BC TREATY COMMISSION

203 –1155 W. Pender St.
Vancouver B.C. V6E 2P4
604 482 9200, Fax 604 482 9222
info@bctreaty.net. www.bctreaty.net

Annual Report 1998

Letter of transmittal

In submitting our fifth annual report, we must first recognize the significant and selfless contribution of Alec Robertson to the treaty process and the Treaty Commission. Mr. Robertson was Chief Commissioner for the past three years including the fiscal year covered by this annual report.

Mr. Robertson brought stability to the Treaty Commission and helped to achieve progress in the treaty process. His evenhandedness and wise counsel have served the treaty process and the Treaty Commission well. We will miss him. Under his leadership, the Treaty Commission maintained its independence and neutrality while addressing difficult issues, for example, interim measures, federal litigation policy and overlaps to name just a few.

With assurances from each of the Principals, we had expected Mr. Robertson to continue as Chief Commissioner for another two years and were surprised and deeply dismayed by the provincial Cabinet's decision not to reappoint him.

We also said goodbye to Commissioner Barbara Fisher who had been with the Treaty Commission through its first five years. Ms. Fisher was tireless in her support of the treaty process and in her work with treaty negotiation tables. She was a valued member of several key Treaty Commission committees and played an active part in producing several important reports including past annual reports.

Paul Kariya, our Executive Director for four years, also moved on to a new challenge as CEO with Fisheries Renewal BC. The Treaty Commission wishes him well in this endeavour.

I wish to express my personal thanks to my fellow Commissioners and to the men and women on the Treaty Commission staff, for their steadfastness during these difficult days. Together, we remain firm in our belief that treaty negotiations are the surest route to reconciliation between aboriginal people and non-aboriginal people.

We urge the Principals to resume the tripartite review of the treaty process in light of the Delgamuukw court decision and in response to the report on system overload which remains largely unaddressed.

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

The terms of 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.

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

We hope the information within this report will improve your understanding of the treaty process and add to your awareness of the progress being made in treaty negotiations.

Wilf Adam
Acting Chief Commissioner

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Executive Summary

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

The Treaty Commission's primary responsibility is to facilitate the negotiation of treaties. It is also responsible for accepting First Nations into the treaty process and assessing when the parties are ready to start negotiations. It develops policies and procedures applicable to the six-stage treaty process, monitors and reports on the progress of negotiations, identifies problems, offers advice and may assist the parties in resolving disputes. It also allocates funding, primarily in the form of loans, to First Nations.

Now in its fifth year overseeing the treaty process, the Treaty Commission has accepted 51 Statements of Intent from First Nations to negotiate treaties. There are 36 First Nations in Stage 4; 12 First Nations in Stage 3; and 3 First Nations in Stage 2.

The Supreme Court of Canada's decision in Delgamuukw on December 11, 1997 was the defining event of the Treaty Commission's 1997/98 fiscal year.

To First Nations, the Delgamuukw decision is a vindication of their claim of title to their territories. They see their bargaining strength at both the treaty table and the interim measures table as being substantially fortified.

To non-aboriginal British Columbia, especially the resource industry, the decision is seen as creating uncertainty by undermining provincial authority to create past, present or future rights in land and resources. It is also seen as increasing the cost of treaties at a time when the economy is clearly fragile.

Whether aboriginal title existed or was consequential and affected provincial jurisdiction, is no longer debatable. The public, especially the resource sector, look to public governments to resolve the uncertainties they are now facing. That can only be accomplished through negotiation.

Fortunately, a negotiation process is already well established but will have to be re-invigorated to bring about the reconciliation the Supreme Court of Canada spoke of.

Just two days after the judgment, a meeting was held between the Principals-the federal and provincial ministers and the First Nations Summit leaders. It had been arranged months before, but Delgamuukw became its focus.

The Treaty Commission, after reviewing the judgment, recommended the Principals share their preliminary views on the decision before coming to any final conclusions or adopting

final positions. It further recommended they establish a tripartite forum through which they could identify, address and attempt to resolve the issues separating them.

The Principals agreed and the Treaty Commission organized meetings in February and March. Legal counsel for each of the Principals gave their respective interpretations of the decision. A list of issues was agreed and a professional facilitator chosen. Two three-day meetings occurred in April resulting in a proposal for approval by all three parties. At the time of this report, further meetings were being considered.

Treaties will reconcile the longstanding dispute over land title in British Columbia. The Supreme Court of Canada has characterized aboriginal rights and title as a burden on Crown title. As with the Crown's view of its title, First Nations view their title as including ownership, jurisdiction and governance over their land, resources and people. This perspective of aboriginal title is based on the fact that First Nation communities existed with well-established governing systems long before contact with non-aboriginal people.

First Nations' traditional territories are at the heart of treaty making. They define the area within which the First Nation and Canada and BC must reconcile their respective interests, jurisdictions and use of resources.

Traditional territories can, and do, overlap. Overlaps may arise from many causes: a tradition of sharing territory for the use of specific resources; movements of families or tribes; or longstanding disputes. Where overlaps represent a tradition of sharing between First Nations, and that is acknowledged for treaty purposes, then everyone knows that the shared territory or resource can only be dealt with by consent of those First Nations.

The Treaty Commission's concern is with contested overlaps between neighbouring First Nations. The overlap dispute between the Nisga'a Tribal Council and the Gitanyow Hereditary Chiefs, now before the courts, underlines the potential for unresolved overlaps to delay completion of a treaty and to precipitate litigation.

The Treaty Commission has recommended guidelines for resolving overlaps to the Principals for their consideration. The goal of all involved must be to achieve clear, uncontested treaties that give everyone certainty about who will make decisions in BC under the new relationships that are being negotiated through treaties.

In applying the definition of First Nation with which it must work, the Treaty Commission has stressed that a community submitting a Statement of Intent to negotiate a treaty must have a traditional territory that is neither wholly shared nor wholly disputed. If there is no distinct traditional territory the question arises whether there are two First Nations or one First Nation with two communities. It has also taken the view that the governing body should be established by and receive its negotiating mandate from all of its members, not just those living on reserve.

The Treaty Commission has few tools for establishing whether the governing body and aboriginal group it represents are appropriate to the task of negotiating and implementing a comprehensive, government-to-government treaty. This implies a size and degree of established organization that justifies the resolution of all the issues that should be in a treaty.

Some First Nations have developed protocols to work at a common negotiating table, a process the Treaty Commission has and will continue to facilitate. First Nations are sharing information on negotiations and related issues both through the First Nations Summit and on a regional basis. This regional cooperation may well extend to treaties themselves, which

may enable and encourage First Nations to cooperate in providing services and exercising certain authorities.

The Treaty Commission acknowledges that a broader concept of nationhood must be balanced by geographical and current political realities. Some First Nations have functioned as independent units for a long time. However, the Treaty Commission also believes that nationhood should, wherever possible, encompass past, present and future considerations if treaties are to lead to a truly new relationship among First Nations, Canada and BC.

Participants in the BC treaty process, as well as the Treaty Commission, recognize the importance of strengthening the capacity of First Nations to negotiate and implement treaties.

Treaties will provide a wide range of modern governance responsibilities that First Nations have not exercised, as well as economic development opportunities that many have not yet enjoyed. Consequently, aboriginal communities will need to develop their abilities or 'capacity' to assume these new responsibilities.

The First Nations Summit, Canada and BC have identified capacity as a central issue in their review of the current treaty process. Initiatives are underway to address First Nations capacity building within the treaty process. A group of First Nations leaders with an interest in capacity building met with the Treaty Commission in January 1998 to discuss the development of self-assessment tools for First Nations in the treaty process. The project, funded by the federal government, seeks to provide flexible tools for First Nations to identify their own capacity needs and determine how best to meet these needs.

The Treaty Commission has during the past year taken on a larger role in public information and education. The first objective of the expanded program is to raise public awareness and understanding of the historical and legal reasons for treaty making and the Treaty Commission's role in the BC treaty process. The second objective is to provide public information on the treaty process, the Treaty Commission and the status of each negotiation.

The allocation of funding to First Nations for treaty negotiations is a key responsibility of the Treaty Commission. The Principals agreed that a neutral body should administer the allocation of funding to First Nations to avoid conflicts between the parties at the negotiation tables.

In November 1997 the Treaty Commission advised the Principals of the need for more treaty negotiation funding. When no increase was forthcoming, the Treaty Commission again advised the Principals of the serious consequences for First Nations.

Given current funding from Canada and BC, the situation will be worse next year. There will be less money available for allocation while almost all First Nations will require funding for complex Stage 4 negotiations.

The Treaty Commission, in meeting its responsibility to ensure First Nations are sufficiently funded for treaty negotiations, urges Canada and BC to consider the consequences of continued underfunding.

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Treaty Commissioners as of May 31, 1998

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

Kathleen Keating was appointed to the Treaty Commission in April 1998 for a two-year term. She replaces Barbara Fisher. Ms. Keating is a lawyer, writer, trainer and consultant in the areas of court process and plain language drafting. She is a member of the Council of the Commonwealth Lawyers Association and has served as a member of the Vancouver Police Board where she was involved in chairing public inquiries and disciplinary hearings. Ms. Keating is also a former member of the Vancouver Public Library Board, and a founding member of the BC Society for Interpreters and Translators. She earned her Bachelor of Laws (1976) from the University of British Columbia.

Peter Lusztig was appointed to the Treaty Commission in April 1995 and re-appointed to a two-year term in April 1997. A former Professor of Finance at the University of British Columbia, he served as Dean of the Faculty of Commerce and Business Administration. In addition to his academic experience, Mr. Lusztig has played an active role in public affairs as a member of one Royal Commission and one Commission of Inquiry and has served with numerous community and business boards. Mr. Lusztig earned his Bachelor of Commerce from the University of British Columbia (1954) his MBA from the University of Western Ontario (1955) and his PhD from Stanford University (1965).

Miles Richardson became a Commissioner in November 1995. He was elected to a second term in April 1997. Formerly a President of the Council of the Haida Nation, he was a member of the First Nations Summit Task Group from 1991 to 1993. Mr. Richardson was a member of the BC Claims Task Force, whose report and recommendations are the blueprint for the treaty negotiation process. He holds a Bachelor of Arts (1979) from the University of Victoria.

Treaty Commissioners - April 1, 1997 to March 31, 1998

Chief Commissioner	Commissioners
Alec Robertson, Q.C.	First Nations Summit (elected) Wilf Adam

	Miles Richardson
	Government of Canada (appointed) Peter Lusztig
	Province of British Columbia (appointed) Barbara Fisher

Alec Robertson was appointed Chief Commissioner on May 15, 1995 for a three-year term ending May 14, 1998. Mr. Robertson is a former partner of Davis and Co. and has served as President of the BC Branch of the Canadian Bar Association, Chair of the Law Foundation of BC, and as a member of the Gender Equality Task Force of the Canadian Bar Association. He was born in Victoria and earned a Bachelor of Commerce (1955) and Bachelor of Laws (1957) from the University of British Columbia and a Master of Laws (1958) from Harvard University. He was admitted to the bar in BC in 1959.

Barbara Fisher was first appointed Commissioner in April 1993, and was appointed to a third, two-year term in April 1997. In April 1998 she resigned from the Treaty Commission to join a Vancouver law firm. Formerly General Counsel and Vancouver Director of the Office of the Ombudsman, Ms. Fisher was also part-time counsel to the BC Information and Privacy Commissioner. She earned her Bachelor of Laws (1981), her Bachelor of Fine Arts (1976) and her Diploma in Education (1977) from the University of Victoria, and her A.R.C.T. from the Royal Conservatory of Music.

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Role and Composition

The Treaty Commission is the independent, neutral body responsible for facilitating treaty negotiations among Canada, British Columbia and First Nations in BC. It oversees the treaty negotiation process to make sure the parties are being effective and making progress in negotiations.

Canada, BC and First Nation governments have no say in its decisions and the Treaty Commission is not a part of any government. It does not negotiate treaties -- that is done by the three parties at each negotiating table: each First Nation, Canada and BC.

The treaty process and the Treaty Commission were established in September 1992 by agreement among the Canada, BC and the First Nations Summit. They are guided by those agreements and modeled on the relevant recommendations in the 1991 BC Claims Task Force report. The Treaty Commission and the six stage treaty process were designed to advance treaty negotiations among Canada, BC and BC First Nations.

Responsible for accepting First Nations into the treaty process, the Treaty Commission also assesses when the parties are ready to start negotiations. It develops policy and procedures applicable to the six stage treaty process, monitors and reports on the progress of negotiations, identifies problems, offers advice and sometimes assists the parties in resolving disputes. It allocates negotiation support funding, primarily in the form of loans, to First Nations in the treaty process.

The Treaty Commission has a major role to play in public information and education. Its first objective is to raise public awareness and understanding of the historical and legal reasons for treaty making and the Treaty Commission's role in the BC treaty process. Its second objective is to provide public information on the treaty process, the Treaty Commission and the status of negotiations at each table.

Five commissioners guide the Treaty Commission. Of the four part-time commissioners, two are selected by the First Nations Summit, one is appointed by Canada, and one is appointed by British Columbia. The Principals -- Canada, BC and the First Nations Summit -- act together in appointing a full-time Chief Commissioner.

The Treaty Commission's independence and neutrality are reflected in its composition and in the way it makes decisions. Commissioners do not represent the Principals that appoint them, but act independently. Every decision requires the support of one appointee of each of the Principals and the chief commissioner.

Commissioners and staff regularly travel to all regions in British Columbia to monitor treaty negotiations and the parties' compliance with commitments they have made to the treaty process. In addition to the five Commissioners, the Treaty Commission employs a staff of 14. The operating budget for the fiscal year covered by this report was $1.86 million.

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Treaty Negotiations

Treaties will reconcile the longstanding dispute over land title in British Columbia. The Supreme Court of Canada has characterized aboriginal rights and title as a burden on Crown title. As with the Crown's view of its title, First Nations view their title as including ownership, jurisdiction and governance over their land, resources and people. This perspective of aboriginal title is based on the fact that First Nation communities existed with well-established governing systems long before contact with non-aboriginal people.

For more than 150 years, First Nations in BC have been consistent in seeking recognition of their aboriginal rights and title - through petition, protest, litigation and negotiation. The Courts have increasingly clarified the nature of aboriginal rights and title, most significantly in the Supreme Court of Canada decision in the Delgamuukw case in December 1997.

There are historical, social and legal reasons for negotiating treaties with First Nations in British Columbia. But it was economic considerations in 1990 that finally prompted the provincial government to come together with the federal government and First Nations to agree on a process to negotiate aboriginal rights and title. Aboriginal protests, further litigation and confrontation throughout British Columbia threatened to seriously damage the provincial economy.

A task force appointed by the provincial and federal governments and First Nations agreed on the structure for a made-in-BC treaty negotiation process. It is captured in the 19 recommendations of the BC Claims Task Force Report. The first of these recommendations is that "the First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding through political negotiations." No one party can dictate the terms of the new relationship that will be captured in a treaty; all three must agree.

One of the greatest strengths of the process is that its structure is agreed by all three Principals to the process and all three Principals can similarly agree to change its structure. A review of the treaty process is currently taking place. In the wake of the Delgamuukw decision the extent of aboriginal rights and title is being re-examined. The Treaty Commission urged the Principals to come together to exchange views, then make changes to the process that all three felt were required as a result of Delgamuukw and in response to system overload -- the imbalance in the system between the demand for negotiations and available resources. Further, the Principals discussed where their internal mandates needed to be reviewed to keep the parties negotiating, and not opting for litigation or confrontation.

The treaty-making process is designed to reconcile interests. This is happening now in communities all over BC as aboriginal and non-aboriginal people exchange views on how their communities should function and move forward. Some communities are taking advantage of the opportunity posed by treaty negotiations and are increasingly working together as they come to better understand each other's interests.

The federal and provincial governments have set up ways to include the views of non-aboriginal people and to encourage discussion between aboriginal and non-aboriginal communities. These discussions will continue while treaties are being finalized. By the time that the eventual treaties set out how the federal, provincial and First Nation governments will reconcile Crown title and jurisdiction with aboriginal title and jurisdiction, there should be an entrenched practice of working together in many communities around the Province.

Increased economic stability will be an inevitable result of clarifying jurisdiction over land and resources through treaties.

Political negotiation is the logical, practical way to address the complex issues relating to aboriginal rights and title. The treaty process provides a solid foundation for negotiations in which the three parties can reconcile their interests.

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History and Progress

December 1990	B.C. Claims Task Force formed.
June 1991	B.C. Claims Task Force Report.
September 21 1992	B.C. Treaty Commission Agreement between First Nations Summit, Canada and B.C.
April 1993	First Treaty Commissioners appointed.
May 1993	First Nations Summit resolution establishing B.C. Treaty Commission.
May 1993	BC Treaty Commission Act passed by the B.C. Legislature.
December 1993	Treaty Commission begins receving Statements of Intent. 29 First Nations file statements to negotiate treaties.
June 1994	Treaty Commission publishes first Annual Report; has accepted 41 Statements of Intent from First Nations to negotiate treaties.
June 1995	Treaty Commission publishes second Annual Report; has accepted 43 Statements of Intent from First Nations to negotiate treaties; 7 First Nations in Stage 3.
December 1995	B.C. Treaty Commission Act passed by federal Parliament.
March 1 1996	B.C. Treaty Commission Act proclaimed by Canada, B.C. and First Nations Summit resolution.
June 1996	Treaty Commission publishes third Annual Report; has accepted 47 Statements of Intent from First Nations to negotiate treaties; 14 First Nations in Stage 2; 22 First Nations in Stage 3; 11 First Nations in Stage 4.
June 1997	Treaty Commission publishes fourth Annual Report; has accepted 50 Statements of Intent from First Nations to negotiate treaties; 11 First Nations in Stage 2; 12 First Nations in Stage 3; and 27 First Nations in Stage 4.
December 11, 1997	Supreme Court of Canada decision in the Delgamuukw case confirms aboriginal title exists in British Columbia, describes its content, requirements for proof, and the limits on its infringement and extinguishment by public governments.
April 1998	At the urging of the Treaty Commission, the Principals begin a series of meetings to address major issues required to revitalize the treaty negotiation process in the wake of Delgamuukw case. Principals agree that tripartite negotiations within the BC treaty process will continue while the review is underway.
May 1998	Representatives of the three Principals agree to reappoint Chief Commissioner for a further two-year term. The reappointment is not approved by the provincial Cabinet.

	The Chief Commissioner's appointment expires May 14, 1998. Wilf Adam is appointed Acting Chief Commissioner on an interim basis.
June 1998	Treaty Commission publishes fifth Annual Report; has accepted 51 Statements of Intent from First Nations to negotiate treaties; 3 First Nations in Stage 2; 12 First Nations in Stage 3; and 36 First Nations in Stage 4.

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Progress Report

As of May 31, 1998 there are 51 First Nations participating in the BC treaty process:

First Nations in Stage 2

Carcross/Tagish First Nation (to Stage 3 June 3, 1998)
Council of the Haida Nation
Katzie Indian Band

Total Stage 2: 3

Negotiation Tables in Stage 3

Cheslatta Carrier Nation
Kwakiutl Laich-Kwil-Tach Council of Chiefs
Lake Babine Nation
Musqueam Nation
Nazko Indian Band
Squamish Nation
Winalagalis Treaty Group
- Gwa'Sala Nakawaxda'xw First Nation
- Kwakiutl First Nation
- Namgis First Nation
- Quatsino First Nation
- Tanakteuk First Nation
- Tlatlasikwala First Nation

Total Stage 3: 12

Negotiation Tables in Stage 4

Alkali Lake Indian Band
Cariboo Tribal Council
Carrier Sekani Tribal Council
Champagne and Aishihik First Nations
Ditidaht First Nation
Gitanyow Hereditary Chiefs
Gitxsan Hereditary Chiefs (in suspension)
Haisla Nation
Heiltsuk Nation
Homalco Indian Band
Hul'qumi'num Treaty Group
In-SHUCK-ch/N'Quat' Qua
Kaska Dena Council

Klahoose Indian Band
Ktunaxa Kinbasket Tribal Council
Lheidli T'enneh Band
Nanaimo First Nation
Nuu chah nulth Tribal Council
Oweekeno Nation
Pacheedaht Band
Sechelt Indian Band
Sliammon Indian Band
Sto:Lo Nation
Taku River Tlingit First Nation
Te'Mexw Treaty Association
Teslin Tlingit Council
Ts'kw'aylaxw First Nation
Tsawwassen First Nation
Tsay Keh Dene Band
Tsleil-Waututh Nation
Tsimshian Nation
Westbank First Nation
Wet'suwet'en Nation
Xaxli'p First Nation
Yale First Nation
Yekooche Nation

Total Stage 4: 36

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Negotiation Table Status

FAR NORTH "

Carcross/Tagish First Nation entered the BC treaty process in mid-1997. While still officially in Stage 2, Carcross/Tagish sits at a common table with two other First Nations with transboundary (Yukon/BC) claims -- Champagne & Aishihik First Nations and the Teslin Tlingit Council which are in Stage 4. The table has made progress on environmental assessment, culture and heritage, water, forestry, fish, self-government, wildlife, and access issues.

The Kaska Dena Council Table entered Stage 4 in January 1996. The table has increased the frequency of negotiation sessions throughout this past year in an attempt to finalize an Agreement in Principle during 1998 or early 1999. The table has made rapid progress addressing most of the issues that will comprise the final treaty. The Kaska Dena Council has also signed a letter of understanding with the Province of British Columbia regarding their role in the newly created Northern Rockies Provincial Park.

Canada, British Columbia and the Taku River Tlingit First Nation have been engaged in negotiation of an Agreement in Principle since August 1996. The parties have begun to address a number of sub-agreements that will form part of the Agreement in Principle and the eventual treaty.

NORTH"

The Carrier Sekani Tribal Council Table entered Stage 4 in May 1997. It was inactive during the winter of 1996/97 while the Carrier Sekani Tribal Council engaged in internal consultation. The table has developed a workplan, created an interim measures working group and set up structures for public information and advisory committees. Beginning early in 1998, the table has been engaged in substantive negotiations focusing on lands and resources.

The Cheslatta Carrier Nation Table entered Stage 3 in May 1997. It has not met since then as the Cheslatta Carrier Nation has been working internally on building community support for a Framework Agreement. Cheslatta has recently engaged in litigation against Alcan, Canada and BC over water licences granted to Alcan and for damage done to Cheslatta traditional territory due to flooding of the Nechako River for hydroelectric purposes.

The Gitanyow Hereditary Chiefs Table entered Stage 4 in June 1996. It has focused on wildlife and fisheries issues and on self-government. Gitanyow concerns about their overlap with the Nisga'a have been accentuated by the imminence of a Nisga'a treaty. The First

Nation has sought an injunction against Canada and BC to ensure that its interests are not prejudiced by a treaty with the Nisga'a.

The Gitxsan Hereditary Chiefs were appellants in the Delgamuukw case. Since the decision, they have not re-entered the tripartite treaty process but have, instead, proposed bilateral negotiations with each of BC and Canada. There are ongoing discussions between the Gitxsan and BC about restarting negotiations.

The Lake Babine Nation Table entered Stage 3 in April 1996 and initialed their Framework Agreement in January 1998. Lake Babine Nation is currently re-organizing its treaty team, seeking ratification of the Framework Agreement, and seeking a mandate for Stage 4 negotiations.

The Lheidli T'enneh Band Table entered Stage 4 in August 1996. It is meeting frequently and making significant progress. Some of the substantive issues the Lheidli T'enneh table has been negotiating over the last year are: culture and heritage; parks and protected areas; access; and land and resources. Public consultation is taking place through the Northern Interior Regional Advisory Committee and Prince George Treaty Advisory Committee.

The Nazko Indian Band Table entered Stage 3 in June 1996. Nazko spent the past year on community consultation, its Framework Agreement, and developing mandates for Stage 4. No tripartite meetings were held during this time. Nazko's internal community consultation and mandate development is expected to continue through 1998.

The Tsay Keh Dene Band Table entered Stage 4 in November 1996. The table has not met for five months but was expected to resume tripartite negotiations in June. The Tsay Keh Dene are continuing to negotiate while involved in litigation against Kemess Mines, Canada and BC over mining activity in an area the Tsay Keh Dene consider their territory.

The Wet'suwet'en Nation Table entered Stage 4 in July 1995. Canada suspended negotiations in September 1996 citing the active recommencement of the Delgamuukw appeal in the Supreme Court of Canada as its reason. The table resumed tripartite negotiations in June 1997 with facilitation by the Treaty Commission. There have been four main table meetings at which individual parties have made interest presentations on fisheries, wildlife, child welfare, environmental management, and justice and policing.

The Yekooche Nation Table entered Stage 4 in October 1996. The table has met consistently and is negotiating sub-agreements on parks, environment, subsurface rights, access, culture and heritage, wildlife, fish and water, governance, and forestry.

NORTH COAST "

The Council of the Haida Nation entered treaty negotiations in December 1993. There has been little progress at this table since then.

The Haisla Nation Table entered Stage 4 in December 1996 and is making progress on several key issues, such as culture and heritage, environmental management and eligibility and enrolment. It has also begun discussions on land selection.

The Heiltsuk Nation Table entered Stage 4 in April 1997 and is addressing eligibility and enrolment, governance, lands and resources and fishing. The table is making progress in sifting through technical information and discussing the interests of each of the parties.

The Oweekeno Nation Table entered Stage 4 in March 1998. It spent much of last year negotiating a Framework Agreement. Concurrent with the signing of the Framework early in 1998, Oweekeno began a period of restructuring for Stage 4 treaty negotiations. The First Nation is preparing their community and staff for treaty negotiations and eventual treaty implementation. Tripartite treaty meetings are on hold pending the restructuring, which is expected to take several months.

The Tsimshian Tribal Council Table entered Stage 4 in February 1997. Seven communities comprise the Tsimshian Tribal Council. It is the largest First Nation by population currently in the treaty process. Tsimshian have spent the last year developing internal mandates for key issues in substantive Agreement in Principle negotiations. At the negotiating table, Canada, British Columbia and the Tsimshian have been discussing their respective interests regarding most of the issues that will be addressed in the Agreement in Principle and the eventual treaty, including lands, resources, cash and governance.

SOUTH "

The Alkali Lake Indian Band Table entered Stage 4 in December 1997. The parties are now holding information workshops in the Alkali Lake community and Williams Lake to share information among the negotiating parties and with the aboriginal and non-aboriginal communities. Workshop topics covered since September include the context of treaty negotiations, culture and heritage and governance. The table is also drafting a Stage 4 workplan and plans to begin substantive negotiations this summer.

The Cariboo Tribal Council Table entered Stage 4 in December 1997. The parties have been convening Stage 4 preparatory information workshops in Williams Lake and CTC communities for the benefit of the negotiating parties, advisory bodies and community members.

The In-SHUCK-Ch/N'Quat'qua Table entered Stage 4 in August 1996. The table is nearing consensus on most substantive issues, including access, administration of justice, fiscal arrangements, lands and resources, parks, eligibility and enrolment, dispute resolution, wildlife and water. The table meets frequently and has established several technical working groups and a legal drafting group to help the negotiators move through subjects as quickly as possible.

The Ktunaxa Kinbasket Tribal Council Table spent the year negotiating their Framework Agreement. The agreement was initialed in November 1997 and ratified early in 1998. In November, the First Nation tabled interim measures proposals dealing with lands and education. In Stage 4 as of May 1998, the treaty table is holding preparatory information workshops in Cranbrook for the negotiating parties and interested third parties.

The Ts'kw'aylaxw First Nation Table entered Stage 4 in October 1996. Ts'kw'aylaxw First Nation has been negotiating with the Province to develop an interim measure over the Pavilion Creek watershed and to establish a process for consultation with the Ministry of Forests over development plans. Agreements have not been reached on either of these issues.

The parties to the Westbank First Nation Table have been negotiating towards an Agreement in Principle in Stage 4 for just over a year, since March 1997. The table's progress has been considerable, it having addressed land selection, access, subsurface resources, water, cultural artifacts, environmental assessment, fish, wildlife and dispute resolution.

Treaty negotiations between Xaxli'p First Nation, Canada and British Columbia have progressed slowly since the three parties signed a Framework Agreement in June 1997 to enter Stage 4. Ongoing discussions continue between the Province and Xaxli'p regarding land and resource decisions in the Xaxli'p territory.

VANCOUVER ISLAND/SOUTH COAST "

Ditidaht First Nation has been in Stage 4 since January 1996. Pacheedaht Band entered Stage 4 in August 1997. Since then, the two First Nations have been formally working at an integrated table. Integration enables the pooling of resources and expertise and a saving of time. These negotiations are at an advanced stage. The First Nations estimate there is agreement with Canada and BC on 75-80% of the principles in the Agreement in Principle.

The Homalco Indian Band Table entered Stage 4 in May 1996. It met on April 1, 1998 after a seven-month pause during which time Homalco was consulting with its people. It expects to make presentations to the table over the next few months.

The Hul'qumi'num Treaty Group Table entered Stage 4 in December 1997. The Hul'qumi'num Treaty Group is consulting with its constituents, including youth. Hul'qumi'num will be negotiating lands, fisheries and general provisions over the next year and will move into other substantive issues towards the end of the year.

The Klahoose Indian Band Table entered Stage 4 in February 1997. Klahoose has focused its attention over the past year on obtaining an interim measure to protect Forbes Bay. An area of major importance to Klahoose, Forbes Bay has dominated meetings between the three parties. As of May 31, 1998 no agreement has been reached but discussions are continuing.

The Kwakiutl Laich-Kwil-Tach Council of Chiefs Table initialed their Framework Agreement in May 1998. It is now being ratified by all three parties.

The Nanaimo First Nation Table entered Stage 4 in September 1996. Substantive negotiations have taken place on land, access, culture and heritage, fisheries and parks. In April 1998, the First Nation signed a Memorandum of Understanding with the federal government regarding National Defence lands. The agreement states the Canada Lands Company will not transfer title to all or any portion of the lands (except to Canada or NFN) until December 31, 2000, or until the parties agree that the lands will not comprise a portion of the lands to be conveyed to or held for the benefit of NFN.

The Nuu chah nulth Tribal Council Table entered Stage 4 in March 1996. The table comprises 13 nations and has five to six days of tripartite negotiation meetings per month. Governance issues are being negotiated collectively among the Nuu chah nulth Tribal Council, Canada and BC. Land and resource issues are being negotiated among individual Nuu chah nulth nations and the two public governments. Recently, negotiations have focused on fisheries management, forest resources, wildlife, and emergency preparedness, as well as on interest presentations on land.

The Sechelt Indian Band entered Stage 4 negotiations in August, 1995. Canada and British Columbia tabled the first substantive offer for an Agreement in Principle at the Sechelt table in August 1997. It was the first such offer in the BC treaty process. The three parties continued to negotiate until January 1998 and agreed on a number of sub-agreements that would eventually form part of the overall treaty. Then, after the Delgamuukw court decision, Sechelt began litigation claiming aboriginal title over their territory. Although Sechelt First Nation has expressed an interest in continuing negotiations while in litigation, the three parties have not resumed negotiations.

The Sliammon Indian Band Table began Stage 4 negotiations in May 1996. Substantive issues being negotiated include culture and heritage, enrolment and ratification, governance, and fish. Since November of 1997 the provincial chief negotiator has been changed twice, resulting in some delays.

The Te'Mexw Treaty Association Table entered Stage 4 negotiations in December 1996. The table spent the fall of 1997 in mediation, assisted by the Treaty Commission. At that time, the table decided to focus on lands and fish issues for a period of several months. A fisheries side table was established in February 1998, and bilateral fisheries discussions are ongoing with the First Nation and the federal Department of Fisheries and Oceans. The table met recently to begin discussions on culture and heritage and economic development.

The Winalagalis Treaty Group Table entered Stage 3 in May 1998. Negotiation of a Framework Agreement will address common and individual issues for six nations: the Kwakiutl, 'Namgis, Tanakteuk, Gwa'Sala Nakwaxda'xw, Tlatlasikwala, and Quatsino nations.

LOWER MAINLAND/ FRASER VALLEY "

The Katzie Indian Band Table entered Stage 2, preparation for negotiations, in December 1996. The parties continue to discuss how to structure negotiations, which will be captured in procedures and openness protocols.

The Musqueam Nation Table entered Stage 3 in August 1995 and aims to sign its Framework Agreement by mid-summer 1998. Musqueam Nation has been engaged in litigation over the loss of Indian Reserve 6, in Kitsilano.

The Squamish Nation Table entered Stage 3 in October 1995 and aims to sign its Framework Agreement by mid-summer 1998. Squamish First Nation has also been engaged in litigation over the loss of Indian Reserve 6, in Kitsilano.

The Sto:Lo Nation Table completed its Framework Agreement in January 1998 and subsequently entered Stage 4 negotiations. In preparation for substantive negotiations, the Sto:Lo Nation -- comprising 18 bands in the Fraser Valley -- is undertaking consultation with its constituents.

The Tsawwassen First Nation Table signed its Framework Agreement in August 1997, and began Stage 4 negotiations in November. A Stage 4 workplan has been developed and the table is beginning to draft chapters on treaty amendment, dispute resolution, ratification and enrolment. The table has experienced a number of federal and provincial staffing changes over the past few months.

The Tsleil Waututh Nation Table commenced Stage 4 negotiations in May 1997. Tsleil Waututh Nation is focusing on a treaty model appropriate to a metropolitan setting. It wants to establish a representative presence throughout its traditional territory through ownership and jurisdiction over some portions, co-jurisdiction and co-management over others and participation in joint ventures. The First Nation has also been engaged in litigation over the loss of Indian Reserve 6, in Kitsilano.

The Yale First Nation Table signed its Framework Agreement in February 1997 and subsequently entered Stage 4 negotiations. It is engaged in discussions on eligibility and enrolment and governance. Yale First Nation has undertaken internal work on land assessment and appraisal and community capacity building. It recently made a fisheries presentation to Canada and BC outlining Yale's traditional and contemporary use of salmon from the Fraser River and its method of harvesting.

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203 –1155 W. Pender St.
Vancouver B.C. V6E 2P4
604 482 9200, Fax 604 482 9222
info@bctreaty.net. www.bctreaty.net

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Overlaps

First Nations' traditional territories are at the heart of treaty making. They define the area within which the First Nation, Canada and British Columbia must reconcile their respective interests, jurisdictions and use of resources. Those interests include, but are not limited to, traditional uses of specific areas for fisheries, wildlife, spiritual use and other activities.

Traditional territories can and do overlap. Overlaps may arise from many causes: a tradition of sharing territory for the use of specific resources; movements of families or tribes; or longstanding disputes. Where overlaps represent a tradition of sharing between First Nations, and that is acknowledged for treaty purposes, then everyone knows that the shared territory or resource can only be dealt with by consent of those First Nations.

The Treaty Commission's concern is with contested overlaps between neighbouring First Nations. When a First Nation commences treaty negotiations with Canada and British Columbia over land and resources, it must have the authority to speak for the traditional territory and resources that it claims. If there are significant unresolved overlaps, then that authority is in question. If the First Nation is to make progress in treaty negotiations, overlaps must be resolved so that the parties can make arrangements without fear of a competing claim to the territory or resource.

Unresolved overlaps assume greater significance as the treaty process progresses. The issue has been raised with the Treaty Commission by the Treaty Negotiation Advisory Committee -- the province-wide advisory body to the federal and provincial governments -- , the Union of BC Municipalities, the Select Standing Committee and various First Nations outside the treaty process.

The overlap dispute between the Nisga'a Tribal Council and the Gitanyow Hereditary Chiefs, now before the courts, underlines the potential for unresolved overlaps to delay completion of a treaty and to precipitate litigation. It has also focused attention on the need for established mechanisms to deal with unresolved overlaps.

The Treaty Commission realizes that overlap is a sensitive issue. However, it is one that cannot be left unaddressed. The increased obligation to consult arising out of the Supreme Court of Canada decision in Delgamuukw and the proposed acceleration of negotiations covering land, resources and cash heightens the need to address it. The court also suggests that all First Nations with an interest in an area should participate in those negotiations.

A principle underlying the treaty making process in British Columbia is that First Nations must resolve the overlaps among themselves. As a result, the Treaty Commission has a limited role in the issue. It is restricted to ensuring that First Nations identify and begin to address overlaps as they prepare for negotiations and to assist the parties to obtain dispute resolution services when requested.

Recognizing the importance of resolving these issues, some First Nations have agreed to their respective boundaries and rights with their neighbours. For them issues of overlap will not affect their progress towards signing a treaty with Canada and BC. Others are engaged in discussion with their neighbours over this issue. And others still, have yet to determine an effective way to address overlaps.

To assist in the resolution of overlaps, the First Nations Summit on behalf of the majority of First Nations in BC has adopted the First Nation Protocol. It outlines a voluntary process to resolve overlaps for First Nations in and outside the treaty process. The protocol is a three-step process starting with resolution through an elder's panel, then mediation, and finally arbitration. An implementation committee is currently addressing the practical application of the protocol to the treaty negotiation process.

Both the federal and provincial governments have policies on overlaps. They are not uniform and their application is unclear. Developing policies to deal with a complex issue such as overlap is difficult. The Treaty Commission hopes that Canada and BC will support the First Nation Protocol and harmonize their policies so that treaties can be concluded without challenges from First Nations with overlaps.

The First Nations Summit, Canada and BC, in reviewing the treaty process as a result of the Delgamuukw decision, have agreed to examine the issue of overlaps. The Treaty Commission believes that experience in BC and elsewhere will lead the parties to conclude that it is essential to resolve issues relating to overlap claims early in negotiations, well before the parties agree to the contents of an Agreement in Principle.

The Treaty Commission has recommended the following guidelines for adoption by the Principals:

First Nations resolve issues related to overlapping traditional territories among themselves. Where First Nations agree to shared use of specific resources within a territory, the agreement must outline the basis on which those resources will be shared. Where First Nations agree to exclusive territories, they must agree on a common boundary.

Canada and British Columbia agree to conclude an Agreement in Principle with a First Nation that anticipates the exercise of treaty rights within areas of overlapping claims only when:

- the other First Nations with an interest in the overlap area consent to the exercise of those rights through an overlap agreement or other appropriate means; or
- absent an overlap or other relevant agreement, other First Nations with an interest in the overlap area join the First Nation, Canada and British Columbia at a common table to address issues arising out of overlapping territories; or
- the First Nation has used best efforts to resolve the conflict with other First Nations with an interest in the overlap area through a process such as the First Nation Protocol.

The goal of all involved must be to achieve clear, uncontested treaties that give everyone the certainty about who will make decisions in BC under the new relationships that are being negotiated through treaties.

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604 482 9200, Fax 604 482 9222
info@bctreaty.net. www.bctreaty.net

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What is a First Nation

There may be as few as 10 or as many as 200 First Nations in BC, depending on the definition used.

For treaty purposes a First Nation is "an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in BC, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia."

The BC Claims Task Force in 1991 recommended that the treaty process should be open to all First Nations in BC and that each First Nation should organize itself for the purpose of treaty negotiations. The Task Force expected there would be up to 30 sets of treaty negotiations.

The Treaty Commission has now accepted 51 First Nations into the process, organized around 43 negotiating tables. Among these First Nations, 35 are band-based, 13 are tribal groups (of which two are Yukon-based), and three are based on hereditary systems.

The Task Force saw several considerations in deciding a First Nation's organization for treaty negotiations -- common language, historical of relationships, geography and natural boundaries. Other factors relate to present and future concerns, for example, the sharing of costs and resources and the more effective jurisdictional coordination.

In applying the definition of First Nation with which it must work, the Treaty Commission has stressed that a community submitting a Statement of Intent to negotiate a treaty must have a traditional territory that is neither wholly shared nor wholly disputed. If there is no distinct traditional territory the question arises whether there are two First Nations or one First Nation with two communities. It has also taken the view that the governing body should be established by and receive its negotiating mandate from all of its members, not just those living on reserve.

The Treaty Commission has few tools for establishing whether the governing body and aboriginal group it represents are appropriate to the task of negotiating and implementing a comprehensive, government-to-government treaty. This implies a size and degree of established organization that justifies the resolution of all treaty issues.

Some First Nations have developed protocols to work at a common negotiating table, a process the Treaty Commission has and will continue to facilitate. First Nations are sharing information on negotiations and related issues both through the First Nations Summit and on a regional basis. This regional cooperation may well extend to treaties themselves, which may enable and encourage First Nations to cooperate in providing services and exercising certain authorities.

The Treaty Commission acknowledges that a broader concept of nationhood must be balanced by geographical and current political realities. Some First Nations have functioned as independent units for a long time. However, the Treaty Commission also believes that nationhood should, where possible, encompass past, present and future considerations if treaties are to lead to a truly new relationship among First Nations, Canada and BC.

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First Nations Capacity

Participants in the BC treaty process, as well as the Treaty Commission, recognize the importance of strengthening the capacity of First Nations to negotiate and implement treaties.

Treaties will provide a wide range of modern governance responsibilities that First Nations have not exercised to date, as well as economic development opportunities that many have not yet enjoyed. Consequently, aboriginal communities will need to develop their abilities or 'capacity' to assume these new responsibilities. Considerable attention is being given to capacity building within the treaty process, so that First Nations can develop the internal skills and expertise required for both immediate treaty negotiations and eventual treaty implementation.

The First Nations Summit, Canada and BC have identified capacity as a central issue in their review of the current treaty process.

Capacity building will also come about through the negotiation and implementation of interim measures within the treaty process. If the parties agree, an interim measures agreement to protect a treaty interest could be implemented as a sub-agreement prior to concluding the final treaty. As precursors to the implementation of self-government, these measures will give First Nations experience in various governance and resource management functions.

Initiatives are underway to address First Nations capacity building within the treaty process. A group of First Nations leaders, with an interest in capacity building, met with the Treaty Commission in January 1998 to discuss the development of self-assessment tools for First Nations in the treaty process. They agreed to form a committee to oversee a project that will produce voluntary community self-assessment surveys, model human resource development plans and a related guidebook, as well as tools to measure or evaluate existing infrastructures, governance experience and business development.

The project, funded by the federal government, seeks to provide flexible tools for First Nations to identify their own capacity needs and determine how best to meet these needs. A further goal is to facilitate access to existing capacity building programs and resources. This will assist First Nations to build or enhance capacity, thereby supporting their treaty negotiations, treaty implementation and overall community development.

The Treaty Commission is providing both a representative and administrative support to the five-member committee which includes four First Nation leaders.Another phase in the capacity building initiative is to identify funding sources, as well as other means of support such as internship opportunities. This information will be made available to First Nations and other interested parties.

These initiatives, while preliminary, are nonetheless important steps in addressing the development of First Nations capacity, the ultimate goal of which is the achievement and implementation of successful and lasting treaties.

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Public Information and Education

The Treaty Commission has during the past year taken on a larger role in public information and education.

The first objective of the expanded program is to raise public awareness and understanding of the historical and legal reasons for treaty making, and the Treaty Commission's role in the BC treaty process. The second objective is to provide public information on the treaty process, the Treaty Commission and the status of each negotiation.

Making Treaties in BC is a one-hour, made-for-television, prime-time documentary being produced by Motion Visual Productions in concert with the Treaty Commission for the Global Television Network. Given the potential of television to reach thousands of British Columbians, participation in the production of the television documentary Making Treaties in BC is a major focus of the Treaty Commission. The documentary, planned for broadcast this fall, will raise awareness and understanding of the issues in treaty negotiations and the process for resolution.

An important new source of information on the treaty process became available via the internet in June 1997 with the launch of the Treaty Commission web site at www.bctreaty.net. The site provides up-to-date information on the status of negotiations as well as a calendar of main table negotiation sessions that are open to the public.

Recognizing the need for information in the classroom on the treaty process and treaty negotiations, the Treaty Commission is working in cooperation with educators to ensure there are appropriate classroom materials on the treaty process.

The Treaty Commission participated in a project with the First Nations Education Steering Committee, BC Teacher's Federation and First Nations Summit to produce the booklet Understanding the B.C. Treaty Process, An Opportunity for Dialogue. The booklet is intended primarily for teachers, but is also available to the public. A second edition, being produced to include information on the Supreme Court of Canada decision in Delgamuukw, will be available later this year.

The Treaty Commission is participating with Qualicum School District #69 in developing teaching materials relating to the treaty process for use in classrooms province-wide. The course materials will be of benefit to teachers throughout the province who are teaching First Nations Studies or integrating information about First Nations into other subjects. This will necessarily include information on the historical, economic and legal reasons for treaty making, the treaty process, negotiations and the role of the Treaty Commission.

The Treaty Commission is informing British Columbians on the status of negotiations through regular editions of Treaty Commission Update. This was published over the past 12 months in April and October 1997 and in February 1998.

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Resources

Resource Materials

A resource guide, listing information on treaty negotiations available from the Treaty Commission, Canada, British Columbia and the First Nations Summit, is available at www.bctreaty.net or in printed form from the Treaty Commission.

Recommended reading

Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C., edited by Roslyn Kunin, Laurier Institution, 1998

The First Nations of British Columbia, Robert J. Muckle, UBC Press 1998

Report of the Royal Commission on Aboriginal Peoples, Minister of Supply and Services, 1996

Treaty Talks in British Columbia, Chris McKee, UBC Press, 1996

Aboriginal Peoples and Politics, Paul Tennant, UBC Press, 1990

Contact and Conflict, Robin Fisher, UBC Press, 1977

Publications

Understanding the B.C. Treaty Process is available by phoning the First Nations Summit at (604) 990-9939

A second edition will be available later in 1998

BC Treaty Commission newsletter Update is available by phone 1 800 665 8330

Federal Treaty Negotiation Office newsletter Treaty News is available by phone 1 800 665 9320

Videos

Whose Land is This?, Motion Visual Productions, 1997

Pulling Together Series, BC HYdro, 1997

Treaty Making in BC II, Treaty Commission, 1997
Available at your local library

World Wide Web

British Columbia Treaty Commission http://209.123.179.89

Canada http://www.inac.gc.ca/

British Columbia http://www.aaf.gov.bc.ca/aaf/

First Nations Summit http://www.firstnations-summit.bc.ca

Carrier Sekani Tribal Council http://www.cstc.bc.ca

Hul'qumi'num Treaty Group http://www.island.net/~hgroup/

In-SHUCK-ch/N'Quat'Qua http://www.inshuckch.com

Nisga'a Tribal Council http://www.ntc.bc.ca

Union of BC Municipalities http://www.civicnet.gov.bc.ca/ubcm/aboriginal/index.html

The Royal Commission on Aboriginal Peoples Final Report
http://www.libraxus.com/RCAP/rcapdefault.htm

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203 –1155 W. Pender St.
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Funding

Allocating funds to First Nations for treaty negotiations is a key responsibility of the Treaty Commission. The Principals agreed that a neutral body should administer funding allocations to First Nations to avoid conflicts between the negotiating parties.

Canada and British Columbia provide a fixed amount of money to the Treaty Commission each year for allocation to First Nations. Eighty per cent is provided to the First Nations through loans and 20 per cent as grants. Canada provides the loans and 60 per cent of the grants with BC providing 40 per cent of the grant funding.

Over the five years since its start in May 1993, the Treaty Commission has allocated $93 million to First Nations, nearly $75 million in the form of loans.

Before releasing funds to First Nations, the Treaty Commission must receive a workplan of the work to be done that year towards a treaty and a budget. In making an allocation, the Treaty Commission may consider several factors including: number of communities; population; geographic location and travel requirements; extent and number of overlaps; and the stage and intensity of treaty negotiations. Under the funding guidelines the Treaty Commission administers, First Nations in Stage 4 are to receive more funding than in previous stages to reflect the complexity of these negotiations. However, the amount of funding each First Nation receives is limited by the total funding available to the Treaty Commission.

Funding available in 1997-98 to support First Nations in treaty negotiations totaled $30.3 million. The budget for the 1998/99 fiscal year is $30 million. In the Treaty Commission estimates loan and grant funding should have been $6 million to $7 million higher.

There are several reasons for the need to increase funding:
there are more First Nations in Stage 4 -- 36 compared with 27 last year
many First Nations, including several larger groups, are now eligible for Stage 4 funding over the full year
one larger First Nation is able to resume negotiations following the Delgamuukw judgment.

In November 1997 the Treaty Commission advised Canada, British Columbia and the First Nations Summit of the need for more treaty negotiation funding. When no increase was forthcoming, the Treaty Commission again advised the Principals of the serious consequences for First Nations. It noted that, although most First Nations have now advanced into Stage 4, they are receiving less funding. Reductions for the 1998/99 fiscal year were capped by the Treaty Commission at 30 per cent.

Given current funding from Canada and BC, the situation will be worse next year. There will be less money available while almost all First Nations will be in Stage 4.

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Challenges

DELGAMUUKW DECISION DEFINING EVENT OF 1997

The Supreme Court of Canada's decision in Delgamuukw on December 11, 1997 was the defining event of the 1997/98 fiscal year and it came as the treaty process was reaching a turning point.

Just four years before, the Treaty Commission had begun accepting First Nations into the treaty process. By December 1997, 32 of 43 negotiating tables had reached Stage 4 agreement-in-principle negotiations. Ten were negotiating intensely, one was close to agreement.

Other tables were moving more slowly, for various reasons, including the unexpectedly large number of First Nations in the treaty process-a problem commonly referred to as system overload. In 1995, the Treaty Commission identified system overload as an emerging problem. In June 1997, the Commission presented to the Principals a System Overload Report based on the work of a tripartite committee. It underlined the problem of supply and demand: the two public governments' resources, especially BC's, were insufficient for advanced agreement-in-principle negotiations with so many First Nations. Inevitably, public governments would focus their resources on a handful of fast-tracked tables of their choosing. The remainder, despite borrowing funds to stay in the process, would have to wait.

By December 1997, system overload was not yet overwhelming. Nonetheless, some First Nations had the capacity to conduct negotiations at a faster pace than government teams could. When Delgamuukw was decided, the system overload report had not been addressed by the Principals.

NEGOTIATIONS PRE-DELGAMUUKW

Negotiations were affected by differing perspectives on the nature and extent of aboriginal rights. Aboriginal people saw aboriginal title as an historical, lawful claim to whole traditional territories amounting to ownership. First Nation leaders saw public government willingness to enter treaty negotiations as a symbolic act of mutual recognition. In their view, the Crown was acknowledging the legitimacy of the First Nations'claim to aboriginal title to and jurisdiction over their territories. In turn, First Nations would recognize the legitimacy of the Crown's claim to underlying title and jurisdiction over those territories.

For their part, public governments have noted that proof or acceptance of aboriginal title is not a precondition to negotiations. However, when pressed, they stated that they could recognize no more than the aboriginal rights recognized by the BC Court of Appeal in Delgamuukw. These were undefined, site-specific, aboriginal rights to engage in sustenance or ceremonial activities.

Some First Nations were close to suspending negotiations because they could not accept a treaty based on governments' perspective of their rights.

Simultaneously, non-aboriginal critics of the process chastised government for paying too little attention to the BC Court of Appeal's characterization of aboriginal rights and title. During the summer of 1997, an organized and well-funded campaign was started to convince British Columbians that the provincial mandate for treaty negotiations was too generous and should be the subject of a public referendum. Campaigners argued that self-government provisions in the Nisga'a Agreement in Principle were contrary to the Court of Appeal decision and that the amount of land and cash for the Nisga'a was excessive because both the trial judge and Court of Appeal had rejected aboriginal ownership or title.

The implicit message was that treaties were desirable, but that aboriginal rights were inconsequential, no threat to provincial jurisdiction over lands and resources, and purchasable through treaties for much less cash and little, if any, land. The public could not help but be confused and there was concern that public support for treaty negotiations was being undermined. That was the status of treaty negotiations in December 1997.

THE IMPACT OF DELGAMUUKW

To First Nations, the Delgamuukw decision was a vindication of their claim of title to their territories. They saw their bargaining strength at both the treaty table and the interim measures table as being substantially fortified.

To non-aboriginal British Columbia, especially the resource industry, the decision was seen as creating uncertainty by undermining provincial authority to create past, present or future rights in land and resources. It was also seen as increasing the cost of treaties, at a time when the economy was clearly fragile.

The decision left huge questions unanswered. The public, especially the resource sector, looked to public governments to resolve the uncertainties they were now facing. That could only be accomplished through negotiation.

THE REVIEW PROCESS

Just two days after the judgment, a meeting was held between the Principals-the federal and provincial ministers and the First Nations Summit leaders. It had been arranged months before, but Delgamuukw became its focus.

The Treaty Commission, after rapidly digesting the key elements in the judgment, recommended that the Principals share their preliminary views on the decision before coming to any final conclusions or adopting final positions. It further recommended that they establish a tripartite forum through which they could identify, address and attempt to resolve those issues that separated them.

The Principals agreed and the Treaty Commission organized meetings in February and March. Legal counsel for each of the Principals gave their respective interpretations of the decision. A list of issues was agreed and a professional facilitator chosen. Two three-day meetings occurred in April resulting in a proposal for approval by all three parties. At the time of this report, further meetings were being considered.

The meetings were closed to encourage candour. However, in addition to the Principals, three representatives from the Treaty Negotiation Advisory Committee and several Chiefs

were present. The Vice-Chief of the Assembly of First Nations represented First Nations outside the BC treaty process. He is seeking to make the process more acceptable to those First Nations. The Treaty Commission was there to provide information and advice.

The purpose of these meetings should be understood. On some issues it is hoped that agreement can be reached on recommendations to improve the process. However, the Principals appreciate that on more substantive issues affecting their mandates, agreement may be neither possible nor appropriate. In these cases, the purpose will be to hear and understand one another and to inform the recommendations that will respectively go before Cabinets and the Summit Chiefs.

IMPROVEMENTS TO THE PROCESS

Until agreement is reached among the Principals, the Treaty Commission can only touch on some of the issues being discussed.

Land, resource and cash issues are usually addressed later in treaty negotiations. The Principals, now recognizing that these issues should be dealt with sooner, are considering a proposal. Other issues relate to the current six-stage treaty process. This is basically a sound process for negotiating treaties, but four years of experience reveal that improvements are required and Delgamuukw underlines their urgency.

The Treaty Commission has its own views on issues that should be addressed.

The System Overload Report suggests criteria that would, in effect, define a First Nation in terms of its capacity to negotiate and implement a comprehensive treaty. Delgamuukw has again focused attention on this by clearly stating that aboriginal title is a communal title held by all the descendants of the nation that exclusively occupied the area in 1846. That statement alone may require some tables to be reconfigured and raises issues of nationhood that must be addressed.

Overlapping claims are clearly an issue that must be reviewed by the Principals.

The implications of Delgamuukw for consultation processes and interim measures clearly must be addressed. Delgamuukw has escalated First Nations' demands for a role in dealings by government over lands and resources within their territories. There are too many First Nations in the process for that to be achieved through treaties alone. Other means must be found. Delgamuukw suggests consultation processes become negotiation processes so that interim measures and economic development agreements become treaty building blocks.

CONCLUSION

The Treaty Commission foresaw that Delgamuukw created an opportunity, but was aware of the risks and difficulties. Above all, restraint and give and take is necessary. The Principals have embarked on a difficult but necessary course and the present review must have a chance to work. It is not a cliche to observe that the success of the review depends on the Principals getting beyond positions and identifying and addressing underlying interests.

The tripartite review is at a standstill primarily because BC has chosen to pursue bilateral discussions with Canada and the First Nations Summit Task Group. The Treaty Commission urges the Principals to re-establish the tripartite review process so that ways can be found to improve the treaty negotiation process and make it more efficient.

The Treaty Commission has also observed that there has not been a stampede by First Nations to litigate. Virtually all First Nations in the BC treaty process have indicated their preference for negotiations. However, First Nations expect public government mandates and approaches to change in response to Delgamuukw.

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A lay person's guide to Delgamuukw

Treaty negotiations among First Nations, Canada and British Columbia had been progressing, but were facing difficulty as indicated in this annual report. Then, in December, the Supreme Court of Canada announced its decision in a case called Delgamuukw, and suddenly everything seemed to change. Those who had been engaged in negotiations, and those who had not, stopped to consider how this decision might affect their positions. Nobody yet can say what the impact of the decision will be but some things are known. The about:blankTreaty Commission has developed this lay person's guide to answer some questions you may have about Delgamuukw. In doing so, we have relied on assistance from two distinguished professors specializing in aboriginal law, Hamar Foster of the University of Victoria and Patrick Macklem of the University of Toronto.

What started the lawsuit?

The Gitxsan Nation and the Wet'suwet'en Nation started the lawsuit in 1984. There was a federal land claims process available at the time, but it was slow, and the Province - which holds underlying title to the Crown land in the area - would not participate. So the First Nations went to court.

What did they claim?

Their claim covered 133 individual territories, amounting to 58,000 square kilometres of northwestern British Columbia. They claimed both ownership of the land and jurisdiction. That is, wherever provincial laws conflicted with tribal laws in the territory, tribal law would prevail.

Who was the claim against?

The main defendant was the Province of British Columbia, as the owner of the lands in question. Other First Nations, business and resource associations were later allowed to take part, arguing on both sides of the case.

What were the main arguments in response to the claims?

BC's main defence at trial was that all aboriginal land rights in BC were extinguished by laws of the colonial government before it became part of Canada in 1871, when authority to pass laws in relation to Indians was transferred to Canada. In the Court of Appeal, BC changed its position and argued that aboriginal land rights had not been extinguished. However, the Court of Appeal appointed special counsel make the extinguishment argument and unanimously decided that there had been no blanket extinguishment of aboriginal interests in land by the colonial government. In the Supreme Court of Canada, BC's main argument was that aboriginal title was primarily a collection of aboriginal rights to engage in traditional activities.

What did the Supreme Court of Canada decide?

There was no decision as to whether the Gitxsan and Wet'suwet'en have aboriginal title to the lands they claimed. The court said that this issue could not be decided without a new trial. One reason was a technical one, having to do with the way the claim was stated. Another was that the original trial judge had not given enough consideration to the oral histories presented by the First Nations.

Will there be another trial?

It will be up to the Gitxsan and Wet'suwet'en to decide whether to negotiate an agreement or to begin again with another lawsuit. The first trial lasted three years and the appeals took another six years.

Why is the case so important?

Even though the actual land claim was not decided, the case has enormous significance for BC because the judges went on to make a number of statements about aboriginal rights and title that indicate how the courts will approach these cases in the future.

What is aboriginal title?

The court said that aboriginal title is a right to the land itself. Until this decision, no Canadian court had so directly addressed the definition of aboriginal title. Other cases had dealt with aboriginal rights in terms of the right to use the land for traditional purposes such as hunting. Aboriginal title is a property right that goes much further than aboriginal rights of usage.

Permitted uses of aboriginal lands are no longer limited to traditional practices. For example, mining could be a permitted use, even if mining was never a part of the First Nation's traditional culture.

In many ways, aboriginal title is just like ordinary land ownership. The owner can exclude others from the property, extract resources from it, use it for business or pleasure.

But there are important differences, too. Aboriginal title is a communal right. An individual cannot hold aboriginal title. This means that decisions about land must be made by the community as a whole.

Because aboriginal title is based on a First Nation's relationship with the land, these lands cannot be used for a purpose inconsistent with that continuing relationship. For example, if the people's culture was based on hunting, their aboriginal title lands could not be paved over or strip-mined if that would destroy their cultural relationship to the land.

Aboriginal title lands can be sold only to the federal government.

Aboriginal title has the additional protection of being a constitutional right. No government can unduly interfere with aboriginal title unless the interference meets strict constitutional tests of justification.

Except for these limitations, aboriginal title holders can use their lands as they wish.

What is the difference between aboriginal title and ordinary land ownership?

This chart shows the major differences established by the Delgamuukw decision between aboriginal title and the familiar kind of land ownership that is registered in the Land Titles office.

	Ordinary Land Ownership	Aboriginal Title
Who can own land?	An individual or a group	A communal group; there are no individual rights to aboriginal title
Can the owner sell the land?	Yes	May be sold only to the federal Crown
What limits are there on land use?	Zoning, and other provincial and municipal laws	Use must not impair traditional use of the land by future generations
What laws protect the land?	common law and provincial statutes	common law and the Canadian Constitution

So where does aboriginal title exist in BC?

Nobody knows yet. It will have to be either agreed on through a treaty process, or decided by the courts on a case-by-case basis. If First Nations decide to go to court to establish title to lands, they will have to prove that they occupied the land, to the exclusion of others, before 1846, the year Britain declared sovereignty over the area that became British Columbia. Then they have to prove some degree of continuity from that occupation until today.

The Delgamuukw case does say that courts must be willing to rely on oral history, including traditional stories and songs, in a way that until now, they have not. However, it is still far from clear exactly what level of proof will be enough to establish a claim of aboriginal title.

Will the decision affect private property?

The Gitxsan and Wet'suwet'en made no claim to private lands, so the court did not directly address this question.

However, the court's decision clearly suggests that there are private lands in BC that are subject to aboriginal title, or at least were wrongly sold. This is because the court confirmed that the province had no authority to extinguish aboriginal title after union with Canada in 1871, yet the province has been selling land to private interests since 1849. Still, the remedy for First Nations is more likely to be the payment of compensation than any adjustment to private ownership.

How will aboriginal title affect the Province's title to Crown lands?

This is a difficult question and one that cannot be answered with any certainty right now.

The court does indicate that the Province will still have a limited right to deal with Crown land that is subject to aboriginal title, for example by granting resource tenures. The limits on that right are expressed in a two-pronged test: It would have to be for a purpose that is compelling and substantial. (The court gives agriculture, forestry, mining, environmental protection and economic development as possible examples, which would have to be

examined on a case-by-case basis);
The government's action must be consistent with the special relationship between the Crown and aboriginal peoples, which is a relationship of trust. This means that the Province will need to consult with First Nations before granting any interest in aboriginal lands to others. Whether this means that a First Nation's consent would be required will depend on the circumstances. Consent would likely be required for provincial laws regulating hunting and fishing on aboriginal lands.

Cash compensation will be another factor. First Nations are entitled to share in the economic benefits derived from their lands.

The general principle seems to be that any infringement by the Crown on aboriginal title has to be for a purpose that promotes the reconciliation of the two cultures.

However, other statements in the decision raise serious doubts about whether provincial laws relating to mining, forestry and other land uses can directly apply to aboriginal title lands. This is one of the most uncertain aspects of the decision and will require further guidance from the courts.

Will I still be able to hike and camp or pick berries on Crown lands that are subject to aboriginal title?

Once it is established that particular lands are aboriginal title lands, the owners naturally will be able to regulate access to those lands. If these regulations conflict with provincial or federal laws, it is not yet clear which law will apply.

Will First Nations be able to use the courts to stop activities on lands they are claiming?

Yes, just as they could before Delgamuukw. It might be somewhat easier now that the court has defined aboriginal title and the requirements for its proof. But there are still strict requirements. A court will not make this kind of order unless it is satisfied that the First Nation's interest in the land will have been irreparably harmed by the activity and that the balance of convenience between all of the parties to the lawsuit favours stopping the activity.

Another way that First Nations can prevent this kind of harm is by negotiating interim measures agreements within the treaty process. Under these agreements, First Nations and the provincial and federal government agree on how land will be used while a treaty is being negotiated, and how the benefits will be shared.

Why did the Supreme Court give special rights to aboriginal people?

In one sense, aboriginal title is not a special right at all. It is simply a matter of recognizing property rights that until now have been wrongfully ignored. To continue to deny First Nations their property rights would be to deny the equality of all Canadians before the law.

But it is true that aboriginal peoples have a unique constitutional status in Canada. The Supreme Court of Canada explained it this way, in an earlier case:

(W)HEN EUROPEANS ARRIVED IN NORTH AMERICA, ABORIGINAL PEOPLES WERE ALREADY HERE, LIVING IN COMMUNITIES ON THE LAND AND PARTICIPATING IN DISTINCTIVE CULTURES AS THEY HAD DONE FOR CENTURIES. IT IS THIS FACT AND THIS FACT ABOVE ALL OTHERS, WHICH SEPARATES

ABORIGINAL PEOPLES FROM ALL OTHER MINORITY GROUPS IN CANADIAN SOCIETY AND THAT MANDATES THEIR SPECIAL LEGAL, AND NOW CONSTITUTIONAL STATUS.

The concept of aboriginal title was not invented by the Supreme Court. It is consistent with approaches developed in New Zealand, Australia and the United States, and in the last century by the Privy Council, which was then the highest court in the British Empire. It also is in many respects a natural evolution of the earlier aboriginal rights cases decided by Canadian courts since 1973.

Can government pass laws to extinguish (wipe out) aboriginal title?

No. In Canada the constitution is the highest authority in the land, not Parliament. Parliament can, in certain circumstances pass laws that conflict with constitutional rights, but only in ways that can meet a strict test of justification set down by the courts. A law to extinguish aboriginal title would be unlikely to meet that test.

Also, the clause in the constitution that permits governments to override certain constitutional rights does not apply to aboriginal rights. Aboriginal title is an aboriginal right.

These issues could cause a lot of conflict between aboriginal and non-aboriginal people. Did the Supreme Court talk about how these conflicts can be worked out?

Yes. The court strongly urges the parties to negotiate rather than litigate. The Chief Justice says at the end of his judgment:

FINALLY, THIS LITIGATION HAS BEEN BOTH LONG AND EXPENSIVE, NOT ONLY IN ECONOMIC BUT IN HUMAN TERMS AS WELL. BY ORDERING A NEW TRIAL, I DO NOT NECESSARILY ENCOURAGE THE PARTIES TO PROCEED TO LITIGATION AND TO SETTLE THEIR DISPUTE THROUGH THE COURTS.

The Crown, he says, is under a moral, if not a legal, duty to enter into and conduct negotiations with First Nations in good faith.

Litigation of aboriginal claims can be not only costly but divisive of communities and entirely unpredictable in their result. And although it will continue to be necessary to resort to the courts for the answers to certain questions, litigation is limited in what it can accomplish. It cannot address the problems of economic and social development that are so critical to aboriginal communities. Negotiated settlements on the other hand, can achieve constructive and creative results that enhance communities and resolve conflict.

The court's decision concludes with these words:

ULTIMATELY, IT IS THROUGH NEGOTIATED SETTLEMENTS, WITH GOOD FAITH AND GIVE AND TAKE ON BOTH SIDES, REINFORCED BY JUDGMENTS OF THIS COURT, THAT WE WILL ACHIEVE . . . "THE RECONCILIATION OF THE PRE-EXISTENCE OF ABORIGINAL SOCIETIES WITH THE SOVEREIGNTY OF THE CROWN."

Let us face it, we are all here to stay.