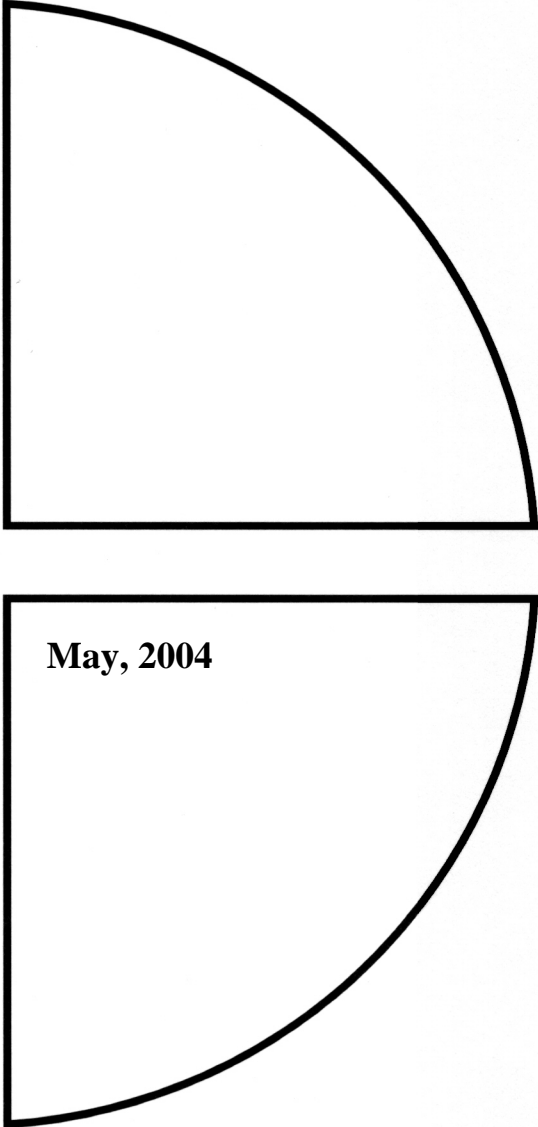


**THE BRITISH
COLUMBIA
TREATY PROCESS:

A ROAD MAP FOR
FURTHER PROGRESS**



May, 2004

Table of Contents

Profiles	ii
Acknowledgements	iii
Caution	iii
Introduction	1
What Has Happened in the Last Ten Years?	1
Current Status of Treaty Making in British Columbia	10
The Views of the Main Players	10
The Perspective of the Business Community	12
□ Consultation and Accommodation	13
□ First Nation Claims	17
□ Government Focus and Resources	19
□ First Nation Capacity	21
□ Success in Negotiations	22
□ Federal/Provincial Matters	23
□ Certainty	25
A. The Legal Technique	26
B. The Whole Agreement	27
C. Interim Predictability	27
D. Management Regimes	28
□ Failure to Agree	29
□ Consultation with the Business Community	29
Summary and Conclusion	30
Appendices	
□ Summary of Recommendations	A1
□ Business Experiences with First Nations in British Columbia	A2
□ Statement on Aboriginal and Crown Title	A3
□ Sample Statement of Intent	A4
□ Reference Material	A5

Profiles

The Business Council of British Columbia

Established in 1966, the Business Council is an association representing approximately 190 large and medium-sized enterprises engaged in business in British Columbia. Our members are drawn from all major sectors of the provincial economy, including forest products, mining, manufacturing, transportation, agri-food, telecommunications, information technology, financial services, energy, tourism, retail, construction, healthcare, education and the professions. Taken together, the corporate members and the associations affiliated with the Business Council are responsible for one-quarter of all jobs in British Columbia.

Dave Kennedy

In his 20 years of involvement in aboriginal issues, Dave has been a senior official for the Newfoundland and British Columbia governments in roles including Chief Negotiator for Treaty Cost-Sharing, Chief Negotiator for Aboriginal Child and Family Services, Chief Negotiator for federal/provincial agreements for aboriginal services, Assistant Chief Negotiator for Land Claims and Director and Executive Director of Aboriginal Policy. From 1998 to 2000 Dave was the Executive Director of the BC Treaty Commission. Through his firm, Dave Kennedy Consulting Inc., he has worked on a wide variety of projects including Central Coast land use planning, the Manitoba Justice Implementation Commission, aboriginal child and family services, Métis matters, First Nation capacity-building and First Nation consultation and accommodation.

This Paper has been prepared for the Business Council of British Columbia by Dave Kennedy Consulting.

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- Grand Chief Edward John, First Nations Summit Task Group
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- Mike Harcourt, Commissioner, BC Treaty Commission
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- Lorne Brownsey, Deputy Minister, Treaty Negotiations Office, Ministry of Attorney General

Our work was also assisted by a number of officials involved in the treaty process. They are too numerous to list here, but we do appreciate their cooperation.

We also thank the First Nations Policy Committee of the Business Council for sharing their experiences and ideas.

Caution

Nothing in this paper represents a legal opinion and any analysis of legal issues in this paper should not be relied on by anyone as legal advice.

Introduction

The Business Council of British Columbia has a longstanding interest in the treaty process in British Columbia. This interest is directly related to our mission to build a competitive and growing economy that provides opportunities for all who invest, work and live in British Columbia. We have participated in many discussions relating to treaties and other aboriginal issues including those of the Treaty Negotiations Advisory Committee, Business at the Summit and hearings on the Nisga'a Agreement in Principle. We have also from time to time intervened in court actions relating to aboriginal rights and title where business interests were affected.

Our goal is to help ensure that the treaty process achieves its objective – the settlement of the land question in this province and securing certainty for the federal and provincial governments, First Nations, non-aboriginal British Columbians, investors, and business interests.

The BC treaty process marked its tenth anniversary on December 15, 2003. Ten years ago the British Columbia Treaty Commission accepted the first Statement of Intent to enter into the treaty process from the In-SHUCK-ch/N'Quat'qua First Nation. There have been many developments, some progress and more than a few setbacks in the past decade. The purpose of this paper is to review where the treaty process has been, assess its current course and make recommendations to the federal and provincial governments, First Nations and the British Columbia Treaty Commission.

Our objective in this paper is to provide the perspective of the business community on substantive matters related to the treaty process, as well as process issues. We offer these recommendations in hopes that they will provide a stimulus for new ideas that will help lead to comprehensive and effective treaties that provide certainty for all British Columbians.

What Has Happened in the Last Ten Years?

The first Statement of Intent (SOI) was accepted by the British Columbia Treaty Commission (BCTC) on December 15, 1993, but the modern treaty process¹ goes back a few years before that.

Earlier in the decade a number of First Nations in British Columbia had taken direct action, partly in support of the Mohawks in Québec, but also to press their demands for the federal and provincial governments to recognize their claims to inherent aboriginal rights and title. In response, the provincial government established the Premier's Council on Native Affairs which recommended that a treaty process be established to deal specifically with the land question in British Columbia. After meetings at the highest

¹ Modern day treaty negotiations had been underway between the public governments and the Nisga'a Nation for some considerable time before the treaty process overseen by the BCTC was initiated.

level, the BC Claims Task Force was established with representatives of First Nations and the federal and provincial governments.

On June 28, 1991, the Task Force presented its Report. It contained 19 recommendations and a good deal of discussion setting out the fundamental aspects of a made-in-British Columbia treaty process. The First Nations Summit passed a resolution accepting the Report. Interestingly, the federal and provincial governments did not endorse the Report itself. Instead, they accepted the 19 recommendations. While this may appear to be a minor technicality, it now seems important that the three Principals² in the treaty process were out of step from the outset.

The BC treaty process³ began with the establishment of the BCTC in September 1992, but it took over a year to get the Commission up and running and ready to undertake its primary role: the receipt and evaluation of Statements of Intent (SOIs). There was a great deal of preparatory work done, including establishing the mechanisms for providing funding to First Nations for their participation in the negotiations. The end result of the discussions was that First Nations would receive funding, 80 per cent of which would be loans repayable at settlement⁴ and 20 per cent of which would be a non-repayable contribution. The loans come from the federal government while the contribution funding is cost-shared between the federal and provincial governments 60:40. In other words, the BC government provides 8 cents on the dollar of the funding received by First Nations, but shares equally with Canada the risks of the loan funding advanced to First Nations by the federal government.

The First Nations Summit refused to endorse the first series of agreements governing loan funding, believing that funding should be a straight grant, not repayable loans. The funding instruments have been renewed a few times since their inception, but the First Nations Summit still does not endorse them.

This is another example of a fundamental disconnect among the treaty negotiation Principals that continues to the present.

In the middle of 1993 the federal and provincial governments reached agreement on how the costs of treaty negotiations and settlements would be shared between them. The agreement is very complex and initially took some considerable study to determine how it ought to be implemented. Notwithstanding, the Cost-Sharing MOU remains in place unaltered.

² Throughout this paper, “Principals” will be used to refer collectively to the governments of Canada and British Columbia and the First Nations Summit.

³ The treaty process in British Columbia is often referred to as the “BCTC process”. This is not an accurate portrayal as the BCTC did not create the process nor does the BCTC engage in negotiation of the substantive issues.

⁴ Or earlier, in the case of default.

In its first Annual Report, the BCTC provided an evaluation of the 19 Recommendations of the Task Force Report.⁵ The BCTC analysis provides an interesting perspective on what has changed and what still remain to be resolved. Some examples include:

Recommendation #2. Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship. The BCTC commented: “There appears to be a clear understanding among the parties that there is no restriction on what can be negotiated.”

Recommendation #8. First Nations resolve issues related to overlapping territories among themselves. The BCTC commented: “What is required is that the First Nations have a procedure in place for resolving overlaps. Otherwise, the First Nation will not be deemed to have achieved readiness to proceed into negotiations.”

Recommendation #10. Non-aboriginal interests be represented at the negotiating table by the federal and provincial governments. The BCTC commented: “...[T]he governments are obligated, as part of their preparation responsibilities, to establish mechanisms for consultation with non-aboriginal interests for each negotiation in which they are to participate.”

Recommendation #11. The First Nation, Canadian and British Columbia negotiating teams be sufficiently funded to meet the requirements of the negotiations. The BCTC comments on this item dealt exclusively with the adequacy, impartiality and management of funding for First Nations.

Recommendation #17. Canada, British Columbia, and the First Nations jointly undertake public education and information programs. The BCTC commented: “It is clear that the absence of accurate information from the Principals has led and will continue to lead to apprehension and resistance from interest groups and the public.”

During the summer of 1995, dubbed “The Long, Hot Summer”, a number of First Nations took direct action against government activities and private developments on their traditional territories. A major standoff at Gustafson Lake was eventually dismantled by the RCMP. Most of the direct actions were taken by First Nations not in the treaty process, but the actions increased public concern about aboriginal rights and put increased pressure on the two levels of government, especially British Columbia, to make advances in treaty negotiations.

⁵ British Columbia Treaty Commission, “The First Annual Report of the British Columbia Treaty Commission for the Year 1993-1994”, 1994, pp. 21 – 25.

The Nisga'a Agreement in Principle was signed in 1996 after 20 years of negotiations. The BC Legislature authorized the all party Select Standing Committee on Aboriginal Affairs to study the impact of the agreement. The Business Council made a detailed submission to the Standing Committee that outlined nine criteria for workable and acceptable treaties dealing with issues including certainty, affordability, compensation and self-government.⁶ After hearing from hundreds of presenters ranging from average citizens to aboriginal, political and business leaders the Standing Committee issued its Report in July 1997. Unfortunately the Standing Committee split along party lines. The majority report supported the Nisga'a AIP and the political views of the government, while the minority report raised many concerns with the agreement.

On December 11, 1997, the Supreme Court of Canada rendered its decision in *Delgamuukw*⁷, which was hailed as a major victory by First Nations, although interpretations of this landmark decision vary widely. First Nations called on the federal and provincial governments to "implement" *Delgamuukw*, asserting:

In *Delgamuukw*, the Supreme Court of Canada has clearly acknowledged that First Nations have aboriginal title, which is a legal interest in land and right to land itself. First Nations have a right to and will exercise our uses of our lands for a complete range of purposes, including contemporary economic activities. ... Finally, the Court confirmed that aboriginal title is on an equal footing with the Crown's title.⁸

The *Delgamuukw* decision prompted the Principals to initiate a review of the BC treaty process. Initially the review was undertaken by the Principals with certain third party interests, including the Business Council, observing the discussions. First Nations objected to third party observers and subsequent review meetings among the Principals were held *in camera*.

Arising from the review was a "Statement on Aboriginal and Crown Title" (see Appendix 3) that set out a joint understanding among the Principals on the relationship between Crown and Aboriginal titles and was a major step in mutual recognition. Oddly, however, this breakthrough did not receive any profile from the Principals or the BCTC. Why a political agreement on the reconciliation of titles did not receive the kind of attention such a breakthrough would seem to deserve remains a mystery.

In January of 2000 the Assembly of First Nations, the First Nations Summit, the Union of BC Indian Chiefs and the Interior Alliance issued a *Consensus Statement on Aboriginal Rights*:

⁶ Business Council of British Columbia, "The Nisga'a Agreement-in-Principle and the British Columbia Treaty Process", submission to the BC Legislature's Select Standing Committee on Aboriginal Affairs, December 4, 1996.

⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R.

⁸ "First Nations Summit Statement to The Honourable Jane Stewart and The Honourable John Cashore on The Supreme Court of Canada Decision in *Delgamuukw*", January 31, 1998, pp. 3-4.

The Assembly of First Nations, the Union of B.C. Indian Chiefs, the Interior Alliance and the First Nations Summit, hereby join together publicly to affirm the Aboriginal title and rights of all First Nations of British Columbia and Canada. Canada's Comprehensive Claims Policy is predicated on the denial of our rights and title. We categorically reject this policy and Canada's implementation of this policy. We call upon Canada to assert the honour of the Crown and to adopt a new policy of recognition, affirmation and implementation of Aboriginal title.

This joint statement was significant in that these four organizations had previously expressed differing views on how best to address aboriginal rights and title. Their unity on this statement was historic and sent a strong message to the governments that federal policy, particularly, was unacceptable.

In the middle of this already uncertain time the government in Victoria changed. The new Liberal government in Victoria was on record as opposing the Nisga'a treaty as being unconstitutional and had filed a court action while in Opposition⁹ challenging the treaty. The Liberals had campaigned on a promise to hold a province-wide referendum on treaties. They also took the position that self-government could only be delegated to First Nations by the federal and provincial governments. The Liberal Platform¹⁰ included the following commitments:

- ❑ Give all British Columbians a say on the principles that should guide BC's approach to treaty negotiations, through a one-time, province-wide referendum, within our first year.
- ❑ Fast-track treaty talks, to conclude fair treaty settlements.
- ❑ Offer to negotiate a delegated, municipal-style of self-government with any First Nation that wants to move beyond the failed Indian Act.
- ❑ Seek clear direction from the Supreme Court of Canada on constitutional questions about aboriginal self-government.
- ❑ Introduce a legislative framework for legally respecting aboriginal rights protected under the Constitution in the absence of treaties.

In view of the Liberal court challenge and its platform on treaty issues, First Nations were understandably concerned that the treaty process might take a whole new direction. Following through on its key commitment the new provincial government held a mail-in referendum seeking British Columbians' views on eight questions. Some 760,000 people cast ballots that overwhelmingly confirmed the provincial government views on these eight issues.

⁹ *Campbell et. al. v. A.G. B.C./A.G. Canada and Nisga'a Nation et. al.*, 2000 BCSC 1123. Ultimately the BC Supreme Court found that the Nisga'a Final Agreement and the federal and provincial settlement legislation established a constitutionally valid treaty. The Liberals did not pursue the action further.

¹⁰ *A New Era for British Columbia*, BC Liberal Party, undated.

There was a significant down time in treaty negotiations during the run up to and during the referendum. However, the apocalypse that many predicted for the treaty process did not occur. Instead, the BC government issued new instructions to its negotiators¹¹ that were vague on specifics, but did provide negotiators with the ability to explore topics that had been under discussion at the senior level through the BCTC.

The Principals' review process continued in changing forms over the next few years and seemed to have all but ended until the BCTC issued its 2001 Annual Report that included a review of the BC treaty process. The BCTC's review addressed a number of issues including:

- ❑ The need to build treaties incrementally through interim measures, high level negotiations, the negotiation of "slim AIPs", working on governance issues and permitting capacity-building "time-outs".
- ❑ Greater candour in negotiations. Tellingly, the BCTC offered, "There is no common understanding of the parameters and goals of treaty negotiations and this is causing mounting frustration on all sides of the treaty table."
- ❑ The slow pace of negotiations relating to the Delgamuukw decision, the federal and provincial elections, an overloaded system and high turnover of negotiators.

The BCTC's review prompted the Principals to reinvigorate their high-level discussions, which had become all but moribund. The result was a tripartite report issued by the Principals through the BCTC.¹² The Tripartite Working Group Report addressed the many tough issues that the BCTC had flagged in its 2001 review. It also reported on the establishment of three "streams" that senior officials from the Principals would address on a priority basis:

Stream 1: "Time Out", Assessment, Funding Implications

Stream 2: Revenue-Sharing, Co-management

Stream 3: Certainty, Governance, Land Status, First Nation Constitution

Some progress has since been made on Stream 2, but the other tables no longer meet or address these issues in any concerted manner. An agreed workplan set out a deadline of May 31, 2002 for the senior officials to give instructions on further work and the creation of new streams to address other issues arising from the Tripartite Working Group Report. It appears, however, that no further action has been taken by the Principals.

There have also been a number of developments brought about by court decisions, aside from the impacts related directly to the *Delgamuukw* decision. In 2002, the British

¹¹ Correspondence, Geoff Plant, Attorney General and Minister Responsible for Treaty Negotiations to Philip Steenkamp, Deputy Minister, Treaty Negotiations Office, July 31, 2002.

¹² BCTC, "Improving the Treaty Process", Report of the Tripartite Working Group, February 25, 2002 (issued in May 2002).

Columbia Court of Appeal rendered its decisions in *Taku River Tlingit*¹³, *Haida*¹⁴ and *Skeena*¹⁵. These three decisions highlight the difficulties of squaring certain aspects of the *Delgamuukw* decision with management of the province in the interests of all citizens.

These decisions dealt with the duty to consult and the obligation to accommodate asserted aboriginal interests in public and private decision-making. Taken together with *Delgamuukw* and earlier decisions, these cases have made First Nation consultation and accommodation much more challenging, asserting:

- ❑ There is always a duty to consult.
- ❑ The Crown has unique trust-like duties to aboriginal peoples.
- ❑ The Crown has a legally enforceable duty to consult even where the aboriginal group has not proven whether it has aboriginal right or title.
- ❑ Consultation is not sufficient; aboriginal interests must be accommodated.
- ❑ In some circumstances private businesses may also be subject to a duty to consult and accommodate.
- ❑ Willingness of a First Nation to participate in a consultation/ accommodation process does not impair its aboriginal rights and title.
- ❑ The assertion of aboriginal rights and title is sufficient to trigger the duty to consult and accommodate.
- ❑ The extent of the obligation to consult and accommodate is related to the potential soundness of claims of aboriginal rights and title.
- ❑ The Crown has an on-going duty to correct past infringements and should do so at each opportunity.
- ❑ Even the sale of assets or the renewal of a license can trigger the duty to consult and accommodate.

These cases have not led to greater certainty for businesses in BC. Compounding this, there is no consensus on these issues and no agreed process to resolve them.

The BC government redrew its policy on consultation and accommodation in October 2002¹⁶. The revised policy built on prior government policy and was intended to respond to the court's direction in the cases earlier that year. First Nations wasted little time in rejecting the new government policy. It was seen by First Nations as inadequate and they were concerned that the Province had not consulted them in the development of the policy¹⁷. The policy also did not offer any direction or assistance to businesses that were

¹³ *Taku River Tlingit v. Ringstad et. al*, 2002 BCCA 59, January 31, 2002.

¹⁴ *Council of the Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 137, February 27, 2002 and 2002 BCCA 462, August 19, 2002.

¹⁵ *Gitksan and other First Nations v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, December 10, 2002

¹⁶ Government of British Columbia, *Provincial Policy for Consultation with First Nations*, October 2002.

¹⁷ Ed John, Personal Communication, November 3, 2003

being directed to consult with First Nations as a requirement to obtain tenures, licences and permits.

At an Open Cabinet Meeting on November 22, 2002, Attorney General Geoff Plant announced that the BC government was developing a new approach to certainty that rejected the “extinguishment” model. This would do away with the terminology of “cede, release and surrender”, use a new technique and rely on the whole treaty to support certainty. The Attorney General said:

The fact is that first nations have today constitutional rights they are not prepared to give up through treaty-making. However, government also requires treaty arrangements that will allow it to proceed in an effective and an efficient management of Crown assets such as forests or oil and gas. As one of the other partners in this overall enterprise, business, to be successful, needs clarity about the legal and regulatory regime in which it must operate. Companies are not likely to invest in mining or forestry projects if they are uncertain about their rights, about government rights or about how aboriginal or treaty rights will affect their operations. First nations have the aspiration to participate in mainstream economic activity. Treaties need to recognize and give effect to that aspiration.¹⁸

This announcement was welcomed by the other parties, although the First Nations Summit has asserted that the effect of the new BC approach is still extinguishment.¹⁹

There have been a number of developments in the more recent past. Agreements in Principle have been reached with five First Nations. Three (Lheidli Teneh, Maa-nulth and Sliammon) have been signed by the parties. The Tsawwassen AIP was ratified in December 2003 while the Snuneymuxw AIP may be put to a community vote after the band election in early 2004.

The fact that four of these AIPs passed community ratification is seen by the business community as very good news. The failure of previous AIPs – like the Sechelt and earlier Sliammon agreements – were major setbacks in the eyes of the Business Council and we are pleased that the current AIPs are moving forward.

The federal and provincial governments also made progress on resource revenue-sharing with the signing of a cost-sharing agreement on October 3, 2003²⁰. The BC government had previously been unwilling to negotiate the sharing of resource revenues with First Nations. The federal/provincial cost-sharing agreement provides that the two governments will equally share resource payments to First Nations.

¹⁸ Honourable Geoff Plant, Attorney General of British Columbia, Open Cabinet Meeting Transcript, November 22, 2002, at 11:35 a.m.

¹⁹ First Nations Summit, *Framework for Recognition and Reconciliation*, September 17, 2003.

²⁰ Canada and British Columbia, *Cost-Sharing Understanding Respecting the Sharing of Resource Revenue Sharing Arrangements Costs*, October 3, 2003.

British Columbia has also achieved a major forestry interim measures agreement with the Gitga'at First Nation that deals with forestry-related consultation and accommodation for a five year period²¹. The agreement provides for direct payments to the First Nation and two invitations to bid on forestry licences. The government and the Gitga'at did not reach agreement on whether forest licensees have a duty to consult First Nations and accommodate their interests. This is not surprising given that this very item has just been argued at the Supreme Court of Canada, but it is disappointing that the negotiating parties (governments and First Nations) did not come to an understanding on this matter.

The Business Council is also disappointed that that the Gitga'at agreement was reached without consultation with the coastal forest industry and without any discussion with tenure holders in the area. The Gitga'at agreement is a major development in the area of consultation and accommodation and has implications for the tendering of forest licences in the region. Seeking the advice and support of the coastal forestry industry may have improved the agreement. At a minimum it would have allowed tenure holders to adjust their plans and forecasts for the region. And, if industry had been involved there may have been progress towards an understanding of the respective roles of government, First Nations and industry in consultation and accommodation.

British Columbia also reached a similar agreement with the Saik'uz First Nation²². Again, while the Business Council applauds the parties' success in dealing with this interim measure, we are disappointed that industry had no meaningful involvement. Moreover, with two of these interim measure agreements the government may be setting the bar for consultation and accommodation. Industry will end up with financial responsibilities arising from these and future agreements, and should have the opportunity to participate at the appropriate stages of discussions.²³

On December 12, 2003, the Supreme Court of Canada ruled that the Okanagan Indian Band's interim costs for litigation resulting from its harvesting of trees without provincial permits should be borne by the BC government.²⁴ It is too early to assess the long term implications of the court's direction, but it appears that this decision will only encourage First Nations to launch more aboriginal rights and title lawsuits. While the Business Council is committed to open access to the courts to resolve issues, we believe that governments and First Nations should concentrate their resources and efforts toward negotiating agreements. The Business Council believes that it is time to re-open discussions about the funding of treaty negotiations to ensure that treaty negotiations are a more fiscally attractive option for First Nations than litigation.

²¹ Gitga'at First Nation and British Columbia, *Gitga'at Interim Measures Agreement Regarding Forestry Development*, October 15, 2003

²² Saik'uz First Nation and British Columbia, *The Saik'uz First Nation Forest and Range Interim Measures Agreement*, November 14, 2003.

²³ On February 5, 2004, the BC government announced five more agreements of this type with coastal First Nations.

²⁴ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, December 12, 2003

Current Status of Treaty Making in British Columbia

The BC treaty process has been in operation for ten years. According to the BCTC, as of December 18, 2003:

- ❑ Three First Nations are in Final Agreement negotiations: Sliammon, Lheidli Teneh and Sechelt
- ❑ The Maa-nulth will move to the Final Agreement stage once they file a new SOI separate from that of the Nuu-chah-nulth Tribal Council
- ❑ Tsawwassen will go to Final Agreement negotiations after the AIP, which was ratified in December 2003, is signed.
- ❑ 39 First Nations will be in AIP negotiations. This will become 40 when the Musqueam Framework Agreement is signed.
- ❑ Three First Nations are still negotiating a Framework Agreement
- ❑ Five First Nations have yet to complete the Readiness to Negotiate process.

In all, some 53 First Nations are negotiating around 42 treaty tables. In other words, 114 of the 197 *Indian Act* bands in BC are in the treaty process (plus 8 from the Yukon). Or, 83 BC bands have chosen not to become involved in treaty negotiations.

The Treaty Commission has allocated approximately \$255 million in negotiation support funding to more than 50 First Nations— \$204 million in the form of loans and \$51 million in the form of contributions. The loans (80 per cent of the funding) do not accrue interest until after an AIP is signed. Interest then accrues on new loans taken. Loans are repayable at the completion of negotiations and are generally to be repaid over the same time period as cash payments to a First Nation under a completed treaty.

In a very recent development, many First Nations in BC filed court actions at the end of 2003 asserting aboriginal right and title to their respective traditional territories. This initiative was taken, we understand, because First Nations were concerned that British Columbia intended to argue in the *Haida* appeal that BC's *Limitations Act* prevents First Nations from asserting aboriginal title six years after the *Delgamuukw* decision. While these "place marker" actions are unlikely to proceed beyond the filing stage, the Business Council is concerned that yet more court actions will further weaken the treaty negotiation process.

The Views of the Main Players

In developing this paper, the Business Council sought the views of leaders in the BC treaty process. We spoke with federal and provincial officials, First Nations Summit leaders and a Commissioner and the Chief Commissioner at the BCTC. The views of these key players on these issues are of great interest to the business community.

The parties seem to agree that more progress was made in the last year or so than had been thought possible not long ago. The five lead tables have reached AIP. Another group of five or six tables could be at that stage within the next year. The parties have differing views on the value of “slim AIPs”. To the federal and provincial governments these AIPs address the key treaty issues – the hard issues – and therefore will make subsequent negotiations clearer and more efficient. The First Nations Summit, however, feels that this form of AIP “punts” too many issues to the Final Agreement negotiation stage; a stage where they believe the objective should only be to achieve legal clarity and improve the detail of the commitments in an AIP. The BCTC’s view on the slim AIPs is similar to that of the First Nations Summit.

When asked if the climate is better than it was ten years ago, there is an interesting divergence of opinion. The federal government believes that the climate is enormously better and points to the AIPs and many partnerships with First Nations. BC notes that there is significant movement towards agreement now and a provincial government that is prepared to be flexible and make the necessary deals. In contrast, both the BCTC and the First Nations Summit argue that the climate is no better than it was ten years ago. They acknowledge that there has been progress, but caution that there is little comfort to be gained from the “slim AIPs” as currently structured.

The BC government changed its position on certainty and has recently moved to include resource revenue sharing in treaties and interim measure agreements. The other key players welcome the new flexibility that BC has been demonstrating. But, First Nations are waiting to see that flexibility manifest in changed mandates. The First Nations Summit, has expressed the belief that BC’s negotiators still have no mandates to negotiate or mandates that are too narrow. The First Nation Summit’s reaction to the move towards resource revenue-sharing agreements is mixed: the agreements provide funding and access, but do not resolve key long-term issues.

The federal and provincial governments point out that there have been numerous agreements reached with First Nations – both inside and outside the treaty process – that have improved the day-to-day lives of First Nations and contribute to the overall governance capacity of First Nation governments. Moreover, they argue these agreements – and the relationships they improve – incrementally improve certainty for business. The Treaty Commission is on record many times as supporting interim measure agreements and feels that agreements between businesses and First Nations will assist the overall relationship-building process. For the First Nations Summit, interim measures have been a key part of the treaty process since Recommendation #16 of the BC Claims Task Force. More recently, the Summit believes that a dual approach is necessary: treaty negotiations while also pursuing socio-economic development.

On the key remaining challenges, the Principals and the BCTC offer a variety of opinions. For BC, these challenges are the need to agree on the scope of self-government and deal with the issue of jurisdiction. BC also believes that overlaps among claims need to be dealt with on a priority basis. Canada is concerned that the BC government

continues to be challenged to provide enough resources to attend to the treaty tables, but is hopeful that the provincial government can provide the necessary financial and human resources. The challenges from the perspective of the First Nations Summit include the accumulation of debt by aboriginal groups leading to increased pressure to settle, the need to demonstrate progress to the communities and what they see as restrictive government mandates.

As noted earlier in this paper, a large number of First Nations are not involved in the treaty process. The traditional territories of many of these First Nations cover a great deal of the central and southern Interior of the province. The business community views this as a significant problem in that many businesses, and particularly utilities, operate in that area of British Columbia. The governments are of the view that more First Nations may enter the treaty process when they see progress in the existing negotiations and the kind of benefits that will be flowing to First Nations through the Final Agreements. The Treaty Commission indicates that it is prepared to engage with the aboriginal organizations not in the treaty process – particularly the UBCIC – but will do so when the time is right and invited to do so.

A related issue is the fact that very little is happening at the vast majority of treaty tables. If governments are concentrating on the five lead tables then some 37 are being left without negotiations. Some of these tables, suggest the governments, are in a capacity-building mode and some others are addressing internal governance or political issues. The Business Council fears that the attention that the governments can give to these tables is likely to reduce as the lead tables move to substantive Final Agreement negotiations that are known to consume more resources than AIP negotiations. First Nations view this as contrary to the accepted recommendations of the BC Claims Task Force that negotiations should begin when a community is ready and that negotiations should be adequately funded.

The Perspective of the Business Community

The business community in British Columbia continues to be concerned with the glacial pace of treaty negotiations, the high numbers of First Nations not in the treaty process or not engaged in productive negotiations, constraints and delays in obtaining licences, consents and approvals and the rash of court actions into which businesses are drawn without any ability to resolve the plethora of related issues that complicate doing business in this province.

Businesses have been very frustrated with the treaty process. Businesses have had some success in dealing with First Nations directly on business and economic development activities. Some examples of these are found in Appendix 2 to this paper. The successes we have seen do not solve the bigger problems, but can help deal with specifics to help move forward on business and First Nation economic interests.

Although the business community cannot resolve the bigger issues, the Business Council has studied the wide range of treaty and related issues and offers potential solutions to the federal and provincial governments, First Nations and the BC Treaty Commission.

Consultation and Accommodation

Earlier in this paper we outlined the historical, legal and government policy developments in requirements to consult First Nations and accommodate their interests. The situation facing business today is:

- ❑ First Nations reject the BC government's consultation policy.
- ❑ The BC government requires business to meet the requirements of the provincial consultation policy. (Note the Catch-22 scenario inherent in these first two statements.)
- ❑ The federal government does not have a policy on First Nation consultation and accommodation.²⁵
- ❑ The federal government has not established the budgets or recruited and trained adequate staff to manage First Nation consultation and accommodation activities.
- ❑ First Nations tend to believe that only the Crown can properly consult with them and will often advise private businesses attempting to engage in a dialogue that "this is not consultation".
- ❑ Line ministries have differing interpretations on the implementation of the BC consultation policy and federal departments are usually unclear and, it seems, confused and inconsistent about roles and responsibilities.
- ❑ The boundaries of First Nation territories are often unclear or different First Nations claim the same territories. At times this means that if a proponent deals with one First Nation another will refuse to talk to the company.
- ❑ The level of First Nation government appropriate to engage in a dialogue is often uncertain. Should the engagement be with a band, a tribal council, a regional political organization, a First Nation technical organization or a larger, province-wide organization? Which level of First Nation government has the ability to "sign off" on discussions as being complete and adequate?
- ❑ Some First Nations will engage in a constructive dialogue, others will not.
- ❑ First Nations often seek funding from proponents for the consultation exercise, usually seeking 100 per cent cost recovery.

²⁵ The National Energy Board published "Consultation with Aboriginal Peoples: National Energy Board Memorandum of Guidance" in March 4, 2002, but it merely directs applicants to identify aboriginal peoples in affected areas and ensure there is "adequate Crown consultation". This is hardly comprehensive or useful direction.

- Business activities are often driven by specific timelines, but there are no established timelines for consultation with First Nations or clarity as to when the consultation and accommodation requirements have been met.
- As evidenced in recent court actions, there remains significant disagreement as to where the responsibility for consultation and accommodation rests and the sources of the obligation.

The Business Council knows that there is not one simple elegant solution to all of the issues and sub-issues arising from the consultation and accommodation morass. However, it is of the view that there are a number of actions that can and should be taken to bring greater clarity.

Recommendation

The Governments of British Columbia and Canada should engage First Nations, the BC Treaty Commission and the Business Council in developing a new, practical and common approach to First Nation consultation and accommodation.

Any approach to consultation and accommodation will have to respect the jurisdictional realities of the governments, but how the governments deal with First Nation consultation in this province must have the same touch points. Businesses and First Nations gearing up for two differing consultation and accommodation policies will frustrate attempts to reach consensus. Moreover, the federal government has a special fiduciary relationship with First Nations. Aside from federal jurisdiction over matters falling under s. 91 of the constitution, it is necessary to ensure that the relationship between the federal Crown and First Nations is respected in consultation and accommodation activities.

In order for government policy in this difficult area to be useful to any party it must be jointly developed and accepted by those directly affected by it. Without a shared commitment to clarify roles and responsibilities, timelines, financial obligations and triggering activities, frustration for business and First Nations will continue. The Business Council suggests that all First Nations be given the opportunity to participate in developing a common approach to consultation and accommodation, irrespective of whether they are in the treaty process or not. The consultation and accommodation requirements are not limited to whether a First Nation is in or not in the treaty process, so all stakeholders must be heard in developing a workable approach.

Recommendation

The workable approach to First Nation consultation and accommodation should establish a clear mechanism with timelines, financial obligations and outcome expectations.

Recommendation

An “Aboriginal Consultation and Accommodation Panel” should be created to facilitate this matter.

Industry is required to obtain licences, permits and tenures from the federal and provincial governments in order to undertake virtually any activities on Crown land. Aboriginal title is a burden or encumbrance on Crown title. Therefore, the issuance of a licence, permit or tenure by the Crown may be encumbered by aboriginal title. It follows, then, that it is the obligation of the Crown – federal, provincial or both – to ensure that the interests flowing from aboriginal title are accommodated when licences, permits and tenures are issued. It is thus the duty of the federal and provincial governments to consult First Nations and ensure that aboriginal title interests are accommodated when considering a development application from a private company. The obligation of private companies, we believe, is to supply information about the proposed development to the governments so that they may consult First Nations.

The Business Council urges all companies to develop good working relationships with First Nations in their operating areas. Grand Chief Ed John has suggested that this relationship must begin at the level of Chief and CEO. A working relationship can then be undertaken by their respective staffs, officials and advisers.

The circle of consultation and accommodation would close when the government or governments issuing the licence, permit or tenure reach an understanding with the affected First Nations and the instrument is issued to the company with agreed conditions regarding aboriginal interests.

The Business Council is struck by the work of the National Native Title Tribunal (NNTT) in Australia as a potential model. Part of the NNTT’s role is to deal with applications for “Future Acts” where, for example, a mining company wishes to undertake a new project. The appropriate state or territorial government advertises the application publicly. If an aboriginal group objects to the fast tracking of an application or has an established Right to Negotiate, then the NNTT can get involved and assist the parties resolve the issues. The government, aboriginal group and company then engage in negotiations on the impact of the proposed project. Ideally they reach agreement. If not, the NNTT can be asked to mediate the negotiations. If no agreement is reached, one party can ask the NNTT to make a determination on the application. An NNTT determination is binding on the parties, but can be appealed to the appropriate court.²⁶

The constitutional and legal status of aboriginal title and resource tenures are different in Australia and Canada. Nevertheless, there are elements of the Australian experience that we believe could be adapted and applied in British Columbia that would benefit all interested parties. Alternatively the Principals might consider whether the roles of the Canadian Centre for the Independent Resolution of First Nations Specific Claims

²⁶ Tim Evans, National Native Title Tribunal, Personal Communication, December 24, 2003.

(recently created by the federal *Specific Claims Resolution Act*) could be expanded to deal with First Nation consultation and accommodation.

One of the major difficulties that industry is having with First Nation consultation in BC is that there are no accepted guidelines or established process by which the consultation and accommodation matters are addressed. The Business Council believes that the interested parties should establish an agreed model for consultation and accommodation. The hallmarks of such a process would be:

- ❑ *First and foremost, universal acceptance and application of whatever process is developed.* There is little point in developing a process if governments, First Nations or businesses can opt out.
- ❑ *A process that is time sensitive.* Consultation and accommodation discussions cannot go on indefinitely. Timeframes need to be set out and workplans developed that are achievable and that lead to a decision on development applications within a reasonable time period.
- ❑ *Adequate resources for First Nation participation must be identified.* The protection of First Nation interests is a matter flowing ultimately from the fiduciary duty of the federal government. It follows that where First Nations require resources to ensure that their aboriginal rights and title interests are addressed and accommodated the federal government should supply the fiscal resources to the First Nations. The Business Council suggests that these funds should not be in the form of loans and that First Nations should not have to use their treaty negotiation loan funding to protect their interests in the short term. We recommend that the federal government allocate funding to an aboriginal body that would then provide funding to First Nations on an application basis for their participation in consultation and accommodation activities.
- ❑ *The process must be transparent.* Development applications by private businesses are usually placed in the public domain for comment, analysis and recommendations from a wide variety of interests. The Business Council recommends that First Nation views, assertions and comments should also be made public. Increased transparency will lead to more understanding of First Nation views and perspectives and to open and comprehensive discussions during consultation and accommodation activities.
- ❑ *A body should be created to oversee the process.* The Business Council very much favours substance over process, but there is a clear need for a neutral, independent body to ensure that the parties engage meaningfully in consultation and accommodation discussions. This body – which we have titled “Aboriginal Consultation and Accommodation Panel” – would:

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- Have the ability to compel the parties to meet and establish workplans, timelines and budgets.
 - Monitor workplans, timelines and budgets and keep parties on target.
 - Provide mediation services if requested by any party.
 - Monitor the discussions to ensure good faith by the parties.
 - Levy penalties against any party not meeting its obligations to good faith negotiations, workplans and other agreed matters.
 - Where no agreement is achieved within the agreed – or set – time frame, make a recommendation to appropriate government departments and affected First Nations on the aboriginal consultation and accommodation outcomes.
 - Monitor the implementation of all consultation and accommodation processes to ensure that the parties are living up to their obligations.
 - Ensure consistency and transparency.

In terms of the range of remedies that the Aboriginal Consultation and Accommodation Panel could deal with, the Business Council suggests that the parties assess the usefulness of the range accorded the NNTT. Appeals from the Aboriginal Consultation and Accommodation Panel should be heard by a court of competent jurisdiction on matters of law.

The Business Council acknowledges that the development of this process and institutions to support it will take some time, so our members believe that their creation ought to be a priority. We also know that there will likely have to be federal and provincial legislation and First Nations would have to pass resolutions accepting the process. The First Nations Summit and the UBCIC should give their formal endorsements and commit to encouraging individual First Nations to engage in the process.

The Business Council will be pleased to engage in further discussions on this recommendation.

First Nation Claims

In the BC treaty process, First Nations submit their claims (although that term is not used) by the means of a Statement of Intent or SOI. The SOI requirements are very minimal and were designed so that comprehensive research and documentation would not be barriers to entering the treaty process. The Business Council believes, though, that the time has come to require First Nations to provide more information than can be gleaned from most SOIs. For reference purposes, we have attached the SOI and SOI map of the Lheidli T'enneh First Nation (Appendix 4), as available at the web site of the BC Treaty Commission.²⁷

²⁷ While this table was not declared ready to negotiate until late 1995, the SOI was not amended.

As demonstrated in the example of the Lheidli T'enneh SOI, there is minimal information available to the public or to businesses wishing to undertake development within the SOI area. Areas of particular interest are not identified; areas of minor interest are not identified; and areas of overlap with other First Nations are not identified. Moreover, the governments do not appear to assess the validity of assertions of traditional territory. The federal and provincial governments have the responsibility to represent non-aboriginal interests at the treaty table²⁸ but how can this be met when the government can not or does not convey to non-aboriginal interests the extent of the claims or the governments' professional assessment of their strength?

Recommendation

The federal and provincial governments should assess the validity of claims – both within and outside the BC treaty process – and provide the results of those assessments to private interests when those private interests have made a *bona fide* development application or proposal.

Overlapping claimed territories also complicate the business community's relationships with First Nations. Notwithstanding, the resolution of overlapping territories among First Nations seems to have been dropped as a priority of governments and First Nations.

Recommendation

Each First Nation – both within and outside the BC treaty process – should develop and make public maps of claimed territories that overlap with the territories of other First Nations or are shared with other First Nations.

Recommendation

Canada, British Columbia and the BC Treaty Commission must ensure that First Nations live up to their commitments to resolve overlapping claims. Resolution of overlaps should be a criterion to be met before governments sign an Agreement in Principle. The BC Treaty Commission should consider First Nations not addressing overlaps to be “not ready” as set out in the Stage 2 of the treaty process.

Recommendation

First Nations should identify and make public areas of primary, secondary and tertiary interest within their claimed traditional territories.

With respect to the last recommendation, members of the Business Council understand that First Nations will not wish to compromise their legal positions. However, a technique ought to be developed to protect First Nations legal interests while making it clearer in what areas First Nation interests might be more readily accommodated. For

²⁸ *The Report of the BC Claims Task Force*, 1991, Recommendation #10.

purposes of illustration, the following examples may clarify what we mean by primary, secondary and tertiary interests:

- ❑ Primary: Sacred sites, village sites or burial grounds
- ❑ Secondary: Important hunting, trapping and fishing areas
- ❑ Tertiary: Access routes, berry or bark gathering areas.

It is the responsibility of the federal and provincial governments to provide appropriate levels of protection to both aboriginal and non-aboriginal interests and the responsibility of First Nations to ensure that their assertions are comprehensive and publicly available. Without access to the kinds of information discussed in this section, industry is courting disaster by being forced to “guess” which First Nations it must deal with, the validity of aboriginal interests and how best to balance those interests with development in British Columbia.

Government Focus and Resources

The federal and provincial governments, more particularly the latter, are concentrating their negotiating efforts on too few tables. While it is important to demonstrate that treaties can be reached, this strategy leaves too many treaty tables without any significant government participation. Moreover, there are no active treaty negotiations in the southern interior of British Columbia as none of the First Nations (except Westbank First Nation, where the treaty table has slowed to a crawl) are prepared to engage in the treaty process. This lack of attention by governments leaves no forum for addressing aboriginal rights and title in a large proportion of the operating area of the business community. Similarly, government resources are inadequate to deal with consultation and accommodation matters, local area consultation and interim measure negotiations.

Recommendation

The federal and provincial governments should dedicate adequate resources to the negotiation and resolution of treaties with all First Nations in British Columbia and to consultation and accommodation activities. All treaty tables should get a reasonable level of attention by the governments. Failure by the governments to do so should be criticized by the BC Treaty Commission.

The Business Council makes this recommendation knowing that it has supported the BC government’s cost reduction activities. However, the treaty process and matters relating to aboriginal rights and title require more government attention than is currently the case.

Recommendation

The BC Treaty Commission should consider declaring a government “not ready” if it fails to continue to meet the readiness criteria set out in Stage 2 of the BC treaty process.

There have been few efforts by the governments or the BC Treaty Commission to encourage First Nations to enter the treaty process. While there have been non-treaty discussions with most First Nations in BC, we are no closer to resolving the questions of aboriginal rights and title for about one-third of First Nations whose traditional territories likely cover a great deal of British Columbia.

Recommendation

The federal and provincial governments and the BC Treaty Commission must renew efforts to engage more First Nations in the treaty process. The First Nations Summit should speak in favour of the treaty process when addressing aboriginal audiences.

The Union of BC Indian Chiefs has adamantly opposed the BC treaty process. The Business Council believes that the information that the UBCIC provides to its members and others contains errors and is incomplete. While the UBCIC or any First Nation organization has the right to interpret policies, initiatives and laws through its own lens, it is incumbent on the governments and the Treaty Commission to challenge those interpretations publicly.

For example, the UBCIC web site (www.ubcic.bc.ca) released an analysis²⁹ of the Lheidli T'enneh and Snuneymuxw AIPs in July 2003. In the press release making the analysis and summary public, Chief Stewart Phillip is quoted as saying,

...[T]he AIPs fall far short of what First Nations are entitled to currently under Section 35(1) of the *Constitution*. The end result, if these AIPs are negotiated through to a final agreement, will be the extinguishment of Aboriginal Title, Rights and in the case of the Snuneymuxw, Douglas Treaty Rights, and the replacement of these rights with severely limited modern-day treaty rights.³⁰

Clearly the UBCIC view is directly at odds with the public position of the federal and provincial governments and appears to conflict with the views of both the BCTC and the First Nations Summit. However, the Business Council is not aware of any efforts by any of these bodies to challenge the UBCIC analysis and assertions. Leaving these analyses and assertions unchallenged ensures that First Nations outside the treaty process will remain on the outside.

²⁹ Correspondence from Ardith Walkem A Law Corporation to Chief Stewart Phillip, "Summary of Lheidli T'enneh and Snuneymuxw Agreements in Principle", June 23, 2003. Attached to this correspondence is a "Plain Language Summary of the Snuneymuxw and Lheidli T'enneh AIPs", prepared by Ardith Walkem A Law Corporation, undated.

³⁰ Union of BC Indian Chiefs Press Release, "New Agreements-In-Principle are Nothing New", July 25, 2003.

Recommendation

The federal and provincial governments, the BC Treaty Commission and the First Nations Summit should engage in a public discussion of the views expressed by the Union of BC Indian Chiefs about the intent and content of the treaty process and the current AIPs. In addition, the Principals and the BCTC should publicly address any analyses and assertions that misrepresent the treaty process.

First Nation Capacity

Few First Nations have the capacity to deal with all the demands of running their governments, engaging in community consultation, engaging in consultation and accommodation discussions, participating in treaty negotiations and interacting with the business and local communities. Some First Nations involved in the treaty process are very small and are unlikely to have the capacity to implement their eventual treaty obligations and responsibilities in the foreseeable future. Related to this is the fact that First Nations are paying for their treaty negotiations from mainly borrowed funding. As the process continues much longer than had been anticipated, the business community fears that a great proportion of the settlements will have to be dedicated to repay aboriginal indebtedness, leaving little to ensure that First Nations are self-sustaining after treaty.

Recommendation

First Nations should pool their expertise where a common interest can be served.

The Business Council submits that combining resources would both save costs for First Nations as well as increase the expertise of those who will be working more in depth on more files. This may also improve the chances of First Nations working together in a constructive manner on substantive issues.

Recommendation

First Nations should combine their treaty negotiations to achieve necessary levels of negotiation capacity. And, First Nations should combine their treaty negotiations to reach appropriate population and land base levels for service delivery and treaty implementation.

It seems pointless, in our view, to negotiate treaties with First Nations too small to undertake the massive obligations modern treaties require. First Nations – with the assistance of the BCTC – should forecast the resource requirements for the treaty responsibilities they intend to undertake and assess whether they will have the human, financial or other resources necessary. In view of the size of some of the First Nations in the treaty process the Business Council submits that it would be in everyone’s interest to

ensure that the final treaties can be implemented in a fiscally sound manner that takes advantage of economies of scale and emerging expertise.

Combining treaty negotiations should not be confused with requiring First Nations to make new political relationships. First Nations decide to proceed based on their own views of governance. However, there may be wisdom in combining negotiation efforts. First Nations in a region might have joint tables with the two governments around common issues as public government mandates are likely going to be constant across many issues. Combined negotiations may provide a strategic advantage to First Nations. It may also reveal areas where First Nations can cooperate in research, capacity-building and, perhaps, implementation.

Under this approach, there could still be individual treaties with the First Nations as currently described in the SOIs. The combined negotiations would simply lead to those end points more quickly, cheaply and effectively and, hopefully, lead to greater success rates during implementation.

Success in Negotiations

The Business Council is pleased that four of the five lead treaty tables have resulted in approved AIPs and is hopeful that the Snuneymuxw people will ratify their AIP in the very near future. The AIPs, however, leave a large number of unanswered questions and – to borrow a description from the Treaty Commission and First Nations Summit – “punt” key issues to later Final Agreement negotiations. The business community takes some comfort in the fact that these AIPs have been reached and has been reassured to find that the general descriptions of the settlement lands are found in the AIPs. However, these AIPs have taken 10 years to reach. At this rate there will be no certainty over most of British Columbia for a very long time.

Recommendation

One of the earliest matters dealt with in AIP negotiations should be the selection of lands. These selections should be made public as soon as possible to allow for public comment and on-going assessment by aboriginal peoples.

The AIPs also lack the detail necessary to permit business or the general public to make development and investment decisions. In key areas such as land management and access the AIPs merely provide that the First Nation will be able to make laws. Other matters are deferred in their entirety. In the meantime it remains unclear how the management regimes will look.

Recommendation

Key areas such as Land Management and Access should be developed in their entirety in AIPs.

The business community is very concerned that there are diminishing incentives for First Nations to close negotiations. Legal developments – most recently the Supreme Court of Canada decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*³¹ where the Court found that the interim costs in the litigation ought to be paid by the Crown where the litigation raises matters of great public importance – encourage litigation rather than negotiation, especially if the costs to do so do not come from negotiation loan funding. Moreover, government policy responses to legal decisions on consultation and accommodation have been incomplete and slow.

The Business Council expects First Nations to continue to argue that the offers made by governments are insufficient. This is a normal part of any negotiation process. Nevertheless, the governments need to closely examine their mandates with respect to land and cash to ensure that they have the ability to offer sufficient resources to encourage settlements. We are not, of course, advocating that governments should indiscriminately make large offers. Rather, the offers should be sufficient to uphold the honour of the Crown and lead to settlements in relatively short order.

Recommendation

The mandates of the federal and provincial governments for land and cash should be sufficient to encourage aboriginal acceptance without undue delay.

Federal/Provincial Matters

Related to the matter of land and cash mandates is the manner in which they are developed. The BC treaty process is built on the assumption that it is tripartite with federal, provincial and First Nation participants. The Business Council has observed that negotiations in the first three stages and in the AIP stage proceed largely in a tripartite fashion. However, the two levels of government negotiate and bilaterally coordinate their AIP offers. First Nations are not part of these discussions. When the offer is ready it is jointly presented by federal and provincial officials.

The Business Council respectfully suggests that bilateral negotiation is not part of a good faith tripartite process. Governments may believe that they should coordinate their offers in order to meet the requirements of clause 1.6 of the treaty cost-sharing Memorandum of Understanding:

Neither Party [i.e., BC or Canada] shall, without the prior agreement of the other Party, propose or conclude a treaty provision with a First Nation

³¹ 2003 SCC 71, December 12, 2003

where such provision would, if implemented, result in the other Party being required to assume financial or other obligations.³²

However, the Business Council observes that:

- The MOU was made by the governments and can be amended by them to address the unfolding realities of the treaty-making process.
- The cost-sharing of treaties need not be done on a treaty-by-treaty basis. Treaties can be evaluated using the formulae in the MOU after the fact or after, say, four or five treaties have been reached. Any cost-sharing imbalance between the two governments can then be rectified by means of a fiscal transfer between them.
- Independent offers would increase the flexibility of the governments in that they could respond to counter-offers without concern about re-working the cost-sharing elements.

The Business Council believes that taking this step would help restore faith in the negotiations on the part of aboriginal participants and lead to more creative and more efficient tripartite negotiations.

Recommendation

The federal and provincial governments should re-visit the Treaty Cost-Sharing MOU to ensure that its operation permits flexible and timely offers.

The federal and provincial governments have established processes for their participation in treaty negotiations that invite certain conflicts and can constrain the governments, in the view of the Business Council. British Columbia has combined the lead for treaty negotiations with the Ministry of Attorney General. By law, the Attorney General

... has the regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature ...³³

As such, the Attorney General is the Province's lead litigator and is required to vigorously defend the Crown against all actions against it as well as prosecute contraventions of the law. Negotiations sometimes take place under threat of litigation or in the face of it. The dual roles came into stark relief in 2003 when the Attorney General (as lead negotiator) made a land offer to the Haida Nation when the Haida Nation had brought serious claims against the BC government. We are concerned that it may appear that there is a conflict between these two important roles.

³² *Memorandum of Understanding between Canada and British Columbia Respecting the Sharing of Pre-Treaty Costs, Settlement Costs, Implementation Costs and the Costs of Self-Government*, June 21, 1993, s.1.6

³³ British Columbia, *Attorney General Act*, RSBC 1996, Ch. 22, s. 2(i)

Recommendation

The BC government should separate the roles of Attorney General and treaty negotiations. While setting up a separate ministry for treaty negotiations would be preferable, it can be expensive. Therefore, treaty negotiations should be housed in another key existing ministry such as Finance or the Office of the Premier.

The federal government houses its lead in treaty negotiations within the Department of Indian and Northern Affairs Canada (INAC). The BC Region of INAC is responsible for programs and services to some 197 bands –nearly one-third of all bands in Canada – and a program budget exceeding \$580 million.³⁴ This is a massive task. It is truly amazing that the BC Region can also manage the biggest indigenous treaty-making process in the country – perhaps in the world. In addition, INAC is the embodiment of the fiduciary responsibility for aboriginal peoples. This role, we believe, cannot be effectively reconciled with taking a sometimes adversarial role in treaty negotiations.

The Business Council views it as critical for that the parties have the ability to seek instructions and clarify mandates efficiently. Moreover, the lead negotiation bodies must be authoritative. With all due respect to INAC, it is not a core department in the federal government and wields little power around the Cabinet table. The recently announced Aboriginal Affairs Secretariat may be an appropriate place to manage the BC treaty process.

Recommendation

The federal treaty negotiation function in British Columbia should be assumed by a key existing department such as Finance, the Privy Council Office (Aboriginal Affairs Secretariat) or the Prime Minister’s Office.

Certainty

No treaty issue has been as important to the Business Council since the beginning of the treaty process as certainty. In our view, the twin purposes of the treaty process are to achieve fair settlements of claims for aboriginal peoples and certainty for British Columbia and all its citizens in terms of the effect of aboriginal rights and title on lands and resources. In the Business Council’s 1996 submission to the Select Standing Committee (see footnote 6 above), we took the following position on certainty:

- ❑ Treaties should bring certainty and finality with respect to the nature and scope of aboriginal rights and jurisdictional authorities.
- ❑ Treaties should resolve current legal uncertainties regarding rights to the use of Crown lands and resources.

³⁴ INAC, *Allocation and Reporting Handbook, BC Region, 2002/2003*, p. I.9

- Treaties should ensure that stakeholders have the security and stability they need to manage their businesses and plan for the future.
- To avoid confusion and inconsistency, all treaties developed in BC should include the same language around certainty.

The Business Council continues to believe that these principles need to be respected. However, we recognize that there has been some evolution on this critical issue and we now offer an expansion on our 1996 position. Certainty has several dimensions, but we will concentrate on four.

A. The Legal Technique

There has been considerable legal debate over the legal mechanism necessary to effect certain and final treaty settlements. With the rejection of the “cede, release and surrender” model by aboriginal groups, new techniques have been sought. In the Nisga’a Final Agreement a new method, modification of rights, was adopted. It had a cede, release and surrender backstop, however, in case the modification technique failed. This backstop technique has not had the full endorsement of all parties in the BC treaty process, however, with the result after ten years of negotiations the parties do not now have an agreed technique. The Business Council is concerned that the Principals have not decided on an overall legal technique for achieving certainty and that this may leave some key issues open for future change.

Treaties must result in certainty, predictability and a full and final resolution and reconciliation of aboriginal and Crown titles.

Recommendation

The Principals in the BC treaty process must develop and agree on the legal technique for achieving certainty and this technique must be used in all treaties to ensure consistent legal regimes and a stable legal environment throughout British Columbia.

This also raises the related matter of what we will term “shared vision”. A decade into the treaty process and it is still clear that the Principals still do not have a shared vision of what the end result of the treaty process is to be. The Principals can barely manage to agree on the interface of aboriginal title with Crown title, given that the Statement on Aboriginal and Crown Title is never referred to or even readily available. Unless the Principals agree what the goals are, they will never reach settlements.

Recommendation

The Principals should set out a shared vision for the BC treaty process.

B. The Whole Agreement

Aside from the legal technique, certainty in treaty settlements can be achieved by setting out in detail the rules for doing business post-treaty. That is, the parties must spell out in great detail the legal, regulatory and management regimes to be established by the treaty. These provisions must be made available to the public and the business community in an understandable fashion so that we can know the rules by which we will be able to – or not be able to – engage in activities on and off settlement lands. More specifically, treaties must set out the requirements for consultation and accommodation, if any, on treaty settlement lands and on lands that were formerly under aboriginal claim.

The Business Council understands and appreciates that treaty negotiation is a very complex process. Nevertheless, the parties need to find ways to keep the business community apprised of where negotiations are heading and receive input on the kinds of regimes that will or will not lead to greater business certainty.

C. Interim Predictability

It is clear that treaty negotiations take a very long time. Despite the ratification of four AIPs a great deal of work is required before anything actually changes in British Columbia. Even then the changes will come piecemeal via individual Final Agreements and later still as Final Agreements are incrementally implemented. In the meantime the business community is faced with no greater certainty with respect to the creation of tenures, management regimes or rents. Businesses need to be able to make investment and other decisions within timeframes that are much shorter than those of the BC treaty process.

Businesses are also sometimes targeted by First Nations for direct action. At times the First Nation action relates to activities that a business is undertaking. At other times, though, a First Nation will target a business because doing so raises the profile of the First Nation's grievance, even though the grievance itself has little or nothing to do with that business. This kind of instability and political posturing is detrimental to the BC investment climate.

Business in British Columbia needs greater interim predictability. Interim predictability would include measures that the parties could agree on to govern day-to-day activities while negotiations are proceeding. Key issues to be addressed would be consultation and accommodation (we speak to this issue earlier in this paper), tenure transition, regulatory changes and the development of aboriginal capacity.

Recommendation

The Principals should consider how to improve the climate for business development and investment while treaty negotiations are underway. The Business Council is prepared to engage in a discussion with the Principals in the near term to find ways to accomplish this.

D. Management Regimes

Recently, the provincial government has signalled its preparedness to move towards cooperative management with aboriginal groups in some areas of the province. In many ways, the recent Resource Revenue Sharing arrangements are a form of cooperative management. The Business Council's concern is that the extent and content of these regimes is not well known and there has been little engagement with the business community about them. Some questions that spring readily to mind include:

- ❑ How will consultation and accommodation be dealt with on lands that are presently within First Nation traditional territories, but will be outside treaty settlement lands?
- ❑ Will there be a codification of the management regime?
- ❑ Will there be one model of cooperative management or will industry have to constantly learn and accommodate different regimes throughout the province?
- ❑ How are the visions and values of non-aboriginal groups reflected in any co-operative management regime?

Recommendation

The Principals – with the assistance of the business community – should develop and make public common elements for all cooperative management regimes, including consultation and accommodation requirements, to be established in British Columbia.

We understand that the Saik'uz and Gitga'at agreements were not considered for cost-sharing with Canada under the October 3, 2003 MOU because the initiatives are not yet rolled into treaty negotiations. The Business Council feels that the BC government should explore all avenues for federal cost-sharing of resource revenue-sharing activities.

Recommendation

British Columbia should take advantage of all opportunities for federal cost-sharing of resource revenue-sharing agreements.

Failure to Agree

The Business Council is concerned that treaty negotiations – or even non-treaty negotiations between governments and First Nations – can get mired in issues that elude agreement. Irrespective of whether they are over major issues (how much land and cash) or seemingly minor ones (how to describe the tenure regime), any disagreement that lasts can stop all momentum, build bad feelings between the parties and derail negotiations.

The BC Treaty Commission has a role in facilitating the negotiation process, but only exercises that role when invited to do so by all three parties. In addition, the BCTC role is more related to whether the parties are meeting and maintaining the agreed process than intervening on substantive issues. The Business Council would like to see a mediation body established for the treaty process to which the negotiating parties can refer questions on which they have failed to reach agreement. The mediation body could develop options that the parties could consider or attempt to find common ground among the parties. Where mediation fails, the parties should consider seeking an arbitrated decision.

Recommendation

The Principals should establish an independent mediation body to assist in the resolution of substantive treaty issues. Consideration should be given to providing this body with the power to arbitrate issues that fail to resolve through mediation.

Consultation with the Business Community

Funding to support the Treaty Negotiations Advisory Committee (TNAC) was halted by the BC government leaving no stable forum for government and business (or other stakeholders) to interact on the treaty process. While TNAC may have outlived its usefulness, there remains no established means by which the business community can express its views to governments. Similarly, the business community is rarely consulted when governments and First Nations are in the process of negotiating agreements whether these are treaties, interim measures or other arrangements. Virtually all such arrangements will affect the activities, plans and projections of businesses, but the advice (and assistance) of the business community is not sought.

The federal government established the Province-wide Treaty Advisory Group (PTAG) with roughly the same membership as TNAC but without labour group participation.³⁵ PTAG meets from time to time, but the BC government has no presence beyond occasionally sending an official to observe.

³⁵ John Watson, *Personal Communication*, November 24, 2003

There is also no forum in which the business community and First Nations can interact on a province-wide basis. Business at the Summit is a good forum, but more and more regular interaction between First Nations and business interests would, we believe, help build bridges.

Recommendation

The Business Council calls on the federal and provincial governments to establish regular meetings with the Business Council to discuss the business perspective on the substantive issues in treaty negotiations. The Business Council also invites the First Nations Summit and the Union of BC Indian Chiefs to engage in regular discussions on the relationships between business interests and aboriginal rights and title.

Summary and Conclusion

The reconciliation of aboriginal and Crown title is an honourable endeavour. Over ten years there have been thousands of meetings, negotiations and debates. There have been forward steps and some retrograde ones. The business community in British Columbia has an abiding interest in the resolution of the many open questions arising from aboriginal rights and title. The Business Council of British Columbia offers this paper as an aid to achieving the desired ends in a more efficient and comprehensive manner.

The unfinished business of aboriginal rights and title cannot remain unfinished indefinitely. The business community in British Columbia, Canada and even internationally is looking for concrete signs of substantive progress and of an increasingly stable investment climate. To date, the treaty process has offered few such signs. We hope that the careful consideration and implementation of the thoughts and recommendations of this paper will help the Principals and the BC Treaty Commission. The Business Council believes that these recommendations will establish a positive climate for economic growth and prosperity in British Columbia.

* * * * *

Appendix 1. Summary of Recommendations

Consultation and Accommodation

1. The Governments of British Columbia and Canada should engage First Nations, the BC Treaty Commission and the Business Council in developing a new, practical and common approach to First Nation consultation and accommodation. (p. 14)
2. The workable approach to First Nation consultation and accommodation should establish a clear mechanism with timelines, financial obligations and outcome expectations. (p. 14)
3. An “Aboriginal Consultation and Accommodation Panel” should be created to facilitate this matter. (p. 14)

First Nation Claims

4. The federal and provincial governments should assess the validity of claims – both within and outside the BC treaty process – and provide the results of those assessments to private interests when those private interests have made a *bona fide* development application or proposal. (p. 17)
5. Each First Nation – both within and outside the BC treaty process – should develop and make public maps of claimed territories that overlap with the territories of other First Nations or are shared with other First Nations. (p.18)
6. Canada, British Columbia and the BC Treaty Commission must ensure that First Nations live up to their commitments to resolve overlapping claims. Resolution of overlaps should be a criterion to be met before governments sign an Agreement in Principle. The BC Treaty Commission should consider First Nations not addressing overlaps to be “not ready” as set out in the Stage 2 of the treaty process. (p. 18)
7. First Nations should identify and make public areas of primary, secondary and tertiary interest within their claimed traditional territories. (p. 18)

Government Focus and Resources

8. The federal and provincial governments should dedicate adequate resources to the negotiation and resolution of treaties with all First Nations in British Columbia and to consultation and accommodation activities. All treaty tables should get a reasonable level of attention by the governments. Failure by the governments to do so should be criticized by the BC Treaty Commission. (p. 19)

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9. The BC Treaty Commission should consider declaring a government “not ready” if it fails to continue to meet the readiness criteria set out in Stage 2 of the BC treaty process. (p. 19)
 10. The federal and provincial governments and the BC Treaty Commission must renew efforts to engage more First Nations in the treaty process. The First Nations Summit should speak in favour of the treaty process when addressing aboriginal audiences. (p.19)
 11. The federal and provincial governments, the BC Treaty Commission and the First Nations Summit should engage in a public discussion of the views expressed by the Union of BC Indian Chiefs about the intent and content of the treaty process and the current AIPs. In addition, the Principals and the BCTC should publicly address any analyses and assertions that misrepresent the treaty process. (p. 20)

First Nation Capacity

12. First Nations should pool their expertise where a common interest can be served. (p. 21)
13. First Nations should combine their treaty negotiations to achieve necessary levels of negotiation capacity. And, First Nations should combine their treaty negotiations to reach appropriate population and land base levels for service delivery and treaty implementation. (p.21)

Success in Negotiations

14. One of the earliest matters dealt with in AIP negotiations should be the selection of lands. These selections should be made public as soon as possible to allow for public comment and on-going assessment by aboriginal peoples. (p.22)
15. Key areas such as Land Management and Access should be developed in their entirety in AIPs. (p. 22)
16. The mandates of the federal and provincial governments for land and cash should be sufficient to encourage acceptance without undue delay. (p.23)

Federal/Provincial Matters

17. The federal and provincial governments should re-visit the Treaty Cost-Sharing MOU to ensure that its operation permits flexible and timely offers. (p. 24)
18. The BC government should separate the roles of Attorney General and treaty negotiations. While setting up a separate ministry for treaty negotiations would be

preferable, it can be expensive. Therefore, treaty negotiations should be housed in another key existing ministry such as Finance or the Office of the Premier. (p. 24)

19. The federal treaty negotiation function in British Columbia should be assumed by a key existing department such as Finance, the Privy Council Office (such as in the new Aboriginal Affairs Secretariat) or the Prime Minister's Office. (p. 25)

Certainty

20. The Principals in the BC treaty process must develop and agree on the legal technique for achieving certainty and this technique must be used in all treaties to ensure consistent legal regimes and a stable legal environment throughout British Columbia. (p. 26)
21. The Principals should set out a shared vision for the BC treaty process. (p. 26)
22. The Principals should consider how to improve the climate for business development and investment while treaty negotiations are underway. The Business Council is prepared to engage in a discussion with the Principals in the near term to find ways to accomplish this. (p. 27)
23. The Principals – with the assistance of the business community – should develop and make public common elements for all cooperative management regimes, including consultation and accommodation requirements, to be established in British Columbia. (p. 27)
24. British Columbia should take advantage of all opportunities for federal cost-sharing of resource revenue-sharing agreements. (p. 28)

Failure to Agree

25. The Principals should establish an independent mediation body to assist in the resolution of substantive treaty issues. Consideration should be given to providing this body with the power to arbitrate issues that fail to resolve through mediation. (p.28)

Consultation with the Business Community

26. The Business Council calls on the federal and provincial governments to establish regular meetings with the Business Council to discuss the business perspective on the substantive issues in treaty negotiations. The Business Council also invites the First Nations Summit and the Union of BC Indian Chiefs to engage in regular discussions on the relationships between business interests and aboriginal rights and title. (p. 29)

Appendix 2.

Business Experiences with First Nations in British Columbia

Several companies provided the Business Council with brief accounts of their experiences in dealings with First Nations in this province. We share their stories here to illustrate some of the points made in the paper and as examples of where companies have been developing positive relationships with First Nations outside the treaty process.

Lignum Ltd.

CEO of Lignum, Jake Kerr, made the following comments during an October 3, 2003 address to the Vancouver Board of Trade:

I should also mention that no speech on forest policy in British Columbia would be complete without mentioning First Nations. I think all British Columbians realize that First Nations claims are a fact of business and that from the forest industry standpoint resolution needs to come creatively and urgently. While government must take the lead in this regard, industry has a responsibility to provide support, ideas and commitment.

... I do believe that companies that operate in BC's public forests have a responsibility to the people of British Columbia. Those people include those who are part of First Nations and those who live in the small communities throughout British Columbia and who have a right to expect sustainability both in the forests and their communities.

In all their relationship-building initiatives Lignum and the First Nations have worked to separate business from politics. This cannot be done entirely but a conscientious effort by both parties has resulted in positive results. To be more specific, Lignum and First Nations do not integrate discussions on the treaty process with those related to such initiatives as logging opportunities.

The specific "products" of these relationships has been four formal joint venture companies with First Nations, several other business relationships, one formal protocol agreement and increased building capacity through technical training, mentoring, and post-secondary education. In addition, Lignum supports forestry liaison workers to assist the First Nations communities in reviewing its plans and providing input on community issues before submitting the plans to the BC government for approval.

Although there have been a number of initiatives entered into by Lignum to involve First Nations in its planning, a recent invitation for a member of a local First Nation community to join Lignum's Community Advisory Group and provide a First Nation perspective is a significant advancement in building understanding. Whether it is

working through business arrangements, providing support to capacity and economic development building or understanding cultural differences, the relationship building has resulted in a positive experience for Lignum in working with First Nations on their traditional territories. This does not mean that they agree on all issues or the working relationships have always been smooth. However, this experience is not unlike any other business relationship that Lignum and other companies have had with non-First Nation initiatives.

Tolko Industries Ltd.

Building fish sustainability for the future is one of the goals of the North Thompson Indian Band (NTIB) and with support from Tolko Industries, through the new Forest Investment Account (FIA), this goal is becoming a reality. Tolko has stepped up and approved an FIA watershed restoration project to be completed on McTaggart Creek in the North Thompson watershed.

McTaggart Creek is an important spawning and rearing stream for North Thompson Coho, which is currently under the Canadian Species at Risk Endangered Category.

Aesthetically, McTaggart Creek is very pleasing as it flows through an interior cedar forest but something was lacking. After conducting a stream prescription study, it was evident the stream was lacking wood and rock. To artificially replenish the stream to its natural functioning condition, 46 log and rock structures were built along the 1,298 meters of stream in less than three days. A series of photo points were set up to monitor the success rate of each structure and the creek's flow in the coming years.

Tolko is also involved with First Nations in the Nicola-Similkameen Innovative Forestry Society. In 1996 the Provincial Government introduced Innovative Forest Practices Agreements as pilot programs that provide Forest License holders an opportunity to practice innovative forest management. The intent of the program is to incorporate progressive management techniques in an attempt to increase the sustainability of the forests. One of the Society's goals is to foster productive partnerships and to ensure consistent forest management across the land base. In order to include all major players in the Society and have a truly cooperative effort, the membership included First Nations bands within the TSA. First Nations participate at all levels and in all activities of the Society. This includes sitting on the Technical Advisory Committee and the Society's Board of Directors. The Society's model of cooperation and consensus decision making among its members can be regarded as a hopeful look into the future of forest management in the province.

EnCana

EnCana considers that its Greater Sierra lands, located east of Fort Nelson British Columbia, contain the largest regional gas play discovered in Western Canada in the past decade. For the last four years EnCana has been steadily acquiring mineral rights and

extending the productive area of this play. Much of these lands are considered to be the Traditional Territory of the Fort Nelson and Prophet River First Nations. EnCana respects the rights, culture and traditions of the First Nation and as a result the Fort Nelson First Nation and EnCana have become partners in prosperity.

One of EnCana's first experiences of dealing with the Fort Nelson First Nation was in the Maxhamish area in the 1990's when it contracted the Band's heavy equipment construction company. Eh-Cho-Dene was hired for a three-well program that consisted of building leases and access roads in the Greater Sierra area. The project was delivered on time and on budget. Since that time the business interests of the First Nation have grown with EnCana. EnCana is the largest employer on reserve at Fort Nelson.

Having built-up its relationship with First Nations over the years has given EnCana a competitive advantage by having its referrals move quickly through the consultation process at the Band office. This only happens when there is a high level of trust built into the relationship. The development by the Oil and Gas Commission of the General Development Plans will also further EnCana's relationship with all First Nations in BC. By putting more information on the table sooner this will greatly improve the overall picture of development in First Nations territories.

On December 2, 2003, EnCana announced that an historic partnership had been entered into with the Fort Nelson First Nation. An \$8 million joint venture between EnCana, Ensign Drilling and Fort Nelson First Nation has been struck by which the First Nation will own and operate an oil and gas drilling rig. Fort Nelson First Nation is the first First Nation in BC to enter into such an arrangement.

Alcan Inc.

Alcan Inc. has relationships with all of the several First Nations whose members make up a significant proportion of the population in its Northern BC operating area. Perhaps the most significant among these relationships is the one with the Haisla, who are Alcan's closest First Nations neighbours. Alcan's Kitimat smelter is located in close proximity to the Haisla community of Kitamaat Village.

Like many corporate – First Nations relationships, this one has been characterized in the past by limited trust and often less than constructive engagement. The parties, however, have invested significant efforts in recent years in better accommodating their respective and often complementary interests.

The transformation of the Alcan – Haisla relationship was underscored in 2000 with the signing of a formal relationship protocol. This formed the basis for a more detailed agreement signed in 2002. Through these agreements, Alcan and the Haisla have committed themselves to be guided by mutual understanding, openness, respect and trust in their dealings with each other. The most recent agreement also establishes a formal

committee structure aimed at advancing the parties' mutual interests in specific areas such as land acquisition, culture, and economic development.

The Alcan-Haisla agreements have served as a foundation for a variety of concrete initiatives. This has included successful efforts to develop contracting and employment relationships, which have provided opportunities for members of the Haisla First Nation while meeting Alcan business needs. An October 2003 letter of intent to negotiate the transfer of two parcels of land within Kitimat, from Alcan to the Haisla Nation also stemmed from the agreements.

In addition, Alcan supports various longer-term Haisla capacity-building initiatives. These include an internship program through which Kitimaat Village residents with leadership capabilities are provided with practical work experience at Alcan facilities. They also include a broader, partnership-based educational development initiative, focusing on needs and opportunities within Kitimaat Village and the surrounding area.

Appendix 3.

STATEMENT ON ABORIGINAL AND CROWN TITLE

WITHOUT PREJUDICE

APRIL 29, 1998

In reading this statement the following applies;

- It is a political document intended to facilitate the negotiation of treaties.
- It is without prejudice to legal rights or positions.
- Each party will take the statement back to their principals seeking approval.

The parties agree to the negotiation of treaties respecting the following principles:

1. The parties recognize that Aboriginal title exists as a right protected under S.35 of the Constitution Act, 1982.
2. Where Aboriginal title exists in British Columbia, it is a legal interest in land and is a burden on crown title.
3. Aboriginal title must be understood from both the common law and aboriginal perspective.
4. As acknowledged by the Supreme Court of Canada, aboriginal peoples derive their aboriginal title from their historic occupation, use and possession of their tribal lands.
5. The parties agree that it is in their best interest that aboriginal and crown interests be reconciled through honourable, respectful and good faith negotiations.

Appendix 4.

Lheidli T'enneh Statement of Intent *(from BCTC Web site, December 29, 2003)*

- 1. What is the First Nation Called?**
Lheidli T'enneh Band
- 2. How is the First Nation established?**
Legislation

Please

Describe:

According to the laws of Canada we are established as a Band under the Indian Act by legislation. We were previously known as the Fort George Indian Band. We are also known by our traditions as the Lheit-Lit'en Nation and that is established by our traditions.

Is there an attachment?

No

- 3. Who are the aboriginal people represented by the First Nation?**
The Lheit-Lit'en are a people of what the non-natives refer to as Carrier Indians. (See original document for further details)
- 4. How many aboriginal people are represented by the First Nation?**
210

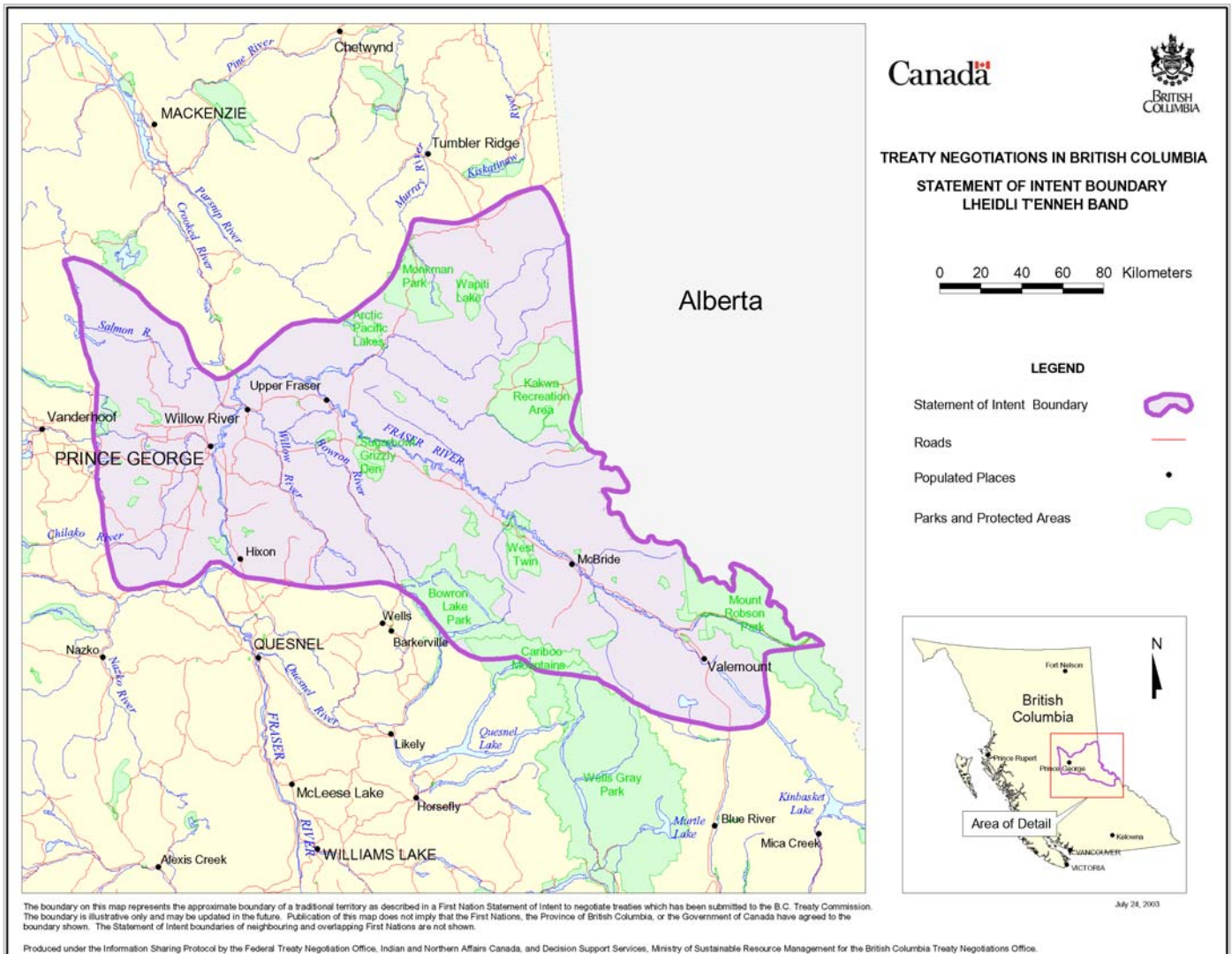
Is there any other First Nation that claims to represent the aboriginal people described in questions 3 and 4? If so, please list.

- 5. Please list any First Nations with whom the First Nation may have overlapping or shared territory.**
 1. Sai-Kuz known also as Stony Creek
 2. Nak'azdli Nation in Fort St James
 3. Red Bluff Band
 4. Mcleod Lake Band
- 6. What is the First Nation's traditional territory in BC?**
See attached map
Attach a map or other document, if available or describe.
Map Available?
Yes
- 7. Is the First Nation mandated by its constituents to submit a Statement of Intent to negotiate a treaty with Canada and British Columbia under the treaty process?**
Yes

How did you receive your Mandate? (Please provide documentation)

Band Council Resolution (copy attached).

8. Contact Person: Barry Seymour
Official Title: Chief
Phone Numbers:
 Main: 963-8451 Office
 Others: 963-9654 Fax
Submitted by:
Title:
Date:



Appendix 5.

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