

British Columbia TREATY COMMISSION

Independent Facilitator for Treaty Negotiations in British Columbia

U P D A T E

MAY 2002

Principals take action on treaty issues

Action is being taken through high level talks to address the major issues that are obstacles to progress in treaty negotiations.

Senior officials had been meeting intensively throughout the winter months on a wide range of topics using Treaty Commission recommendations as the starting point for their discussions.

Central to the Treaty Commission's recommendations is



**Weisgerber
newest
Commissioner**

Jack Weisgerber, a former minister of aboriginal affairs, has been appointed to the Treaty Commission by the BC government.

Weisgerber represented Peace River South in the BC Legislature for 15 years from 1986 to 2001. He became BC's first Minister of Aboriginal Affairs in 1988, and in 1991 he was appointed Minister of Energy, Mines and Petroleum Resources. His leadership was also key to the formation of the BC Claims Task Force, whose report and recommendations is the blueprint for the BC treaty process.

Weisgerber replaces Kathleen Keating who resigned in November. The Treaty Commission comprises four commissioners appointed to two-year terms: a provincial appointee, a federal appointee and two commissioners appointed by the First Nations Summit. The chief commissioner is chosen by agreement of Canada, BC and the First Nations Summit.

the idea that treaties will be built over time. High level talks, interim measures agreements, capacity building and governance are among the building blocks of incremental treaty building that were set out in the Treaty Commission's 2001 annual report.

In March senior officials tabled their suggestions for moving forward on the major issues. Since then, three teams have been assigned to tackle three areas of concern:

- > Certainty, governance, First Nation constitution, and land status;
- > Revenue sharing and co-management on land and resources; and
- > Table assessments, "time outs" from treaty negotiations and funding implications.

The federal Indian and Northern Affairs Minister, First Nations Summit Task Group and the provincial Minister Responsible for Treaty Negotiations have endorsed the incremental approach to treaty making and have instructed their representatives to recommend, as soon as possible, how to move to an incremental approach. Serious consideration in high level talks is being given to early implementation

of land and resource agreements, which would provide immediate benefits to communities.

Individual treaty tables, too, have taken a positive approach and are exploring ways to build treaties incrementally, for example, by concluding land protection, fish or forest agreements as building blocks for a treaty. Building treaties incrementally allows a more flexible approach at individual tables to reflect diverse First Nation realities.

The Treaty Commission is applauding the governments of Canada and BC for negotiating interim measures agreements and for funding their implementation. Despite cutbacks to the BC Treaty Negotiation Office, the provincial government has recently made funding available for interim measures agreements and economic development, and is pursuing land protection agreements at several treaty tables.

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KEEPER OF THE PROCESS

Changes to Public Consultation a Concern

The BC government has eliminated funding for consultation groups established as a requirement of the BC treaty process.

The governments of Canada and BC are responsible for consulting with British Columbians and representing their interests in treaty negotiations. Through the creation of a Treaty Negotiation Advisory Committee representing the province's major sector interests, and regional and treaty advisory committees, the governments of Canada and BC have met the basic requirements for public consultation called for in the BC Claims Task Force Report. Now many of these advisory groups will be dismantled because of the provincial cutbacks. It appears likely the expertise gained over the past eight years may be allowed to erode.

Although the government says it will develop new consultation processes, none has yet been established. BC must act quickly to reassure British Columbians that public consultation will continue and to set up an effective process that allows for meaningful public participation.

The Government of Canada also has a duty to consult the public, but is re-evaluating its options given the provincial government's change in approach. There has been a high response rate to its survey on

consultation sent to more than 400 advisory committee members. The results of the survey will help set the course for future consultation. Canada will also continue meetings with the Treaty Negotiation Advisory Committee throughout the summer months to get member's views on proposed changes to the BC treaty process.

The BC government is holding a one-time, province-wide referendum as a way to consult with British Columbians on the principles that will guide BC's approach to treaty negotiations.

While the referendum will give British Columbians the opportunity to have input on broad treaty principles, it is not a cost-effective or efficient means for consulting with people throughout the course of treaty negotiations. Effective public consultation is essential if governments are to adequately represent non-aboriginal interests in the treaty process, and a one-time referendum is no substitute for meaningful consultation.

The Treaty Commission has repeatedly expressed concern about the Principals' efforts in consultation, public information and education. It recommended the Principals seek out independent experts in public consultation to develop a more

effective model for the BC treaty process.

The Treaty Commission is facilitating regional visioning discussions between aboriginal communities and their neighbours. Regional visioning provides an opportunity for people to consider a collective vision for their region and has the potential to be an influential forum for setting priorities now and after a treaty. However, regional visioning forums are not intended to replace other consultation processes.

More resources are also needed to keep the public informed and to provide for classroom discussion of modern-day treaty making. Teaching materials on self government and treaty making for Grade 4, to complement existing materials on First Nations, are being prepared by the Treaty Commission. However, costs for printing and distribution to schools will require funding from outside sources that have yet to be determined.

TREATY UPDATE

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Treaty Update is distributed to organizations and individuals interested in treaty negotiations in British Columbia. Please feel free to circulate or reprint the material in this newsletter.

Treaty Update is also available on the Treaty Commission's web site at www.bctreaty.net

Court underlines duty to consult First Nations

Two landmark rulings in the BC Court of Appeal direct the provincial government to properly consult First Nations before proceeding with development in their traditional territories.

One ruling reinforces the notion that the interests of First Nations in the BC treaty process, expressed in a framework agreement, are sufficiently substantive to deserve the protection of the courts. It also requires BC to consult with the First Nations in cases of infringement of those interests.

The court further said that consultation must take place without requiring First Nations to prove their title to the land in a lengthy trial. One of the court decisions held that third parties – in that case Weyerhaeuser – also have this duty to consult.

The two cases in question are *Haida v. B.C. and Weyerhaeuser*, and *Taku River Tlingit First Nation v. Ringstad et al.* In February 2002 the BC Court of Appeal ruled unanimously that the provincial government (Crown) and Weyerhaeuser did not properly consult the Council of the Haida

Nation when renewing a tree farm licence on Haida Gwaii (Queen Charlotte Islands). Further, the court held that a legally enforceable duty to consult will continue until Haida title and rights are determined in a treaty or by a court. According to the court, the Crown's duty to consult derives from the "trust-like relationship" between aboriginal peoples and the Crown.

The Haida decision followed a January 2002 decision by the Court of Appeal in the Taku River Tlingit case. In this case, the court ruled that the province must consult the Taku River Tlingit First Nation before they re-issue a project permit to Redfern Resources to reopen the Tulsequah Chief Mine in northwestern BC.

In *Haida*, the BC Court of Appeal noted there is a duty to consult the Haida who have a compelling case for aboriginal title in the Queen Charlotte Islands. In *Taku*, the court noted the aboriginal interests expressed at the treaty table give rise to this obligation.

The rulings also call into question the policy of both the governments of

Canada and BC to suspend treaty negotiations with a First Nation that is pursuing aboriginal-rights related litigation. In *Haida*, the court said:

If the Crown can ignore or override aboriginal title rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claim of aboriginal title or rights, even on an interim basis.

Given that there is now both a duty to consult once a claim is made and a supervisory role for the courts, the Haida case may undermine governmental policies against litigating and negotiating a treaty at one and the same time. The court made it clear that interim processes, either through the courts or negotiated agreements, can temporarily reconcile competing interests until there is a final reconciliation through a treaty or a decision at trial.

Principals take action

(continued from page 1)

However, cutbacks to funding and staff are already having an effect on the operations of the BC Treaty Negotiation Office, as well as other ministries that contribute expertise and solutions to treaty negotiations. While provincial treaty teams have been restructured to promote efficiencies, cuts of this magnitude in a system that is already overloaded impair BC's ability to advance

negotiations at all tables that have signed framework agreements.

First Nations are concerned that the provincial negotiating teams may be forced to devote their resources to concluding comprehensive treaties at fewer negotiating tables. First Nations in the treaty process have borrowed \$149 million to participate in treaty negotiations. There is concern the

cutbacks may prolong negotiations and unnecessarily increase the debt load of First Nations.

Faced with mounting debts, modest results to date and the prospect of prolonged negotiations due to provincial cutbacks, support for participation in the BC treaty process is eroding in many First Nation communities.

Self government matters

A 13-year study of indigenous nations in the United States has found economic success is closely linked to the power to make decisions.

Dr. Stephen Cornell, co-author of the *Harvard Project on American Indian Economic Development*, says their research has yet to find a single case in the United States of sustained economic activity on indigenous lands in which some government body other than the indigenous nation itself is making the decisions about government structure, natural resource use, internal civil affairs and development strategies.

Dr. Stephen Cornell

is Director of the Udall Center for Studies in Public Policy. He is also a professor of sociology and of public administration and policy at



the University of Arizona. He is co-founder of the Harvard Project on American Indian Economic Development, a research program – headquartered at the Kennedy School of Government at Harvard University – which he continues to co-direct.

A specialist in political economy and cultural sociology, Cornell holds a Ph.D. degree from the University of Chicago and taught at Harvard University for nine years before moving to the Udall Center in 1989.

He has spent much of the last 13 years working closely with Indian nations in the United States and Canada on economic development, tribal governance and tribal policy issues.

The economic research has found four critical factors for success:

1. Jurisdiction (self government) matters.
2. Effective governing institutions are necessary.
3. Governing institutions must be appropriate to the people.
4. The indigenous nation must have a strategic orientation.

Speaking to the Treaty Commission conference, *Speaking Truth to Power III*, on self government in March, Cornell said jurisdiction matters because, “it puts the development agenda and control of the necessary resources in indigenous hands.

“Without jurisdiction, indigenous nations are subject to other people’s agenda. You can’t ask people to be accountable if you don’t give them decision-making power. Whoever is making the decisions has the accountability. Jurisdiction marries decisions to consequences, which leads to better decisions.”

The second critical factor, not surprisingly, is that good government is essential to economic success.

Cornell said governments establish and enforce the rules of the game. “Those rules send a message to investors – everybody from some person thinking of taking a job in the nation’s government to someone thinking of starting a small business on reserve land – and the message is either, ‘Do or don’t invest here’.”

Thirdly, the governing institution must be culturally appropriate and have the support of the people.

“Institutions that match contemporary indigenous cultures are more successful than those that don’t,” said Cornell. “On the other hand, there is no blank cheque: institutions have to perform. We’ve seen nations who have admitted their traditional way of doing things isn’t up to the challenges they currently face, but that doesn’t mean they just grab a set of institutions off the shelf...it means they spend some hard time trying to invent new institutions that they believe in and that are capable of getting the job done.”

The fourth factor for success is strategic orientation. A strategic orientation “encourages politicians to serve the nation instead of themselves because there is an explicit sense of what it is the nation is trying to do.”

Across the United States, Cornell and colleague Joseph Kalt found many examples of Indian nations succeeding in building sustainable, self-determined economies.

In a systematic examination of 75 Indian nations in the United States with timber resources, the researchers found that for every job that moved from Bureau of Indian Affairs management to indigenous management, profits and profitability rose. The researchers found similar indications of effectiveness and

: Harvard study

efficiency in housing and in the gaming market.

Other examples of economic success include the Mississippi Choctaws who, on several small pieces of land, today import labour. Every day about 5,000 workers drive on to Choctaw land to take jobs in Choctaw-owned and-operated industries.

Another example is the Citizen Potawatomi Nation in Oklahoma. This is a Nation that today has close to 20,000 people. In 1975 they had only a few acres of land and less than a thousand dollars in the bank. Today they own the First National Bank of Shawnee, Oklahoma and they are the economic engine of that mixed-race region.

The Confederated Salish and Kootenai tribes of the Flathead Reservation in northwest Montana run a tribal college that gets applications from non-Indian people because it provides the highest quality education in that part of the state.

Kalt, in testimony before the United States Senate said, “You would not be surprised if I pointed out that eastern Europe was unlikely to develop economically as long as the major decisions about its future were being made in Moscow. Why would you be surprised then if I were to tell you that Indian country is not going to develop economically as long as the

major decisions about its future are being made in Washington, DC? It’s the same principle. Yield decision-making power.”

Based on their research, Cornell’s advice to the governments of Canada and British Columbia is to yield decision-making power and support indigenous jurisdiction. “Take nation building seriously. This is not about building administrative capacities.”

Cornell concluded his presentation by saying, “I’ve been very struck in the visits I’ve made to British Columbia by the opportunities offered by the treaty process. When I first heard about it, the discussions were often about claims. But the more I’ve looked at that process, the more it has struck me that the process has enormous nation building and constitutional potential... This is one place where nation building is, in fact, taking place, perhaps intentionally, perhaps in some cases inadvertently. It’s where people are rethinking what their governments should look at, where they’re asserting power. That strikes me as an enormously encouraging development...”

Cornell’s entire presentation is available at www.bctreaty.net/files/truthtopower.htm

Information campaign underway

Thousands of British Columbians have answered the Treaty Commission’s call to become informed about treaty issues.

Treaty Commission staff have handled hundreds of telephone calls and emails, and there have been thousands of web site visits as well as requests for thousands of the Treaty Commission’s most popular publications: *What’s the deal with treaties?*, *Why treaties?*, *Annual Report 2001*, and *A Lay Person’s Guide to Delgamuukw*.

As the independent voice of the BC treaty process, the Treaty Commission is a major source of information on treaty making in British Columbia. With recent heightened interest in treaty issues, the Treaty Commission is stepping up its efforts to provide timely, accurate and understandable information on the BC treaty process. The goal is to provide British Columbians with the resources they need to develop an informed opinion on treaty making.

A series of newspaper and television advertisements were run during the month of April to encourage people to become informed by visiting the Treaty Commission’s web site, www.bctreaty.net, emailing info@bctreaty.net or calling toll-free to 800 665 8330.

The Treaty Commission’s web site now includes information on aboriginal rights, self government, land and resources, financial issues and frequently-asked questions. Open negotiation sessions and developments at each negotiation table are regularly updated.

A touch-screen display has also been set up at Pacific Centre Mall in Vancouver to promote the Treaty Commission’s web site and 1-800 telephone number and to answer commonly asked questions about treaty negotiations. A similar display is providing information about treaty negotiations for Victoria-area residents.

Interim Measures Watch

A look at recent interim measures development – agreements enabling First Nations to manage or use land and resources in the interim before treaties are concluded.

Moving away from the ‘big bang’ theory of treaty making, the parties continue to explore creative ways to build treaties incrementally through interim measures agreements.

In the November *Update*, the Treaty Commission reported that interim measures negotiations had resumed in July, but the Government of BC was not expected to commit funding necessary to conclude agreements until later that year.

On April 23, BC announced a \$30-million First Nations Economic Measures Fund – \$10 million in each of the next three years to promote First Nations involvement in areas such as forestry, oil and gas, tourism and the 2010 Olympic bid.

“These dollars can open up aboriginal participation in some sectors of the economy that need more participation by local First Nations people,” said Minister Responsible for Treaty Negotiations Geoff Plant.

The Treaty Commission expects the fund will help conclude more interim measures agreements in the next few months.

New Agreements

Ten new interim measures agreements – including funding for governance research, economic development and land-use planning – were signed in March and April 2002. To date, nearly 70 interim measures agreements have been signed under the BC treaty process.

Cariboo Tribal Council (CTC), Canada and BC signed an agreement enabling CTC to participate in land-use planning and park management. The agreement promotes co-operation between CTC’s land-use planning work and the sub-regional land-use planning process currently underway in CTC’s traditional territory.

Homalco Indian Band, Canada and BC will cost-share an economic development study to assess fisheries and aquatic resource potential within Homalco’s traditional territory.

Hul’qumi’num Treaty Group, (HTG), Canada and BC signed an agreement that will help the nation identify social, economic and cultural needs to support treaty settlement land selection. The agreement will also help HTG prepare to take part in land-use planning. A second agreement will promote Hul’qumi’num’s internal governance work and help build relationships with local governments.

Katzie Indian Band is using interim measures funding to pursue an economic development study. The study will include research on the general state of the economy within Katzie’s traditional territory and ‘best practices’ of economic development. Katzie also plans to assess future employment and training opportunities for Katzie members.

Ktunaxa/Kinbasket Treaty Council (KKTC) is using interim measures funding to develop a

business plan for the creation of a Land and Resource Agency. KKTC will build a plan that addresses the land-use priorities of KKTC people and training required to staff the agency entirely within the community.

Laich-Kwil-Tach K’omoks Tlowitsis Council of Chiefs (LKTCC) signed two new interim measures agreements. The first agreement will allow LKTCC to pursue important governance development work. To establish a solid governance vision, LKTCC will research existing aboriginal governance models and their own traditional governance. The agreement will also allow LKTCC to facilitate a hands-on governance workshop. A second agreement provides funding for LKTCC to evaluate shellfish aquaculture opportunities within their traditional territory.

Northern Regional Negotiation Table members Taku River Tlingit First Nation, Carcross Tagish First Nation and Teslin Tlingit Council received funding from Canada and BC to help identify land for treaty negotiations and explore land-use options within their traditional territories.

Winalagalis Treaty Group An interim measures agreement signed with Winalagalis Treaty Group will allow the nation to identify tourism development opportunities and develop an implementation plan.

The plan will detail implementation needs, including marketing, product, human and capital development.

First Nations participating in cooperative land-use planning

Because First Nations culture and spiritually is intrinsically tied to their traditional territory, it's not surprising that they want to participate in the way that land is managed.

Many First Nations are already participating in collaborative land-use planning processes, such as the *Central Coast Land Management Plan*. The plan, endorsed by First Nations, forestry companies, community groups, environmentalists and truck loggers, protects 600,000 hectares of Crown land ranging from Knight Inlet to Princess Royal Island—home of the Kermode Spirit Bear—and defers logging on an additional 900,000 hectares.

In April 2002, the Government of BC announced the creation of the \$35-million Coast Sustainability Trust to address the economic impacts of land-use decisions in the Central Coast as well as the North Coast and Haida Gwaii. The fund is part of a broader strategy to work towards finalizing land-use plans and coastal/marine planning; establish ecosystem-based management; move forward with economic measures for First Nations; and build protocol arrangements with First Nations – including discussions to finalize protection areas in the Central Coast.

Other land use planning processes underway include the *Haida Gwaii Land Use Plan*, *Xay Temixw* [Sacred Land] *Land Use Plan* (Squamish Nation), the Okeover Round Table and Theodosia Adaptive Water Management Planning Process (Sliammon Indian Band) and the *Cates Park/Whay-ah-Wichen Agreement* (District of North Vancouver and Tsleil Waututh Nation).

Recommended Resources

Central Coast Land Resource Management Plan
<http://www.luco.gov.bc.ca/lrmp/cencoast/>

Xay Temixw Land Use Plan
http://www.squamish.net/news/land_use/land.htm

Okeover Round Table and Theodosia Adaptive Water Management Planning Process
<http://www.sliammontreaty.com/>

Treaty Commission Continues to Urge Land Protection Agreements

First Nations are watching potential treaty settlement land being developed by forestry, mining and other businesses, while not sharing in decision making or business opportunities. Some development is occurring within sensitive archaeological areas and areas with spiritual significance to First Nations.

Protecting land is crucial to restoring First Nations faith in the treaty process and to ensuring that an acceptable land package can be delivered when a final treaty is reached. Land protection agreements, a type of interim measures agreement between Canada, BC and a First Nation, protect First Nation interests in land that will ultimately be part of a final treaty settlement.

For example, in March 2001, Cowichan Tribes, Hul'qumi'num Treaty Group, Canada and BC signed an agreement to protect 1,700 hectares of land between Duncan and Lake Cowichan known as the Hill 60 sacred site.

The Treaty Commission has strongly recommended that the governments of Canada and BC negotiate more land protection agreements and can report that several land protection agreements are currently under discussion.

STATUS REPORT

There are now 50 First Nations, representing 111 Indian Act bands and two-thirds of all aboriginal people in BC, participating in the BC treaty process. Because some First Nations negotiate at a common table, there are 41 sets of negotiations underway. The treaty process is voluntary and open to all First Nations in BC. There are 42 First Nations in Stage 4 agreement-in-principle negotiations and one First Nation in Stage 5 negotiations to finalize a treaty.

1 First Nation in Stage 1

In-SHUCK-ch Council

2 First Nations in Stage 2

Council of the Haida Nation

Hupacasath First Nation

4 First Nations in Stage 3

Cheslatta Carrier Nation

Musqueam Nation

Squamish Nation

Quatsino First Nation (member,

Winalagalis Treaty Group)

42 First Nations in Stage 4

Northern Regional Negotiations

Carcross / Tagish First Nation

Champagne and Aishihik First

Nations

Taku River Tlingit First Nation

Teslin Tlingit Council

Winalagalis Treaty Group

Kwakiutl Nation

'N̓am̓gis Nation

Da'naxda'xw Awaetlatla Nation

Gwa'Sala-'Nakwaxda'xw Nation

Tlatlasikwala Nation

Ditidaht First Nation and

Pacheedaht Band

Cariboo Tribal Council

Carrier Sekani Tribal Council

Esketemc First Nation

Gitanyow Hereditary Chiefs

Gitxsan Hereditary Chiefs

Haisla Nation

Heiltsuk Nation

Homalco Indian Band

Hul'qumi'num Treaty Group

Kaska Nation

Katzie Indian Band

Klahoose Indian Band

Ktunaxa/Kinbasket Treaty Council

Laich-Kwil-Tach K'omoks Tlowitsis

Council of Chiefs

Lake Babine Nation

Lheidli T'enneh Band

Nazko Indian Band

Nuu-chah-nulth Tribal Council

Oweekeno Nation

Sliammon Indian Band

Snuneymuxw First Nation

Sto:Lo Nation

Te'Mexw Treaty Association

Tsawwassen First Nation

Tsay Keh Dene Band

Tsimshian Nation

Tsleil-Waututh Nation

Westbank First Nation

Wet'suwet'en Nation

Yale First Nation

Yekooche Nation

1 First Nation in Stage 5

Sechelt Indian Band

In-SHUCK-ch to resume negotiations

In-SHUCK-ch Council will lead the communities of Douglas, Samahquam and Skookumchuk in treaty negotiations with the governments of Canada and British Columbia.

Community members have given the council a mandate to resume negotiations following a period of reassessment stretching back to August 2001.

In-SHUCK-ch/N'Quat'qua entered the treaty process in March 1995. Following the joint land and cash offer made by the governments of Canada and BC in October 1999, the First Nation group withdrew from active treaty negotiations to consider its options. N'Quat'qua eventually withdrew from the treaty process.

COMINGS AND GOINGS

Recent changes at the Treaty Commission.

Comings:

Dan Gill, the Treaty Commission's funding manager between 1997 and 2000 returned to the position in January 2002. In the interim, Gill helped develop curriculum for the Mohawk College Aboriginal Financial Officers Association in Oakville, Ontario and worked with individual First Nations in Victoria. He replaces Philip Wang.

Peter Colenbrander was appointed process manager in November 2001 after an absence from the Treaty Commission of one year. In the intervening period, he worked on a project basis for the Office of Indian Residential School Resolution. Colenbrander served the Treaty Commission between 1995 and 2000.

Goings:

Anna Mathewson, senior process advisor, has accepted a post as water and land-use coordinator with the Fraser River Estuary Management Program. Mathewson left the Treaty Commission in April after five years of service.

Treaty Commission Operations Director **Tracy St. Claire** is moving to Peachland at the beginning of June to care for an elderly grandmother and spend more time with her family. St. Claire joined the Treaty Commission in March 1995 as treaty analyst.

British Columbia

Treaty Commission

Update May 2002

