

“Improving the Treaty Process”  
Report of the Tripartite Working Group

May 2002

In its 2001 annual report, “Looking Back, Looking Forward”, the Treaty Commission took a hard look at treaty negotiations in British Columbia based on the lessons learned since the process began in 1993. The report also made comprehensive recommendations to the Principals – the First Nations Summit, the Government of Canada, the Province of British Columbia -- on how to improve the process.

The Treaty Commission is pleased by how committed the Principals have been to taking on these wide-sweeping recommendations in a spirit of openness, partnership and mutual commitment to the treaty process. The attached report, “Improving the Treaty Process,” reflects the work of senior officials between October 2001 and late-February this year to develop ideas to address the recommendations of the Commission’s report.

This report was reviewed by the Principals – Minister of Indian Affairs and Northern Development Robert Nault and Secretary of State Stephen Owen for Canada, Attorney General and Minister responsible for Treaty Negotiations Geoff Plant for B.C. and Task Group members Kathryn Teneese, Gerald Wesley and Bill Wilson for the First Nations Summit -- at their meeting on March 15, 2002. The report contains a number of ideas and recommendations for achieving efficiencies in the treaty process and options for building treaties incrementally that would lead to more immediate benefits for all British Columbians.

At that meeting, the Principals endorsed the report and instructed officials to devise a workplan to identify options that could be used by individual tables. Initial progress reports will be developed by May 31, 2002. A copy of the general workplan is being released along with “Improving the Treaty Process.”

With these developments, much good work has been done to lay the path to solutions. It is clear that we are at an important turning point in the treaty process – the ideas in these reports would fundamentally change the treaty process while continuing to embody the principles of the BC Claims Task Force Report in 1991 from which the BC treaty process emerged.

The Commission urges the parties to take this work further and to find the means of reaching agreements.

Miles Richardson  
Chief Commissioner  
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Canada



## **“IMPROVING THE TREATY PROCESS”**

### **REPORT OF THE TRIPARTITE WORKING GROUP**

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## 1. PURPOSE

In 1991, the Principals committed to the recommendations set out in the Report of the B.C. Claims Task Force. The first of these was that “the First Nations, Canada and British Columbia establish a new relationship based on mutual trust, respect and understanding, through political negotiations.” These negotiations were expected to lead to earlier opportunities for changes to the status quo. The experience of the intervening years has shown that building new relationships is a more complex and time-consuming undertaking than was initially recognized.

On October 27, 2001 the Principals considered the B.C. Treaty Commission’s (BCTC) report entitled, “Looking Forward, Looking Back - A Review of the Treaty Process”. In its Review the BCTC offers, “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 towards resolution.” The Principals agreed that the treaty process in British Columbia is at a critical juncture and that change is needed. Through such change, the Principals could reaffirm their commitment to the fundamentals of the Task Force Report.

The current process is expensive and it takes a long time to achieve results. In the meantime, it does not provide stability on the ground for First Nations, governments or third parties. Nor does it improve the social and economic conditions for First Nations and other British Columbians. This leads to growing frustration and reduces support for treaty making.

After considering the BCTC Review, the Principals agreed to jointly assess the Review’s recommendations and directed their senior officials to report back. Senior officials established a working group to carry out this task. Guided by the Task Force Report, the BCTC Review and eight years of negotiating experience, several days were spent in frank discussions. This report contains suggestions for changes to the current approaches and practices in order for the process to realize its original promise. The working group did not canvass the full range of issues related to the treaty process, nor was it the working group’s expectation that the discussion among the Principals would be limited to the subjects covered in this report.

The working group acknowledges that changes to the parties’ mandates, including increased flexibility, and a greater willingness to reach accommodations may be necessary to achieve comprehensive treaties.

The common objective of all parties remains comprehensive treaties. However, experience shows that it is not possible for all the negotiating tables to expeditiously conclude comprehensive treaties. Therefore the working group looked at what could also be achieved in the short term as the parties progress towards comprehensive agreements.

Discussions focused on process efficiencies and options to build treaties incrementally. The following report contains the results of those tripartite discussions.

## **2. BUILDING TREATIES INCREMENTALLY**

The central recommendation in the BCTC Review was that First Nations, Canada and British Columbia shift their emphasis in treaty making to building treaties incrementally over time so that when a final treaty is signed, the new relationships necessary for success will largely be in place.

This concept largely builds upon Recommendation 16 of the B.C. Claims Task Force Report regarding interim measures and therefore is not an entirely new concept. Interim measures continue to be critical for First Nations, given the ongoing alienation of strategic lands and resources while negotiations are ongoing.

The working group discussed a number of options for improving the treaty process. Incremental treaty making is one such option. Many other options for improvement are process efficiencies, which would also apply in the context of incremental treaty making. Therefore, the working group focused first on incremental treaty making.

It is important to emphasize that not all negotiating tables may favour an incremental approach. Certain First Nations may not view this approach as meeting their needs. As such the parties may agree to continue negotiations under the current approach to negotiations and adopt any of the other process efficiencies to achieve progress.

Where the parties do adopt an incremental approach to treaty making it will have implications for the current process, including negotiation support funding for First Nations, the 6-stage treaty process and possibly, the role of the B.C. Treaty Commission.

What does building treaties incrementally mean? While there is not yet clarity on what incremental treaty making means in practical terms, the working group notes that it is a process for building treaties by negotiating over time a series of arrangements or agreements linked to

treaties that can be implemented before a final treaty. This concept is in its early formulation and requires further elaboration.

An incremental approach to treaty making is not a move away from comprehensive treaties. It is not about maintaining the status quo by only negotiating arrangements that are currently available under existing policy, programs and legislation. Instead, it reflects a commitment by all parties to be innovative and to strive for results on the ground. This should create a more stable social and economic environment sooner, which contributes to building a new relationship.

## Benefits

An incremental approach that offers a variety of paths to treaties should produce numerous benefits. First, it enables the parties to develop process efficiencies. Second, it provides tangible results for all the parties along the way to building comprehensive treaties. Third, new relationships are formed as the negotiations progress.

Process efficiencies resulting from an incremental approach include:

- More efficient allocation of resources by focusing on results;
- Concrete milestones to measure progress;
- Greater flexibility of timing and sequencing of arrangements and agreements;
- Testing arrangements before they are locked into a final agreement;
- Facilitating arrangements or agreements with groups of First Nations or individual communities within a First Nation;
- Focusing on tangible results, rather than arbitrary process milestones; and
- Making progress in some areas while disagreements are addressed in other forums or set aside.

An incremental approach can produce results for all parties by:

- Providing the parties with benefits earlier in the process without needing to resolve all issues for the eventual treaty;
- Improving the quality of life of First Nations and protecting their cultures;
- Building First Nation capacity;
- Increasing First Nation involvement in the BC economy;
- Fostering the stability needed for a positive climate for investment and business operations; and
- Encouraging social and economic development for all British Columbians.

Relationships may be improved through an incremental approach by:

- Achieving greater social and economic stability sooner in the process;
- Alleviating pressures caused by unrealistic timelines for comprehensive treaties;
- Building trust among the parties through experience implementing agreements on the ground;
- Facilitating First Nations cooperation through arrangements and agreements covering more than one First Nation;
- Enhancing relations between First Nations and local governments and between First Nations and business interests; and
- Accommodating different levels of readiness among and within First Nations by providing opportunities for communities to work at their pace and according to their own priorities.

## Implementation

### **Vision**

The success of incremental treaty building will, in large measure, depend on the parties having a clear and shared vision of where they are going in treaty negotiations. If the parties are negotiating a series of arrangements and agreements that will ultimately form a comprehensive treaty through an incremental approach, they need to have a plan or vision of how those components will all come together.

For example, an incremental approach to treaty making would require the parties to identify and prioritize issues and determine how to make progress on those issues earlier in the process, with the long-term goal of incorporating those issues in a comprehensive treaty. Since this vision may change over time as the parties build their relationships and acquire experience, the parties need to find ways of adjusting their vision as necessary while remaining focused on the end goal.

In order to achieve the vision, the parties need a work plan to help them measure progress and decide whether adjustments are needed. A more detailed discussion of the use of work plans can be found later in this report.

### **Incremental Tools**

Most of the subjects that eventually form part of the treaty may be appropriate for an incremental arrangement or agreement. These could include:

- Land and resource protection;
- Land and resource acquisition;
- First Nation access to land and resources;
- First Nation involvement in land and resource management and planning;
- Governance arrangements;
- Cultural resources and activities;
- Fiscal arrangements; and
- Economic development initiatives.

Negotiation tables can develop a range of arrangements and agreements as tools to meet their needs. These could include:

- Sectoral treaties on a specific subject which are protected under section 35 of the *Constitution Act, 1982*;
- Contractual agreements that are not constitutionally protected;
- Agreements to resolve or to set aside disputes including litigation;
- Political accords or memoranda of understanding (MOUs);
- Agreed-upon measures implemented by one party; and
- Other measures designed to support the negotiations, such as pilot projects.

These arrangements would generally be in effect for a fixed period of time or until a particular event takes place (such as a treaty coming into force).

### **Planning for Comprehensive Treaties**

The working group recognizes that, since the ultimate goal of the parties remains comprehensive treaties, they will need a plan on how incremental elements will fit together with the treaty.

For instance, the parties could negotiate the potential provisions with respect to a subject within a treaty. Once that has been concluded, they could determine whether all or some of the provisions could be implemented as a treaty building block. Or, the parties could begin by negotiating an incremental agreement. Then, after implementing that agreement, the parties could negotiate language with respect to that subject for the treaty. In either case, experience gained from negotiating and implementing the incremental agreement will help the parties finalize the treaty.

## Predictability

If the parties to a negotiation table choose to adopt an incremental approach to treaty making, the working group recognizes the importance of providing predictability regarding the parties' respective rights and obligations. This should help lay the foundation for stable and lasting relationships and encourage social and economic development in British Columbia.

Agreements developed under an incremental approach will likely include:

- Measures to provide predictability about the rights and obligations of the parties to an agreement with respect to the matters covered by the agreement for as long as it remains in effect;
- Proportional and reciprocal commitments to provide a stable foundation on which to build and maintain the relationship reflected in the agreement;
- An articulation of how the agreement will contribute to the successful completion of a comprehensive treaty; and
- Other ways to contribute to the stability of the relationship, such as establishing effective communication and dispute resolution processes.

## Governance

The working group recognizes that effective implementation of incremental agreements or arrangements will require appropriate governance structures. Negotiations will also have to establish the governance arrangements that are necessary to implement the agreement or arrangement. Some of the governance issues that the parties will need to consider include the development of new legal entities, management capacity and the jurisdiction necessary to implement the arrangements and agreements.

## **3. PROCESS EFFICIENCIES**

The current process has been criticized for not delivering results. In addition to considering an incremental approach to treaty making, the working group explored other ways to make the process more results-based, with concrete measures of progress.

The BCTC suggested a number of process improvements that could promote efficient and effective treaty making under either the current process or an incremental approach. The

working group explored these and other mechanisms for ensuring effective negotiations and expediting the achievement of results for all parties.

## Promoting Results-Based Negotiations

The working group discussed two tripartite tools for promoting results-based negotiations: an assessment and an associated work plan.

### **Assessment**

The working group strongly emphasizes the need for all tables to assess promptly and candidly how close they are to achieving a treaty. This would include a frank assessment of whether a treaty is achievable at all, given the mandates of the parties. The working group believes that as part of this assessment, the parties may explore if the options described in this report could be fruitfully used to achieve progress in negotiations.

As a result of this assessment, the parties may be able to:

- Outline how to progress to a comprehensive treaty, identifying key areas of agreement and disagreement;
- Determine the best course of action for making progress on the ground; and
- Identify difficult issues and how to resolve them, for example by using facilitators or high-level talks.

Alternatively, the parties may wish to explore other options.

### **Work Plans**

Based on the outcome of the assessment, it is important for the parties to take the time to develop clear results-based work plans that would identify the:

- Scope of agreements or subjects to be negotiated;
- Defined milestones;
- Resources required to reach the identified milestones;
- Timing;
- Measurable criteria for evaluating progress;
- Risks and consequences of not meeting the desired milestones; and
- Strategies to address those risks and consequences.

These work plans would enable the parties to objectively assess whether or not they are on track according to the deadlines set out in their plans and to evaluate the parties' productivity and success.

The working group discussed a potential role for the BCTC in evaluating the extent to which the negotiating parties are on track in meeting their desired outcomes.

### **Slim Agreements-in-Principle**

One of the ideas put forward in the BCTC Review was the use of abridged or "slim" agreements-in-principle. The working group felt that if too many substantive issues were put aside in the negotiation of a slim agreement-in-principle, the result would not necessarily represent a meaningful agreement-in-principle. Using slim agreements-in-principle would therefore not be an attractive option for marking actual progress at negotiation tables.

There is an additional concern about the financial implications of concluding slim agreements-in-principle. The parties would likely spend more time negotiating a final agreement, which would add to the interest burden facing First Nations, given that interest will be applied to loan advances made following the date of an agreement-in-principle.

### **Time Outs**

The BCTC Review highlighted the pressures created by the expectations that all treaties would be concluded within a set period of time. "Looking back today, the Treaty Commission believes not that the process was too slow, but that it tried to accomplish too much, too soon."

The BCTC recommended there be opportunities for some First Nations to step back from negotiations for the purpose of enhancing the prospect of productive negotiations when the parties re-engage and without negative consequences in the interim.

Some reasons First Nations might step back from active negotiations include:

- First Nations with limited human resources may wish to take some time to address other social and economic priorities;
- First Nations may wish to build capacity to prepare for more effective negotiations;
- First Nations may wish to consider the results of high-level discussions on fundamental issues and consult their constituents on the results; or
- First Nations may wish to engage their constituents in developing a treaty vision and assessing mandates for negotiations.

Providing First Nations with opportunities to step back from negotiations will enable Canada and B.C. to focus negotiation resources to achieve results at other tables in the meantime.

To make stepping away from negotiations a viable option, some negative consequences need to be addressed. The BCTC noted that aspects of the current negotiation support loan funding arrangements discourage First Nations from taking time out from negotiations. Canada and B.C. may wish to consider stopping or suspending the clock on loan repayment for First Nations where the parties have agreed to a pause in negotiations.

The parties share an interest in not losing all momentum at negotiating tables where treaty negotiations are placed on hold. First Nations have invested in infrastructure and developed knowledge and expertise to support negotiations. Without some funding during a time out from negotiations, key human and support resources may be lost to future negotiations.

Funding during this period should be time-limited and linked to specific outcomes that will contribute to effective treaty negotiations upon re-engagement. The working group encourages Canada and B.C. to explore options for providing contribution funding for this purpose.

## Organization of First Nations

The Task Force Report recommended that First Nations decide how to organize themselves for the purpose of treaty negotiations. While the working group recognizes the importance of maintaining this approach, it has created a number of challenges for the treaty process.

While the Task Force anticipated up to 30 separate negotiations would be established under the process, the BCTC has noted that there are currently 49 First Nations participating in 40 sets of negotiations. The disparity in the number is largely a result of First Nations negotiating as single communities rather than as components of larger nations.

A greater than anticipated number of First Nations has increased overlaps, stretched negotiating resources and complicated Canada's and B.C.'s management of their participation in the treaty process.

In addition, the "lock step" nature of six-stage process, which requires component groups to progress at the same pace and according to the same priorities, discourages First Nations from joining or remaining together as strong and viable governments. The working group has also

noted that the land selection model favoured by Canada and B.C. has discouraged First Nations from proposing solutions that involve the sharing of lands and resources.

As well, negotiating and implementing complex agreements with wide ranging powers with small First Nations may be difficult.

The working group considered a number of options for meeting these challenges:

- Supporting First Nations negotiating together on a regional or sector basis for effective implementation of certain subjects (e.g. fish, wildlife, governance);
- Matching the scope of agreements to the First Nation organization that will implement them;
- Ensuring the First Nation is the appropriate entity to conclude and implement effective agreements and treaties;
- Supporting the rebuilding of First Nations through the negotiation and implementation of incremental agreements on a trial basis; and
- Negotiating treaties that are sufficiently flexible to support First Nation aggregation after treaties are concluded with individual First Nations.

Another challenge facing the treaty process is that it is intended to be future-oriented and address aboriginal rights, title and governance, while First Nations are still in most cases organized on the ground as bands under the *Indian Act*.

The working group considered options to address this challenge:

- Building treaties incrementally could assist First Nations to establish new legal entities that would exercise authorities envisioned under the treaty; and
- First Nations could negotiate and implement eligibility, enrolment and ratification provisions early in the process to appropriately reflect the people they represent in treaty negotiations.

## Organization of Public Governments

The First Nations Summit has expressed concerns about the manner in which Canada and B.C. organize their participation for treaty negotiations, and identified two specific issues. First, it is concerned that there is not enough coordination between government offices responsible for treaty negotiations and government departments responsible for specific subjects (e.g. fisheries, forestry) or commitment by the latter to the treaty negotiation process. Second, it expressed the view that First Nations see the reporting relationship of the Federal Treaty Negotiation Office to the Department of Indian Affairs and Northern Development as a lack of commitment to building a new relationship between the Crown and First Nations.

The Task Force Report spoke of the need for all parties to set aside the often troubled relationship between the Crown and First Nations. In its place, the Task Force called on First Nations, Canada and B.C. to develop and nurture a new relationship to recognize the unique place of First Nations in Canada.

The working group recognizes the need for all parties to approach treaty making with a common commitment to be creative. Building a new relationship will depend in large part on finding innovative approaches to resolve issues, rather than simply enshrining current policy or legislative approaches in constitutionally protected treaties.

The working group recognizes the need for coordination and effective communication between government offices responsible for negotiating treaties and government departments responsible for operational matters relevant to treaty negotiations.

The resources that governments devote to negotiating treaties can be seen as an important signal of their commitment. At the same time, the amount of human and financial resources and the manner in which governments deploy those resources are not, in themselves, a reliable measure of that commitment. It is important to ensure that scarce resources are used strategically to advance a results-based process and are measured against performance criteria.

## Mandates and Mandating Processes

The working group recognizes that mandates are a significant issue for the treaty process. The First Nations Summit's view is that current government mandates are inadequate and are the primary obstacle to making progress in treaty negotiations.

Changes to mandates in key areas are, in the First Nations Summit's view, necessary for addressing those obstacles. As an example, the working group acknowledged that revenue sharing with First Nations is a subject that can usefully be explored to facilitate the treaty process.

High level talks, as discussed below, would be one method for discussing key mandate issues.

While this report is not intended to focus on specific changes to mandates, it does outline some options in response to general mandate concerns including:

- Flexibility of mandates;

- Transparency of each party's mandate; and
- Efficient mandating processes to reduce delays in negotiations.

### **Flexibility of Mandates**

The working group recognizes that governments do not have unlimited resources, particularly given the current fiscal situation. Emphasis on flexibility of structuring the elements of a deal is key. Negotiators must be given the flexibility to be creative in arriving at the cumulative components that might make up a deal. The First Nations Summit expressed concern that cost-sharing arrangements between B.C. and Canada may preclude flexibility of approach.

Incremental approaches may permit all parties to be more flexible in approaching their mandates since they will often be time-limited, trial arrangements.

### **Intensify High Level Talks**

The working group recognizes the value of high level talks for developing solutions to key mandate issues, provided they do not impede negotiations at individual tables.

The purpose of high level talks at a provincial or regional level is to provide a single forum for discussions. They could be used for developing options, and possibly standardized text, for potential use by individual negotiation tables. Topics could include matters that have proven to be obstacles in negotiations such as:

- Fiscal relations;
- Certainty;
- Governance;
- Land status;
- Participation in land and resource management;
- Reconciliation, recognition and compensation; or
- Revenue sharing.

High level talks may be used to deal with highly technical subject matters as well as matters that Canada and B.C. believe lend themselves to common solutions. For example, high level talks on highly technical matters such as fiscal relations, can help the parties realize economies of scale by jointly retaining experts who can provide advice and transfer knowledge to First Nations in the treaty process, and who can engage with representatives of the federal and provincial

governments in a single process. Individual tables, at their option, could then use the product of this work.

With respect to matters that could lend themselves to common solutions, process efficiencies may be realized through discussions in a single forum on the issues. This would reduce the expenditure of resources at individual tables in developing provisions on issues such as the application of the *Criminal Code*. This would also provide First Nations with a clear picture of where Canada and B.C. may be constrained with respect to developing unique options for inclusion in individual treaty agreements. This in turn would save time and resources by not having to repeat negotiations at numerous tables.

High level talks would support an incremental approach to building treaties by enabling the parties at individual tables to focus on other matters while province-wide discussions take place, and to move forward on implementation of issues where agreement has been concluded.

In order to make progress in high level talks, each party will have to be organized for effective participation. This means having clear instructions, and appropriate and timely access to constituents and decision makers. Parties must also set clear deadlines for producing results from these discussions.

How First Nations are represented in these high level talks needs to be addressed, including funding for their participation.

### **Clarity**

The working group agrees that clarity regarding all parties' policy mandates would facilitate progress in negotiations. Problem solving will be enhanced if each side understands the others' approaches and constraints.

Governments suggested that one option for promoting clarity would be developing legislation that sets out the policy framework for treaty negotiations. The principal advantage of this approach is that governments' approaches would be readily accessible and clearer. This option is discussed later under Ratification.

## Managing Offers

The BCTC identified that the manner in which government offers were made to First Nations, in particular the round of offers made between 1999 and 2001, impeded the conclusion of agreements-in-principle. In some cases it derailed the negotiations or made it difficult to have a productive discussion on the content of the offers. Some of the concerns that have been expressed regarding the offer process include:

- First Nations felt that public announcements were premature and had the effect of prejudicing the scope of future negotiations by fixing public expectations;
- Some First Nations felt that public announcements were made without their agreement;
- First Nations felt that offers did not reflect the understandings developed among the parties over several years of negotiations;
- First Nations objected to the term “offer”, which in their view gave the impression that treaty making is about governments giving First Nations land and cash, rather than reconciling Aboriginal title and rights with Crown title; and
- First Nation communities were surprised by the gap between their expectations and the content of the offers.

Canada and B.C. felt that public offers were important for general information sharing, but acknowledge they placed strains on the negotiating tables.

An incremental approach to treaty making may defuse some of the concerns about offers during the agreement-in-principle process.

The working group recognizes the importance of the parties providing each other with information regarding the scope and content of their mandates and approaches to negotiations in order to inform negotiators and their respective constituents. A number of options were identified:

- The parties jointly determine the timing and manner in which they will provide one another and the public with information regarding their positions;
- Reconsider the concept and related terminology of “making offers” as it suggests an adversarial labour-style negotiation process;
- Offers should not give an artificial sense of finality to the negotiations where there is still scope for negotiations; and
- Consider a different approach to offers to reflect an incremental approach to building treaties.

Finally, the working group recognizes the need for the parties to review their Openness Protocols to determine if changes are required to promote a more productive process.

## Ratification

### **Governments**

The working group notes that an incremental approach to treaty making will mean that a greater number of agreements, both constitutionally protected and non-constitutionally protected, will need to be ratified.

In the past, comprehensive treaties were ratified and implemented through specific provincial and federal legislation. Given that a large number of constitutionally protected agreements will require approval by the Parliament of Canada and the Legislative Assembly of British Columbia, the working group discussed the need for innovative and efficient options for the ratification and implementation of those agreements by governments.

One option discussed by the working group was for a legislature to use legislation to delegate to Cabinet the authority to ratify and implement such agreements. The delegation of authority would need to be exercised within a policy framework established by the legislature. In this manner, legislation could establish the principles and policy framework for future treaties, and then delegate to Cabinet the power to approve agreements, which accord with those principles and framework. Such legislation could give legislators a voice in modern treaty making, and create a more efficient process for approving treaties.

Such a framework would also assist the governments to establish their vision of treaty making early in the negotiation process, as discussed elsewhere in this report. The principles and policy framework could also incorporate the results of the high level talks on major issues of interest to all treaty tables.

The First Nations Summit expressed serious concern that legislation establishing the government vision of treaty making, and the principles and policy framework might reduce the flexibility of government mandates and could unilaterally determine outcomes.

If this legislative option were pursued, the First Nations Summit stressed that meaningful involvement by First Nations would be required on the development of the principles that would ultimately form the basis for the legislation. The parties could use high level talks as the mechanism for involving First Nations in the development of the legislation.

The working group acknowledged that such legislation could have the effect of reducing the flexibility of negotiators, unless the principles are cast in quite general terms. The working group noted that a balance is needed between flexibility and clarity. It was also recognized that the drafting and adoption of legislation can be a complex and time-consuming process in itself. In addition, the members recognized the importance of involving First Nations in the preparation of such legislation. The working group noted if such legislative option were pursued, it should not stand in the way of implementing non-legislative changes to the treaty process.

### **First Nations**

The working group notes that the processes for First Nation ratification of comprehensive treaties may need to be re-examined in the context of an incremental approach to treaty making for the following reasons:

- Certain subjects require approval by the members of the Indian bands concerned with those issues (e.g. changes to the status of Indian reserves or band monies under the *Indian Act*);
- Other subjects may require different ratification procedures depending on the agreement; and
- Ratification procedures should reflect the relative importance of an agreement (e.g. time-limited contract as opposed to a constitutionally-protected treaty).

An incremental approach could contribute to better management of the process of First Nation ratification by providing opportunities for communities to see some of the benefits of the treaty negotiation process before ratifying a comprehensive treaty.

The working group discussed the importance of consultation and communication within and between First Nations during the negotiation process prior to ratification. Ultimately, the long term workability and durability of an agreement will largely depend on the support of the First Nations and their members.

## **4. FINANCIAL IMPLICATIONS**

### **Negotiation Support Funding**

The working group recognizes the urgency and importance of addressing funding issues that have arisen under the current negotiation support funding arrangements. The First Nations

Summit highlighted the following issues of concern with respect to the existing negotiation support funding arrangements:

- Funding should be in the form of contributions, rather than a combination of contribution and loan funding;
- Accumulation of interest on loan advances made after an agreement-in-principle has been concluded is a significant disincentive to concluding such agreements; and
- It seems unlikely that most First Nations will have concluded treaties before their loans become due (12 years following the first advance).

### **Funding Implications of An Incremental Approach**

The working group notes that there are a number of financial issues that need to be considered in adopting an incremental approach to treaty making. In particular, an incremental approach to treaty making implicitly assumes that not all First Nations will proceed to comprehensive treaties in the time frame contemplated under current negotiation loan funding arrangements. The working group acknowledges that mechanisms for providing negotiation funding should not act as a disincentive to progress in negotiations either through the accumulation of loan debt that overwhelms the financial component of a treaty or through the provision of ongoing funding for negotiations that are not producing results.

An incremental approach to treaties has funding implications for Canada and B.C. and may require financial mandates to be tailored to suit new circumstances. Adopting an incremental approach will require clarity about the relationship between benefits provided under incremental approaches and the comprehensive treaty mandate.

The working group discussed the need to adjust negotiation support funding arrangements to reflect an incremental approach. Relevant considerations include:

- Scope and subject matter of negotiations;
- Length of time it will take to build comprehensive treaties under the incremental approach;
- Incentives for productive negotiations; and
- Role of independent assessments of progress in negotiations.

### **Working Committee**

Due to the number and complexity of financial issues, senior officials have agreed to establish a tripartite working committee to address these issues.

## 5. ROLE OF BCTC

In its Review, the BCTC recommended, “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.”

The First Nations Summit has passed a resolution also calling for such a review and emphasized the need for the BCTC to have greater authority.

The working group identified the following issues for further consideration:

- Changes to the BCTC’s role that may be required to implement any changes agreed to by the Principals flowing out of this review process;
- Changes to the BCTC’s role to support an increased use of facilitation in the treaty process; and
- Changes to the BCTC’s role in negotiation support funding.

This examination of what, if any, changes are required to the Commission’s role would be undertaken once the review of the other elements of the treaty process has been completed.

Changes to the BCTC’s role might require changes to the First Nations Summit resolution and the federal and provincial legislation that together establish the BCTC.

## 6. NEXT STEPS

The working group suggests the following next steps:

- Principals review the options contained in this report and seek agreement on changes to improve the treaty process;
- Principals take necessary steps to implement agreed changes;
- Principals give direction to officials to engage in high level talks on identified mandate issues; and,
- Senior officials consider the value of continuing the tripartite working group.