionary."

The study also found that the level of non-aboriginal support for, or acceptance Of treaty negotiations and settlements is closely related to the availability of information.

Public information is a necessary component of a successful treaty negotiation process. The underlying principle is one of openness in providing information to the public about the negotiation process and the substantive issues under discussion and in allowing appropriate public access to negotiation tables.

In short, the public must have access to accurate and timely information on the progress and course of negotiations.

Balancing Openness and Confidentiality

A balance of openness and confidentiality, combined with broad public information programming, is the key to the success of the treaty process. Most main table talks are open to the public and, despite charges by some critics, information about negotiations is readily available

Treaty negotiations are hard work. They include complex social, policy and legal issues in which the parties seek to forge new relationships between aboriginal and non-aboriginal people.

Because of the nature of these negotiations, some discussions need to be conducted in confidence. Parties need time to explore interests and develop options in a safe and confidential environment. They need to develop trust among themselves. When they have narrowed the issues for continued discussion, the time should be appropriate for the talks to be open to the public. Main tables generally provide this opportunity. The public has everything to gain by supporting a process that allows for confidential exploratory discussions combined with open sessions.

Third-Party Consultations

This is a tripartite process, now established in legislation. Canada and B.C. have the responsibility to represent non-aboriginal interests in the negotiations. In order to carry out

this responsibility, these two governments have a duty to consult with those interests in the communities and regions likely to be affected.

B.C. and Canada have established the Treaty Negotiation Advisory Committee (TNAC), various regional advisory committees (RAC), treaty advisory committees (TAC), and local advisory committees (LAC). Respectively these represent sectoral, regional, local government and community interests.

The structures that now exist should provide the opportunity for those affected by negotiations to offer advice to these two governments about how their interests may be taken into account.

In some areas, there are critics who say these consultation mechanisms are not working. However, in many areas of the province these committees are working well. Effective consultation can take place, and is taking place It is likely that the advisory committees will engage in more substantial work during Stage 4 of negotiations.

"THE COMMISSION RECOMMENDS THAT CANADA AND BRITISH COLUMBIA CONTINUE THEIR EFFORTS TO ENSURE THAT EFFECTIVE CONSULTATION TAKES PLACE WITH NON-ABORIGINAL INTERESTS."

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Resources

"The Commission recognizes the need to expand its role in the field of public information and education, and is determined to meet this challenge. The Commission recommends that the Principals continue and increase efforts to inform and educate the public about the treaty-making process, and find additional and innovative ways to meet this responsibility."

Resource Materials

People wishing to learn more about the treaty-making process may refer to the following:

- Aboriginal Peoples and Politics, Paul Tennant, UBC Press, 1990
- Contact and Conflict, Robin Fisher, UBC Press, 1977
- Treaty Talks In British Columbia, Chris McKee, UBC Press, forthcoming

Newsletters

The British Columbia Treaty Commission newsletter Update is available by phoning 1 800 665 8830

The Federal Treaty Negotiation Office newsletter Treaty News is available by phoning 1 800 665 9820

Videos

The two-part video Unfinished Business and Key Questions, produced by Knowledge Network, comes with a viewer's guide, and is available through the Commission office.

World Wide Web

Canada http://www.inac.gc.ca/
British Columbia http://www.aaf.gov.bc.ca/aat/