



# FIRST NATIONS SUMMIT

## **A TIME FOR LEADERSHIP... A TIME FOR COURAGE**

**WRITTEN BRIEF SUBMITTED TO  
THE STANDING COMMITTEE ON ABORIGINAL AFFAIRS  
AND NORTHERN DEVELOPMENT**

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**November 19, 1999**

**PREFACE**

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We first wish to express our disappointment in the process of the Standing Committee on Aboriginal Affairs and Northern Development. We, the First Nations Summit, were not invited to make a presentation before this Committee, despite the fact that since 1991 we have represented the interests of B.C. First Nations in the Treaty Making Process. We are also deeply concerned that this Committee did not respect the traditional protocols of the First Nation governments, in whose territories these Committee meetings have been held.

Finally, and most importantly, we wish to underscore our concern and strong objection regarding the untoward objectives of the Reform Party in this process. The Reform Party is using this forum as a platform to fan the flames of intolerance and racism against First Nations peoples in Canada. This should not be tolerated by our federal government or by the Canadian public.

## **INTRODUCTION**

The purpose of the First Nations Summit's written brief is three-fold. First of all, we want to re-affirm our support for the Nisga'a people concluding a modern day treaty that addresses the fundamental issues of land, resources, financial matters and governance. Secondly, we want to indicate our support for Bill C-9 which will give effect to the Nisga'a Final Agreement. Thirdly, we want to provide the Standing Committee with information to enable the committee members to better understand the broader context of the B.C. treaty process.

The Summit's written brief will address the following issues:

1. Summit support for Bill C-9
2. Summit approach to treaty negotiations
3. Legal basis for treaty negotiations
4. Certainty
5. Compensation
6. Interim measures
7. Scope of negotiations
8. Negotiating process
9. A time for leadership... a time for courage

The Summit was established in 1990 shortly after the Government of British Columbia reversed its policy, which it had maintained for over a century, of refusing to negotiate treaties. The Province made this decision because of the obvious negative impact to the B.C. economy of not settling the "land

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question” in B.C. - lack of certainty, increased court challenges, and the denial of First Nations basic human rights.

The Summit’s mandate is to represent the interests of First Nations that have agreed to participate in the treaty process. The Summit’s role is not to negotiate treaties on behalf of First Nations, but to support local First Nations’ negotiations. In doing so, the Summit also recognizes that not all First Nations in the Province have chosen to participate in the treaty process. The Summit respects each First Nation’s right to determine its own course.

The Summit’s approach to treaty-making is largely reflected in the June 1991 Report of the British Columbia Claims Task Force (Tab 2). This report, adopted in its entirety by the Summit, lays the foundation for the treaty process in British Columbia.

The B.C. Claims Task Force was originally established in December 1990 following the decision by the B.C. Government to join the ongoing Nisga’a negotiations and to commit to negotiations with other First Nations. The Task Force was made up of representatives of the federal and provincial governments and First Nations. Its goal was to recommend to the parties how they could begin negotiations and what the negotiations should include. As the Nisga’a negotiations had already been in progress for many years, it was agreed that the parties to those negotiations could adopt aspects of, but would not be required to follow, the negotiation process envisaged by the Task Force and now facilitated by the B.C. Treaty Commission.

## **1. SUMMIT SUPPORT FOR BILL C-9**

The Summit supports the passage of Bill C-9, an act to give effect to the Nisga’a Final Agreement. We believe that the federal government must pass this legislation in order to show its good faith in the Nisga’a treaty negotiation process. If the legislation to ratify and implement the Nisga’a treaty, which was negotiated over the course of almost two decades, is not passed First Nations in B.C. will question whether any treaty process can be effective and whether the path of reconciliation that treaty making is supposed to represent is simply a waste of time, energy and precious human and financial resources.

The Summit confirmed its support for the Nisga’a treaty in an October 1998 resolution (Tab 7) supporting the Nisga’a people in achieving their modern day treaty which addresses land, resources, financial matters and governance in a manner consistent with the Summit’s own Fundamental Principles (Tab 6). We recognize, however, that there are some neighbouring First Nations who have

unresolved issues in relation to the Nisga'a treaty and these need to be dealt with..

## **2. SUMMIT APPROACH TO TREATY NEGOTIATIONS**

The Summit's approach to treaty negotiations is founded on the knowledge that we, as First Nations, hold Aboriginal title to our territories, including the lands, resources, seas and air within them. First Nations in British Columbia have never been conquered, nor has there ever been a cession of our territories to the Crown. Therefore, all interests granted by the Crown remain subject to Aboriginal title and rights which are protected by section 35 of the *Constitution Act, 1982*. This has left B.C. with an outstanding "land question".

The Summit's position is, and has been from its inception, that negotiation, rather than litigation or confrontation, is the preferred route to settling the outstanding "land question" and reconciling Aboriginal and Crown title to lands within the province. The Summit's perspective on this issue acknowledges the reality that, in the words of the former Chief Justice of the Supreme Court, "we are all here to stay". However, First Nations negotiators are becoming increasingly frustrated with the provincial and federal governments lack of true commitment to, and mandates for, the treaty negotiation process and principles set out in the 1991 Report of the B.C. Claims Task Force. In order for negotiations to succeed in resolving the difficult challenges that this reconciliation presents, the federal and provincial governments must uphold the honour of the Crown in their negotiations with First Nations. This cannot be achieved by, for instance the federal and provincial governments current practice of setting unilateral preconditions that are clearly not conducive to fairly reconciling crown title and aboriginal title.

First Nations currently engaged in the treaty process have become increasingly frustrated by the lack of progress in these negotiations. This lack of progress is seen as a direct result of:

- ! governments' continued alienation of lands and resources within First Nations traditional territories without First Nations' consent and without any compensation for infringement of Aboriginal title and rights;
- ! governments' unwillingness to address this continued alienation of lands and resources through effective interim measures agreements;
- ! governments' refusal to negotiate with First Nations that continue to exercise their legitimate Aboriginal title and rights;

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- ! governments' unwillingness to recognize and respect Aboriginal title and right and to discuss compensation as an item for negotiation in the treaty process;
- ! governments' continued insistence on setting preconditions to treaty negotiations;
- ! government negotiators' lack of a sufficient mandate to resolve key issues; and
- ! governments' failure to provide the necessary financial resources to carry out effective negotiations.

A more detailed statement of the Summit's views on treaty-making is contained in "Treaty Making: the First Nations Summit Perspective" (at Tab 4).

One of the fundamental principles underlying the Summit's approach to treaty-making is our view that each First Nation negotiates on its own behalf in the treaty process in order that it may address its unique concerns. This view is reflected in the Summit's October 1998 resolution which welcomed Canada and British Columbia's statements that each treaty will be unique and not be a duplication of the Nisga'a treaty. As the Nisga'a themselves have articulated, the Nisga'a Treaty was negotiated specifically for the Nisga'a, and their Final Agreement should not be utilized as a blueprint for other treaty negotiations in British Columbia. British Columbia is made up of many different First Nations who have profound differences in history, culture, priorities and circumstances. Each Nations unique circumstances must be recognized in their treaties.

### **3. LEGAL BASIS FOR TREATY NEGOTIATIONS**

The Supreme Court of Canada's decision in *Delgamuukw* confirms what First Nations have been saying since the earliest days of contact with non-Aboriginal people. We have Aboriginal title to our lands. This title has been described by the Supreme Court as a legal interest in land and a right to the land itself. This title confirms our exclusive right to use our lands for a wide range of activities that need not be tied to a particular custom or tradition, including many contemporary economic activities. We also confirm that Aboriginal title is on an equal footing with the Crown's title.

Shortly after the *Delgamuukw* decision was rendered by the Supreme Court, the Summit called on Canada and British Columbia to signify their good faith by immediately bringing their policies in line with the requirements of that decision. In large measure, the Governments of Canada and British

Columbia have not heeded this call.

In *Delgamuukw* and many earlier decisions, the courts have encouraged negotiations as the means for addressing conflicts relating to Aboriginal rights and title. More recently, the courts have gone even further by rejecting the position advanced by the other governments that they are not required to meet the standard of good faith in their negotiations with First Nations.

#### **4. CERTAINTY**

A major benefit of treaties will be certainty of jurisdiction and ownership over lands and resources. The Summit has consistently rejected extinguishment of Aboriginal rights as a mechanism for achieving certainty. Instead, treaties should recognize and affirm the existence of Aboriginal rights and title and facilitate the exercise by First Nations of our rights. The Summit supports the view of the B.C. Claims Task Force that certainty can be achieved through treaties that precisely state each party's rights, duties and jurisdiction.

#### **5. COMPENSATION**

Despite the fact that the Supreme Court of Canada has made it clear that First Nations are entitled to compensation when our Aboriginal title or rights are infringed without proper justification, the Governments of both Canada and British Columbia are refusing to discuss compensation at all treaty negotiation tables. Instead, they have suggested that if First Nations are concerned about this issue, we 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. We also view 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".

Any infringement of our title and rights must have the full and informed consent of our Nations. Where First Nations consent to infringement, fair compensation must be provided. The details of this compensation will be negotiated between First Nations and the other governments.

#### **6. INTERIM MEASURES**

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The continued alienation of lands and resources by the other governments is a major concern to First Nations in the B.C. treaty process. Interim measures have been identified as the appropriate mechanism to alleviate this threat to the treaty process.

Interim measures cannot just be a mechanism by which the other governments reduce their legal obligations to First Nations. Rather, interim measures must signal a positive step forward by recognizing First Nations' interests in lands and resources and the need to compensate First Nations for any infringement of our interests. The Summit is not satisfied with the governments' refusal to implement effective interim measures that would result in the protection of lands and resources within First Nations' territories pending treaty settlements. The Summit once again calls on Canada and British Columbia to implement the B.C. Claims Task Force's recommendation which both of them accepted – to negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.

## **7. SCOPE OF NEGOTIATIONS**

One of the important challenges of the treaty process is to ensure that the full range of issues is addressed. The Summit acknowledged from the start that the process would have to resolve key differences among the parties on issues such as the nature and scope of interim measures, recognition of Aboriginal title and rights, and certainty. The Summit also recognized that an effective treaty negotiation process would have to address the following subject matters: lands, waters, air and resources; First Nations government and jurisdiction; and compensation and financial arrangements.

### *Land, water, air and resources*

Every region of British Columbia falls within First Nations' territories. Consequently all the land and resources within these territories are subject to Aboriginal title. Our traditional territories provide the basis for our existence, enable us to sustain ourselves, create self-sufficient communities and allow our cultures to flourish. In order to ensure that our people survive, the connection with our territories – including the land, water, air and resources – must be preserved and enhanced through the treaty process.

### *First Nations government and jurisdiction*

As First Nations we have the inherent right, responsibility and authority to govern within our territories and to exercise jurisdiction over our citizens wherever they are. Treaties must include agreements

regarding: the nature, scope and exercise of this right; the nature of the relationship between First Nations governments and the Governments of Canada and British Columbia; and mechanisms for resolving conflicts and priorities between First Nations laws and the laws of other governments. Treaties must also acknowledge that First Nations' government authority will continue to be recognized and affirmed in section 35 of the *Constitution Act, 1982*.

#### *Compensation and financial arrangements*

As discussed above, the treaty-making process must take into account compensation for the alienation and 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. It is discriminatory for Canada and British Columbia to take the position that First Nations cannot be compensated for our losses, 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.

### **8. NEGOTIATING PROCESS**

Federal negotiators in the treaty process are handicapped by their lack of a comprehensive and flexible mandate. This slows negotiations down because negotiating sessions are simply not productive. This problem is compounded by the inadequate number of federal and provincial government negotiating teams, which means they are unable to meet on a sufficiently frequent basis. The net result of these two problems has been an overloaded and sometimes paralyzed process. Delays inevitably work against First Nations. First of all, most First Nations are borrowing funds to support our negotiations. Unnecessary delays inevitably increase First Nations' negotiating costs. Secondly, the impact of delays on First Nations is greater than on the other two parties as the status quo does not adequately protect First Nations' interests.

#### *Negotiation protocol*

First Nations support a process that keeps all British Columbians well informed about treaty negotiations. The longstanding positions of First Nations on treaty-making have been articulated for years. First Nations intend, along with Canada and British Columbia, to provide to the public regular updates on the progress of our negotiations.

The need for open negotiations should be balanced with the requirements of confidentiality and

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respect for protocol among parties negotiating in good faith. In particular, the Summit is very concerned that the federal and provincial governments have seriously breached negotiation protocol with First Nations by deliberately ignoring their requests that federal/provincial treaty offers to them not be released without their consent. Furthermore, according to the negotiators for the Ditidaht and Pacheedaht First Nations, the governments' recently announced offer to them bears little relevance to their circumstances, disregards years of effort and effectively preempts their negotiations.

## **9. A TIME FOR LEADERSHIP... A TIME FOR COURAGE**

As the Royal Commission on Aboriginal Peoples noted in its report entitled *People to People, Nation to Nation*, "the treaty format is still a powerful way of stating the terms of a relationship... Treaty making is one of the great achievements of human societies. It enables the deepest conflicts to be set aside in favour of respectful co-existence."

The B.C. treaty process presents an opportunity for First Nations to tell our story and to negotiate the changes which we feel are necessary for the well-being and survival of our people as the original peoples of this land. As well, the treaty process is an opportunity for the people of this province and this country to resolve, with Aboriginal peoples, the outstanding "land question" in a fair and just manner. This matter has been ignored or at worst denied for far too long! At the recent sixty-fifth session of the United Nations Human Rights Committee, the Committee reported that the most pressing human rights issues facing Canadians are those of First Nations peoples. They strongly stated that the governments current practice of extinguishing the inherent rights of aboriginal peoples must be abandoned. The governments of Canada and B.C. can address this international embarrassment by negotiating treaties with First Nations honourably and in good faith.

We hope that together we can shape a different and better future – one from which we can all benefit and in which we will live together peacefully as neighbours. The treaty process gives us an opportunity to establish a new vision for all who live here. However, enduring treaties will only result from negotiations conducted in utmost good faith by all parties. First Nations have committed in good faith to negotiate treaties through the process outlined in the Report of the B.C. Claims Task Force. We hope, as do many other British Columbians, that the treaty process will not only resolve the land question, but also allow First Nations, Canada and British Columbia to build a new relationship based on mutual trust, respect and understanding.

The path to reconciliation is a difficult one and requires all parties to set aside long-held beliefs and differences. Righting the wrongs of the past presents a serious challenge to decision-makers who may feel pressured by opponents of reconciliation, people who do not share the spirit of compromise.

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The Nisga'a have courageously chosen to follow the path of reconciliation and look to a brighter future. Surely it is time for the Government of Canada to show its determination, leadership and courage and do the same. To not address these issues could result in more court actions, injunctions, civil disobedience, and continued economic uncertainty in this province we now share. As we have underscored we prefer to address our outstanding "land questions" by negotiation, however, we can only do this if all parties enter into the process honourably and are committed to a just and fair outcome.

**SUBMITTED BY THE FIRST NATIONS SUMMIT  
NOVEMBER 19, 1999**

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Chief Joe Mathias

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Robert Louie

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Grand Chief Edward John

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**ATTACHMENTS**

- Tab 1 - The Road to Treaty Negotiations in British Columbia: A Chronology of Key Events
- Tab 2 - *The Report of the British Columbia Claims Task Force* (June 28, 1991)
- Tab 3 - British Columbia Treaty Commission Agreement (September 21, 1992)
- Tab 4 - "Treaty Making: The First Nations Summit Perspective" (June 1996)
- Tab 5 - Statement on Aboriginal and Crown Title (endorsed by all three Principals, 1999) and supporting correspondence between the three principals to the BC treaty negotiation process, Canada, BC and the First Nations Summit
- Tab 6 - First Nations Summit Fundamental Principals
- Tab 7 - First Nations Summit Resolution #1098.06 Re: First Nations Position on Nisga'a Final Agreement
- Tab 8 - *Understanding the B.C. Treaty Process: An Opportunity for Dialogue*, prepared for the First Nations Education Steering Committee, the B.C. Teachers' Federation and the Tripartite Public Education Committee (2nd ed., October, 1998)