



BC TREATY COMMISSION

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Newsletter Update: February 1999

Removing obstacles will invigorate treaty talks

Invigorating the treaty process - that's the goal of First Nations, Canada and British Columbia in talks now underway.

At the urging of the Treaty Commission, the review of the treaty process by the three Principals was undertaken in response to the Supreme Court of Canada decision in *Delgamuukw*.

First Nations, Canada and BC have acknowledged that removing major obstacles to progress is critical to the success of treaty making in British Columbia.

The goal of the Principals in the review is to agree, where possible, on recommendations to improve the process. But where agreement is either impossible or inappropriate, the goal will be to better understand each other's viewpoint and to make recommendations that will go to Cabinets and the First Nations Summit.

The Treaty Commission, at the request of the Principals, has identified the obstacles which are preventing the parties from completing treaties and put forward suggestions for addressing those obstacles.

The Treaty Commission sees mutual recognition as the starting point. Reconciling First Nation title with Crown title is the purpose of treaty negotiations. Mutual recognition and working towards reconciliation is indicative of the commitments of the parties to completing treaties.

A practical expression of mutual recognition is interim measures which will balance First Nation and Crown interests while negotiations are underway. There is recognition that resolving issues around land and resources sooner rather than later will restore confidence in the treaty process. The Principals are examining ways to accelerate negotiations on land, resources, cash and the financial components of treaties.

Fixed negotiating positions are another obstacle to progress. Inflexible mandates prevent the parties from finding creative ways of accommodating each other's interests. The Treaty Commission has been asked by the Principals to analyze and consider whether it should have a larger role in dispute resolution and how good faith negotiations can be monitored and enforced.

The treaty process does not provide for First Nations who need to temporarily stand back from active negotiations in order to develop their treaty visions or build capacity to negotiate or implement a treaty. This would benefit individual First Nations and help alleviate some of



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New Chief Commissioner outlines priorities

Newly appointed Chief Commissioner Miles Richardson has identified two major challenges facing the treaty process - keeping the public informed and invigorating the treaty tables.

Speaking to reporters on the day he became chief commissioner, Mr. Richardson said, "First, the Treaty Commission must work with the Principals and all of the parties at the tables to inform all British Columbians and Canadians about the opportunity that we have in front of us. It's an opportunity to negotiate treaties that we should not take for granted.

"It is a choice and with the Nisga'a Final Agreement going to the Legislature of British Columbia and then to the Parliament of Canada, British Columbians are making a fundamental choice. Do we negotiate the resolution of these issues or do the parties use other options? When British Columbians, Canadians and First Nations take a moment to think about the options, I know they will choose negotiations. And we must get on with that task of informing them about these issues.

"Second, we need to invigorate the treaty tables. There is a lot of frustration with progress on the substantive issues, land.governance.and all that entails. A year ago, Canadians received clear direction from the Supreme Court of Canada in the Delgamuukw decision. We must adapt this treaty negotiation process in British Columbia to reflect the realities of the Delgamuukw decision."

Announcement of Mr. Richardson's appointment was made jointly at a news conference November 20 by federal Indian Affairs Minister Jane Stewart, then provincial Aboriginal Affairs Minister Dale Lovick and Grand Chief Edward John for the First Nations Summit.

Ms. Stewart said that Richardson, who has been one of the main proponents of the creation of an independent treaty commission in BC will now be at its head.

Mr. Lovick said, "Choosing Miles Richardson as the chief commissioner is, I think, an important and necessary step in demonstrating to the world that we are, all of us, committed to achieving a new relationship with First Nations people and those others of us who are not First Nations."

Grand Chief John said that it is important for people to understand that although Miles Richardson is Haida, he has to be considered as an independent, neutral and impartial chief commissioner for an important body overseeing the treaty negotiation process in British Columbia.

About Miles Richardson

Miles Richardson is a citizen of the Haida Nation. He grew up among his people on Haida Gwaii, attended high school in Prince Rupert, and in 1979 received a Bachelor of Arts in Economics from the University of Victoria. From 1984-1996 he served as President of the Council of Haida Nation.

Mr. Richardson was a member of the British Columbia Claims Task Force which made recommendations to the Government of Canada, Government of British Columbia and First Nations in British Columbia on how the three parties could begin negotiations to build a new relationship and what the negotiations should include.

From 1991 to 1993 Mr. Richardson was a member of the First Nations Summit Task Group, which is the executive body representing First Nations in British Columbia. In October 1995, he was nominated by the Summit and appointed as a Commissioner to the BC Treaty Commission.

His appointment as chief commissioner is effective November 18, 1998 for a three-year term.

the resource problems caused by the entry of 51 First Nations into a process originally designed for 30.

Where major overlaps remain unresolved or First Nation capacity is of concern, it may be difficult to conclude treaties. These concerns raise questions around the organization and structure of the First Nation for treaty purposes.



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New Commissioner named

Debra Hanuse is the newest member of the five-person Treaty Commission that is responsible for facilitating treaty negotiations with First Nations in British Columbia.

Commenting on the appointment, Chief Commissioner Miles Richardson said, "Ms. Hanuse has frontline experience in treaty negotiations, experience in law and a background in the aboriginal community which the Treaty Commission will find invaluable as it faces the challenge of invigorating the treaty process."

The appointment of Ms. Hanuse, after the absence of a chief commissioner for six months, restores the Treaty Commission to full strength, said Richardson. A vacancy was created with the appointment of commissioner Richardson to the position of chief commissioner. Ms. Hanuse was appointed by the First Nations Summit for the remainder of the term ending April 1999, at which time it is expected that an election will be held.

Ms. Hanuse was raised in Alert Bay and is a member of the Namgis Tribe. In 1986, she earned a Bachelor of Arts in Political Science from Simon Fraser University, and then a Bachelor of Laws from the University of British Columbia in 1990. She was admitted to the bar in BC in 1991 and joined Davis & Company where she practised corporate, commercial and aboriginal law for four years. Ms. Hanuse became a sole practitioner in 1995, focusing on treaty negotiations on behalf of First Nations.

The Treaty Commission comprises a chief commissioner chosen by agreement of Canada, BC and the First Nations Summit, two commissioners elected by the Summit, a commissioner appointed by Canada and a commissioner appointed by British Columbia.



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Agreement in Principle near Sechelt AiP first in BC treaty process

The first treaty in the BC treaty process is within reach following the release of a draft agreement by the Sechelt Indian Band and the federal and provincial governments.

When the agreement is signed, following further consultation with the Local Advisory Committee and among Sechelt band members, it will form the basis for a Sechelt treaty. The Treaty Commission believes the agreement, made public January 26, is good news for the treaty process that will raise confidence in negotiations. Chief Commissioner Miles Richardson observed that, "British Columbians want results and this is the first indication that negotiations can produce an agreement in the treaty process that we facilitate."

The Treaty Commission also sees the agreement as significant because the parties were dealing with a First Nation traditional territory where there is a large amount of privately-held land. And they were negotiating without the benefit of similar agreements as guideposts.

The agreement provides \$40 million to the Sechelt Prosperity Fund and \$2 million to a Sechelt Transition Fund and adds approximately 933 hectares of new lands to existing Sechelt lands of about 1,031 hectares. Sechelt will be able to acquire and add up to 1,066 hectares of new treaty lands, within 24 years after the treaty is in place. On one urban parcel, the Sechelt Indian Band initially will share gravel and timber revenues with the provincial government. This share of revenues will later rise to one hundred per cent. Sechelt Indian Band governance arrangements, in place successfully for nearly 13 years, will continue after the treaty is signed.

"This treaty process works when there is the political will on all sides to reach an agreement," said Richardson. Just a year ago, Sechelt had walked away from negotiations in favour of court action, citing too many obstacles to an agreement. The Sechelt commenced court action despite their steadfast desire to reach a settlement through negotiation.

Four months ago the parties agreed to try again to reach an agreement. A new offer from Canada and BC was made in November, which forms the basis for the draft agreement now in the final stages of consultation.

The Treaty Commission praised the three parties in negotiations for their thorough public consultation and information program. "We don't expect there will be any surprises in this agreement for the people of the Sunshine Coast," said Richardson.

Progress in negotiations

The Katzie Indian Band becomes the 50th First Nation to enter Framework negotiations with the governments of Canada and British Columbia. Carcross/Tagish First Nation becomes the 38th First Nation to sign a Framework Agreement and enter agreement-in-principle negotiations.

First Nations, in addition to Sechelt, looking to complete Agreements in Principle in 1999 include:

- In-SHUCK-ch/N'Quatqua
- Ditidaht First Nation
- Pacheedaht First Nation
- Kaska Dena Council



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Status Report as of January 31, 1999

Of the 51 First Nations in the process, 38 are in Stage 4 Agreement in Principle negotiations. A table refers to a negotiation table at which three parties sit - one or more First Nations, Canada and BC

First Nations in Stage 2: 1

Council of the Haida Nation

Negotiation tables in Stage 3: 12

Cheslatta Carrier Nation
Katzie Indian Band

At one table:

Gwa'Sala-'Nakwaxda'xw First Nation
Kwakiutl First Nation
Namgis First Nation
Quatsino First Nation
Da'naxda'xw First Nation
Tlatlasikwala First Nation

Lake Babine Nation
Musqueam Nation
Nazko Indian Band
Squamish Nation

Negotiation Tables in Stage 4: 38

At one table:

Carcross/Tagish First Nation
Champagne and Aishihik First Nations
Taku River Tlingit First Nation
Teslin Tlingit Council

At one table:

Ditidaht First Nation
Pacheedaht First Nation

Cariboo Tribal Council

Carrier Sekani Tribal Council
Esketemc First Nation
Gitanyow Hereditary Chiefs
Gitxsan Hereditary Chiefs (in suspension)
Haisla Nation
Heiltsuk Nation
Homalco Indian Band
Hul'qumi'num Treaty Group
In-SHUCK-ch/N'Quat'qua
Kaska Dena Council
Klahoose Indian Band
Ktunaxa/Kinbasket Tribal Council
Kwatiutl Laich-Kwil-Tach Council of Chiefs
Lheidli T'enneh Band
Nuu-chah-nulth Tribal Council
Oweekeno Nation
Sechelt Indian Band
Sliammon Indian Band
Snuneymuxw First Nation
Sto:Lo Nation
Te'Mexw Treaty Association
Tsay Keh Dene Band
Ts'kw'aylaxw First Nation (Pavilion Band)
Tseil-Waututh Nation (Burrard Band)
Tsimshian Nation
Tsawwassen First Nation
Wet'suwet'en Nation
Westbank First Nation
Xaxli'p First Nation (Fountain Band)
Yale First Nation
Yekooche Nation



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Communities are working together

The ultimate purpose of the treaty process is to establish new relationships between First Nations, Canada and British Columbia through political negotiations.

But, as Chief Leonard George of the Tsleil Waututh Nation in North Vancouver remarked to the Lower Mainland Regional Advisory Committee in early January, that also means new partnerships on the ground between First Nations, local governments and local communities. Some such new partnerships are already being forged.

In late September 1998, the Town of Ladysmith agreed to provide technical assistance and mentoring to the Ditidaht Nation as it begins to develop a new self-government structure as part of its treaty. The Ditidaht Nation is located on southwest Vancouver Island and is in the advanced stages of agreement-in-principle negotiations.

Ditidaht's Chief Jack Thompson noted that the Ladysmith council's experience offers an invaluable resource to the First Nation as it develops its institutions, systems and procedures. The council's relations with provincial and regional government will help Ditidaht find the most effective ways to meet and implement its objectives.

Ladysmith Mayor Rob Hutchins has said that the arrangement between Ladysmith and Ditidaht will allow both parties to develop an appreciation of the administrative relationship and integration that will exist between First Nations governments and surrounding municipalities post-treaty.

Staff from Ladysmith have begun meeting with Ditidaht elders, staff and the treaty team about Ditidaht self-government for treaty purposes. This cooperation is expected to lead to the development of policies and procedures for responsible and accountable government, and the identification of human resource and training needs in government administration, finance, public works, social and land use planning and so on.

Commissioner Peter Lusztig has expressed enthusiasm for the cooperative approach being taken by Ladysmith and Ditidaht. "This is exactly the kind of partnership the recently established Capacity Panel envisioned and is hoping to encourage."

Sharing the Ditidaht treaty table is the Pacheedaht First Nation of Port Renfrew, also on southwest Vancouver Island. Pacheedaht recently agreed to work together with the Sooke Electoral Area of the Capital Regional District on a market analysis of the Sooke/Port Renfrew region to study land-use trends and identify viable economic ventures. Chief Councillor Marvin McClurg noted that the decision to move ahead arose from the economic needs of both the Sooke and Port Renfrew communities. Pacheedaht will pay half the costs of the study.

In the words of the then provincial Aboriginal Affairs Minister, Dale Lovick, "It's a spin-off of the treaty process. They're in the process of establishing relationships and developing a vision for the future in economics."



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Self-assessment tools available soon

First Nations soon will have new tools to help determine their preparedness for substantive treaty negotiations and eventual treaty implementation.

A group of First Nations leaders with an interest in capacity building met with the Treaty Commission one year ago to discuss the development of capacity self-assessment tools for First Nations in the treaty process. A steering committee was formed to oversee the development of a self-assessment survey, model resource plan and guidebook.

Funded by, but independent of, the federal government, the project sought to provide flexible tools for interested First Nations to identify their capacity needs and determine how best to meet these needs. The tools provide a community with an internal capacity 'snapshot' and encourage discussion about steps required to develop or improve capacity. The survey itself includes questions on organizational strategy, governance, organizational structure, human resources, community resources, economic development and community infrastructure. The use of these tools is for each First Nation to decide.

A consultant began work last summer to develop the self-assessment tools in cooperation with the committee and four volunteer 'pilot' communities. The Heiltsuk, Hupacasath, a member of the Nuuchahnulth Tribal Council, Sto:lo and Ts'kw'aylaxw First Nations assisted the Committee by testing the draft survey and guidebook in their respective communities and commenting on the model resource plan. Feedback from these four First Nations has been critical to ensuring that the tools will be useful to First Nations choosing to make use of them.

The Committee, in late January, approved the self-assessment tools and will arrange for their distribution by early March. First Nations requiring more information on this project should contact the First Nations Summit or the Treaty Commission.

Committee members are Charlene Belleau, Carole Corcoran, Robert Joseph, Sophie Pierre, Art Sterritt, Kathryn Teneese, Gerald Wesley and Treaty Commissioner Peter Lusztag. The Treaty Commission has been providing administrative support to the Committee.



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Capacity panel report to minister

In July 1998, federal Indian Affairs Minister Jane Stewart committed \$3-5 million for each of five years, towards First Nation capacity building in British Columbia. Funding may be bolstered by other sources and partnerships, including the Government of British Columbia.

At the same time, the federal minister appointed a panel to recommend measures for enhancing First Nation capacity to manage lands and resources and negotiate treaties. The "Post-Delgamuukw Capacity Panel", comprising aboriginal and non-aboriginal participants representing a broad spectrum of interests and expertise, submitted an interim report to the minister on November 6/98. A final report to the minister was submitted in mid-January. Federal funding to address the capacity needs of First Nations is expected to be available this spring.



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Documentary tackles Making Treaties in BC

Making Treaties in BC is a one-hour, made-for-television documentary that focuses on the issues in treaty negotiations and the process for resolution.

The documentary, which aired on the Global Television Network in December, was produced for Global by independent filmmaker MotionVisual Productions with support from the BC Treaty Commission.

The filmmaker set out on the highway late in 1997 just in time to record initial reactions to the landmark decision of the Supreme Court of Canada in the Delgamuukw case. Then progress at the treaty tables slowed while First Nations, Canada and British Columbia re-examined their positions in light of Delgamuukw. Attention turned to the Nisga'a in the summer of 1998 with the initialing of the first modern treaty in BC.

The documentary looks at the impacts of the Delgamuukw case, the process for resolving the land question, the differences between rural and urban treaties, and the Nisga'a Final Agreement.

"Our goal was to bring people together through an understanding of each other's views," says the film's director and producer Richard Hersley.

The Treaty Commission can provide a limited number of VHS copies of the documentary to non-profit community groups and organizations through a licensing agreement with MotionVisual Productions. Government, corporate and educational institutions can obtain VHS copies of the program by contacting:

MOTIONVISUAL PRODUCTIONS AT 604 990-9337, OR COYOTE@UNISERVE.COM OR UPPER 65 MAHON AVENUE, NORTH VANCOUVER, BC, V7M 2R3.



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Referendum no way to measure treaty support

If a province-wide referendum was held on the Nisga'a Final Agreement the results would be an inaccurate measure of how British Columbians feel about the treaty. That's because a referendum is too blunt an instrument for deciding a multi-faceted subject. There are two basic types of referendums:

Single issue question

For example, should the UK withdraw from the European Union?

Multi-faceted question

An example is the Charlottetown Accord that required people to cast a single yes or no vote on a list of wide-ranging items.

Evidence from Australia, where referendums are used regularly, shows that even single-issue questions are likely to result in a majority of "no" votes. For multi-faceted questions, the probability of rejection is very much greater.

A treaty is not a single-issue topic. It is a package of issues dealing with diverse topics such as land, resources, cash and governance. The Nisga'a Final Agreement, with 22 chapters and over 1,000 clauses, would demand that voters consider many issues, then cast a single vote of "yes" or "no".

Why might a treaty referendum fail?

- The evidence regarding referendums suggests that people generally feel more strongly about and give greater weight to those things they disagree with than to those they agree with.
- The composition of support for each issue changes from issue to issue.

Here's a simple illustration. In this scenario the entire electorate is made up of only three voters - a fisher, a farmer and a logger. The treaty addresses only three issues - fisheries, land and forestry. This is how they feel about the issues:

	Fisheries	Land	Forestry
Fisher	not supportive	supportive	supportive
Farmer	supportive	not supportive	supportive
Logger	supportive	supportive	not supportive

Each issue has majority support. If each issue was voted on individually all parts of the treaty pass. But, on the package each voter is likely to vote "no" even though they support most of what is in the treaty. This is because support for most issues is outweighed by the unhappiness over the issue they disagree with.

In the economic and political science literature, this phenomenon is known as the 'coalition of minorities' theory. Increase the number of issues and the array of voters and the likelihood increases that voters will cast a negative ballot.

In other words, there are enough disaffected minorities with strong views which taken together will effectively torpedo a multi-issue package. This happens even though most of the voters support most of what is in the package and most of these minorities have little in common with each other.



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How does ratification occur?

In keeping with commitments made early on, the Nisga'a Final Agreement must be ratified by all three parties to become a binding treaty.

The ratification process began with the Nisga'a Nation, where 61% of eligible Nisga'a voters voted in favour of accepting the Nisga'a Treaty in November 1998. Of those casting ballots, 72% were in favour of the agreement.

British Columbia began its ratification process when Bill 51, The Nisga'a Final Agreement Act, was introduced in the British Columbia Legislature November 30 and read for the first time. The Legislature reconvened on January 13 to give second reading to Bill 51. It was passed by a majority and sent to Committee.

Upon approval by the Nisga'a and the provincial government, the Government of Canada will begin its ratification process by introducing settlement legislation before Parliament. Following debate by Members of Parliament, the legislation must be passed by a majority vote.



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Court challenges to Nisga'a Final Agreement concern Treaty Commission

The Treaty Commission believes lawsuits launched by the provincial Liberal party and the BC Fisheries Survival Coalition are a challenge to the treaty process.

Legal actions run counter to direction given by the Supreme Court in the Delgamuukw judgment and to agreements between the federal and provincial governments and First Nations.

In Delgamuukw, the Supreme Court strongly encouraged the provincial and federal governments and First Nations to settle their differences through negotiation, not litigation.

The parties to negotiations in the BC treaty process are negotiating on the basis that self-government, lands and resources are "on the table." This understanding is based on the recommendations in the 1991 BC Claims Task Force Report, which were accepted by Canada, BC and First Nations.

In lawsuits filed in the BC Supreme Court in October, the Liberals and Fisheries Coalition say the Nisga'a Final Agreement has the effect of amending the Constitution of Canada. Among their arguments are that the agreement:

- creates a third order of government; and
- conveys lands and resources, including a share of the Nass commercial fishery, to the Nisga'a.

The possible implications, if these arguments are successful, is that governments would have to either amend the constitution or renegotiate the Nisga'a Final Agreement. Either course of action would be difficult and take time, maybe years, and would effectively undermine or even halt all treaty negotiations in British Columbia. That could wipe out five years of progress and make other options such as litigation and direct action by First Nations much more likely.



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Nisga'a self government provisions

Self-government is an important part of the Nisga'a Final Agreement. The goal of the Nisga'a was to secure control over matters that are internal and integral to their culture

Under the Final Agreement, the Nisga'a will have paramountcy (ie., their laws will prevail over federal or provincial laws, to the extent of a conflict) over the following areas:

- administration, management and operation of Nisga'a government;
- Nisga'a citizenship;
- preservation, promotion and development of Nisga'a culture and language;
- use and management of Nisga'a Lands by the Nisga'a nation;
- use, management, planning, zoning and development of Nisga'a Lands;
- use, possession and management of Nisga'a assets on Nisga'a Lands;
- public order, peace and safety;
- design, construction, maintenance, repair, and demolition of buildings, structures, and public works on Nisga'a Lands;
- regulation of traffic and transportation within Nisga'a villages, to the same extent as other municipal governments;
- authorization or licensing of aboriginal healers (does not include the authority to regulate products or substances that are regulated under federal or provincial laws of general application);
- child and family services, at standards comparable to provincial standards;
- pre-school to grade 12 education, at standards that are comparable to provincial standards;
- post-secondary education, at standards that are comparable to provincial standards;
- devolution of cultural property (ie., ceremonial regalia) of a Nisga'a citizen who dies intestate;
- internal allocation of fish (ie., how the Nisga'a allocate their share of the fish among their citizens); and

- internal allocation of wildlife.

Nisga'a authority over the following matters will be subject to federal or provincial law to the extent of the conflict:

- solemnization of marriages;
- provision of social services;
- health services;
- prohibition, sale, exchange, possession, or consumption of intoxicants; and
- emergency preparedness.

The Nisga'a government will also participate in a Joint Fisheries Management Committee under the authority of the federal government, and a Wildlife Management Board under the authority of the provincial government.



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Opinion: Treaties are about rights, not about race

Some people are critical of treaty rights which they see as creating inequality. They argue that Canada is built on the principle of "one country, one law". True. Canada is one country. Canada has one law, the Constitution, which recognizes and protects aboriginal rights including title.

The Supreme Court of Canada has made it clear that aboriginal rights are distinct and different from the rights of other Canadians and include unique property rights. The court didn't create these rights, it recognized that these rights continue to exist.

The Supreme Court said aboriginal people have special constitutional and legal status because they were living here when Europeans first arrived in North America.

".the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means" Supreme Court Justice J. Judson in *Calder v. Attorney-General of British Columbia*, 1973.

This fact makes aboriginal people different from minority groups in Canada and is the source of their unique status.

Common law in the United States and Canada has long recognized that First Nations have a unique interest in the land. And, unlike interests in land given by a Crown grant, First Nations' interests stem from their own possession, occupation and governing of the land before the arrival of Europeans.

The Constitution Act protects existing aboriginal and treaty rights in Section 35 (1). It extends that protection to rights set out in future treaties in Section 35 (3). That means the rights set out in a new, modern day treaty are given constitutional protection when ratified by the First Nation, Canada and British Columbia. Aboriginal rights, including title, exist whether or not they are set out in a treaty. But without a treaty there is uncertainty about how and where those undefined rights apply.

The majority of British Columbians agree it is necessary and important to negotiate treaties with First Nations to bring certainty to land ownership and jurisdiction. Informed people may disagree over the amount of land, resources, cash and jurisdiction that should be in a specific treaty. But treaties must address these issues, especially self government, if they are to be successful. These elements of a treaty relate to the aboriginal rights that First Nations see as essential to the survival of their language and culture, and ultimately their society.

Given First Nations' experiences with the Indian Act, residential schools, forced adoptions, laws forbidding cultural practices and the use of local resources by others, it is not surprising that they seek jurisdiction in these areas, to protect themselves from the whims of future governments.