

LOOKING BACK  
LOOKING FORWARD

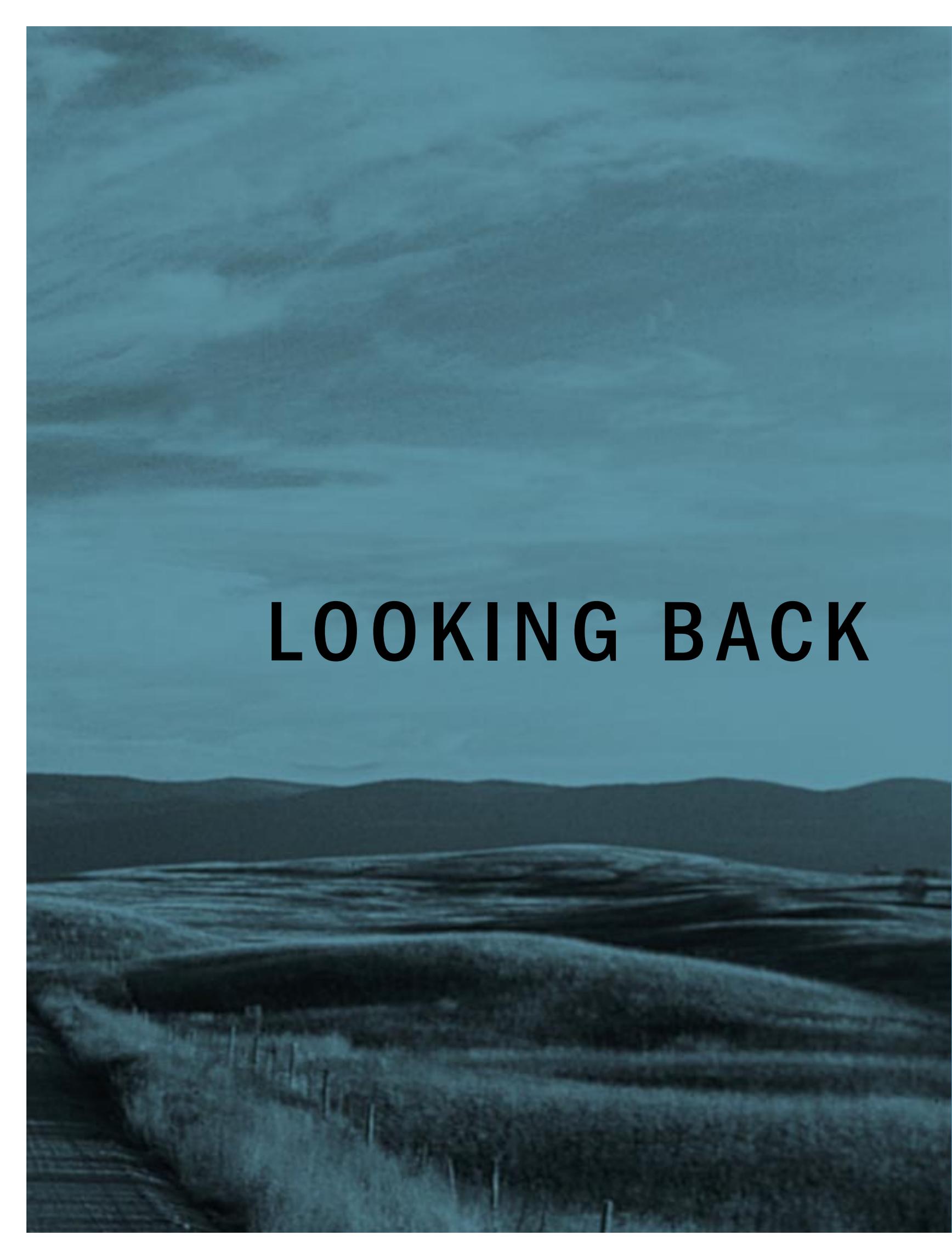
A REVIEW OF THE BC TREATY PROCESS

# LOOKING BACK LOOKING FORWARD

7 A REVIEW OF THE BC TREATY PROCESS

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A monochromatic blue-toned landscape photograph. The scene depicts rolling hills and a field in the foreground, with a fence line visible. The sky is filled with soft, wispy clouds. The overall mood is serene and nostalgic.

# LOOKING BACK

# Our expectations for comprehensive treaties were unrealistic. We tried to accomplish too much too soon.

## A TREATY IS A PROCESS NOT AN EVENT

### **A hard look at treaty negotiations in BC**

In 1991 First Nations, the governments of Canada and British Columbia agreed to a made-in-BC treaty process for resolving the dispute over title to land in this province. Through the process established by this agreement, Canada and BC agreed to negotiate treaties with willing First Nations in British Columbia. In 1993 the Treaty Commission opened its doors to accept First Nations into the treaty process. Although there has been significant progress over the past eight years, there are no treaties. It's no surprise then that in 2001 many British Columbians are looking for results.

The Treaty Commission, from its unique perspective as keeper of the process, has taken a hard look at the experience of the past eight years and presents its findings in this report. What we offer is an account of the strengths of this process, a blunt assessment of the lessons learned, a review of the parties' fundamental commitments and the extent to which they have been honoured, and finally a prescription for moving forward toward resolution.

In this report the Treaty Commission points the way to speeding up the delivery of the tangible benefits that can flow from treaty making while recognizing that the attainment of comprehensive treaties will be further down the road than many once had hoped.

## WHAT HAS BEEN ACCOMPLISHED

Treaty negotiations have become a fact of life in British Columbia and it's easy to forget what a monumental undertaking they represent.

**They are tripartite:** For the first time in Canadian history, a provincial government has joined with Canada to negotiate the resolution of aboriginal rights and title through government-to-government negotiations with First Nations in a process agreed to by all three parties.

**They are open:** British Columbia treaty negotiations are the most open and transparent negotiations of their kind anywhere in the world.

**They are comprehensive:** When completed, treaties will entail not only transfers of land and cash, but recognition of governance authorities and resource management arrangements as well.

Not surprisingly, they have proven difficult to achieve. And yet, much has been accomplished.

- The parties are building trust in the negotiations as evidenced by the number of First Nations staying at the negotiating table. Before 1991, road blockades, angry rhetoric and litigation filled the daily news. Now, most First Nations in BC have chosen treaty negotiations over direct action and lawsuits.
- The BC treaty process provides a forum for the parties to address aboriginal issues in a constructive manner. With facilitation by the Treaty Commission, the parties have created a formal province-wide process to address major outstanding issues common to all tables, thereby laying the groundwork for agreements to come at individual tables.
- Since negotiations began in December 1993, 42 First Nations have advanced to the agreement-in-principle stage of negotiations, where they are

addressing the substantive issues that will form part of their treaties. Twelve offers have been exchanged or tabled between Canada and BC and First Nations on critical issues such as land, resources, and fiscal arrangements. Six First Nations are at earlier stages of negotiations and one is in stage five. The magnitude of this accomplishment has to be measured against the 23 years that it took the Nisga'a Nation to achieve its treaty and the 21 years that have been spent negotiating agreements in the Yukon.

- During the past 18 months, more than 60 interim agreements have been signed, touching on forestry, fisheries, land use planning and economic development, and more are being negotiated.
- Many British Columbians now have a much deeper understanding of treaty issues than they did when the process began.
- A majority of British Columbians continues to support the resolution of these issues through treaty negotiations.
- Resource industries have established new relationships with First Nations including a variety of business arrangements.
- Community-to-community forums, funded in part by the federal government, have successfully brought together municipal governments and neighbouring First Nations to meet and discuss matters of mutual interest.
- Aboriginal people involved in these negotiations, both at the negotiating tables and on the administrative side, have developed new skills and gained expertise, to the lasting benefit of their communities.

## WHY TREATIES ARE TAKING SO LONG

The reasons why treaties are taking so long are discussed in detail in the following pages. Simply stated, these are comprehensive agreements and the negotiations are necessarily complex. There are deep-seated differences between First Nations and the governments of Canada and BC and very different ideas of modern treaty making that must be addressed.

But there have been other unforeseen reasons for delay:

- The Supreme Court of Canada *Delgamuukw* decision in December 1997 sent everyone back to the drawing board. Because the court clearly confirmed the existence of aboriginal title as a right to the land itself, all parties had to re-examine their mandates and decide whether to change their approach to negotiations.
- Negotiations have been in virtual suspension for much of the past 11 months, by reason of the federal election campaign in the fall of 2000, then the period of uncertainty preceding the provincial election call, the election campaign, and the new government's settling-in period. This hiatus was extended by the provincial government's announcement that many important issues were to be put aside pending a referendum and a reference to the courts on the question of self government. The recent decision by the Province to abandon the court challenge brings hope that negotiations will soon resume on the full range of issues.
- The system is overloaded. There are far more First Nations negotiating treaties than was contemplated when the process was designed and the negotiating resources of Canada and BC, but especially BC, have often been overtaxed. The result is long stretches between meetings because negotiators' calendars are full, sometimes with a consequent loss of momentum.
- A high turnover of negotiators at some tables, and on all sides, causes delay as new negotiators have to be brought up to speed. And it takes time for trust to rebuild among the negotiators.

## WHAT WE HAVE LEARNED

Looking back over the last eight years, the question that looms large is “what could we have done better?” Although not an exhaustive list, some of the important lessons that we have learned are set out below:

**1. The ‘Big Bang’ theory of treaty making needs rethinking.** When this process began, interim measures agreements – incremental steps – were seen as essential to treaty making. But no effort was made to conclude interim agreements. Most people believed that there would be a period of intensive negotiations, at the end of which a series of comprehensive treaties would be signed, putting in place new relationships, new regimes of land ownership and new law-making authorities. That turns out to have been too simplistic. It didn’t recognize that new relationships take time and that there are good reasons for wanting to try out new arrangements before they are set in “constitutional cement.”

**2. It’s taking too long for aboriginal communities to see the benefits of treaty making.** While negotiations go on, First Nations are seeing their traditional territories being depleted of resources, timber being committed to others, and land that should be available for treaty settlements being alienated. At the same time, their debts are mounting. The result is rising frustration, especially among young people who are looking for opportunities to build a future.

**3. The ‘expectation gap’ is great.** First Nations look to treaties to affirm their place in their traditional territories. This includes measures to support their communities’ economic sustainability. Political rhetoric from Canada and BC supports these economic goals but an examination of the offers themselves points to a population-based formula. First Nations see the offers being made as too little

to support their vision of the future, while many British Columbians see First Nations’ expectations as unaffordable.

**4. There will not be 40 different solutions to some of the problems faced in the 40 sets of negotiations.**

Each First Nation is autonomous and each negotiation stands alone. But time and money are not well spent in trying to craft individual approaches when it is clear there will be certain elements fundamental to Canada and BC that will be common to all treaties. Fiscal relations is a good example.

**5. Neither Canada, nor BC nor most First Nations have clearly articulated visions of life after treaties.**

This is closely related to the immediately preceding statement and it is true both for the province as a whole, and for the parties at most negotiating tables. Progress is hampered by the lack of a plan for what comprehensive treaties are meant to accomplish at a level of detail that goes beyond broad notions of sustainability, fairness and autonomy.

**6. First Nations’ ability to resolve issues in high level talks with federal and provincial ministers has been hampered by the structure of the First Nations Summit.**

The Summit is a process, not an organization. It brings together four times a year the chiefs of those First Nations involved in treaty negotiations. Its three-member task group cannot make decisions that would bind individual First Nations without first consulting the chiefs at the next Summit meeting. And the Summit does not have sufficient resources to support activity between quarterly meetings. As a result, the Summit has had difficulty being on an equal footing in talks with the federal and provincial government ministers.

**7. Some First Nations do not yet have the human resources to assume the full range of legislative, executive, judicial and administrative responsibilities that governance entails.** The government of Canada recognizes the inherent right of aboriginal people to govern themselves as they did before European contact, but it is unclear how this right will be exercised by some First Nations who today have very small populations or who do not have a recent history of strong governance.

**8. Reaching treaties with urban First Nations poses new challenges that demand creative solutions.**

Private lands will be critical to the settlement of treaties in urban areas where Crown land is limited. As negotiations intensify over governance powers and settlement lands for First Nations in urban areas, the need to address local government concerns is becoming more acute.

**9. The Treaty Commission could be more effective.**

The Commission has not enforced all of the formal reporting requirements contained in its policies and procedures. For example, it does not have reports of the parties' consultation and public information efforts so that it can fully evaluate their effectiveness. And the Commission has not sought time-limited commitments from the parties or held them accountable for results. The Treaty Commission only steps in when it identifies a problem through periodic monitoring of the negotiations or when asked to by the parties.

**10. Some First Nations have left the treaty process and others may do so.** The reasons are complex.

Certainly there is disappointment at the offers that are being made. There is anxiety over the growing debt burden as First Nations continue to borrow money to support their negotiations. The *Indian Act* system of biennial band elections undermines political stability so that in some cases, the chief and council whose support for negotiations is so important are replaced every two years.

## COMMITMENTS TESTED

Treaty negotiations in BC are founded upon the 19 commitments that were made by Canada, British Columbia and the First Nations Summit. Recommended in 1991 by the British Columbia Claims Task Force — a tripartite body — they were unanimously accepted as the basis for an unprecedented, made-in-BC treaty process. A review of the process, then, requires an assessment of the extent to which the parties have honoured those commitments — or any further or different commitments they have made.

Several of the 19 commitments address the need for a process open to all First Nations and facilitated by an independent Treaty Commission. Much of that work has been accomplished — the Treaty Commission was established early and the negotiation process is in place. The Treaty Commission is firm in the belief that the process itself is fundamentally sound, though it does remain a work in progress.

However, the parties need to make greater efforts to live up to the commitments set out below.

### **A new relationship**

*The parties agreed: “First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding through political negotiations.”*

In entering negotiations, the parties recognize one another as legitimate governments representing the interests of their constituents. This is the starting point in building a new relationship. Eventually, comprehensive treaties will give that relationship full expression.

In the meantime, mutual trust, respect and understanding will grow as the parties demonstrate their continuing commitment to the process. Interim measures agreements are an effective way to demonstrate that commitment, but progress here is only recent. The Treaty Commission has more to say about interim measures later in this review.

### **Significant issues**

*The parties agreed: “Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.”*

If the negotiations do not address the issues that each party considers critical, treaties can never be successfully concluded. One issue that slows and even stalls the progress of negotiations is compensation, which Canada and BC have declined to address. This constitutes a serious failure of commitment on the part of the governments of both Canada and BC.

First Nations argue that compensation is an issue significant to the new relationship and it should be addressed at the treaty table. Canada and BC argue that compensation is a legal concept and so has no place in a political negotiation, and that treaties are about the future, not about the past.

Musqueam and Quatsino negotiations have been stalled over this issue. Other First Nations reluctantly signed framework agreements that don’t specifically include compensation as an issue for negotiation because they could not afford further delays.

Saying that a party must be free to introduce an issue is not to say that the parties must arrive at an agreement on that particular issue. There may be some issues on which they ultimately don’t agree — and yet there may be enough common ground that a treaty is possible. It is the refusal to engage in the discussion that breaches a fundamental commitment.

Compensation has now been referred to a high level working group for discussion. This is a positive step, though the issue still is not being addressed at individual tables.

### **A flexible process**

*The parties agreed: "A six-stage process be followed in negotiating treaties."*

The six stages of negotiations were designed to promote efficient and effective negotiations. The process now needs to be more flexible. We have to pay more attention to the early formulation of a treaty vision and mandate by all three sides in the negotiations. In the past, this has been left to later in the process, so that time and money and peoples' energies are spent working towards ill-defined goals.

Three areas of the process requiring attention are:

**1.** The British Columbia Treaty Commission Agreement, signed by the parties, calls for the Commission to assess the parties' readiness to move from stages two to three, which is where the framework agreement is negotiated. The Commission sees a need for monitoring the parties' readiness throughout the process. First, the resources and mandate needed to negotiate a framework agreement are quite different from those required for more substantive agreement-in-principle talks. Second, community support and political commitment can fluctuate from time to time on all sides, and this is reflected in the level of resources that a party is willing or able to commit to negotiations.

**2.** The process is designed so that parties sign a framework agreement and then negotiate an agreement in principle (AiP) that contains substantially all the components of a comprehensive treaty. Recently, it has been recognized that there are certain elements of treaties that need to be discussed at the level of the First Nations Summit and the federal and provincial ministers, where options can be developed for consideration at individual tables. Fiscal relations is such an example. First Nations should have the option of signing a "slim AiP" which contains important elements of their treaty but leaves a defined set

of issues for resolution in those high level talks. However, current funding arrangements serve as a disincentive. Up to the signing of an AiP, the money First Nations borrow to support their negotiations is interest free until the loan becomes due, while funds advanced after an AiP carry interest charges from the date of advance. Loans are normally due only when a treaty is signed, or seven years after an AiP, or 12 years after the first loan advance.

The parties need to address this so that funding arrangements do not restrict the flexibility of the process.

**3.** Some First Nations need the opportunity to step aside from treaty negotiations for a time, to focus on preparing themselves for the many challenges involved in negotiating and implementing a comprehensive treaty. Again, funding arrangements discourage this and the result is often ineffective negotiations.

### **Open to all**

*The parties agreed: "The treaty negotiation process be open to all First Nations in British Columbia." And*

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

Together, these two recommendations have serious implications for all the parties in negotiations. These are voluntary political negotiations. No First Nation that meets the process' definition of First Nation is to be barred. In fact, recently, the Treaty Commission admitted the Kwayhquitlum First Nation to the process but Canada and BC refused to negotiate with them on the basis of their small population — fewer than 100 members.

Until Canada, BC and First Nations agree to revisit the recommendation that the process be open to all First Nations or revise the definition of First Nations agreed to for treaty purposes, the parties must honour their commitment to this recommendation. In fact, the definition of a First Nation for treaty purposes — a governing body, a territory and a mandate from its members — is loose and open to many interpretations. Consequently, instead of the 30 First Nations in negotiations envisioned by the Task Force, there are now 49 First Nations involved at 40 negotiating tables. The situation could become more acute if more First Nations decide to enter the process.

The difficulties caused by this proliferation are twofold. The greater than expected numbers has taxed the negotiating resources of Canada and BC. But more significantly, the Principals have not squarely addressed the meaning of self governance for First Nations with very small present-day populations, and the challenges they face in negotiating comprehensive treaties.

### **Overlaps**

*The parties agreed: "First Nations resolve issues related to overlapping traditional territories among themselves."*

The Treaty Commission has urged the governments of Canada and BC not to conclude agreements in principle with First Nations until overlap issues have been resolved or efforts exhausted. Otherwise, progress is ultimately impeded and the integrity of the process is called into question where the First Nation does not have the authority to enter into an agreement. Only a small number of overlaps have been resolved through agreement on a boundary or shared area. The First Nations Summit did develop a protocol for resolution of these disputes but to the Treaty Commission's knowledge it has never been used. First Nations have not had much success in living up to this commitment and must be more proactive in resolving overlaps.

### **Dispute resolution**

*The parties agreed: "The Commission provide advice and assistance in dispute resolution as agreed by the parties."*

This commitment is one that has largely been met, but one that the Treaty Commission urges the parties to reconsider. In many cases, the Treaty Commission does assist, often successfully. But the Treaty Commission is often constrained by the fact that all three parties must agree to seek its involvement. The Treaty Commission suggests that this commitment be altered so that any one party at a table may invite the Treaty Commission to attempt to facilitate the resolution of a problem.

The other constraint on its activity is financial. At present the Treaty Commission does not have the resources to provide a higher level of service.

### **Interim measures**

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

Interim measures have several purposes: they can provide a measure of certainty for all parties over land and resources; they can protect key First Nation lands and resources while a treaty is being negotiated; they can allow the parties to test solutions before building them into constitutionally - protected documents; they can bring economic benefits to communities during negotiations. Whatever the specifics, interim measures agreements build trust by demonstrating the parties' continuing commitment to negotiating treaties.

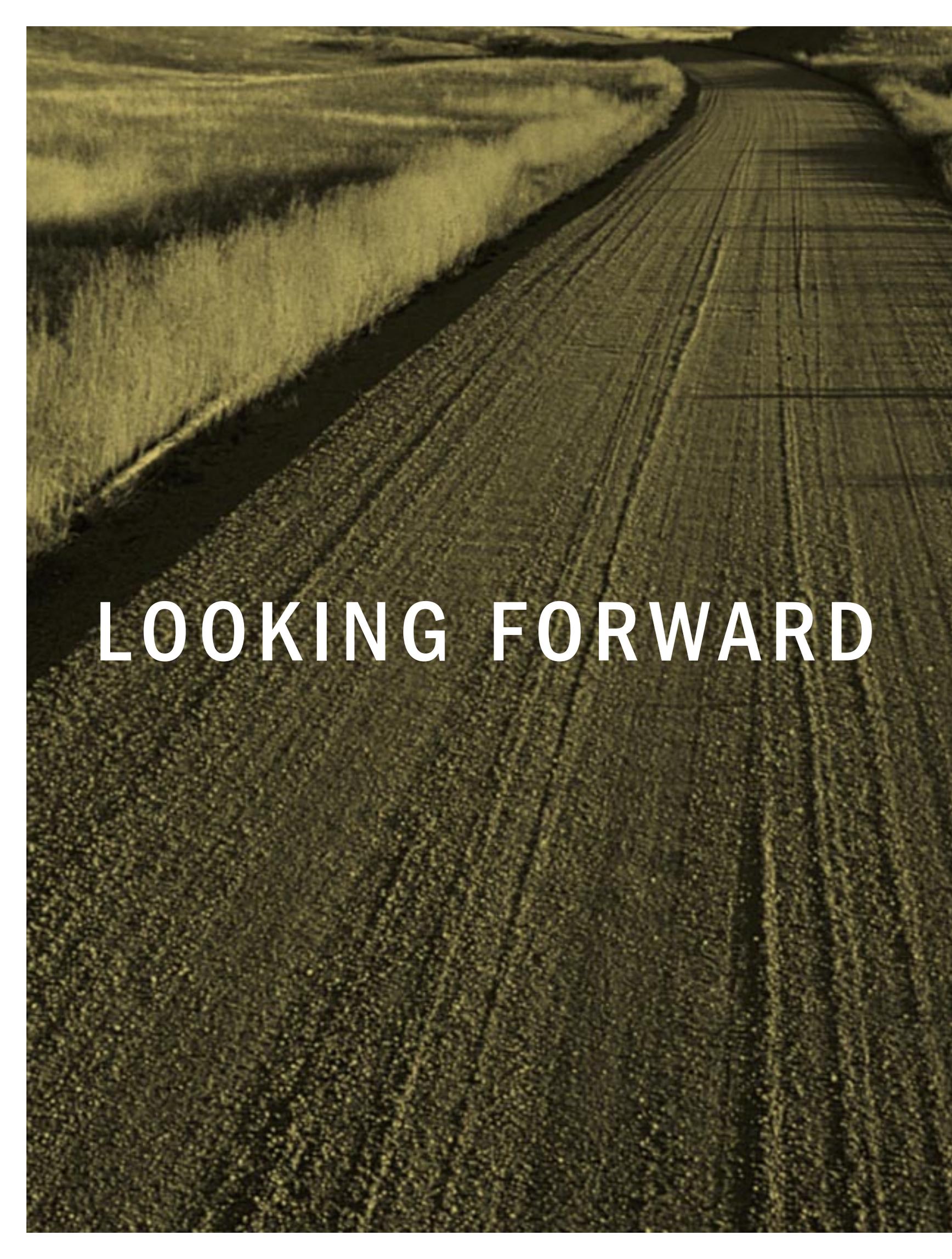
In the past, the Treaty Commission has battled Canada and BC over their reluctance to negotiate interim measures. Failure over several years to attain an interim measure protecting its interests in the Pavilion Creek watershed was a significant factor in Ts'kw'aylaxw First Nation's withdrawal from the treaty process last year.

More recently, with pressure from industry, some 60 agreements were signed. Only one of these was a land protection agreement; some were for land use planning or economic development projects; many were studies in support of negotiations. The provincial government has recently signalled a willingness to pursue more land and resource protection measures.

However, despite the fact that the parties did commit to negotiate such interim measures "before or during the treaty negotiations" Canada and BC had often taken the position that they would only agree to interim protection measures during the late stages of negotiations.

Part of the impetus for more interim agreements has come from a recent cost-sharing agreement between Canada and BC. Because interim measures are largely land and resource based, their cost falls disproportionately on BC, as the holder of Crown title to most of BC. The federal-provincial agreement allows for more equitable sharing of the burden.

In summary, this is a commitment that was breached in the past, but which the parties are showing a new and significant willingness to honour.

An aerial photograph of a winding road or path through a vast field of tall, golden-brown grass. The road curves from the top right towards the bottom left, creating a strong sense of perspective. The lighting is warm, suggesting late afternoon or early morning, with long shadows cast across the field. The overall mood is serene and contemplative.

**LOOKING FORWARD**

# A treaty, like any new relationship, takes time. More time than we thought.

## COMPREHENSIVE TREATIES MUST BE BUILT OVER TIME

### **A prescription for moving forward**

The treaty process today is at risk of being crushed under the weight of unrealistic expectations. When the Treaty Commission opened its doors in December 1993, there was an expectation that we would see treaties ratified by the end of the decade. That has not happened. Looking back today, the Treaty Commission believes not that the process was too slow, but that it tried to accomplish too much, too soon.

Treaty negotiations in BC were launched with a "Big Bang" vision of how they would proceed. The expectation was that each set of negotiations would result, relatively quickly, in a comprehensive treaty. What has become clear is that treaty negotiations were, and are, simply too complex for speedy solutions and that British Columbians — aboriginal and non-aboriginal — need time to prepare for the new relationships that will result.

As keeper of the treaty process, the Treaty Commission has reflected on the course of negotiations and offers the following prescription for moving forward toward the ultimate goal: the achievement of comprehensive treaties.

## BUILD TREATIES INCREMENTALLY

We need to shift our focus away from a treaty as a one-time achievement, and see treaties instead as the embodiment of new relationships that can be built over time. Interim measures, ministerial-level discussions to resolve certain issues, “slim AiPs,” governance initiatives, time outs to allow for community development — all of these can be the building blocks of treaties.

This approach need not be an impediment to attaining the certainty that many see as the ultimate goal of treaty making. What “certainty” really means in this context is “predictability” and that can never be delivered by a piece of paper. Predictability comes from familiarity and from practices that develop through a history of working together. The certainty all parties want can be achieved incrementally.

A building block approach also meets the concerns of those who worry that treaties will set in “constitutional concrete” new governance arrangements that have never been tested.

*The Treaty Commission recommends that First Nations, Canada and BC shift the emphasis in treaty making to incremental treaties—building treaties over time—so that when a final treaty is signed, the new relationships necessary for success will largely be in place.*

The Commission has identified several elements to this new approach. There likely are more.

### **1. Negotiate more interim protection agreements.**

Until the year 2000, the Claims Task Force recommendation regarding interim measures was largely ignored. Over the past 18 months more than 60 interim measures agreements have been signed, including one land protection agreement.

A land protection agreement is a formal agreement among Canada, BC and a First Nation to protect First Nation interests in land that will ultimately form part of a treaty settlement, while negotiations progress. For example, a piece of Crown land that is particularly significant to a First Nation might be protected from

sale or from development, on the premise that it will ultimately form part of treaty settlement lands.

If treaty making is approached as an incremental process, land protection can be an important tool for building trust and for preserving the parties’ ability to deliver an acceptable package when it is time for determination of treaty settlement lands. This will be particularly critical in the case of urban treaties, where Crown land is at a premium.

*The Treaty Commission recommends that Canada and BC negotiate interim measures agreements that can serve as the building blocks of treaties, and provide sufficient funding for their implementation.*

*The Treaty Commission further recommends that interim measures agreements protecting key lands and resources be given priority at those tables where failure to address these issues would undermine negotiations.*

### **2. Intensify high level talks on major issues.**

Each First Nation negotiates its own treaty. However, there are certain issues that cannot have different solutions at each table.

In the wake of the *Delgamuukw* decision, the Principals — represented by the federal and provincial ministers, and the First Nations Summit task group — began meeting on an irregular basis to discuss some of the challenges facing the treaty process itself. Recently, these meetings have been supported by the work of senior officials and targeted working groups. Indications are that these high level discussions can be an effective engine to drive the process forward.

For example, the *Indian Act* income tax exemption was identified as an issue that is unlikely to be resolved at individual tables. Moreover, it became clear that this is just one element of a complex set of intergovernmental fiscal relations that will be created by treaties. So, the Principals appointed a tripartite working group to explore the entire area of post-treaty fiscal relations and to develop options for

consideration by individual tables as they approach comprehensive treaties. The First Nations Summit has appointed to the working group a lead negotiator who has expertise in the area and has established a secretariat, with appropriate resources, to support the discussion and to share information amongst First Nations.

A challenge to this process is posed by the asymmetrical nature of the Principals. Ministers for Canada and BC are mandated to speak, within certain parameters, for their governments. When they come to a meeting they have been briefed by their officials and are prepared to make decisions. The three-member First Nations Summit task group represents First Nations. The Summit is a periodic gathering of chiefs; it has no constitution and very little infrastructure. The chiefs come together every three months but not much work is carried on between meetings and there is no central storage of information. The elected task group generally has no mandate except to attend meetings with the ministers, present First Nation interests and report back to the Summit. This lack of structure and flexible mandate has impaired the First Nations' ability to respond to issues in a timely manner and to take full advantage of the opportunities offered by these high level discussions.

A further imbalance is illustrated by the fact that federal and provincial negotiation teams each meet weekly to discuss strategies and mandates and to exchange information. First Nations negotiators on the other hand meet four times a year. Each team has its own set of experts and advisors and there is no central repository for information.

For Canada's part, it has often been difficult to schedule meetings of the political leaders because of the heavy demands from every part of the country on the federal minister's time.

*The Treaty Commission recommends that the First Nations Summit, Canada and BC commit all the necessary resources—including the assignment of experienced negotiators—to high*

*level discussions that will address elements that will be common to many treaties, to develop options for consideration at individual negotiations. Senior officials and working groups are important supports for this process, but the political leaders must meet at least quarterly to give direction and maintain momentum.*

*The Treaty Commission recommends that the First Nations Summit direct resources to support the work of the task group, provide for meaningful exchanges of information among negotiators, and mandate the task group so that they can engage effectively with the federal and provincial ministers.*

*The Treaty Commission recommends that when a Principal is unable to meet the commitment to quarterly meetings, an elected political alternate be appointed, with full authority to act on behalf of the Principal.*

### **3. Negotiate “slim AiPs”**

While certain elements of treaties are being addressed at the high level discussions described above, some First Nations will want to conclude the other parts of an agreement in principle — the land and cash components for example. Then, during stage 5 (final agreement negotiations) the parties can examine the options developed by those high-level discussions and adopt such elements as are appropriate — or reject them but take advantage of the work that has been done to develop another, mutually agreeable approach.

Rather than hold up individual negotiations while these broader talks continue, “slim” agreements in principle can be signed so that benefits begin to flow earlier rather than later to First Nation communities and so that there is certainty of ownership over land and resources.

An incentive for adopting this approach is that the availability of treaty-related measures is linked to achievement of an agreement in principle. Treaty-related measures are a recently developed subset of interim measures supported by federal and provincial funding. These measures can include pre-implementation of treaty provisions.

At the same time, current funding arrangements provide a powerful disincentive for First Nations signing an agreement in principle before all issues are resolved. When the BC treaty process was initiated, First Nations began to accept loan funding to support their negotiations on the basis that the money would be effectively interest-free. Loan funds advanced before an agreement in principle is signed are interest free until the loan becomes due, while funds advanced after an agreement in principle carry interest charges from the date of advance. Loans are normally due only when a treaty is signed, or seven years after an agreement in principle, or 12 years after the first loan advance.

*The Treaty Commission recommends that Canada and BC change funding arrangements so that First Nations can conclude a "slim" agreement in principle earlier in the treaty process – without resolving all of their treaty issues and without incurring additional interest charges on loans.*

#### **4. Give priority to governance initiatives.**

A reliable, open and accountable system of governance is critical to any nation's economic and social development. First Nations in BC, whose traditional governance systems have long since been replaced by the *Indian Act*, need time and support to develop modern governance structures that can support prosperous futures.

The Treaty Commission recommends three initiatives:

*A conference to review governance models, including lessons learned and best practices from Canada and around the world;*

*A province-wide table to identify common and conflicting interests, guiding principles, and options for the governance component of treaties; and*

*A permanent institute of governance to do research, develop workshops and training courses, disseminate information and maintain an inventory of existing governance initiatives.*

#### **5. Allow "time-outs" for the development of human resources, governance and vision.**

Some interim measures are aimed not at preserving real estate, but at creating human capital. There are First Nations in BC that need time and money to focus on developing human resources, governance and a vision for their communities, without accumulating further debt and without the continuing pressure of supporting tripartite negotiations while they do that.

Current funding arrangements do not encourage First Nations to take time out from treaty negotiations. Provision must be made to suspend interest charges during the time-out and contribution funding must be available to First Nations for this purpose.

This approach would also relieve the pressure on the resources of Canada and BC, allowing negotiators to focus on those tables where First Nations are ready for intensive negotiation.

*The Treaty Commission recommends that Canada and BC provide contribution funding to allow First Nations to develop their human resources, governance and vision without accumulating further debt and without the continuing pressure of supporting tripartite negotiations.*

## BE CANDID IN NEGOTIATIONS

There is no common understanding of the parameters and fundamental goals of treaty negotiations and this is causing mounting frustration on all sides of the treaty table.

In some cases First Nations have an unclear vision about their own futures, making it difficult to work towards a successful treaty settlement. More problematic are the conflicting messages delivered by the governments of Canada and BC as to their goals in treaty making.

Treaty negotiations use an interest-based negotiation model where negotiators spend time exploring individual First Nations' interests in economic and social development, implicitly supporting the assumption that treaty offers will reflect those interests. However, a review of the offers made to date points to a population-based formula as the primary basis for the calculations by the governments of Canada and BC.

Political rhetoric about sustainable communities and economic self-sufficiency gives rise to First Nations' expectations that are dashed when offers are presented by Canada and British Columbia.

No negotiating party should be compelled to divulge its bottom line before it is ready, but First Nations who understand sooner rather than later the basis on which offers will be made can make rational decisions as to whether the treaty process promises enough to warrant continued investment of the financial and personal resources that such negotiations demand.

The perception that treaty making requires extinguishment is keeping some First Nations out of the treaty process. Despite a tripartite effort by Canada, BC and the First Nations Summit to change this view, and the BC Claims Task Force statement that certainty can be achieved without extinguishment, the perception remains.

*The Treaty Commission recommends that First Nations, Canada and BC all articulate clearly their goals in treaty making and their vision of British Columbia after treaties.*

## RESPECT THE TRIPARTITE PROCESS

The BC treaty process is founded on the commitments of the three Principals — First Nations, Canada and BC. Unilateral or bilateral actions that run counter to those commitments weaken the process and destroy the trust that is so hard-won.

There are several recent examples:

- Canada and BC, as mentioned above, refused to negotiate with the Kwayhquitlum First Nation even though it had met the criteria laid down by all three Principals.
- On occasion, a negotiator for Canada or BC has sought to deny permission to the Treaty Commission to attend a negotiation session. This is an unacceptable interference with the Treaty Commission's ability to perform its statutory obligation to monitor and facilitate negotiations. If requested by all parties the Treaty Commission will, of course, respect the wishes of the negotiators for a private meeting.
- BC has recently unilaterally indicated that it will conduct a review of the Treaty Commission. As a result, it will only approve a one-year budget rather than the five-year budget agreed by Canada, BC and First Nations. As noted in the BC Claims Task Force Report, "A commission which must constantly seek funding or protect its funding sources will be distracted from its task."

The British Columbia Treaty Commission Agreement calls for a tripartite review of the Treaty Commission's effectiveness every three years. In spite of calls from the Treaty Commission for such a review, it has never been done.

*The Treaty Commission recommends that the Principals respect the tripartite nature of the BC treaty process by not attempting to alter fundamental commitments without the agreement of all three.*

*The Treaty Commission recommends that the Principals undertake as soon as practicable a tripartite review of the Treaty Commission's effectiveness, as called for in the British Columbia Treaty Commission Agreement.*

## ADDRESS URBAN ISSUES

Treaty settlements in urban areas pose challenges not faced before either in British Columbia or elsewhere in the world.

Public support for treaties has generally been centred in urban areas. It may be assumed that it is easier for people to support settlements that will not directly affect their lives. As negotiations progress with First Nations whose traditional territories encompass large parts of Vancouver, Victoria and other population centres, the depth of that public support may be tested.

Private lands will be critical to the settlement of treaties in urban areas where Crown land is limited. While most parties have long agreed that private lands will not be expropriated for treaty purposes, the issue of a willing buyer/willing seller has long been accepted at the negotiation tables but is now stirring controversy. Local governments are increasingly concerned that if private lands become treaty lands (through purchase and sale on a willing buyer/willing seller basis) their local tax base will be eroded, and along with it, their ability to provide services to residents and address community planning issues.

BC's principles for treaty negotiations stipulate that local government participation in the treaty process is guaranteed. As negotiations intensify over governance powers and settlement lands for First Nations in urban areas, the nature and extent of that local government participation may become more and more contentious.

*The Treaty Commission recommends that the Principals clarify the role of local government in tripartite treaty negotiations, and work with local government to address problems that arise from private land, acquired from willing sellers, being incorporated into treaty settlement lands.*

*The Treaty Commission further recommends that the Principals commit the resources necessary to fully inform the public about complex treaty issues, to build support for treaty negotiations in urban areas where land issues will be contentious.*

## IMPROVE CONSULTATION, INFORMATION

British Columbians are much more aware of treaty issues today than they were when the process began. Main table meetings are open to the public and are sometimes broadcast on cable television. Local government and interest groups have input through advisory committees at local, regional and province-wide levels. News of developments in negotiations is carried in all major media. The Treaty Commission's website is visited several thousand times each month; it mails out printed material to thousands of people at least three times a year and its touch-screen displays have been heavily used at museums, shopping malls, ferry terminals and public libraries throughout the province. But public understanding still falls far short of what is needed to support successful resolution of such long outstanding issues.

The Treaty Commission has produced, and supported the production by others, a variety of materials for use in schools. However, they are used at the discretion of teachers and it is unclear how widely they are disseminated.

Public consultation promotes public education and also depends on it. Even though the consultation process is extensive, tensions are arising from a misunderstanding in some quarters as to the real meaning of public consultation.

It has been the case that only the provincial government consults with local governments. The Principals should consider whether Canada and First Nations should take part in that consultation. The Treaty Commission has developed a proposal for a form of consultation with communities, both aboriginal and non-aboriginal, that it refers to as “regional visioning.” That proposal has been presented to the Principals and the Treaty Commission looks forward to a response.

*The Treaty Commission recommends that the Principals seek expert advice on ways to improve the consultation process now in place in treaty negotiations, including a set of standards that will clarify the rights and responsibilities inherent in a public consultation process.*

*The Treaty Commission further recommends that the Principals urge educators to more fully integrate into the classroom discussion of modern-day treaty making in British Columbia and that the Government of British Columbia commit the funding necessary to make new and existing educational resources on treaty making available to teachers for use in the classroom.*

## NEGOTIATE DURING REFERENDUM

The Treaty Commission has spoken before about the difficulty of obtaining meaningful public input on a complex issue through a referendum. Without knowing the question, or questions, posed to British Columbia voters, it is impossible to predict the impact a referendum will have on the negotiation process. What we can say is this: the issues these negotiations must address have largely been laid down in law. Those will not change, referendum or no referendum. Nor will the 19 commitments made by Canada, BC and First Nations as the foundation for this process. Further, early on in the treaty

process BC established and published a set of principles to guide its negotiations.

First Nations have borrowed \$150 million to negotiate over the past eight years, within these established parameters. It is entirely appropriate, and even healthy, for any party to refine its mandate and guiding principles and to build support among its constituents. However, if the BC government's guiding principles are to change in a fundamental way, there could be irreparable damage to the negotiation process. At the very least, debt arrangements between First Nations and Canada and British Columbia would need to reflect the change.

In the meantime, BC has severely restricted the mandate of its negotiators. With the recent announcement that the provincial government will not pursue a challenge to the Nisga'a treaty in the courts, it is to be hoped that these restrictions will be lifted.

*The Treaty Commission recommends that the Government of British Columbia extend as far as possible the range of issues remaining open for negotiation, while it awaits the results of its referendum.*

## WHAT IF WE DON'T DO TREATIES

In the past, the cost of our collective failure to resolve the BC land question has been almost entirely borne by aboriginal people. This is no longer the case. We will all bear the cost if we fail this time. A breakdown in negotiations will lead to continued economic and social uncertainty and more court cases and confrontation.

Failure at this point would be especially unfortunate given the huge investment of time and money, not to mention sheer human effort and goodwill – and given our achievements to date. Much of the work has already been done. The road to treaties is before us. With commitment, political courage and creativity, we will succeed.



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Merging past and present, the Treaty Commission symbol represents the three Principals in modern-day treaty making—the governments of Canada and British Columbia and First Nations. Pointing in an upward and forward direction, the symbol implies a “coming together” pivotal to successful negotiations and treaty making.