Understanding the B.C. Treaty Process

An Opportunity for Dialogue

Prepared for
The First Nations Education Steering Committee,
The B.C. Teachers' Federation, and
The Tripartite Public Education Committee

Second Edition
February, 1998

Supporting Partners

*The **First Nations Education Steering Committee** (FNESC) works to ensure that First Nations students have access to quality educational opportunities. Information about the Steering Committee is available by calling (604) 990 - 9939, or by faxing (604) 990 - 9949.*

*The **B.C. Teachers' Federation (BCTF)** is 42,000 teachers, working together to achieve goals adopted more than 75 years ago: to promote the cause of education; to raise the status of the teaching profession, and to promote the welfare of teachers. The BCTF can be contacted by phone at (604) 871 - 2283 or toll free at 1-800-663-9163. The BCTF Web Site is http://www.bctf.bc.ca*

*The **Tripartite Public Education Committee** is a joint committee with a representative of each of the three principals -- the First Nations Summit and the federal and provincial governments.*

*The development of this handbook was also supported by the **B.C. Treaty Commission** (BCTC), the independent and impartial keeper of the treaty process. The BCTC can be reached by phone at (604) 482 - 9200 or 1-800-665-8330. Information about the BCTC can also be found on the Web at http://www.bctreaty.net*

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Preface

This handbook was prepared jointly by the First Nations Education Steering Committee, the B.C. Teachers' Federation, the Tripartite Public Education Committee, and with support from the B.C. Treaty Commission. It is intended to be a resource for teachers, primarily to assist them in responding to questions and to facilitate discussions about the treaty process which may arise in the classroom setting. Fundamentally, this handbook is based upon the notion of providing comfort through information; it attempts to dispel some of the common myths and misunderstandings associated with treaties and the B.C. Treaty Process, and to explain how the process works.

This handbook provides basic information about treaties. It outlines some of the reasons for the establishment of the treaty process, as well as some of the reasons why First Nations have and have not chosen to participate in the process. This handbook also highlights some of the issues treaties may help to resolve, and the contribution the treaty process may have to the building of more positive relationships between First Nations and non-Aboriginal people. The materials included outline the role of the B.C. Treaty Commission, the process of negotiations, and some of the challenges and opportunities which are being highlighted through the treaty process.

It should be noted that in this handbook generalizations may be made in order to introduce complex issues in an understandable way. It is important to remember that First Nations people in Canada are enormously diverse in terms of their goals, languages, cultures, and traditions.

What Are Treaties, and Why Are They Being Negotiated?

A Background to Treaty Making in Canada and B.C.

The Purpose of Treaties

Fundamentally, treaties between First Nations, Canada and British Columbia are a means to address issues related to the rights of First Nations, as well as to establish a foundation for building a new relationship between First Nations and non-Aboriginal governments and people. They are also a way in which to provide greater certainty about the rights of non-Aboriginal people and to increase the level of understanding of how people and governments can work together for the future development of all communities.

Articulating Aboriginal Rights

The existence of Aboriginal rights has been clearly and firmly established, and is no longer open to question. Aboriginal people have been consistent in their assertion of their rights, and in their insistence that those rights be recognized, affirmed and protected. Government commissions established to review and make recommendations on policies affecting Aboriginal people have also consistently supported the existence of Aboriginal rights. In addition, the *Constitution Act, 1982* acknowledges Aboriginal rights. Section 35 of the Constitution reads "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Section 35, however, does not define Aboriginal rights, and their nature and extent remains largely unresolved. It is still necessary, then, to specify the scope of Aboriginal rights, to develop mechanisms for making their implementation a reality, and to define the relationship between Aboriginal and non-Aboriginal people — all formidable challenges. These outstanding issues can be clarified through negotiations and the establishment of modern treaties. Of particular importance is the fact that treaty negotiations represent an opportunity to address the land, resource and governance rights of Aboriginal people through a collective process which is consistent with their values and their emphasis on their communities.

> *… a treaty with First Nations peoples … should begin with a stated recognition that the First Nation has Aboriginal rights in the territory and the treaty area, and then should clearly outline the principles that will guide the new relationship.*
>
> ***The Task Force to Review Comprehensive Claims Policy, 1985***

Providing for a More Certain Relationship

In articulating specific aspects of Aboriginal rights, treaties will provide a greater sense of certainty -- an outcome which will be beneficial to a range of people and communities. Many Aboriginal people have expressed a strong desire for certainty with respect to their title, rights and interests within their traditional lands. Many also want certainty that their rights and benefits will be respected and implemented.

Many non-Aboriginal people also have stressed the importance of achieving certainty, and providing all residents with a clear understanding of their rights and responsibilities, with security of tenure, and with a clear process for acquiring and disposing of land. Certainty for many people also means the ability to conduct their operations in a stable and predictable environment.

Clear treaties can set out and describe the rights of parties and others affected by the terms of the agreement. As the 1990 and 1991 Annual Reports of The Canadian Human Rights Commission indicate, treaties can provide a "workable balance" between the desire of Aboriginal people to preserve their rights and the desire of government to clarify the legal status of the land question. The overall task, then, is to construct a treaty that will recognize the existence of Aboriginal rights and provide certainty with respect to the rights of all interested people.

> *Certainty of ownership over lands and resources will benefit everyone. First Nations have been clear they do not expect to achieve treaties at the expense of others. More important, First Nations are committed to building a new relationship with all people of B.C. and Canada, based on mutual respect and understanding.*
>
> ***First Nations Summit,***
> ***Treaties in British Columbia Information Pamphlet***

What is Meant by "Certainty?"

The concept of certainty is a key aspect of the current treaty process. In some past negotiations, the federal government insisted that clauses be included stating that Aboriginal parties "cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land" in exchange for compensation, rights and benefits set out in agreements, and that legislation to approve the agreement "extinguish all native claims, rights, title and interests." Most Aboriginal people, however, consistently objected to a policy based upon a need for surrender, and the B.C. Treaty process emphasizes "certainty" rather than "extinguishment."

The meaning and importance of the concept of certainty as it relates to treaties is considered in some depth in *A New Partnership*, the Report of Hon. A.C. Hamilton, Fact Finder for Minister of Indian Affairs and Northern Development, 1995. Hamilton's report is based upon a consideration of past reports and recommendations related to "certainty," as well as consultation with Aboriginal people and government representatives, non-Aboriginal government representatives, and "third parties" with an interest in treaty negotiations.

Generally, Hamilton concludes that certainty reflects a need by the parties (Aboriginal people, the federal government, the provincial government, and members of the public) to know that their rights and interests are secure, and will not be interfered with by the rights of others.

Aboriginal people generally express a strong desire for certainty with respect to their title, rights and interests within their traditional lands. They are unwilling to surrender their Aboriginal rights; however, they generally are not unwilling to have the extent of their rights to lands and resources set out in a treaty. Many want treaties to provide certainty that their rights and benefits will be respected and implemented. Aboriginal people generally have expressed a view that certainty can be achieved through treaties that establish continuing relationships and provide sufficient flexibility, as long as their provisions are fulfilled.

Most provincial authorities also stress the importance of achieving certainty, and providing ***all*** residents with a clear understanding of their rights and responsibilities, with security of tenure, and with a clear process for acquiring and disposing of land.

Third Parties want treaties to clearly identify the rights of each party, and protect the rights of Aboriginal and non-Aboriginal people. Certainty for them is a primary concern — meaning the ability to conduct their operations in a stable and predictable environment. They also emphasize the need for a new relationship.

Hamilton's suggested approach for achieving certainty contains the following:

- negotiate a clear concise treaty, a clear definition of the types of land involved, a statement of the rights of all parties and of all affected interests, and mutual assurance provisions;
- make the treaty fair and balanced so that all commitments are jointly made;
- guarantee the enforceability of the treaty with its own dispute resolution mechanism;
- provide the parties with the means to consensually negotiate changes to the treaty; and
- have the treaty form the basis for future relationships based on mutual respect and trust.

Finally, Hamilton comments that:

"***I suggest that Aboriginal rights should not be and do not have to be surrendered under any circumstances whatsoever in order to either aid negotiations or to achieve equality***."

The Hamilton Report, however, is unlikely to be the last consideration of issues associated with certainty. Discussions of its meaning and implications are likely to continue for some time.

An Alternative to Continued Confrontations and Court Actions

As an alternative to the negotiation of treaties, the scope of Aboriginal rights may be addressed through a continuation of confrontations and court actions -- routes which have been pursued on numerous occasions in the past. The use of Canadian courts to articulate Aboriginal rights, however, has proven to be time consuming, expensive, and not entirely satisfactory for any party.

The Canadian courts have generally favoured negotiations as a more appropriate route to resolve issues between Aboriginal and non-Aboriginal people. In recent decades, a number of court decisions have recognized, and to a certain extent defined, Aboriginal rights. But these cases, almost without exception, have emphasized that litigation of these issues is not the ideal route to their resolution. Rather, the courts have generally maintained that negotiation — not litigation — will provide the best solution. For example, in responding to the Nisga'a case decades ago (described in more detail on pages 33 - 35), the court recommended negotiation rather than litigation as a means for addressing questions associated with Aboriginal title. Similarly, in the *Delgamuukw* appeal brought to the B.C. Court of Appeal by the Gitskan and Wet'suwet'en Hereditary Chiefs, Justice MacFarlane notes in his decision:

> … that treaty-making is the best way to respect Indian rights there is no doubt … The parties have expressed willingness to negotiate their differences. I would encourage such consultation and reconciliation, a process which may provide the only real hope of an early and satisfactory agreement which not only gives effect to the aspirations of the aboriginal peoples but recognizes there are many diverse cultures, communities and interests which must co-exist in Canada. A proper balancing of all those interests is a delicate and crucial matter.

Resolving a Range of Important Issues

Treaty negotiations can encompass a range of issues deemed to be important by the parties involved. The issues considered at each treaty negotiation table will vary, reflecting the unique priorities of each participating First Nation. Some of the issues likely to arise at the majority of tables are outlined briefly in this handbook on pages 24 - 29. Those issues include: lands and resources, including parks and protected areas; forestry; fisheries; self-government, including education, culture, languages and heritage, eligibility and enrolment, and social services; and financing and the amount of money to be included in the agreement.

Additional Information

Each of the three principals have information related to the treaty process which is available to the public. For further information:

- Contact the First Nations Summit Office at (604) 990 - 9939.

- Contact the Government of Canada Federal Treaty Negotiations Office at 1-800-665-9320, or on the Internet at http://www.inac.bc.ca/

- Contact the Government of British Columbia, Ministry of Aboriginal Affairs at 1-800-880-1022, or on the Internet at http://www.aaf.gov.bc.ca/aaf/

The Context of Treaty Making
Overcoming Difficulties Arising from Past Policies

The current treaty making process can only be fully understood in the historical context of relations in Canada between Aboriginal and non-Aboriginal people.

Before the arrival of European peoples to what later became known as Canada, First Nations peoples governed themselves in self-sustaining and effective ways, and conducted their activities and relations in a regulated, organized manner which reflected their cultures, values and traditions. Issues of land and land management are also directly related to and inseparable from issues of First Nations rights and governments. Land has always had economic and political significance for First Nations peoples, and it has been connected to their values, spirituality, resource use, and their ways of life.

> *"As nations of people we made laws to govern ourselves. Among the laws that we made were laws governing our use of the land and its resources."*
> *Plain (1985)*

Early Treaty Making in Canada

With the arrival of Europeans to Canada, efforts commenced to establish the basis for a relationship between First Nations and non-Aboriginal people. Treaty making between First Nations people and European arrivals has extended from as early as the 18th century, when First Nations entered into treaties with the Dutch, French and English arrivals. The tradition of treaty making continued throughout that century, and into the 20th Century.

The earliest treaties were the "peace and friendship" treaties that were established as early as the 1720's in what are now Canada's Maritime provinces. In these treaties, as the name suggests, the Crown and the First Nations involved agreed to live in peace and friendship. Later, the focus of treaties shifted to include land issues. There were significant differences between them, but all of the federal treaties basically established that First Nations agreed to cede certain rights and privileges in return for treaty rights and protections. Interpreting and implementing these treaties has been and continues to be an issue of some contention, with some First Nations and non-Aboriginal people disagreeing about the meaning and extent of their terms and conditions. However, despite any outstanding questions, most of the First Nations people who have signed treaties with the Crown regard their treaties as living documents, with direct relevance to their lives and to their goals.

The Royal Proclamation

One of the most important documents is seen by many people to be the Royal Proclamation of 1763. The Royal Proclamation was issued by King George III. It was intended to keep Indian people as allies during times of war and to keep them as trading partners. It was also intended to protect Indian peoples' lands from encroachment. Accordingly, the Royal Proclamation decreed that Indian peoples should not be disturbed in their use and enjoyment of the land. It also stated that land held by Indians was to be purchased by the Crown only -- not by individuals -- with the consent of Indian people, and only after an open negotiation session. This Proclamation is still often referred to by many First Nations people as evidence of their sovereignty and rights -- particularly their rights to land and resources. Provisions of the Royal Proclamation are used in many of the legal arguments made for First Nations rights to this day. The Royal Proclamation, and its determination that only the Crown could acquire lands from First Nations, meant that treaty making was the primary means of transferring lands from First Nations to the Crown. By the 1850's, treaties had been established with the First Nations in Eastern Canada, and gradually the process continued west to the Rockies, and into B.C.

Treaty Making in British Columbia

The treaty making policy was not consistently pursued in the west. James Douglas, Hudson's Bay Company Agent and, later, Governor of the British colony on Vancouver Island, was instructed by the British Crown to purchase First Nations lands. Between 1850 and 1854 Douglas made fourteen agreements on the island that are known as the Douglas Treaties. For the first agreement, Douglas had the Chiefs sign a blank piece of paper, on which he then filled in the text. Douglas may have thought of these agreements as land purchases, but they were taken to be peace treaties by the First Nations involved, and they were upheld by a 1965 Supreme Court of Canada judgement as valid treaties. The provisions of these agreements have been the basis of a number of successful court challenges, especially the guarantee that the signers would be "at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly." Some communities whose ancestors' names are listed on the Douglas Treaties hold that the treaties continue to define the relationship between their communities and the federal government. They do not think that a new treaty making process is necessary for them. Other communities intend to use the terms of the Treaties in their present negotiations. Treaty 8 was also established, which encompasses an area in the Northeast corner of what is now British Columbia. When the mainland was made a colony in 1858 Douglas was expected to continue the policy of purchasing lands, but a shortage of funds made the Crown's purchase of additional lands impossible. As a result, throughout most of British Columbia no treaties were established.

Douglas initially offered First Nations people the opportunity to acquire Crown lands and become farmers -- an opportunity like that offered to other settlers. However, this policy was not consistent with the culture and priorities of First Nations peoples. Further, when Douglas retired in 1864, many of his policies were reversed, and the right of First Nations people to acquire land was removed. While European settlers were allowed a pre-emption of 160 acres and could purchase additional lands, in 1866 a land ordinance was issued preventing First Nations people from pre-empting land without the written permission of the governor. There was only one case in which such approval was given. Generally, Aboriginal title to the land was denied, and no compensation was offered to First Nations people for their loss of their lands and resources.

Assimilationist Policies

For years after the arrival of Europeans, in both British Columbia and elsewhere in the country, it was assumed by many non-Aboriginal people that First Nations people would eventually be absorbed into the European-based Canadian society. A concerted effort was made to ensure that this process took place, including policies and legislation which banned traditional ceremonies, forbid celebrations, prohibited the wearing of traditional costumes, and silenced spiritual leaders. This effort to impose unfamiliar traditions intensified into a sustained effort toward the assimilation of First Nations people into non-Aboriginal society.

Additional Information

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Residential Schools

One aspect of the policy of assimilation which has resulted in a lasting legacy for First Nations peoples is the residential school system. For decades, First Nations children were removed from their homes, often forcibly, and were sent to residential schools. These schools were usually established and run by missionaries, and were jointly funded by the Canadian government and churches. In these schools, children were trained in European traditions, and they were forbidden to speak their own languages or practice their own cultures. This separation of children from their families, their elders, and their communities was devastating, and efforts are still being made to overcome its effects. In addition, there have been increasing reports of devastating abuse which took place in many of the residential schools, and individuals and communities are still working to resolve the pain those years of abuse created.

The Reserve System and the Indian Act

The reserve system was also a crucial aspect of the history of First Nations and non-Aboriginal people. Established by federal and provincial legislation, the reserve system set aside tracts of land which the Crown held in trust, and First Nations people were assigned to live in specified reserves. Beginning in 1830, the reserve system was gradually expanded to the entire country. The system was in some ways contradictory; it recognized the uniqueness of First Nations people, but it also acted as a way of assimilating them into Canadian society by allowing the government to control their lives.

Related to the establishment of the reserve system was the development of the *Indian Act*, which has had a continued impact on the lives of First Nations people. The first *Indian Act* was passed by the federal government in 1876, consolidating the then existing laws pertaining to Indians. The writing of the *Indian Act* included no input from First Nations people, and First Nations people did not even participate in the election of the politicians who legislated the Act, as they were unable to vote in federal elections until 1960. Yet the *Indian Act* was a comprehensive piece of legislation which regulated virtually every aspect of life.

The Indian Act

The *Indian Act* can be described as the legal centrepiece of past policies relating to First Nations people, as it established reserves and relates to almost all other assimilationist policies.

Most First Nations people resent the *Indian Act*, but there has been adamant and vehement resistance to attempts to repeal or modify the Act without other safeguards of Aboriginal rights in place. Treaties may represent one form of such a safeguard. The *Indian Act* has severely constrained First Nations people, but it has also defined their special status and has guaranteed them at least some recognition and protection by the Canadian government and the Canadian public (although this can be both positive and negative).

According to the *Indian Act*, Indian Agents administered every reserve, and all matters relating to a reserve were under the agent's direct control. For many years, Indian people could not leave their reserve without written permission -- not even to hunt, fish, or visit extended family members on another reserve -- and the Indian Agent enforced all imposed laws. Between 1927 and 1951 it was illegal for Aboriginal people to hire a lawyer or raise money to commence a legal proceeding.

All land title on a reserve was vested in the Crown, and the Indian Agent was the only person authorized to sign contracts that were associated with reserve lands. Even now the *Indian Act* means that First Nations people do not "own" the land on which they live, making it impossible for them to use it as collateral for accessing credit and the financing needed for economic development. This situation is extremely limiting, often frustrating efforts by First Nations to end cycles of economic dependency.

The establishment of the Act also ignored the traditional governing patterns of First Nations and made Band Councils the only form of officially recognized government. It also dictated that elections were to be held every two years. The *Indian Act* explicitly stated that the Minister of Indian Affairs had ultimate control over band governments, and for several years the Indian Agent even called and set the agendas of Band Council meetings.

Amendments to the *Indian Act* in the 1880's and 1890's continued to reflect a policy of assimilation. The Crown banned traditional social and religious institutions, such as the Pacific Coast potlatch. At that time, the minister responsible for Indian affairs had veto power over all Band Council enactments, any financial decisions required his approval, and any resolutions by the Councils were usually approved or rejected by the Crown based upon the Indian agent's recommendations. Today, the Minister still has veto power in many instances.

The imposition of the *Indian Act* was met with significant resistance by First Nations peoples, and changes have been continually demanded. There have been significant amendments to the *Indian Act* in recent years, including changes in the powers of Band Councils, in taxation policies, and regarding membership in First Nations. Some of the most draconian measures have been removed. Many people argue, however, that the Act remains an inadequate basis for First Nations governments, and treaties may represent a more appropriate foundation.

Summarizing Past Policies

There are at least two views regarding early Canadian government policies. Some people believe that the policies were well intentioned but simply misdirected. Such arguments include claims that reserves were intended to protect "Indians and Indian lands" from exploitation and encroachment by new settlers, and that Canadian government policy was intended to help First Nations people to "progress" and transform from wards of the state into citizens. Other people argue that reserves were intended to isolate First Nations people in areas under federal government control in order to facilitate assimilation. They also assert that government policies represented a deliberate attempt to destroy traditional forms of government in order to forestall any initiative for independent political action.

Whether the past policies of the Crown were well intentioned or not, it is generally believed that they were based upon incorrect and ethnocentric assumptions about the "backwardness" of First Nations people. Also, the impact of the policies was and continues to be tremendous. For over 300 years First Nations people have faced a series of challenges brought about by the arrival of Europeans to what is now known as North America, and by the expansion of Canadian social, religious, economic, and political systems. A resolution of the problems which have arisen as a result of that situation are crucial to the establishment and ultimate effectiveness of the current treaty process.

"*We believe that treaty-making offers aboriginal people and other British Columbians our best chance to face the challenges of the future head-on. Treaty-making will not achieve all of our shared objectives. Neither will it resolve all of the conflicts that have resulted from the failure of successive British Columbian governments over more than one century to come to terms with the issue of the rightful place of First Nations in the history and future of British Columbia. Nevertheless, treaty-making is an essential cornerstone in the strategy for moving forward to build a new relationship.*"

First Nations Summit presentation to the Select Standing Committee on Aboriginal Affairs, December 4, 1996

What are Interim Measures?

In 1990, a B.C. Claims Task Force was established to consider the design of a treaty negotiation process (described further on page 17). Among the key points made by that Task Force were those related to interim measures. The Task Force pointed out that the negotiation of treaties could require a significant length of time, and that in the meantime, existing disputes could have a limiting effect on development efforts. At the same time, the continuation of some economic development initiatives could have a detrimental effect on the lands and resources being considered in the negotiations.

Accordingly, the Task Force recommended that interim measures be implemented to resolve any outstanding disputes and to ensure a positive climate for the negotiations. The Task Force noted that:

> Interim measures are an important early indicator of the sincerity and commitment of the parties to the negotiation of treaties. To protect interests prior to the beginning of negotiations, the federal and provincial governments must provide notice to First Nations of proposed developments in their traditional territories and, where required, initiate negotiations for an interim measures agreement.

First Nations have expressed concern regarding developments which could seriously threaten the lands and resources within their traditional territories. As the First Nations Summit(described on page 16) comments in its paper of October 28, 1996, *Interim Measures: Getting the Process Back on Track*:

> Interim measures are necessary in order to facilitate the successful negotiation of treaties by protecting and enhancing lands, waters, air and resources which might form part of a treaty settlement and by protecting and enhancing Aboriginal rights, title or interests pending treaty settlement.

The Summit paper also calls the failure to negotiate satisfactory and timely interim measures "the greatest threat facing the treaty process."

The negotiation of interim measures has proven to be one of the most difficult aspects of treaty negotiations, and interim measures are a somewhat politically sensitive issue for British Columbia. For example, some fear has been expressed that interim measures would act as moratoria on resource development.

If successfully negotiated, however, interim measure agreements can demonstrate a real commitment to the process of building new relationships. They can provide the time and security for First Nations to address the comprehensive and complex matters involved in treaty negotiations, and interim measures can also allow for a resolution of issues which are hindering development initiatives. As such, effective and clearly communicated interim measure agreements can result in benefits for all people in British Columbia.

As described in the *1997 BC Treaty Commission Annual Report*, in 1996 British Columbia and the First Nations Summit confirmed their commitment to negotiate a range of interim measures at any stage during the process. This confirmation is seen by many people as a positive step.

What is "Self-Government," and How Does It Relate to Treaties?

In discussions of issues involving Aboriginal people, reference is sometimes made to the term "self-government." ***Self-government*** is a term which will be interpreted differently according to varying situations and contexts. Self-government can be viewed as the right and the capacity of people to manage a significant proportion of the affairs which they deem to be important, and to make decisions regarding their social, cultural, economic, political and natural environment.

Self-government generally includes the right of people to decide and consent to the way in which they will be governed, as well as to their government having jurisdiction over health, education and other social programs effecting the lives of its membership. Perhaps the concept of Aboriginal governments can be most usefully understood as products of people living and working to form the political structures they require to meet the challenges of economic development, health, education, social services, resource management, and any number of concerns in their communities and on their lands.

There are currently many examples of First Nations delivering their own health, education, social services, and policing programs. Generally, those examples demonstrate that tremendous success can be achieved when First Nations are responsible for their own services.

According to the federal government's policy on self-government (1995): "Aboriginal governments need to be able to govern in a manner that is responsive to the needs and interests of their people. Implementation of the inherent right to self-government will provide Aboriginal groups with the necessary tools to achieve this objective." This right, the federal government notes, is an existing Aboriginal right under s. 35 of the Constitution. As such, it may find expression as a result of negotiations which lead to constitutionally protected agreements. The federal policy includes within the scope of self-government negotiations matters that are internal to Aboriginal Nations, integral to distinct Aboriginal cultures, and essential to their operation as governments or institutions.

As such, those governments may take a number of different forms. They may involve specific legislation and arrangements for new forms of service delivery and financing between Aboriginal governments and federal, provincial, and/or municipal governments. They may also involve expanded resource management and economic development schemes.

There have been a diverse range of efforts toward the development and recognition of Aboriginal governments. Some Aboriginal people are using treaty and land claims processes as a means of securing their rights through negotiations. Others are testing what they assert is their inherent right of self-determination independent of Canadian laws and social organizations by passing their own legislation. Still others are attempting to guarantee a recognition of their rights by demanding amendments to the Canadian Constitution.

The way in which self-government issues are included in treaties will almost certainly vary depending upon the unique circumstances and goals of each Aboriginal Nation. However, increasing the level of control over their own lives and institutions is a common objective of most Aboriginal people.

Section 35 of the *Constitution Act, 1982* reads:

Rights of the Aboriginal Peoples of Canada

35. (1) **Recognition of existing aboriginal and treaty rights. —** The existing aboriginal and treaty rights of the aboriginal people are hereby recognized and affirmed.

(2) **Definition of "aboriginal peoples of Canada". —** In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

(3) **Land claims agreements. —** For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) **Aboriginal and treaty rights are guaranteed equally to both sexes. —** Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

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Establishing New Relationships

Despite years of pressure to assimilate into Canadian society, First Nations people in this country have refused to abandon their rights, cultures and values. They have remained committed to the continuation and evolution of their traditional lifestyles and value systems, and to the application of those values to current and future circumstances. The extent and nature of their efforts to do so have always been widespread, determined and persistent.

During the last few decades, movements for change have gained momentum, and First Nations peoples have attempted in a variety of ways to regain fuller control over their governments and to assert their land, resource, language, and other rights. The movement has involved attempts to gain more control over the programs, services and institutions which have a significant impact on peoples' lives. Many First Nations organizations and communities have undertaken initiatives to expand their administrative capacities, and efforts have been made to redesign programs and services to make them more culturally appropriate. As these and other developments take place, however, First Nations people often find that they lack the jurisdiction to make the necessary changes to accomplish their goals. In addition, it has become increasingly clear that there is a need for more cooperative efforts. Many people believe that treaty making represents the best route to negotiating new relationships, and to clarify the ways in which Aboriginal and non-Aboriginal title and jurisdiction relate.

What is the First Nations Summit?

The First Nations Summit was established in 1990 shortly after the Government of British Columbia announced its willingness to negotiate with First Nations. The Summit's mandate is to represent the interests of those First Nations participating in the treaty process. The Summit does not negotiate on behalf of any First Nation; rather, its role is to support First Nations in their negotiations of appropriate agreements. The Summit also recognizes that not all First Nations in the Province have chosen to participate in the treaty process, and respects each First Nation's right to determine its own course.

(First Nations Summit presentation to the Select Standing Committee on Aboriginal Affairs, December 4, 1996)

For further information on the First Nations Summit, contact Suite 207 - 1999 Marine Drive, North Vancouver, B.C. V7P 3J3 phone (604) 990 - 9939 fax (604) 990 - 9949
e-mail: FNS@ISTAR.CA

How Was the Current Treaty Process Initiated?

The British Columbia Claims Task Force

In 1990, the B.C. government, then led by Premier Bill Van der Zalm, undertook an historic change in policy and agreed to enter into negotiations with First Nations in the province. Following Premier Van der Zalm's commitment to negotiate, in October, 1990, leaders of First Nations met with then Prime Minister Brian Mulroney and with the Premier and Cabinet of British Columbia. Those meetings led to an agreement to develop a process for negotiations, and to appoint a Task Force to make recommendations about how such negotiations should proceed.

The British Columbia Claims Task Force was accordingly established in December, 1990, reflecting a perspective that negotiations represent the most effective route to articulating First Nations rights, bringing certainty to all parties, and developing positive relationships.

The B.C. Claims Task Force included two representatives appointed by Canada, two by the Government of British Columbia, and three representatives of First Nations chosen at a "First Nations Summit" meeting. Once assembled, the group was called upon to make proposals related to the scope of negotiations, the organization and process for the negotiations, interim measures, and public education.

The Task Force first met on January 16, 1991. Throughout the following six months, it met with a variety of people who had significant interest and experience in relevant negotiations. Following a province-wide request for input, seventeen written submissions were also received. Based upon the materials and suggestions collected, the task force made 19 recommendations. Among the recommendations made was a call for the establishment of a B.C. Treaty Commission -- a Commission to facilitate the process of negotiations and to ensure that they proceed in a fair, impartial, effective and understandable manner. The Commission is responsible for monitoring the progress made, and for assisting with dispute resolution and encouraging timely negotiations.

The report of the Task Force was published on June 28, 1991, and a B.C. Treaty Commission was appointed on April 15, 1993. This Commission is now supported by federal and provincial legislation, and by a resolution of the First Nations Summit.

Recommendations of the British Columbia Claims Task Force

1 The First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding -- through political negotiations.

2 Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.

3 A British Columbia Treaty Commission be established by agreement among First Nations, Canada, and British Columbia to facilitate the process of negotiations.

4 The Commission consist of a full-time chairperson and four commissioners -- of whom two are appointed by First Nations, and one each by the federal and provincial governments.

5 A six-stage process be followed in negotiating treaties.

6 The treaty negotiation process be open to all First Nations in British Columbia.

7 The organization of First Nations for the negotiations is a decision to be made by each First Nation.

8 First Nations resolve issues related to overlapping traditional territories among themselves.

9 Federal and provincial governments start negotiations as soon as First Nations are ready.

10 Non-aboriginal interests be represented at the negotiating table by the federal and provincial governments.

11 The First Nation, Canadian, and British Columbian negotiating teams be sufficiently funded to meet the requirements of the negotiations.

12 The Commission be responsible for allocating funds to the First Nations.

13 The parties develop ratification procedures which are confirmed in the Framework Agreement and in the Agreement in Principle.

14 The Commission provide advice and assistance in dispute resolution as agreed by the parties.

15 The parties select skilled negotiators and provide them with a clear mandate, and training as required.

16 The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.

17 Canada, British Columbia, and the First Nations jointly undertake public education and information programs.

18 The parties in each negotiation jointly undertake a public information program.

19 British Columbia, Canada, and the First Nations request the First Nations Education Secretariat, and various other educational organizations in British Columbia, to prepare resource materials for use in the schools and by the public.

What is the B.C. Treaty Commission?

The Keeper of the Process

The BC Treaty Commission was established in order to facilitate treaty negotiations between Canada, B.C., and First Nations in British Columbia. The BC Treaty Commission is an independent body with five Commissioners appointed by the federal government, the provincial government, and the First Nations Summit. The First Nations Summit appoints two Commissioners, and the federal and provincial governments each appoint one. A Chief Commissioner is appointed by all three Principals.

As outlined in its *1997 Annual Report*, the Treaty Commission's independence is reflected in both its composition and in the way it makes decisions. Once appointed, Commissioners do not represent any one principal. All decisions require both a quorum and the support of one appointee of each of the Principals.

The Commission is not an arm of any government, and it does not negotiate treaties. Rather, the Commission is responsible for accepting First Nations into the treaty process, and assesses when the parties are ready to start negotiations. The Commission also develops policies and procedures applicable to the six-stage treaty process (described on pages 22 - 23), and it 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.

In addition to the five Commissioners, the Treaty Commission employs a full-time staff of 12 and a part-time staff of five. Commissioners and staff regularly travel to all regions of British Columbia, and its operating budget for the last fiscal year was $1.86 million.

How Are Negotiations Proceeding?

The Process and the Progress

The treaty process established in British Columbia involves six stages. That process is described on pages 22 and 23 of this handbook. The negotiations are voluntary, and not all First Nations in the province have chosen to enter the B.C. Treaty Process. A majority, however, have chosen to do so. A map illustrating the 50 First Nations currently involved in the process is included on page 31.

Interest in the treaty process is generally very high. This has, to some extent, made the task of negotiating treaties more complex, as increasing numbers of First Nations submit statements of intent and join the process, and as the need for public education grows.

As the *1997 Annual Report of the B.C. Treaty Commission* indicates, by June, 1994, 41 First Nations had joined the process. Currently, 50 First Nations are involved.

Significant progress is being made in the negotiations taking place throughout British Columbia. The rate of the progress has varied, depending upon the issues needing to be resolved in each area. According to the *1997 B.C. Treaty Commission Annual Report*, generally progress is being made more rapidly than estimated in 1991. Most parties have moved quite quickly through Stage 2. There are 12 tables in Stage 3, and 27 in Stage 4 agreement-in-principle negotiations. At least 8 more tables are expected to be in Stage 4 in the coming year. That is a substantial increase from just one year earlier, at which time there were 22 First Nations in Stage 3, and 11 in Stage 4. In the year ahead, most of the First Nations involved in the process are expected to be in Stage 3 or 4, and some agreements-in-principle may be signed.

There are, of course, significant challenges to be met. The increase in participation has put strain on the resources of the federal and provincial governments. The federal government has hired additional staff to address that situation. In addition, in the past year a special committee was appointed by the Principals and chaired by the Treaty Commission. That committee was to address the issue of "system overload," and the committee's report is now being considered by the Principals.

Discussions have also taken place regarding the possibility of negotiating some issues on a regional basis, and some First Nations are beginning to work together and are negotiating common issues at common tables. In some cases, this may present a viable mechanism for addressing issues; it can only take place, however, if all parties in the negotiations agree.

Funding of the process also continues to be a key issue. Funding arrangements must ensure that the process is fair -- an aspect which is particularly significant as more First Nations move into Stage 4, the most costly stage in the process to date.

There is also a need to establish a balance between openness and confidentiality. While there is a need to explore some issues in a confidential environment, most main table discussions have been open to the public and a great deal of information about the treaty process is available.

In addition, the federal and provincial governments, having responsibility to represent non-Aboriginal interests in the negotiations, have established a Treaty Negotiation Advisory Committee, various regional committees, treaty advisory committees, and local advisory committees. Those committees are intended to offer an opportunity for people interested in the negotiations to have input into the process and to have their perspectives taken into account.

Regular meetings, workshops, seminars and public meetings will continue to be held throughout the province. In some cases, negotiations are also broadcast on the local cable television station. The Treaty Commission has also made a commitment to assume an expanded role in public information.

Further information about specific treaty negotiations taking place can be obtained by contacting local First Nations, treaty offices and Tribal Councils directly, or by contacting the B.C. Treaty Commission or local advisory committees. In addition, many First Nations involved in the treaty process have developed their own Web Sites to provide more detailed information.

The Six Stage Negotiation Process

Stage 1 -- Statement of Intent

A First Nation files with the Commission a Statement of Intent to negotiate a treaty. To be accepted, the Statement of Intent 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 also 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 have a 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 be 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. 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 the negotiation of a comprehensive treaty. The three parties identify the subjects to be negotiated, the goals of the negotiation process, procedural arrangements, and a timetable for negotiations. They may also identify milestones that should be reached at specified stages in the process. 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 consultations at the regional and local levels through Regional Advisory Committees and sometimes through Local Advisory Committees. Municipal governments participate through Treaty Advisory Committees. At the provincial level, a Treaty Negotiation Advisory Committee also represents the interests of business, labour, environmental, recreation, fish and wildlife groups.

The Six Stage Negotiation Process

Stage 4 -- Negotiation of an Agreement in Principle

This is the stage at which the parties begin substantive negotiations. During this stage, the parties examine in detail the elements of the framework agreement. The goal is to reach the major agreements that will form the basis of the treaty. The agreement in principle will identify and define a range of rights and obligations, including existing and future interests in land, sea and resources, structures and authorities of governments, regulatory processes, amending processes, dispute resolution, fiscal arrangements, and others. The Agreement-in-Principle will also 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. A treaty is a unique constitutional instrument to be signed and formally ratified at the conclusion of this stage.

Stage 6 -- Implementation of a 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 will be brought to maturity.

Issues Being Considered -- Lands and Resources

Among the most important issues being considered in the treaty process are those related to lands and resources. Land has economic and political significance for First Nations peoples, but it is also connected to their values, their way of life, and land is generally viewed in profoundly spiritual terms. First Nations ownership of land is also tied to resource development and income generation, as their territories often contain valuable resource generating capacities. For all of these reasons, First Nations people view lands and resources as fundamental components of modern treaties, and most treaties will involve more than simple cash settlements.

Lands and resources, however, are also important to non-First Nations people. Many people are concerned about their ability to own property, develop resources, establish businesses, and enjoy recreational pursuits following the implementation of treaties.

As the B.C. Claims Task Force notes, the fundamental importance of lands and resources to First Nations and non-First Nations peoples has meant that they have been at the centre of contention between First Nations, federal and provincial governments, sometimes leading to disputes and serious confrontations.

A resolution of issues related to lands and resources is therefore critical to treaty negotiations, and is a key aspect of the new relationship being developed. Some treaties will likely include the transfer of ownership of and authority for some settlement lands to First Nations.

In addition, past agreements have usually included other lands which, although still owned and managed by the provincial government, may allow for specific treaty rights for First Nations peoples, such as fishing and hunting rights.

In none of the land claims signed to date, however, were private lands allocated under settlement or were lease arrangements of existing title holders transferred. In all cases, the transfer of resources was based strictly on a transfer of Crown properties. In addition, Aboriginal groups which have signed agreements have all demonstrated a desire to allow projects and developments to take place when benefits will be returned to the community, and they have not imposed significant restrictions on access to their lands.

As outlined in a study of the *Benefits and Costs of Treaty Settlements in British Columbia* by KPMG consultants, increased control over lands and resources by First Nations peoples will increase their self-sufficiency and independence. It will also likely result in a strong investment in resource industries and improvements in the skills and abilities associated with resource management. While this may result in some displacement of non-Aboriginal employees, over time First Nations control over lands and resources will allow them to invest and develop successful businesses, which will have spin-off benefits for other British Columbians and result in opportunities for joint ventures. Previous settlements have indeed resulted in numerous joint venture and partnership opportunities.

Additional Information

- ARA Consulting Group. 1995. *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis*. Victoria.
- Cassidy, F. and N. Dale. 1988. *After Native Claims? The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia*. Lantzville, B.C.: Oolican Books and the Institute on Research on Public Policy.
- KPMG. 1996. *Benefits and Costs of Treaty Settlements in British Columbia -- A Financial and Economic Perspective*. Victoria, British Columbia. February.
- Notzke, C. 1994. *Aboriginal Peoples and Natural Resources in Canada*. North York, Ontario: Centre for Aboriginal Management Education and Training and Captud Press Inc.
- The Royal Commission on Aboriginal Peoples. 1993. *Sharing the Harvest. The Road to Self-Reliance*. Report of the National Round Table on Aboriginal Economic Development and Resources. Ottawa: Minister of Supply and Services.

Issues Being Considered -- Parks and Protected Areas

In 1989, the World Wildlife Fund Canada and the Canadian Parks and Wildlife Society launched the endangered species campaign. The goal of that campaign is to complete a network of protected areas which represent each of the ecological regions of Canada. Canada's Green Plan supports the key elements of this campaign, and further establishes the idea of protecting 12 per cent of Canada as a national goal.

Many British Columbians support the protection of existing and the creation of additional parks and protected areas. Parks are valued for the recreational opportunities they present, as well as for the protection they offer plant and animal species.

The concepts of "parks" and "protected" areas are somewhat alien to First Nations traditions. However, as pressures on lands and resources have increasingly threatened the traditional territories of many First Nations, the idea of isolating specific areas to protect them from human intervention has gained support from many First Nations people. Support has been particularly strong when First Nations have been included in plans for the development and management of parks, and when the areas being set aside are of particular cultural and spiritual importance.

Treaties will likely address issues related to parks and protected areas. Many existing land claims agreements provide for the maintenance of existing parks and for the protection of additional areas. In most of these cases, Aboriginal peoples are to be directly involved in the planning and operation of the parks, and provisions are included related to the employment of Aboriginal peoples. It is quite likely that some future agreements will also include a portion of settlement lands being set aside and protected.

Issues Being Considered -- The Fishery

In British Columbia, perhaps no resource is seen to be more important than the fishery. The fishery has significance for the livelihood and lifestyles of many British Columbians, and has particular relevance for First Nations people. Almost all First Nations communities have an interest in fish for food, trade, employment and commercial purposes, and fish are an important aspect of their histories and values.

Jurisdiction for the fishery is more complex than is the case for most other renewable resources. The federal government has legislative jurisdiction for the "seacoast and inland fisheries," and this jurisdiction is exercised through the *Fisheries Act*. The province, however, generally owns the bed of non-tidal waters, as well as the areas of fish habitat and the surrounding uplands. In addition, the federal government delegates some powers related to the fishery to the provincial government, such as controls on gear and the timing of fishing.

At the same time, most First Nations in British Columbia have never signed treaties or in any other form relinquished their rights to the fishery. And as the *Calder* (1973) court case made clear, fishing rights are an aspect of Aboriginal title. In that case, Justice Hall described Aboriginal title as "a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams" (cited in Notzke, 1994). In the *Sparrow* case, (1986) the courts further ruled that Aboriginal people have an unextinguished right to fish for food, and that "food fishery" should be broadly interpreted.

Clarifying jurisdiction for the fishery is made more complicated by the general state of the resource, which many people perceive to be precarious. Concern about a depletion of fish stocks is quite widespread, which substantially increases sensitivity surrounding fisheries issues.

In that context, addressing the fisheries resource in treaty negotiations will likely be quite challenging. Based on previous land claims settlements, it is likely that agreements will allocate to each First Nation a portion of the Total Allowable Catch -- the surplus in excess of conservation requirements and Aboriginal food requirements. This may be included as a final amount, a percentage, or a figure that will vary depending upon current conditions.

As the 1996 KPMG study of the *Benefits and Costs of Treaty Settlements in British Columbia* points out, such an allocation may cause concern for non-Aboriginal fisher groups, as they may fear that it will result in mismanagement, reduced quality and over-fishing. However, KPMG notes that settlements of the past have demonstrated that Aboriginal people recognize the importance of conservation and are interested in preserving fishing stocks. Also, as is the case with other resources, treaty agreements will likely result in greater certainty regarding the ownership of and jurisdiction over the fisheries resource, which will be of general benefit to the industry. It should also reduce conflicts and litigation, which have proven to be costly for everyone interested in the fishery.

Issues Being Considered -- Forestry

It would be difficult to overstate the importance of British Columbia's forests. Forestry is a key component of the province's economy, an important source of jobs, and British Columbia's forests have recreational and spiritual relevance. The importance of the forests is particularly true for the First Nations people of the province.

Like the fisheries resource, however, there are tremendous pressures on the province's forestry resources. Given fears about a crisis in a sector on which the province depends so heavily, it is not surprising that significant forestry related conflicts and challenges have arisen in the past. The uncertainty resulting from unresolved First Nations rights has added to the volatility of this situation.

Incidents of the past have raised some concerns about the results of treaties, and a fear that a transfer of land ownership and resource control to First Nations will result in the elimination of timber harvesting and processing on settlement lands.

This situation is addressed by KPMG in their study of the benefits and costs of treaty settlements. KPMG concludes that, while the ultimate outcome will vary depending upon the unique circumstances and priorities of each First Nation involved in the negotiations, most First Nations will likely consider both conservation and extraction when developing their forest management plans. Examples from throughout the province demonstrate that First Nations are interested in taking advantage of the economic opportunities the forestry resource represents, but that they are interested in doing so in ways which do not threaten the long term viability of the resource.

Following treaty settlements there may be a transition period in which some interests will be displaced. However, there will also likely be a range of new opportunities for cooperative efforts to manage and harvest forestry resources.

The ARA Consulting Group undertook a study of the impacts of Aboriginal land claim settlements, reviewing the implementation and outcomes of land claims agreements in northern Canada. The ARA group determined that, generally, the climate for investment in resource development improved or stayed the same following settlements, due to increased certainty. A variety of land and resource management structures were formed following settlements, including a range of co-management structures which generally resulted in a productive and cooperative environment. The Aboriginal groups also undertook a variety of joint venture initiatives.

Many past forestry related confrontations have not been caused entirely by opposition to logging; many, at least to some extent, have been a result of First Nations peoples' desire to be adequately involved in the management of the resources on their traditional territories. Treaties, therefore, may help to lessen the frequency of disputes, and may provide an opportunity for more cooperative efforts.

Issues Being Considered -- Governance

Eligibility and Enrolment

Central to treaties will be the determination of who is eligible to be enrolled under the agreements. In other words, each treaty will include an indication of who is to be considered a member of the First Nation. Agreements signed in the past have included a variety of eligibility criteria, usually including some indication that an individual is to be of relevant Aboriginal ancestry, and accepted as a member by the Aboriginal community. All of the agreements have also included a provision that an individual can be enrolled under only one agreement.

Governance and Social Services

Issues of jurisdiction and responsibility for the delivery of social services will likely be an important component of treaties. A recent study by the ARA consulting group points out that through past settlements, Aboriginal groups have achieved the economic and organizational means to deliver social services in ways considered culturally appropriate. In many cases, Aboriginal cultures and values are also more appreciated as a result of settlements. Past settlements have resulted in a greater mix of responsibility for program administration through co-operation, self-government, and contracting arrangements. Traditional lifestyles in social service management and delivery are a subject of focus, as are concepts of "wellness" and "healing." The general opinion is that Aboriginal communities should deliver social services, a change from the paternalistic approach of the past. Many First Nations have also indicated that they want the opportunities for economic development in order to pay a reasonable share of their government responsibilities.

Culture, Language and Heritage

In addition to the inclusion of language and cultural issues in the governance provisions, treaties may also include other specific provisions related to the importance of language and culture issues for First Nations people. For example, treaties may provide for a repatriation of cultural artifacts, for the protection of archeological and other heritage sites, and for the use of First Nations names and references.

Financing

The ability of First Nations to finance their activities and services will be a crucial aspect of the success of treaty agreements. First Nations will therefore require the ability to access revenues, to borrow, to receive transfers from other governments, and possibly to levy taxes. The capacity to undertake these activities will likely be addressed in treaties, as will other economic development mechanisms, such as training needs and opportunities to bid for contracts.

A Memorandum of Understanding between the federal and provincial governments indicates that the current treaty process may involve financial settlements made up of cash, cash equivalents (the market value of urban lands), and forgone resource revenues. B.C. and Canada will each contribute a portion of the financial settlement.

In past agreements, transfer payments to the Aboriginal party have taken place over a number of years, according to an agreed upon schedule of payments. In addition, those agreements have often included provisions related to revenue sharing, and have provided opportunities for Aboriginal people to generate revenue from their own resource developments.

Issues Being Considered -- Education

Among the key issues being considered in treaty negotiations are those related to governance and jurisdiction for government services. As described above, First Nations have been consistently asserting their right to self-government, which has been recognized and affirmed in Section 35 of the *Constitution Act, 1982*.

Education is clearly an important aspect of the right to self-government, and as such will be an issue for discussion during treaty negotiations.

Many people support the perspective that the needs of First Nations learners have not been adequately met in the past. The 1972 National Indian Brotherhood Report -- *Indian Control of Indian Education* -- was one of the most significant reports which argued for First Nations control of education. That report was followed by a series of studies and papers also calling for greater input from First Nations people into the education of their young people. The provincial Royal Commission on Education, which published its findings in 1988, was among the strongest proponents of First Nations educational self-determination, support for First Nations designed and operated schools, and greater cooperative arrangements and close working relationships between the public school system and First Nations people.

Treaty making may represent an important mechanism for responding to the many calls which have been made for increased First Nations control of their education.

First Nations people generally want the opportunity to educate their children according to their own cultures and traditions. They also strongly believe that their children should have the opportunity to learn First Nations languages and values. Fundamentally, First Nations people want an education system which allows their young people to participate fully and effectively in meeting the goals of their communities.

Each First Nation involved in the treaty process likely has its own specific goals related to education. Some may have a good working relationship with their local school district, and may want to have their children continue to attend provincial schools. In such situations, treaties may formalize aspects of that relationship, and clearly establish the rights and responsibilities of each party. In other cases, First Nations may want to continue to work with the provincial system, but with stronger decision-making capabilities and greater influence over the education being provided to their children. Some First Nations, however, may want to establish their own education authorities, schools, and, in some cases, school boards. The discussion of education issues will vary, depending upon the needs and circumstances of each First Nation.

Additional Information

- Williams, C. 1997. *Building Strong Communities Through Education and Treaties*. Vancouver: First Nations Education Steering Committee.

Participants in the B.C. Treaty Process

As of May 30, 1997

(from the B.C. Treaty Commission Annual Report, 1997)

1	Alkali Lake Indian Band	Stage 4
2	Burrard Band (Tsleil-Waututh Nation)	Stage 4
3	Cariboo Tribal Council	Stage 4
4	Carrier Sekani Tribal Council	Stage 4
5	Champagne and Aishihik First Nations	Stage 4
6	Cheslatta Carrier Nation	Stage 3
7	Council of the Haida Nation	Stage 2
8	Ditidaht First Nation	Stage 4
9	Gitanyow Hereditary Chiefs	Stage 4
10	Gitxsan Hereditary Chiefs	Stage 4
11	Gwa'Sala - 'Nakwaxda'xw	Stage 2
12	Haisla Nation	Stage 4
13	Heiltsuk Nation	Stage 4
14	Homalco First Nation	Stage 4
15	Hul'qumi'num Tribes	Stage 4
16	In-SHUCK-ch/N'Quatqua	Stage 4
17	Kaska Dena Council	Stage 4
18	Katzie Indian Band	Stage 2
19	Klahoose Indian Band	Stage 4
20	Ktunaxa/Kinbasket Tribal Council	Stage 3
21	Kwakiutl First Nation	Stage 2
22	Kwakiutl Laich-Kwil-Tach Council of Chiefs	Stage 3
23	Lake Babine Nation	Stage 3
24	Lheidli T'enneh Nation	Stage 4
25	Musqueam Nation	Stage 3
26	Nanaimo First Nation	Stage 4
27	'Namgis First Nation	Stage 2
28	Nazko Indian Band	Stage 3
29	Nuu-chah-nulth Tribal Council	Stage 4
30	Oweekeno Nation	Stage 4
31	Pacheedaht Band	Stage 4
32	Quatsino First Nation	Stage 2
33	Sechelt Indian Band	Stage 4
34	Sliammon Indian Band	Stage 4
35	Squamish Nation	Stage 3
36	Sto:lo Nation	Stage 4
37	Taku River Tlingit First Nation	Stage 4
38	Tanakteuk First Nation	Stage 2
39	Te'Mexw Treaty Association	Stage 4
40	Teslin Tlingit Council	Stage 4
41	Tlatlasikwala First Nation	Stage 2
42	Tsawwassen First Nation	Stage 4
43	Tsay Keh Dene Band	Stage 4
44	Tsimshian Nation	Stage 4
45	Ts'kw'aylaxw First Nation (Pavilion Indian Band)	Stage 4
46	Westbank Indian Band	Stage 4
47	Wet'suwet'en Nation	Stage 4
48	Xaxli'p First Nation (Fountain Indian Band)	Stage 4
49	Yale First Nation	Stage 4
50	Yekooche Nation	Stage 4
51	Carcross/Tagish	Stage 2

Map Showing Participants

Map Adapted from the *B.C. Treaty Commission Annual Report, 1997*
Map is not to scale.

The Way Ahead

Fundamentally, treaties between First Nations and non-Aboriginal people and governments represent one mechanism for addressing issues which have been outstanding since the earliest contact between First Nations people and European settlers. First Nations peoples have consistently asserted their rights and have attempted to resolve the relationship between Aboriginal and Crown title. Many non-Aboriginal people have also urged the federal and provincial governments to reach agreement with First Nations people in order to provide a more stable and cooperative environment.

The current treaty process in this province represents an opportunity to move ahead in that direction. Treaties can provide for a new relationship based on mutual respect, and for a recognition of the need to work in partnership to ensure that everyone living in British Columbia has the opportunity to lead fulfilling lives. Treaties can also create the certainty needed to provide comfort to First Nations and non-Aboriginal people and governments.

A significant effort has been made to ensure that the B.C. Treaty Process is fair and effective, and that it will result in useful agreements that address the concerns and needs of all people. Widespread support for that process is needed, however, to ensure that it continues to move forward in a positive manner. That support can only come with a good understanding of the purpose of treaties and the process of negotiations, and through continued dialogue and open communication about the issues being considered. This handbook is intended to offer an opportunity for people to become more informed about a process which has such tremendous significance for all British Columbians.

How Does the Nisga'a Agreement Relate?

Concluding a period of negotiations which began long before the Treaty Process was established, in 1996 the Nisga'a signed a land claims Agreement-in-Principle (AIP) with the federal and BC governments. That agreement, however, was negotiated outside of the B.C. Treaty Process.

Attempts by the Nisga'a to have issues of Aboriginal title addressed began more than a century ago. For decades, however, there was no effective mechanism for bringing their claims forward. The Nisga'a filed a law suit in 1967 with the Supreme Court of British Columbia, claiming that their title had never been lawfully extinguished, and asking the courts for a declaration supporting that assertion. Their trial opened in 1969, but the trial judge dismissed their claim.

The Nisga'a then carried their case to the British Columbia Court of Appeal and, following an unfavourable verdict there, to the Supreme Court of Canada -- representing the first opportunity for a First Nation to ask the Supreme Court to rule on the status of Aboriginal title.

The Nisga'a Chiefs and elders travelled to Ottawa, where their case -- *Calder* (1973) -- was heard by seven judges. Six of the seven judges hearing their case found that the Nisga'a had held Aboriginal title before the arrival of Europeans. Those six judges, however, were split in their decision regarding whether that title had or had not been extinguished by the policies of the colonial government. The seventh judge would not break the tie, ruling that the court action was improper because the law required that British Columbia consent to be sued. Technically, then, the Nisga'a lost their case, but in its pursuit they had a tremendous impact on Canadian government policy.

The Nisga'a decision moved the issue of Aboriginal title into the political arena, and in 1973 the federal government announced its intention to settle native land claims in all parts of Canada where no treaties existed. The process of land claims negotiations then became official when the Office of Native Claims opened in Ottawa in 1974 and began to receive proposals for negotiations. In 1983, a First Minister's Conference resulted in a Constitutional amendment that confirmed modern-day land claims agreements as treaties.

The Nisga'a agreement was negotiated through the federal land claims negotiation process, rather than within the B.C. Treaty Process. The final Nisga'a agreement, therefore, will have the legal status of a "treaty," but it is not directly related to the six-stage process recommended by the B.C. Claims Task Force. It has been clearly indicated that the terms of the Nisga'a AIP will not serve as the model for the other treaties currently being negotiated, but it does give a sense of some of the key components of a treaty.

Further information related to the Nisga'a Agreement in Principle is available in:

- MacKenzie, I. 1996. *Without Surrender Without Consent. A History of the Nisga'a Land Claim*. Vancouver: Douglas and McIntyre.

Information is also available on the Internet.

What Does the Nisga'a Agreement Include?

The Nisga'a Agreement-in-Principle (AIP) is a very lengthy document, and only a brief summary will be included here. A copy of the AIP can be found in many libraries, and is also available on the Internet. Many of the provisions included in the Nisga'a AIP are similar to those included in other land claim agreements signed with Aboriginal peoples elsewhere in Canada. Some of the key points in the AIP include:

- The Nisga'a will gain communal ownership of about 1,930 square kilometres of Nisga'a Lands in the Lower Nass Valley. In addition, 56 Nisga'a reserves in the region will become Nisga'a owned lands, and 18 reserves located outside of Nisga'a Lands will become fee simple lands owned communally by the Nisga'a people.
- Non-Nisga'a people will have unimpeded access to their lands. In addition, there will be reasonable public access to Nisga'a Lands for non-commercial and recreational purposes, including hunting and fishing.
- Existing legal interests on Nisga'a Lands will continue on their current terms. These interests include rights of way, angling and guide outfitter licences, and traplines.
- Regarding fisheries, conservation will be the primary consideration. A trust will be established to safeguard the long-term survival of Nass area fish resources. The salmon harvest provisions outline 2 components: i) a treaty entitlement; and ii) a supplemental harvest. The supplemental harvest will be delivered through a separate agreement, and will provide fish for food as well as some commercial opportunities. The Nisga'a will be entitled to harvest fish species for domestic purposes.
- Following a transition period to allow for existing licensees to adjust their operations, the Nisga'a will own and manage all forest resources on Nisga'a Lands. The Nisga'a will establish and implement their own forest management standards, but those standards must meet or exceed provincial standards.
- Within a designated wildlife management area, the Nisga'a will be entitled to hunt wildlife for domestic purposes. The Nisga'a will not be able to sell wildlife, but they will be able to trade or barter among themselves or with other Aboriginal peoples.

What Does the Nisga'a Agreement Include?

- The Nisga'a will set environmental protection standards for Nisga'a Lands, but those standards must meet or exceed provincial and federal standards.
- A Nisga'a Government will be established, and a Constitution will be designed to ensure an open and democratic government. The Nisga'a will be able to make laws pertaining to, among other matters, culture, language, the solemnization of marriage, public works, traffic and transportation, and land use.
- The criteria for Nisga'a enrolment will reflect Nisga'a traditional laws.
- Non-Nisga'a people who live on Nisga'a lands will be consulted about and may appeal any decisions which directly affect them. They will also be able to participate in elected bodies which directly affect them.
- The Nisga'a will be able to establish a Nisga'a court with jurisdiction over Nisga'a laws on Nisga'a Lands, with the approval of the province.
- The Canadian Charter of Rights and Freedoms will apply to Nisga'a government and institutions.
- The Indian Tax Exemption will be eliminated after a transitional period of 8 years (for sales taxes) and 12 years (for income taxes).
- The Nisga'a will receive $190 million over a period of several years. Those funds are to be used to provide services at levels comparable to other jurisdictions in B.C.'s northwest region.
- The *Indian Act* will eventually no longer apply to the Nisga'a.

What is Delgamuukw, and What Are Its Implications?

On December 11, 1997, the Supreme Court of Canada rendered its decision in the case of *Delgamuukw v. Her Majesty the Queen in Right of British Columbia*. The *Delgamuukw* case was brought to the Supreme Court by the Gitksan and Wet'suwet'en peoples, and it focused on a recognition of their Aboriginal title to their traditional territories. The Court found that a new trial was necessary to determine some specifics of the case, and it did not rule on self-government. The decision, however, makes several significant comments about the nature of Aboriginal rights which are relevant to negotiations.

The *Delgamuukw* decision begins to provide greater clarity regarding what is protected by Section 35 of the *Canadian Constitution*. The Court characterizes Aboriginal title as "a right to the land itself," which derives from their original occupation and possession at the time the Crown asserted sovereignty. Aboriginal title is said to encompasses the right to exclusive use and occupation of land for a variety of purposes. Those purposes are not restricted to activities which are aspects of practices, traditions or cultures integral to the Aboriginal group; the purposes are framed in broad terms, and include contemporary economic activities. According to the judgement, however, Aboriginal title lands cannot be used for purposes that would result in a destruction of their inherent and unique values which are to be enjoyed by the community, and if the lands are to be used for purposes which Aboriginal title does not permit, they must be converted to non-title lands. The decision also states that Aboriginal title is held communally.

The decision states that Aboriginal title can be transferred to the Crown in exchange for valuable consideration, but it cannot be transferred, sold, or surrendered to anyone but the Crown. It is also characterized as proprietary, and able to be shared by groups.

While recognizing Constitutional protection for Aboriginal title, the *Delgamuukw* decision maintains that Aboriginal rights and title are not absolute. The federal and provincial governments may infringe upon or interfere with Aboriginal title if justified. The Court holds that an infringement is permissable if: (1) there is a compelling and substantial legislative objective to the infringement, such as conservation, general economic or infrastructure development, or environmental protection; and (2) the infringement is consistent with the fiduciary relationship between the Crown and Aboriginal peoples. Issues relevant to infringement include the accommodation of Aboriginal peoples' interests. Aboriginal peoples must be involved in decisions about their lands in a way which is "significantly deeper then mere consultation," including, in some cases, consent. There must also be fair compensation when Aboriginal title is infringed.

There will undoubtedly be numerous and varied interpretations of the implications of the Delgamuukw case. One immediate challenge rasied by the Supreme Court in the *Delgamuukw* decision is its encouragement that all parties negotiate, and its insistence that the Crown is under a moral, if not a legal, duty to enter into and conduct negotiations in good faith.

Additional Information

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