



**FIRST NATIONS SUMMIT
DISCUSSION PAPER ON:**

INTERIM MEASURES

November 18, 1999

INTERIM MEASURES

November 18, 1999

Draft for discussion purposes only

First Nations are extremely concerned with the current pace of development within their traditional territories and are dismayed at Canada and British Columbia's unwillingness to negotiate satisfactory interim measures. In fact, the failure to negotiate satisfactory and timely interim measures is presently one of the greatest threats facing the treaty process. Interim measures are necessary in order to facilitate the successful negotiation of treaties by protecting any lands, waters, air and resources which might form part of a treaty settlement and by protecting and enhancing Aboriginal rights, title and interests pending treaty settlement.

By continuing in a "business as usual" way to renew and grant new interests to third parties in First Nations' territories, the federal and provincial governments are implementing meaningful interim measures for everyone – except First Nations. This seriously frustrates First Nations in the treaty process, and discourages other First Nations from entering the process. It also encourages First Nations to address their concerns through other means – be it roadblocks, court action or simply by exercising their Aboriginal rights – because the treaty process offers them no hope for a timely resolution.

Interim measures cannot just be a mechanism by which Canada and British Columbia 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 16 which both of them accepted – to negotiate interim measures agreements before or during the treaty negotiations when an interest is being

November 18, 1999
Draft for discussion purposes only

affected which could undermine the process.

In addressing the issue of interim measures, the B.C. Claims Task Force noted in its June 1991 report that “the current legislative framework does not protect Aboriginal interests in any meaningful way”. This was one of the obstacles which interim measures was supposed to address. To balance the conflicting interests of the parties, the Task Force envisaged broad and flexible interim measures, as the following excerpts indicate:

Interim measures agreements may affect the management and use of lands, sea and resources and the creation of new interests.

They may facilitate the access to and development of resources, often a useful means of dealing in a preliminary or experimental way with a contentious issue, or provide transition to implementation of a treaty.

The implementation of interim measures agreements may require changes in existing policies, legislation and regulations.

BENEFITS OF INTERIM MEASURES

Interim measures allow the parties to treaty negotiations to begin the process of building a **new and constructive relationship**. Through successful interim measures agreements, the parties can begin to develop trust in, as well as a better understanding of, one another. Many members of First Nations communities are not convinced that the federal and provincial governments are committed to concluding treaties. They fear that the negotiation process will not lead to treaties or will lead to treaties that do not

November 18, 1999

Draft for discussion purposes only

improve their circumstances. Interim measures can offer a sign that the other governments are sincerely committed to resolving issues through treaty negotiations. Interim measures agreements can produce **tangible benefits for First Nations, Canada and B.C.** by, for example, allowing economic development to take place on terms that are acceptable to all parties. It also allows all parties to demonstrate to their constituents that treaty-making is an effective process.

Given that it takes considerable time to negotiate treaties, interim measures offer the parties a mechanism to **resolve contentious issues** and provide an **incentive** to First Nations to enter into and remain in the treaty process.

During the negotiation of treaties, interim measures allow the parties to **balance their conflicting interests**. In the case of First Nations, this may mean that they have access to certain lands, waters and resources within their traditional territories or that certain harvesting and culturally significant areas are protected from industrial development. In the case of Canada or B.C., this may mean that a development project or a protected area proposal can proceed with the support and cooperation of the local First Nation. The balancing of interests during negotiations is critical to maintaining a level playing field. This in turn increases the likelihood of successfully concluding lasting treaties.

The implementation of timely and effective interim measures will be more cost-effective than the current approach of ignoring contentious issues until they boil over and then dealing with them on a one-off basis. By implementing interim measures through the process described below, there will be more coordination of initiatives across the Province and issues can be addressed in a more **proactive, efficient and rational** manner.

Interim measures are a useful way to **build capacity** within First Nations, both in terms

November 18, 1999
Draft for discussion purposes only

of human resources and organizational infrastructure. In the absence of that capacity, treaties will not provide significant employment and other benefits for First Nations people.

Interim measures allow the parties to move forward **step-by-step**, rather than in a single giant leap at the conclusion of the treaty. This approach will minimize both economic and structural dislocation during the post-treaty period.

ESSENTIAL REQUIREMENTS FOR SUCCESSFUL INTERIM MEASURES

The following elements are the essential requirements for successful interim measures which may be implemented through agreements, legislation or policy.

Interim measures must recognize and reflect the **government-to-government relationship** between First Nations and the federal and provincial governments. This means that First Nations must be treated as governments with legitimate **jurisdiction** in interim measures negotiations.

Interim measures must allow the parties to **protect certain lands, waters, air and resources** pending the settlement of treaties. As more and more land, water and resources are unilaterally alienated by the B.C. and Canada, the need to protect some of what remains becomes increasingly critical. Otherwise, there will be nothing left to negotiate.

Interim measures must enable First Nations to have **satisfactory access to certain lands, waters and resources** within their traditional territories. This access may, in some cases, enable commercial resource harvesting to take place.

November 18, 1999

Draft for discussion purposes only

First Nations must have the **opportunity to take part in economic development initiatives** within their traditional territory through interim measures. This may lead to industrial development by First Nations on their own or through joint ventures. Successful interim measures enable First Nations to **participate in a meaningful way in decision-making** on land, water, air and resource issues within their traditional territory, and social and policy issues which affect their members.

While the negotiation of interim measures is critical to the success of treaty making, interim measures are not a substitute for treaties and should **not displace or jeopardize treaty negotiations**.

SPECIFIC RECOMMENDATIONS

1. Surplus federal and provincial crown lands should be held (i.e. not alienated to third parties) at the request of any First Nation within whose traditional territories these lie pending treaty settlement.
2. Once a First Nation has tabled a proposal with respect to the lands it intends to select in the treaty process ("selected lands"), these should be held until its treaty is finalized. Selected lands should not be designated as protected areas without the First Nation's consent.
3. A process must be developed to ensure that First Nations' cultural and spiritual sites and artifacts are protected.
4. Resource extraction (including mining and forestry) should cease on selected lands, except in circumstances where the First Nation consents to the extraction

November 18, 1999
Draft for discussion purposes only

and is provided with some form of financial or other compensation.

5. Consultation processes must be established to ensure that any renewal or granting of interests by the Crown does not infringe on First Nations' rights unless they have provided their consent and received proper compensation.
6. Canada and British Columbia must ensure that First Nations' rights to access resources during treaty negotiations are respected in their resource allocation decisions and renewal and granting of interests (such as forestry or mining tenures).
7. A percentage of federal and provincial government royalties, stumpage and other resource-based taxes should be set aside in a global fund to be distributed to First Nations to offset the cost of treaty negotiations.
8. Companies, such as B.C. Gas and B.C. Hydro, that have utility corridors that cross First Nations' reserves should be directed to pay property taxes to those First Nations whose lands they cross, rather than to the provincial government (at present this only occurs where First Nations are recognized taxation authorities).
9. Canada and British Columbia should commit to enter into substantive negotiations for interim land and resource protection and co-management. The resulting agreements would detail how lands would be held and any particular arrangements with respect to their interim management on a joint basis. These agreements would also address co-management of wildlife (including endangered species), resources (including water, forestry and mining resources), and environmental matters.

November 18, 1999

Draft for discussion purposes only

10. Canada and British Columbia should commit to entering agreements that recognize First Nations' jurisdiction and enable First Nations to build their capacity for managing resource and social service program management through the exercise of their jurisdiction.

11. These recommendations should form the basis of an Interim Measures Protocol Agreement that would articulate the basic concepts to be included in interim measures agreements. Such a Protocol could also address a number of issues that arise during the treaty negotiation process, including: principles for good faith negotiation to be adhered to by all parties to treaty negotiations; a commitment to carry on negotiations even in cases of threatened or ongoing litigation; and a commitment to finally resolve the issues arising out of Order in Council 1036. The Protocol could also establish processes to address the implementation of court decisions recognizing Aboriginal and treaty rights.