Commissioner Wilf Adam
First elected April 1995

Commissioner Jack Weisgerber
First appointed March 2002

Commissioner Jody Wilson
Elected March 2003

Commissioner Michael Harcourt
Appointed May 2003

Letter from the Commissioners

Last year we pronounced that treaties were within reach if the parties could clear the remaining, significant hurdles. As the views we have gathered in this report show, that process is underway and the new relationship being sought is beginning to take shape for some First Nations.

Three more agreements in principle have been ratified, bringing the total to four in the past 14 months. Negotiators for the parties hope to reach final agreements early in 2005. The Treaty Commission is committed to assisting these four tables achieve treaties and will support through active facilitation all those tables where the First Nations are ready and committed to moving forward.

We have been without a chief commissioner for the past six months. However, current conditions demand that we continue to act. We have developed a Mission Statement, which will set the tone and direct the actions we will be taking to move treaty negotiations forward. The Mission Statement identifies 10 key recommendations from the BC Claims Task Force as being fundamental to fair and effective negotiations. Of key importance is the need for interim measures as an early form of mutual recognition pending the completion of treaties.

We see it as necessary for the Principals and the Treaty Commission to meet to assess progress and address ongoing concerns about treaty making in British Columbia. It will be an opportunity for the newly appointed federal minister, newly elected First Nations Summit Task Group members and the provincial minister to also address the pressing need for a chief commissioner and to consider our role and mandate in light of the effectiveness review undertaken by the Principals last year.

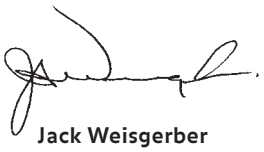
We owe our special thanks to former chief commissioner Miles Richardson who was an outstanding spokesperson for the treaty process and the Treaty Commission, and a consensus-builder among the parties in treaty negotiations.

We are grateful to our staff for their efforts in maintaining the Treaty Commission's high standard of service in the absence of a full-time chief commissioner.

The British Columbia Treaty Commission was appointed on April 15, 1993 under the 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 First Nations in British Columbia.

The terms of the agreement require the Treaty 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. Our financial information has been prepared to coincide with the release of Annual Report 2004 and is submitted as a separate document.

Wilf Adam
Commissioner



Jack Weisgerber
Commissioner

Jody Wilson
Commissioner

Michael Harcourt
Commissioner

...the current status

PHOTO: DON BAIN

Protest

First Nation leaders cite the continuing denial of aboriginal rights as the reason for the protest held on the lawns of the legislature in Victoria earlier this year.

the broadest recognition for First Nations will come in the form of:

> Ownership of treaty settlement land;
> Clear governance authorities;
> Capital transfers;
> Fiscal and tax structures;
> Harvest agreements;
> Revenue sharing;
> A cooperative management role off treaty settlement land; and,
> The other terms of the treaty itself.

A treaty, with all of its components, should be an effective tool for achieving a prosperous and self-sustaining future for First Nation communities.

Four First Nations expect to conclude final agreements early in 2005, if they are able to maintain the current pace of intensive negotiations and reach agreement on all of the outstanding issues. Another dozen First Nations hope to achieve agreements in principle in 2005 or 2006.

The agreements in principle we have today leave a number of major issues to be negotiated. What is clear, however, is the commitment of the parties to negotiate a resolution of the issues and to reach agreement.

The four agreements in principle signed to date, and a fifth initialed by the negotiators, although not legally binding, do provide a degree of clarity over future treaty settlement land and resources, and a capital transfer. They are important milestones.

There were several reasons why First Nations and the governments of Canada and BC want agreements in principle and were prepared to defer negotiation of several substantial issues.

First Nations want some certainty of land ownership and access to resources and require an estimate of the cash amount. The governments of Canada and BC, First Nations and the Treaty Commission believe it is important that the constituents are informed of progress to date and, in the case of First Nations people whose rights are at the heart of the negotiations, are given an opportunity to determine if negotiations should continue based on that progress.

An added incentive for getting an early and less comprehensive agreement in principle was the promise of treaty related measures — a subset of interim measures supported by federal and provincial government funding that kicked in once an agreement in principle was reached — and the leverage the agreement provided in dealings with neighbouring industries and regional and local governments. However, in accepting the recommendations of the BC Claims Task Force, the parties committed to negotiating interim measures at any time.

First Nations in Stage 5, and now many in Stage 4, are beneficiaries of these treaty related measures, which can be used for several purposes, including:

> Information gathering and studies to support negotiations;
> Protection of Crown lands that are targeted for treaty settlements;
> Enhanced First Nations participation in land, resource and park management;

It is clear from the Treaty Commission's perspective that interim measures are an ideal tool for protecting Crown land from alienation, pending the outcome of treaty negotiations, as was envisioned in the *BC Claims Task Force Report*.

Use of fish allocations

First Nations have for thousands of years sustained vibrant and rich cultural identities profoundly linked to the lands, waters and resources that now form British Columbia. First Nations also have had a role, sometimes greater, sometimes less, in the commercial fisheries since the early days of European contact.

So, for First Nation governments, gaining greater access to the commercial fishery as part of treaty negotiations is really about recognizing that fish is both an integral part of their culture, and critical to restoring economic self-sufficiency.

Many First Nations expect treaties to provide an allocation of fish to be used for either domestic use or sale.

In agreements in principle signed to date, it is proposed that fish caught under treaty provisions are for food, social or ceremonial purposes, whereas fish caught under harvest agreements, signed separately from treaties, are for commercial use. This is the case in the Nisga'a treaty.

The aboriginal food fishery has been recognized by the Supreme Court of Canada as a right enshrined in the constitution, and for that reason the government of Canada has given it priority over all other fishing.

The commercial fishery, by contrast, has been held by the Supreme Court of Canada not to be a general aboriginal right but one that must be proved on a case-by-case basis in light of the historical circumstances of each First Nation.

Agreements between First Nations and Fisheries and Oceans Canada under the Aboriginal Fisheries Strategy had provided for the aboriginal food fishery as well as the commercial fishery.

Agreements for the commercial fishery, known as pilot sales agreements, were intended as interim measures to provide some First Nations with commercial access to fish, pending the settlement of treaties.

These agreements were suddenly terminated in 2003 following the *Kapp* decision in provincial court declaring them contrary to the Charter of Rights and Freedoms. That decision was overturned on appeal to the BC Supreme Court before Chief Justice Donald Brenner. He ruled in July 2004 that sales of fish were legal and did not infringe on the rights of non-natives. Pilot sales have been restored, but an appeal has been launched in the BC Court of Appeal.

Two reports on the commercial fishery have been completed for the benefit of First Nations and the governments of Canada and BC.

According to the report, *Treaties and Transitions,* by Donald McRae and Dr. Peter Pearse, "long-term rights provided by harvest agreements are well suited to commercial fisheries, generally."

McRae and Pearse took a detailed look at the agreements in principle signed to date and their implications for post-treaty fisheries. Their analysis suggests the fears that there will be no room left for non-aboriginal fishers if treaty settlements continue on their present path are exaggerated.

The authors calculate that if future settlements increase sockeye allocations by the same magnitude as the agreements in principle agreed to so far, the cumulative result after all treaties are settled will be an allocation of 33 per cent of the total coast-wide catch of sockeye to First Nations under their provisions for food fishing and commercial use combined. However, McRae and Pearse admit their statistical basis for the estimates is somewhat weak.

It is now up to the governments of Canada and BC that commissioned the study to act on the many recommendations contained in the report.

The second report on the west coast fishery is from a panel appointed by the First Nations Summit and the BC Aboriginal Fisheries Commission. It was established because no First Nation representatives were appointed to the fisheries panel established by the governments of Canada and British Columbia.

The First Nations panel is calling for a complete overhaul of the west coast fishery and immediate recognition of aboriginal fishing and fisheries management rights.

The panel is calling on the Canadian government to allocate to aboriginal fishers a 50 per cent share of all fisheries, as an interim measure until management and allocation are resolved through treaties or other negotiated agreements.

In *Our Place At the Table: First Nations in the BC Fishery*, authors Russ Jones, Marcel Shepert and Neil Sterritt identify a number of treaty issues, but note that some First Nations in the treaty process are negotiating actively and with some success to resolve these issues. For many more First Nations, the treaty process is slow and there is little or no progress on fishery issues.

The report states that the treaty process falls short of many First Nations' expectations for the fishery and may affect the interests of those First Nations that have chosen not to participate in treaties.

Through the years 1994 to 1997, much of the focus was on process issues. There was less progress on substantive issues, although 27 First Nations did complete the steps necessary to be in Stage 4 where substantive negotiations were to take place.

Then on December 11, 1997 the Supreme Court of Canada decision in the *Delgamuukw* case brought the treaty process to a virtual standstill. Because the court clearly confirmed the existence of aboriginal title as a right to the land itself, all parties sought to re-examine their positions and decide whether to change their approach to negotiations.

When negotiations resumed, First Nations were buoyed by the Supreme Court decision, but ultimately disappointed with the response from the other governments.

Before the issues could be seriously addressed in negotiations, talks were effectively halted by other political developments. First, there was a federal election, then a period of uncertainty leading up to a provincial election, the provincial election campaign and the new government's settling-in period. This hiatus was extended when the provincial government opted for a provincial referendum on its mandate to negotiate. There were First Nations, too, that had to delay their participation in negotiations due to internal political issues.

In light of the delays and lack of progress in treaty negotiations, the Treaty Commission undertook a long overdue review of the treaty process in 2001. The recommendations from the review set in motion a series of high level talks over the following two years, during which all parties had the opportunity to discuss the substantive issues that are the subject of the negotiations. Working groups, representative of all parties, as well as experts, aided the participants in the high level talks to develop options and approaches that could be considered for use in individual negotiations. High level talks were then concluded in favour of test driving the proposed options at individual tables. Several tables began to make progress.

At much the same time there was another series of court decisions favouring First Nations. Two landmark rulings in the BC Court of Appeal confirm that the BC government must properly consult with and accommodate the interests of First Nations before proceeding with development on their traditional territories. The court also placed a new onus on industry to consult with and accommodate the interests of First Nations.

The BC government is consequently under increasing pressure to consult with, negotiate and accommodate First Nations. Many business and local government leaders have also stepped up their efforts to involve First Nations in their ventures.

There is a feeling among some First Nations that bringing their issues before the court will force the governments of Canada and BC to protect land, sea and resources within their traditional territories, because they do not believe their interests are being adequately addressed in treaty negotiations. They say there has not been sufficient recognition of their legitimate interests and their status as equal participants in the negotiations as was envisioned at the outset of the treaty process.

The parties are awaiting the outcome of the *Haida* case in the Supreme Court of Canada, which could further inform negotiations this fall.

The views of others

Soowahlie Chief Doug Kelly, recently elected to the First Nations Summit executive, says the governments of Canada and BC want to cut a simple, straightforward real estate deal whereby First Nations surrender all of their title and rights for land and cash.

"In order to maintain confidence in the system, we have to produce results. When you are investing the kinds of funds that are being invested, there has to be some measurable progress and we haven't had it to date. The only way we are going to achieve measurable progress in this treaty negotiation process is when Canada and BC throw out this failing notion this is simply a real estate deal.

"That's not what we envisioned (when the treaty process was established)…Rather than a simple, straightforward real estate transaction, what we are talking about is sharing. How are we going to identify opportunities by which we share resources, revenue, power, land and all of the challenges associated with planning and managing resources and land?

"When you talk about sharing agreements, and you mean constitutionally protected sharing agreements called treaties, that gives you certainty…over how decisions will be made about future developments… it gives you certainty about how benefits will be shared …and it's free of litigation.

"It's absolutely critical that we support those tables that are in agreement-in-principle negotiations today. Because whether we like it or not, the BC government and the federal government treat those agreements in principle as models for future treaty agreements. That's the cold hard reality. So the more support that we can offer those four or five tables that are in the midst of AiP negotiations right now, the more we can support them with reaching agreements on policy that will carry forward, the better for us.

"We need to be able to support one another to make certain that, yes, the deals need to be acceptable by those First Nations at that particular table but they also need to be acceptable to the tables that are following right behind them.

"It's not fair that Canada and British Columbia are saying these will be models for future agreements. And we know they will be. So, we have to work together. We have to advance proposals that make sense for everyone that is following. We have to support them."

"…We went into court with Weyerhaeuser and the provincial government because as we sat talking about interim measures and they said, 'Everything's on the table.' The replacements of these licences, which have been on our land already for 25 years were going to be replaced for another 25 years. We said that's got to be there on the table; they said it will be, they'll talk about it. And then, in their wisdom, they decided that they would just replace it.

"That court case that we won has caused an interesting situation and it created an opportunity for between now and the point of us proving title, which we intend to do. For several reasons we intend to do this: one is that when we went into court on the tree farm licence case, the position of the Crown was quite telling and probably really pinpoints what is the problem with the treaty process. And their position is that unless you prove title they don't owe us any duty to consult or negotiate or do anything with us."

"…In that case they decided to replace that licence. We went in (to court), we lost one round…in our case we were able to show them that even in the public domain there's enough evidence of our title around that they should be behaving as if there is title. In that instance we established an encumbrance over all the licences in this province, and that's a pretty important thing to realize. In fact, the provincial government argued that while indeed they did say they could replace these licences over lands, which are not otherwise encumbered, certainly they meant encumbered by other things, not by us. We didn't really count in that equation. But the court said yes, that is a valid and real encumbrance.

Tsawwassen First Nation Chief Kim Baird has said a treaty is "not utopia with a bow on it.

"It's a toolbox, with some resources and money and jurisdiction to help us rebuild our community. It's going to take a treaty to give us the best set of tools to move beyond our current socio-economic conditions.

"I've also found that now that we are in more advanced discussions of treaty negotiations, there's a great deal of increased credibility; people view my community a little bit differently than they did a year ago. That's a positive benefit.

"I don't think we can get improved community conditions under the *Indian Act*. I don't think we can necessarily get it through litigating these issues. I think that negotiation is a practical way of advancing our interests as a community without losing our identity or without giving up anything."

Minister Responsible for Treaty Negotiations Geoff Plant, in responding to Treaty Commission questions, said, "Treaty negotiations are about resolving a complex set of legal, historical and moral issues by creating new relationships founded on mutual respect and a shared commitment to reconciliation.

"The status quo is the uncertainty created by a history of failure — and in BC's case, a century of refusal — to address these important issues, especially the unsettled relationship between aboriginal rights and title and Crown rights and title. Negotiating treaties is about working towards agreements that will put that legacy of failure behind us.

"Treaties are a tool to help us move beyond the stalemate and uncertainty of litigation and threats of litigation, to a world of opportunity founded on certainty, respect and shared understanding.

"Final agreements will be the full and final settlement of aboriginal rights related to land and resources. From BC's perspective a primary element of the new relationship established in modern treaties is a clear statement of the rights and responsibilities of the parties with respect to land and resources — both ownership and decision-making rights. This is what the public expects by the goal of finality in treaty negotiations.

"In large measure, our ongoing relationship will be through multi-year implementation plans. Our relationship with First Nations will undoubtedly continue to evolve through this period.

"In addition to the important issues of land, resources and governance, one of our priorities is to work with First Nations on initiatives that recognize the historical and cultural presence of aboriginal people in this province and help us build better working relations.

"Intergovernmental relations are another key topic for BC. Through the treaty process, we are working to facilitate working relations between First Nations and local governments.

"The fundamental goal is for First Nations people and communities to participate as equals in the political, economic and social life of British Columbia.

"Our commitment has included a willingness to rethink approaches to some issues such as the legal technique of certainty, compensation, resource revenue sharing, and cooperative management, where the old approaches were creating obstacles to success.

"And now, for the first time in 12 years, we are in final agreement negotiations at four tables. This represents unprecedented progress compared to where we were when I took on this task three years ago. I'm hopeful we'll have final agreements under the BC Treaty Commission process in 2005."

Hupacasath First Nation Chief Judith Sayers, speaking at the Treaty Commission conference, said, "A treaty was intended to provide us with lands, resources and money to ensure our future.

"I remember one time sitting at the treaty table and hearing the provincial negotiator say to me, 'We're not here to meet your needs, we're just here to give you a start.' And I was really shocked because I thought that's what we were there to do: to maintain a way of life, to provide a future for our children.

"Economic independence; two words, but they mean so much. We don't want to rely on transfers from the government. We want to be able to use the lands and resources as we always did to make our own way."

Elmer Derrick, chief negotiator, Gitxsan Hereditary Chiefs says, "The Crown forced Indian reserves on the Gitxsan and corralled people into small tracts of land where they became totally dependent on someone else for their wherewithal.

"The Crown conquered the Gitxsan by legislation and denied them access to their own resources by public policy that has shifted resource rights from local people to foreign corporations.

"The will to fight back has never gone away. The battlefield was leveled in 1982. *The Constitution Act, 1982* recognizes and affirms aboriginal and treaty rights. The Gitxsan played an instrumental role in getting that particular milestone.

"In 1984 the Gitxsan continued on the journey to correcting the imbalance in the relationship with the Crown by launching the *Delgamuukw* court case. The case went through three levels of the Queen's own court until the final word came down from the Supreme Court of Canada in December 1997.

"The final decision on *Delgamuukw* can be summarized as such: the Gitxsan have never ceded Gitxsan title to the Crown; the Gitxsan can be very Gitxsan within Canada and do not have to be Indians; the Gitxsan can decide to what uses their lands may be put; Gitxsan title has an inescapable economic component; and the pre-existence of the Gitxsan has to be reconciled with Crown title.

Treaties will bring certainty to land ownership and jurisdiction. Treaties will bring a major cash injection and new investment to BC. We are reasonably confident now that land and cash transfers to First Nations will be important economic drivers in the future. We think the benefits to British Columbians over the longer term will be in the tens of billions of dollars.

Our research into, and conference on, the economic benefits of treaties earlier this year provide compelling reasons for concluding treaties sooner rather than later for the benefit of all British Columbians.

Talking Circles

In May 2004, the Treaty Commission launched its video *Our Sacred Strength: Talking Circles Among Aboriginal Women* at film events in Vancouver and Tofino. The launch marked the next step in the Treaty Commission's efforts to promote talking circles among aboriginal women.

The video is designed to reflect the many common concerns and challenges aboriginal women share in the pursuit of a better future, and is intended to engage more women in the treaty process. The video and a facilitation guide have been provided to aboriginal women across BC and the Yukon.

The Treaty Commission will continue to promote talking circles among aboriginal women in fall 2004, using the video as a catalyst for discussions. Events are planned for Campbell River, the Fraser Valley, Prince George and Terrace. The Talking Circles initiative was made possible through the financial support of Status of Women Canada and the BC Ministry of Community, Aboriginal and Women's Services and by a steering committee of aboriginal women, who guided the project.

Sharing the Experience

This year, the Treaty Commission cooperated with Indian and Northern Affairs Canada to produce the video *Sharing the Experience*. As the name implies, *Sharing the Experience* taps the insights and advice of five First Nation leaders who have reached significant milestones in treaty negotiations in BC — one that is implementing a treaty and four that have signed agreements in principle.

The 22-minute video features Nisga'a Lisims government President Joseph Gosnell, Lheldli T'enneh Chief Barry Seymour, Sliammon Chief Maynard Harry, Tsawwassen Chief Kim Baird, and Maa-nulth chief negotiator George Watts discussing their experiences at the negotiation table. The video is intended for First Nations seeking to learn from the experiences of others in the treaty process. Copies are available from Indian and Northern Affairs Canada.