

- 1. Speaking Points for First Nations Summit Task Group presentation to the Standing Committee on Indigenous and Northern Affairs (INAN) – Document**



FIRST NATIONS SUMMIT

Presentation to the House of Commons Standing Committee on Indigenous and Northern Affairs

Coast Tsawwassen Inn Hotel, Pacific Ballroom - 1665 56 Street, Delta, BC
September 25, 2017 | 9:00 a.m. - 10:00 a.m.

BACKGROUND ON THE FIRST NATIONS SUMMIT

1. The First Nations Summit (the Summit) was established in 1993 to support First Nations' engagement in the made-in-BC treaty negotiations framework and is one of three Principals (along with Canada and British Columbia) of the made-in-BC treaty negotiations framework.
2. The foundation for the Summit's mandate arises from:
 - the tripartite 1991 BC Claims Task Force Report jointly developed by the First Nations, Canada and BC,
 - the 1992 agreement to set up the BC Treaty Commission as the independent body to "facilitate" treaty negotiations, and
 - subsequent federal and provincial legislation and the First Nations Summit Chiefs resolutions.
3. The Summit is the only body with the exclusive mandate to support First Nations in conducting their own direct treaty negotiations with Canada and BC. This includes advocating and promoting resolution of the outstanding land question through good faith negotiations of treaties, agreements and other constructive arrangements facilitated by the BC Treaty Commission (BCTC). Since its inception, the Summit consistently operates as an actions and solutions oriented First Nations-driven organization.
4. Approximately 150 First Nations participate in First Nations Summit assemblies. In addition to respecting and upholding its existing mandate, the Summit has also been directed by its constituents via Chiefs' resolutions to take a leadership and advocacy role on the full range of issues of concern to First Nations regarding day-to-day social and economic issues which affect First Nations.
5. A critical element of the Summit's efforts includes the identification of concrete, actionable steps to overcome negotiation barriers. In First Nations-Crown treaty negotiations in BC we are facing a number of process and substantive issues that pose significant challenges in treaty negotiations, which must be overcome in order to reach treaties, agreements and other constructive arrangements.
6. Addressing process and substantive negotiation issues and barriers must be undertaken in the context of implementing the Truth and Reconciliation Commission's (TRC) Calls to Action, and the United Nations *Declaration on the Rights of Indigenous Peoples (UN Declaration)*.



7. Any review and redesign of the made-in-BC treaty negotiations framework or any federal or provincial initiative that may impact on the made-in-BC treaty negotiations framework (including in review and revision of Canada's Comprehensive Claims Policy and related laws, policies) must include the Summit from the outset and be consistent with the UN *Declaration* and existing case law.

SHIFTING POLITICAL AND LEGAL ENVIRONMENT

Key Federal and Provincial Commitments – the UN *Declaration*, TRC Calls to Action and Tsilhqot'in

8. The Summit acknowledges that we are currently discussing these important issues with the Standing Committee on Indigenous and Northern Affairs in a new political and legal environment which have important implications on these discussions. The Summit welcomes the federal and provincial government's unequivocal commitments to implementation of the Truth and Reconciliation Commission's 94 Calls to Action and the UN *Declaration* and parallel reviews of federal and provincial legislation. Further, BC has made the welcome and necessary commitment to implement the historic *Tsilhqot'in Nation* decision regarding Aboriginal title and rights issues.
9. We collectively have a historic opportunity to positively and dramatically transform the relationship between all levels of government and First Nations governments. There is absolutely nothing to fear in the TRC's 94 Calls to Action and in the human rights standards in the UN *Declaration*. We must put our minds together and combine our collective best efforts for constructive and long-lasting solutions.

Path forward - opportunities for collaboration

10. The Summit takes this opportunity to highlight that full and effective collaboration from the outset of undertaking this important work is consistent with key international instruments and documents, as outlined in the 46 Articles of the UN *Declaration*, the American Declaration on the Rights of Indigenous Peoples and the Outcome Document of the September 2014 World Conference on Indigenous Peoples, all three of which Canada has agreed to.
11. As we move forward together, it is imperative that we remain mindful and vigilant of any attempt by any level of government to implement narrow interpretations of jurisprudence, legislation, policies and key international instruments, to serve as a breeding ground for fear mongering and the creation of conflict where there should be collaboration. What is required to accomplish transformation of barriers and challenges are new attitudes and tone in leadership and in the bureaucracy as a whole. This work requires strong, bold leadership, from all levels of government, including those bodies monitoring government activities.
12. In this regard, the Summit is optimistic about the perceptible shift in leadership at the federal level with Canada's new 10 Principles guiding its relationship with Indigenous peoples, as well as the recent dissolution of Indigenous and Northern Affairs Canada and creation of two new ministries: Crown-Indigenous Relations and Northern Affairs, and Indigenous Services. These are a hopeful sign that Canada is serious about decolonizing its approach to Indigenous issues and to building a new relationship from a more appropriate foundation.



13. In reflecting on Canada’s commitment to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change, we stress the “recognition” of Aboriginal rights, especially through mechanisms such as modern-day treaties, agreements and other constructive arrangements.

FIRST NATIONS SUMMIT’S SUBMISSION

14. The Summit has prepared a 51-page submission which sets out key perspectives on the status of treaty negotiations in BC and key challenges and barriers. Further, it contains 30 recommendations to transform First Nations-Crown treaty negotiations in BC – as well as highlighting key intersections between treaty negotiations and the new federal framework for reconciliation, including the reform of Canada’s laws and policies.

CONTEXT FOR MADE-IN-BC TREATY NEGOTIATIONS FRAMEWORK

Made-in-BC Treaty Negotiations Framework and BC Claims Task Force Report

15. The 1991 BC Claims Task Force Report and the subsequent made-in-BC treaty negotiations framework was established in response to the profound failures of the federal government's comprehensive claims policies, which required First Nations to prove their connection to their lands through a cumbersome and inappropriate process. The Task Force Report provided a blue print for a new and different, made-in-BC negotiations framework.
16. The policy direction set out in the Task Force Report has over time been displaced by Canada’s increasing reliance on its pre-existing, outdated and unacceptable comprehensive claims policy.
17. The interest-based negotiations have become “position-based”, as government bureaucrats are assigned to oversee the process and, in many cases, negotiate treaties. This is not helpful or conducive to reconciliation.
18. The Summit continues to remain mindful of the Supreme Court of Canada’s statements at paragraphs 20, 38 in *Haida Nation v. BC*, which provide that “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty” and also that, “negotiations, the preferred process for achieving ultimate reconciliation.”
19. The British Columbia Treaty Commission (BCTC), established in 1992 by agreement among the Principals (the Summit, Canada and BC) started operations in 1993. Its role is set out in the *BC Treaty Commission Agreement* and in ratifying legislation and resolutions of the Principals. The BCTC’s independence is a fundamental component of the made-in-BC treaty negotiations framework.
20. Among other responsibilities, the BCTC facilitates negotiations in BC, a role which could be expanded to include dispute resolution.



21. At various points in time since the inception of the BCTC, concern has been raised that Canada and BC have encroached too closely on the independence of the BCTC. The Summit continues to advocate that Canada and BC must meaningfully commit to fully respecting the independence of the BC Treaty Commission's allocation of negotiation support funding and the principles that no one party should have unilateral control over First Nations-Crown treaty negotiations in BC and no party should have their expenditures reviewed by another party to the negotiations.

BC treaty negotiations constitute by far the largest grouping of negotiations across Canada

22. To provide important context about importance of a made-in-BC treaty negotiations framework, it should be noted that 57 of the 99 (or 58%) of "Comprehensive Land Claim and Self-Government Negotiation Tables" are in BC. This figure includes two self-government tables and three transboundary tables. This includes stand-alone self-government negotiations and sectoral self-government negotiations.

However, when you do not include transboundary tables or stand-alone self-government negotiations, you get a clearer picture of how important BC treaty negotiations are within this Canada-wide initiative numbers change, 52 of the 66 (or 79%) "Comprehensive Land Claim with Self-Government" negotiation tables are in BC.

When you exclude transboundary tables, stand-alone self-government negotiations and Indigenous groups located in the three northern territories, it becomes clear that 52 of the 61 (or 85%) of the "Comprehensive Land Claim with Self-Government" negotiation tables are in BC. This means that BC First Nations must play a key role in any discussion about reforming federal policies that impact on treaty negotiations.

STATEMENTS ON TREATY NEGOTIATIONS

23. This is all about relationships. Seek Canada's (and BC's) commitment to taking a leadership role in working towards reconciliation with First Nations in BC, including the negotiations of viable, fair, workable and equitable treaties, *agreements and other constructive arrangements* (it is not always about full comprehensive treaties, it can be a number of arrangements).
24. Further, in this regard, seeking Canada's commitment to a process which will ensure that decisions of the Courts relating to lands, territories and resources are fully implemented.
25. Seek Canada's commitment to finding creative solutions in working toward reconciliation and moving beyond dialogue regarding barriers to negotiations and on to the implementation of agreed concrete commitments and implement steps to overcome challenges (see the 30 recommendations in the Submission).
26. Governments must provide space for engaging bodies such as the First Nations Summit, First Nation Governments and other key parties in developing instructions concerning the scope and content of mandate development and subsequently provide their negotiators with sufficiently flexible mandates to ensure that meaningful interest-based negotiations can take place at treaty tables.



27. Canada must be committed to address the proper and full implementation of historic and modern treaties, while protecting the legal interests of neighboring First Nations including those participating in negotiations and those who are not involved in negotiations;
28. Commit to implement mechanisms to ensure that the Crown (and corporations supported through Crown activity) doing business in First Nations territories respect the legal and constitutional Aboriginal rights, Aboriginal title and treaty rights of First Nations.
29. Further, the path forward must reflect the BC Leadership's Four Principles: On September 11, 2014, following the Supreme Court of Canada's decision in *Tsilhqot'in Nation*, First Nations leadership in BC set out "Four Principles" as the basis of recognition and reconciliation work, which have been endorsed through resolution of Chiefs in Assembly. The Summit remains committed to advocating that any provincial or federal re-engagement structure, processes, agreements, or frameworks for engagement must be fully informed and directly influenced by the four foundational principles. It is recommended that Canada, with the free and effective participation of Indigenous Peoples, carefully consider and reflect the Four Principles accordingly.

These 4 Principles are as follows:

- a. Acknowledgement that all our relationships are based on recognition and implementation of the existence of Indigenous peoples' inherent title and rights, and pre-confederation, historic and modern treaties throughout BC.
- b. Acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout BC.
- c. Acknowledgement of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition.
- d. We immediately must move to consent based decision-making and title based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.

Negotiation Support Funding

30. Negotiation Support Funding is a specific negotiation issue that has been a top priority for First Nations participating in negotiations and which we have been actively and consistently seeking to resolve.
31. First Nations' participation in treaty negotiations in BC and elsewhere in Canada has been funded primarily through loans from Canada.
32. The BC Claims Task Force Report proposed that a **new** system of financial support that did not place First Nations at a disadvantage be implemented. Instead, however, Canada insisted that BC First Nations' participation be funded primarily by loans consistent with the approach that was already in place in the rest of Canada. (The one important difference in BC was the implementation of the Task Force's recommendation that the BC Treaty Commission allocate funding to First Nations.)



33. As of March 31, 2016, **First Nations in BC owed a total of \$528 million to Canada**. According to the BC Treaty Commission, there are 57 First Nations (some of whom represent several communities) negotiating in BC. This means **an average of \$9.3 million is owed per First Nation**. For First Nations that have been actively engaged in negotiations since 1994, the amount owing is generally far greater than this.
34. Given the magnitude of the amount owing, if negotiating parties at a table are unable to reach a treaty, the First Nations at those tables will not be able to repay their treaty loans in most cases.
35. All of which is concerning given that Ministers Wilson-Raybould and Bennett have stated that one of the principal mechanisms for implementing the UN *Declaration* is modern-day treaty negotiations.
36. The loan funding approach to treaty negotiations and the accumulation of negotiation debt has had a damaging effect on reconciliation and the Nation to Nation relationship we are trying to build through modern-day treaty negotiations in BC.
37. Mounting treaty negotiation debt has placed a tremendous burden on First Nations and their communities and has left First Nations at a significant disadvantage in negotiations. Numerous delays, caused primarily by Canada and BC, have further increased the mounting debt and unfairly impacted First Nations.
38. Two of the critical problems associated with using treaty loans to finance negotiations are:
- the mounting debt is deducted from the final capital transfer payment, which erodes the net value of the treaty (in one recent case, more than half of the capital transfer would have been deducted to repay the treaty loans); and
 - there is tremendous uncertainty regarding what will happen to the debt if the parties are unable to reach a treaty.
39. At a broader level, treaty negotiation debt has hindered negotiations, provided a disincentive to the ratification of treaties, negatively impacted political decision-making, stability and governance within First Nations, and hampered First Nations' community and economic development initiatives (e.g. in one instance, a First Nation's treaty loan limited the amount the First Nation could borrow to finance an economic development project.)
40. Proposals for loan forgiveness and go-forward contribution funding are being considered as part of a federal policy reform initiative. As it has consistently done, the Summit is strongly urging the federal government to:
1. forgive existing First Nations' treaty loans,
 2. fund First Nations' future participation in treaty negotiation by non-repayable contributions, and
 3. compensate those First Nations and other Indigenous groups who have already concluded treaties and have repaid or are currently repaying their loans.
41. If the federal government is committed to building a path towards reconciliation, these treaty loans must be forgiven and First Nations' participation in treaty negotiations must be funded solely through contributions.



42. It should be noted that treaty loans violate Canada's obligations under the UN *Declaration on the Rights of Indigenous Peoples*:

- by negatively impacting “the ways and means for financing [First Nations'] autonomous functions” (Article 4); and
- by depriving First Nations of their “means of subsistence and development”, which would then entitle them to “just and fair redress” (Article 20(2)).

43. These treaty loans are also an impediment to the full implementation of Article 26 of the UN *Declaration*, which states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

