Treaty News

Federal Treaty Negotiation Office

Vol. 3 No. 2 - July 1996

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Federal Treaty Negotiation Office

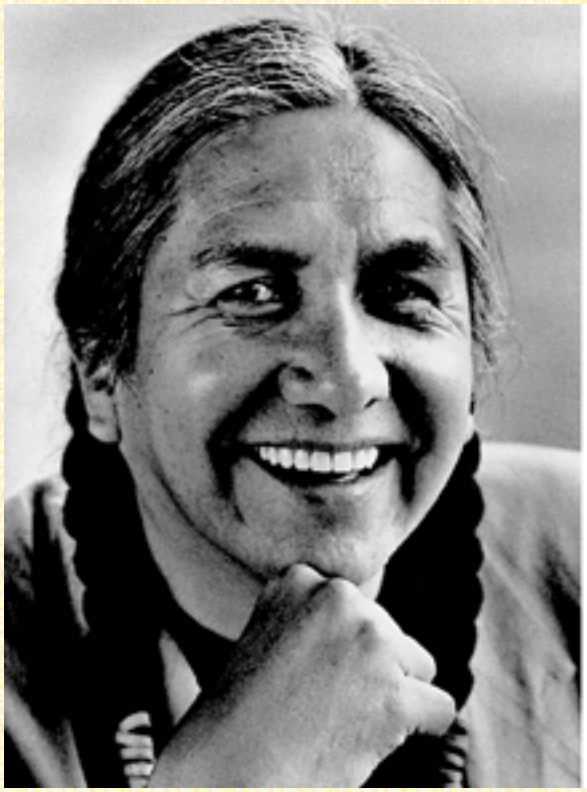
New Frontiers in Aboriginal Business

Unresolved Aboriginal claims to lands and resources have hindered major investments in B.C. By removing the uncertainty that deters investment, negotiated treaties will encourage economic development throughout the province. At the same time, Aboriginal people are working within their communities to create an environment that will ensure a solid economic footing on which to build future prosperity.

Beginning with this issue, *Treaty News* will introduce you to some of the people and organizations behind the growth of Aboriginal business in B.C. A series of articles will profile the people and companies that are involved in changing the face of Aboriginal business.

A groundbreaking relationship

For the past few years, the Tsleil Waututh First Nation has been developing housing projects on their North Vancouver reserve. Also known as the Burrard Indian Band, the First Nation formed Takaya Development in 1992 and has already completed a driving range, golf centre, and the first phase of the Ravenwoods housing complex. Future projects include the Windsong residential development and a two-sheet ice rink.



**Chief Leonard George
of the Tsleil Waututh
First Nation**

Throughout the development process, Chief Leonard George and the Tsleil Waututh have been working with the District of North Vancouver to reach maintenance and service agreements. Don Sigston, Manager of Lands for the district, has been representing the municipality during the meetings. Both men have observed the evolution of the relationship and the cooperation needed to make it work.

"We've gone through growing pains in our relationship with North Vancouver," said George, explaining that neither side was familiar with the others' system for doing business. "We have to take the time to explain things to each other," he said. "That's unusual in a development corporate setting, but necessary in building this relationship."

Sigston described the Tsleil Waututh business style as face-to-face discussions and handshake agreements, versus the reams of legal documents that the district receives from other developers. "The band stands on their word," said Sigston. "They do what they say they'll do."

"In the last few months, we've worked through some very sensitive issues together," said Sigston, explaining how the project ran into some difficulties in getting the necessary public approvals. "We all learned from the process," George said. "It was a good experience. We might have lost our tempers in a meeting but everyone came back to the meeting and kept moving ahead."

Like many other B.C. First Nations, the Tsleil Waututh are pursuing treaty negotiations. "Deep within our hearts, the fire of living with our rights is rekindled," said George. "The oppression is over--we have the freedom to do what we want. We need a vision of where to go and how to get there on our own."

George said that while working to secure their rights through the treaty process, First Nations need to have a broad-based business plan. Aboriginal groups "have to think larger--to develop public companies, corporations, banks, freight lines," he said.

In the years prior to entering the land development business, the Tsleil Waututh had a very different outlook. "Life on the reserve influenced the vision of what we are," George said. "Six years ago, we weren't doing anything. We were caught in the web of dependence and oppression." So the band decided to dust themselves off and take control of their future. "I wish I had a video of where we were then to contrast with where we are now--everyone is moving."

Before taking the first steps into the business world, George said that the band made a dream list of accomplishments. "By identifying our dreams, we can make them realities," he said. "What you've accomplished halfway through is often the best you can get from a dream. We end up getting what's best for us."

The business relationship between the municipality and the First Nation is more than just men and women sitting in board rooms making decisions. The Tsleil Waututh building projects are helping North Vancouver residents and band members live better together, said Sigston. "There is more interaction between the two groups, and the groups are on more equal footing."

"In 100 years we'll still be neighbours," said George. "The health of our children relates to the health of your children. We need to know each other and share responsibility for our communities."

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It's time: First Nations and the future B.C.

As part of its efforts to inform British Columbians about the treaty process, the First Nations Summit has produced two 30-second commercials and a 30-minute video for television. The commercials and video feature a series of interviews with First Nations people sharing their views on the importance of treaties.

"This is something that First Nations people have never done in British Columbia before," says Karen Isaac, Executive Producer and Communications Coordinator of the First Nations Summit.

The video and commercials are the first part of a Summit campaign to combat fear and dispel myths about the treaty process in B.C.

A 12-minute version of the video is also in the works for use by individual First Nations.

Isaac hopes these videos will initiate public discussion about the issues and inform people about the unique First Nations' perspective on the process and the benefits of treaty-making in B.C.

"We have modest goals and it is a modest campaign," says Isaac. "We are not out to change the world. We simply want to increase awareness about the treaty process among the public."

Ardyth Cooper
T'souke First Nation (part of Te'mexw Treaty Association)

Ardyth Cooper: "I think it's important for people who sit in judgment to just pause and think about what it is that they want to achieve from the treaty negotiations. It's really a question of just being open to creating a new way of understanding how societies have to operate."

Wendy Grant: "What a treaty is about is how we come together as two groups of people, Aboriginal and non-Aboriginal people, and find some kind of a common ground for us to live together."

Wendy Grant
Musqueam First Nation

Grand Chief Ed John: "One of the laws in this country is the law that's enshrined in the Constitution that says Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed. These are not empty words. It is a part of the Constitution of this country. It is part of the law of this country."

Grand Chief Ed John
Tl'azt'en Nation (part of Carrier Sekani Tribal Council)

Chief Joe Mathias: "Right now we are faced with terrible, terrible issues like drug, alcohol abuse, lack of education, poverty, no power to make decisions for ourselves in the future, those things can be resolved. The system these past 100 years has failed us, the system imposed upon us by non-Indian governments, through legislation and regulations and policies, has failed us."

Chief Joe Mathias
Squamish Nation

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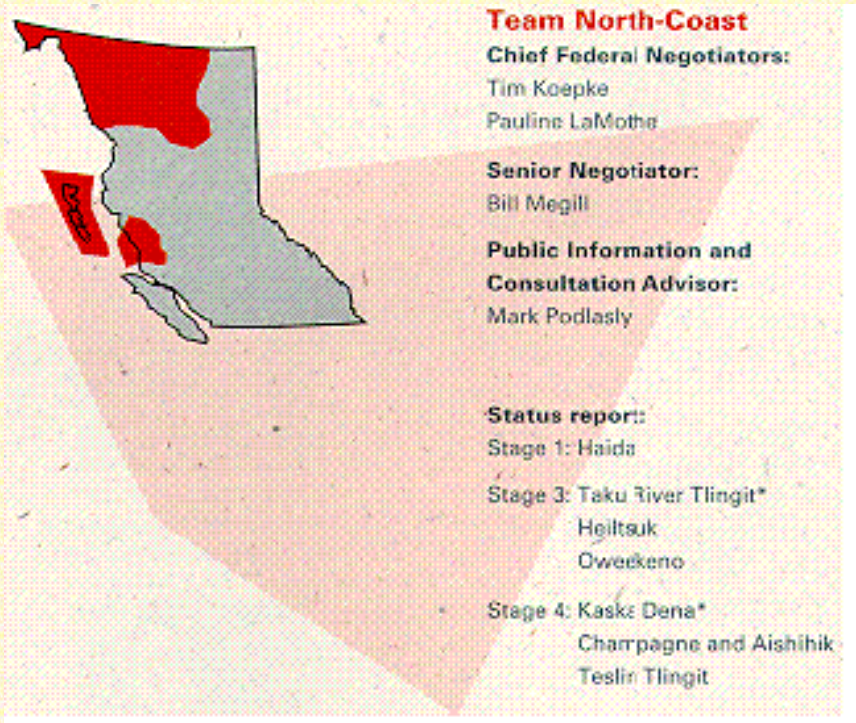
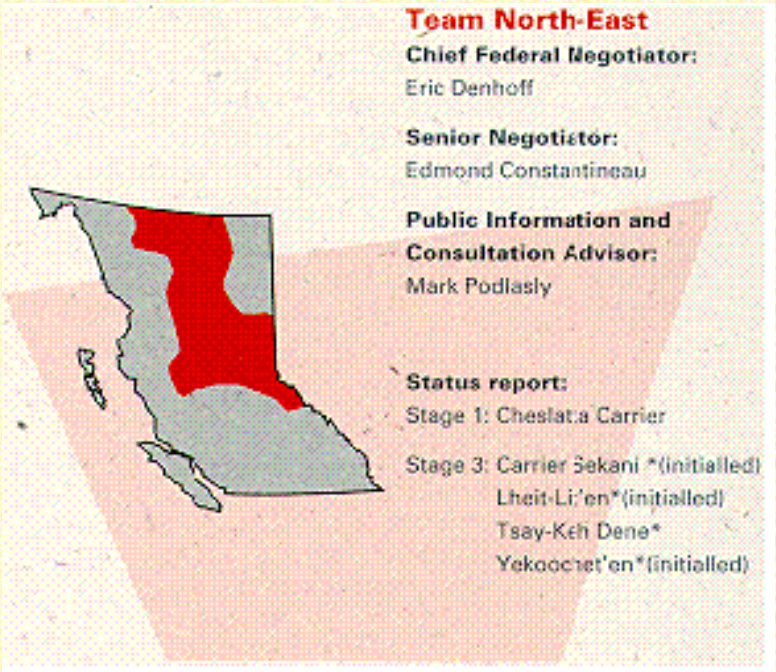
Progress In Negotiations

The following provides an update on the status of B.C. treaty negotiations as of June 1996.

6 Stage Treaty Negotiation Process

Stage 1 - Statement of Intent
Stage 2 - Preparation for Negotiations
Stage 3 - Negotiation of a Framework Agreement
Stage 4 - Negotiation of an Agreement-in-Principle
Stage 5 - Negotiation to Finalize a Treaty
Stage 6 - Treaty Implementation





Team North-East

Chief Federal Negotiator:
Eric Denhoff

Senior Negotiator:
Edmond Constantineau

Public Information and Consultation Advisor:
Mark Podlasly

Status report:
Stage 1: Cheslatta Carrier

Stage 3: Carrier Sekani *(initialled)
Lheit-Li'en*(initialled)
Tsay-Keh Dene*
Yekooche'en*(initialled)

Team North-Central

Chief Federal Negotiator:
Tom Molloy

Senior Negotiator:
Bill Zaharoff

Public Information and Consultation Advisor:
Joan McEwen

Status report:
Stage 3 Haisla*(initialled)
Lake Babine*
Tsimshian*(initialled)

Stage 4: Gitanyow*
Gitxsan*
Wetsuwet'en*

Team South #1

Chief Federal Negotiators:
Eric Denhoff
Robin Dodson

Senior Negotiator:
Mike Sakamoto

Public Information and Consultation Advisor:
Jonathan Rayner

Status report:
Stage 1: Katzie
Nazko

Stage 2: Esket (Alkali Lake)*

Stage 3: Cariboo Tribal Council*
Squamish*
Tsleil Waututh*

Team Vancouver Island

Chief Federal Negotiators:
John Langford
Wendy Porteous

Senior Negotiators:
Lynne Gregor
Ross McKinnon

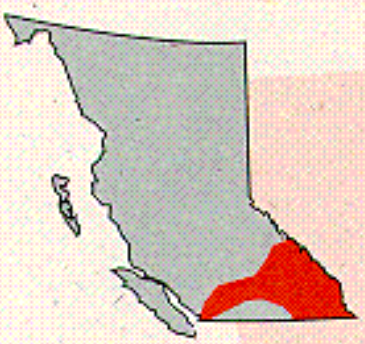
Public Information and Consultation Advisor:
John McIsaac

Status report:
Stage 1: Comox
Kwakiutl
Pacheenaht
Qualicum
Quatsino

Stage 2: Hul'qumi'num*
Klahoose

Stage 3: Nanaimo
Te'mexw*

Stage 4: Ditidaht*
Homalco*(signed)
Nuu-chah-nulth*(signed)
Sliammon (signed)



Team South #2

Chief Federal Negotiators:
Robin Dodson
Wendy Porteous

Senior Negotiator:
Mike Sakamoto

Public Information and Consultation Advisor:
Margo Novak

Status report:
Stage 1: Sto:lo

Stage 2: Ktunaxa/Kinbasket

Stage 3: In-SHUCk-Ch/N'Quatqua*
Musqueam
Ts'Kw'aylaxw (Pavilion)*
Tsawwassen*
Westbank*(initialled)
Xaxli'p (Fountain Band)
Yale*

Team Nisga'a

Chief Federal Negotiator:
Tom Molloy

Acting Senior Negotiator:
Jim Barkwell

Public Information and Consultation Advisor:
Joseph Whiteside

Status report:
Outside the British Columbia Treaty Commission process; recently concluded an Agreement-in-Principle.

* Openness protocols are in place for these negotiations.
  These protocals outline the negotiating parties' commitment to public information and consultation in the treaty negotiation process.

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Treaty-making on Vancouver Island

Except for the 14 Douglas treaties reached in the 1850s, no treaties have been signed with Aboriginal people on Vancouver Island.

Since the British Columbia Treaty Commission (BCTC) opened its doors to accept statements of intent to negotiate treaties, 13 Vancouver Island First Nations groups have entered the BCTC treaty process.

The Ditidaht First Nation and the Nuu-chah-nulth Tribal Council (NTC) were among the first in B.C. to submit statements of intent to the BCTC. To date, negotiations with these First Nation groups are the most advanced. Both the Ditidaht and the NTC signed framework agreements with the governments of Canada and British Columbia earlier this year and have subsequently entered into agreement-in-principle negotiations.

Two other First Nations, the Homalco and Sliammon, have also recently signed framework agreements with Canada and B.C. (see accompanying sidebar) and are engaged in agreement-in-principle discussions with the two governments.

Two First Nations groups on southern Vancouver Island are in the framework agreement stage: the Nanaimo First Nation and the Te'mexw Treaty Association which represents the Sooke, Malahat, Songhees, Beecher Bay and Nanoose First Nations.

The Hul'qumi'num Treaty Group, which represents seven Cowichan tribes and five bands, and the Klahoose First Nation on Cortes Island are preparing for framework agreement negotiations.

Negotiators for Canada and British Columbia also met recently with the Kwakiutl Treaty Society on northern Vancouver Island for preliminary readiness discussions.

The Comox, Pacheenaht, Qualicum and Quatsino First Nations have also submitted statements of intent to negotiate and are preparing for negotiations.

Public information and consultation

Eight public information working groups, with representatives from each of the negotiating parties, have been established on Vancouver Island to plan and organize public meetings, open houses, media interviews and speaking engagements for treaty negotiators.

Further to commitments made by Canada and B.C. to consult with third party interests, three regional advisory committees, or RACs, have been formed on

west and southern Vancouver Island as well as the Desolation Sound area. The West Island, South Island and Desolation Sound RACs meet regularly to provide advice to federal and provincial negotiators. The governments are in the process of establishing a fourth RAC for northern Vancouver Island.

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Three more First Nations enter the fourth stage of negotiations

The Homalco First Nation, the Sliammon First Nation, and the Nuu-chah-nulth Tribal Council have signed framework agreements with Canada and British Columbia, and have now moved on to negotiations toward agreements-in-principle.

Ronald A. Irwin, Minister of Indian and Northern Affairs (left), Chief Jack Thompson (centre) and B.C. Minister of Aboriginal Affairs (right) at the Ditidaht framework agreement signing ceremony.

The Homalco live near the community of Campbell River and are part of the Salishan linguistic group. The Homalco First Nation represents approximately 350 people.

The Sliammon people are part of the northern Coast Salish culture group. The Sliammon First Nation includes about 730 people, most of whom live on-reserve just north of Powell River.

The Nuu-chah-nulth Tribal Council consists of 13 First Nations representing 6,350 people on the west coast of Vancouver Island. The Ditidaht First Nation is also a member of the Tribal Council, but has chosen to negotiate separately.

Ronald A. Irwin, Minister of Indian Affairs and Northern Development, congratulated all parties on the milestone they have reached. "I wish all parties to the negotiations continued success as they move on to the next stage of negotiating an agreement-in-principle."

Lilian Howard, Nelson Keitlah and Richard Watt of the Nuu-chah-nulth Tribal Council sign the framework agreement.

The framework agreement outlines the main topics for negotiations, the process and timing for the agreement-in-principle stage of the B.C. Treaty Commission process.

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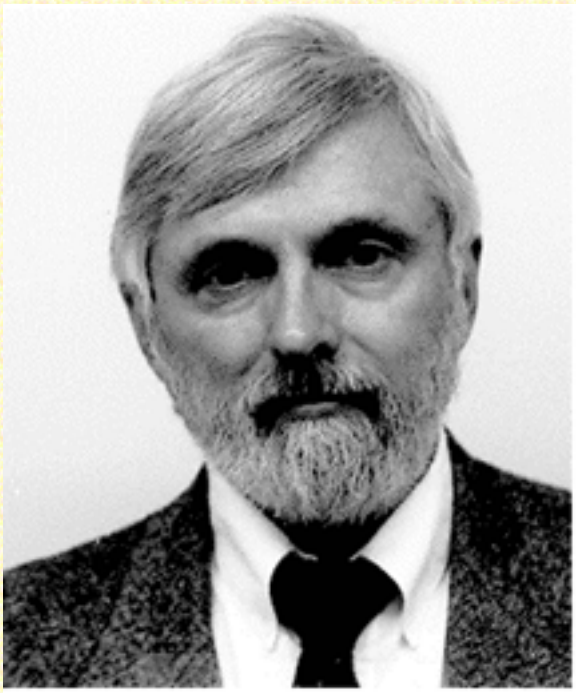
Why is there a treaty process in B.C.?

by Hamar Foster, Professor of Law, University of Victoria

Much of the opposition to the Nisga'a agreement and the treaty process in B.C. is based upon a false premise: that the courts have said there is no aboriginal title beyond the right to hunt and fish for food. The conclusion then follows that a process which promises more is somehow illegitimate.

An examination of the treaties east of the Rockies and some recent court cases demonstrates why this premise is false.



Hamar Foster is a law professor at the University of Victoria, specializing in Aboriginal issues.

Aboriginal title and rights in the treaties, 1850 to 1921

The text of these treaties (as opposed to what the tribes may have understood them to mean) is important. It reveals that, although the tribes gave up their right to occupy and possess most of their traditional lands, they kept their rights to hunt, fish and trap, even on the land they had given up. The treaties thus distinguished between aboriginal title and aboriginal rights.

West of the Rockies, provincial policy from Confederation until 1991 denied the existence of aboriginal title and rights. So there was no need for treaties: the tribes could not give up what they did not have.

This policy is at the heart of what has been known since 1875 as the B.C. Indian Land Question.

The Calder Case (1973)

When the Nisga'a took the *Calder* case to court in the 1960s, they conceded that sovereignty and even the "underlying" title to their traditional lands was in the Crown. But they argued that the Crown's title was subject to Nisga'a Aboriginal title, i.e., their right to occupy and manage their lands until otherwise provided by treaty. The Nisga'a lost at trial and in the B.C. Court of Appeal, which held that there was no Aboriginal title in this province because the government had not recognized it. So the Nisga'a appealed to the Supreme Court of Canada.

There, one of the seven judges who heard the appeal ruled that the issue of Aboriginal title was not properly before the Court because the Nisga'a had not obtained permission to sue the Crown. He would not consider the case further.

However, the other six judges stated that Aboriginal title, which the Nisga'a had when Europeans arrived, is a "burden" on the underlying title of the Crown that can exist whether the government recognizes it or not. They therefore disagreed with the B.C. Court of Appeal.

Three of these six said that the Nisga'a title still existed. The other three held that it had been abolished ("extinguished") by colonial land laws, and that the Nisga'a should have sought permission to sue. The Court therefore split 3:3 on whether the Nisga' still had title, and ruled 4:3 that the appeal was not properly before them. So, technically, the Nisga'a lost.

Nonetheless, it was clear that something significant had happened. Six judges of Canada's highest court had confirmed that aboriginal title is part of Canadian law, and that the Nisga'a once had such title. Three thought the Nisga'a still had it. This is a major reason why Ottawa developed a land claims policy.

British Columbia took a different view. The government maintained that because *Calder* was a split decision, the Supreme Court's findings had no significance. Instead, provincial lawyers argued that the Court of Appeal's decision in *Calder* was a binding precedent in B.C. - a proposition that even the Court of Appeal rejected. In *Sparrow* (1987), five judges of that court expresed surprise that lawyers would make such a "fallacious" argument. They said that if six members of the Supreme Court of Canada had rejected the view that Aboriginal title can exist only if the government recognizes it, "there can be no justification for continuing to treat that view as binding."

Yet a version of this discredited view lives on. Mel Smith, for example, denies that *Calder* was a major legal turning point. In his book, *Our Home or Native Land?*, he castigates those who say that the Supreme Court held the Nisga'a once had Aboriginal title. According to Smith, this statement "rewrites" history because the Court "did no such thing." The only significance of *Calder*, he says, is that it decided that the Nisga'a needed permission to sue. Smith prefers the *St. Catherine's* case, an 1888 Privy Council decision which implies that Indian title exists only if the government recognizes it.

British Columbians should also compare Smith's point of view with the Supreme Court of Canada's decision in *Guerin* (1984). In that case, Justice Dickson described *Calder* as having "recognized

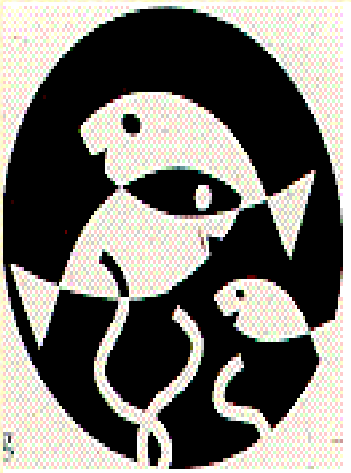
aboriginal title as a legal right derived from the Indians' historic possession of their tribal lands." Calder, he concluded, therefore "went beyond the judgment of the Privy Council in St. Catherine's." In 1988 this view was confirmed by the whole Court.

You decide.

Delgamuukw (1993)

Still, three of the seven judges in Calder said that the colonial land laws had implicitly extinguished Nisga'a title. If this view had prevailed in the courts, there would be no Aboriginal title in B.C. But it didn't.

In *Delgamuukw* (1993), the B.C. Court of Appeal ruled that, although the Gitksan did not "own" their traditional lands in the way a company or a homeowner does, the colonial laws considered in *Calder* had *not* extinguished non-exclusive Aboriginal rights to hunt and fish on those lands. These rights, said the court, still exist today.



An obvious question thus presents itself: if colonial laws were not sufficient to extinguish non-exclusive Aboriginal *rights* in B.C., how likely is it that such laws extinguished the much more substantive rights of occupation and possession associated with the idea of Aboriginal *title*?

However, three of the five judges in *Delgamuukw* would not decide whether the Gitksan had the sort of Aboriginal title described in *Calder*, i.e. title based upon exclusive or "shared-exclusive" possession but falling short of common law "ownership". They held, much as the seventh judge in *Calder* had done, that this issue was not properly before them: only ownership and non-exclusive rights were. But they did say that "treaty-making is the best way to respect Indian rights."

The remaining two judges dissented. One found that the Gitksan did have aboriginal title "to occupy, possess, use and enjoy all or some of the land within the claimed territory." The other stated that Aboriginal rights to land are "of such a nature as to compete on an equal footing with proprietary interests [enjoyed by third parties]."

It is this aspect of' the *Delgamuukw* decision that opponenets of the treaty process ignore. The majority of the five judges did *not* rule that there is no Aboriginal title in B.C. beyond the right to hunt and fish for food. They did not decide this question, and it would appear that most judges think that it is more appropriate for elected officials to negotiate treaties than for courts to create them by judicial *fiat*. In short, it is a question that requires informed *compromise*. Which is why there is a treaty process in B.C.

But it is both necessary and appropriate for courts to decide tough questions if the parties to a dispute cannot, especially where constitutional rights are at stake. For example, when attempts to negotiate a shared fishery fell apart south of the border, the American courts were obliged to act. They held that the tribes were entitled to up to *50* per cent of the commercial salmon fishery - much more than the negotiated amount - and the Supreme Court of the United States agreed. Another reason there is a treaty process in B.C.

How will the Supreme Court of Canada ultimately rule, if the issue of Aboriginal title comes properly before that Court? Law is largely prediction and it is particularly vague in this area, so different lawyers will give different answers. But consider this. The rights affirmed by the Court of Appeal in *Delgamuukw* are the same sort of rights that the tribes east of the Rockies retained even *after* they surrendered their Aboriginal title to the Crown. If the Supreme Court holds that there is no Aboriginal title in B.C., it will be saying in effect that the tribes west of the Rockies, who have never signed treaties surrendering their title, are legally in the same position as the tribes east of the Rockies, who did.What, then, did the eastern tribes surrender?

Aboriginal title

There is not yet a clear answer to the question "what is Aboriginal title." Mel Smith says that, "at best," Aboriginal title is only "a right to engage in...traditional activities for sustenance and ceremonial purposes."

But Smith's view ignores the distinction, affirmed in the treaties, between Aboriginal title and Aboriginal rights. It also ignores the fact that *Delgamuukw* dealt only with non-exclusive rights, whereas the jurisprudence on Aboriginal title has emphasized exclusive, or at least shared-exclusive, possession: see *Hamlet of Baker Lake* (Federal Court, 1979) and *Bear Island* (Supreme Court of Canada, 1991).

Once again, compare Smith to the Supreme Court of Canada. That Court has said, *unanimously*, that Aboriginal title is not only more than hunting and fishing, it is "more that the right to enjoyment and occupancy." The Court added that it is difficult to express how much more in legal terms. Yet another reason for the treaty process.

Aboriginal title is a part of Canadian law, and the treaty process in B.C. is both necessary and long overdue. Don't be fooled by those who would tell you that the law says different.

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New Chief Federal Negotiator appointed

The Honourable Ronald A. Irwin, Minister of Indian Affairs and Northern Development, recently announced the appointment of Chief Federal Negotiator Eric Denhoff.

"I am pleased to welcome such an experienced professional to the ranks of the Federal Treaty Negotiation Office," said Minister Irwin.

Eric Denhoff,
Chief Federal Negotiator

Eric Denhoff is responsible for treaty negotiations with the Carrier Sekani Tribal Council, Cheslatta Carrier Nation, Lheit-Lit'en Nation, Yekoochet'en First Nation, Cariboo Tribal Council, Esket Nation, Nazko Indian Band and Tsay-Keh Dene Band.

Mr. Denhoff has lived and worked in B.C. for over 15 years. He has held public and private sector positions in communications and Aboriginal affairs, and has considerable experience as a government negotiator. Prior to his appointment as Chief Federal Negotiator, Mr. Denhoff headed up a management company providing advisory services on trade issues.

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A lifetime of achievement

Dr. Frank Calder, President Emeritus of the Nisga'a Tribal Council, was honoured by a Lifetime Achievement Award at the 1996 National Aboriginal Achievement Awards for his contribution to the process of First Nation land claims settlement in Canada.

Dr. Frank Calder
Nisga'a Nation

Made an Officer of the Order of Canada in 1988 and a Member of the Aboriginal Order of Canada in 1985, Dr. Calder was the first Aboriginal person elected to a Canadian Parliament in 1949. He served as a British Columbia MLA for 26 years, with the CCF, the NDP and later with Social Credit. He was the first Aboriginal person to become a Minister of the Crown in Canada when he served as Minister Without Portfolio from 1972-1973.

Among Dr. Calder's most recognized achievements is the role he played in leading the tribal council efforts to defend Nisga'a interests in the *Calder* case.

The Supreme Court of Canada's 1973 decision in that case raised doubts about whether Aboriginal title to land in B.C. had been properly dealt with and prompted the federal government to develop a new policy to address unsettled Aboriginal land claims across Canada.

Treaty negotiations between the Government of Canada and the Nisga'a began three years later.

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Credits

Treaty News is published by the Federal Treaty Negotiation Office. It is distributed to organizations and individuals interested in the progress of treaty negotiations in British Columbia. Readers are invited to reprint articles from Treaty News in other publications.

The Federal Treaty Negotiation Office of the Department of Indian Affairs and Northern Development represents all federal departments, agencies and the people of Canada in treaty negotiations with First Nations in British Columbia.

Treaty News
A quarterly publications of the Federal Treaty Negotiation Office

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