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Treaty Negotiations in British Columbia:

An Assessment of the Effectiveness of British Columbia's Management and Administrative Processes

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The Honourable Bill Barisoff
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Dear Sir:

I have the honour to transmit herewith to the Legislative Assembly of British Columbia my 2006/2007 Report 3: Treaty Negotiations in British Columbia: An Assessment of the Effectiveness of British Columbia's Management and Administrative Processes.

Arn Van Iersel, CGA
Auditor General (Acting)

Victoria, British Columbia
November 2006

copy: Mr. E. George MacMinn, Q.C.
Clerk of the Legislative Assembly

Table of Contents

Foreword

The reconciliation of Aboriginal rights and title to land with the assertion of sovereignty by the Crown in the province of British Columbia (B.C.) has been a long-standing issue. Despite several attempts by Canada, British Columbia, and First Nations to resolve this issue, a solution satisfactory to all has yet to be found. This matter has far-reaching implications for B.C. as it affects and raises questions about the use, management, and regulation of land and resources and the laws that apply to the land and the people.

In 1992, Canada, British Columbia, and the First Nations Summit, representing the First Nations involved in the process, created the British Columbia treaty process. This process is aimed at building a relationship with B.C. First Nations based on respect and trust that will result in treaties, thus settling the uncertainty associated with unresolved land claims in B.C.

Initially, the federal government expected that all claims in B.C. would be resolved by the year 2000. Today, about 40 percent of eligible B.C. First Nations, or *Indian Act* bands, representing about 30 percent of their population, do not participate in the process.

At the federal level, Indian and Northern Affairs Canada (INAC) represents Canada in the B.C. treaty negotiations. About 40 other federal departments and agencies provide assistance to INAC. At the provincial level, the B.C. Ministry of Aboriginal Relations and Reconciliation has the primary responsibility for negotiating treaties on behalf of the province, with assistance from various other ministries.

The Auditors General of Canada and British Columbia are tabling separate audit reports to their respective legislatures on the management of the B.C. Treaty process. The Auditor General of Canada primarily examined the procedures and the resources being used by the federal government to negotiate treaties. The Auditor General of British Columbia examined whether the provincial government has effective administrative processes and resources in place to negotiate treaties successfully. Both Auditors General focussed on the results of their respective government's activities.

The two audits were performed concurrently to present a broader perspective on the treaty process. Our offices shared methodologies and met jointly with First Nations and other organizations.

Foreword

Limited results

Although progress is being made at some negotiation tables, with two final agreements seen as imminent and a third close behind, the process has not yet resulted in any treaties with First Nations. After spending hundreds of million of dollars over more than 12 years of negotiations, the results achieved are well below the three parties' initial expectations. In the last few years, however, efforts have been made by the two governments to improve the treaty process.

Differing views

Successful negotiations require that the participants share a common vision of their relationship and of the future. Our two audits found that the participants have differing views on the nature of the treaties being negotiated. For example, the two governments base their participation in the treaty process on their own policies, and do not recognize the Aboriginal rights and title claimed by the First Nations. Many First Nations base their participation in the process on the assertion that they have Aboriginal rights under Canada's Constitution and that these rights should be acknowledged before negotiations begin. Additionally, the governments see treaties as a full and final settlement of the Aboriginal rights and title claimed by First Nations, whereas First Nations see them as documents capable of evolving as the relationship between the parties develops.

These differences limit progress at a number of treaty negotiation tables and contribute to the fact that about 40 percent of the First Nations that could enter the treaty process have not done so.

Evolving context

We have noted that, in the absence of treaties, other options have evolved to deal with questions related to Aboriginal rights and title, although in many cases, these solutions are temporary. Both audits noted that some court decisions may make litigation a more attractive option than negotiation. A rising number of contracts between First Nations and the federal and provincial governments, municipalities, and private companies was observed. The audits also noted the endorsement by British Columbia and the three organizations representing all B.C. First Nations of the document entitled "A New Relationship" which outlines how a

new "government-to-government" relationship will be established between B.C. and First Nations based on respect, recognition, and the accommodation of Aboriginal rights and title.

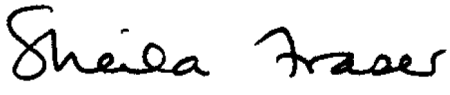
As a result of these other legal, economic and political options, it is challenging for the federal and B.C. provincial governments to offer benefits to First Nations that meet or exceed those available outside the treaty process.

Need for review

Progress continues to be slow and there is a risk that the treaty process, as it exists today, may be overtaken by the changing legal, economic, and political environments in which the negotiations are taking place. At this point, we believe that signing treaties with most B.C. First Nations based on the treaty process as it currently exists will continue to be difficult.

In our view, however, negotiations remain an effective means by which the parties can build the New Relationship they are seeking and resolve their claims. As Supreme Court of Canada Chief Justice Lamer stated in the landmark 1997 *Delgamuukw* decision: "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve (…) the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

We call on our respective governments, working together and with First Nations, to take action to address our recommendations.



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Auditor General of Canada

Arn van Iersel, CGA
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Foreword

The chapter "Federal Participation in the British Columbia Treaty Process" is available on the Office of the Auditor General of Canada web site at www.oag-bvg.gc.ca . For copies, contact

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Acting Auditor General's Comments

Arn van Iersel, CGA
Auditor General (Acting)

In 1992, a modern-day treaty process was started in British Columbia to resolve a century-old impasse between First Nations and the province about who owns the land and the resources. Thirteen years later, no treaty has been signed under this process. British Columbia's inability to conclude treaties with First Nations continues to adversely affect its relationship with First Nations people in British Columbia. Many First Nations in other provinces have treaties. In B.C., with the exception of the Northeast and Northwest corners of the province and parts of Vancouver Island, Aboriginal land title has remained unsettled for 150 years. There has been increasing recognition that the lack of treaties is detrimental not only to First Nations, but also to the province's economic development and social well-being.

However, as the legal, political and economic contexts affecting treaty negotiations have changed over the last 10 years, the province has responded by providing First Nations with options such as economic incentives, interim measures, and other interim agreements that deal with issues of an immediate nature. While these options provide temporary reconciliation of issues—similar to "renting" certainty—ultimately they do not give parties the long-term certainty that treaties offer.

The Office decided to do this audit because of the importance of treaty negotiations, the recent changes in the provincial approach to its relationship with First Nations, and the benefits of providing an audit of the provincial perspective at the same time that the Auditor General of Canada was carrying out a similar audit from the federal perspective.

We examined the province's participation in the treaty process and the results of its activities. We looked at the administrative and management processes and the resources used to develop and implement the treaty negotiation process.

Overall, we concluded that the provincial government only has effective administrative and management processes and resources in place to successfully negotiate treaties for the few First Nations at the "breakthrough tables"—a small number of treaty tables that the province decided were most likely to be successful. This strategy was the ministry's response to fiscal restraint implemented by the province in 2001/2002 and its desire to complete some treaties to create momentum for the process. Steady progress has been made

on some of the breakthrough tables, with three tables expected to conclude within the next year; however, government's strategy is causing frustrations amongst some First Nations.

Negotiating treaties—reconciling aboriginal rights and title with the province's sovereignty, to provide certainty for land and resource management—is a challenging task, both in heavily populated areas where most of the land has already been developed and on rural lands that have been tenured (for example, through forest licences) or set aside under such designations as provincial park or protected area. Also, although treaties provide the most certainty for the province, it is voluntary and many First Nations have never joined the process—about 40% of the First Nations or bands. For many, their fundamental position is that Aboriginal title cannot be negotiated, traded or extinguished.

An emerging policy, the New Relationship—an opportunity for all First Nations, whether inside or outside the treaty process, to work with the province to develop a new government to government relationship—may help to strengthen relationships between the province and First Nations in the negotiation process. However, until the province clarifies the link between its New Relationship and treaty negotiation policies, the "wait-and-see" attitude of some First Nations will contribute to the slow pace of negotiations.

Following are our key findings:

1) **Modern treaty negotiations have been slower than expected. Business has occurred with First Nations outside the treaty process. This could hamper the continuing interest of First Nations in the treaty process.**

2) **The administration of the treaty process including providing negotiators, clear guidance and mandates, although sufficient to move a few treaty tables forward, is burdened with challenges.**

3) **The Ministry of Aboriginal Relations and Reconciliation is providing relevant but incomplete information about the treaty negotiation program. Although it reports the number of Agreements-in-Principle completed compared with targets set, the ministry does not report fully on the status of other negotiations, the issues and challenges it faces and the effort it has made to overcome these barriers to success.**

Acting Auditor General's Comments

I wish to thank everyone who cooperated with my Office and assisted us in gathering the information for this audit. As well, I would like to acknowledge the hard work, professionalism and dedication of my staff in the production of this report.

Arn van Iersel, CGA
Auditor General (Acting)

Victoria, British Columbia
November 2006

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Executive Summary

Unreconciled Aboriginal Rights and Title with the Province's Sovereignty Creates Uncertainty About Ownership, and Management of Land and Resources

Unreconciled Aboriginal rights and title to land and resources with the province's sovereignty (authority) is an issue that has strained the relationship between First Nations and the Province of British Columbia for over 150 years. It creates a state of uncertainty about land and resource management. Resolving the issue is critical to British Columbia because sound management of public lands and natural resources is a matter of vital importance as the economy is significantly based on our ability to develop them.

Reconciling to promote certainty for development and management of land and resources is a challenging task, both in heavily populated areas where most of the land has already been developed and on rural lands that have been tenured (for example, through forest licences) or set aside under such designations as provincial park or protected area.

In the early 1990s, the province, the federal government and First Nations agreed to focus on negotiating treaties to reconcile interests in land and resources. Although participation by the First Nations is voluntary, the province initially hoped that treaties would be negotiated with most of them, and that all would be signed within 15 years.

Since then, all parties have incurred significant costs in the negotiation process. We estimate that between 1993 and 2004/05, British Columbia has spent $260 million (see Exhibit 1).

Exhibit 1

Estimated Provincial Costs for the B.C. Treaty Process (in $ millions)

B.C. Participation [1]	$203
Supporting the Process [2]	10
Supporting First Nations [3]	47
Total Treaty Process	$260

[1] Funding for B.C.'s treaty negotiation program.
[2] Contributions to the British Columbia Treaty Commission.
[3] Includes contributions to First Nations to cover 8% of their negotiation costs ($26 million) and contributions for treaty-related measures.

Source: British Columbia Public Accounts, Ministry of Aboriginal Relations and Reconciliation and British Columbia Treaty Commission

Executive Summary

By early 2001, some treaty negotiation "tables" (appointed groups including representatives from the three parties and facilitated by the B.C. Treaty Commission) had been successful in providing a means for dialog where nothing had existed before between many First Nations and the provincial government. Tables were often used to resolve issues; and to establish "interim agreements" on matters such as land use planning, awards of access to harvest timber, protection of cultural resources, economic development and consultation between the parties, and protection of land for treaty settlement. However, although almost 80 interim measures agreements were signed by 2003, no treaties have been signed with the 57 First Nations participating in the British Columbia treaty process. Even the well-publicized treaty signed with the Nisga'a First Nation (http://www.nisgaalisims.ca/?page=links) was negotiated outside of the provincial treaty process. As a result, the issue of who owns, uses and manages the land and resources still remains, for the most part, unreconciled. The treaty negotiation process, it seems, is not working as well as expected.

The province has introduced two strategies to reconcile with First Nations. The first is to focus its negotiation resources on a few lead tables that are close to signing a treaty. The second is to engage First Nations, whether or not they are in the treaty process, in a New Relationship initiative that will offer additional reconciliation options.

Audit Purpose

This audit comes at a critical time for British Columbia. The need for reconciliation between First Nations and the province, and the need for measures that help First Nations improve their social and economic conditions, are as important as ever. Although the New Relationship initiative may provide crucial tools for reconciliation, it is not clear how the province's commitment to successful treaty negotiations will be affected.

The purpose of this audit was to assess whether the provincial government has effective administrative and management processes and resources in place to negotiate treaties successfully including:

- an effective relationship-building process with First Nations and the federal government;

- clear goals, objectives and direction to the province's negotiation teams;
- sufficient and appropriate human, financial and information resources; and,
- the means to analyze barriers to progress, the effect of legal authorities, and options for change as well as strategies for acting on the analyses.

We also assessed whether sufficient and appropriate information on British Columbia's part in treaty negotiations is being reported to the Legislative Assembly and the public.

We concentrated our examination on the Ministry of Aboriginal Relations and Reconciliation (MARR), but also included other provincial ministries (such as Forests and Attorney General) whose programs complement or support the treaty process.

Audit Scope

In conducting this audit, we took into account two key factors that are outside the treaty process. First, court decisions have made it clear that the government has the obligation to consult with and accommodate First Nations on decisions that affect their Aboriginal rights and title to land and resources. Since treaty negotiations take many years, more timely agreements between the province and First Nations have been signed outside the treaty process. Examples of such agreements include forest revenue sharing, forest management licences, oil and gas consultation, and park land co-management arrangements. These agreements can also have negative effects on successful treaty negotiations because First Nations are able to achieve some of their goals outside of the treaty process.

Second, the province is now entering into what it describes as a "New Relationship" with First Nations, and has begun developing new ways for working together to make decisions about the use of land and resources. Given this new focus, it is likely that alternative agreements with First Nations will become increasingly prevalent. As part of our audit, we considered the potential impact on the treaty process of the options that make up this new approach, looking for where the treaty process "fits in" with these other options.

Executive Summary

Although the treaty process involves three parties—First Nations, the province and, the federal government—we did not audit the negotiation-related activities of First Nations, the overseeing B.C. Treaty Commission or the federal government. We did, however, consult with some First Nations representatives and B.C. Treaty Commissioners to obtain their views.

First Nations receive funding through loans and grants from the federal government to help them participate in the negotiations. Although British Columbia has agreed to cost-share in case of loan default, the disbursement and management of the funding process and system is the responsibility of the federal government. For this reason, we did not include this matter in the scope of our audit.

We also did not assess the many government policies that have been established to address the treaty negotiation process in British Columbia. Those policies include Aboriginal rights and title, self-government, land and resources, fisheries, forestry, taxation, and overlapping land claims. We do, however, comment on the impact of those policies in achieving government objectives.

We performed this audit in accordance with assurance standards recommended by the Canadian Institute of Chartered Accountants, and accordingly included such tests and other procedures we considered necessary to obtain sufficient evidence to support our conclusions.

We carried out this audit in cooperation with the Auditor General of Canada. Although we are reporting separately from that office, we collaborated on the criteria used to assess our respective treaty negotiation processes (see Appendix A).

Overall Conclusion

Using treaties to resolve who owns, uses and manages the land and related resources—thought to be the best way to reconcile—has proven to be expensive and time-consuming for all three parties (First Nations and the two levels of government). It often raises more questions than it answers, and there is often a large gap in the parties' negotiating positions. At the same time, treaties appear to be a way for some First Nations to achieve recognition of their rights and title.

Overall, the provincial government only has effective administrative and management processes and resources in place to successfully negotiate treaties for the few First Nations at the "breakthrough tables"—a small number of treaty tables that the province decided were most likely to be successful. This strategy was the ministry's response to fiscal restraint implemented by the province in 2001/2002 and its desire to complete some treaties to create momentum for the process. Steady progress has been made on some of the breakthrough tables, with three tables expected to conclude within the next year; however, government's strategy is causing frustrations amongst some First Nations.

As the legal, political and economic contexts affecting treaty negotiations have changed over the last 10 years, the province has responded by providing First Nations with options such as economic incentives, interim measures, and other interim agreements that deal with issues of an immediate nature. However, while these options provide temporary reconciliation of issues—similar to "renting" certainty—ultimately they do not give parties the long-term certainty that treaties offer.

We were told the slow pace of negotiations at the majority of treaty tables is straining relationships between governments and First Nations and is increasing the sense of frustration among some First Nations. An emerging policy, the New Relationship—an opportunity for all First Nations, whether inside or outside the treaty process, to work with the province to make decisions about the use of land and resources—may help to strengthen relationships between the three parties. However, until the province clarifies the link between its New Relationship and treaty negotiation policies, the "wait-and-see" attitude of some First Nations will contribute to the slow pace of negotiations.

Negotiators working at the other treaty tables are finding that support is not easily available to ensure they are working with the most recent mandate policies or are provided with the reasoning behind a particular mandate. This situation can leave negotiators without guidance to determine what they can or cannot propose or agree to at the table—creating bottlenecks in getting mandates issued to these tables.

The province has competent and experienced staff supporting and working directly to negotiate treaties; however, their numbers

although adequate to support the breakthrough tables, are not sufficient to meet the needs of the other tables waiting in the queues. And because the treaty program is likely to lose many of its skilled employees, especially to retirement, meeting emerging needs will be challenging for all ministries involved.

As the lead ministry on treaty negotiations, the Ministry of Aboriginal Relations and Reconciliation reports to the Legislative Assembly and the public on the progress of treaty negotiations. In its annual service plan report, the ministry should do more to report the issues, the efforts it makes and the challenges it faces in moving treaty negotiations forward.

Key Findings and Recommendations

1) **Modern treaty negotiations have been slower than expected. Business has occurred with First Nations outside of the treaty process. This could hamper the continuing interest of First Nations in the treaty process.**

   - The provincial government, in consultation with First Nations, should review and revise as appropriate, its policy goals and approach to the treaty negotiation process; in particular, harmonization with the New Relationship policy.

2) **The administration of the treaty process including providing negotiators, clear guidance and mandates, although sufficient to move a few treaty tables forward, is burdened with challenges.**

   - The Ministry of Aboriginal Relations and Reconciliation (MARR), in conjunction with the other ministries involved in treaty negotiations, should improve the administration of the treaty negotiation process by:
     - — reassessing the negotiation strategy of focusing only on a few lead tables; and
     - — expediting the mandating processes at MARR and related ministries

   to achieve its long-term goals for getting treaties signed and implemented.

- The Ministry of Aboriginal Relations and Reconciliation, in conjunction with the other ministries involved, should ensure there is adequate alignment of resources, roles and responsibilities to support the treaty negotiation process.

3) **The Ministry of Aboriginal Relations and Reconciliation is providing relevant but incomplete information about the treaty negotiation program. Although it reports the number of Agreements-in-Principle completed compared with targets set, the ministry does not report fully on the status of other negotiations, the issues and challenges it faces and the effort it has made to overcome these barriers to success.**

- The Ministry of Aboriginal Relations and Reconciliation should report annually on the status of negotiations, the barriers to success and the efforts it has made to overcome those barriers.

Detailed Report

1. Background — Why treaties?

"Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve… 'the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.' Let us face it, we are all here to stay."

— Right Honourable Antonio Lamer,
Chief Justice of Canada, 1990-2000[1]

Where there is no treaty, British Columbia's assertion of sovereignty conflicts with First Nation's Aboriginal title claims—land that they have occupied for millennia, long before European contact. This has created uncertainty in the management of the land and resources of British Columbia and dissatisfaction on the part of First Nations. For example, there have been periodic flare-ups in tension between First Nations, and the province, and resource developers.

In order to resolve this conflict, British Columbia and the federal government together with First Nations formed a task force to examine the claims issues in 1990. The task force made 19 recommendations which included establishing a process to negotiate treaties for settling land claims. In 1992 the treaty negotiation process was started (see Appendix B).

The B.C. Treaty Commission was created to facilitate the treaty negotiation process, and to monitor and report on its progress. The province and the federal government provide support funding to First Nations to participate in the treaty process, and the B.C. Treaty Commission allocates this funding. The federal government provides 80% of the funding as a loan to First Nations. The other 20% is a contribution, with 8% provided by the province and 12% by the federal government. In the event First Nations are unable to repay the loans, the province will be responsible for 50% of the unpaid principal and interest. The sharing of these pre-treaty costs are included in a Memorandum-of-Understanding (MOU) between the Province and the federal government. Also included in this MOU is the settlement costs (land, cash and resources), which are to be shared equally between the two governments.

[1] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at paragraph 186.

The government of British Columbia has the following reasons for negotiating treaties

- **The goal of treaties is to provide certainty by reconciling competing claims of right and title to land**

Treaties are intended to replace often uncertain and ill-defined First Nation rights with defined rights. In a typical proposed treaty, a First Nation may obtain ownership of certain tracts of land, and defined rights to natural resources such as timber, fish and game. In exchange, the First Nation may give up or modify Aboriginal rights to occupy other land within its traditional territory.

As well, treaties can provide a First Nation with certain defined rights over areas that are not transferred to it. Examples include giving a First Nation the right to veto development in areas of spiritual significance, or a special role in environmental assessments of projects in its traditional territory.

Canadian courts have stated that governments must act honourably (often described as the Honour of the Crown) during negotiations, so that the result is fair settlement of First Nation claims. Recent court cases have also established that the government has a duty to consult with First Nations, and, if warranted, accommodate their interests when contemplating action on traditional lands.

- **Unresolved land claims have an impact on economic and social opportunities**

Compared with other citizens in the province, First Nations people in British Columbia suffer lower economic and health standards, experience more social problems and higher mortality rates, and are less likely to graduate from high school or have post-secondary education. Treaties can help by providing economic and social opportunities associated with land settlement and money transfers.

Treaties are important for economic and community development for the people of British Columbia, including First Nations. In 1990, a Price Waterhouse study determined that the uncertainty created by unsettled land claims in British Columbia was having a $1 billion impact on the economy and was leading to 1,500 jobs being lost in the mining and forest sectors each year. Subsequent studies by KPMG in 1996 and by Grant Thornton in 1999 and 2004

also concluded that British Columbians would reap substantial net financial benefits from treaty settlements, with the most recent estimate being net benefits over 40 years of around $4 billion.

How much land?

The province would ultimately own all remaining Crown land free from claims if treaties are signed with all First Nations. How much land a First Nation will own as compared to its original claim will vary. The determining factors include how broadly a First Nation initially defines its traditional territory, the extent to which it chooses commercially valuable land, and the size of the First Nation.

For instance, under the Agreement-in-Principle with the small Lheidli T'enneh First Nation (one of the treaty tables most advanced in its negotiations at the time of this audit), the Lheidli T'enneh—located near the city of Prince George—will include 4,027 hectares of land that will be their treaty settlement land. At the beginning of the treaty negotiation process, however, the Lheidli T'enneh identified an area of over 4.5 million hectares as traditional territory.

In another area, the Yekooche—a small First Nation located in a rural setting north west of Prince George—under its Agreement-in-Principle will include a larger percentage of its claim. Yekooche identified an area of 811,700 hectares as traditional territory and will include 6,340 hectares as treaty settlement land.

Treaty making does not involve all First Nations

Although treaties provide the most certainty for the province, joining the process is voluntary and many First Nations have chosen not to do so—about 40% of the First Nations or bands. For many, their fundamental position is that Aboriginal title cannot be negotiated, traded or extinguished.

In the following sections of this report, we present our findings and conclusions about the effectiveness of the province's processes for managing negotiations with First Nations.

2. The evolving state of negotiations has not yet produced a signed treaty

The legal, political, and economic contexts within which treaty negotiations take place have evolved since the current treaty process in British Columbia was established in 1992. As a result, other options have emerged that enable all First Nations to pursue their claims and to provide inputs into decisions regarding resources.

We expected the province to be analyzing changes to the treaty environment including the shift in case law and other relevant developments, and to be acting on its findings.

Conclusion

As the legal, political and economic contexts have changed, the province has been actively engaged in actions meant to help the treaty negotiations evolve too. It has responded by providing First Nations with options such as economic incentives, interim measures, and other agreements that deal with issues of an immediate nature. However, while these options may provide temporary reconciliation of issues—similar to "renting" certainty—ultimately they do not give parties the long-term certainty that treaties offer.

Another issue the ministry responded to was fiscal restraint. Beginning in 2001/2002, it concentrated resources on a small number of treaty tables most likely to be successful, resulting in steady progress at some of these "breakthrough" tables. Three of the tables are expected to conclude within the next year. However, the slow pace of negotiations at the majority of other treaty tables is straining relationships between the province and First Nations at some of those tables and is increasing the sense of frustration among all parties.

The province's 2005 New Relationship policy will provide an opportunity for all First Nations whether they are within or outside of the treaty process to work together with the province in making decisions about the use of land and resources. However, the province has not yet determined how the treaty process can be supported and complemented by this broader range of options. Until the province clarifies the link between its New Relationship and treaty negotiation policies, some First Nations are taking a "wait-and-see" attitude. This is contributing to the slow pace of negotiations at some tables.

2. The evolving state of negotiations has not yet produced a signed treaty

Findings

Modern treaty negotiations have been slower than expected

Between 1850 and 1990 only a handful of treaties were negotiated in British Columbia (see Appendix C for history summary). In 1992, the British Columbia Treaty Commission was set up to facilitate negotiations (see Appendix B), under the joint leadership of the province, the federal government and First Nations. Progress, however, has been slower than initially hoped.

As of July 2006, there are 57 First Nations or bands (out of 202) participating in the B.C. Treaty process, in 47 sets of negotiations (see Appendix D). No treaties have yet been signed under this process (the Nisga'a Treaty, initiated in 1976 and signed in 2000, was negotiated outside the B.C. Treaty process).

Changing case law related to Aboriginal rights is altering the incentives to negotiate and sign treaties

The common law on many issues related to Aboriginal rights is continuing to develop.

Those issues include:

- the continued existence of Aboriginal title;
- the extent of Aboriginal title;
- the evidence courts will accept as establishing title;
- duties of the Crown to accommodate First Nations' interests in the absence of treaty; and
- Aboriginal rights to food, ceremonial or commercial fishing.

These changes all have an impact on whether parties believe they are better or worse off entering into a treaty, and whether or not they should continue to focus their energies on treaty negotiation.

Other considerations affecting parties' inclination to negotiate and sign treaties are:

- anticipated benefits from treaty;
- the time and cost of pursuing Aboriginal title and rights through the courts;
- the speed with which treaties can be negotiated or court cases resolved; and
- the relative benefits of concentrating limited resources on economic development rather than on negotiation or litigation.

2. The evolving state of negotiations has not yet produced a signed treaty

Evolution of Legal Context Through Case Law

The roots of First Nations and treaty rights and the duties of government to First Nations extend back to cases in the 1800s and earlier. However, the legal context in which treaties are negotiated has evolved significantly over the last two decades. The following cases mark distinct changes:

- The 1990 Supreme Court of Canada decision in *Sparrow* made it clear that Aboriginal rights to fish and hunt for food, including for social and ceremonial purposes, had not been extinguished by government regulation. To do so, the Crown must demonstrate why it intends to infringe on an Aboriginal right and provide adequate justification.
- In the 1995 *Van der Peet* decision, the test for whether an activity was a constitutionally protected Aboriginal right was made clear.
- In the 1997 *Delgamuukw* decision, the legal test for existence of Aboriginal title, the question of whether Aboriginal title had been extinguished, and the contents of Aboriginal title were clarified.
- In the 2004 *Haida* decision, the duty of the Crown to accommodate First Nations, where rights or title were asserted but not proven in court, was made clear.
- In the 2005 *Mikisew* decision, how the duties of consultation and accommodation applied to treaty rights was clarified.

These cases and others have progressively helped define Aboriginal and treaty rights.

First Nation pursuit of benefits outside the treaty process may affect their interest in treaties

Just as the legal context will affect parties participation in the B.C. Treaty Process, so will opportunities available to First Nations outside of the treaty process. Although numerous interim measures agreements have been negotiated within the treaty process, many other agreements and government programs have also developed over the last five years, providing benefits to First Nations regardless of whether they are in the treaty process or not (see Appendix E). These have been related to land management, cash transfers, resource revenue sharing and other matters.

The pursuit of benefits outside the treaty process can have both positive and negative effects on the process of treaty negotiation and reconciliation. On the one hand, agreements on issues such as First Nations role in managing land use and resource extraction activities or revenue-sharing agreements are steps towards reconciliation. They may prove to be building blocks towards treaty. On the other hand, the Forest and Range Opportunity Agreements that provide the sharing of forest revenue, are available to all First Nations. Those not participating in the treaty process are enjoying the same benefit, with less time commitment and cost, thus providing a disincentive to join the treaty process.

2. The evolving state of negotiations has not yet produced a signed treaty

Resources are focused on treaty tables most likely to succeed, in response to cross-government cutbacks

As part of the provincial Core Services Review in 2001/2002, the government reduced resources for treaty negotiations by around 40%, and adopted a "breakthrough strategy," by concentrating the remaining resources on a smaller number of treaty tables that the province decided were most likely to be successful.

Although the majority of tables are not making steady progress, there are five treaty negotiations that the province believes are close to conclusion—the "breakthrough tables" (see Exhibit 2). While significant issues remain on some of them, we understand that three of the tables are expected to conclude within the next year.

Exhibit 2

Breakthrough Tables

First Nation	Stage of Negotiations	Approximate Membership [2]
Maa-Nulth First Nations	5 – Final Treaty Negotiation	Approx. 2,000
Lheidli' Tenneh Band	5 – Final Treaty Negotiation	Approx. 300
Tsawwassen First Nation	5 – Final Treaty Negotiation	Approx. 270
Yekooche Nation	5 – Final Treaty Negotiation	Approx. 212
Yale First Nation	5 – Final Treaty Negotiation	Approx. 140

[2] Population estimates based on British Columbia Treaty Commission estimates in British Columbia Treaty Commission, *Changing Point: 2005 Annual Report* or, in the case of Yekooche, Ministry of Aboriginal Relations and Reconciliation. Numbers are not necessarily consistent with figures estimated by First Nations in Statements of Intent.

Source: Ministry of Aboriginal Relations and Reconciliation

However, the First Nations at these breakthrough tables, except for the Maa-nulth First Nation, are relatively small. For instance, the Lheidli' T'enneh First Nation represents only about 300 members. We were told that negotiations are much more complex for the larger First Nations (such as the Carrier Sekani or Haida with several thousand members) and as a result progress toward completing treaties for these and other First Nations in the process has not been what was hoped for.

2. The evolving state of negotiations has not yet produced a signed treaty

Meanwhile, most of the other tables that have not yet reached agreement in principle are making little progress in getting there. And, an additional five First Nations that had joined the process have withdrawn. First Nations told us that the reduced presence of provincial negotiators at the treaty tables, as a result of the breakthrough strategy, has contributed to their frustration.

Treaty negotiations can be disrupted by a variety of events

We found the pace of negotiations can be disrupted by various events. For example, court decisions can slow down negotiations, while the impacts of these decision are analyzed. Elections at the provincial, federal and First Nations level can delay decisions or affect negotiation positions. In addition, one or more of the parties may from time to time re-examine positions. For instance, some First Nations have undertaken reorganizations for treaty negotiation purposes and, in 2002, the province held a province-wide referendum on principles for treaty negotiations.

Why Progress is Slow? B.C. Treaty Commission answers.

The B.C. Treaty Commission has also made an assessment of why treaty negotiations have not resulted in signed treaties. The following is their assessment:

The reasons for lack of progress at treaty tables are varied and interlinked:

- differences in parties' positions on key issues;
- First Nations focusing their energies on opportunities outside the treaty process;
- the federal government's position that it will not negotiate with First Nations engaged in litigation;
- shifts in membership of First Nations negotiating groups;
- First Nations' difficulty in obtaining their communities' support or direction for treaty negotiations;
- the province's unwillingness to commit to negotiations with northern First Nations who extend into the Yukon and Northwest Territories; and
- the province's reduction in resources for negotiations and choice of focusing the remaining resources on a few tables.

First Nations we spoke to—that are in the treaty process—attributed the lack of progress in negotiations to more than the reduced presence of the province at the treaty table, however it continues to be a source of their frustration.

2. The evolving state of negotiations has not yet produced a signed treaty

The following is a summary of what we heard from First Nations' representatives both inside and outside the treaty process:

From First Nations in the treaty process:

Negotiation funding. Accumulation of higher negotiation loans than expected has become one of the greatest obstacles to progress in treaty negotiations. It puts First Nations at a disadvantage since governments are not under pressure to close negotiations.

Interim measures. Few measures have been implemented to postpone resource exploitation or protect resources in claimed territory while negotiations continue.

Dispute resolution. The B.C. Treaty Commission treaty process lacks a dispute resolution process for negotiating tables.

Community support. First Nations' support for treaty negotiations can be difficult to maintain in light of the complexity of negotiations, the limited tangible result, the bands' growing debt load and the attention needed for other pressing social and economic problems.

Overlaps. Definitions of traditional territories can cause conflicts between First Nations.

Power imbalance. First Nations have limited capacity to negotiate all subjects that governments want to cover in treaties, while governments have access to many experts.

Mandates. Governments give negotiators narrow and inflexible mandates that leave little room to negotiate.

Alternatives. Options outside the process have drawn some First Nations' attention away from the negotiation table. The relevance of treaty negotiations is questionable when other options are available.

From First Nations outside of the treaty process:

No recognition of rights. The treaty process has been flawed from the beginning because it does not acknowledge Aboriginal rights and involves the surrender of Aboriginal title.

Nature of treaty. Type of treaty offered is archaic and outdated; not in keeping with the kind of relations they would like to establish with the two governments.

The province established a New Relationship policy, but details are still being worked out

In March 2005 British Columbia met with the First Nations Summit, the Union of B.C. Indian Chiefs and the B.C. Assembly of First Nations to develop new approaches to consultation and accommodation. This consultation resulted in a vision for a "New Relationship" that would include:

- developing a new government-to-government relationship with First Nations; and
- establishing new processes and structures for coordination of the management and use of land and resources.

In September 2005, the Premier of British Columbia made a historical speech to the First Nations Summit. He acknowledged Aboriginal rights—the first time any British Columbia premier had done so—with the following statement: "For too long … we did follow a path of denial. There was a denial of rights, of culture, of

2. The evolving state of negotiations has not yet produced a signed treaty

opportunity and equality ... The First Nations and Aboriginal people of Canada have been failed, and we must move forward to rectify that."

The province has also committed significant funds to addressing Aboriginal issues. In 2006, the government passed the *New Relationship Trust Act*, creating a corporation outside government that will provide $100 million in funding to meet the needs and priorities of First Nations.

We found that the ministry is in the process of developing a policy framework to implement the New Relationship. At the time of our audit, it was not clear how the New Relationship policy will be harmonized with the treaty negotiations policy.

Recommendation

The provincial government, in consultation with First Nations, should review and revise as appropriate, its policy goals and approach to the treaty negotiation process; in particular, harmonization with the New Relationship policy.

3. The provision of negotiation mandates should be better managed

Mandates in treaty negotiations are what each party is willing to put on the table, or offer to the other parties. For the province, the offer is a combination of land, resource rights and cash in exchange for defined Aboriginal rights and title.

We expected the province to provide its negotiators with clear, up-to-date mandates regarding its stand on each of the issues that come into play at the treaty table, as well as the reasoning behind those mandates.

Conclusion

Government's processes for providing mandates to negotiators concentrated on the few lead tables are in general, appropriate and appear to be sufficient. Experts from provincial ministries, mandate staff at the ministry, Treasury Board and, on occasion, members of Cabinet provide negotiators with the details and parameters they need to formulate offers.

However, although the job of providing mandates to the lead tables is getting done, support is not easily available to negotiators working at the other tables. The concern is that they are not working with the most recent mandate policies from the various ministries because documentation is not always kept up-to-date. And in some cases, negotiators have been unable to determine the reasoning behind a particular mandate, leaving them without guidance to determine what they could or could not propose or agree to at the table—creating bottlenecks in getting mandates issued to these tables.

Findings

Work plans set up for the negotiation process must be flexible

Overall, the treaty process follows a six-stage framework (see Appendix B, Exhibit 3). Intensive negotiations start after the three parties have signed their "stage 3 framework agreement", which prescribes the structure of negotiation tables, as well as their terms of reference, frequency and location for meetings and, in some instances, a time schedule for achieving agreements.

Work plans are prepared by the three parties to allocate the work and set targets for the various negotiation stages. However, according to negotiations staff, work plans have been difficult

to manage because of the complexity of issues involved and the relationship dynamics at the table. They told us they have learned to be flexible to allow for reassessing issues, mandates, and the influence of those on staff and targets.

Structure of Negotiations

The treaty process consists of main table and side table or working group negotiation sessions between the three parties.

Main table – where the chief negotiators for the province, federal government, and the First Nation and their teams discuss and negotiate their parties' interests and treaty issues and where commitments can be made. Main table sessions may be open to members of the public.

Side or working group table – under the supervision of the main table, these groups work on technical treaty issues and develop draft treaty documents that they present for formal review and approval by the chief negotiators at main table negotiation sessions. A side table usually consists of technical and expert representatives from the three parties. It is also responsible for narrowing the scope of many issues before they are brought to the main table for further discussion and decision making. Side table negotiations are not open to the general public.

Mandates are documented, but are not always up-to-date or backed by rationales

For the province, its mandate offer includes a combination of land, resource rights and cash in exchange for Aboriginal rights and title as defined or modified by the treaty.

Many issues are covered by mandates, including:

- self-government;
- land;
- fisheries;
- forestry;
- mining;
- taxation; and
- overlapping land claims between First Nations.

Generic mandates

The ministry translates broad government policy relating to treaty issues into mandates that define the parameters within which negotiators can negotiate. This primary level of mandate, described as a generic, non-financial mandate (e.g., the province's positions on game or forest management), is the starting point for negotiations. We were told by negotiators that the wording of some of these mandates was such that it could easily be lifted from the mandate manual and used as draft treaty language. We were also told that

certain mandates in the manual are prone to becoming dated. This happens because the province must move forward as economic and environmental circumstances change, or when agreements with First Nations are implemented as a result of legal rulings or new programs.

When budgets were cut as a result of the government's Core Program Review of 2001/2002, ministry staff responsible for mandate changes and updates were reduced. Ministry staff told us that, consequently, they are unable to keep up with documenting new government positions and practices. Staff have been doing their best to provide negotiators with up-to-date information, but as more treaty tables progress, there is potential for oversights to occur.

In 2002, the ministry's treaty negotiation program implemented the Cabinet-approved "breakthrough strategy": the idea of concentrating negotiating efforts and resources on a few lead tables to push for one or more tables to reach treaty settlement. Priority for accessing staff to obtain, or clarify, new government positions and practices has been given to negotiators assigned to these lead tables. Negotiators at the other tables often have to seek out this information by working (mainly through informal networks) with a reduced number of experts from the various ministries to ensure they have up-to-date information with which to negotiate.

Negotiators also told us that rationales for these generic mandates were often not documented, leaving them without guidance to determine what they could or could not propose or agree to at the table. Better access to this type of information would be helpful to negotiators to provide them with more flexibility at the treaty table.

Specific mandates

As negotiations progress, specific financial mandates (e.g., quantum of land and cash to be offered) and specific non-financial mandates (e.g., a change to a generic mandate to remove a deal blocker) are used. Treasury Board must approve financial mandates before they are brought to the treaty table. The lead negotiator works with the province to develop the financial proposal. Since some costs are shared in accordance with a 1993 Memorandum of Understanding, both the Province and the federal government must agree on these before they are brought to the treaty table.

3. The provision of negotiation mandates should be better managed

Negotiators also need approval before discussing specific non-financial mandates at each treaty table. Who approves—the ministry, other affected ministries, Treasury Board or Cabinet—depends on the magnitude of the issue. And the approved mandate can only be used at that particular table.

To ensure that negotiation staff know and use the mandates as intended (and in addition to accessing the generic mandate binders), information is shared on the ministry's Intranet and seminars are presented on specific topics. Additionally, negotiators on the lead tables meet regularly with each other and ministry executive to discuss issues needing resolution and to develop a common approach.

Expertise on administrative policies relating to treaty negotiations is focused on the few lead tables

At treaty tables, issues arise that require specific expertise to help negotiators move forward. To accommodate this requirement, experts from the various ministries (such as those responsible for forests, mining, and land inventory) are assigned to a negotiation team, to provide subject and local area expertise and to receive regular updates on the status of the negotiations. These experts often sit at side tables with representatives from all three parties to discuss issues in detail. They are also available for negotiators to check back with as issues are raised, or if help is needed on specific wording for a treaty section.

These experts have also helped to develop policies and side deals known as interim measures and treaty-related measures. Actions such as these help address immediate needs and concerns that might otherwise slow down or halt the negotiation process. Interim measures usually relate to land. For example, halting the staking of new claims on mineral reserves is an interim measure used when active mining is taking place on land selected, or being considered for selection as treaty settlement land. Treaty-related measures apply to building the capacity of First Nations. Examples include funding an assessment of resource development potential (such as hydro power) or developing a management regime for a resource being considered in the treaty area. Treaty-related measures are usually cost-shared with the federal government.

3. The provision of negotiation mandates should be better managed

We found that this coordination of expertise has been essential to treaty negotiations moving forward. However, since negotiators at the lead tables have first call on these resources, the negotiators at the other treaty tables must obtain advice or help informally whenever it is available. This creates bottlenecks in getting mandates issued to these tables.

We also found that the job of providing mandates to the lead tables is getting done; however, it can create frustration for negotiators and other negotiating partners because the process of making changes to specific mandates can be time-consuming. We were told, that because of the complexity of many issues, experts in the other ministries often need time to assess how change requests might affect policy objectives and other administrative implications.

Provincial mandates sometimes present a barrier to negotiations

Shortly after the new government was elected in British Columbia in 2001, it conducted a mail-in referendum asking citizens whether they supported eight guiding principles of treaty negotiation. Most of the principles were consistent with the positions of previous governments. One exception was the principle that provided that First Nations self-government "should have the characteristics of local government, with powers delegated from Canada and British Columbia." This represented a shift from the Nisga'a agreement where self-government rights had been given constitutional protection within the treaty. The referendum was controversial: many First Nations and non-Aboriginal organizations opposed it. Although there was a low response rate, those votes that did come in endorsed the principles by a large margin.

We found that exclusion of the issue of self-government from the treaty process has slowed progress at the negotiation tables, and for some even has the potential of being a deal breaker.

Another example of how a provincial position is creating a barrier to negotiations is the introduction of the New Relationship initiative. Although the province has promoted this as a means to establish a New Relationship based on respect and recognition of Aboriginal rights and title, the government has not yet determined how this new initiative might impact treaty negotiations. Some First Nations are therefore currently adopting a "wait and see" attitude, which is further slowing negotiations.

3. The provision of negotiation mandates should be better managed

Recommendation

The Ministry of Aboriginal Relations and Reconciliation (MARR), in conjunction with the other ministries involved in treaty negotiations, should improve the administration of the treaty negotiation process by:

- **reassessing the negotiation strategy of focusing only on a few lead tables; and**
- **expediting the mandating processes at MARR and related ministries**

to achieve its long-term goals for getting treaties signed and implemented.

4. Experienced staff lead negotiations, but their numbers may not meet future demand

Successful negotiation requires skilled, well-supported negotiators. A good "deal maker" is someone who is an excellent communicator, understands what the other parties are asking for, knows what can be offered and knows how to identify and overcome the many barriers to success.

We expected the Ministry of Aboriginal Relations and Reconciliation (MARR) to have appropriate processes for recruiting and training negotiators. We also expected it to:

- provide a work environment, where staff are encouraged to maintain and improve their skills and knowledge;
- ensure adequate numbers of negotiators are maintained to handle the work load; and
- plan for the future, to ensure staff are available to replace retiring negotiators and respond to emerging needs.

Conclusion

The provincial treaty program has competent and experienced staff that are devoted mainly to meeting the needs of the few treaty tables close to signing. That is, leaving some tables with the potential to advance waiting in the queue—causing some frustration to the other parties involved. This strategy is based on the expectation that the first few signed treaties will pave the way for more to come, facilitating progress—an expectation that is not held by all parties to the negotiation.

In its work plan, the ministry has identified that over the longer term, the treaty program is likely to lose many of its skilled employees, especially to retirement. The ministry has included strategies to replace them in its succession planning. Also identified, is an immediate shortage of supporting staff in the other ministries. In addition, the ministry sees the need to consider the level of continuing involvement negotiators will provide to implement the treaties, once they are signed. Thus, maintaining an adequate number of experienced staff to respond to emerging needs will be challenging for all ministries involved.

4. Experienced staff lead negotiations, but their numbers may not meet future demand

Findings

Staff roles are well defined and standard hiring practices are followed

We found that the ministry had tools such as organization charts and job descriptions that did a good job of spelling out the duties and responsibilities of negotiators, and of other staff involved in the treaty negotiation. Based on our interviews and file reviews, staff members understand and are carrying out their designated roles.

The ministry follows standard public service hiring practices designed to ensure a merit-based assessment of an applicant's competence to do the job. For negotiators, we found appropriate criteria for determining an individual's qualifications and competencies.

Negotiators improve their skills and knowledge through on-the-job training

We found that staff use the ministry Intranet to share common treaty knowledge. For example, the land and resource chapters of all completed Agreements-in-Principle are posted and available to staff. Staff also share knowledge through weekly meetings, internal workshops and joint sessions with the other ministries involved with treaty negotiations. However, busy travel schedules necessitate on-the-job training and mentorship as the main source of training.

The ministry has identified future challenges in maintaining its negotiations workforce

The government has defined how big a negotiating staff it wants, and has chosen to concentrate that staff at the "lead tables" — those that have signed Agreements-in-Principle and are thought by the province to be moving rapidly forward to a signed treaty. The expectation is that getting a few treaties signed will spur others to complete negotiations. The ministry is aware that some negotiations in earlier stages, not designated as lead tables, would benefit from greater staffing, but it has chosen to stay the course with its focus on the lead tables.

With a view to maintaining the current size of the workforce, the ministry has developed a workforce plan. Through this plan, the ministry has identified both immediate and long-term staff shortages. The most immediate problem is the loss of experienced staff in supporting ministries. For example, negotiation requires

specialized legal services from the Ministry of Attorney General, so the projected retirement there of many senior counsel, who specialize in First Nations issues, could materially hinder treaty negotiations. Within the ministry itself, projections show that 33% of its staff will be eligible for retirement within the next 10 years. And within nine years, it is estimated that 82% of present chief negotiators and more than half of senior negotiators and negotiators will be eligible for retirement.

We were also told about the challenges identified outside the ministry, including a shrinking available workforce as the population gets older; external competition for negotiators to work for the federal and other governments; and, an increased demand for negotiators by other provinces for collaboration and relationship building with their Aboriginal people.

We found that the workforce plan provides strategies to mitigate many of the challenges such as actions to attract negotiators and support staff and to retain current staff.

Recommendation

The Ministry of Aboriginal Relations and Reconciliation, in conjunction with the other ministries involved, should ensure there is an adequate alignment of resources, roles and responsibilities to support the treaty negotiation process.

5. Reporting by government to the Legislative Assembly and the public needs to be strengthened

We expected the ministry to gather timely and balanced information about its treaty negotiation program, including successes and challenges; and, to report it clearly and accurately to the public and the Legislative Assembly.

Conclusion

Although the B.C. Treaty Commission provides an overview of the tripartite treaty process including the status by table, the ministry could do more to report to the Legislative Assembly and the public on the issues, the effort it makes, and the challenges it faces in moving treaty negotiations forward.

Findings

There is no simple measure for assessing success

We found that the original estimates of completion times for signed and implemented treaties were unrealistically short. A lack of benchmarks made success difficult to assess.

We looked to other jurisdictions inside and outside Canada that have signed treaties to see if their treaty environment is comparable to British Columbia's. The difference we found was that the treaties in those jurisdictions had been signed many decades and some even centuries ago. Finding land that is not encumbered as private or with multiple interests attached was much easier than in today's British Columbia. With less unencumbered land to offer, First Nations land needs becomes difficult to accommodate.

Many look to the Nisga'a First Nation treaty as a benchmark for achieving treaty success. The topics included in that treaty have been influential in the formulation of potential treaty content for other treaties currently in process. From start to finish, though, the modern phase of the Nisga'a treaty took almost 25 years to complete.

One way to assess success is to look at the cost and associated benefits of the treaty process. On the benefits side, as treaty negotiations continue, there is no longer a need for First Nations in negotiations to stand up for their rights using blockades and other measures to halt the harvesting of trees and other resources from their traditional territory. Another benefit is that, over time, British Columbia's relationship with its First Nations has improved.

5. Reporting by government to the Legislative Assembly and the public needs to be strengthened

The treaty process has supported First Nations in building their capacity to better manage resources and to assume self-government. Surveys also show that public support of (or at least lack of objection to) treaty-making has increased markedly in the last decade.

Although it is not fair to judge the success of treaty negotiations solely by looking at the number of signed treaties—none after 13 years—we heard disappointment expressed on all sides that the collective effort and desire is not achieving as much as anyone wanted.

The ministry annual report provides relevant but incomplete information

In its 2005/06 service plan report, the ministry indicated the number of Agreements-in-Principle it completed compared with the targets it set. It also noted that the federal election had caused delays in the treaty negotiation process. However, little else was said about the issues and challenges the ministry is facing as it carries out its part in the negotiation process.

For the most part, the three parties have delegated the reporting of treaty progress to the B.C. Treaty Commission. Annually the Commission reports to the British Columbia Legislature and Canada's Parliament on all three parties' successes and challenges at the table. It also produces information packages and education materials, sometimes in partnership with one or more of the three parties, for the general public.

However, we believe the ministry should do more to meet its accountability responsibilities to the Legislative Assembly.

Recommendation

The Ministry of Aboriginal Relations and Reconciliation should report annually on the status of negotiations, the barriers to success and the efforts it has made to overcome those barriers.

Response from the Ministry of Aboriginal Relations and Reconciliation

Response from the Ministry of Aboriginal Relations and Reconciliation

The Province is pleased to respond to the Office of the Auditor General's report,

"Treaty Negotiations in British Columbia: An Assessment of the Effectiveness of British Columbia's Management and Administrative Processes".

The Auditor General and the Province share a common commitment to ensure the effectiveness of the Province's role in the treaty process. The Province appreciates the efforts of the Office of the Auditor General and will use this report to help assess the ongoing effectiveness of our management and administrative processes for treaty negotiations.

The following discussion is intended to provide additional information to help British Columbians better understand and assess the context around the Auditor General's suggestions and the Province's response to specific findings and recommendations.

The province's response will address the key findings and recommendations of the report as outlined in the final section of the foreword.

Key Findings and Recommendations:

1. Modern treaty negotiations have been slower than expected. Business has occurred with First Nations outside of the treaty process. This could hamper the continuing interest of First Nations in the treaty process.

   - *The provincial government, in consultation with First Nations, should review and revise as appropriate, its policy goals and approach to the treaty negotiation process; in particular, harmonization with the New Relationship policy.*

   Modern treaty negotiations have been slower than expected.

   The Province agrees with the Auditor General that modern treaty negotiations have taken longer than expected. In its 2002 review of the BC treaty process the BC Treaty Commission states "Our expectations for comprehensive treaties were unrealistic. We tried to accomplish too much too fast." The report goes on to state that "There are far more First Nations negotiating treaties than was contemplated when the process was designed".

Response from the Ministry of Aboriginal Relations and Reconciliation

Negotiating comprehensive agreements has proven to be a highly complex process covering a broad range of issues with multiple inter-relationships. Engagement in comprehensive negotiations has required all parties to build capacity at a variety of levels. The process has also been influenced by external factors that have affected progress and necessitated changes in approach. For example, elections amongst all treaty partners have resulted in re-assessments of approaches to certain issues at the treaty table. Court decisions, from Delgamuukw in 1997 to Haida and Taku in 2004, have resulted in the need to broaden the thinking on ways to achieve reconciliation.

Business has occurred with First Nations outside of the treaty process. This could hamper the continuing interest of First Nations in the treaty process.

The treaty process was never conceived to limit business activity to those in treaty or until treaties are finalized and the Province did not enter into the process with that in mind. Also, the courts have stated the need to engage with First Nations differently and that treaties are not the only means to resolve issues. Therefore, for many years business has occurred in and outside of the treaty process depending on the needs and goals of the First Nation, province, local government and industry, as well the nature of the activity.

One of the key lessons we have learned from the treaty process has been the need for a range of options to be available to meet the varied needs of First Nations. Some First Nations are far along in the treaty process while others are not and some communities want to focus on social objectives as a priority rather than land and resources as a way to ensure that they are ready to exercise the new authorities made available to them through a treaty. First Nations not in the treaty process also seek economic and capacity building opportunities.

The Province strongly believes that interim agreements, interim treaty measures and other opportunities that may become available through the new relationship can build relationships with First Nations, capacity in communities, and generate economic development for First Nations and for BC in general. Rather than being an impediment to progress on treaties, initiatives such as the Forest and Range Opportunities Agreements offered through the Ministry of Forests and Range represent successes that can move those in the treaty process further along and help encourage others into the treaty process.

Response from the Ministry of Aboriginal Relations and Reconciliation

Agreements should not create a disincentive to success in the treaty process; however, our achievements in moving relations forward with First Nations should not be solely defined by participation in the treaty process or in the signing of a final agreement. The audit findings are to a large extent based on thinking that treaties are an end in themselves. One of the key underpinnings of the New Relationship that has been incorporated into treaty making by the Province is that reconciliation involves ongoing government to government interaction. Treaties and other long lasting agreements are important milestones in defining and deepening those relationships but they are not the whole story.

The Province supports the Auditor General's recommendation that treaty making and initiatives developed under the New Relationship should be harmonized. In fact, the Province is actively working to ensure that the broad suite of initiatives now underway or in development with the help of First Nations leaders will ensure meaningful progress in achieving reconciliation.

The treaty process has been a learning process for all of the parties. The Province's policy goals and approaches to treaty making have evolved throughout the process to address lessons learned and evolving circumstances. The Province's efforts to review and revise policy approaches and goals in the treaty negotiation process will continue in consultation with our partners, especially in light of the recent success we have achieved with three final agreements substantively concluded and under review by the parties and four other tables entered into final agreement negotiations.

The new relationship initiative has involved a monumental effort on the part of the Province and the First Nations Leadership Council recognizing the need for a fresh examination of how to achieve reconciliation and improve relations with aboriginal people overall. While, as the audit notes, the New Relationship was announced in 2005, the Province had acknowledged the reality and importance of aboriginal rights much earlier. As the government noted in its Speech from the Throne on February 11, 2003,

"The future will be forged in partnership with First Nations—not in denial of their history, heritage and culture. It will be won in recognition of First Nation's constitutional rights and title—not lost for another generation because we failed to act."

Response from the Ministry of Aboriginal Relations and Reconciliation

2. The administration of the treaty process including providing negotiators, clear guidance and mandates, although sufficient to move a few treaty tables forward, is burdened with challenges.

- *The Ministry of Aboriginal Relations and Reconciliation (MARR), in conjunction with the other ministries involved in treaty negotiations, should improve the administration of the treaty negotiation process by*:
  - — *reassessing the negotiation strategy of focusing only on a few lead tables; and*
  - — *expediting the mandating processes at MARR and related ministries to achieve its long-term goals for getting treaties signed and implemented.*
- *The Ministry of Aboriginal Relations and Reconciliation, in conjunction with the other Ministries involved, should ensure there is adequate alignment of resources, roles and responsibilities to support the treaty negotiation process.*

The Province agrees that there are many challenges in the administration of the treaty process. Providing clear guidance, mandates and an adequate alignment of resources in the context of government-wide, multi-agency interests and responsibilities is an ongoing challenge for government.

The Province's strategy of focusing on key tables was not developed as, and is not now, a means to cut provincial spending on treaty making. The "breakthrough" strategy is primarily a way to maximize the potential for the most advanced tables to achieve conclusion. It is premised on the principle that lead tables will identify barriers and resolve issues in a variety of means, including evolving mandates, which will translate into solutions and success for other tables—thereby potentially accelerating overall progress.

The Province's approach has, in fact, made a major contribution to the recent successes in the treaty process as outlined above. The province appreciates this recommendation and will continue to ensure effective administration and working relationships are in place to meet the needs of the treaty process.

3. The ministry is providing relevant but incomplete information about the treaty negotiation program. Although it reports the number of Agreements-in-Principle completed compared with targets set, the ministry does not report fully

on the status of other negotiations, the issues and challenges it faces and the effort it has made to overcome these barriers to success.

- *The Ministry should report annually on the status of negotiations, the barriers to success and the efforts it has made to overcome those barriers.*

The Ministry is committed to ensuring that the Legislative Assembly is well informed about the status of the treaty process and we are pleased that the Auditor General has found that relevant information is being provided to the Legislative Assembly about the treaty negotiation program. Reporting to the Legislative Assembly on the treaty process involves submission of the annual service plan of the Ministry of Aboriginal Relations and Reconciliation as well as the annual report of the British Columbia Treaty Commission, the independent and neutral body responsible for facilitating treaty negotiations among the governments of Canada, BC and First Nations in BC.

The Ministry does report regularly to Cabinet on the issues and challenges we face in the treaty process. A Legislative Assembly that is also well informed about the challenges and barriers to success in the treaty process is in the broad public interest. Therefore, the Ministry will seek to improve the way in which the treaty process is reported to the Legislative Assembly specifically regarding the status of other negotiations, issues, challenges and efforts to overcome barriers to success.

Conclusion:

The Auditor General's report highlights the challenges facing the Province in negotiating treaties. The Province agrees with the Auditor general that "…negotiation remains an effective means by which the parties can build the new relationship…". This report will help the Province as we build on the recent successes achieved in the treaty process. Government's relations with First Nations will continue to evolve over time as a result of the changing environment in which we all operate. Ultimately, reconciliation is a journey —not a destination.

Appendices

Appendix A: Detailed Audit Criteria

1. To manage the treaty negotiation process effectively, the Province should:

   1.1 Have an appropriate management and administrative policy framework in place to provide clear goals, objectives and directions to the province's negotiation teams;

   1.2 Ensure that a policy structure and process, with an operational mechanism, is in place to identify and analyze barriers to progress, the effect of legal authorities, and options for change, as well as a strategy for acting on such analysis;

   1.3 Ensure that sufficient and appropriate human, financial and information resources are available to support and facilitate the effective negotiation of treaties, and are grounded in a commitment to continual improvement; and

   1.4 Ensure that there is an effective relationship-building process with First Nations and Canada.

2. To effectively report to the Legislative Assembly and the public, the province should:

   2.1 Ensure timely provision of balanced, transparent and easy to understand information and reports to the public and the Legislature.

These audit criteria are based on:

- Provincial and federal policies and agreements;
- British Columbia Treaty Commission agreement and legislation;
- Guidance published by other jurisdictions, such as the New Zealand Government;
- Accepted negotiation principles; and
- Expert opinions (e.g., "Treaty Negotiations: What works, What doesn't – A Negotiators' Dialogue", Centre for Dialogue, Simon Fraser University).

Appendix B: Modern-day Treaty Process

British Columbia Treaty Commission process established to negotiate treaties throughout B.C.

The Premier's Council on Native Affairs, set up in 1989, recommended that British Columbia move quickly to establish a process for negotiating First Nations land claims. So, in 1990, the British Columbia Claims Task Force was established. Its nineteen recommendations (see Exhibit 3 below) were endorsed by the B.C. First Nations Summit (representing First Nations interested in entering into treaty negotiation), the province and the federal government. Key recommendations included establishing "a New Relationship based on mutual trust, respect and understanding through political negotiations".

The intention was that the three parties would negotiate constitutionally protected modern day treaties. Ground rules included that they were not to be confrontational, the court system would not be used to settle differences, and that participants were to be free to introduce any issue to the negotiations.

The British Columbia Claims Task Force envisaged agreements which would:

- establish the powers and governing responsibilities of First Nation, federal and provincial governments;
- provide certainty as to ownership and jurisdiction over land, sea and natural resources;
- include cash to recognize past use of land and resources, and to provide funding for community and economic development;
- define who is responsible for providing each government service such as resource management, economic development, social development and justice;
- provide certainty through clear definition of rights, duties and authority; and,
- include processes for amending the agreement as necessary.

The Task Force also recommended creating a tripartite British Columbia Treaty Commission (BCTC) to facilitate negotiations.

Appendix B: Modern-day Treaty Process

Exhibit 3 British Columbia Claims Task Force — Nineteen Recommendations

1. The First Nations, Canada, and British Columbia establish a New Relationship based on mutual trust, respect and understanding through political negotiations.
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.
3. A British Columbia Treaty Commission (BCTC) be established by agreement among First Nations, Canada and British Columbia to facilitate the process of negotiations.
4. The Commission consist of a full time chairperson and four commissioners — of whom two are appointed by the First Nations, and one each by the federal and provincial governments.
5. A six stage process be followed in negotiating treaties:

   Stage 1 — Statement of intent to negotiate.

   Stage 2 — Readiness to negotiate assessed by the Commission.

   Stage 3 — Negotiation of a framework agreement. The three parties negotiate a framework agreement that identifies the issues to be negotiated, goals, procedures, a timetable for negotiations and a public information program.

   Stage 4 — Negotiation of an Agreement-in-Principle. The three parties examine in detail the issues identified in the framework agreement in order to reach an Agreement-in-Principle, which forms the basis for the treaty. The parties also begin to plan for implementation of the treaty.

   Stage 5 — Negotiation to finalize a treaty. Technical and legal issues are resolved, to produce a final agreement that embodies the principles outlined in the Agreement-in-Principle and formalizes the New Relationship among the parties. Once signed and formally ratified, the final agreement becomes a treaty.

   Stage 6 — Implementation of the treaty.
6. The treaty negotiation process be open to all First Nations in British Columbia.
7. The organization of First Nations for negotiations be made by each First Nation.
8. First Nations resolve issues related to overlapping traditional territories among themselves.
9. Federal and Provincial governments start negotiations as soon as First Nations are ready.
10. Non-Aboriginal interests be represented at the negotiating table by federal and provincial governments.
11. First Nation, Canadian, and British Columbia negotiating teams be sufficiently funded.
12. The Commission be responsible for allocating funds to the First Nations.
13. The parties develop ratification procedures which are confirmed in the Framework Agreement and Agreement-in-Principle.
14. The Commission provide advice and assistance in dispute resolution as agreed by the parties.
15. The parties select skilled negotiators and provide them with a clear mandate and training, as required.
16. The parties negotiate interim measures agreements before or during treaty negotiations when an interest is being affected which could undermine the process.
17. Canada, British Columbia, and the First Nations jointly undertake public education and information programs.
18. The parties in each negotiation jointly undertake a public information program.
19. British Columbia, Canada, and the First Nations request the First Nations Education Secretariat, and various educational organizations in British Columbia, to prepare resource materials for use in the schools and by the public.

Appendix B: Modern-day Treaty Process

When the BCTC treaty process began in 1992, there was optimism that treaties would be settled quickly.

The British Columbia Treaty Process began with the establishment of the BCTC. Parties were optimistic that treaties would be settled quickly. Senior government officials expected that there would be a significant number of treaties signed within five to ten years. There were also projections that all B.C. treaties would be signed within 15 years.

The first year was spent getting the BCTC up and running, including deciding on how to help First Nations' fund the cost of negotiations. It was negotiated that 80% percent would be provided in the form of repayable loans and 20% from non-repayable grants.

The loans are provided by the federal government. Payment on the loans is generally due once the treaty has been signed. However, if the loans are not fully repaid, for whatever reason, the Province has agreed to reimburse the federal government for half the unpaid amount.

The province also pays 40% of the grant portion of the funding, with federal government paying the balance.

Entry into the treaty process is open to any First Nation having a claim on B.C. territory. First Nations decide how they want to organize or group themselves for treaty negotiations. Based on what they learned from the federal comprehensive claims policy experience, the Task Force estimated that there would be as many as thirty separate negotiations. However, the First Nations organized into smaller negotiation entities than anticipated. So, currently there are 57 First Nations participating in the BCTC treaty process, in 47 sets of negotiations (see Appendix D).

Nine years later BCTC reflected on why treaties are taking longer than expected.

In its 2001 Annual Report, the B.C. Treaty Commission reported that it had identified a number of reasons why treaties were taking longer than expected to complete as follows:

- compensation for past disregard of Aboriginal title and rights was not on the table for negotiation, but First Nations felt it should be;
- readiness for parties to negotiate (mandates, resources and political commitment) was something that required ongoing

monitoring, but was only being done at the beginning of negotiations (at stage 2);

- First Nations were not having much success resolving overlapping claims on their own;
- BCTC's intended role in dispute resolution has been constrained by limited funding and the need for 3 parties at the table to agree to the intervention; and
- interim measure agreements are under used (i.e., agreements that deal with issues requiring immediate action such as restricting commercial access to land and resources under negotiation).

The report also contained a recommendation that the three parties take a different approach to treaty making, by negotiating a series of incremental treaty segments, over time, so that when a final treaty is signed, the New Relationship needed for success will be in place.

In addition to its role in providing advice and facilitating the modern treaty process, BCTC continues to administer treaty negotiation funding to First Nations so that they can prepare for and carry out negotiations on a more even footing with the two governments. For every $100 of negotiation support funding paid out, $80 is a loan from the federal government, $12 is a contribution also from them and $8 is a contribution from B.C.

Its third role, to provide public information and education on treaty making, is done through its website www.bctreaty.net, publications, documentaries and presentations.

Observers of the B.C. treaty process have suggested that chances of successfully achieving treaties could be improved if the B.C. Treaty Commission's role in the following areas was strengthened:

- gatekeeper, so that parties unlikely to be able to achieve treaty do not enter the process;
- co-ordinator of the process of resolving overlapping treaty claims;
- mediator, when strained relations at the table or with outside parties, such as municipalities, is seriously reducing potential for achieving treaty success; and
- "off ramp" manager, for those First Nations in the treaty process, wanting an alternative to achieve reconciliation.

Appendix C: History of Relations with First Nations in British Columbia

First Nations have been in British Columbia for a very long time.

For the thousands of years prior to contact with Europeans, First Nations people—numbering in the hundreds of thousands—lived in what is now British Columbia, thriving on the abundance of salmon and other resources. The very diverse cultures and social organizations of their many tribes have been described as some of the most socially complex hunter-gatherer societies known.

Europeans arrived here in the Eighteenth Century.

In the decades after 1778, when Captain James Cook of the British Navy reached Nootka Sound—on the west coast of Vancouver Island—trading for sea otters expanded rapidly, and Europeans explored much of the coast and interior of British Columbia. Britain, Spain, the United States and Russia made competing claims for the west coast of North America—claims that were fully settled by 1846, with the signing of the Oregon Boundary Treaty between the United States and Britain.

European contact brought disastrous consequences for First Nations people. They were introduced to a number of diseases for which they had not developed natural resistance including small pox, measles, whooping cough, influenza and others. It has been estimated that between 33% to 90% of their population died as a result.

With a minor exception, First Nations were not considered for competing land claims in B.C.

While Britain had resolved competing claims for the area with European nations, it had not resolved claims of First Nations to the land of British Columbia. In the eastern part of the continent, Britain had recognized the interests of First Nations in that land with the Royal Proclamation of 1763. It decreed that First Nations should not be disturbed in the possession of their lands, and specified that only the government could purchase land from them. By the 1850s, many First Nations had signed treaties in Ontario.

This process continued west as far as the Rockies but stopped there. However, it was pursued on Vancouver Island, where the British government had given trading rights to the Hudson's Bay Company. James Douglas, representing the company, made fourteen

land purchases from First Nations in the 1850s, known as the Douglas Treaties.

Homesteading was offered to all, then that and much more was taken from First Nations.

When the mainland of British Columbia became a colony in 1858, Douglas did not arrange any further treaties, apparently due to a shortage of funds. Instead, his government offered settlers and First Nations people equal opportunity to homestead on government land. Colonial administrators assumed that First Nations people would acquire land, abandon their traditional lifestyle and adopt that of the new society, but this did not happen.

After Douglas' retirement in 1864, the new governor, Joseph Trutch, discontinued offering homesteads to First Nations, thus removing their right to acquire government land. He also reduced the size of existing Indian reserves, limited the size of new reserves, and denied the existence or past acknowledgment of their title to traditional lands. No compensation was provided to First Nations for this.

After Confederation, courts rule provinces hold title to government land subject to First Nations rights.

When British Columbia entered Confederation in 1871 responsibility for "Indians, and the lands reserved for the Indians" was allocated to the federal government. However, several years later, the courts ruled that while Canada had legislative jurisdiction over First Nations land, the provinces actually held title to the land—subject to First Nations rights. This means that when treaties are signed in British Columbia, it is the provincial and not the federal government that gains the benefit of freeing land of Aboriginal title.

First Nations attempts to assert their rights through political action were ignored.

As settlers took up land in the new province, First Nations began organized political action. During the 1880s, their leaders began to demand treaties that would "establish a just relationship and guarantee for their peoples' possession of their territories for present and future generations." These demands extended over several

decades but were ignored—as the provincial government continued to deny First Nations' rights.

A province-wide advocate for Aboriginal rights, the Allied Tribes of British Columbia, was formed in 1916. During the 1920s it petitioned to have its case sent to the Judicial Committee of the Privy Council in London. This was at the time the ultimate court of appeal for Canadian cases (indeed, for all cases in the British Empire). Aboriginal land claims in the British Empire had been given a boost by the Judicial Committee's 1921 decision, in *Amodu Tijani v. Secretary, Southern Nigeria*, that Aboriginal title is a pre-existing right that "must be presumed to have continued unless the contrary is established." A few years later, in 1927, Canada amended its *Indian Act* to prohibit raising money for land claims, effectively preventing tribes from hiring lawyers, and the activities of the Allied Tribes subsequently diminished.

Meanwhile, in 1912 the federal and provincial governments had established a joint commission, the McKenna-McBride Commission, to look at reserve size in British Columbia. Over the next few years the Commission heard repeated Aboriginal demands for treaties and larger reserves. First Nations were assured that no reductions in their reserves would occur without their consent. The Commission recommended adding certain lands to Indian Reserves while cutting off other lands. First Nations opposed these proposals, but were assured by the Prime Minister that no lands would be removed without their consent. Several years later, however, the federal government did exactly that.

First Nations also used direct action to assert rights.

Some First Nations took direct action. For example, First Nations near Fort St. John armed themselves, halted the flow of miners to the Yukon, and demanded a treaty. In response, the federal government agreed in 1899 to extend a prairie treaty, Treaty 8, westward into Northeast British Columbia, for several First Nations (the B.C. government took no part in this treaty-making).

Court cases and changing social attitudes lead to modern treaty making process.

Service by Aboriginal and Asian Canadians in Canada's military during the Second World War, and focus on international human rights issues, shifted Canadian views on racial discrimination. So, in

Appendix C: History of Relations with First Nations in British Columbia

1949, British Columbia allowed Status Indians to vote in provincial elections (although Indians were not given the right to vote, without renouncing their rights, in federal elections until 1960).

In 1951 the *Indian Act* prohibition on raising money for land claims was repealed. First Nations once again began pursuing land claims. In 1969, the Nisga'a went to court (*Calder v. British Columbia*), resulting in the 1973 Supreme Court of Canada decision that First Nation title was created by the use and occupation of land prior to European settlement. However, the Court couldn't decide on whether First Nations title had been validly extinguished by colonial or provincial laws.

Nonetheless, the Nisga'a case was a major turning point because after that, the federal government adopted a Comprehensive Claims policy. It said that undefined First Nations rights would be exchanged for a clearly defined package of rights and benefits set out in a settlement agreement—what are now called modern treaties.

Although still problematic, Northern Canadian Treaty negotiations have been more successful.

Between 1975 and 1984 treaties were signed with the James Bay Cree and Inuit of Northern Quebec, the Naskapi of Northern Quebec, and the Inuvialuit of the Mackenzie Delta. Thirteen additional treaties for areas north of the 60th parallel were signed between 1992 and 2005. The time taken to negotiate these agreements varied. The James Bay agreement was concluded within three years after the Quebec Association of Indians applied for an injunction to stop construction of the James Bay hydro project. Other negotiations are still ongoing after over twenty-five years.

Ten of the agreements were made under the Yukon Umbrella, which established a framework for individual agreements. These were the first in Canada to recognize First Nations as a third order of government (in addition to federal and provincial). Their self-government powers included passing laws for governing settlement lands and the people living on those lands, as well as administering government programs (however, rights of self-government were not given the constitutional protection afforded to treaty rights).

Appendix C: History of Relations with First Nations in British Columbia

Constitutional reforms, courts and protests led to provincial negotiation with Nisga'a in British Columbia.

During Canada's process of constitutional reform in the early 1980s, First Nation people called for protection of First Nations and treaty rights. As a result, section 35 of the *Constitution Act*, 1982, "recognized and affirmed" ... "existing Aboriginal and treaty rights," thus prohibiting loss of their title or rights through the passing of laws (prior to 1982, both common law and the constitution allowed the federal government to extinguish First Nations title and rights).

However, British Columbia continued to insist that First Nations title and rights had already been extinguished by colonial and post colonial laws, and were thus not "existing" rights protected by section 35. As a result, B.C. did not initially join in when the federal government and the Nisga'a began treaty negotiations in 1976.

Through the 1980s First Nations used protests, blockades and court injunctions to block resource development and road building projects in several areas around the Province.

As a result, the provincial government reconsidered their concerns. In 1989, the B.C. Premier's Council on Native Affairs was set up and the Ministry of Native Affairs established. A year later the province decided to enter negotiations with the Nisga'a.

Negotiations continued through most of the 1990s, with an agreement in principle signed in November 1998 and a Final Agreement ratified in April 2000. Northern treaties were the model for Nisga'a (especially the Yukon treaties, which included First Nations self-government).

Appendix D: Negotiation Tables — Status as of July 2006

There are 57 First Nations, and groups of First Nations, participating in the B.C. treaty process.

First Nations	Negotiation Stage	Notes
Lheidli T'enneh Band Maa-nulth First Nations Sechelt Indian Band+ Sliammon Indian Band Tsawwassen First Nation Yekooche Nation Yale First Nation	7 First Nations in Stage 5	+The Sechelt Band has disengaged from negotiation but has yet to submit the formal cancellation document.
Carcross/Tagish First Nation* Northern Shuswap (formerly Cariboo) Tribal Council Carrier Sekani Tribal Council Champagne and Aishihik First Nations* Da'naxda'xw Awaetlatla Nation** Ditidaht First Nation *** Esketemc First Nation Gitanyow Hereditary Chiefs Gitxsan Hereditary Chiefs Gwa'Sala-'Nakwaxda'xw Nation** Haisla Nation Heiltsuk Nation Homalco Indian Band Hul'qumi'num Treaty Group In-SHUCK-ch Nation Kaska Dena Council Katzie Indian Band Klahoose Indian Band Ktunaxa/Kinbasket Treaty Council Kwakiutl Nation (in suspension)# Laich-Kwil-Tach K'omoks Council of Chiefs Lake Babine Nation Musqueam Nation 'Namgis Nation Nazko Indian Band Nuu-chah-nulth Tribal Council Pacheedaht Band*** Quatsino First Nation** Snuneymuxw First Nation Sto:Lo Nation Taku River Tlingit First Nation* Te'Mexw Treaty Association Teslin Tlingit Council* Tlatlasikwala Nation** Tsay Keh Dene Band Tsimshian First Nations Tsleil-Waututh Nation Westbank First Nation Wet'suwet'en Nation Wuikinuxv (Oweekeno) Nation	40 First Nations in Stage 4	* Carcross/Tagish First Nation, Champagne and Aishihik First Nations, Taku River Tlingit First Nation and Teslin Tlingit Council negotiate at the Northern Regional Negotiation Table ** Da'naxda'xw/Awetlala, Gwa'sala-'Nakwaxda'xw, Quatsino, and Tlatlasikwala First Nations negotiate as the Winalagalis Treaty Group *** The Ditidaht First Nation and the Pacheedaht Band negotiate at a common table. # The Kwakiutl First Nation has suspended negotiations to pursue issues around their Douglas Treaty
Cheslatta Carrier Nation Hupacasath First Nation Squamish Nation Tlowitsis First Nation	4 First Nations in Stage 3	
Acho Dene Koe First Nation Allied Tribes of Lax Kw'alaams Council of the Haida Nation Liard First Nation McLeod Lake Indian Band Ross River Dena Council	6 First Nations in Stage 2	

Appendix E: Programs and Agreements Outside of the Treaty Process

Forest Revenue. The province and First Nations negotiate forest revenue sharing and access to harvest timber.

Central Coast and North Coast Land and Resource Management Plan. Coastal First Nations and environmental groups negotiated a plan to protect a substantial portion of land under dispute and to co-manage the rest in a sustainable way.

Haida Gwaii Land Use Planning. As a result of litigation and negotiation, the Haida and the province will jointly manage the land in a sustainable way including community planning, revenue sharing, commercial bear hunting, and timber harvesting.

2010 Olympics Agreement. The Squamish Nation and the Lil'wat Nation entered into an agreement with the province to support the 2010 Olympics in exchange for land and cash and a say in the Sea-to-Sky Highway upgrades.

Tsawwassen Delta Port Deal. As part of an out of court settlement, the Tsawwassen First Nation received cash for past and future infringements caused by development of the Roberts Bank port facility.

Appendix F: Office of the Auditor General: Performance Auditing Objectives and Methodology

The Office has three lines of business:

- examining the reliability of the provincial public sector's financial reporting;
- assessing how well the public sector manages its key risks; and
- assessing the quality of provincial public sector performance reports.

Each of these lines of business have certain objectives that are expected to be achieved, and each employs a particular methodology to reach those objectives. The following is a brief outline of the objectives and methodology applied by the Office for assessing how well the public sector manages its key risks.

Performance Auditing

What are Performance Audits?

Performance audits (also known as value-for-money audits) examine whether money is being spent wisely by government—whether value is received for the money spent. Specifically, they look at the organizational and program elements of government performance, whether government is achieving something that needs doing at a reasonable cost, and consider whether government managers are:

- making the best use of public funds; and
- adequately accounting for the prudent and effective management of the resources entrusted to them.

The aim of these audits is to provide the Legislature with independent assessments about whether government programs are implemented and administered economically, efficiently and effectively, and whether Members of the Legislative Assembly and the public are being provided with fair, reliable accountability information with respect to organizational and program performance.

In completing these audits, we collect and analyze information about how resources are managed; that is, how they are acquired and how they are used. We also assess whether legislators and the public have been given an adequate explanation of what has been accomplished with the resources provided to government managers.

Appendix F: Office of the Auditor General: Performance Auditing Objectives and Methodology

Focus of Our Work

A performance audit has been described as:

...the independent, objective assessment of the fairness of management's representations on organizational and program performance, or the assessment of management performance, against criteria, reported to a governing body or others with similar responsibilities.

This definition recognizes that there are two forms of reporting used in performance auditing. The first—referred to as attestation reporting—is the provision of audit opinions as to the fairness of management's publicly reported accountability information on matters of economy, efficiency and effectiveness. This approach has been used to a very limited degree in British Columbia because the organizations we audit do not yet provide comprehensive accountability reports on their organizational and program performance.

We believe that government reporting along with independent audit is the best way of meeting accountability responsibilities. Consequently, we have been encouraging the use of this model in the British Columbia public sector, and will apply it where comprehensive accountability information on performance is made available by management.

As the performance audits conducted in British Columbia use the second form of reporting—direct reporting—the description that follows explains that model.

Our "direct reporting" performance audits are not designed to question whether government policies are appropriate and effective (that is achieve their intended outcomes). Rather, as directed by the *Auditor General Act*, these audits assess whether the programs implemented to achieve government policies are being administered economically and efficiently. They also evaluate whether Members of the Legislative Assembly and the public are being provided with appropriate accountability information about government programs.

When undertaking performance audits, we look for information about results to determine whether government organizations and programs actually provide value for money. If they do not, or if we are unable to assess results directly, we then examine management's processes to determine what problems exist or whether the processes are capable of ensuring that value is received for money spent.

Appendix F: Office of the Auditor General: Performance Auditing Objectives and Methodology

Selecting Audits

All of government, including Crown corporations and other government organizations, are included in the universe we consider when selecting audits. We also may undertake reviews of provincial participation in organizations outside of government if they carry on significant government programs and receive substantial provincial funding.

When selecting the audit subjects we will examine, we base our decision on the significance and interest of an area or topic to our primary clients, the Members of the Legislative Assembly and the public. We consider both the significance and risk in our evaluation. We aim to provide fair, independent assessments of the quality of government administration and to identify opportunities to improve the performance of government. Therefore, we do not focus exclusively on areas of high risk or known problems.

We select for audit either programs or functions administered by a specific ministry or government organization, or cross-government programs or functions that apply to many government entities. A large number of such programs and functions exist throughout government. We examine the larger and more significant of these on a cyclical basis.

Our view is that, in the absence of comprehensive accountability information being made available by government, performance audits using the direct reporting approach should be undertaken on a five- to six- year cycle so that Members of the Legislative Assembly and the public receive assessments of all significant government operations over a reasonable time period. We strive to achieve this schedule, but it is affected by the availability of time and resources.

Planning and Conducting Audits

A performance audit comprises four phases—preliminary study, planning, conducting and reporting. The core values of the Office—independence, due care and public trust—are inherent in all aspects of the audit work.

Appendix F: Office of the Auditor General: Performance Auditing Objectives and Methodology

Preliminary Study

Before an audit starts, we undertake a preliminary study to identify issues and gather sufficient information to decide whether an audit is warranted.

At this time, we also determine the audit team. The audit team must be made up of individuals who have the knowledge and competence necessary to carry out the particular audit. In most cases, we use our own professionals, who have training and experience in a variety of fields. As well, we often supplement the knowledge and competence of our staff by engaging one or more consultants to be part of the audit team.

In examining a particular aspect of an organization to audit, auditors can look either at results, to assess whether value for money is actually achieved, or at management's processes, to determine whether those processes should ensure that value is received for money spent. Neither approach alone can answer all the questions of legislators and the public, particularly if problems are found during the audit. We therefore try to combine both approaches wherever we can. However, because acceptable results-oriented information and criteria are often not available, our performance audits frequently concentrate on management's processes for achieving value for money.

If a preliminary study does not lead to an audit, the results of the study may still be reported to the Legislature.

Planning

In the planning phase, the key tasks are to develop audit criteria—"standards of performance"—and an audit plan outlining how the audit team will obtain the information necessary to assess the organization's performance against the criteria. In establishing the criteria, we do not expect theoretical perfection from public sector managers; rather, we reflect what we believe to be the reasonable expectations of legislators and the public.

Appendix F: Office of the Auditor General: Performance Auditing Objectives and Methodology

Conducting

The conducting phase of the audit involves gathering, analyzing and synthesizing information to assess the organization's performance against the audit criteria. We use a variety of techniques to obtain such information, including surveys, and questionnaires, interviews and document reviews.

Reporting Audits

We discuss the draft report with the organization's representatives and consider their comments before the report is formally issued to the Legislative Assembly. In writing the audit report, we ensure that recommendations are significant, practical and specific, but not so specific as to infringe on management's responsibility for managing. The final report is tabled in the Legislative Assembly and referred to the Public Accounts Committee, where it serves as a basis for the Committee's deliberations.

Reports on performance audits are published throughout the year as they are completed, and tabled in the Legislature at the earliest opportunity. We report our audit findings in two parts: an Auditor General's Comments section and a more detailed report. The overall conclusion constitutes the Auditor General's independent assessment of how well the organization has met performance expectations. The more detailed report provides background information and a description of what we found. When appropriate, we also make recommendations as to how the issues identified may be remedied.

It takes time to implement the recommendations that arise from performance audits. Consequently, when management first responds to an audit report, it is often only able to indicate its intention to resolve the matters raised, rather than to describe exactly what it plans to do.

Without further information, however, legislators and the public would not be aware of the nature, extent, and results of management's remedial actions. Therefore, we publish updates of management's responses to the performance audits. In addition, when it is useful to do so, we will conduct follow-up audits. The results of these are also reported to the Legislature.

Appendix G: Summary of our reports issued in 2006/07

Report 1 – April 2006

Strengthening Public Accountability: A Journey on a Road that Never Ends

Report 2 – September 2006

The 2010 Olympic and Paralympic Winter Games: A Review of Estimates Related to the Province's Commitments

Report 3 – November 2006

Treaty Negotiations in British Columbia: An Assessment of the Effectiveness of British Columbia's Management and Administrative Processes

Each of these reports can be accessed through our web site http://www.bcauditor.com or requested in print from our office.