BC TREATY COMMISSION

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Letter of Transmittal

The Government of Canada has been reluctant to engage in treaty negotiations with a First Nation that is pursuing aboriginal rights-related litigation against the government.

The reasons given include the potential for legal prejudice to Canada as a litigant. Of concern, too, is the cost to Canada, particularly if the federal government is providing test case funding to the First Nation. There is also the possibility that progress at the negotiation table will be affected by litigation.

The Treaty Commission recognizes Canada's need to reconsider the continuance of negotiations if any of these negative consequences are likely to occur. However, not all litigation is incompatible with treaty negotiations. The Treaty Commission became concerned during 1996 with the number of treaty negotiations that had been delayed while Canada contemplated suspensions because of litigation despite the low likelihood of the negative consequences described above.

Discussions were initiated by the Treaty Commission in late 1996 and early 1997 with federal government representatives. Since then, Canada has made significant progress in resolving litigation-related issues and in recognizing that not all litigation is incompatible with negotiations. This has allowed First Nations involved in litigation to recommence or continue negotiations.

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Executive Summary

As the independent and impartial keeper of the treaty process, the British Columbia Treaty Commission has the responsibility to oversee all treaty negotiations within the province, with the exception of the Nisga'a negotiations.

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

There are now 50 First Nations in the B.C. treaty process and 27 negotiating tables are in Stage 4, agreement in principle negotiations. At least eight more First Nations are expected to be in Stage 4 in the coming year for a total of 35. This is progress.

There are more First Nations in negotiations, organized into smaller groups, than was initially anticipated by the B.C. Claims Task Force. These developments have prompted the Commissioners to re-examine the definition of First Nation in the Treaty Commission mandate.

The Treaty Commission recognizes the need to remain flexible in determining what is a First Nation for treaty purposes. The challenge is to be fair, yet reinforce the concept of nationhood to preserve the integrity of the process. The Treaty Commission urges First Nations, wherever possible, to join with others in the treaty process.

There are some factors that should allow the public governments to sustain more tables. First, the Treaty Commission has observed that some First Nations are able to negotiate effectively and have a plan to implement their treaty. Other First Nations need more time to organize their negotiations. Those that move more slowly will reduce somewhat the pressures on federal and provincial resources for negotiations.

Second, some First Nations are beginning to work together, merging their negotiations or negotiating common issues at common tables. If this trend continues, more First Nations should be able to progress through Stage 4.

Nonetheless, the Treaty Commission believes that changes need to be made to the process to enable Canada and B.C. to accommodate even more negotiating tables in Stage 4.

As recommended in the our last annual report, a special committee appointed by the Principals and chaired by the Treaty Commission began meeting in November to address this "system overload" issue. A report, arising from the committee's work, was prepared by the Treaty Commission and is being considered by the Principals.

Canada and British Columbia must ensure that their commitment to negotiate treaties with all First Nations in B.C. remains firm over the long term. First Nations that require more time for

negotiations should be able to take it without fear their place at the treaty table will disappear.

Interim measures will play an increasingly important role as it becomes apparent that some First Nations' negotiations will take more time than was anticipated. The Treaty Commission is pleased to see the Province reaffirm its commitment to negotiate the full range of interim measures at any stage in the process.

Canada has been reluctant to engage in treaty negotiations with a First Nation that is pursuing aboriginal rights-related litigation against the government. So, discussions were initiated by the Treaty Commission with federal government representatives. Since then, Canada has made significant progress in resolving litigation-related issues and in recognizing that not all litigation is incompatible with negotiations. This has allowed First Nations involved in litigation to recommence or continue negotiations.

In its last annual report, the Treaty Commission called on the First Nations Summit to take a leading role in developing protocols for resolving overlap disputes between First Nations. A voluntary, three-step protocol was formally adopted by the Summit in May 1997. Many First Nations have traditional methods to resolve overlaps but may now also choose the Summit protocol.

Overlap disputes should be resolved before the conclusion of Stage 4 as clarity and certainty of First Nation territorial boundaries and rights within a territory are required to bring finality to the issues on the treaty table.

Canada and British Columbia should have consistent policies on negotiating treaty rights within disputed territory that encourage First Nations to resolve their overlap disputes in a timely manner.

The Treaty Commission previously highlighted the effect of funding on the fairness of the process, and urged the Principals to review and resolve various funding issues. In the past, intensive negotiations involving Canada, British Columbia, the First Nations Summit and the Treaty Commission have resulted in an increase in funding levels to support negotiations.

The Treaty Commission asks the Principals to continue this process of review to ensure that funding arrangements do get adjusted as required to make the treaty process fair. This is particularly significant as more First Nations move into Stage 4, the most costly stage in the process to date.

The three parties are negotiating difficult issues; treaties will define jurisdiction, rights and responsibilities. Progress toward treaties will require the goodwill and commitment not only of the Principals and the parties at each negotiation table, but also of the public at large.

All negotiating tables operate under openness protocols, negotiated during the early stages of the process, which provide for main table negotiating sessions to be open to the public unless the chief negotiators agree otherwise.

Open sessions work well in framework negotiations and in the early stages of agreement-in-principle negotiations. Interested people are able to learn about the issues under negotiation. However, once the negotiations advance, the difficult task of finding solutions begins. If the only forum for negotiations is open, there will be little opportunity for the parties to have a safe environment in which they can explore options and look for innovative solutions.

The Treaty Commission recommends that the three parties in agreement in principle negotiations ensure that, in addition to public main tables, there is sufficient working time for chief negotiators to have wide-ranging, non-prejudicial discussions on ways to resolve the complex issues on the negotiating table.

Third party consultation remains an essential component of the treaty process, but is separate from the actual treaty negotiations. From Treaty Commission observations, the consultative advisory process is evolving and improving as people become more experienced in its use, and where it is given a chance to work.

In addition, British Columbians require an independent source of information to understand the historical, legal and economic reasons for treaty making, the process for settlement and the issues under negotiation. So, the Treaty Commission is assuming an expanded role in public information. However, the federal and provincial governments share a major responsibility for public information and education which the Treaty Commission cannot replace and which should not be abandoned.

Based on the Treaty Commission's experience over the past 3-1/2 years, the treaty process is firmly established. The majority of First Nations people are represented in negotiations. Progress is being made. Inevitably problems will arise which may undermine that progress and the Treaty Commission must step in to help resolve those problems.

The Treaty Commission asks the Principals to consider its assessment of the treaty process and its recommendations in this fourth annual report to ensure that unresolved issues do not stand in the way of progress in negotiations.

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Role & Composition of the Commission

The three Principals in the British Columbia treaty process are the First Nations Summit, the Government of Canada and the Government of British Columbia.The First Nations Summit represents those First Nations participating in the B.C. treaty process.

Together, the three Principals established the B.C. Claims Task Force in 1990 and accepted all 19 of its recommendations to create the B.C. Treaty Commission and the treaty process. The subsequent Treaty Commission Agreement is supported by federal and provincial legislation and by a resolution of the First Nations Summit.

The B.C. treaty process is new to British Columbians. It began in September 1992 with the signing of a tripartite agreement to establish the British Columbia Treaty Commission. In December 1993 the Treaty Commission began receiving Statements of Intent from First Nations wanting to enter the treaty process.

In establishing the treaty process, the three Principals accepted the Claims Task Force recommendation that First Nations, Canada and British Columbia establish a new relationship based on mutual trust, respect, and understanding through political negotiation. To achieve this new relationship, the Task Force envisaged that the negotiations would be fairly conducted and that the parties would be equal participants on a government to government basis.

The Claims Task Force stressed that "recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be a hallmark of this new relationship."

As keepers of the B.C. treaty process, the Treaty Commission has five members: a Chief Commissioner chosen by agreement of the three Principals; two Commissioners selected by the First Nations Summit; a Commissioner appointed by Canada; and a Commissioner appointed by British Columbia. The full-time Chief Commissioner is appointed for a three-year term. Commissioners serve two-year terms.

The Treaty Commission's independence is reflected in its composition and in the way it makes decisions. Commissioners do not represent the Principals that appoint them, but act independently. Decisions require both a quorum and the support of one appointee of each of the Principals.

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

Responsible for accepting First Nations into the treaty process, the Treaty Commission assesses when the parties are ready to start negotiations. It develops policies and

procedures applicable to the six-stage treaty process, monitors and reports on the progress of negotiations, identifies problems, offers advice and may assist the parties in resolving disputes. It also allocates funding, primarily in the form of loans, to First Nations. Commissioners and staff regularly travel to all regions in British Columbia.

In addition to the five Commissioners, the Treaty Commission employs a full-time staff of twelve and a part-time staff of five. The operating budget for the fiscal year covered by this report was $1.86 million.

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Keeper of a six-stage process

"The six-stage process is described in the BC Claims Task Force Report of 1990 and incorporated in the tripartite Treaty Commission Agreement of 1992."

STAGE 1: Statement of Intent to Negotiate

A First Nation files with the Commission a Statement of Intent (SOI) to negotiate a treaty. To be accepted by the Treaty Commission, the SOI must meet several criteria. It must identify for treaty purposes the First Nation's governing body and the people it represents and show that it has a mandate from those people to enter the process. The statement must describe the geographic area of the First Nation's distinct traditional territory in B.C. and identify any overlaps with other First Nations. The First Nation must also name a formal contact person.

STAGE 2: Readiness to Negotiate

The Treaty Commission must convene an initial meeting of the three parties within 45 days of accepting a Statement of Intent. For many First Nations, this will be the first occasion on which they sit down at a treaty table with representatives of Canada and British Columbia.

This meeting allows the Treaty Commission and the parties to exchange information, consider the criteria for determining the parties' readiness to negotiate, and generally identify issues of concern.

Referred to as 45-day meetings, they usually take place in the traditional territory of the First Nation. Subsequently, when the Treaty Commission determines all three parties have met the criteria for readiness, it will declare the negotiating table ready for meetings to begin on a framework agreement.

STAGE 3: Negotiation of a Framework Agreement

The framework agreement is, in effect, the "table of contents" for negotiation of a comprehensive treaty.The three parties identify the subjects to be negotiated, goals, procedural arrangements, and a timetable for negotiations. They may also identify milestones that should be reached at specified stages in the process. The parties must also start a public information program for their negotiating table that will continue throughout negotiations.

Canada and B.C. engage in public consultation at the regional and local levels through Regional Advisory Committees and sometimes through Local Advisory Committees, as well. Municipal governments participate through Treaty Advisory Committees. 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 where treaty negotiations begin. The three parties examine in detail the elements of their framework agreement. The goal is to reach the major agreements which will form the basis of the treaty.

These agreements will identify and define a range of rights and obligations, including existing and future interests in land, sea and resources, structures and authorities of government, regulatory processes, amending processes, dispute resolution, fiscal arrangements, and so on.

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 intended to result in a mandate to conclude a treaty.

STAGE 5: Negotiation to finalize a Treaty

The treaty formalizes the new relationship among the parties and embodies the agreements reached in the agreement in principle. Technical and legal issues will be resolved. A treaty is a unique constitutional instrument to 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. Plans to implement the treaty will be carried out. All aspects of the treaty will be realized and with continuing goodwill, commitment and effort by all parties, the new relationship wil come to maturity.

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Treaty Commissioners

Chief Commissioner
Alec Robertson, Q.C.

First Nations Summit Commissioners
Wilf Adam
Miles Richardson

Government of Canada Commissioner
Peter Lusztig

Province of British Columbia Commissioner
Barbara Fisher

The Treaty Commission has five members who serve two-year term:

- a full-time Chief Commissioner chosen by the Principals for three years
- two Commissioners selected by the First Nations Summit
- a Commissioner appointed by Canada
- a Commissioner appointed by B.C.

Commissioners returning for two more years

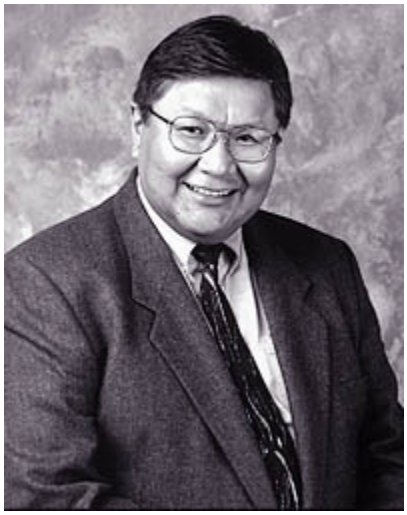
Commissioners will be working together for another two years following announcements in April 1997 by the First Nations Summit, Canada and British Columbia.

Wilf Adam and Miles Richardson return for second terms as appointees from the First Nations Summit. Peter Lusztig is appointed for a second term by the Government of Canada and Barbara Fisher has accepted her third consecutive appointment from the Government of British Columbia.

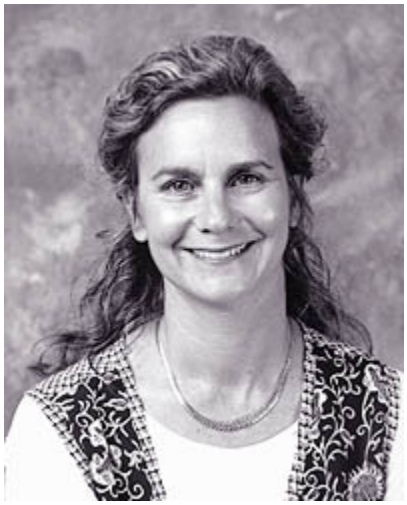
The reappointments bring stablility and continuity to the Treaty Commission at a time when most of the tables will be in Stage 4 negotiations and facing the most difficult issues which must be resolved.

About the Commissioners

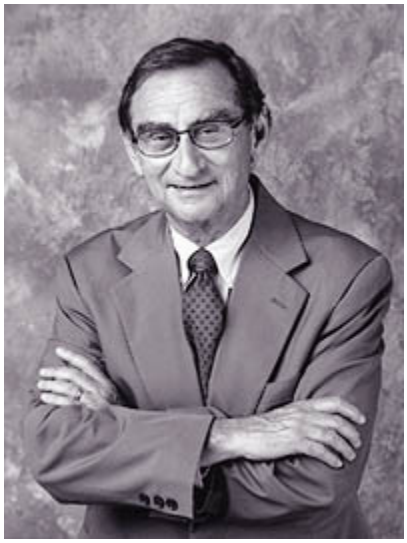
Alec Robertson was a partner with Davis and Co. until his appointment as Chief Commissioner to a three-year term on May 15, 1995. Among his many community activities, Mr. Robertson has served as President of the B.C. Branch of the Canadian Bar Association, Chair of the Law Foundation of B.C., and as a member of the Gender Equality Task Force of the Canadian Bar Association. He was born in Victoria and earned a Bachelor of Commerce (1955) 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.



Wilf Adam became a Commissioner in April 1995. He was re-elected for a further two years in April 1997. He is a former Chief Councilor of the Lake Babine Band and former chair of the Burns Lake Native Development Corporation. Mr. Adam is a co-founder of the Burns Lake Law Centre. He was born in Burns Lake and raised at Pendleton Bay. In 1985, he completed a course in Business Management at the College of New Caledonia in Prince George.



Barbara Fisher was first appointed Commissioner in April 1993, and was appointed to a third, two-year term in April 1997. Formerly General Counsel and Vancouver Director of the Office of the Ombudsman, Ms. Fisher also practises as part-time counsel to the B.C. Information and Privacy Commissioner. She earned her Bachelor of Laws (1981), her Bachelor of Fine Arts (1976) and her Diploma in Education (1977) from the University of Victoria, and her A.R.C.T. from the Royal Conservatory of Music.



Peter Lusztig was appointed to the Commission in April 1995 to a two-year term and re-appointed in April 1997. 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. Mr. Lusztig earned his Bachelor of Commerce from the University of British Columbia (1954) his MBA from the University of Western Ontario (1955) and his PhD from Stanford University (1965).

Miles Richardson became a Commissioner in November 1995. He was appointed to a second term in April 1997. Formerly a President of the Council of the Haida Nation, he was a member of the First Nations Summit Task Group from 1991 to 1993. Mr. Richardson was a member of the B.C. Claims Task Force, whose report and 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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Negotiation Tables

As of May 30, 1997 there are 50 First Nations participating in the B.C. treaty process:

Negotiation Tables in Stage 2

Cheslatta Carrier Nation
Council of the Haida Nation
Gwa'Sala-'Nakwaxda'xw
Katzie Indian Band
Kwakiutl First Nation
Kwakiutl Laich-Kwil-Tach Council of Chiefs
Namgis First Nation
Pacheedaht Band
Quatsino First Nation
Tanakteuk First Nation
Tlatlasikwala First Nation

Total Stage 2 = 11

Negotiation Tables in Stage 3

Alkali Lake Indian Band
Cariboo Tribal Council
Hul'qumi'num Tribes
Ktunaxa/Kinbasket Tribal Council
Lake Babine Nation
Musqueam Nation
Nazko Indian Band
Oweekeno Nation
Squamish Nation
Sto:Lo Nation
Tsawwassen First Nation
Xaxli'p First Nation (Fountain Band)

Total Stage 3 = 12

Negotiation Tables in Stage 4

Carrier Sekani Tribal Council
Champagne and Aishihik First Nations
Ditidaht First Nation
Gitanyow Hereditary Chiefs
Gitxsan Hereditary Chiefs
Haisla Nation
Heiltsuk Nation
Homalco Indian Band
In-SHUCK-ch/N'Quat' Qua
Kaska Dena Council
Klahoose Indian Band
Lheidli T'enneh Nation
Nanaimo First Nation
Nuu-chah-nulth Tribal Council
Sechelt Indian Band
Sliammon Indian Band
Taku River Tlingit First Nation
Te'Mexw Treaty Association
Teslin Tlingit Council
Ts'kw'aylaxw First Nation (Pavilion Band)
Tsay Keh Dene Band
Tseil-Waututh Nation (Burrard Band)
Tsimshian Nation
Westbank First Nation
Wet'suwet'en Nation
Yale First Nation
Yekooche Nation

Total Stage 4 = 27"

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History and Progress

December 1990	B.C. Claims Task Force formed.
June 1991	B.C. Claims Task Force Report.
September 21 1992	B.C. Treaty Commission Agreement between First Nations Summit, Canada and B.C.
April 1993	First Treaty Commissioners appointed.
May 1993	First Nations Summit resolution establishing B.C. Treaty Commission.
May 1993	BC Treaty Commission Act passed by the B.C. Legislature.
December 1993	Treaty Commission begins receving Statements of Intent. 29 First Nations file statements to negotiate treaties.
June 1994	Treaty Commission publishes first Annual Report; has accepted 41 Statements of Intent from First Nations to negotiate treaties.
June 1995	Treaty Commission publishes second Annual Report; has accepted 43 Statements of Intent from First Nations to negotiate treaties; 7 First Nations in Stage 3.
December 1995	B.C. Treaty Commission Act passed by federal Parliament.
March 1 1996	B.C. Treaty Commission Act proclaimed by Canada, B.C. and First Nations Summit resolution.
June 1996	Treaty Commission publishes third Annual Report; has accepted 47 Statements of Intent from First Nations to negotiate treaties; 14 First Nations in Stage 2; 22 First Nations in Stage 3; 11 First Nations in Stage 4.

May 1997 Treaty Commission has accepted 50 Statements of Intent from First Nations to negotiate treaties; 11 First Nations in Stage 2; 12 First Nations in Stage 3; and 27 First Nations in Stage 4.

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Resolving First Nation Overlaps

All tables operate under openness protocols negotiated during the early stages of the process. The protocols provide for main table negotiating sessions to be open to the public unless the chief negotiators agree otherwise.

The main table is the forum for chief negotiators to discuss issues and negotiate towards agreement. Side tables and working groups normally do the preparatory work for main tables. Chief negotiators do not usually attend side tables or working groups.

Open sessions work well in framework negotiations and in the early stages of agreement-in-principle negotiations. Interested people are able to learn about the issues under negotiation. However, once agreement-in-principle negotiations advance, the difficult task of finding solutions begins. If the only forum for negotiations is open, there will be little opportunity for the parties to have a safe environment in which they can explore options and look for innovative solutions.

The public has everything to gain by supporting a process that allows the participants at the negotiating table to discuss periodically some issues away from the spotlight. When the parties have narrowed the issues for continued discussion, the talks should be open to the public. But there need to be negotiating forums which provide an environment where the parties can seek out common ground beyond firmly held positions.

There need to be negotiating forums which provide an environment where the parties can seek out common ground beyond firmly held positions. The public has everything to gain by supporting a process that allows the negotiators to discuss periodically some issues away from the spotlight.

"The Treaty Commission recommends that the three parties in agreement in principle negotiations ensure that, in addition to public main tables, there is sufficient working time for chief negotiators to have wide-ranging, non-prejudicial discussions on ways to resolve the complex issues on the negotiating table."

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First Nations for Treaty Purposes

A First Nation for treaty purposes in B.C. is defined as an aboriginal governing body, organized and established by aboriginal people with a mandate from its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia. This is the definition that was given by the Principals to the Treaty Commission to apply in the treaty process.

The B.C. Claims Task Force concept of First Nations, when it developed the B.C. treaty process, was "self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life."

Recent developments have prompted the Commissioners to re-examine the definition of First Nation in the Treaty Commission mandate. There are more First Nations in negotiations, organized into smaller groups, than was initially anticipated by the Task Force. Of the 50 First Nations in the B.C. treaty process as of May 30, 1997, 34 are band-based, 13 are tribal groups of which two are Yukon-based, and three are based on hereditary systems.

The First Nation governing body and the people it represents must be the appropriate body and people for government to government treaty negotiations with Canada and B.C. over lands and resources, self governance, fiscal arrangements and other issues.

In order to administer a definition of First Nation appropriate to treaty negotiations the Treaty Commission believes several requirements must be met. First, the governing body of a First Nation must be organized and established by the aboriginal people themselves including constituents living on and off reserve. It is essential that the same people who will ratify the treaty support the organization which is negotiating on their behalf.

Second, the governing body and its aboriginal people must have a traditional territory that is distinctly their own. If two communities each claim the same traditional territory in its entirety, there has to be a real question as to whether they are two First Nations or one First Nation with two communities.

Third, the governing body and the people it represents must be the appropriate body and people for government to government treaty negotiations with Canada and B.C. over lands and resources, self governance, fiscal arrangements and other important issues. This implies a size and degree of established organization that not only justifies the resolution of these issues but will likely result in their fair resolution.

The Treaty Commission recognizes the need to remain flexible in determining what is a First Nation for treaty purposes. It is a concept more than a definition. The challenge is to be fair, yet reinforce the concept of nationhood to preserve the integrity of the process.

There are currently two examples of First Nations sharing resources and working together to negotiate treaties. The Pacheedaht Nation and Dididaht Nation aim to complete their negotiations in a more efficient and effective manner by cooperating to negotiate a single agreement in principle. Six northern Kwa'kwala speaking Nations are working cooperatively in treaty negotiations and bringing their common interests to one main negotiating table. The Treaty Commission anticipates that other First Nations will seek similar arrangements.

"The Treaty Commission recommends that First Nations, wherever possible, join with others in the treaty process."

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Human Resource Requirements Rising

As reported last year, there are more First Nations in the six-stage treaty process than was initially anticipated by the B.C. Claims Task Force, and most have been proceeding through the early stages more quickly than expected.

There are 50 First Nations in the process and 27 negotiating tables are in Stage 4. At least eight more First Nations are expected to be in Stage 4 in the coming year for a total of 35.

This places substantial demands on the federal and provincial governments. Both public governments acknowledge that, in time, the human and financial resources provided to support their negotiating teams will not be sufficient to sustain substantive negotiations simultaneously with all First Nations currently in the process.

Each of five regional teams for both the federal and provincial governments are currently responsible for an average of nine to 11 negotiating tables. Many of the tables are in negotiation toward agreement in principle.

For framework and the early stages of agreement-in-principle negotiations, this structure works reasonably well. Once substantive agreement-in-principle negotiations advance, experience has shown that one negotiating team only can sustain a few active tables. At the most intensive stage of negotiations, each negotiating table may require one dedicated team of negotiators and expert support in order to conclude an agreement.

The Treaty Commission believes that some changes need to be made to the process to enable Canada and B.C. to accommodate even more negotiating tables in Stage 4.

There are some factors that should allow the public governments to sustain more tables. First, the Treaty Commission has observed that some First Nations are able to negotiate effectively and have a plan to implement their treaty. Other First Nations need more time to organize their negotiations. Those that move more slowly will reduce somewhat the pressures on federal and provincial resources for negotiations.

Second, some First Nations are beginning to work together, merging their negotiations or negotiating common issues at common tables. If this trend continues, more First Nations should be able to progress through Stage 4.

Nonetheless, the Treaty Commission believes that changes need to be made to the process to enable Canada and B.C. to accommodate even more negotiating tables in Stage 4.

As recommended in the Treaty Commission's last annual report, a special committee appointed by the Principals and chaired by the Treaty Commission began meeting last November to address this issue of "system overload". A report, arising from the committee's work, was prepared by the Treaty Commission and is being considered by the Principals.

Canada and British Columbia must ensure that their commitment to negotiate treaties with all First Nations in B.C. remains firm over the long term. The treaty process was initially designed to accommodate negotiating tables proceeding at different paces. First Nations who require more time should be able to take it without fear their place at the treaty table will disappear. Interim measures will play an increasingly important role, as it becomes apparent that some First Nations negotiations will take more time than anticipated.

"The Treaty Commission recommends that Canada and British Columbia ensure their commitment to negotiate treaties with all First Nations in B.C. remains firm over the long term."

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Public Information Role Expanding

The Treaty Commission is assuming an expanded role in public information recognizing the important part is has to play in promoting understanding of the B.C. treaty process.

British Columbians require an independent source of information to understand the historical, legal and economic reasons for treaty making, the process for settlement and the issues under negotiation.

Public information planning and effort must be forward looking to match growing public interest in treaty negotiations. Commissioners expect that interest will rise as agreements in principle emerge over the next two to five years.

Establishing the internal capacity to manage public information has been the Treaty Commission's first priority. A communication committee, comprising commissioners and staff, chaired by the Chief Commissioner has been created and a communications manager hired to help develop and implement the Treaty Commission's expanded public information program.

British Columbians require an independent source of information to understand the historical, legal and economic reasons for treaty making, the process for settlement and the issues under negotiation.

As part of this program, the Treaty Commission is working in cooperation with educators to ensure there are appropriate information materials on the B.C. treaty process in the classroom.

The Treaty Commission is strengthening its reporting capability to British Columbians on the status of negotiations through regular editions of Treaty Commission Update. With the addition of a manager, the Treaty Commission will be more accessible and responsive to information requests. This responsibility includes responding to media requests for information and encouraging media interest in treaty making.

A web site which will improve access to current information is under development for launch later this year. The Treaty Commission is planning for the site to become a venue for discussion on treaty negotiations.

Video is being used to reach both youth and adults. The Treaty Commission is distributing a two-part video Treaty Making in B.C. along with a companion discussion guide to all school resource centres and libraries in the province.

In its last annual report, the Treaty Commission acknowledged the need to expand its role in the field of public information and indicated its determination to meet this challenge.

However, the federal and provincial governments share a major responsibility for public information and education which the Treaty Commission cannot replace and which should not be abandoned.

"The Treaty Commission recommends the Principals continue to expand their efforts to inform and educate the public about the treaty-making process."

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Third Party Consultation

Canada and British Columbia are responsible for representing non-aboriginal interests and consulting with those interests throughout the treaty process.

As the B.C. Claims Task Force noted, "the two public governments face a major challenge in properly representing the full range of non-aboriginal interests in negotiations. As the treaties will cover a variety of political, economic and social issues, as well as the ownership of and jurisdiction over land, sea and resources, they will significantly affect British Columbians and other Canadians.

" A wide range of groups want to participate in the development of treaties with First Nations. This interest should be encouraged. If treaties are to establish a workable new relationship, it is essential that these groups have the opportunity to contribute to their development. To achieve this, the federal and provincial governments must establish effective ways of consulting with non-aboriginal interest groups."

Third party consultation is an essential component of the treaty process, but is separate from the actual treaty negotiations.

Third party consultation is an essential component of the treaty process, but is separate from the actual treaty negotiations. Consultation is happening through several different public avenues. The Treaty Negotiation Advisory Committee (TNAC), regional advisory committees (RACs), treaty advisory committees (TACs), and local advisory committees (LACs) provide opportunities for those affected by negotiations to discuss issues with chief negotiators and their negotiating teams. These advisory groups represent sectoral, regional, local government and community interests.

The treaty process benefits most when those in an advisory role represent their constituents, understand the treaty process and constructively approach the issues which need to be resolved at the negotiating table.

From Treaty Commission observations, the consultative advisory process is evolving and improving as people become more experienced in its use, and where it is given a chance to work.

The three parties to the negotiating table also maintain public information working groups (PIWGs) to actively provide information in communities where treaty negotiations are underway.

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Openness

All tables operate under openness protocols negotiated during the early stages of the process. The protocols provide for main table negotiating sessions to be open to the public unless the chief negotiators agree otherwise.

The main table is the forum for chief negotiators to discuss issues and negotiate towards agreement. Side tables and working groups normally do the preparatory work for main tables. Chief negotiators do not usually attend side tables or working groups.

Open sessions work well in framework negotiations and in the early stages of agreement-in-principle negotiations. Interested people are able to learn about the issues under negotiation. However, once agreement-in-principle negotiations advance, the difficult task of finding solutions begins. If the only forum for negotiations is open, there will be little opportunity for the parties to have a safe environment in which they can explore options and look for innovative solutions.

The public has everything to gain by supporting a process that allows the participants at the negotiating table to discuss periodically some issues away from the spotlight. When the parties have narrowed the issues for continued discussion, the talks should be open to the public. But there need to be negotiating forums which provide an environment where the parties can seek out common ground beyond firmly held positions.

There need to be negotiating forums which provide an environment where the parties can seek out common ground beyond firmly held positions. The public has everything to gain by supporting a process that allows the negotiators to discuss periodically some issues away from the spotlight.

"The Treaty Commission recommends that the three parties in agreement in principle negotiations ensure that, in addition to public main tables, there is sufficient working time for chief negotiators to have wide-ranging, non-prejudicial discussions on ways to resolve the complex issues on the negotiating table."

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Interim Measures Important

The Government of British Columbia and the First Nations Summit extended the First Nation Recognition Protocol in September 1996, renewing their commitment to a government-to-government process for resolving interim measures.

The signing of the protocol was followed in December 1996 by a letter from the Aboriginal Affairs Deputy Minister confirming British Columbia's commitment to negotiate the full range of interim measures at any stage in the process. This is a positive step.

First Nations have concerns about development in their traditional territories which may become the subject of the negotiations. Interim measures are seen as essential to balance conflicting interests, and where critical, to protect lands, waters, air and resources which might form part of a treaty settlement. The B.C. Claims Task Force saw interim measures as an early indication of the parties' commitment to treaty negotiations.

The five options for interim measures spelled out in the Claims Task Force Report are:

- 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

Interim measures became a politically sensitive issue for British Columbia. There were fears such measures as moratoria would freeze all resources while treaty negotiations are underway. It is important to remember, however, that the three parties must negotiate to determine which of the five options is appropriate in the given circumstances.

In its last annual report, the Treaty Commission stressed the need for the three parties to be able to discuss interim measures at any stage in treaty negotiations. The Treaty Commission is pleased to see the Province reaffirm its commitment to negotiate the full range of interim measures at any stage in the process.

Interim measures have a special importance for all First Nations but especially for those who may be required by circumstance to proceed at a slower pace. Interim measures provide the time and security for First Nations to address the comprehensive and complex matters involved in treaty negotiations. The Treaty Commission believes it appropriate to remind the parties of the importance of this fundamental commitment.

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Litigation Affects Negotiations

The Government of Canada has been reluctant to engage in treaty negotiations with a First Nation that is pursuing aboriginal rights-related litigation against the government.

The reasons given include the potential for legal prejudice to Canada as a litigant. Of concern, too, is the cost to Canada, particularly if the federal government is providing test case funding to the First Nation. There is also the possibility that progress at the negotiation table will be affected by litigation.

The Treaty Commission recognizes Canada's need to reconsider the continuance of negotiations if any of these negative consequences are likely to occur. However, not all litigation is incompatible with treaty negotiations. The Treaty Commission became concerned during 1996 with the number of treaty negotiations that had been delayed while Canada contemplated suspensions because of litigation despite the low likelihood of the negative consequences described above.

Discussions were initiated by the Treaty Commission in late 1996 and early 1997 with federal government representatives. Since then, Canada has made significant progress in resolving litigation-related issues and in recognizing that not all litigation is incompatible with negotiations. This has allowed First Nations involved in litigation to recommence or continue negotiations.

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Fairness in Funding

Allocating funds to support First Nations in treaty negotiations is a primary responsibility of the Treaty Commission. Canada and British Columbia provide the money. Eighty per cent is a loan and 20 per cent is a contribution. Canada pays 100 per cent of the loan and 60 per cent of the contribution and B.C. pays 40 per cent of the contribution.

In total, $28.3 million was provided to First Nations for the 1996-97 fiscal year which included $3 million carried forward from 1995-96. A total of $30.3 million ($27.3 million plus $3 million carried forward) is available for allocation in 1997-98.

To guide the Treaty Commission in allocating funding, Canada, B.C. and the First Nations Summit together set very general criteria. These take into account 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 set maximum funding amounts, or review limits, for each stage in the treaty process. Review limits for Stage 4, however, are annual as it is difficult to accurately estimate how much time will be required to complete an agreement in principle.

$28.3 million for allocation in 1996-97

The Treaty Commission has full discretion to consider all relevant factors when making allocations. When a First Nation reaches a review limit, the Commission must determine whether circumstances justify additional funding for that stage. Over time, the Treaty Commission has refined its approach to allocations to ensure that distributions are as fair as possible.

$3 million carried forward into 1997-98 to meet needs of First Nations moving into more intensive and expensive treaty negotiations.

The Treaty 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.

Total $30.3 million ($27.3 million plus $3 million carried forward) available for allocation in 1997-98.

Given that negotiations are advancing into the more expensive stages of the process, the Treaty Commission multiplies the identified dollar amounts by a factor of 1.75 for First Nations in Stage 3 and by 2.5 for those in Stage 4.

No monies were held back for new entrants to the process.

In 1996-97 no attempt was made to recognize the varying intensities and anticipated duration of Stage 4 negotiations across the several negotiating tables. This is being done in 1997-98.

Two years ago, the Treaty Commission highlighted the effect of funding on the fairness of the process, and urged the Principals to review and resolve various funding issues. As a result of intensive negotiations involving Canada, B.C., the First Nations Summit and the Treaty Commission, funding levels to support negotiations did rise and the paperwork required was simplified.

The Principals should continue this process of review to ensure that funding arrangements do get adjusted as required to make the treaty process fair. This is particularly significant as more First Nations move into Stage 4, the most costly stage in the process to date.

A cost study started last year by the Treaty Commission is continuing to help it make a more definitive four-year funding projections for the Principals.

"THE TREATY COMMISSION RECOMMENDS THAT THE PRINCIPALS CONTINUE THE PROCESS OF REVIEW TO ENSURE THAT FUNDING ARRANGEMENTS DO GET ADJUSTED AS REQUIRED TO MAKE THE TREATY PROCESS FAIR."

Funding levels

Year	Original Level ,000)	Revised Level
1994-1995	$18,688	-
1995-1996	$23,846	-
1996-1997	$19,035	$25,300
1997-1998	$16,065	$27,300*
1988-1999	-	$28,000*
1999-2000	-	$28,000*

* subject to Treasury Board approval

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Exchanging Knowledge and Awareness

The Role of Openness in Treaty Negotiations

The British Columbia treaty process is the most open and accessible since modern treaty making with aboriginal peoples began in the mid 1970's.

British Columbia's aboriginal people represent the largest number of individuals with the greatest linguistic and cultural diversity organized into the largest number of communities and political organizations in Canada. Consequently, there will be many treaties. However, non-aboriginal people now constitute a significant majority of the population within the proposed settlement areas.

To be successful, the treaty process must reach out to both aboriginal and non-aboriginal British Columbians. It must inform. It must build trust and confidence. It must ensure that the interests of aboriginal and non-aboriginal British Columbians are heard and considered as the negotiating parties proceed through the various stages of a comprehensive, complex and sensitive set of negotiations.

The Commissioners believe that First Nations, Canada and British Columbia have demonstrated a clear commitment to this goal of an informed and supportive public. The evidence is the various initiatives the parties have undertaken since the beginning of the process.

Many First Nations devote a great deal of time and resources to receiving and providing information and developing mandates within their own communities. As well, most have organized or participated in forums at the local or regional level to better inform their neighbours.

B.C. and Canada have cooperated in the organization of the Treaty Negotiation Advisory Committee (TNAC), a group of some 31 industry, sectoral, labour and social organizations. The committee assists in identifying the interests which will inform the development of province-wide negotiating mandates.

Regional Advisory Committees have been formed to support negotiations at the regional and local levels and to reflect the unique circumstances which characterize the province's regional diversity.

A special place has been reserved for municipalities because of their delegated authority for local government matters through the creation of treaty advisory committees for all of the settlement areas.

Access to information about treaty issues and negotiations is available through videos, regional events, web sites, newsletters, toll free numbers and one-on-one access to negotiators, support staff and through the Treaty Commission.

Prior to the start of substantive negotiations, each of the negotiation tables agrees on an Openness Protocol. It details the steps to be taken to ensure that information flows from the negotiation table to aboriginal and non-aboriginal constituents in a useful way.

What is important about openness and how does it relate to the need for efficient and effective negotiations?

The treaty negotiation process has at least two major components. The first component is developing the mandate and the second is negotiating.

MANDATE DEVELOPMENT IS THE PROCESS THROUGH WHICH EACH PARTY DEVELOPS THE INSTRUCTIONS IT GIVES TO ITS NEGOTIATORS.

The mandate process must precede negotiations. However, it doesn't stop when negotiations begin. Mandates developed prior to negotiations reflect only the interests of one party. For an agreement to be effective and long lasting, it must satisfy a majority of the interests of all parties. Consequently, mandates must be reviewed and revised once all interests have been canvassed at the table.

It is essential that initial mandates be expressed as interests as opposed to positions. Interests describe what is important to people about a particular topic. Interests capture people's needs, desires, concerns and objectives. They are not what you have decided upon but rather what causes you to decide. There may be a number of options which can address those interests and the negotiation process is the key to uncovering the greatest number of possibilities.

Mandate development must be open and inclusive if it is to reflect the interests of a large and diverse constituency. The Treaty Commission has observed positive trends in that direction both from public governments and First Nations. But work must continue to assure aboriginal and non-aboriginal British Columbians that their interests are included in the instructions which negotiators bring to the table.

NEGOTIATION IS WHERE NEGOTIATORS SET THE AGENDA, EXCHANGE INFORMATION WITH EACH OTHER ABOUT THEIR RESPECTIVE INTERESTS, CREATE AND EVALUATE A RANGE OF SOLUTIONS, DECIDE ON THE MOST APPROPRIATE OUTCOMES AND TRANSLATE THEM INTO AN AGREEMENT.

Negotiations need an environment which will promote efficiency and effectiveness. The process must permit the parties to inform, exchange, create and evaluate. To do these things, there are times when the parties at the negotiating table must reach out to constituents through public sessions.

However, there are also times when the negotiators need to focus inward in an environment conducive to creative brainstorming. To do that, negotiators need to meet by themselves to build elements of personal trust through non-positional exchanges of information and interests away from the rhetoric of adversarial bargaining.

If the process does not provide for those needs in its structure and operating practices through periodic closed sessions, these exchanges and brainstorming will take place in coffee shops and hallways thereby eroding the public's confidence in the negotiation process. It is far better to recognize and provide for these sessions as part of a negotiation workplan that the aboriginal and non-aboriginal people can see, understand and appreciate.

The objectives of openness are not inconsistent with providing for private negotiating sessions as part of a workplan.

Openness in its various applications has at least four objectives:

- to inform aboriginal and non-aboriginal British Columbians about the purposes of treaties and the issues under negotiation;
- to ensure that the various elements of each party's constituency can voice their interests and needs;
- to contribute to an environment of public confidence and trust in the process; and
- to provide an understanding of the value of various settlement options, as the process unfolds, and to build a positive atmosphere for the eventual process of ratification.

These objectives must be achieved in a way that promotes efficient negotiations. Treaty making is expensive. First Nations are participants largely on the basis of loans against the value of their future settlement. Anything that delays the process, keeps the parties locked into positional and rhetorical dialogue and frustrates the process of creative brainstorming, will be costly for all the participants.

When the four objectives of openness are viewed against the need to create an effective environment for negotiations, the issue becomes selecting the most appropriate tools to achieve what needs to be a sensitive balance.

The public's need for information about treaty objectives and treaty issues, whether they are general or specific to a negotiating table, can be satisfied in a variety of ways. Tripartite information sessions for the general public and topic specific literature are a few examples.

Ensuring that constituencies' interests are heard and reflected will require a different approach. Each party's process for developing a mandate is the most appropriate forum to achieve this openness objective. Each party's initial mandate for negotiations should reflect the interests of its constituency. As negotiations proceed, that mandate must continue to be informed and refined by the exchange of knowledge and awareness of the other parties' interests.

The negotiating table is not the appropriate forum to ensure that constituents' voices and needs are heard. Promoting creative problem solving and abandoning adversarial negotiations isn't likely to happen if all negotiating sessions are open.

Confidence and trust in the process can only partly be achieved through openness. To truly achieve confidence and trust, the parties need to create treaty outcomes based on the shared general objectives of aboriginal and non-aboriginal British Columbians.

In their travels and discussions throughout the province, Commissioners and Treaty Commission staff have observed that most British Columbians want treaties that provide the means by which B.C.'s First Nations can achieve social and economic equality. They want to see the richness and diversity of B.C.'s aboriginal people preserved and protected. If the process is seen primarily as a land and resource reallocation, it will perhaps never be viewed with complete confidence and trust regardless of openness initiatives.

Openness is good business. It is also good business to let the negotiation process breathe. Openness serves important purposes, but it must give way from time to time to meet the needs of the negotiation process.

Now that 27 of the 50 B.C. First Nations are in stage 4 agreement-in-principle negotiations, it's time to let the parties move beyond the initial stages of negotiations by exchanging non-positional options to capture as many of the collective interests of the parties as possible.

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Resources

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

British Columbia Treaty Commission http://209.123.179.89/
Canada http://www.inac.gc.ca/
British Columbia http://www.aaf.gov.bc.ca/aat/
First Nations Summit http://www.firstnations-summit.bc.ca/