



**FIRST NATIONS SUMMIT
DISCUSSION PAPER ON:**

COMPENSATION

November 18, 1999

For discussion purposes only

November 18, 1999

COMPENSATION

Despite the fact that the Supreme Court of Canada has made it clear that First Nations are entitled to compensation when their Aboriginal title or rights are infringed without proper justification, Canada and British Columbia are refusing to even discuss compensation at individual treaty negotiation tables. Instead, they have suggested that if First Nations are concerned about this issue, they should take the matter to the courts. But the courts themselves have repeatedly stated that these matters should be resolved through negotiation, rather than litigation. The Summit views the other governments' unwillingness to discuss the issue of compensation, in a process by which they intend to negotiate an agreement that represents "full and final settlement of all claims", as a breach of their duty to negotiate in good faith. The Summit also views this as a breach of recommendation #2 of the Task Force Report which states that "each of the parties [should] be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship".

The purpose of this briefing document is to describe both the legal and political foundation for the requirement of compensation for infringement of Aboriginal title and rights.

POLITICAL FOUNDATION

First Nations view compensation as a core topic of negotiation along with land and water, self-government and access to and ownership of natural resources. They seek compensation for past, present and future use of their lands and for the denial of access to their territories, as well as other injustices including discrimination, residential schools and the damage to Aboriginal cultures and languages. The treaty-making process must take into account compensation for the alienation and

**For discussion purposes only
November 18, 1999**

loss of First Nations' lands and resources. To do otherwise is to ignore one of the fundamental reasons for treaty-making – correcting the injustices done to First Nations.

First Nations are equally concerned about the other governments' refusal to address the issue of compensation in the context of interim measures.

Despite their refusal to discuss compensation with First Nations, the other governments have compensated third parties in the past, even in the absence of specific court direction (for example, B.C. has recently agreed to compensate forestry companies for the creation of protected areas). It is discriminatory for Canada and British Columbia to take the position that First Nations cannot be compensated for their losses unless they bring the matter before the courts, while assuring non-Aboriginal people that their interests will not be expropriated and that they will receive fair and timely compensation for any losses they suffer.

LEGAL FOUNDATION

The Supreme Court of Canada's (SCC) decision in *Delgamuukw* provides a strong legal foundation for First Nations' position that they should receive compensation for past and future infringement of their Aboriginal title. The SCC stated that the requirement to compensate arises from the "inescapable economic aspect" of Aboriginal title and the honour and good faith of the Crown. Two key principles arising out of the decision are: (a) compensation is required for infringement of Aboriginal title; and (b) compensation must be calculated on a case by case basis, since it varies with the nature of the Aboriginal title affected. The decision also confirms that the principle that the Crown cannot expropriate a property interest without compensation applies equally to Aboriginal and non-Aboriginal people alike.

For discussion purposes only

November 18, 1999

The SCC urged the Crown to negotiate with First Nations in *Sparrow*. When the Courts find themselves repeating the same message years later, it shows that the governments have not taken the message to heart. The federal and provincial governments' refusal to discuss certain issues such as compensation does not meet the standard for good faith negotiations established by the SCC. The duty to negotiate in good faith means that governments have an obligation to avoid the appearance of sharp dealing, to disclose relevant facts and to negotiate without oblique motive. They also cannot refuse to discuss or negotiate a term which they have previously addressed in other similar agreements. (See, for example, the attached excerpt from the Council for Yukon Indians' Umbrella Final Agreement which includes an entire chapter entitled "Financial Compensation").

POST-DELGAMUUKWREALITY

Both Canada and B.C. have endorsed a "Statement on Aboriginal and Crown Title" whereby they recognize the existence of Aboriginal title in accordance with *Delgamuukw*. However, this has been followed up by statements from them that they will only recognize Aboriginal title in specific instances if First Nations have proven it in the courts. This is precisely the approach the courts have actively discouraged the parties from taking, but it is the approach that First Nations are reluctantly concluding may be their only option.

Recommendation 2 of the 1991 Report of the British Columbia Claims Task Force states that, "each of the parties [should] be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship". The Task Force Report goes on to state that treaty negotiations must deal with the issues of fundamental importance to the relationship, that there should be no unilateral restriction by any party on the scope of the negotiations. The imposition of restrictions can only serve to create conflict and detract from the central purpose of

**For discussion purposes only
November 18, 1999**

the negotiations. The Task Force Report encourages the parties to reach solution by bargaining with good will and good faith in the determination of compensation.

The B.C. Treaty Commission considered the issue of compensation in light of recommendation 2 and concluded that the recommendation is unambiguous. The Commission also noted all the parties to treaty negotiations have committed to this recommendation and urged them to live up to that commitment. In the Summit's view, the governments' unwillingness to consider compensation for past and present infringement of Aboriginal title and rights violates this recommendation.

The Royal Commission on Aboriginal Peoples similarly recommended that issues relevant to treaty relationships identified by either treaty party be open for discussion in treaty implementation and renewal and treaty-making processes.

In the absence of updated Crown policies to address issues of compensation, First Nations are faced with two equally problematic alternatives. Either incur the time and cost of litigation with the objective of obtaining injunctive relief and ultimately fair compensation or allow the infringement of title and rights to take place without proper compensation.

While the federal and provincial governments have to date concluded that it is in their best interest to refuse to discuss compensation, the Summit recommends that they reconsider this view. In particular, if they fail to offer compensation when they intend to grant a land or resource tenure in an area where Aboriginal title has been asserted, and such title is later proven, they run the risk that the resulting infringement will ultimately be found by a court to be unjustified. One would expect that this would provide the governments with incentive to address the issue.

SPECIFIC RECOMMENDATIONS

For discussion purposes only

November 18, 1999

1. Any infringement of Aboriginal title and rights must have the full and informed consent of First Nations.
2. Where First Nations consent to infringement, fair compensation must be provided. A policy for determining how such compensation will be calculated must be developed jointly by First Nations and the other governments.
3. The details of such compensation will need to be negotiated between First Nations and the governments. Such negotiations must be conducted in good faith.
4. First Nations need to be involved in the policy and legislative agenda of the governments as government policy and legislation often determines whether any infringement of Aboriginal title and rights occurs and whether compensation will be paid to First Nations.
5. Canada and B.C. should revise their treaty negotiators' mandate to allow the issue of compensation to be raised and addressed through treaty negotiations.