SHADOW REPORT IN RESPONSE TO

CANADA'S 19TH AND 20TH PERIODIC REPORT TO

THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD)

JOINT SUBMISSION by Bertha Williams of the Tsawwassen People; Jackie MukSamma Timothy Hereditary Hagoos of the Tishsosum People (Sliammon First Nation); Dexter Quaw, hereditary chief of the Lheidli T'enneh People; Chief Arthur Adolph, Xaxli'p Indian Band; and the Skwelkwek'welt Protection Centre of the Secwepemc Nation

January 30, 2012

Prepared with the Assistance of the
INDIGENOUS NETWORK ON ECONOMIES AND TRADE
11608 Palfrey Drive, Coldstream, BC, V1B 1A8 Canada
Tel:+1-250-3190688 Fax:+1-250-7623163 Email:
amanuel@telus.net

I. BACKGROUND

1. This joint shadow report is submitted to the Committee on the Elimination of Racial Discrimination (CERD - "the Committee") by Indigenous Peoples from across British Columbia who continue to face human rights violations and discrimination because Canada's policies still aim at the *de facto* extinguishment of their inherent indigenous rights and Aboriginal Title and rights as recognized by a number of international human rights bodies.

2. The UN Committee on Economic Social and Cultural Rights (CESCR) inscribed their concerns in their concluding observations of Canada in 2006:

> 16. The Committee, while noting that the State party has withdrawn, since 1998, the requirement for an express reference to extinguishment of Aboriginal rights and titles either in a comprehensive claim agreement or in the settlement legislation ratifying the agreement, remains concerned that the new approaches, namely **the "modified rights model" and the "non-assertion model", do not differ much from the extinguishment and surrender approach**. It further regrets not having received detailed information on other approaches based on recognition and coexistence of rights, which are currently under study."

3. The CESCR had picked up on where the UN Human Rights Committee had left off the previous year, voicing similar concerns and referring back to the concluding observations both committees had already made during the last reporting period. For example the CESCR in 2005 had concluded that:

> 18. The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP, and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. The Committee is greatly concerned that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation.

4. Similarly the UN Special Rapporteur on the Rights and Freedoms of Indigenous Peoples had made it clear that the inclusion of clauses in land claims agreements requiring Aboriginal peoples to "release" certain rights has led to serious concerns that this may be merely another term for "extinguishment".These concerns had also been previously noted in the Concluding Observations of the Committee the Elimination of Racial Discrimination (UN CERD, 2002, A/57/18, paragraphs 330-331) during the previous reporting period. Indigenous peoples from Canada have been involved in all these reporting procedures, and they welcome the continued involvement and follow-up of the respective UN Committees and Human Rights Bodies.

6. The concluding observations document a record of racial discrimination and human rights violations against Indigenous Peoples in Canada, especially when it comes to the failure of the Canadian government to recognize and implement indigenous land rights. Indigenous Peoples had to struggle for a long time to ensure the full recognition of indigenous rights at the international level and through the Canadian courts. In 1996 the Royal Commission on Aboriginal peoples presented a comprehensive report, starting off with the call for recognition of indigenous land rights as the key to the righting of historic wrongs, and moving on to self-government and then presenting substantive recommendations, which have not been met by the federal government or even reported on appropriately for now over a decade.

7. In 1997 in the Delgamuukw Decision (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010), the Supreme Court of Canada unanimously recognized Aboriginal Title, as the land rights of Indigenous Peoples who have not signed treaties, which is true for the majority of British Columbia. The Supreme Court also made it clear that no government through policy or law can unilaterally extinguish Aboriginal Land Rights. Yet the federal government refused to change its Comprehensive Land Claims Policy, dealing with indigenous land rights to their traditional territories, and still aims at the *de facto* extinguishment, or modification and non-assertion of Aboriginal Title over their traditional territories. This policy has not changed since 1997 nor has it been replaced by new approaches that focus on recognition of Aboriginal Title and co-existence, as recommended by a number of UN bodies.

8. The Comprehensive Claims Policy is also the policy underlying the British Columbia Treaty Commission (BCTC) Process, that stipulates that in order to sign a final agreement Aboriginal peoples have to give up their inherent land rights; land granted back in return will no longer be inalienable, but will be private property, namely fee simple lands under provincial jurisdiction, rather than collective land rights under federal and Aboriginal jurisdiction. The full extent of all rights will be inscribed in the agreement. The terms of reference for the federal and provincial negotiators are very clear and issues such as recognition of Aboriginal Title and inalienability of collective land rights are simply not on the table. Aboriginal People are either forced to negotiate under the current policy with all its limitations that violate human rights or they stay out of the process, with no alternative venue open to deal with their land issues. Especially large nations in the Interior of British Columbia have chosen not to negotiate under the British Columbia Treaty Process and together with nations in the treaty process, they have tried to initiate a reform of the federal comprehensive claims policy, but have been flatly rejected. They are left with no other venue than to take their concerns international.

II. GENERAL RESPONSE TO CANADA'S PERIODIC REPORTS IN RELATION TO INDIGENOUS LAND RIGHTS AND ABORIGINAL TITLE AND RIGHTS

9. The submitters have been involved in an urgent action early warning procedure before the CERD Committee since 2009, the following submissions are made in the context of that procedure and in the context of Canada's periodic review before the committee, especially in response to Canada's 19th and 20th periodic reports. Attached as Appendix I to this submission is a map showing the location of the some of the communities of the Indigenous Peoples who jointly prepared this submissions. Starting with the Tishsosum People, also known as the Sliammon First Nation (1) close to Campbell River; followed by Tsawwassen (2) close to Vancouver; the Skwelkwek'welt Protection Centre (3) located in the heart of Secwepemc territory; the Xaxli'p Indian Band (4) along the Fraser River; and finally Lheidhli T'enneh close to Prince George. The distance between the furthermost communities amounts to 1284 km and their respective nations' traditional territories cover many different parts of British Columbia. This joint submission also demonstrates that Indigenous Peoples across Canada are racially discriminated against by Canada's policies.

10. The only specific cases relating to Aboriginal Peoples mentioned in Canada's 19th an 20th periodic reports are in relation to the joint urgent action request under the early warning procedure to the Committee on the Elimination of Racial Discrimination submitted on February 9, 2009 by members of the Tsawwassen People, the Lheidli Tenneh People, the Xaxlip Indian Band and the Secwepemec People. The intention of this joint submission was to demonstrate to the Committee that Canada's Comprehensive Policy discriminates against Indigenous Peoples across Canada, whether they participate in the BCTC process or not.

11. When People outside of the BCTC want to deal with issues related to their territories, they are told that the only comprehensive negotiating process available is the BCTC operating under the Comprehensive Claims Policy. This leaves them with no negotiating avenue since their people have instructed their leadership not to negotiate under a policy that aims at the extinguishment of their Aboriginal Title and Rights. On the other hand Indigenous Peoples negotiating under the BCTC have repeatedly raised concerns regarding the Comprehensive Claims Policy and the restrictive policies, but they are in turn told that these are the operative policies and otherwise they cannot negotiate. Those who leave the negotiations are settled with large outstanding loans that could put them in third party management with the federal government. If their members vote against a proposed final agreement, pressure is exercised by demanding repayment of negotiating loans to secure a revote. Only three modern agreements (Tsawwassen, Maa'nulth, and Yale) have been signed under the BCTC and the members of the respective First Nations are told that their territorial rights to lands not covered by the agreement have been extinguished. Both Indigenous Peoples inside and outside the BCTC have lobbied to change the Comprehensive Claims Policy to one that recognizes Aboriginal Title - without success.

12. In paragraph 112 of their periodic reports, Canada again questions the authority of the Committee, as they did when the Committee considered the underlying early warning/urgent action request. It is the submission of the Indigenous Peoples who made the request that the Committee has the authority to consider these issues and that they are properly considered under the urgent action and early warning procedures and also in the context of the review of Canada's periodic reports and the review of the state party's implementation of the ICERD. The issue of Canada's failure to recognize and implement indigenous land rights, especially Aboriginal Title, is one of the most substantive and long-standing issues that Indigenous Peoples from Canada have brought to UN human rights bodies. At the same time the issue is increasingly urgent as Canada is continuing to force agreements negotiated under the Comprehensive Claims Policy. Members of the Tishsosum Nation, also known as the Sliammon First Nation, are joining the previous members of the joint urgent action/early warning request in this submission, since they are currently facing a vote on the final agreement which would extinguish their Aboriginal Title and Rights. The vote is currently scheduled for June 2012, adding further urgency to the submission.

> **8. Additional information requested by the Committee**
>
> 112. Canada thanks the Committee for its observations and recommendations. By letter dated March 12, 2010, the Committee made supplementary requests for Canada to provide further information in its periodic report regarding several situations involving Aboriginal communities in British Columbia. Canada has thus included the information requested as part of its periodic reporting. Although these calls for additional information originated from submissions referred to the Committee's Working Group on Early Warning and Urgent Action, the provision of the information by Canada in no way constitutes agreement that these situations are appropriate for consideration under the Early Warning and Urgent Action Procedure. Furthermore, as the Committee is aware, Canada has not entered a declaration under Article 14 of the Convention and does not recognize the competence of the Committee to receive or consider complaints by individuals or groups of individuals.

13. Canada only briefly mentions Aboriginal Title in paragraphs 110 and 119 of its nineteenth and twentieth periodic reports (CERD/C/CAN/19-20). It is correct that in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the Supreme Court of Canada unanimously ruled that Aboriginal Title had not been extinguished by federal or provincial legislation. Yet following the decision, the federal and provincial governments did not change their legislation and policies to recognize Aboriginal Title.

14. The federal government has maintained its Comprehensive Claims Policy that employs a "modification" and "non-assertion" approach resulting in the *de facto* extinguishment of Aboriginal Title, which has been found in violation of international human rights standards by a number of UN Human Rights bodies. In British Columbia this policy is currently being implemented through the British Columbia Treaty Process (BCTC), where provincial and federal negotiators have strict mandates to implement the policy and negotiate agreements resulting in delegated jurisdiction (similar to municipalities) rather than implementation of Aboriginal Title and Rights and indigenous jurisdiction.

15. The federal government is required to act as a fiduciary to Indigenous Peoples and to protect and implement Aboriginal Title and Rights which are recognized and affirmed by Section 35 of the Canadian Constitution. As such there is an affirmative obligation on the federal government to bring its laws and policies in line with the highest law in the country, the Canadian constitution, and the highest court in the country, the Supreme Court of Canada. The federal government has implemented Supreme Court of Canada decisions regarding other issues, such as same sex marriage and safe injection sites, but not regarding Aboriginal Title and Rights, although they have an even more stringent obligation in that regard as the fiduciary. The result is a constitutional breach, where the executive branch (the government) does not implement the binding rulings of the judiciary branch and the constitution, the highest expression of the legislative branch. In turn Indigenous Peoples who assert and exercise their Aboriginal Title and Rights rather than negotiating under policies that violate the constitution and international human rights standards, are subject to executive action and criminalization.

16. This ongoing blatant constitutional breach underscores the importance of an independent international mediator when it comes to indigenous land issues in British Columbia, Canada. The federal government continues to fail to live up to its constitutional obligations as a fiduciary opposing judgements in favour of indigenous rights, instead of taking the side of Indigenous Peoples.

II. TSAWASSEN, SLIAMMON AND TREATY VOTES

17. In their periodic reports Canada tries to downplay the important substantive concerns raised by the Committee regarding transparency of treaty votes. Specifically in paragraph 113 they state:

> 113. Canada appreciates the need for transparency of treaty votes and will continue to work with other treaty parties to ensure such procedural transparency. In so doing, Canada must consider and respect independent decisions of democratically elected Aboriginal leaders such as the decision of the Tsawwassen First Nation Council to provide elder benefits. In its sole discretion, the Tsawwassen First Nation Council elected to provide elder benefits to enable certain elders to participate in the future benefits of the Tsawwassen Treaty, that, because of their age, they may not otherwise have lived to enjoy. Elder benefits were provided by the Tsawwassen First Nation Council to 18 elders who had attained the age of 60 years or older. As previously stated, 130 Tsawwassen First Nation members (representing 70 percent of all voters) voted in favour of ratification of the Tsawwassen First Nation Treaty. Other than this small group of 18 elders, no eligible Tsawwassen First Nation voters received any monies from the Tsawwassen First Nation or from any Government. The Tsawwassen First Nation Government continues to provide elder benefits to Tsawwassen First Nation members reaching 60 years of age on the same basis that underlay provision of such benefits to the 18 initial recipients following the Tsawwassen Final Agreement ratification vote.

18. Canada makes specific reference to the vote on the Tsawwassen Agreement, in response to which it is important to note that the initial elder payments were made immediately following the vote in favour of the agreement and long before it was ratified by the provincial and federal government and before any settlement monies were paid out. The money was provided as part of a direct funding allocation by the governments, which amounted to a total of 1.5 million provided on a discretionary basis to promote the agreement and to ensure a vote in favour of the agreement. The funds were used to engage public relation companies and to provide glossy brochures promoting the agreement, but not providing detailed and substantive information. No easily accessible information about how the agreement would affect indigenous rights was provided. When questioned about this slush fund and especially the immediate incentive payment following the positive treaty vote, the provincial minister for Aboriginal affairs acknowledged that the payment was outside the settlement agreement and directly provided by government. He defended this action as being justified to secure a positive treaty vote. This directly contradicts the assertion made in Canada's periodic report to the Committee above.

19. In light of the above it is especially concerning that Canada states that it continues to employ a similar approach and "will continue to work with other treaty parties to ensure such procedural transparency". This is currently the case with the Tishsosum Nation/Sliammon First Nation where similar monies have been set aside to promote a vote in favour of the Sliammon Final Agreement. A vote is currently scheduled for June 2012 and again no funds are provided to set out substantive issues with the final agreement and how it will negatively affect Aboriginal Title and rights and undermine international standards for the protection of Indigenous Rights.

20. Instead the monies are made directly available to the Sliammon Treaty Society who was part of the negotiations and funded by treaty loans. In the recent past, the Sliammon Treaty Society has come under investigation for vote manipulation. Personal information, names, addresses were given to potential candidates for chief by a spouse working in the treaty society using treaty resources to gain access to information for only one individual running for chief. Forensic audits had to take place a few times, and the findings were passed on to the federal Department of Indian and Northern Affairs (DIAND) that failed to take action but through their non-action condoned such practices. Instead DIAND gave the Sliammon treaty society one million Canadian Dollars for “communication costs” as set out above undermining transparency when it comes to the treaty vote.

21. One of the intentions behind the modern agreement is to gain control over indigenous lands and secure access to third parties, taking resources and lands away from Indigenous Peoples. In the case of the Tishsosum Nation/Sliammon First Nation they are dealing with the discovery of natural gas in Powell River, in the traditional territory of the nation. It was said

there are only two places in the world they have this one in Africa and the other in Powell Lake, Powell River. Powell Lake has been used for the Township of Powell River for their water, but in the summer of 2011 the water supply was moved to Haslem Lake with a huge tower and tank built to hold the water supply. When the announcement was made about the gas findings it was specified by the gas company had to meet with the provincial Ministry of the Environment in Victoria to seek the approval for the project. Two years ago a gas company from Calgary, Alberta solicited the Sliammon Band and signed an agreement to extract gas out of the lake for the next fifty years at a value of up to 268 million Canadian Dollars a year for 50 years. At that time then Chief Clint Williams signed the agreement but suggested that they wait until he has another council in place to have control over the project at a chief and council level. This is now the case and since then community members have been cut out of the negotiating process and have not been informed about the negotiations or agreements with the company. Monies for the treaty negotiations by DIAND have been channelled to promote this development and others without the proper involvement of the membership who has not benefitted from it. There has been no accountability both for the decision and the funds which have benefitted third parties over the impoverished members of the Tishsosum Nation/Sliammon First Nation.

22. It is feared that the ongoing treaty vote and the discretionary funds provided to promote it will result in a further lack of accountability and transparency. This is entirely unacceptable, when it comes to a vote on the a final agreement that aims at the extinguishment of Aboriginal Title and Right. The Committee is urged to question Canada in regard to the ongoing vote on the Sliammon Final Agreement and to take urgent against Canada's promotion of the final agreement before the final vote takes place.

23. Once a majority or members of a First Nation has been coaxed to vote in favour of a final agreement, the governments will take the position that the rights of all the members of the First Nation are now limited to those set out in the agreement. Aboriginal Title and Rights are collectively held by the respective Indigenous Peoples, the substance of these rights is defined by the indigenous laws and legal systems of the respective Indigenous Peoples. Indigenous Peoples have elaborate systems for managing their traditional territories and traditional structures of leadership. On the other hand, elected leadership under the federal Indian Act, does not have authority regarding territorial decisions and Aboriginal Title and Rights. Yet following a treaty vote, the government will argue that the elected leadership and the agreements they sign regarding treaty lands and developments bind all the members. This would mean that effectively Indigenous Peoples are blocked from exercising their collective inherent rights to their traditional territories. When members of First Nations under final agreements, want to protect their territories and assert their rights, the government will argue they have no standing.

24. This is already happening in the case of the Tsawwassen First Nation. Mainstream commercial industrial developments have been increasing in the traditional territory of the Tsawwassen People, since the governments argue that Aboriginal Title issues no longer have to be taken into account. One of the major developments currently underway is the South Fraser Perimeter Road, a major infrastructure venture in the Greater Vancouver Area. The proposed route would result in the destruction of sacred sites, including burial sites of the Indigenous Peoples of the area, including Tsawwassen. As a result Bertha Williams, a member of the Tsawwassen First Nation and a descendant of the hereditary leadership of her Nation brought a legal action to challenge the development, in light of the destruction it would cause. In their response to the application the provincial government plead the provisions of the Tsawwassen First Nation (TFN) Final Agreement, and an accommodation agreement signed by the elected TFN that had written into it that it will not challenge or impede the province's right to contract and develop the project. The province further claimed that Bertha Williams is bound by the obligations of the TFN members in both the TFN Final Agreement and the accommodation agreement. Finally it claimed that Bertha Williams is estopped and precluded from challenging or impeding, the province's right to construct, develop or regulate the project[1]. The government is effectively arguing that TFN members cannot assert or exercise their Aboriginal Title and rights, that they are *de facto* extinguished.

III. HOSTAGE TO TREATY LOANS

25. The influence exercised by government funding is not only an issue in the lead-up to treaty votes, but pervades the negotiations under the BCTC. The process *is premised on an approach which* forces participating First Nations to take out loans to fund their participation in the negotiations. This leaves them at a disadvantage and imbalance of power in the negotiating process, where the parties they negotiate with are also the ones on a position to enforce the loans. As a result First Nations have seen themselves pressure to remain in the BCTC or to be faced with the loans being enforced. For most First Nations this would result in such high debt levels that in turn the federal government would be in a position to put them under third party management. Third party managers are appointed by the federal government putting them effectively in control of the administration of the respective first nation. The government can and in some cases has refused to issue monies for other services in light of the outstanding loans. Following the vote against the final agreement by the Lheidli Tenneh First Nation, they found themselves faced with pressure that the loan monies would be due unless they agreed to remain in the BCTC process and

[1] For more information see pleadings in BCSC file number S113375 (Vancouver Registry): Bertha Williams and William Burnstick v. the Queen in the right of the Province of British Columbia (esp. HMTQ BC response to civil action)

have a second vote. There were also indications that they would not be eligible to access other monies for services and important infrastructure, such as a fire station, unless they agreed to a revote. Under such pressure, the membership saw themselves forced to agree to a revote with negotiators making sure that the threshold for passing the agreement was moved from two thirds to 50% plus one vote. Similarly substantive slush funds are being made available to promote the same agreement that the membership previously turned down by substantively more than 50%.

26. In paragraph 114 of its periodic reports Canada states that "the Lheidli T'enneh First Nation is presently undertaking community wide consultations to determine whether the community desires a second ratification vote or a preliminary democratic vote on whether a second ratification vote is desired. The development and direction of this process is entirely within the sole discretion and direction of the Lheidli T'enneh First Nation." No such community wide consultation has taken place, and no substantive information about the ongoing process has been disclosed to the membership contrary to Canada's assertions.

> 114. Canada will also seek to ensure that loan funding offered to Aboriginal groups to permit their unfettered participation in the treaty process is properly understood as a means to facilitate the achievement of constitutionally protected treaties for Aboriginal groups as well as a new relationship between federal and provincial governments and Aboriginal groups. In regard to the Xaxli'p First Nation, the Xaxli'p First Nation accepted loan monies to participate in the Treaty process and elected to withdraw from Treaty negotiations in 2001. Canada restates that Canada has written to the Xaxli'p First Nation to state that the obligation to repay the loan amount has been placed into abeyance and thus loan repayment is not being sought by Canada. In regard to the Lheidli T'enneh First Nation, the Lheidli T'enneh First Nation is presently undertaking community wide consultations to determine whether the community desires a second ratification vote or a preliminary democratic vote on whether a second ratification vote is desired. The development and direction of this process is entirely within the sole discretion and direction of the Lheidli T'enneh First Nation.

27. The above statement regarding Xaxli'p are also directly disproved by the letter of the Xaxli'p Chief and Council, attached as Appendix II to this submission which was also directly sent to CERD. In the letter the Chief of Xaxli'p explains that they never received a letter from the government of Canada that their loan payments have been put in abeyance. On the contrary the federal government keeps sending requests for payment and the threat of being put under third party management if they loans are enforced keeps hanging over the community. The Committee is urged to inquire with the government about the status of the Xaxli'p and other treaty loans and whether the government's claims that the loans have been put in abeyance will result in debt forgiveness or whether they will continue the treat of outstanding loans to exercise control over the respective First Nations.

IV. ASSERTION OF ABORIGINAL TITLE AND LITIGATION

28. Indigenous Peoples who refuse to extinguish their Aboriginal Title and therefore refuse to participate in negotiations under the BCTC and the federal Comprehensive Claims Policy are left with few avenues to assert and protect their Aboriginal Title and Rights. The federal and provincial government do not engage in negotiation processes based on the recognition of Aboriginal Title and Rights. They also do not implement the internationally recognized principle of indigenous prior informed consent (PIC) to developments that affect the lands and waters traditionally used by Indigenous Peoples. It is presumptuous for Canada, as set out in its below paragraph 115 of its current reports, to suggest that Indigenous Peoples should have to be the ones to take legal action regarding governmental decisions approving development activities that negatively affect indigenous interests and Aboriginal Title and Rights. The cost of Aboriginal Title and Rights litigation is prohibitive, with the most recent Aboriginal Title case resulting in costs of tens of millions of dollars for the Aboriginal litigators alone, separate from the litigation costs of the federal and provincial government, who denied the claim to Aboriginal Title. Why does the federal government not start living up to their role as a fiduciary and challenge provincial government decisions regarding land use and developments that threaten Aboriginal Title and Rights?

> 115. Canada further draws the Committee's attention to the constitutional protection of Aboriginal rights in Canada. Many First Nations have successfully challenged governmental decisions in Canadian courts on the basis of asserted but unproven Aboriginal rights and successfully enjoined developmental activity until proper consultation and, where required, reasonable accommodation of asserted Aboriginal rights occurs. In regard to the Secwepemc Nation, protesters at Sun Peaks elected not to pursue protection of their asserted but unproven constitutionally protected rights through available judicial processes or through their democratically elected First Nation leadership. Instead, they acted extra-judicially. As previously stated, in one case, protesters employed large wood blocks, rocks, fire, pallets, as well as human beings, to form a highway blockade. Participants in the protests represented small numbers within only two of the 17 bands of the Secwepemc Nation. Neither the Secwepemc Nation nor any of its constituent 17 bands sponsored the extra-judicial activities. Canada restates that while only four convictions resulted from the totality of these extra-judicial activities, none resulted in incarceration.

29. It adds insult to injury for Canada to suggest that Indigenous Nations, who collectively live under the poverty line should have to use their limited funds most of which are earmarked for providing services to their members, to litigate. The federal government has the constitutional responsibility for "Indians and lands reserved for Indians" and also for Aboriginal Title, which in turn can serve as an ouster for provincial jurisdiction. Canada should therefore take action to protect indigenous interests and Aboriginal Title and Rights when threatened by provincial government decisions allowing developments that would harm such. In addition Canada also has partial constitutional responsibility for protecting the

environment. Yet rather than asserting its constitutional and fiduciary responsibility the federal government is increasingly vacating the field to the provincial government and promoting development over indigenous interests. This often leaves Aboriginal Peoples as the only ones standing up to protect the environment and their Aboriginal Title and Rights.

30. When faced with impending destructive developments, Indigenous Peoples are often left with no other option than to assert their constitutionally protected Aboriginal Title and Rights. Canada suggest in its above paragraph 115 takes issue with Indigenous Peoples taking action "extra-judicially", but when they are asserting their Aboriginal Title and Rights they are acting under the umbrella of the Canadian constitution and as such their constitutionally protected Aboriginal Title and Rights (the only constitutionally protected property rights in Canada) should trump other interests, such as commercial-industrial developments. Instead the governments, the executive branch, keeps taking executive action against Indigenous Peoples who exercise their Aboriginal Title and Rights. They continue to arrest, prosecute and criminalize Indigenous Peoples who exercise their Aboriginal Title and Rights on the ground.

31. Canada is providing false information to the Committee, when setting out in its above paragraph 115 that: "Canada restates that while only four convictions resulted from the totality of these extra-judicial activities, none resulted in incarceration". In the particular case referred to alone, a number of young Secwepemc women and mothers were incarcerated. The Committee has already previously been provided with affidavit evidence by Amanda Soper, who was arrested in relation to charges stemming from the Sun Peaks conflict. She was incarcerated pending her hearing at a time when her newborn son was just 4 months old and breast-feeding was his only source of nutrition. She was not allowed to have her newborn with her in custody and only limited visits were facilitated, resulting in extensive trauma for the newborn, the mother, the entire family and community. She was kept in custody separated from her child for over 60 days. In the course of the activities to oppose the expansion of the Sun Peaks Ski Resort between 2000 and 2003 over 50 indigenous activists asserting their Aboriginal Title and Rights were arrested, a number served jail time as a result of prosecutions and were made subject to conditions not to return to Sun Peaks Ski Resort.

32. Sun Peaks Ski Resort is located in the core of Secwepemc territory, the Secwepemc People refer to the area as Skwelkwek`welt and it remains an important current and traditional use area. Despite the unresolved specific claim (in relation to the unilateral reduction of the historic Neskonlith-Douglas Reserve) and comprehensive claim to Aboriginal Title over Skwelkwek'welt, the federal and provincial government have continued to promote large scale real estate developments at Sun Peaks. Although Aboriginal Title serves as an ouster for provincial jurisdiction the provincial government proceeded to incorporate Sun Peaks as

the first ever mountain resort municipality in 2010. The Secwepemc People were collectively opposed to the incorporation of Sun Peaks Resort since their Aboriginal Title was in direct conflict with provincial jurisdiction and the municipal incorporation would be used by the province to assert their jurisdiction over the area and to secure third party interests that could undermine Aboriginal Title and Rights.

33. One of the member bands of the Lake Secwepemc People, the Adams Lake Indian Band, at great cost, brought a judicial review of the provincial government decision to incorporate Sun Peaks as a municipality. Finding a strong prima facie case for Aboriginal Title and rights to the area, the trial judge further fund that the municipal incorporation would be used by local interests and the province to gain further control over land use management which could harm and undermine Aboriginal Title and rights. Despite finding that there had been a lack of consultation and accommodation of the Lake Secwepemc People regarding the municipal incorporation, the trial judge refused to grant the remedy of quashing the municipal incorporation, thereby denying the Secwepemc people an effective remedy[2].

34. This is just one of many cases, where Aboriginal Peoples were substantively won over the arguments of the provincial and or federal government, but the courts failed to provide them with effective remedies. In the two longest Aboriginal Title litigations in British Columbia the courts used technicalities to not have to provide binding rulings on Aboriginal Title, this although decades and tens of millions of dollars have been spent in litigation. This is indicative of the reluctance of the judiciary to make a binding ruling on such critical issues as Aboriginal Title, preferring to have the issue referred to negotiations and the political roam. In terms of international law, this means that Indigenous Peoples are left with no effective national remedies to protect their Aboriginal Title and rights.

V. INDEPENDENT MEDIATORS FOR LAND CLAIMS IN BRITISH COLUMBIA

35. The Indigenous Peoples making this joint submission agree with the recommendation of the Committee to use independent mediators for land claims in British Columbia. They disagree, in the most forceful terms, with Canada's suggestion in its below paragraph 116 of its current reports, that the BC Treaty Commission is an independent body and can serve in this role. The British Columbia Treaty process is created by statute and is funded by the provincial and federal governments and is bound to negotiations under Canada's current Comprehensive Land Claims policy. In light of Canada's intransigent position regarding both its process and policy, also reflected in its current reports before the committee, the Indigenous Peoples making this joint submission, respectfully suggest that such an independent mediator for land claims best be situated at the international level.

[2] Adams Lake Indian Band v. British Columbia, 2011 BCSC 266

> 116. Finally, in regard to the Committee's recommendation on the use of independent mediators for land claims, Canada notes that such mediators are already available via the British Columbia Treaty Commission. The BC Treaty Commission is an independent body created pursuant to the recommendations of Aboriginal leaders, Canada and the Province of British Columbia to oversee the British Columbia land claims or "treaty process". It is mandated to carry out three complementary roles: facilitation, funding and public information and education on the treaty process. In its facilitation role, upon the request of the parties, BC Treaty Commission representatives attend treaty negotiations, offer advice to the parties, "chair" table negotiations and assist the parties in developing solutions and resolving differences arising from negotiations. The BC Treaty Commission is further specifically mandated to obtain dispute resolution services to facilitate resolution of differences or disputes between the parties and does so, upon request of the parties, through the appointment of independent mediators.

36. In recent statements the Chief Commissioner of the BC Treaty Commission acknowledged the limitations of the BCTC and the BC Treaty Commission. In 2012 the BCTC process is entering its 20th year of negotiations having spent over $500 million in negotiation costs for First Nations alone, of which over $422 million have been provided as loans to First Nations, which have to be paid back upon conclusion of the negotiations/agreements. Yet only three agreements have been reached over this time. The Chief Treaty Commissioner stated that the pace of negotiations was unacceptable and that the Commission and the entire treaty process should be jettisoned if both the provincial and federal governments will not commit to firm targets. Attached as Appendix III to this submission is an article reporting on the statements by the Chief Treaty Commissioner under the heading "Head of BC Treaty Commission suggests shutting it down".

37. In the report of the BCTC the Chief Commissioner further set out that:

> *Given First Nations' growing debt load and the fragile state of our country's economy, getting beyond the barriers to settlement and reconciliation in the BC treaty process must be an urgent priority. Failure to act in a constructive and progressive manner will result in more litigation, confrontation, economic uncertainty and* ***potentially the dissolution of the treaty process*** *with no viable alternative. (Emphasis added) (Chief Commissioner Sophie Pierre, 2009 BCTC Annual Report)*

38. These statements by the Chief Commissioner of the BC Treaty Commission herself demonstrate that the BCTC process and the BC Treaty Commission are not effective, they are being limited by Canada's policies and funding schemes. The BC Treaty Commission clearly cannot serve as an independent body/mediator for land claims. The statements also further confirm that Indigenous Peoples in British Columbia are not provided effective national remedies to address their Aboriginal Title and Rights, neither in negotiations, nor in court.

VI. INCREASED URGENCY

39. The increased urgency of the situation is illustrated by the failure of the BCTC. In addition Christy Clarke took office as the Premier of British Columbia in 2011 and announced an aggressive economic strategy to open 8 new mines in British Columbia by 2015 and to sign 10 economic opportunity agreements with First Nations. Attached as Appendix IV to this submission, is an article on new mines and First Nations Deals as key pillars in BC Premier's Job Plan. The referenced agreements will not be based on the recognition of Aboriginal Title, rather they aim at the justification of the infringement on Aboriginal Title and could undermine indigenous land rights in the long run.

40. At the same time the Premier made it clear that the province had lost faith in the BCTC process because it did not result in sufficient agreements (as also set out in Appendix III), despite the long drawn-out negotiating process. Meanwhile both the federal and provincial governments have taken steps to limit and shorten environmental assessment processes, so both the environment and indigenous rights are increasingly threatened.

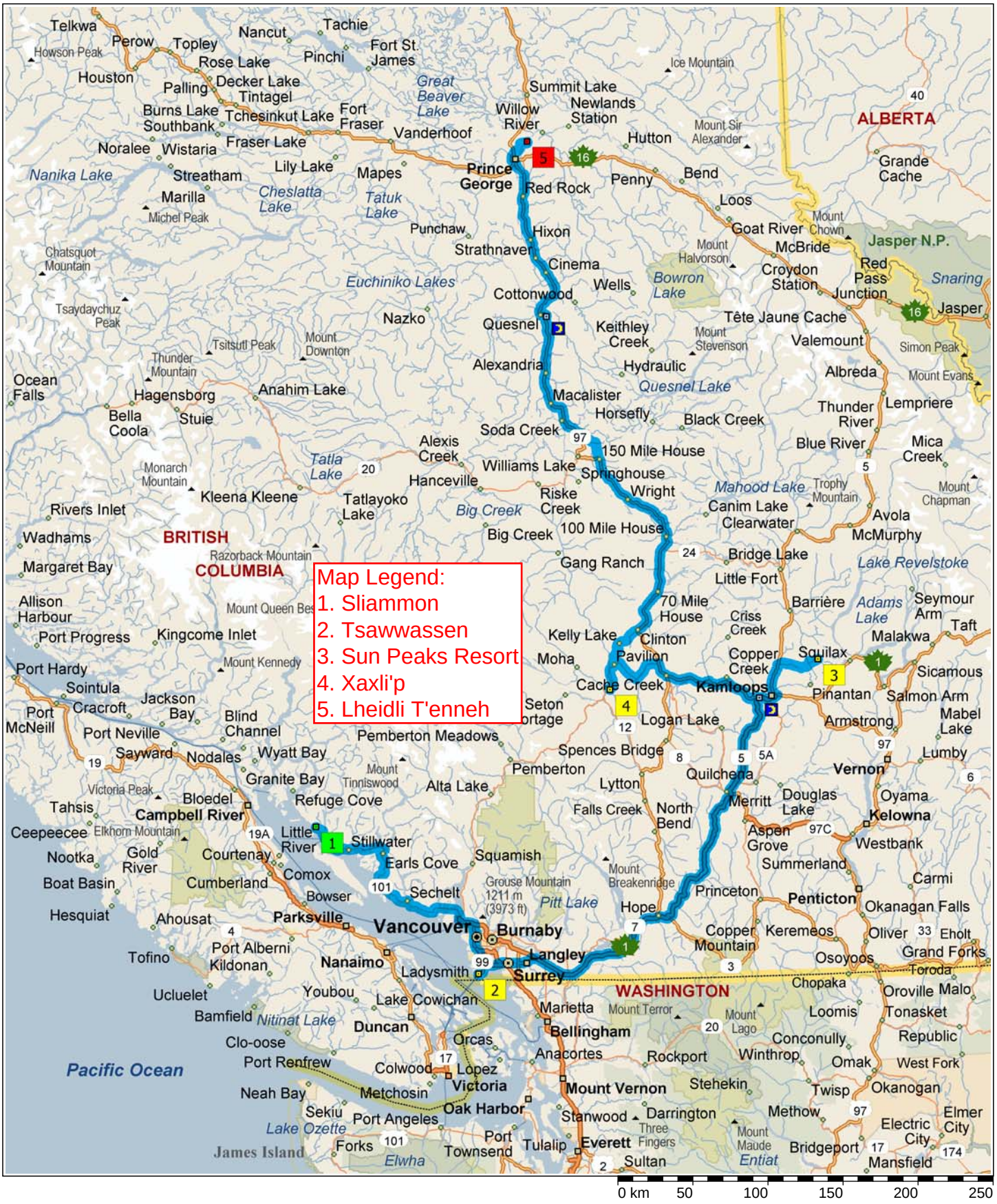
41. Indigenous Peoples in British Columbia are left with no effective national remedies when it comes to protecting their land rights. Current negotiating processes and policies undermine indigenous rights. Court proceedings are very costly and drawn out and although in many cases they result in findings that Aboriginal Title and Rights have been infringed without justification, the decisions do not provide appropriate remedies. Finally if Indigenous Peoples assert their Aboriginal Title and Rights on the ground, they are subject to executive enforcement action and criminalization.

42. The Indigenous Peoples presenting this submission respectfully urge the Committee to question Canada regarding what attempts they are making to reform their policies and laws to recognized and implement Aboriginal Title and Rights. They further urge the Committee to proceed with its Urgent Action and Early Warning Procedure to request the state party to stop discriminating against Indigenous Peoples in Canada by promoting negotiations under its current Comprehensive Claims Policy that *de facto* extinguishes Aboriginal Title and Rights. Further recommendations could focus on: the need to reform the policy and negotiating process and not to allow final (extinguishment) agreements to proceed to a vote in the meantime; and on abandonment of treaty negotiating loans as a means of exercising pressure on Indigenous Peoples.

Appendix I - Map of submitting Indigenous Peoples

Sliammon Indian Reserve 1 to Fort George (Shelley) Ir 2

1284.0 kilometers; 2 days, 1 hour, 47 minutes



Xaxli'p
PO Box 1330
Lillooet, BC V0K 1V0
Phone: (250)256-4800 Fax: (250)256-4803

Appendix II: Letter by Xaxli'p Chief and Council to CERD regarding outstanding Treaty Loan

January 27, 2012

Mr. Anwar Kemal,
Chairperson,
International Committee on the Elimination of Racial Discrimination (CERD)
UNOG-OHCHR
1211 Geneva 10, Switzerland
Fax: +41 22 917 90 08 E-mail: cerd@ohchr.org

RE: British Columbia Treaty Process – Xaxli'p Treaty Loan

Dear Mr. Anwar Kemal:

First, I sincerely appreciate the United Nations Committee on the Elimination of Racial Discrimination (CERD) examining the standards of fairness and transparency of the British Columbia Treaty Process and the treaty loans accumulated through the treaty process.

In a letter dated March 13th, 2009, CERD wrote to the Canadian Permanent Mission to the United Nations in Geneva seeking clarifications to questions regarding the standards of fairness and transparency in the negotiation process on the modification of Aboriginal titles, including allegations concerning financial inducements to conclude agreements. Canada responded in Canada's Interim Report in follow-up to the review of Canada's Seventeenth and Eighteenth Reports, dated July 2009, in paragraphs 82 and 83, stating that "In 2008, the Government of Canada wrote to the Xaxli'p First Nation to state that the obligation to repay the loan amount had been placed into abeyance by the federal government".

As well, in Canada's report submitted by States parties under article 9 of the Convention, Nineteenth and Twentieth Periodic Reports of States parties due in 2009, states in paragraph 114:

> ". . . In regard to the Xaxli'p First Nation, the Xaxli'p First Nation accepted loan monies to participate in the Treaty process and elected to withdraw from Treaty negotiations in 2001. Canada restates that Canada has written to the Xaxli'p First Nation to state that the obligation to repay the loan amount has been placed into abeyance and thus loan repayment is not being sought by Canada. . . ."

As Chief for Xaxli'p I would like to clarify that Xaxli'p has not received any correspondence from Canada stating the treaty loan is placed in abeyance. Beginning in 2006 to present, Xaxli'p has received letters annually from Indian and Northern Affairs Canada requesting repayment of the Treaty Loan plus interest, currently at $2.68 million.

Xaxli'p has not repaid the treaty loan, urging Canada to remove Xaxli'p's accounts payable from their balance sheet. Xaxli'p has not accepted the treaty loan as accounts payable in our audited statements, which are submitted to the federal government as part of our funding arrangements for community services and programs. Canada has not acted on our rejection of the treaty loan as an accounts payable that commenced in 2007 to present. Thus, Xaxlip'p has viewed the nonactions of Canada to Xaxlip's adjusted accounts payable balance sheet as acquiescence and has treated it as such.

The reason Xaxli'p withdrew from the treaty negotiations in March 2001 was that the community felt that both the Canadian and British Columbia governments were not following the Report of the British Columbia Claims Task Force's 19 recommendations. Paramount was the accumulating loan as well as the concern that the treaty process was limited by the federal Comprehensive Claims Policy that would extinguish our Aboriginal Title and Rights to our territory, limiting us to only 5% of our territory. Xaxli'p was under the assumption that by participating in the BC Treaty Process we would rebuild our community and become self-sufficient. However Xaxlip recognized that self sufficiency/determination could not be accomplished with the accumulating treaty loan debt in conjunction with forcing us to survive on only 5% of our territory, a carrying capacity that is inadequate for Xaxli'p's raising population rate, which would only further perpetuate poverty in our community.

Again, I sincerely appreciate the United Nations' CERD examining the standards of fairness and transparency of the British Columbia Treaty Process and the treaty loans accumulated through the treaty process and appreciate the efforts that strive for justice for Aboriginal People, in this case for Xaxli'p. Please feel free to contact me if you have any further questions, I can be reached by email: chief@xaxlip.ca, or through the above listed contact numbers.

Sincerely,

Chief Arthur Adolph

cc: Arthur Manuel, Chairman
Indigenous Network on Economics and Trade (INET)
Chris Roine, Barrister & Solicitor, Donovan & Company

Appendix III: Article - head of BC Treaty Commission suggests shutting it down

THE GLOBE AND MAIL

October 12, 2011

Head of BC Treaty Commission suggests shutting it down

By JUSTINE HUNTER
From Thursday's Globe and Mail

Glacial pace, lack of firm targets unacceptable, says commissioner Sophie Pierre

British Columbia should abandon its 140-year-old quest for treaties with first nations if it cannot find the will to make and meet targets for treaty settlements, says the head of the BC Treaty Commission.

"We know in the next few years we could have 13 treaties done," said chief commissioner Sophie Pierre as she released the commission's latest annual report on Wednesday. "And if we can't do it, it's about time we faced the obvious - it isn't going to happen, so shut 'er down."

The treaty commission will mark its 20th anniversary next year. In that time, the process has led to three settlements - and one of those won't be implemented until 2013.

Ms. Pierre said that pace is unacceptable. The commission, and the entire treaty process, should be jettisoned if both the provincial and federal governments won't commit to firm targets.

"We'd never shut down the commission without having to shut down the whole process," she said in an interview. "If we can't accomplish what we've set out to do, then it's time to set it aside and do something different."

First nations at the treaty table are digging deep into debt to pay for their share of negotiations. Since opening its doors, the commission has lent first nations $422-million for treaty talks. In addition, the federal and provincial governments have contributed more than $100-million - and that doesn't include the cost of their own negotiating teams.

Ms. Pierre said the coming 20th anniversary of the treaty commission is the appropriate time for people to ask if it is worth it.

In her report, Ms. Pierre says all three parties are partly responsible for a lack of urgency at the table. She singles out the federal government for foot-dragging. Ottawa has refused to negotiate matters related to fisheries for the past four years, in part because of the long-running Cohen Commission of inquiry into the collapse of the Fraser River salmon run.

She also says Ottawa needs to give clear mandates to its negotiators.

"Once an agreement has been reached that has taken years of work and millions of dollars, there should be no need to subject it to a long, internal review without an explanation to the other parties," the report states.

The B.C. government has been focused primarily on interim measures since abandoning its ambitious recognition and reconciliation proposal. Ms. Pierre said Victoria needs to recommit to treaties rather than simply working toward short-term solutions in first nations communities. "Lasting reconciliation can only be achieved through a treaty," she writes.

In the Throne Speech earlier this month, B.C. Premier Christy Clark said she is committed to agreements of some kind with first nations - but not necessarily treaties.

"Your government will focus attention on establishing agreements with first nations that will create certainty over our respective responsibilities," the Throne Speech stated. "And while treaties may be an option for some first nations, there are many ways to reach agreements that can benefit all communities - aboriginal and non-aboriginal alike."

Ms. Pierre also has a task for first nations leaders, saying they must make a concerted effort to address overlapping claims that create roadblocks to settlements.

BY THE NUMBERS

140 - the number of years British Columbia has been wrestling over land and governance with its first nations

19 - years since the B.C. Treaty Commission was established to settle those questions

2 - number of treaties that have come into effect under the commission process to date. (A third is expected to do so in 2013.)

60 - number of first nations (representing 110 bands) in treaty negotiations

$10-billion - the value to the B.C. economy if treaties are settled, according to an economic study done for the B.C. Treaty Commission

Appendix IV: Article - New Mines, First Nations deals key pillars in BC Premier's Job Plan

THE GLOBE AND MAIL

September 22, 2011

New mines, first nations deals key pillars in B.C. Premier's job plan

By IAN BAILEY
Globe and Mail Update

Program to cost less than $300-million, generate $1.6-billion a year for government coffers, Premier Clark says; NDP Leader Adrian Dix slams 'extremely disappointing' plan

B.C.'s Liberal government will be pushing for new jobs in the natural-resources sector by helping companies open eight new mines in the province within four years and working to complete at least 10 non-treaty agreements with first nations.

The two key pieces of Premier Christy Clark's long-awaited jobs policy were unveiled Thursday in her speech to the Vancouver Board of Trade. After a provincial tour this week during which Ms. Clark released parts of the plan, she released the entire B.C. Jobs Program that she said would cost less than $300-million over several years.

Ms. Clark committed to helping create eight new mines in B.C. by 2015 - two years after the next provincial election, scheduled in May, 2013 - as well as the expansion of nine other currently operating mines, which she said would generate $1.6-billion per year of additional revenue for the government and create 1,800 new jobs.

The government would not be funding the mines but would speed up approvals and cut red tape to get the project rolling.

"We believe the interest and investment is there. The markets are certainly there. The question is: How do we make sure that those mines become a reality, respecting the environmental and social needs in British Columbia?" she told a news conference after a speech outlining a jobs program aimed at rebranding the government after 10 years of leadership by former premier Gordon Campbell.

Jobs Minister Pat Bell later said the province was being discreet about disclosing the specific mining projects. "We don't want to name specific mines that we expect will be opening. These are all private sector companies that are publicly traded and it could certainly influence the value of those companies if we were to name them. However, we are confident that we will be able to get those eight mines moving forward," he said.

The jobs plan also commits to 10 new non-treaty agreements with first nations by 2015 to improve economic certainty.

"What we recognize as a government is there are lots of opportunities outside the treaty process to give economic opportunity to first nations," Ms. Clark said at the news conference.

Mr. Bell said economic agreements would revolve around such major projects as new mines, natural gas pipelines, Liquid Natural Gas ports, and forestry-based activities.

Some pieces of the program have specific job targets, but Ms. Clark ruled out an overall job target for the programs announced Thursday, which include a Major Investments Office for Mr. Bell's ministry to work with investors proposing significant projects in B.C.

At best, Ms. Clark said she could commit to B.C. placing among the top two provinces in Canada in terms of GDP growth by 2015 and new job growth in Canada by the same date.

"I think it's irresponsible to put a whole bunch of numbers on jobs in the plan," Ms. Clark said. "I'm not going to get into playing that game."

The plan also includes a commitment to invest $50-million to improve the provincially owned corridor that connects the Deltaport Terminal to Canada's rail-transportation network as part of a $200-million terminal expansion that will add between 600 and 800 new jobs to port operations.

NDP Leader Adrian Dix said the "extremely disappointing" plan gives "short shrift" to the forestry sector, and tourism.

He also noted that Ms. Clark did not get to Vancouver Island, hard-hit by unemployment, during her jobs tour this week or offer policies specific to the needs of the region.

Mr. Dix said he found the absence of targets odd.

"You would think a job plan would set targets and not have its principal target be how the B.C. economy is doing relative to New Brunswick," he said, alluding to the Premier's focus on B.C.'s relative economic performance.