

Understanding the B.C. Treaty Process

An Opportunity for Dialogue

*Prepared for
The First Nations Education Steering Committee,
The B.C. Teachers' Federation, and
The Tripartite Public Education Committee*

*Second Edition
February, 1998*

Supporting Partners

The **First Nations Education Steering Committee (FNESC)** works to ensure that First Nations students have access to quality educational opportunities. Information about the Steering Committee is available by calling (604) 990 - 9939, or by faxing (604) 990 - 9949.

The **B.C. Teachers' Federation (BCTF)** is 42,000 teachers, working together to achieve goals adopted more than 75 years ago: to promote the cause of education; to raise the status of the teaching profession, and to promote the welfare of teachers. The BCTF can be contacted by phone at (604) 871 - 2283 or toll free at 1-800-663-9163. The BCTF Web Site is <http://www.bctf.bc.ca>

The **Tripartite Public Education Committee** is a joint committee with a representative of each of the three principals -- the First Nations Summit and the federal and provincial governments.

The development of this handbook was also supported by the **B.C. Treaty Commission (BCTC)**, the independent and impartial keeper of the treaty process. The BCTC can be reached by phone at (604) 482 - 9200 or 1-800-665-8330. Information about the BCTC can also be found on the Web at <http://www.bctreaty.net>

Table of Contents

Preface	1
What Are Treaties, and Why Are They Being Negotiated?	2
What is Meant by Certainty?	4
The Context of Treaty Making -- Overcoming Difficulties Arising from the Past	7
The <i>Indian Act</i>	11
What Are Interim Measures?	13
What is Self-Government, and How Does it Relate to Treaties?	14
How Was the Current Treaty Process Initiated?	17
Recommendations of the B.C. Claims Task Force	18
What is the B.C. Treaty Commission? The Keeper of the Process	19
How Are Negotiations Proceeding? The Process and the Progress	20
The Six Stage Negotiation Process	22
Issues Being Considered	
• Lands and Resources	24
• Parks and Protected Areas	25
• The Fishery	26
• Forestry	27
• Governance	28
• Education	29
Participants in the B.C. Treaty Process	30
The Way Ahead	32
How Does the Nisga'a Agreement Relate?	33
What Does the Nisga'a Agreement Include?	34
What is Delgamuukw, and What Are Its Implications?	36

Preface

This handbook was prepared jointly by the First Nations Education Steering Committee, the B.C. Teachers' Federation, the Tripartite Public Education Committee, and with support from the B.C. Treaty Commission. It is intended to be a resource for teachers, primarily to assist them in responding to questions and to facilitate discussions about the treaty process which may arise in the classroom setting. Fundamentally, this handbook is based upon the notion of providing comfort through information; it attempts to dispel some of the common myths and misunderstandings associated with treaties and the B.C. Treaty Process, and to explain how the process works.

This handbook provides basic information about treaties. It outlines some of the reasons for the establishment of the treaty process, as well as some of the reasons why First Nations have and have not chosen to participate in the process. This handbook also highlights some of the issues treaties may help to resolve, and the contribution the treaty process may have to the building of more positive relationships between First Nations and non-Aboriginal people. The materials included outline the role of the B.C. Treaty Commission, the process of negotiations, and some of the challenges and opportunities which are being highlighted through the treaty process.

It should be noted that in this handbook generalizations may be made in order to introduce complex issues in an understandable way. It is important to remember that First Nations people in Canada are enormously diverse in terms of their goals, languages, cultures, and traditions.

What Are Treaties, and Why Are They Being Negotiated?

A Background to Treaty Making in Canada and B.C.

The Purpose of Treaties

Fundamentally, treaties between First Nations, Canada and British Columbia are a means to address issues related to the rights of First Nations, as well as to establish a foundation for building a new relationship between First Nations and non-Aboriginal governments and people. They are also a way in which to provide greater certainty about the rights of non-Aboriginal people and to increase the level of understanding of how people and governments can work together for the future development of all communities.

Articulating Aboriginal Rights

The existence of Aboriginal rights has been clearly and firmly established, and is no longer open to question. Aboriginal people have been consistent in their assertion of their rights, and in their insistence that those rights be recognized, affirmed and protected. Government commissions established to review and make recommendations on policies affecting Aboriginal people have also consistently supported the existence of Aboriginal rights. In addition, the *Constitution Act, 1982* acknowledges Aboriginal rights. Section 35 of the Constitution reads “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

Section 35, however, does not define Aboriginal rights, and their nature and extent remains largely unresolved. It is still necessary, then, to specify the scope of Aboriginal rights, to develop mechanisms for making their implementation a reality, and to define the relationship between Aboriginal and non-Aboriginal people — all formidable challenges. These outstanding issues can be clarified through negotiations and the establishment of modern treaties. Of particular importance is the fact that treaty negotiations represent an opportunity to address the land, resource and governance rights of Aboriginal people through a collective process which is consistent with their values and their emphasis on their communities.

“

... a treaty with First Nations peoples ... should begin with a stated recognition that the First Nation has Aboriginal rights in the territory and the treaty area, and then should clearly outline the principles that will guide the new relationship.

”

The Task Force to Review Comprehensive Claims Policy, 1985

Providing for a More Certain Relationship

In articulating specific aspects of Aboriginal rights, treaties will provide a greater sense of certainty -- an outcome which will be beneficial to a range of people and communities. Many Aboriginal people have expressed a strong desire for certainty with respect to their title, rights and interests within their traditional lands. Many also want certainty that their rights and benefits will be respected and implemented.

Many non-Aboriginal people also have stressed the importance of achieving certainty, and providing all residents with a clear understanding of their rights and responsibilities, with security of tenure, and with a clear process for acquiring and disposing of land. Certainty for many people also means the ability to conduct their operations in a stable and predictable environment.

Clear treaties can set out and describe the rights of parties and others affected by the terms of the agreement. As the 1990 and 1991 Annual Reports of The Canadian Human Rights Commission indicate, treaties can provide a “workable balance” between the desire of Aboriginal people to preserve their rights and the desire of government to clarify the legal status of the land question. The overall task, then, is to construct a treaty that will recognize the existence of Aboriginal rights and provide certainty with respect to the rights of all interested people.

“ *Certainty of ownership over lands and resources will benefit everyone. First Nations have been clear they do not expect to achieve treaties at the expense of others. More important, First Nations are committed to building a new relationship with all people of B.C. and Canada, based on mutual respect and understanding.*

”

***First Nations Summit,
Treaties in British Columbia Information Pamphlet***

What is Meant by “Certainty?”

The concept of certainty is a key aspect of the current treaty process. In some past negotiations, the federal government insisted that clauses be included stating that Aboriginal parties “cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land” in exchange for compensation, rights and benefits set out in agreements, and that legislation to approve the agreement “extinguish all native claims, rights, title and interests.” Most Aboriginal people, however, consistently objected to a policy based upon a need for surrender, and the B.C. Treaty process emphasizes “certainty” rather than “extinguishment.”

The meaning and importance of the concept of certainty as it relates to treaties is considered in some depth in *A New Partnership*, the Report of Hon. A.C. Hamilton, Fact Finder for Minister of Indian Affairs and Northern Development, 1995. Hamilton’s report is based upon a consideration of past reports and recommendations related to “certainty,” as well as consultation with Aboriginal people and government representatives, non-Aboriginal government representatives, and “third parties” with an interest in treaty negotiations.

Generally, Hamilton concludes that certainty reflects a need by the parties (Aboriginal people, the federal government, the provincial government, and members of the public) to know that their rights and interests are secure, and will not be interfered with by the rights of others.

Aboriginal people generally express a strong desire for certainty with respect to their title, rights and interests within their traditional lands. They are unwilling to surrender their Aboriginal rights; however, they generally are not unwilling to have the extent of their rights to lands and resources set out in a treaty. Many want treaties to provide certainty that their rights and benefits will be respected and implemented. Aboriginal people generally have expressed a view that certainty can be achieved through

treaties that establish continuing relationships and provide sufficient flexibility, as long as their provisions are fulfilled.

Most provincial authorities also stress the importance of achieving certainty, and providing *all* residents with a clear understanding of their rights and responsibilities, with security of tenure, and with a clear process for acquiring and disposing of land.

Third Parties want treaties to clearly identify the rights of each party, and protect the rights of Aboriginal and non-Aboriginal people. Certainty for them is a primary concern — meaning the ability to conduct their operations in a stable and predictable environment. They also emphasize the need for a new relationship.

Hamilton’s suggested approach for achieving certainty contains the following:

- negotiate a clear concise treaty, a clear definition of the types of land involved, a statement of the rights of all parties and of all affected interests, and mutual assurance provisions;
- make the treaty fair and balanced so that all commitments are jointly made;
- guarantee the enforceability of the treaty with its own dispute resolution mechanism;
- provide the parties with the means to consensually negotiate changes to the treaty; and
- have the treaty form the basis for future relationships based on mutual respect and trust.

Finally, Hamilton comments that:

“I suggest that Aboriginal rights should not be and do not have to be surrendered under any circumstances whatsoever in order to either aid negotiations or to achieve equality.”

The Hamilton Report, however, is unlikely to be the last consideration of issues associated with certainty. Discussions of its meaning and implications are likely to continue for some time.

An Alternative to Continued Confrontations and Court Actions

As an alternative to the negotiation of treaties, the scope of Aboriginal rights may be addressed through a continuation of confrontations and court actions -- routes which have been pursued on numerous occasions in the past. The use of Canadian courts to articulate Aboriginal rights, however, has proven to be time consuming, expensive, and not entirely satisfactory for any party.

The Canadian courts have generally favoured negotiations as a more appropriate route to resolve issues between Aboriginal and non-Aboriginal people. In recent decades, a number of court decisions have recognized, and to a certain extent defined, Aboriginal rights. But these cases, almost without exception, have emphasized that litigation of these issues is not the ideal route to their resolution. Rather, the courts have generally maintained that negotiation — not litigation — will provide the best solution. For example, in responding to the Nisga'a case decades ago (described in more detail on pages 33 - 35), the court recommended negotiation rather than litigation as a means for addressing questions associated with Aboriginal title. Similarly, in the *Delgamuukw* appeal brought to the B.C. Court of Appeal by the Gitskan and Wet'suwet'en Hereditary Chiefs, Justice MacFarlane notes in his decision:

... that treaty-making is the best way to respect Indian rights there is no doubt ... The parties have expressed willingness to negotiate their differences. I would encourage such consultation and reconciliation, a process which may provide the only real hope of an early and satisfactory agreement which not only gives effect to the aspirations of the aboriginal peoples but recognizes there are many diverse cultures, communities and interests which must co-exist in Canada. A proper balancing of all those interests is a delicate and crucial matter.

Resolving a Range of Important Issues

Treaty negotiations can encompass a range of issues deemed to be important by the parties involved. The issues considered at each treaty negotiation table will vary, reflecting the unique priorities of each participating First Nation. Some of the issues likely to arise at the majority of tables are outlined briefly in this handbook on pages 24 - 29. Those issues include: lands and resources, including parks and protected areas; forestry; fisheries; self-government, including education, culture, languages and heritage, eligibility and enrolment, and social services; and financing and the amount of money to be included in the agreement.

Additional Information

Each of the three principals have information related to the treaty process which is available to the public. For further information:

- Contact the First Nations Summit Office at (604) 990 - 9939.
 - Contact the Government of Canada Federal Treaty Negotiations Office at 1-800-665-9320, or on the Internet at <http://www.inac.bc.ca/>
 - Contact the Government of British Columbia, Ministry of Aboriginal Affairs at 1-800-880-1022, or on the Internet at <http://www.aaf.gov.bc.ca/aaf/>
-

The Context of Treaty Making Overcoming Difficulties Arising from Past Policies

The current treaty making process can only be fully understood in the historical context of relations in Canada between Aboriginal and non-Aboriginal people.

Before the arrival of European peoples to what later became known as Canada, First Nations peoples governed themselves in self-sustaining and effective ways, and conducted their activities and relations in a regulated, organized manner which reflected their cultures, values and traditions. Issues of land and land management are also directly related to and inseparable from issues of First Nations rights and governments. Land has always had economic and political significance for First Nations peoples, and it has been connected to their values, spirituality, resource use, and their ways of life.

“ *As nations of people we made laws to govern ourselves. Among the laws that we made were laws governing our use of the land and its resources.* ”
Plain (1985)

Early Treaty Making in Canada

With the arrival of Europeans to Canada, efforts commenced to establish the basis for a relationship between First Nations and non-Aboriginal people. Treaty making between First Nations people and European arrivals has extended from as early as the 18th century, when First Nations entered into treaties with the Dutch, French and English arrivals. The tradition of treaty making continued throughout that century, and into the 20th Century.

The earliest treaties were the “peace and friendship” treaties that were established as early as the 1720’s in what are now Canada’s Maritime provinces. In these treaties, as the name suggests, the Crown and the First Nations involved agreed to live in peace and friendship. Later, the focus of treaties shifted to include land issues. There were significant differences between them, but all of the federal treaties basically established that First Nations agreed to cede certain rights and privileges in return for treaty rights and protections. Interpreting and implementing these treaties has been and continues to be an issue of some contention, with some First Nations and non-Aboriginal people disagreeing about the meaning and extent of their terms and conditions. However, despite any outstanding questions, most of the First Nations people who have signed treaties with the Crown regard their treaties as living documents, with direct relevance to their lives and to their goals.

The Royal Proclamation

One of the most important documents is seen by many people to be the Royal Proclamation of 1763. The Royal Proclamation was issued by King George III. It was intended to keep Indian people as allies during times of war and to keep them as trading partners. It was also intended to protect Indian peoples' lands from encroachment. Accordingly, the Royal Proclamation decreed that Indian peoples should not be disturbed in their use and enjoyment of the land. It also stated that land held by Indians was to be purchased by the Crown only -- not by individuals -- with the consent of Indian people, and only after an open negotiation session. This Proclamation is still often referred to by many First Nations people as evidence of their sovereignty and rights -- particularly their rights to land and resources. Provisions of the Royal Proclamation are used in many of the legal arguments made for First Nations rights to this day. The Royal Proclamation, and its determination that only the Crown could acquire lands from First Nations, meant that treaty making was the primary means of transferring lands from First Nations to the Crown. By the 1850's, treaties had been established with the First Nations in Eastern Canada, and gradually the process continued west to the Rockies, and into B.C.

Treaty Making in British Columbia

The treaty making policy was not consistently pursued in the west. James Douglas, Hudson's Bay Company Agent and, later, Governor of the British colony on Vancouver Island, was instructed by the British Crown to purchase First Nations lands. Between 1850 and 1854 Douglas made fourteen agreements on the island that are known as the Douglas Treaties. For the first agreement, Douglas had the Chiefs sign a blank piece of paper, on which he then filled in the text. Douglas may have thought of these agreements as land purchases, but they were taken to be peace treaties by the First Nations involved, and they were upheld by a 1965 Supreme Court of Canada judgement as valid treaties. The provisions of these agreements have been the basis of a number of successful court challenges, especially the guarantee that the signers would be "at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly." Some communities whose ancestors' names are listed on the Douglas Treaties hold that the treaties continue to define the relationship between their communities and the federal government. They do not think that a new treaty making process is necessary for them. Other communities intend to use the terms of the Treaties in their present negotiations. Treaty 8 was also established, which encompasses an area in the Northeast corner of what is now British Columbia. When the mainland was made a colony in 1858 Douglas was expected to continue the policy of purchasing lands, but a shortage of funds made the Crown's purchase of additional lands impossible. As a result, throughout most of British Columbia no treaties were established.