

**FRAMEWORK FOR “ADVANCING RECOGNITION &
RECONCILIATION” & “IMPROVING THE LIVES OF FIRST
NATIONS PEOPLE” IN BRITISH COLUMBIA**

**Prepared by the First Nations Summit -
a Response to Prime Minister Martin’s Address
to the Canada-Aboriginal Peoples Roundtable – April 19, 2004**

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*Part III will be developed in the next stage of development of this framework. It will address how to measure progress and Prime Minister Martin's proposed Aboriginal Report Card.

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SUMMARY OF RECOMMENDATIONS

The following recommendations represent a framework for addressing key government mandate issues to facilitate progress in the treaty negotiation process in BC, as well as process and structural changes required for reconciliation.

RECOMMENDATION 1 (Canada's Role in Treaty Negotiations – Section 91(24))

In order to meet the commitments of the Prime Minister to Aboriginal people, Canada must:

- i) reaffirm its exclusive constitutional authority under section 91(24) of the *Constitution Act, 1867* for the negotiation and conclusion of treaties in British Columbia,
- ii) recommit to the 19 recommendations of the BC Claims Task Force and the full implementation of those recommendations,
- iii) be proactive in protecting Aboriginal rights, title and interests pending treaties (e.g. through interim protection measures), and
- iv) abandon:
 - the requirement of proof of Aboriginal rights and title by First Nations,
 - the notion of *terra nullius*,
 - the notion that Aboriginal peoples abandoned their traditional territories and their Aboriginal rights and title,
 - extinguishment policies in any form, and
 - its litigate/negotiate policy.

RECOMMENDATION 2 (Canada's Comprehensive Claims Policy)

a) Canada, in collaboration with First Nations, must revise its comprehensive claims policy to be consistent with and reflective of current conventions and common law, including, but not limited to:

- i) explicit and unequivocal recognition of Aboriginal Peoples and Aboriginal title and rights, including the inherent right of self-government and, in particular, that:
 - Aboriginal title is a legal interest in the land itself and extends throughout the entire traditional territory of each First Nation, including the foreshore, seabed and other water bodies,
 - First Nations have a right to choose how the land is used, and
 - Aboriginal title has an inescapable economic component.
- ii) interim land protection, and
- iii) a diversity of land tenure options, including section 35 and section 91(24).

b) Canada must adopt a revised comprehensive claims policy that:

- i) expressly acknowledges and accommodates the need for a variety of negotiating mandates designed to meet the differing circumstances in the various regions of the province, and
- ii) provides that Canada will implement and live up its legal obligations, including:
 - international conventions, and
 - the objectives, spirit and intent of existing and new treaties.

RECOMMENDATION 3 (Certainty – Reconciling Aboriginal title and rights with the assertion of Crown sovereignty)

Canada and British Columbia must review and modify their approaches to certainty in treaty negotiations as follows:

- i) expressly abandon the extinguishment approach to certainty adopted in the historic treaties, including “backdoor” or “two-step” forms of extinguishment, such as the modification and release, and “backup release”, approaches to certainty.
- ii) accept the principle that modern treaties must recognize and affirm existing Aboriginal title and rights and treaty rights and bring them forward into the modern treaty.
- iii) consistent with the principles set out in the Task Force Report, adopt an approach to certainty negotiations which allows for flexible mandates from table to table and which allows for efficiently obtaining changes to the certainty mandate as necessary.
- iv) accept that certainty for all parties will be reflected by the totality of the terms of the Final Agreement and that clarity of intent for each provision will, therefore, be essential.
- v) abandon any effort to force First Nations to accept a specific approach to certainty before the totality of the Final Agreement’s terms are known.
- vi) abandon policies requiring a blanket release of all claims which First Nations may have for past infringements of their Aboriginal rights and title.
- vii) negotiate certainty models which provide for the First Nation’s interests in ensuring certainty of benefits in the face of changing and evolving circumstances by (for example):
 - flexible definitions of rights,
 - inclusion of intergovernmental arrangements for the management of lands and resources, and a legitimate and distinct role for First Nations in decision making in matters affecting their traditional territories and treaty rights, and
 - inclusion of orderly processes regarding Aboriginal rights and title issues not addressed in the treaty or where replacement rights are necessary due to changing circumstances (ending with binding dispute resolution, if necessary).

RECOMMENDATION 4 (Governance)

- a) Canada must renew its Inherent Right of Self-Government Policy, and British Columbia must adopt an approach, to:
 - i) explicitly and unequivocally recognize and affirm First Nations’ section 35 protected inherent right of self-government,
 - ii) expressly recognize that First Nations have the right to exercise their right of self-government and to define their own jurisdictions and systems of governance,
 - iii) recognize that First Nations have the right to determine their own citizenship pursuant to their inherent right of self-government,
 - iv) ensure the negotiation of First Nations jurisdiction, including areas of exclusive and concurrent jurisdiction, necessary to support the First Nation Government,
 - v) ensure the protection of governance provisions under section 35,
 - vi) ensure the negotiation of broader priority of laws provisions necessary to support the First Nation Government and its jurisdictions,
 - vii) ensure the negotiation of rules for governing conflicts of laws,
 - viii) ensure the negotiation of orderly processes to enable the governance component to evolve with changing circumstances,

- ix) ensure the negotiation of clear benchmarks (including how and when) the First Nation will exercise its jurisdictions, and
 - x) ensure the negotiation of implementation issues, such as capacity (e.g. the cost of law-making, establishing infrastructure and institutions).
- b) Canada and British Columbia must:
 - i) support First Nation developed Constitutions and Charters of Rights which protect traditional collective rights and values, as well as individual rights, and
 - ii) not impose the application of the Canadian *Charter of Rights and Freedoms* on First Nations through treaties.
 - c) Canada must negotiate governance with First Nations based on the above principles and not defer to provincial negotiating positions that are contrary to or inconsistent with them.

RECOMMENDATION 5 (Lands and Resources)

- a) Canada and British Columbia must recognize the existence of Aboriginal title and that this title exists throughout the entire traditional territories of First Nations, including the foreshore, seabed and other water bodies.
- b) Canada and British Columbia must fulfill the Crown's constitutional responsibility to conclude land and resource negotiations with First Nations and adopt policies and mandates to ensure that land and resource components in treaties will be sufficient to ensure First Nation sustainability and self-sufficiency. This includes:
 - i) negotiating lands and resources according to First Nations' present and future cultural and economic needs, not a formula approach – in particular, flexible mandates that allow for increasing the quantum of land and cash available in order to provide for viable treaties,
 - ii) negotiating all issues of interests to First Nations in order to increase the likelihood of concluding Final Agreements, including, but not limited to:
 - putting all federal Crown lands, including surplus and non-surplus lands, on the table for negotiation,
 - negotiating foreshore and seabed, and
 - negotiating riparian and other water rights.
 - iii) in addition to negotiating ownership of and access to lands, negotiating intergovernmental arrangements for the management of lands and resources, and other arrangements (e.g. revenue-sharing) with First Nations regarding the entirety of their traditional territories and with respect to all natural resources – prior to treaty (e.g. interim measures, treaty-related measures) and within the treaty itself,
 - iv) consistent with recommendation 16 of the BC Claims Task Force, implement early, interim protection of land and resources, prior to the signing of an Agreement-in-Principle, and
 - v) negotiating with First Nations regarding the range of diverse constitutional land tenure options in agreements that includes section 35 and section 91(24).
- c) Canada and British Columbia must provide early disclosure of their mandates regarding land and cash, prior to Agreement-in-Principle, in order for a First Nation to make informed decisions with respect to treaty negotiations.

RECOMMENDATION 6 (Intergovernmental Management of Lands & Resources)

- a) Canada and British Columbia must:
- i) recognize, as the Supreme Court of Canada has in *Delgamuukw*, First Nations' inherent right to choose the uses to which their lands, and the resources on those lands, are put and, therefore, their right to participate in decision-making regarding those lands and resources.
 - ii) negotiate arrangements with First Nations where the First Nations are co-managers, with supporting jurisdiction, of the lands and resources throughout the entirety of their traditional territories, including the foreshore, seabed and other water bodies,
 - iii) include sufficient funding to ensure long-term, meaningful participation by First Nations in intergovernmental arrangements for the management of lands and resources, and
 - iv) ensure that future federal and provincial budgets include sufficient funding to ensure effective federal and provincial participation in intergovernmental arrangements for the management of lands and resources.

RECOMMENDATION 7 (Consultation & Accommodation)

Canada and British Columbia must work with First Nations to establish workable, government-wide approaches, policies and guidelines that reflect the legal principles and standards set out by the courts, promote meaningful consultation and accommodation, and assist third parties in coming to terms with their own obligation to consult with and accommodate First Nations.

RECOMMENDATION 8 (Fiscal Relationship)

- a) Canada and British Columbia must have flexible mandates that recognize that:
- i) the fundamental objective in all cases, regardless of the size or circumstances of a First Nation, is that every First Nation must be able to fully implement its treaty in a viable, sustainable and rational manner over time,
 - ii) First Nations must be supported in becoming self-determining and in reaching their goals regarding the socio-economic indicators in their communities,
 - iii) treaties must incorporate planning cycles to reflect the fact that the parties cannot possibly predict the full costs associated with the implementation of the treaty over time, and
 - iv) fiscal relationships in treaties must be able to respond to the economic circumstances in the same way that other levels of government operate.
- b) Canada and British Columbia must work with First Nations to develop a process to focus on negotiating fiscal models for treaties that:
- i) meet First Nations' present and future needs,
 - ii) support the First Nation Government,
 - iii) reflect the principles set out in (a) above, and
 - iv) address the following issues:
 - areas of exclusive and concurrent tax jurisdiction to ensure that tax room cannot be removed by other governments,
 - priority of laws provisions necessary to support First Nations Governments,
 - ongoing fiscal transfers that meet a First Nation's growth and needs over time,

- establishing a fiscal relationship that is capable of evolving as a First Nation reaches the socio-economic indicators it has identified for itself,
 - all sources of revenue sharing through arrangements that are ongoing,
 - own source revenue (OSR) (including the definition of OSR, certainty of inclusion rates, linking of phasing in of certainty rates to offsets, and creating a level playing field) ,
 - tax exemption and immunity (including determining the value of the section 87 exemption), and
 - compensation for past, current and proposed infringements of Aboriginal rights, title and interests.
- c) Canada and British Columbia must abandon the approach of negotiating treaties based on only the number of registered status Indians for each First Nation and recognize that each First Nation has the right to determine their own citizenship, pursuant to their inherent right of self-government.

RECOMMENDATION 9 (Separation of FTNO/DIAND)

Canada must separate the Federal Treaty Negotiation Office from the Department of Indian Affairs and Northern Development and place it under the responsibility of the Prime Minister’s Office to focus on the broader objectives of building a new Crown-Aboriginal relationship, improving the lives of Aboriginal people, concluding treaties and facilitating the coordination of efforts across federal department.

RECOMMENDATION 10 (BC Treaty Commission Role: Mandate & Terms of Reference)

The Principals must revise the mandate of the BCTC to assist it in responding to the effectiveness review so that it can be more effective in facilitating negotiations and assisting the parties in working through issues.

RECOMMENDATION 11 (Purpose of Agreements-in-Principle)

Canada and British Columbia must:

- i) formally adopt a policy that every set of negotiations is distinct and that no agreements or provisions of one agreement will be forced upon a First Nation at another negotiation table, and
- ii) include an express provision in Agreements-in-Principle that Canada and British Columbia will not impose the Agreement-in-Principle as a template for negotiations with other First Nations.

RECOMMENDATION 12 (Federal/Provincial Cost-Sharing Arrangements)

Canada and British Columbia must abandon their bilateral negotiations whereby they pre-determine key land and fiscal issues for treaties.

RECOMMENDATION 13 (Loans/contributions)

Canada and British Columbia must forgive First Nations’ treaty negotiation loans and work with First Nations to design contribution funding arrangements that will facilitate treaty negotiations.

INTRODUCTION

Recognition & Reconciliation

On April 19th, 2004, Prime Minister Paul Martin proposed a framework at the **Canada-Aboriginal Peoples Roundtable** for ensuring success in breaking “the cycle of poverty, indignity and injustice in which so many Aboriginal Canadians live” and “making real improvements in their lives and living conditions”, all of which lead to economic self-sufficiency.

From the perspective of First Nations in BC, the proper approach to achieving these goals is through recognition and reconciliation. Recognition and reconciliation are about building bridges to a new and ongoing relationship. **Recognition** means recognizing First Nations as “Peoples” and as the original owners and occupants of the land now known as British Columbia. It also means respecting that the Canadian Constitution recognizes, affirms and protects the special and unique rights arising from First Nations prior occupation of the land. Recognition is an integral part of the ongoing reconciliation required by section 35 of the *Constitution Act, 1982*.

Reconciliation is about building bridges to a new and ongoing relationship. There will always be a Crown-Aboriginal relationship. The goal is to achieve a more positive and peaceful coexistence that is no longer rife with conflict, denial, exclusion and suppression. As discussed at the Roundtable, we need to transform this relationship.

Aboriginal and treaty rights are legitimate, legal and constitutionally protected. In particular, Aboriginal title is a legal interest in the land itself whereby First Nations have an inherent right to manage, occupy, develop and economically benefit from their lands. The governments deny their existence until they are proven in court or negotiated in a treaty. Canada must negotiate with First Nations in good faith to reconcile Aboriginal title and rights with the assertion of Crown sovereignty.

Canada-Aboriginal Peoples Roundtable

Prime Minister Martin identified **six key areas** in particular that require urgent attention and political will to achieve success – including education, health, economic opportunities, housing, measuring progress, and negotiating self-government and land claims agreements. All of these areas are of critical importance to First Nations communities. Other important issues include children and families, justice, language and culture.

All of these issues are inter-related and require a cooperative and coordinated effort by First Nations and the Crown to address them. To be successful, First Nations must be part of the design, planning and implementation of any strategy, policy or approach. As

well, we must set ourselves up for success by ensuring that political solutions filter down to the civil service for effective implementation.

Framework for Advancing Recognition & Reconciliation

This paper will be developed in stages and will set out the vision of the First Nations Summit on how to achieve recognition and reconciliation and constructively address Aboriginal issues to ensure success.

Part I is the first stage of this paper. In it, we provide some of our analysis and propose a framework for addressing key mandate issues in the treaty negotiation process, as well as process and structural changes required for reconciliation to work. The next stages of this paper will be Parts II and III. **Part II** will look at how to improve the day-to-day social and economic conditions of Aboriginal people in BC to break the cycle of poverty. **Part III** will confirm the need for accountability mechanisms to monitor progress.

In our view, proceeding with the framework set out in this paper will lead to the success the Prime Minister speaks of – measurable improvements in the lives of Aboriginal people and workable treaties in BC. It builds upon, and is complementary to, the September 2003, *First Nations Summit-Government of British Columbia Protocol Respecting the Government-to-Government Relationship*, which established the parties' intention to form a partnership to work on building new approaches to materially improve First Nations' quality of life. In our view, a similar partnership with Canada is critical.

The First Nations Summit welcomes this long overdue opportunity to develop a more positive relationship with Canada and developing **a joint framework for achieving reconciliation**.

PART I – TREATY NEGOTIATIONS

A. Mandate Issues

There is a myriad of problems in the treaty negotiation process in BC. In particular, there is a **critical and urgent need for a shift in government structures, policies and mandates** in order to conclude negotiations on land claim and self-government agreements. This has become clear over the past decade, as we have observed the slow pace of negotiations and the points of disagreement that appear to be insurmountable in the parameters of current government mandates.

First Nations and the First Nations Summit have attempted to address these issues at the treaty tables, and the Principals level, but to no avail. We are now elevating them to the Canada-Aboriginal Peoples Roundtable and seek to hold the Prime Minister to his commitment of making Aboriginal issues a priority for Canada.

Government mandates are inconsistent with the direction established by the courts, contrary to the fundamental objectives of First Nations and the Prime Minister, and inconsistent with the properly approved 19 recommendations of the BC Claims Task Force.

In particular, **government pre-occupation with certainty and corresponding mandates are proving to be unworkable.** Canada and British Columbia require First Nations to pay too high a price for a final treaty, most notably with respect to the issue of certainty. As well, in many key areas, such as governance, BC is attempting to lead negotiations to achieve its own objectives and Canada is acquiescing. This approach compounds the problems associated with government mandates themselves.

We note that the BC Treaty Commission (BCTC) still views the BC Claims Task Force's recommendations as "the cornerstone of the treaty process. Adherence to those recommendations is essential to effective negotiations and the achievement of fair and honourable agreements."¹ The BCTC identifies mandate issues as a specific barrier to progress.² We agree with these observations of the BCTC.

The courts have confirmed that once the Crown enters into treaty negotiations, it has a **duty to negotiate in good faith**, which includes protecting the integrity of the negotiations. Mandates need to respond to, and be reflective of the diversity among First Nations in BC and the goal of achieving workable treaties that help to sustain First Nations as Peoples. In this context, we cannot emphasize enough that "one size does not fit all". The First Nations Summit has and continues to fundamentally oppose the forced imposition by Canada and British Columbia of Agreements-in-Principle and Final Agreements as templates for negotiations with other First Nations.

¹ British Columbia Treaty Commission, *Treaty Commission Annual Report 2004* (September 2004) at p. 8.

² *Ibid* at p. 9.

Our **central proposition** in this framework is that Canada work with First Nations to develop positions, policies and mandates consistent with the principles of recognition and reconciliation.

The First Nations Summit intends to address all issues that relate to treaty negotiations in BC. Many, though not all, of these issues are addressed under the following broad headings:

- 1) Canada's Role in Treaty Negotiations – Section 91(24)
- 2) Canada's comprehensive claims policy
- 3) Certainty – Reconciling Aboriginal title and rights with the assertion of Crown sovereignty
- 4) Governance
- 5) Lands and Natural Resources
- 6) Intergovernmental Management of Lands & Resources
- 7) Consultation & Accommodation
- 8) Fiscal Relationship

1 *Canada's Role in Treaty Negotiations – Section 91(24)*

Canada's ongoing refusal to assert and give appropriate expression to its constitutional authority under section 91(24) of the *Constitution Act, 1867* in relation to the treaty negotiation process in BC represents a significant weakness of the negotiation process. Federal treaty negotiators appear to not understand the important implications of Canada's exclusive jurisdiction over "Indians and Lands reserved for the Indians" to the treaty negotiation process and, as the result, there are a number of challenges facing the treaty negotiation process.

Under section 91(24), the Government of Canada has the constitutional authority to address the continued existence of First Nations' Aboriginal title, rights and other interests in and to their respective traditional territories in BC. Canada can negotiate a treaty with First Nations in respect of their rights and interests, even without the consent or involvement of the province, as was demonstrated by the negotiation of Treaty 8. However, rather than assuming the leadership role which its exclusive constitutional authority entitles it to, Canada defers to the provincial government on critical issues such as governance. In this case, BC argues for "delegated", or municipal-style, governance, rather than negotiating on the basis of the recognition of the inherent right of self-government. As well, Canada has not taken steps to press the BC Government to commit to negotiations with transboundary First Nations.

If Canada continues to allow the province to play a leadership role in the treaty process, particularly in terms of negotiation mandates, then that process is doomed to failure.

We support the continuation of tripartite treaty negotiations. However, in order to make the treaty negotiation process work, it is essential that Canada assert the leadership role which its exclusive constitutional authority under section 91(24) entitles it to in relation to the treaty negotiation process in BC.

RECOMMENDATION 1

In order to meet the commitments of the Prime Minister to Aboriginal people, Canada must:

- i) reaffirm its exclusive constitutional authority under section 91(24) of the Constitution Act, 1867 for the negotiation and conclusion of treaties in British Columbia,***
- ii) recommit to the 19 recommendations of the BC Claims Task Force and to the full implementation of those recommendations,***
- iii) be proactive in protecting Aboriginal rights, title and interests pending treaties (e.g. through interim protection measures), and***

iv) abandon:

- ***the requirement of proof of Aboriginal rights and title by First Nations,***
- ***the notion of terra nullius,***
- ***the notion that Aboriginal peoples abandoned their traditional territories and their Aboriginal rights and title,***
- ***extinguishment policies in any form, and***
- ***its litigate/negotiate policy.***

2 Canada's comprehensive claims policy

The 1986 federal comprehensive claims policy, which guides Canada's participation in all treaty negotiations and aims to achieve finality with respect to "land-based" Aboriginal rights, is outdated and entirely inconsistent with the common law. The Supreme Court of Canada, in its November 2004 decisions in *Haida*³ and *Taku*⁴, confirmed the Crown's honourable duty to *protect* First Nations' Aboriginal rights, title and interests as the parties pursue reconciliation through negotiation. To date, the government's objective of finality has translated into extinguishment of Aboriginal land rights. First Nations in BC have consistently rejected this approach.⁵ This policy represents a fundamental flaw in the treaty negotiation process.

BC is the only province where reconciliation of pre-existing Aboriginal title and asserted Crown sovereignty through treaties is largely outstanding.⁶ Further, the Crown continues to alienate lands that may be important to concluding treaties. Crown policy must recognize the existing Aboriginal interest in the lands and resources and provide for interim measures to protect these lands in order to increase the likelihood of successfully concluding agreements.⁷ Further, there needs to be particular recognition of the urgent need for protecting lands for First Nations situated in urban locations. An updated policy must also provide for a diversity of land tenure options for treaties and otherwise, including section 91(24) and section 35 land status and incorporate the express recognition of the inherent right of self-government – which it is currently lacking. Land and governance are inextricably linked and, so, federal policy guiding its participation in treaty negotiations must reflect this connection.

Crown policy must expressly provide for the development of different negotiating mandates that reflect and accommodate the differing circumstances of First Nations in the various regions of the province. It is beyond doubt that the current "one size fits all" approach that government negotiators bring to the treaty tables not practical or workable and must be abandoned. Crown policy must accommodate the significant differences existing between, for example, a First Nation in the southern part of the province and a First Nation involved in northern or transboundary treaty negotiations. Accordingly, it is essential that Canada adopt policies and mandates that accommodate the great differences that exist amongst First Nations in various regions of the province.

³ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.

⁴ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74.

⁵ For example, on January 28, 2000, the Assembly of First Nations, the Union of BC Indian Chiefs, the Interior Alliance and the First Nations Summit issued a joint Statement noting that the Comprehensive Claims Policy is predicated on the denial of our Aboriginal rights and title and that we categorically rejected the policy and Canada's implementation of it.

⁶ The only existing treaties in BC are the Douglas Treaties on Vancouver Island, Treaty 8 in the northeastern part of the province and the Nisga'a treaty in central BC.

⁷ The current lack of land protection is having serious consequences in the treaty negotiation process. For example, the Musqueam First Nation has been forced to litigate in an effort to protect key lands that the First Nation intends to be subject to treaty negotiations from alienation by Land and Water BC, a provincial Crown corporation.

Arising from a tripartite review of the treaty negotiation process after the Supreme Court of Canada decision in *Delgamuukw*⁸ was an April 29, 1998 “Statement on Aboriginal and Crown Title”. In this statement, the Principals politically agreed to the negotiation of treaties respecting the following principles:

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

In our view, these principles must be reaffirmed and reflected in government policies and negotiation mandates. Further, Canada must adhere to the legal principles established by the courts that affirm the existence of their Aboriginal rights and title. If Canada fails to address First Nations’ expectations and recognize Aboriginal title and rights, including the inherent right of self-government, we do not see treaties being concluded.

Finally, Canada must commit to achieve the broad objectives, spirit and intent of treaties within the context of a new relationship, as opposed to be merely complying with narrowly defined obligations at a technical level.⁹ This commitment and follow-through is necessary for successful treaties to be concluded.

RECOMMENDATION 2

- a) ***Canada, in collaboration with First Nations, must revise its comprehensive claims policy to be consistent with and reflective of current conventions and common law, including, but not limited to:***
 - i) ***explicit and unequivocal recognition of Aboriginal Peoples and Aboriginal title and rights, including the inherent right of self-government and, in particular, that:***
 - ***Aboriginal title is a legal interest in the land itself and extends throughout the entire traditional territory of each First Nation, including the foreshore, seabed and other water bodies,***
 - ***First Nations have a right to choose how the land is used, and***
 - ***Aboriginal title has an inescapable economic component.***

⁸ (1997), 153 D.L.R. (4th) 193.

⁹ See Land Claim Agreement Coalition, “A New Land Claims Implementation Policy” (2004). See also the Auditor General of Canada’s 2003 Report, which comments on the federal government’s focus on discharging obligations rather than meeting objectives to be a matter of fundamental disagreement between the Auditor General’s Office and the Department of Indian Affairs and Northern Development.

3 *Certainty – Reconciling Aboriginal title and rights with the assertion of Crown sovereignty*

Certainty for First Nations will evolve out of the governments' **genuine recognition** and affirmation of First Nations inherent rights and title to their homelands. Treaties will emerge if Canada and British Columbia are sincere in their efforts to **reconcile** these pre-existing title and rights with Crown title.

Canada's approach to developing certainty models has been to meet the certainty and finality requirements of its outdated comprehensive claims policy. Canada developed its most recent "non-assertion/fall-back release" model to achieve *substantially the same finality* as either the "modification/release" technique approved for the Nisga'a Agreement, or the "up-front surrender" in other land claim agreements -- therefore meeting the certainty and finality requirements of Canada's comprehensive claims policy.¹⁰ Further, Canada's position is that the release for past infringement of any land-based rights in its new technique is *essential to provide certainty for third parties and developers and government* with regard to the use of land and other resources.

As noted by the Royal Commission on Aboriginal Peoples, "federal negotiators do not have the authority to depart from existing comprehensive claims policy. Without significant policy changes, therefore, extinguishment of Aboriginal title will remain one of the criteria for any new treaties in British Columbia."¹¹ **Certainty is a two-way street** and treaties must provide certainty to First Nations that they will be able to preserve their distinct cultures, achieve self-sufficiency and protect the exercise of their rights. Governments, acting honourably, cannot continue to seek certainty only for themselves and third parties through the negotiation of treaties and other agreements.

Canada and British Columbia have publicly stated they will not seek extinguishment of Aboriginal rights and title. As well, the Principals also issued a tripartite "Statement on Certainty Principles for Treaty Negotiations in British Columbia" on April 28, 2000. These principles included the following:

- 1) Certainty in a treaty is achieved by providing predictability and clarity in relation to:
 - a. rights to ownership and use of land and resources in the area to which the treaty applies,
 - b. the jurisdictions, authorities and the relationship of laws in the area to which the treaty applies, and
 - c. the First Nation's rights recognized and affirmed by s.35 of the *Constitution Act, 1982*,
- 2) Certainty in a treaty is also achieved by providing for the resolution of claims of past infringements of Aboriginal rights, and by providing mechanisms for resolving disputes amongst the parties.

¹⁰ "Canada's Approach for Dealing with Section 35 Rights", Ministerial Recommendations to Cabinet – November 24, 2000 at p.2

¹¹ From "Restructuring the Relationship - Part Two", Vol. 2, *Report of the Royal Commission on Aboriginal Peoples*, Volumes 1-6 (Ottawa: Supply and Services, 1996) at 542.

- 3) However, achieving certainty is not limited to a few provisions of the treaty. It is found in the clear, detailed and precise manner in which rights and obligations, and the relationship between those rights and obligations, are carefully defined or set out.
- 4) Achieving certainty also requires full implementation of the treaty and assurance that the treaty can be relied upon by all persons.

However, while the governments may not insist on the specific terms “extinguishment” and “cede, release and surrender”, the operation of the proposed “modification/release” model will nevertheless have the *effect* of extinguishing certain Aboriginal rights, including certain governance rights. The inconsistency between political statements made by the governments and their approach at the negotiation tables is contrary to the principles of good faith negotiation. As noted by the BCTC, “Canada continues to insist on a form of release that poses a serious challenge to First Nations.”¹²

The governments are proposing certainty models that are incomplete and, therefore, unworkable. In particular, they do not provide for the resolution of potential issues that conceivably may arise, such as when replacement rights are needed due to the diminishment of a negotiated right. Rather, the governments are insisting that every subject-matter be finally negotiated in the treaty, leaving no room for future change which could be achieved without having to formally amend the treaty.

Each and every right, area of jurisdiction and exercise of power cannot be contemplated at the time that the treaty is being negotiated and there are legal mechanisms that can enable the treaty to evolve in response to legal or other changes without formal amendment. This would enable the parties to keep the treaty viable and relevant. To require otherwise would mean that decisions First Nations make today regarding their constitutionally protected rights, as defined in a treaty, may be rendered valueless by changes in conditions over the long term. Some of these changes may be within the control of Canada or British Columbia (e.g. land use decisions), while others may not (e.g. climate change).

Flexibility and recognition of the need for change and adaptation to unforeseen circumstances are **fundamental aspects of constitutional interpretation** in Canada.¹³ The “frozen rights” approach to constitutional interpretation was rejected by the Privy Council and the courts set out the “living tree” doctrine which recognizes that the Canadian Constitution is indeed capable of evolution with the changing circumstances of the country.¹⁴ As constitutional documents, treaties must retain the flexibility to adapt to changing circumstances. Failure to draft a treaty with a view to both the present and to the (unknown) future would fail to achieve the ongoing reconciliation purpose that the courts have mandated for section 35.¹⁵

¹² *Supra* note 1 at p. 12.

¹³ Options for making changes within a treaty, prepared by Bob Freedman (Cook, Roberts), August 19, 2004.

¹⁴ *Ibid.* See *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136.

¹⁵ *Ibid.*

In order to achieve certainty, there needs to be **sufficient protection of the substance of the treaty**. This can be achieved in a number of ways. For example, intergovernmental arrangements for the management of lands and resources throughout a First Nation's traditional territory can be a means of recognizing a First Nation's legitimate role in the management of lands important for the protection of treaty rights. Another example would be the **adoption of orderly processes** that do not require formal amendment of the treaty to deal with such things as unforeseen issues, changes in the international legal regime or changes in the definition of particular Aboriginal or treaty rights. This would allow for the parties to expressly leave open issues related to the definition of specific rights that may be difficult or impossible to define at the present (for example, rights related to presently commercially non-viable fish species). The BCTC observes that "an orderly process for the consideration or addition of rights not included in a treaty has been identified as a key issue in these negotiations."¹⁶

Other issues arise from the governments' proposed certainty model. For example, Canada and British Columbia are trying to eliminate the current legal interpretive principles that First Nations fought hard to gain through their proposed certainty provisions. In our view, the **common law interpretive principles** set out by the courts can be used by the parties as a tool for negotiating sound and effective certainty provisions in treaties.

Another difficulty arising from the certainty model put forward by Canada and British Columbia in the context of British Columbia's proposal is that most of the First Nation's **governance powers** would be set out in a separate agreement that is not protected under section 35. First Nations are not satisfied that effectively exchanging their constitutionally protected Aboriginal right of self-government for a governance agreement that is not protected under section 35 will benefit them in any way.

Canada must abandon its policy of requiring a blanket release from "all claims in relation to past infringements of any Aboriginal rights, which infringement occurred before the effective date of an agreement", currently found in AIPs. This captures both land and non-land based infringements, such as residential school issues, loss of language, and so on. This approach raises serious concerns, given the governments seek governance agreements that are not protected under section 35. It is unreasonable to expect First Nations to release their section 35 protected right of self-government for a package of jurisdictions that are not protected under section 35, while also seeking a release for claims of past infringement where there is no compensation package provided in return.

Further, the release that the governments are seeking in that regard goes well beyond the release required elsewhere in Canada. Such a release is clearly not required in order to achieve certainty in relation to lands and resources in BC; and, such a release is entirely inconsistent with the recommendations made to Cabinet regarding federal

¹⁶ *Supra* note 9.

requirements in relation to “certainty” in November 2000.¹⁷ It is inappropriate for the governments to require this comprehensive release of the claims of First Nations to past infringements of their Aboriginal rights and title, while at the same time refusing to provide any compensation in consideration of such a comprehensive release.

Achieving certainty when governments and First Nations hold diametrically opposing views is the **most challenging and fundamental issue in treaty negotiations**. The Crown must revise its mandates to recognize Aboriginal title and rights, uphold the honour of the Crown and be: reflective of the law, supportive of good faith negotiations, and consistent with well-established principles of international law.

RECOMMENDATION 3

Canada and British Columbia must review and modify their approaches to certainty in treaty negotiations as follows:

- i) expressly abandon the extinguishment approach to certainty adopted in the historic treaties, including “backdoor” or “two-step” forms of extinguishment, such as the modification and release, and “backup release”, approaches to certainty.***
- ii) accept the principle that modern treaties must recognize and affirm existing Aboriginal title and rights and treaty rights and bring them forward into the modern treaty.***
- iii) consistent with the principles set out in the Task Force Report, adopt an approach to certainty negotiations which allows for flexible mandates from table to table and which allows for efficiently obtaining changes to the certainty mandate as necessary.***
- iv) accept that certainty for all parties will be reflected by the totality of the terms of the Final Agreement and that clarity of intent for each provision will, therefore, be essential.***
- v) abandon any effort to force First Nations to accept a specific approach to certainty before the totality of the Final Agreement’s terms are known.***
- vi) abandon its policy of requiring a blanket release of all claims which First Nations may have for past infringements of their Aboriginal rights and title.***

¹⁷ *Supra* note 7.

vii) negotiate certainty models which provide for the First Nation's interests in ensuring certainty of benefits in the face of changing and evolving circumstances by (for example):

- **flexible definitions of rights,**
- **inclusion of intergovernmental arrangements for the management of lands and resources, and a legitimate and distinct role for First Nations in decision making in matters affecting their traditional territories and treaty rights, and**
- **inclusion of orderly processes regarding Aboriginal rights and title issues not addressed in the treaty or where replacement rights are necessary due to changing circumstances (ending with binding dispute resolution, if necessary).**

4 Governance

First Nations have pre-existing inherent rights, responsibilities and authority to govern their territories as a whole and to exercise authority over their citizens wherever they are. The inherent right of self-government has been confirmed by the courts. As the BC Supreme Court in *Campbell* stated:

...a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership *to make decisions* about that occupation and use, matters commonly described as *governmental functions*. *As an unextinguished right, the right to self-government is protected by s.35 of the Constitution, and may be defined and given content in a treaty...*¹⁸
(emphasis added)

First Nations must exercise a full range of jurisdictions in order to govern effectively and to achieve political, social and economic self-sufficiency at standards that the First Nation determines for itself. First Nations want to **enjoy a standard of living that they determine for themselves**. Some have articulated this to mean enjoying standards which are reminiscent of their rich and vibrant pasts, prior to the onset of colonialism, and that have some comparability with the standards prevailing in the rest of Canada. This includes providing adequate levels of services to their citizens and maintaining their traditional roles as stewards throughout their territories (i.e. decision-making power). Thus, the implementation of their inherent right of governance will be a fundamental component of treaties.

To survive as distinct Peoples, First Nations **require clear, and in some cases exclusive, law-making authorities** to:

- fulfill their governmental functions,
- build on their traditions of governance,
- restore the health and well-being of their people and communities,
- protect and strengthen their cultures and preserve their languages, and
- develop resource and other economies in a sustainable manner that preserves their lands and resources for future generations.

A treaty must therefore clearly set out the parties' respective jurisdictions and authorities, as well as rules for priority of laws (paramountcy) and conflicts. The First Nations Summit has adopted the following governance principles as guiding principles for negotiations¹⁹:

Treaties or Agreements will include provisions that:

1. recognize and affirm the First Nation inherent right of self-government,
2. recognize and affirm the exclusive areas of jurisdictions of First Nations,

¹⁸ *Campbell v. British Columbia (Attorney General)* 2000 BCSC 1123 at para 114.

¹⁹ First Nations Summit Resolution #0602.06 "Adoption of Governance Principles".

3. recognize and affirm the areas of paramount/concurrent jurisdiction of First Nations,
4. ensure that First Nations have the jurisdiction and paramouncy of laws necessary to effectively implement the Treaty or Agreement,
5. ensure First Nations have sufficient revenue, resources and capacity to implement the Treaty or Agreement,
6. recognize and affirm that First Nations have Aboriginal rights to and economic interests in their lands and resources throughout their territories,
7. recognize, affirm and ensure the legitimate role of First Nation governments in all land and resource management and decision-making processes within or affecting their territories,
8. ensure that federal and provincial settlement legislation required to give effect to First Nation Treaties or Agreements is paramount over all other federal or provincial legislation, and
9. ensure that First Nation laws, programs and services can apply to First Nation citizens regardless of place of residence.

Canada and British Columbia must negotiate governance with First Nations based on **express and unequivocal recognition of the inherent right of self-government**. They must abandon the “delegated”, municipal-style, governance model, where the separate governance agreement is not protected under section 35.²⁰

Canada and British Columbia must also reverse the unprecedented policy of requiring First Nations to agree that, under the terms of a treaty, a First Nation’s laws will not apply to either Canada or the province. Canada’s support for such a policy is a cause for concern among First Nations in BC. Never before in the modern history of treaty and land claims negotiations has Canada concluded an agreement containing such a provision and, in our view, there is no just or honourable reason for requiring it in BC. To continue to do so will only result decrease the likelihood of concluding and ratifying treaties in BC.

Further, we point out that **unilateral attempts** by Canada to address First Nations self-government in the past **have failed**. For example, INAC’s proposed *First Nations Governance Act*, which would have amended the current *Indian Act*, did not have the support of First Nations in BC. It impacted on self-government negotiations and would have interfered with First Nations efforts to strengthen their traditional systems of governance. While First Nations support the objective of First Nations governments’ accountability (the purpose of this legislative initiative), they opposed the unilateral imposition of federal legislation to achieve this.

As well, Canada’s bottom line approach that the *Charter of Rights and Freedoms* must apply to First Nations as it does to the other governments in Canada ignores the unique history and traditions of First Nations governance in BC. The *Charter* cannot be imposed to undermine First Nations inherent right of self-government, which is protected under section 35.

²⁰ The Government of Canada has negotiated section 35 protected governance components elsewhere in Canada. See for example, the recent Labrador Inuit Land Claims Agreement. This option must be available in BC as well.

The Crown has a responsibility to negotiate to ensure First Nations governments are well supported by all of the components of the treaty. They must negotiate a land and resource base capable of sustaining the First Nation, as well as a sufficiently broad range of powers for First Nations governments (that other governments cannot override) to enable them to function as governments. Canada and British Columbia must also work with First Nations to make the implementation of the governance component workable and affordable. For example, orderly processes must be negotiated to enable the governance component to **evolve with changing circumstances**. As well, the parties must address implementation issues, such as the high cost of making laws post-treaty. First Nations require sufficient revenue, resources and capacity to implement their treaties. Also, improved intergovernmental relationships and cooperation will be required to support capacity building and ongoing treaty implementation (e.g. government-to-government agreements, protocols).

As identified in the Roundtable Report, “success of the renewed relationship will be dependent on a Nation-to-Nation - Government-to-Government approach, recognizing the Government of Canada’s fiduciary relationship with First Nations.”

RECOMMENDATION 4

- a) Canada must renew its Inherent Right of Self-Government Policy to:**
- i) explicitly and unequivocally recognize and affirm First Nations’ section 35 protected inherent right of self-government,**
 - ii) expressly recognize that First Nations have the right to exercise their right of self-government and to define their own jurisdictions and systems of governance,**
 - iii) recognize that First Nations have the right to determine their own citizenship pursuant to their inherent right of self-government**
 - iv) ensure the negotiation of First Nations jurisdiction, including areas of exclusive and concurrent jurisdiction, necessary to support the First Nation Government,**
 - v) ensure the protection of governance provisions under section 35,**
 - vi) ensure the negotiation of broader priority of laws provisions necessary to support the First Nation Government and its jurisdictions,**
 - vii) ensure the negotiation of rules for governing conflicts of laws,**
 - viii) ensure the negotiation of orderly processes to enable the governance component to evolve with changing circumstances,**
 - ix) ensure the negotiation of clear benchmarks (including how and when) the First Nation will exercise its jurisdictions, and**

- x) ***ensure the negotiation of implementation issues, such as capacity (e.g. the cost of law-making, establishing infrastructure and institutions).***
- b) ***Canada and British Columbia must:***
 - i) ***support First Nation developed Constitutions and Charters of Rights which protect traditional collective rights and values, as well as individual rights, and***
 - ii) ***not impose the application of the Canadian Charter of Rights and Freedoms on First Nations through treaties.***
- c) ***Canada must negotiate governance with First Nations based on the above principles and not defer to provincial negotiating positions that are contrary to or inconsistent with them.***

5 *Lands and Resources*

Land is a central issue for all parties in treaty negotiations and is a core matter that must be resolved in order to reach agreements that meet all parties' goals. A workable comprehensive land claim must provide First Nations with **a secure and sufficient land base to meet the First Nation's needs for the present and into the future**, including the ability to develop an economy to support its people and to continue their way of life. This will not be achieved if measures are not taken to ensure that an adequate land base is available at the time a treaty is concluded. The acquisition and protection of land is a vital component of any treaty settlement and governments must work to make lands available.

Currently, **four key government policy barriers** are preventing significant progress at treaty tables with respect to lands. They are:

- a lengthy and uncertain land selection process,
- lack of interim land protection,
- an unworkable and inappropriate formula approach to valuation of land and cash offers, and
- inflexible positions on the status of lands held under treaty.

Negotiations of Lands

The governments' "land selection process" has hindered progress at many tables. In particular, the governments have stated that they have no specific land/cash mandate until a table is near conclusion of an Agreement-in-Principle. A table can be 10 years into the process before the First Nation finds out the governments' mandate and can assess its acceptability from its own perspective.

Early knowledge of the land package is essential for First Nations to negotiate the integrally connected resource and jurisdictional issues in a treaty. First Nations require timely and full disclosure in order to make informed decisions about land. Such disclosure must include at a minimum (1) information on current land status, including subsurface status, (2) identification of land which the Crown may consider 'essential' to retain ownership of post-treaty, and (3) clear and full information on valuation of lands so that informed decisions can be made regarding lands (e.g. choosing between willing-seller lands and Crown lands).

Further, the governments are insisting that certain key issues are not on the table for negotiation, contrary to recommendation 2 of the BC Claims Task Force Report, which provides that each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship. Currently, the governments will not negotiate issues such as federal Crown lands, water bodies or riparian rights. Some of these lands and water issues may be viewed as essential to a land package for First Nations and making them available for negotiation may help the parties make progress. Canada must revise or abandon its current surplus lands policy so that it is

not a barrier to progress in negotiations. Further, the governments insist that existing Indian reserves will form part of the land package. Given their per capita formulas that strongly influence land quantum, this is problematic and unacceptable.

‘Comparability’ Formulas Create Inequitable Land Packages

First Nations are seeking treaties that secure ownership and jurisdiction over lands that will enable them to become self-sufficient and to protect and preserve their cultures. Federal policy which sets out ‘comparability’ of land and cash values for settlements of land claims has led to very problematic proposals in BC. This policy appears to place a comparatively low per-hectare value on lands in northern regions and high values on lands in southern areas. Governments offer northern communities more ownership and jurisdiction of their traditional territories, while southern First Nations are offered much smaller areas.

In northern areas where offers may be larger, the valuation approach appears arbitrary in how much Crown land is available for selection, putting the onus on First Nations to make the impossible decision of identifying lands for treaty settlements .

In southern areas, small land offers are not balanced with options that provide certainty and that recognize these First Nations’ continuing aspirations to have meaningful connections to, jurisdiction over and benefits derived from their territories. Without such options, these First Nations are faced with the additional pressure in the negotiation process of having to prioritize economic, residential and cultural land uses. While certain lands may have a high potential value from a development perspective (and economic development is generally important to First Nations), First Nations with small land offers will be put into the compromised position of having to choose between using lands for much needed economic development purposes and future residential or cultural uses. Further, the small land quantum and lack of serious discussions about intergovernmental arrangements for the management of lands and resources would place considerable strain on the small parcels of land that First Nations would retain through their treaties. First Nations would be left with no certainty that they could continue to exercise their Aboriginal or other rights negotiated under the final agreement — the fundamental purpose of treaties – as the land base they control would be too small and their ability to influence the activities carried out elsewhere in their traditional territory would be minimal, if not negligible.

Another issue is that Aboriginal title to the foreshore and seabed located within First Nations’ traditional territories is currently not within the mandate of federal or provincial negotiators to discuss. Ownership options for these areas must be on the table in order to address First Nations’ cultural and economic aspirations.

These very limited mandates make it difficult to convince First Nation members that treaty negotiations will lead to a better outcome than the status quo or litigation. Long-term certainty will require larger land bases and cash components, and approaches that recognize and preserve cultural connections. First Nations require a

sufficient land base that will allow for economic and cultural sustainability now and into the future.

Ongoing Alienation of Lands & Lack of Interim Protection

While treaty negotiations proceed, government decisions to **continue to alienate lands and resources** pending treaties are creating significant tension. First Nations are extremely concerned that there will not be adequate lands and resources at the end of the day to support workable treaties and to maintain their ties to their traditional lands, particularly in urban areas where the limited Crown land is being systematically “cherry-picked” for sale by Land and Water BC (LWBC). As noted by the BCTC, “a scarcity of Crown land for treaty settlements is an issue taking on greater urgency as treaty negotiations gain momentum in southern Vancouver Island, the Lower Mainland and the Fraser Valley.”²¹

The Principals’ accepted recommendation 16 of the BC Claims Task Force, which recommended that the parties negotiate interim measures agreements *before or during the treaty negotiations when an interest is being affected which could undermine the process*. The BCTC still holds the view that interim measures are key to success. In its most recent Annual Report the BCTC states that “of key importance is the need for interim measures as an early form of mutual recognition pending the completion of treaties.”²² Further, the BCTC “is urging the governments of BC and Canada to protect available Crown land, both surplus and underutilized land, on an interim basis pending the settlement of treaties and to consider potential economic opportunities for First Nations in buildings now owned by either the federal or provincial governments.”²³

The Supreme Court of Canada decisions in *Haida* and *Taku* support the negotiation and implementation of interim measures to protect Aboriginal interests pending treaties to avoid “unfortunate consequences” such as having the land and resources “changed and denuded” by the time that the distant goal of proof or settlement is finally reached.

On April 28, 2000, the Principals issued “A Statement on Interim Measures Principles for Treaty Negotiations in British Columbia”, which stated:

- 1) The Principals support the timely negotiation of interim measures in accordance with recommendation 16 of the British Columbia Claims Task Force Report...
- 2) The objective of interim measures (including Treaty-Related Measures) is to support and facilitate the treaty process by, for example, building relationships/partnerships, building capacity, providing tangible benefits, resolving contentious issues, and balancing interests.
- 3) There are a range of options for interim measures: capacity building initiatives, economic opportunities, governance-related initiatives, and *measures to protect land and resources*.

²¹ *Supra* note 1 at p.13.

²² *Ibid* at p. 3.

²³ *Supra* note 18.

- 4) *At any time in the treaty process, where the three parties to a treaty negotiation table agree that a parcel of land is likely to form part of a treaty, the parties may agree to measures to protect that parcel.*
- 5) The Principals acknowledge that the implementation of some interim measures may require changes in the existing policies and legislation. *Canada and British Columbia are prepared to consider such changes.*
- 6) Canada and British Columbia will ensure that line ministries/departments actively participate in interim measures negotiations as appropriate.

Early land protection processes must be implemented to demonstrate the Crown's intention to negotiate in good faith. This is an especially urgent issue regarding those First Nations situated in urban centres, as is illustrated by the *Musqueam v. UBC* case. Further, interim measures can be a tool by which the parties resolve outstanding disputes (e.g. specific claims) prior to a Final Agreement. This will contribute to achieving certainty. Canada has implemented interim land protection measures in other parts of the country²⁴ and must continue this necessary approach in BC.

Constitutional Status of Lands

The governments' current proposed model for defining the constitutional status lands under a treaty as either section 91 or section 92 does not recognize the underlying Aboriginal title of First Nations, which already has constitutional status under section 35. It is a legal interest in the land itself, held collectively by each First Nation, and arises from the First Nation's connections to its lands.

While there is interest among some First Nations to hold certain lands under section 91(24), there is concern about the Department of Indian and Northern Affairs Canada continuing to have a role in matters related to the First Nation's land. Most, if not all, First Nations have expressed concern that bringing their lands under section 92 will expose First Nations to provincial and municipal interference. It is very concerning that the governments are not seriously considering the option of clearly defining a unique allodial-type²⁵ of land status that would be neither section 91 or 92, but, rather, a status that is clearly already recognized and affirmed by section 35. Not only do the governments want all Aboriginal lands to be either section 91 or 92, they are also seeking to eliminate the reserve status of section 91(24) lands. These approaches do not address First Nation interests or provide them the certainty they seek.

Further problems have been raised by First Nations who want to reconcile collective and individual ownership of treaty settlement land, so that individuals may see full value in their homes and lands, while the collective underlying ownership of land lies with the community. In seeking such a model, First Nations require a strong expression of certainty with respect to the relationship of collective ownership and jurisdiction on their Aboriginal title lands. First Nations seek a constitutional diversity of land tenure options

²⁴ For example, interim protection measures were implemented in the Yukon Territory, as well as with the Tlicho in the Northwest Territories, to protect lands pending the conclusion of Final Agreements.

²⁵ Dukelow & Nuse, *The Dictionary of Canadian Law* (Carswell: 1991) defines "Allodial lands" as "lands held absolutely and not the estate of any lord or superior."

to protect their unique rights, and to meet their needs and aspirations to become self-sufficient. This includes having underlying ownership of their treaty settlement lands recognized and protected under section 35.

Natural Resources

First Nations have long-standing and unique relationships with their homelands, and the resources on them. These relationships must be recognized and protected to ensure that First Nations can continue their roles as stewards of their natural environment, continue to exercise their domestic and commercial harvesting activities, continue to exercise other cultural activities, and to benefit economically from their lands and resources. This includes access to and use of the full range of resources, including forests, fisheries, aquatic resources, minerals, water and oil and gas. Further, there must be strong intergovernmental management and revenue-sharing arrangements throughout the entirety of the First Nation's traditional territory.

Currently, government policy requires resource revenue-sharing to be subject to limitations, which might include an absolute dollar amount, a limited timeframe for revenue-sharing or a reduction of the percentage of royalties generated.²⁶ Thus, natural resource revenue-sharing arrangements are seen more correctly as a way of spreading cash compensation over a longer period of time, rather than securing a significant continuing source of revenue for Aboriginal claimants from the resources that continue to be extracted from their traditional territories.²⁷ First Nations are seeking true, ongoing revenue-sharing arrangements based on their Aboriginal title over their lands and resources and their right to an economy derived from those lands and resources. This means a share in the total natural resource revenue derived from their traditional territory. Such arrangements must be negotiated, not unilaterally determined by the Crown. Crown title is not unencumbered and the Crown cannot continue to deal with the lands as though it owns them outright.²⁸ Interim measures must be negotiated and implemented prior to the conclusion of treaties and real revenue sharing must form part of treaties and the ongoing reconciliation with the Crown, as required by section 35.

RECOMMENDATION 5

- a) *Canada and British Columbia must recognize the existence of Aboriginal title and that this title exists throughout the entire traditional territories of First Nations, including the foreshore, seabed and other water bodies.***
- b) *Canada and British Columbia must fulfill the Crown's constitutional responsibility to conclude land and resource negotiations with First Nations and adopt policies***

²⁶ *Supra* note 8 at 538.

²⁷ *Ibid.*

²⁸ Section 109, *Constitution Act, 1867*. See Kent McNeil "Crown Lands or Aboriginal Lands? Hidden Constitutional Issues in Haida Nation and Taku River" (Toronto: Osgood Hall Law School), a paper prepared for the Pacific Business and Law Institute's conference on the "Impact of the Haida and Taku River Decisions: Consultation and Accommodation with First Nations", Vancouver, BC, January 26-27, 2005.

and mandates to ensure that land and resource components in treaties will be sufficient to ensure First Nation sustainability and self-sufficiency. This includes:

- i) negotiating lands and resources according to First Nations' present and future cultural and economic needs, not a formula approach – in particular, flexible mandates that allow for increasing the quantum of land and cash available in order to provide for viable treaties,**
 - ii) negotiating all issues of interests to First Nations in order to increase the likelihood of concluding Final Agreements, including, but not limited to:**
 - putting all federal Crown lands, including surplus and non-surplus lands, on the table for negotiation,**
 - negotiating foreshore and seabed, and**
 - negotiating riparian and other water rights.**
 - iii) in addition to negotiating ownership of and access to lands, negotiating intergovernmental arrangements for the management of lands and resources, and other arrangements (e.g. revenue-sharing) with First Nations regarding the entirety of their traditional territories and with respect to all natural resources – prior to treaty (e.g. interim measures, treaty-related measures) and within the treaty itself,**
 - iv) consistent with recommendation 16 of the BC Claims Task Force, implement early, interim protection of land and resources, prior to the signing of an Agreement-in-Principle, and**
 - v) negotiating with First Nations regarding the range of diverse constitutional land tenure options in agreements that includes section 35 and section 91(24).**
- c) Canada and British Columbia must provide early disclosure of their mandates regarding land and cash, prior to Agreement-in-Principle, in order for a First Nation to make informed decisions with respect to treaty negotiations.**

6 Intergovernmental Management of Lands & Resources

First Nations have existing Aboriginal title in BC protected by section 35 of the *Constitution Act, 1982*. *Delgamuukw* confirms that this is a legal interest in the land itself and it includes the right to choose the uses to which the land will be put, as well as an inescapable economic component. The Crown has authority to decide upon certain land uses under its sphere of constitutional jurisdiction. **These two constitutional levels of authority must be reconciled.** With respect to sharing and making decisions about lands and resources, there must be intergovernmental arrangements for the management of lands and resources both prior to and within treaties.

Interim agreements and treaties must provide for formal First Nation participation, on a government-to-government basis, in strategic level decision-making on all planning, development, use or disposition of lands and resources, including aquatic resources, to ensure the preservation of treaty rights, the protection of First Nations' cultural and economic interests, and access and use for future generations.

So far, opportunities for intergovernmental management of lands and resources through treaties in BC have been negligible compared to those offered elsewhere in modern day treaties. This, coupled with the proposed small land bases, offers First Nations little certainty that they will have sufficient management authority over what takes place within their traditional territory. As well, government policy requires that any arrangements recognize the overriding powers and authority of either the provincial or the federal government. While there are many examples of management boards and committees under various comprehensive claims and other agreements, these boards and committees are generally 'advisory' in nature, with the retaining full jurisdiction and final decision-making authority.²⁹

First Nations cannot accept treaties that provide them with a less substantive right to participate in decision-making than they have under common law and recognized principles of international human rights law.³⁰

Government mandates must allow for creative opportunities for intergovernmental management of lands and resources through practical joint decision-making processes at a strategic level.

²⁹ *Supra* note 22.

³⁰ The Supreme Court of Canada, in *Haida*, set out that where there is a strong *prima facie* case for Aboriginal title, there will be a duty of deep consultation, aimed at finding a satisfactory interim solution. The consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision (*Haida*, para 44) It seems clear from *Taku* that First Nations that submitted comprehensive claims under the old federal comprehensive claims policy, or are in treaty negotiations with the Crown, are in a position to establish a strong *prima facie* case of Aboriginal title and rights.

RECOMMENDATION 6

Canada and British Columbia must:

- i) recognize, as the Supreme Court of Canada has in Delgamuukw, First Nations' inherent right to choose the uses to which their lands, and the resources on those lands, are put and, therefore, their right to participate in decision-making regarding those lands and resources.***
- ii) negotiate arrangements with First Nations where the First Nations are co-managers, with supporting jurisdiction, of the lands and resources throughout the entirety of their traditional territories, including the foreshore, seabed and other water bodies,***
- iii) include sufficient funding to ensure long-term, meaningful participation by First Nations in intergovernmental arrangements for the management of lands and resources, and***
- iv) ensure that future federal and provincial budgets include sufficient funding to ensure effective federal and provincial participation in intergovernmental arrangements for the management of lands and resources.***

7 Consultation & Accommodation

Aboriginal rights and title exist in BC.³¹ These rights and title are legal and constitutional in nature.

These pre-existing Aboriginal rights and title give rise to a unique relationship between the Crown and First Nations. The Crown in all of its dealings with Aboriginal peoples, has a legal duty to consult with, and substantially accommodate, First Nations where activities are existing or proposed that impact, or will impact, on a First Nation's interests.³² This duty is grounded in the principle of the honour of the Crown, a core precept that finds its application in concrete practices and infuses the processes of consultation and accommodation, as well as treaty making and treaty implementation.³³ In particular, the Crown's duty to consult and accommodate is necessary for the reconciliation of the prior existence of Aboriginal peoples with the assertion of Crown sovereignty, which is mandated by section 25. The Court in *Haida* held that

... the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people... "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (para 32)

Importantly, the Supreme Court of Canada confirmed that the Crown's legal duty to consult prior to proof of Aboriginal rights or title is necessary to protect the land prior to the achievement of reconciliation and is not limited to justifying infringements of Aboriginal rights and title. As the Court acknowledged, if such protection is not pursued then, when "the distant goal of proof is finally reached, the aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation."³⁴ Further, the Court held that the Crown, acting honourably, "cannot cavalierly run roughshod over aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof" and cannot "unilaterally exploit the resource" during the process of reconciliation."³⁵

³¹ See, for example, *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385, *R. v. Gladstone* [1996] 4 C.N.L.R. 65, *Campbell v. British Columbia (Attorney General)* *supra*, and *Delgamuukw* *supra*.

³² Most notably *Haida Nation v. British Columbia (Minister of Forests)* 2002, BCCA 462, *Taku River Tlingit First Nation v. British Columbia*, [2002] 2 C.N.L.R. 312, *Halfway River First Nation v. British Columbia*, [1999] 4 C.N.L.R. 1, *Mikisew Cree First Nation v. Canada*, [2002] 1 C.N.L.R. 169 (FCTD), *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 (BCCA), *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 (BCCA).

³³ *Haida*, SCC, para 19.

³⁴ *Ibid* at para 33.

³⁵ *Ibid* at paras 26-27.

This case law sets out **legal principles and standards** for addressing Aboriginal rights and title and for implementing the Crown's duty. As articulated by the Supreme Court of Canada in *Delgamuukw*:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified...The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases, when the minimum acceptable standard is consultation, ***this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples*** whose lands are at issue. In most cases, it will be significantly deeper mere consultation. ***Some cases may even require the full consent of an aboriginal nation,*** particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.³⁶ (emphasis added)

Some of the other legal principles and standards include the following:

- good faith consultation requires no sharp dealing,
- there is a duty to provide First Nations with full information in a timely manner and to explain the information to the First Nation,
- there is a duty to avail oneself of the First Nations interests and concerns,
- the Crown and/or third party must endeavor to seek workable accommodations between the Aboriginal cultural and economic interests and the short-term and long-term objectives of the Crown and other parties,
- non-Aboriginal economic concerns or “economic forces” alone will not be sufficient for the Crown to justify infringement,
- First Nations are entitled to a distinct consultation process apart from public forums or general public consultation,
- the Crown cannot delegate its consultation duties to third parties, though third parties may have their own legally enforceable duty to consult

To date, **government policy responses have been incomplete** and unilaterally developed without any discussion with First Nations.³⁷ Further, British Columbia has systematically taken steps aimed at reducing the uncertainty created by the legal precedents. These include unilateral amendments to forestry legislation in an effort to avoid or reduce its duties to consult and accommodate, entrenching its negotiation positions on consultation and accommodation in policy documents, and concluding

³⁶ *Delgamuukw* at p. 265.

³⁷ The *Provincial Policy for Consultation with First Nations* (October 2002) was developed without any discussion with First Nations in BC. The First Nations Summit commissioned a number of legal analyses of this Policy, all of which conclude that the Policy falls short of what the case law sets out and has as its primary focus steps for how the provincial Crown may justifiably infringe Aboriginal rights and title. Canada has never formally engaged with First Nations across Canada to develop federal policy responses to court decisions on the Crown's duty of consultation and accommodation.

agreements that reflect its position.³⁸ As a result, government policies are self-serving and do not address First Nations needs.

In our view, the **emerging jurisprudence provides a solid framework** for proceeding cooperatively in land and resource and other decision-making that affects Aboriginal people. As the Supreme Court of Canada clarified, consultation and accommodation is

...an essential corollary to the honourable process of reconciliation that section 35 demands. It preserves the aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation...³⁹

There is an urgent need to implement the case law to develop workable consultation processes leading to mutually agreeable accommodation agreements. Such processes and agreements can help facilitate progress in treaty negotiations and interim accommodation agreements may form important elements of a treaty. For example, consultation and accommodation can help the parties to focus on workable and practical processes for intergovernmental management of lands and resources at a strategic level. Many First Nations have developed consultation and accommodation policies setting out approaches for a new relationship (see, for example, the First Nations Summit Consultation & Accommodation Tool Kit for First Nations).

We agree with the Supreme Court of Canada that the ideal approach to reconciliation is negotiation. If the parties all demonstrate the necessary political will, proof of rights through lengthy, costly and adversarial litigation, will be unnecessary.

RECOMMENDATION 7

Canada and British Columbia must work with First Nations to establish workable, government-wide approaches, policies and guidelines that reflect the legal principles and standards set out by the courts, promote meaningful consultation and accommodation, and assist third parties realizing the practical need to consult with and accommodate First Nations.

³⁸ Title & Rights Alliance, *Title and Rights Alliance Background Paper: Forest and Range Agreements* (May 2004), prepared for Title and Rights Alliance conference: Moving Forward in Unity, May 19, 2004, a p.1. This document discusses the risks First Nations assume in signing a Forest and Range Agreement. These agreements purport to accommodate the economic component of Aboriginal title and provide time and/or amount limited timber tenure and revenue-sharing opportunities. However, in exchange, First Nations must agree in writing that some or all aspects of their Aboriginal title and rights have been accommodated. They must do so in relation to an extremely broad range of future, unknown tenure and forestry decisions. This seriously limits a First Nations' ability to exercise and defend their Aboriginal title and rights during the term of the agreement.

³⁹ *Haida*, SCC, at para 38.

8 Fiscal Relationship

Prior to contact, First Nations were strong, healthy societies with distinct cultures and traditions of stewardship and governance. Colonialism has caused First Nation communities to now exist in social and economic disparity. An improved fiscal relationship that supports First Nations becoming self-determining, and that supports economic growth, will improve the fiscal position of *all orders of government* by increasing revenues, increasing First Nation control over its circumstances, and reducing the costs associated with poverty. Current government mandates do not facilitate movement toward this improved relationship.⁴⁰

First Nations Governments, pursuant to their inherent right of self-government, have all of the duties and responsibilities as other governments do in terms of providing adequate levels of services for its citizens, such as health, housing, and education. As well, they have decision-making authority with respect to their homelands, and a right to an economy derived from those lands.

Currently First Nations' socio-economic circumstances are far below the national average. First Nations require the practical ability to govern themselves and build economic bases to significantly improve the standard of living in their communities. As such, they require the **“hallmarks” of governments** in treaties, which include such things as:

- taxation authority and decision-making power,
- immunity from taxation by other governments,
- fiscal transfer,
- a workable approach to own source revenue, and
- participation in all forms of revenue-sharing.

As articulated by one First Nation, the fundamental objective in all cases, regardless of the size or circumstances of a First Nation, is that every First Nation must be able to implement fully its treaty in a sustainable and rational manner over time. Failure to meet this objective will render a treaty unworkable where the parties encounter those aspects of implementation that have not been appropriately resourced. The parties cannot possibly predict the full costs associated with the implementation of the treaty over time and, so, they cannot reasonably expect to negotiate specific, detailed provisions at the time of signing that will achieve certainty into the future. This reality is reflected in the way that other governments prepare five year fiscal planning cycles, with annual updates and adjustments. They simply cannot project with certainty what their fiscal needs will be far into the future.

The fiscal relationship in a treaty must ensure that First Nations have the necessary tools and funding sources to establish and maintain credible and effective systems of

⁴⁰ Despite extensive tripartite work through the Fiscal Relations Working Group, government mandates remain inflexible and inadequate for meeting First Nations needs.

government for their citizens and to participate meaningfully in the economy. First Nations must be in a position to generate sufficient funds from a range of sources including resource revenues, taxation and business development. Tax jurisdiction is a critical aspect of any government. It also must be designed to enable First Nations to achieve socio-economic indicators that they set as goals for themselves.

However, **the net effect of current government policy would put First Nations in a worse position** than they are in now, without treaties and under the *Indian Act*. Treaties are intended to improve First Nations circumstances and move them toward economic self-sufficiency. They are not intended to entrench the *status quo* or worse. In particular,

- First Nations need a guarantee that **transfers** will support programs and services up to national standards over time and Canada has not been willing to develop a formula-based transfer system.
- First Nations require certainty with respect to the **tax room**, where Canada cannot take back the tax room at its discretion, in a range of areas (e.g. income, property, commodities).
- First Nations must be in a position to make informed decisions and must be treated fairly in comparison to other governments. Problems with the current federal **own source revenue (OSR)** policy include the following:
 - it threatens the independence of First Nations by making all programs jointly funded,
 - it limits the ability of First Nations to generate income and invest in programs and services,
 - it does not enable First Nations to make informed decisions about the real value of the capital transfer - since any income earned by the investment of the capital transfer into a settlement trust will be subject to offsets, and since there is no certainty about offset rates beyond the first (and possibly several) agreements, and
 - it prejudices the nature of economic activity a First Nation engages in since First Nation corporations will be subject to double-taxation: taxation through the corporate tax regime and taxation through OSR offset.

Canada must revise its OSR Policy to ensure it does not put First Nations in a worse position than they are now. For example, income earned by the investment of the capital transfer to the settlement trust must not be included in the definition of own source revenue capacity. As well, Canada needs to abandon its position on the “8” and “12” timing provision in favor of a provision based on the capacity of the First Nation to generate wealth. The sooner First Nations become economically self-sufficient and successful at generating wealth, all governments will benefit.

Canada must also abandon its negotiating position of providing for only registered status Indians. Every First Nation has a right to determine its citizenship in accordance with its inherent right of self-government. Canada’s approach is not realistic and would

not result in a viable fiscal relationship as it does not address First Nations' actual needs and circumstances.

In order for the parties to negotiate the fiscal relationship, Canada must provide full disclosure of all information related to the fiscal relations negotiations in order for First Nations to make informed decisions on the components of this relationship in a treaty. For example, First Nations need to understand the value and historical underpinnings of the section 87 tax exemption. Section 87 represents a valuable interest for which a value can be established. Governments are insisting on its elimination outright, with no view to first ensuring First Nations standards of living have parity with the rest of Canadian society, no commitment to compensate for loss of the historical exemption, and no commitment to improving its mandate regarding tax authority, OSR, revenue sharing and capital transfer.

Finally, with respect to compensation, we agree with former Minister Mitchell's statement to the Roundtable that "we need to remember and understand the past". Part of this will be to acknowledge infringements of Aboriginal rights and title. Compensation for such infringements is an essential part of embarking on a new Crown-Aboriginal relationship in BC and advancing reconciliation.

RECOMMENDATION 8

a) *Canada and British Columbia must have flexible mandates that recognize that:*

- i) the fundamental objective in all cases, regardless of the size or circumstances of a First Nation, is that every First Nation must be able to fully implement its treaty in a viable, sustainable and rational manner over time,***
- ii) First Nations must be supported in becoming self-determining and in reaching their goals regarding the socio-economic indicators in their communities,***
- iii) treaties must incorporate planning cycles to reflect the fact that the parties cannot possibly predict the full costs associated with the implementation of the treaty over time, and***
- iv) fiscal relationships in treaties must be able to respond to the economic circumstances in the same way that other levels of government operate.***

b) *Canada and British Columbia must work with First Nations to develop a process to focus on negotiating fiscal models for treaties that:*

- i) meet First Nations' present and future needs,***
- ii) support the First Nation Government,***
- iii) reflect the principles set out in (a) above, and***

iv) address the following issues:

- **areas of exclusive and concurrent tax jurisdiction to ensure that tax room cannot be removed by other governments,**
- **priority of laws provisions necessary to support First Nations Governments,**
- **ongoing fiscal transfers that meet a First Nation's growth and needs over time,**
- **establishing a fiscal relationship that is capable of evolving as a First Nation reaches the socio-economic indicators it has identified for itself,**
- **all sources of revenue sharing through arrangements that are ongoing,**
- **own source revenue (OSR) (including the definition of OSR, certainty of inclusion rates, linking of phasing in of certainty rates to offsets, and creating a level playing field) ,**
- **tax exemption and immunity (including determining the value of the section 87 exemption), and**
- **compensation for past, current and proposed infringements of Aboriginal rights, title and interests.**

c) Canada and British Columbia must abandon the approach to negotiating treaties based on only the number of registered status Indians for each First Nation and recognize that each First Nation has the right to determine their own citizenship, pursuant to their inherent right of self-government.

PART I: TREATY NEGOTIATIONS (cont'd)

b) Process and Structural Changes Required

A number of process and structural changes are also required to improve the treaty negotiation process in BC and to increase the likelihood of successfully concluding treaties. We note that Canada has already created a number of new structures and institutional initiatives that may help to advance reconciliation. However, there are other process and other structural changes required to facilitate treaty negotiations.

New Federal Structural & Institutional Initiatives

*Cabinet Committee on Aboriginal Affairs (Chaired by Prime Minister)
Privy Council Office Secretariat on Aboriginal Affairs
Parliamentary Secretary on Aboriginal Affairs*

Prime Minister Martin has committed to place a “renewed emphasis” and priority on Aboriginal issues. To First Nations, this commitment is long overdue. The creation of the new structures presents opportunities for long awaited progress. To be effective, though, they must have clear links with the Aboriginal community and must engage directly with First Nations without the obstacles of bureaucracy.

In our view, these **new structures must play an active role of working in partnerships with First Nations and measuring progress**. It is imperative that they be used as forums for reporting and ensuring Ministers are fulfilling their amended mandates to work in partnership with Aboriginal people and to discuss policy initiatives in advance of implementation. It is also important that they engage directly with and be accessible to First Nations. Often, bureaucracy is not equipped to overcome certain issues or obstacles to progress and political intervention and direction is necessary. Bureaucratic processes are too slow and ineffective and, as former Minister Mitchell pointed out, there have been “so many opportunities lost, so many chances to move forward, not grabbed and taken.” With political direction, these obstacles can be addressed. In this regard, it is key that Canada has committed to improving coordination among the various departments, with the assistance of the Prime Minister’s office. This high-level participation and engagement will form an integral part of ensuring success.

Other process and structural changes required

In addition to the new changes in government, other process and structural changes required to advance reconciliation include:

- 1) Separation of FTNO/DIAND
- 2) BC Treaty Commission Role: Mandate & Terms of Reference
- 3) Purpose of Agreements-in-Principle
- 4) Loans/contributions

1 Separation of FTNO/DIAND

A structural change that is needed within the federal government is the separation of the Federal Treaty Negotiation Office (FNTNO) from the Department of Indian Affairs and Northern Development (DIAND). This change would help to facilitate progress in treaty negotiations. It would enable the responsibilities for treaty negotiations to be separated from those of program and service responsibility. A separate office that does not have line department function would be far better suited to the role of negotiating treaties in BC. It would help to separate the day-to-day dealings with First Nations at a program level from the larger objective of building a new relationship at the treaty table. As well, it would allow the department with responsibility for treaty negotiations to focus solely on those negotiations.

DIAND has had a long and difficult relationship with First Nations. As noted by the Royal Commission on Aboriginal Peoples,

Even today, despite the exponential growth over the past 20 years of policies and programs to deal with land claims and claims-related issues, the tradition that Indian people do not have land or resource rights outside their reserves is a strong component of the corporate memory of the department of Indian affairs. It is **reflected in the department's preference for extinguishment as a valid option in comprehensive claims settlements**. It is reinforced by interpretations of Aboriginal and treaty rights that continue to be advanced by lawyers working in the departments of justice and Indian affairs... **Adversarial attitudes are hindering the creation of policy measures that can genuinely fulfill the federal government's fiduciary duty** to Aboriginal peoples.⁴¹
(emphasis added)

The Commission further noted that “since the early 1970s, a virtual claims industry has developed; federal claims policies continue to perpetuate procedures that are dilatory, adversarial and unsatisfactory to all concerned... Federal policies have consistently ignored what should be the fundamental goal of a just settlement of Aboriginal claims.”⁴²

The Land Claim Agreement Coalition⁴³, in its document entitled “A New Land Claims Implementation Policy”, stated that there must be “Recognition that the Crown in right of Canada, not the Department of Indian Affairs and Northern Development, is party to our land claims agreements and self-government agreements.” This coalition of First Nations who have modern land claim agreements and self-government agreements, are already experiencing difficulties in having Canada live up to the spirit and intent of the agreements. Instead, they have found that Canada is treating the agreements as though they are “merely contracts with the Department of Indian Affairs and Northern

⁴¹ *Supra* note 8 at 555.

⁴² *Ibid* at 556.

⁴³ Council of Yukon First Nations, Grand Council of Crees (Eeyou Istchee), Gwich'in Tribal Council, Inuvialuit Regional Corporation, Nisga'a Lisims Government, Nunavut Tunngavik Incorporated, the Sahtu Secretariat Incorporated.

Development.” As a result, the Coalition has concluded that there does not appear to be any understanding by the Crown that these are “not ordinary contracts” and there has been a lack of coordination and oversight by senior officials within the Government of Canada. Canada must ensure that land claim and self-government agreements are accorded the appropriate level of senior oversight to ensure that Canada lives up to the spirit and intent, and its other obligations, in implementing the agreements. As the Coalition identifies, there is a **need for an attitudinal shift in government as a whole**, and, in particular, a **shift away from the entrenched attitude of the Department of Indian Affairs** that the objectives of entering into the agreements are to be forgotten or ignored once the First Nation has signed the document.

Industry has also identified the need to elevate treaty negotiations to a higher level within Parliament.⁴⁴ A separation of the treaty negotiation process from DIAND would send a clear signal that the federal government is sincere in wanting to conclude treaties and establishing a new and more positive relationship with First Nations.

RECOMMENDATION 9

Canada must separate the Federal Treaty Negotiation Office from the Department of Indian Affairs and Northern Development and place it under the responsibility of the Prime Minister’s Office to focus on the broader objectives of building a new Crown-Aboriginal relationship, improving the lives of Aboriginal people, concluding treaties and facilitating the coordination of efforts across federal department.

⁴⁴ Business Council of British Columbia, “The British Columbia Treaty Process: A Road Map for Further Progress” (May 2004) at p. 25.

2 *BC Treaty Commission Role: Mandate & Terms of Reference*

The main role of the BC Treaty Commission (BCTC) is to “facilitate” the negotiation of treaties. In our view, this means more than “chairing” meetings and “monitoring” negotiations. It has become clear that the BCTC needs the authority to effectively assist the parties in working through difficult issues. Its current inability to make binding decisions on any of the parties prevents it from being able to resolve disputes or effectively address the inherent imbalance of bargaining power that permeates the process. In other words, the BCTC has no real power to achieve results. First Nations want to be confident that there is an independent body that will indeed work to ensure as level of a playing field as possible.

In 2003, the Principals commissioned an independent effectiveness review of the BCTC. Deloitte & Touche conducted this review and submitted their report to the Principals on November 18, 2003. The review gave the BCTC a passing grade, but noted that it needs to be more proactive, such as with disputes among the parties.

The BCTC, in its 2004 Annual Report, responded to the review by indicating the parties can “expect a more forceful Treaty Commission” and that it “will be taking further action though intensive facilitation at specific tables where obstacles are preventing any appreciable progress.”⁴⁵

RECOMMENDATION 10

The Principals must revise the mandate of the BCTC to assist it in responding to the effectiveness review so that it can be more effective in facilitating negotiations and assisting the parties in working through issues.

⁴⁵*Supra* note 1 at p. 8-9.

3 *Purpose of Agreements-in-Principle*

Treaty negotiations are a difficult undertaking. For First Nations, they place pressure on the leadership and negotiators to secure a treaty that breathes life into their Aboriginal rights, maps a course for their self-sufficiency into the future, and defines a new relationship with the Crown. These issues evoke emotions and expose the hearts of each community – and each community is unique and distinct. In this context, it is unfair and contrary to the principles of negotiation agreed upon at the outset of the treaty negotiation process in BC to place the burden on those First Nations in the more advanced stages of negotiation of establishing “templates” that will be imposed on First Nations further behind in the process. First Nation negotiators are mandated to negotiate a treaty *for that First Nation* – not for other First Nations. Negotiators proceed within those confines of their mandate. Canada and British Columbia must not place the added pressure and burden on them of setting a “public mandate” that will apply to all other sets of negotiations.

RECOMMENDATION 11

Canada and British Columbia must:

- i) formally adopt a policy that every set of negotiations is distinct and that no agreements or provisions of one agreement will be forced upon a First Nation at another negotiation table, and***
- ii) include an express provision in Agreements-in-Principle that Canada and British Columbia will not impose the Agreement-in-Principle as a template for negotiations with other First Nations.***

4 *Federal/provincial cost-sharing arrangements*

The fiscal mandates of governments are dependent on, or at least directly linked to, the cash and land related cost-sharing arrangements between them. First Nations are not a part of this discussion, nor is the BCTC. This process contributes to the imbalance of bargaining power and provides an opportunity for Canada and British Columbia to influence one another's mandates.

It is inappropriate for Canada and British Columbia to pre-determine issues through a bilateral process outside of the tripartite treaty negotiation process. Even the Business Council of British Columbia has "respectfully suggested that bilateral negotiation is not part of a good faith tripartite process."⁴⁶ Abandoning this approach "would help restore faith in the negotiations on the part of aboriginal participants and lead to more creative and more efficient tripartite negotiations."⁴⁷

RECOMMENDATION 12

Canada and British Columbia must abandon their bilateral negotiations whereby they pre-determine key land and fiscal issues for treaties.

⁴⁶ Business Council of British Columbia, "The British Columbia Treaty Process: A Road Map for Further Progress" (May 2004) at p. 23.

⁴⁷ *Ibid* at 24.

5 *Loans/contributions*

As of September 2004, First Nations have borrowed \$231 million to negotiate treaties.⁴⁸ This loan arrangement has become one of the greatest obstacles to progress as First Nations are extremely concerned that the loans will effectively reduce any cash settlement by a significant amount. Due to issues and events such as lack of adequate mandates, elections, the provincial referendum, and reduced provincial resources at the tables (e.g. negotiators), loans have accumulated beyond what First Nations expected when they made the decision to enter into the process. Currently, the accumulation of loans is proving to be a disincentive to concluding treaties and is placing a considerable amount of strain on First Nations in the treaty process.

The loans should be converted into contributions, and funding from this point on should only be in the form of contributions. This would be consistent with the Crown's fiduciary relationship with Aboriginal people and is supported by recent case law, where the courts have supported the principle that governments must fund First Nations efforts to secure and protect their rights. First Nation should not have to borrow money from the Crown, its fiduciary, in order to negotiate treaties with the Crown. Canada has a constitutional responsibility to negotiate these treaties in order to reconcile their asserted sovereignty with pre-existing Aboriginal rights and title.

RECOMMENDATION 13

Canada and British Columbia must forgive First Nations' treaty negotiation loans and work with First Nations to design contribution funding arrangements that will facilitate treaty negotiations and increase the likelihood of First Nations becoming economically self-sufficient.

⁴⁸*Supra* note 1 at p. 48.

PART II: SOCIAL & ECONOMIC ISSUES - BREAKING THE CYCLE OF POVERTY

In order to break the cycle of poverty, indignity and injustice referred to by Prime Minister Martin, there must be full First Nation participation in design, planning and implementation of any strategy addressing these issues, including education, health, housing, justice, children and families, youth suicide, social assistance and economic opportunities. While progress may be made at the national level with Aboriginal organizations on these issue, there also needs to be a focus on promoting a true inter-governmental relationship with First Nations directly and an integrated approach to raising the social and economic standards of Aboriginal people in BC. There are existing initiatives in BC that demonstrate the success that can result from involving First Nations as full partners. We can learn from and build upon these processes and work in partnership, on a government-to-government basis, to raise the social and economic standards of Aboriginal people in BC.

Part II will be developed as the next stage of development of this framework. It will address the other priority areas identified by Prime Minister Martin at the Canada-Aboriginal Peoples Roundtable: health, housing, education, economic development.

PART III - ACCOUNTABILITY

Measuring progress/“Aboriginal Report Card”

We agree with the Prime Minister that progress must be tracked and measured and that, in order to do so, new tools are required. However, the Aboriginal Report Card needs to report on progress in treaty negotiations, as well as the socio-economic priority areas identified in the Roundtable Report.

Canada must work cooperatively with First Nations to ensure that the Aboriginal Report Card includes a component that measures progress in treaty negotiations in BC and that the primary responsibility for preparing the Aboriginal Report Card lies with the Prime Minister’s Office and the new government structures in cooperation with First Nations.

Part III will be developed in the next stage of development of this framework. It will address how to measure progress and Prime Minister Martin’s proposed Aboriginal Report Card.

CONCLUSION

In order for the implementation of this framework to be successful, there needs to be high-level commitment and representation by Canada and British Columbia to address the issues. They cannot become mired in bureaucracy. The newly established government structures must play a central and active role.

The First Nations Summit takes the commitments made at the Roundtable and in the Prime Minister's address to embark on "a new era of cooperation" seriously and is fully prepared to participate in developing a "concrete plan" for a "brighter, healthier and more prosperous future" for Aboriginal people in BC.

We hope the Prime Minister is sincere that Canada's will is resolute and its focus will not falter.